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# ANTI-INQUISITORIALISM

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## ANTI-INQUISITORIALISM

David Alan Sklansky\*

*A broad and enduring theme of American jurisprudence treats the Continental, inquisitorial system of criminal procedure as epitomizing what our system is not; avoiding inquisitorialism has long been thought a core commitment of our legal heritage. This Article examines the various roles that anti-inquisitorialism has played and continues to play in shaping our criminal process, and then it assesses the attractiveness of anti-inquisitorialism as a guiding principle of American law. The Article begins by describing four particularly striking examples of anti-inquisitorialism at work: the Supreme Court's recent reinterpretation of the Confrontation Clause; the Court's invalidation of mandatory sentencing schemes that rely on facts found by the trial judge; the Court's endorsement of procedural default rules rejected by the International Court of Justice; and the longstanding invocation of the inquisitorial system in the law of interrogations and confessions. The Article then considers three different reasons the inquisitorial system might be thought a helpful guide to the paths American criminal procedure should not take. The first reason is originalist; it takes inquisitorial processes to be the chief set of evils against which the criminal procedure provisions of the Constitution were intended to provide protection. The second reason is holistic; it appeals to the organic integrity of our adversary system. The third reason is instrumental; it assumes that the inquisitorial system simply is worse than ours — worse at uncovering the truth, worse at protecting individual rights, or worse at preventing abuses of government authority. None of these arguments is fully convincing. There is little evidence that the criminal procedure provisions of the original Bill of Rights were originally intended, or understood, to serve as protections against the inquisitorial system. There is even less reason to think the Fourteenth Amendment had that aim. Regarding the holistic argument, the chief problems are, first, that it is harder than might be expected to identify the core elements of the inquisitorial system, and second, that there is little reason to think that our system of criminal procedure actually has the fragile kind of organic integrity that the argument assumes. Assessing the functionalist argument is more complicated. Elements of the adversary system may in fact have instrumental worth, particularly in protecting against authoritarian abuses. But that is a reason to value those elements of the adversary system, and to value them insofar as they serve other, more fundamental aspirations. It is not an argument for treating the inquisitorial system as epitomizing, across the board, what our system of criminal justice should strain to avoid.*

### INTRODUCTION

Anti-inquisitorialism is a broad and enduring theme of American criminal procedure. By anti-inquisitorialism, I mean the use of inquisitorial procedure as what William Connolly would call a “contrast-

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model,” an idealized system against which we define our own.<sup>1</sup> A lengthy tradition in American law looks to the Continental, inquisitorial system of criminal adjudication for negative guidance about our own ideals. Avoiding inquisitorialism is taken to be a core commitment of our legal heritage.

Not so long ago this way of thinking seemed to be waning, at least in majority opinions of the Supreme Court. In 1991, when Justice Stevens dissented from a decision limiting the scope of *Miranda* protections and accused the Court of favoring “an inquisitorial system of justice,”<sup>2</sup> Justice Scalia’s majority opinion expressed puzzlement. There was nothing magical about the labels “adversarial” and “inquisitorial,” Justice Scalia explained. “What makes a system adversarial rather than inquisitorial” is simply “the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.”<sup>3</sup> So the investigatory stage of any conceivable system of criminal justice, including ours, *had* to be inquisitorial; that was no cause for embarrassment.<sup>4</sup> And for most of the 1990s, the contrast model of inquisitorialism played a small role, by historical standards, in the Supreme Court’s criminal procedure decisions.

No longer. Take the Sixth Amendment right of a criminal defendant “to be confronted with the witnesses against him.”<sup>5</sup> Among the biggest news in criminal procedure over the past few years — certainly the news with the largest impact on criminal trials in this country — has been the Supreme Court’s dramatic reinterpretation of the Confrontation Clause in *Crawford v. Washington*<sup>6</sup> and *Davis v. Washington*,<sup>7</sup> a pair of cases in which Justice Scalia wrote for the Court, and in which anti-inquisitorialism figured heavily. In *Crawford*, Justice Scalia identified “the civil-law mode of criminal procedure” as “the principal evil at which the Confrontation Clause was directed.”<sup>8</sup> This historical claim provided much of the support for the Court’s new rule that the Confrontation Clause generally bars the introduction of hearsay against a criminal defendant if, and only if, the hearsay is “testimonial.”<sup>9</sup> The notion that the Confrontation Clause serves first and foremost to protect Americans from the inquisitorial system of criminal ad-

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<sup>1</sup> William E. Connolly, *The Challenge to Pluralist Theory*, in *THE BIAS OF PLURALISM* 3, 22–24 (William E. Connolly ed., 1969).

<sup>2</sup> *McNeil v. Wisconsin*, 501 U.S. 171, 189 (1991) (Stevens, J., dissenting); see also *id.* at 183.

<sup>3</sup> *Id.* at 181 n.2 (majority opinion).

<sup>4</sup> See *id.*

<sup>5</sup> U.S. CONST. amend. VI.

<sup>6</sup> 541 U.S. 36 (2004).

<sup>7</sup> 126 S. Ct. 2266 (2006).

<sup>8</sup> 541 U.S. at 50.

<sup>9</sup> *Id.* at 68.

judication similarly served as the Court's chief reference point as it began to work out, in *Crawford* and later in *Davis*, the definition of "testimonial" hearsay.

Nor are *Crawford* and *Davis* unique in this regard. Three months after *Crawford*, the Court issued its far-reaching decision in *Blakely v. Washington*,<sup>10</sup> concluding that the Sixth Amendment right to a jury trial bars mandatory sentencing schemes that rely on facts found by the judge rather than the jury. Writing again for the Court, Justice Scalia stressed that "the Framers' paradigm for criminal justice" rejected "civil-law traditions" in favor of "the common-law ideal of limited state power accomplished by strict division of authority between judge and jury"; the Constitution "do[es] not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."<sup>11</sup>

One week after deciding *Davis*, the Court again pointed to the adversarial, noninquisitorial nature of our criminal process, this time in refusing to follow rulings by the International Court of Justice (ICJ) interpreting the Vienna Convention on Consular Relations,<sup>12</sup> which the United States has joined. The ICJ had barred the application of procedural default rules to claims raised by criminal defendants under the Vienna Convention. But the Supreme Court refused to go along. Writing for the majority in *Sanchez-Llamas v. Oregon*,<sup>13</sup> Chief Justice Roberts explained that "[p]rocedural default rules generally take on greater importance in an adversary system such as ours than in the sort of magistrate-directed, inquisitorial legal system characteristic of many of the other countries that are signatories to the Vienna Convention."<sup>14</sup> The ICJ's rulings, the Chief Justice concluded, were "inconsistent with the basic framework of an adversary system."<sup>15</sup>

Moreover, the Court continues to rely on the contrast model of inquisitorialism in shaping the constitutional doctrines governing interrogations and confessions. Here is Justice Kennedy, for example, explaining for the Court in 1999 why a guilty plea may not be treated as a waiver of the defendant's Fifth Amendment privilege to stay silent at sentencing: otherwise the prosecutor could call the defendant to the stand, "undermining the long tradition and vital principle that criminal proceedings rely on accusations proved by the Government, not on

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<sup>10</sup> 542 U.S. 296 (2004).

<sup>11</sup> *Id.* at 313.

<sup>12</sup> Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

<sup>13</sup> 126 S. Ct. 2669 (2006).

<sup>14</sup> *Id.* at 2686.

<sup>15</sup> *Id.* For similar views about procedural default and the adversary system, see, for example, *Castro v. United States*, 540 U.S. 375, 385–86 (2003) (Scalia, J., concurring in part and concurring in the judgment).

inquisitions conducted to enhance its own prosecutorial power. . . . “[O]urs is an accusatorial and not an inquisitorial system.”<sup>16</sup> Language like this has long been standard in interrogation cases; the insistence that our system is accusatorial or adversarial rather than inquisitorial can be found in decisions stretching back over more than a century.<sup>17</sup> Similar language can also be found, albeit less commonly, in search-and-seizure cases,<sup>18</sup> prosecutorial discretion cases,<sup>19</sup> trial procedure cases,<sup>20</sup> and right-to-counsel cases.<sup>21</sup> Anti-inquisitorialism is today what it has been for most of American history: a fixture of our criminal procedure jurisprudence.

That fixture has had its critics, of course, even in the United States. From time to time there are suggestions, mainly from scholars, that European criminal procedure may have features worth copying.<sup>22</sup> But these are voices in the wilderness. If they think about it at all, the vast majority of American scholars, like the vast majority of American judges, are apt to agree with the Supreme Court that “the civil-law mode of criminal procedure,” far from meriting emulation, should be studiously avoided — indeed, that avoiding inquisitorial justice is what our own system is all about.<sup>23</sup> There is a broad consensus that the inquisitorial system can and should serve as a kind of negative polestar for American criminal procedure.

Whether the consensus is warranted is another question. Take *Crawford* and *Davis*, for example. Construing the Confrontation Clause as a bulwark against Continental forms of criminal adjudication led the Court to some odd conclusions, including that the formal-

<sup>16</sup> *Mitchell v. United States*, 526 U.S. 314, 325 (1999) (alteration in original) (quoting *Rogers v. Richmond*, 365 U.S. 534, 541 (1961)).

<sup>17</sup> *See, e.g.*, *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964); *Watts v. Indiana*, 338 U.S. 49, 54–55 (1949) (plurality opinion); *Brown v. Walker*, 161 U.S. 591, 596–97 (1896).

<sup>18</sup> *See, e.g.*, *Andresen v. Maryland*, 427 U.S. 463, 476–77 (1976); *Marcus v. Search Warrant*, 367 U.S. 717, 729 n.22 (1961); *United States v. Salemme*, 91 F. Supp. 2d 141, 190 (D. Mass. 1999), *rev’d in part sub nom. United States v. Flemmi*, 225 F.3d 78 (1st Cir. 2000).

<sup>19</sup> *See, e.g.*, *In re United States*, 503 F.3d 638, 641 (7th Cir. 2007).

<sup>20</sup> *See, e.g.*, *Perry v. Leeke*, 488 U.S. 272, 282 (1989); *In re Oliver*, 333 U.S. 257, 268–69 (1948); *State v. Costello*, 646 N.W.2d 204, 208 (Minn. 2002).

<sup>21</sup> *See, e.g.*, *United States v. Ash*, 413 U.S. 300, 308 (1973).

<sup>22</sup> *See, e.g.*, LLOYD L. WEINREB, *DENIAL OF JUSTICE* (1977); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979); John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: “Myth” and Reality*, 87 YALE L.J. 1549 (1978); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199 (2006).

<sup>23</sup> *Cf., e.g.*, William T. Pizzi, *Sentencing in the US: An Inquisitorial Soul in an Adversarial Body*, in *CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT* 65, 66 (John Jackson, Máximo Langer & Peter Tillers eds., 2008) (noting “a fundamental tenet of the belief system of American lawyers and judges that our trial system is strongly adversarial and that such a system is to be preferred over Continental systems, which are often referred to as ‘inquisitorial’, with some disparagement sometimes intended”).

ity of the setting in which a statement was made — meaning, for the most part, the steps the government took to keep an accurate record of the statement or to assure its reliability — should count heavily *against* admissibility of the statement in a later trial.<sup>24</sup> More fundamentally, in relying on “the civil-law mode of criminal procedure” as a contrast model, the Court never made clear what, precisely, was wrong with that mode of procedure, or how it threatened values that warranted constitutional protection. Sometimes the Court implied that inquisitorial process was bad because it relied on untrustworthy evidence.<sup>25</sup> At other times the Court suggested the real concern was that Continental criminal procedure lent itself too easily to authoritarian abuse.<sup>26</sup> And sometimes it seemed as if the chief sin of Continental criminal procedure was simply that it was Continental — “wholly foreign” to our way of doing things.<sup>27</sup>

All of this could be excused if there were some standard account of what makes inquisitorial process so objectionable. But there is not. Nor is there even agreement about what makes a procedural system inquisitorial. In *Crawford* and *Davis*, the Court proceeded on the assumption that at least one critical attribute of “the civil-law mode of criminal procedure” was the “use of *ex parte* examinations as evidence against the accused.”<sup>28</sup> But elsewhere, as we have seen, the Justices have taken the view that the adversarial system is defined by the presence of a neutral, detached judge, acting solely as a passive umpire, and relying on the parties to investigate the facts and the law. At other times the Court has found the key distinguishing feature of the “inquisitorial system” in the reliance on confessions — convicting a defendant “out of his own mouth”<sup>29</sup> — or in the trust placed in professional factfinders rather than lay jurors.<sup>30</sup>

And there is another difficulty. I have been using the terms “inquisitorial” and “civil law” interchangeably, much as the Supreme Court seemed to do in *Crawford*, *Davis*, and *Sanchez-Llamas*. That usage reflects a particular understanding of the legal systems of Continental Europe: that those systems, in their current form, are still identifiably the outgrowths of the inquisitorial systems of medieval Europe. This is the implicit view of many, if not most, American judges and

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<sup>24</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2278 & n.5 (2006); see, e.g., Roger C. Park, *Is Confrontation the Bottom Line?*, 19 REGENT U. L. REV. 459, 460–61 (2007).

<sup>25</sup> See *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

<sup>26</sup> See *id.* at 56 n.7.

<sup>27</sup> *Id.* at 62.

<sup>28</sup> *Id.* at 50; accord *Davis*, 126 S. Ct. at 2278.

<sup>29</sup> E.g., *Rogers v. Richmond*, 365 U.S. 534, 541 (1961); *Watts v. Indiana*, 338 U.S. 49, 54–55 (1949) (plurality opinion).

<sup>30</sup> See, e.g., *Blakely v. Washington*, 542 U.S. 296, 313 (2004).

scholars. Occasionally Europeans talk in the same way<sup>31</sup> — but only occasionally. Most Continental judges and scholars, along with comparative scholars both in America and overseas, describe Europe's modern systems of criminal procedure as “mixed,” combining aspects of the old, inquisitorial process with elements borrowed from, or at least convergent with, the common law tradition.<sup>32</sup> Some of the borrowing or converging is recent, but much of it took place during a wave of reforms in the nineteenth century — reforms that included public trials, oral proof, guarantees of judicial impartiality, limited use of lay adjudicators, protections against compelled self-incrimination, and other procedural features that Americans still tend to view as incompatible with the “civil law mode of criminal procedure.”<sup>33</sup> Of course, even if the inquisitorial system is today no more than a “historical ‘archetype,’”<sup>34</sup> it still may provide guidance about what our own procedures aim to avoid. But then it becomes especially important to be clear about the system's essential characteristics and why it deserves shunning. And certain versions of anti-inquisitorialism then become particularly hard to justify — such as the Supreme Court's suggestion in *Sanchez-Llamas* that procedural default rules, which may be unimportant in “inquisitorial” countries, nonetheless remain essential to the “basic framework” of our “adversary system.”<sup>35</sup>

My goals in this Article are therefore twofold. First, I want to examine the various roles that anti-inquisitorialism has played and continues to play in shaping our criminal process. Second, I want to assess the attractiveness of anti-inquisitorialism as a guiding principle of American jurisprudence. Roughly speaking, the first chunk of the Article will be descriptive and analytic, the second portion will be evaluative, and the last bit will be something of a combination.

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<sup>31</sup> See, e.g., STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 10 (2005) (characterizing “the ‘continental’ legal tradition” in criminal procedure as “close to the inquisitorial model”).

<sup>32</sup> See, e.g., MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 4 n.4 (1986); JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 137 (1969); John D. Jackson, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?*, 68 MOD. L. REV. 737, 741 (2005); J.F. Nijboer, *Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective*, 41 AM. J. COMP. L. 299, 308, 334–35 (1993). On the recent spread of “mixed” systems to Latin America, see Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617 (2007).

<sup>33</sup> See, e.g., MERRYMAN, *supra* note 32, at 15–19, 132, 136–39; SARAH J. SUMMERS, FAIR TRIALS: THE EUROPEAN CRIMINAL PROCEDURAL TRADITION AND THE EUROPEAN COURT OF HUMAN RIGHTS 21–59 (2007); Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 818–20, 870 (2000); Langer, *supra* note 32, at 627–28.

<sup>34</sup> Nijboer, *supra* note 32, at 303 (emphasis omitted).

<sup>35</sup> *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2269, 2686 (2006).

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More precisely, Part I of the Article will discuss how the contrast model of inquisitorial process is employed in American criminal procedure. I will focus on four particularly striking examples of anti-inquisitorialism at work: the Supreme Court's recent reinterpretation of the Confrontation Clause, the jury trial right applied in *Blakely*, the procedural default ruling in *Sanchez-Llamas*, and the longstanding, rhetorical invocation of the inquisitorial system in the law of interrogations and confessions. Unpacking the role of anti-inquisitorialism in each of these areas will require some detours, because the doctrines in question have taken a number of twists and turns. This is particularly true of the confrontation cases.

Part II of the Article will consider three different reasons the inquisitorial system might be thought an appropriate contrast model in American criminal procedure. The first reason is originalist. It takes inquisitorial processes to be the chief set of evils against which the criminal procedure provisions of the Bill of Rights were intended to provide protection. The second reason is holistic, appealing to the organic integrity of our adversary system. The argument here is that the adversary system, whatever its flaws, is our system, and that for the system to work it must be true to itself. Practices that might function tolerably in a very different system — like the systems of criminal procedure found in civil law countries — might nonetheless prove unworkable in ours. The third reason is instrumental. Maybe the inquisitorial system simply is worse than ours: worse at uncovering the truth, worse at protecting individual rights, or worse at preventing abuses of government authority.

In the end, I will argue that none of these considerations justify the role that anti-inquisitorialism plays in American criminal procedure, although I will have some sympathetic things to say about the instrumental arguments. So Part III of the Article will ask how our law of criminal procedure might look *without* the contrast model of the inquisitorial system.

I should say a few words about what this Article is not. First of all, it is not a call to make America's criminal justice system look more like those abroad. I do think there are things we can learn from civil law systems, and I think one cost of anti-inquisitorialism is that it can blind us to those lessons. But I will not be rehearsing the provocative arguments that others have made, from time to time, for emulating the way criminal justice is administered in France, in Germany, or elsewhere in the civil law world.<sup>36</sup> My prescriptive claim will be more modest: not that we should try to copy civil law systems, but simply that we should not go out of our way to differentiate our own system

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<sup>36</sup> See sources cited *supra* note 22.



from theirs, and that we should stop treating differentiation of that kind as a paramount constitutional value.

Second, this is not an article about the “true” nature of the inquisitorial system or what “really” divides it from the adversarial system. Nor is it an article about how, if at all, the “adversary” system should be distinguished from an older, premodern “accusatory” system.<sup>37</sup> This is not, in short, an exercise in comparative law — either in its old fashioned, taxonomic mode, or in its more modern, model-building mode — and it is not an exercise in legal history. I will draw on scholarship in comparative law and legal history, but only when it bears on my central concerns: how ideas about the inquisitorial system, whether accurate or not, help to shape American criminal procedure, and whether they should continue to play that role.

Finally, this is not, except tangentially, an article about the general practice of defining a legal system by distinguishing it from a foreign system taken as self-evidently inferior — what one scholar of comparative law has called “legal nationalism”<sup>38</sup> and another, more sympathetically, has termed “aversive constitutionalism.”<sup>39</sup> Views on this broader practice are divided. Some people deplore it as an invitation to insularity;<sup>40</sup> others praise it as an effective way of “fixing the essential constitutional character of a national polity.”<sup>41</sup> I incline toward the former view, but I will stay agnostic here about the merits of the larger practice. Plainly much depends on the particulars. My focus is on a specific instance of legal nationalism or aversive constitutionalism: the use of the inquisitorial system as a contrast model in American criminal procedure.

## I. ANTI-INQUISITORIALISM AT WORK

Before assessing anti-inquisitorialism as a theme of American criminal procedure, we need to examine it in operation, preferably

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<sup>37</sup> Cf., e.g., Mireille Hildebrandt, *The Trial of the Expert: Épreuve and Preuve*, 10 NEW CRIM. L. REV. 78, 95 n.31 (2007). For a variation on this distinction, see Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1016–17 (1974).

<sup>38</sup> SUMMERS, *supra* note 33, at 11.

<sup>39</sup> Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296 (2003); see also VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (forthcoming 2009) (manuscript, ch. 1, at 17–18, 45, on file with the author) (discussing the development of “autochthonous constitutional law” through the “use of foreign law as a negative precedent”).

<sup>40</sup> See, e.g., SUMMERS, *supra* note 33, at 13.

<sup>41</sup> Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269, 290 (2003). For a more measured endorsement, see Scheppele, *supra* note 39.

in more than one context. We will start with the prominent role that the contrast model of inquisitorial process has played in the Supreme Court's recent reinterpretation of the Confrontation Clause. Then we will consider, in turn, the employment of that contrast model in *Blakely v. Washington* to invalidate mandatory sentencing schemes that rely on facts found by the trial judge, and in *Sanchez-Llamas v. Oregon* to justify the application of procedural default rules rejected by the International Court of Justice. Finally, I will discuss the area of criminal procedure in which anti-inquisitorialism has been invoked longer and more insistently than in any other: the constitutional regulation of interrogations and confessions. In each of these doctrinal areas, and especially in the first, we will need to take some detours in order to understand the context in which anti-inquisitorialism is operating.

#### A. *Anti-Inquisitorialism and Confrontation*

1. *Confrontation and Cross-Examination.* — The Confrontation Clause of the Sixth Amendment gives every criminal defendant “the right . . . to be confronted with the witnesses against him.”<sup>42</sup> Along with the rest of the Bill of Rights, the Sixth Amendment originally applied only to the federal government.<sup>43</sup> But like most of the other provisions of the Bill of Rights, the Confrontation Clause was found applicable to the states by the Warren Court, on the theory that it was part of the “due process of law” protected against the states by the Fourteenth Amendment.<sup>44</sup>

The drafters and ratifiers of the Confrontation Clause left little direct evidence of what they intended to require; the clause comes to us, the Justices have noted, “on faded parchment.”<sup>45</sup> Partly as a consequence, there has long been controversy about how to interpret the clause — both about what it means to be “confronted” and about who counts as a “witness.”

Letting a defendant “confront” a witness could simply mean having the witness testify in the defendant’s presence. Or it could mean giving the defendant a chance to argue directly with the witness, requiring the kind of unstructured, face-to-face “altercation” that was common in early modern criminal trials, both in England and on the

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<sup>42</sup> U.S. CONST. amend. VI.

<sup>43</sup> See generally AKHIL REED AMAR, *THE BILL OF RIGHTS* (1998).

<sup>44</sup> See *Pointer v. Texas*, 380 U.S. 400 (1965).

<sup>45</sup> *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988) (quoting *California v. Green*, 399 U.S. 149, 174 (1970) (Harlan, J., concurring)) (internal quotation mark omitted); accord, e.g., Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1022 (1998); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 77 (1995); Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 540 n.3 (2003).

Continent, and that some civil law systems still retain.<sup>46</sup> But the Supreme Court has long interpreted the Confrontation Clause to guarantee, first and foremost, neither a simple encounter nor an unmediated argument, but something more formal: cross-examination of prosecution witnesses by defense counsel in front of the jury. The constitutional violation in *Pointer v. Texas*,<sup>47</sup> the decision extending the Confrontation Clause to state prosecutions, arose precisely because the defendant's only chance to question his alleged victim occurred at a preliminary hearing, before the defendant had been assigned a lawyer.<sup>48</sup> The great evidence scholar John Henry Wigmore took cross-examination to be the "main and essential" purpose of confrontation,<sup>49</sup> and the Supreme Court has quoted his words and followed his lead.<sup>50</sup>

Wigmore was emphatic about this point, and his argument rested in part on his own version of anti-inquisitorialism. For Wigmore, as for Jeremy Bentham a century earlier, the chief advantage common law trials had over civil law procedures, the "great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure," was not the jury, but cross-examination — "beyond any doubt the greatest legal engine ever invented for the discovery of truth."<sup>51</sup> Wigmore blamed the unavailability of that "engine" for "some of the great failures of justice in Continental trials," and he thought the "special weakness of Chancery procedure (which followed Continental traditions) lay in its obstacles to an effective cross-examination."<sup>52</sup> This exalted view of cross-examination predisposed Wigmore to see it as the "main idea"<sup>53</sup> and the "original and fundamental object" of confrontation.<sup>54</sup> "If there has

<sup>46</sup> JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 13–16 (2003) (quoting SIR THOMAS SMITH, *DE REPUBLICA ANGLORUM* 114 (Mary Dewar ed., Cambridge Univ. Press 1982) (1583)). On confrontation in Continental criminal trials, see DAMAŠKA, *supra* note 32, at 137 & n.71; and WEINREB, *supra* note 22, at 111.

<sup>47</sup> 380 U.S. 400.

<sup>48</sup> See *id.* at 407.

<sup>49</sup> 3 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 1395, at 94 (2d ed. 1923). Wigmore explained that "[t]he opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining of immediate answers." *Id.*

<sup>50</sup> See, e.g., *Delaware v. Van Arsdall*, 475 U.S. 673, 678–79 (1986); *Delaware v. Fensterer*, 474 U.S. 15, 19–20 (1985); *Davis v. Alaska*, 415 U.S. 308, 315–16 (1974). Regarding Wigmore's influence on the law of confrontation, see, for example, SUMMERS, *supra* note 33, at 52 & n.152; and Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 332–43 (1981).

<sup>51</sup> 3 WIGMORE, *supra* note 49, § 1367, at 27; see also *id.* at 29 (quoting with approval JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (1827)).

<sup>52</sup> *Id.* at 27.

<sup>53</sup> *Id.* § 1395, at 95.

<sup>54</sup> *Id.* at 97.

been a Cross-examination,” Wigmore thought, then “there has been a Confrontation.”<sup>55</sup>

Wigmore acknowledged that physical, face-to-face confrontation did more than facilitate cross-examination: it gave the judge and jury the benefit of seeing the witness’s demeanor while testifying, and it could thereby produce “a certain subjective moral effect” on the witness.<sup>56</sup> These benefits, though, were very much “secondary and subordinate,”<sup>57</sup> and they did not depend on the defendant and the witness actually being brought face to face, but only on the witness testifying live before the adjudicators.<sup>58</sup> Wigmore relegated to “earlier and more emotional periods” of English history the idea that a face-to-face encounter with the defendant might “unstring the nerves of a false witness,” but he noted, with a touch of condescension, that “French practice still shows this notion of confrontation, in liveliest manner.”<sup>59</sup>

The Supreme Court has largely followed Wigmore in treating cross-examination as the central point of confrontation. Indeed, the Court has called “reasonable latitude” for cross-examination the very “essence of a fair trial.”<sup>60</sup> The physical aspect of confrontation, the “face-to-face meeting” between defendant and accuser, has received protection too,<sup>61</sup> but less insistently.<sup>62</sup>

The meaning of the term “confronted” in the Sixth Amendment is thus largely settled, and has been so for decades. Confrontation means an opportunity for cross-examination by defense counsel in front of the jury, ordinarily with the defendant and the witness both in the courtroom.<sup>63</sup> There is controversy only at the edges, chiefly about the limits that can be placed on cross-examination and the circumstances in which a “face-to-face meeting” can be dispensed with.

There has been much more controversy about who qualifies as a “witness” under the Confrontation Clause. I need to say a bit about

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<sup>55</sup> *Id.* § 1396, at 97.

<sup>56</sup> *Id.* § 1395, at 96.

<sup>57</sup> *Id.* at 94.

<sup>58</sup> *Id.* at 97.

<sup>59</sup> *Id.* at 96 n.2.

<sup>60</sup> *Smith v. Illinois*, 390 U.S. 129, 132 (1968) (quoting *Alford v. United States*, 282 U.S. 687, 692 (1931)).

<sup>61</sup> *See, e.g., Perry v. Leeke*, 488 U.S. 272, 282 n.6 (1989); *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).

<sup>62</sup> In 1990, a bare majority of the Court held that the defendant’s right to be in the same room with a witness testifying against him may be sacrificed, and the witness may testify from another room by closed-circuit television, when such a procedure is “necessary to further an important public policy” and “the reliability of the testimony is otherwise assured.” *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

<sup>63</sup> *See Dutton v. Evans*, 400 U.S. 74, 95 (1970) (Harlan, J., concurring in the result) (suggesting that “[i]f one were to translate the Confrontation Clause into language in more common use today, it would read: ‘In all criminal prosecutions, the accused shall enjoy the right to be present and to cross-examine the witnesses against him.’”).

that controversy in order to lay the groundwork for the discussion of *Crawford* and *Davis* below. "Witness" could be defined straightforwardly to mean someone who comes to court and testifies. Then the Confrontation Clause would simply govern trial procedures, giving defendants a right to have prosecution witnesses cross-examined in their presence. The clause would say little about the admissibility of testimony or physical evidence of statements made earlier, outside of court, which would be regulated entirely by statutory and common law rules about hearsay evidence. This was in fact Wigmore's position. He thought the constitutional guarantee of confrontation meant only that "so far as testimony is required under the Hearsay rule to be taken *infra-judicially*, it shall be taken in a certain way, namely, subject to cross-examination, — not secretly or 'ex parte' away from the accused."<sup>64</sup> This was also the position reached ultimately by the second Justice Harlan.<sup>65</sup>

But it has never been the Court's position. The Court has consistently taken the view that some uses of hearsay evidence against criminal defendants violate the Confrontation Clause. In fact the vast majority of the Supreme Court's Confrontation Clause cases have involved challenges to hearsay evidence.<sup>66</sup> The reason is not hard to see. Introducing evidence of an out-of-court accusation from someone who never testifies raises some of the same concerns as examining a witness outside the defendant's presence: in either case the defendant has no opportunity to cross-examine the accuser in front of the jury. As the Court has often pointed out, the hearsay rule and the Confrontation Clause "protect similar values"<sup>67</sup> and "stem from the same roots."<sup>68</sup>

In the traditional telling, those roots lie in grievances about prosecutions based on affidavits and depositions taken *ex parte* from the defendants' accusers — especially in the infamous English treason trials of the 1500s and early 1600s, and most particularly in the 1603 trial of Sir Walter Raleigh. Raleigh was convicted of joining the so-called Main Plot to murder James I and to place Arabella Stuart on the throne. The core evidence against him consisted of a written examina-

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<sup>64</sup> 3 WIGMORE, *supra* note 49, § 1397, at 101. Lest there be any confusion, Wigmore reiterated the point:

The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given *infra-judicially*, — this depends on the law of Evidence for the time being, — but only what mode of procedure shall be followed — i.e. a cross-examining procedure — in the case of such testimony as is required by the ordinary law of Evidence to be given *infra-judicially*.

*Id.*

<sup>65</sup> See *Dutton*, 400 U.S. at 94 (Harlan, J., concurring in the result).

<sup>66</sup> For a survey of pre-*Crawford* cases, see White, *supra* note 45, at 555–91.

<sup>67</sup> *California v. Green*, 399 U.S. 149, 155 (1970); see also *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>68</sup> *Dutton*, 400 U.S. at 86 (plurality opinion); see also *Roberts*, 448 U.S. at 66.

tion of the plot's alleged leader, Lord Cobham, and a letter Cobham later wrote. Raleigh asked repeatedly, but unsuccessfully, for Cobham to be brought from his cell to the courtroom. The trial ended in a sentence of execution, which was eventually carried out.<sup>69</sup> Widespread revulsion at the conduct of Raleigh's trial has long been credited with helping spur development both of the common law right to confrontation and of the hearsay rule.<sup>70</sup>

The Court has therefore thought it plain that the Confrontation Clause excludes some hearsay.<sup>71</sup> At the same time, the Justices have been wary of treating *all* prosecution hearsay as a constitutional violation; that would "abrogate virtually every hearsay exception" and be "too extreme."<sup>72</sup> Over a century ago, in its first case applying the Confrontation Clause, the Supreme Court warned that "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."<sup>73</sup> The Court retained this pragmatic perspective on the Confrontation Clause throughout the 1900s. The trick was deciding where to draw the line.

Nearly thirty years ago, in *Ohio v. Roberts*,<sup>74</sup> the Court drew the line at reliability. The Justices reasoned that the "underlying purpose" of confrontation was "to augment accuracy" by "ensuring the defendant an effective means to test adverse evidence."<sup>75</sup> So prosecution hearsay was barred by the Confrontation Clause unless it carried "adequate 'indicia of reliability'" — either because the statements at issue fell, by statute or common law, within a "firmly rooted" exception to the hearsay ban, or because they bore "particularized guarantees of trustworthiness."<sup>76</sup> The Court eventually made clear that it deemed all

<sup>69</sup> See, e.g., CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE* 414–16 (1957); Allen D. Boyer, *The Trial of Sir Walter Raleigh: The Law of Treason, the Trial of Treason and the Origins of the Confrontation Clause*, 74 *MISS. L.J.* 869, 888–94 (2005).

<sup>70</sup> See, e.g., *Green*, 399 U.S. at 157 n.10; FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 104–06 (1951); Boyer, *supra* note 69, at 895–901; Jonakait, *supra* note 45, at 81 n.18. For a skeptical assessment of this received understanding, see Kenneth W. Graham Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 *CRIM. L. BULL.* 99, 100 & n.4 (1972).

<sup>71</sup> See, e.g., *Roberts*, 448 U.S. at 63.

<sup>72</sup> *Id.*

<sup>73</sup> *Mattox v. United States*, 156 U.S. 237, 243 (1895).

<sup>74</sup> 448 U.S. 56.

<sup>75</sup> *Id.* at 65.

<sup>76</sup> *Id.* at 66. *Roberts* also suggested that when a prosecution witness was available to testify in court, the Confrontation Clause "normally" called for the exclusion of the witness's out-of-court statements even in the face of "indicia of reliability." See *id.* But the Court made clear that "[a] demonstration of unavailability . . . is not always required," *id.* at 65 n.7, and the constraint later fell by the wayside, applying only to statements admitted under hearsay exceptions that themselves required a showing of unavailability, see *White v. Illinois*, 502 U.S. 346, 355–56 (1992); *United States v. Inadi*, 475 U.S. 387, 394 (1986); Robert P. Mosteller, *Confrontation As Constitu-*

of the myriad hearsay exceptions codified in the Federal Rules of Evidence and adopted by most of the states to be “firmly rooted.”<sup>77</sup> This amounted to allowing the Confrontation Clause to track the Federal Rules of Evidence, because most states have copied the Federal Rules of Evidence virtually verbatim.<sup>78</sup>

Partly because it seemed odd to hitch constitutional doctrine to the twists and turns of evidence law, the *Roberts* approach to the Confrontation Clause was never popular with commentators. By the time the Court decided *Crawford v. Washington* in 2004, it was ready for a new approach.

2. *Confrontation Revisited.* — The facts were these: Michael Crawford was convicted of stabbing a man who allegedly tried to rape Crawford’s wife, Sylvia. The evidence against him included a tape-recorded police interrogation of Sylvia Crawford, in which she described the stabbing. Sylvia declined to testify against her husband at trial, invoking spousal privilege, but the prosecutors introduced her tape-recorded interrogation. Based in part on that evidence, the jury rejected Crawford’s claim of self-defense. The trial judge found no violation of the Confrontation Clause because Sylvia’s statements appeared reliable. The statements did not fall within a firmly rooted exception to the hearsay rule, but they had “particularized guarantees of trustworthiness”:<sup>79</sup> they were based on direct observation, they were made soon after the events in question, they did not seek to shift blame, and they were made under questioning by a “neutral” law enforcement officer.<sup>80</sup> The intermediate appellate court reversed, finding the statements insufficiently reliable, but the state supreme court reinstated the conviction, relying chiefly on the manner in which the statements by Michael Crawford and Sylvia Crawford “interlocked.”<sup>81</sup>

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*tional Criminal Procedure: Crawford’s Birth Did Not Require That Roberts Had To Die*, 15 J.L. & POL’Y 685, 694 & n.28 (2007).

<sup>77</sup> See *White*, 502 U.S. at 355 n.8.

<sup>78</sup> The only exceptions the Court ever found *not* to qualify were the catchall provisions in the Federal Rules of Evidence and most state evidence codes for statements “not specifically covered” by other exceptions “but having equivalent circumstantial guarantees of trustworthiness.” *Idaho v. Wright*, 497 U.S. 805, 812 (1990) (quoting IDAHO R. EVID. 803(24)). The Court reasoned that “ad hoc” assessments of reliability did not deserve the weight given to “longstanding judicial and legislative experience” in evaluating particular categories of extrajudicial statements. *Id.* at 817. Statements admitted under the catchall exceptions could still survive a Confrontation Clause challenge, but only if they had “particularized guarantees of trustworthiness,” which the Court interpreted *not* to include corroboration. *Id.* at 822 (quoting *Roberts*, 448 U.S. at 66) (internal quotation marks omitted). “To be admissible under the Confrontation Clause,” the Court explained, “hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.” *Id.*

<sup>79</sup> *Crawford v. Washington*, 541 U.S. 36, 40 (2004) (quoting *Roberts*, 448 U.S. at 66) (internal quotation marks omitted).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 41; see also *id.* at 38–42.

The United States Supreme Court reversed. Writing for the majority, Justice Scalia made clear he agreed with Washington's intermediate court of appeals about the reliability of Sylvia Crawford's statements to the police, but he declined simply to "reweigh[] the 'reliability factors' under *Roberts*."<sup>82</sup> Instead, he took the occasion to revisit *Roberts* and to reject its entire approach, at least as applied to statements made in a police interrogation or to other hearsay that seemed "testimonial." For those statements, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."<sup>83</sup> That meant that testimonial hearsay was inadmissible against a criminal defendant unless the defendant actually received an opportunity to cross-examine the witness, either at trial or in an earlier proceeding. And even then, statements by a witness who did not appear at trial would be inadmissible if the witness were available and could in fact be called to the stand.<sup>84</sup> The only exceptions the Court signaled it would accept to these imperatives were the equitable principle of "forfeiture by wrongdoing"<sup>85</sup> and, possibly, the venerable rule admitting dying declarations<sup>86</sup> — doctrines that the Court has since made clear are to be applied narrowly, with strict adherence to their contours in eighteenth-century common law.<sup>87</sup>

The rules announced in *Crawford* brought both new rigidity and a large element of new confusion to the law of confrontation. The *Crawford* requirements for the admissibility of testimonial hearsay against a criminal defendant are, by design, less flexible and less pragmatic than the Court's old approach to the Confrontation Clause. But the Court declined in *Crawford*, and has declined in subsequent cases, to offer any comprehensive set of criteria for distinguishing hearsay that is "testimonial" from hearsay that is not. So the rules announced in *Crawford* are both relatively inflexible and substantially ambiguous. What made them attractive to the Court?

Part of the answer, Justice Scalia suggested in his majority opinion, was the even worse — because intrinsic — ambiguity of the *Roberts* test, with its reliance on the "[v]ague,"<sup>88</sup> "manipulable,"<sup>89</sup> and "amorphous" concept of "reliability."<sup>90</sup> *Crawford* is thus one of a series of criminal procedure decisions over the past decade and a half in which

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<sup>82</sup> *Id.* at 67; *see also id.* at 68.

<sup>83</sup> *Id.* at 68–69.

<sup>84</sup> *See id.* at 53–54, 68.

<sup>85</sup> *Id.* at 62.

<sup>86</sup> *See id.* at 56 n.6 (suggesting that if "an exception for testimonial dying declarations . . . must be accepted on historical grounds, it is *sui generis*").

<sup>87</sup> *See Giles v. California*, 128 S. Ct. 2678 (2008).

<sup>88</sup> *Crawford*, 541 U.S. at 68 & n.10.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 61 (internal quotation marks omitted).



Justice Scalia and to a lesser extent Justice Thomas have led the Court in trying to undo the substitution of “open-ended balancing tests” for constitutional guarantees that should be, and were intended to be, “categorical.”<sup>91</sup> But Justice Scalia explained for the *Crawford* majority that the truly “unpardonable vice of the *Roberts* test” was not its unpredictability but rather its failure to protect against “core” violations of the Confrontation Clause, like what had happened to Michael Crawford.<sup>92</sup> Convicting a criminal defendant with statements from someone else’s police interrogation — or someone else’s testimony at a preliminary hearing, in front of a grand jury, or in a different trial — was a “core confrontation violation[],”<sup>93</sup> because it bore such a strong resemblance to “the abuses at which the Confrontation Clause was directed.”<sup>94</sup>

And what were those abuses? The ones the Court had earlier identified: trials, like Raleigh’s, where prosecutors relied on statements taken in the defendant’s absence, without opportunity for cross-examination. And echoing Wigmore, the Court in *Crawford* gave this history an important, anti-inquisitorial gloss. Trial by affidavit, the injustice that befell Raleigh, was “the *civil-law* mode of criminal procedure.”<sup>95</sup> This was a longstanding point of difference, Justice Scalia explained, between Anglo-American law and “continental civil law.” Our “common-law tradition is one of live testimony in court subject to adversarial testing,” whereas “the civil law condones examination in private by judicial officers.”<sup>96</sup> (Note the present tense, a matter to which we will return later.) England had “at times adopted elements of the civil-law practice.”<sup>97</sup> “[T]he great political trials of the 16th and 17th centuries,”<sup>98</sup> including Raleigh’s case, were examples of this, and so were the more widespread and mundane use of witness statements taken by low-level magistrates pretrial, under bail and committal statutes passed during the reign of Queen Mary in the sixteenth century — the so-called Marian statutes.<sup>99</sup> But statutory and judicial reforms in England reacted against these abuses, creating the right to confrontation later codified, across the Atlantic, in state declarations of rights and the Sixth Amendment to the United States Constitution.<sup>100</sup> Con-

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<sup>91</sup> *Id.* at 67–68. Regarding similar efforts in Fourth Amendment cases, see David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000).

<sup>92</sup> *Crawford*, 541 U.S. at 63.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 68.

<sup>95</sup> *Id.* at 50 (emphasis added).

<sup>96</sup> *Id.* at 43.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 44.

<sup>99</sup> *See id.* at 43–44.

<sup>100</sup> *See id.* at 44–50.

victing Crawford with statements his wife made during police interrogation was a “core” violation of the Confrontation Clause because it smacked so strongly of Continental criminal procedure.

The Court did not say in *Crawford* whether the *Roberts* test, or any other requirements derived from the Confrontation Clause, would continue to apply to *nontestimonial* hearsay introduced against a criminal defendant. The Court answered that question two years later, though, in *Davis v. Washington*. Writing again for the Court, Justice Scalia explained that the focus on testimonial statements was “so clearly reflected in the text” of the Confrontation Clause that it “must fairly be said to mark out not merely its ‘core,’ but its perimeter.”<sup>101</sup> *Davis* thus makes clear that the Confrontation Clause now applies only to testimonial hearsay.

*Davis* also threw some additional light on the key term “testimonial,” at least in the context of questioning by law enforcement officers or their agents. In that context, the Court held, statements are testimonial if “the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution,” rather than to respond to an “ongoing emergency.”<sup>102</sup> The Court therefore found no constitutional violation in the evidence used to convict Adrian Davis of assault: statements his former girlfriend, Michelle McCottry, made after calling 911 to report that he was attacking her.<sup>103</sup> Those statements included the name of her attacker, provided in response to questions from the 911 operator.<sup>104</sup> But the Court thought that even the questions about the assailant’s identity appeared “necessary to be able to resolve the present emergency,” because police dispatched to the scene would want to “know whether they would be encountering a violent felon.”<sup>105</sup> The heart of the matter was that “[a]lthough one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry’s call was plainly a call for help against bona fide physical threat. . . . She simply was not acting as a *witness*; she was not *testifying*.”<sup>106</sup>

In this respect the Court thought McCottry’s statements contrasted sharply with the statements at issue in *Hammon v. Indiana*,<sup>107</sup> a case consolidated for decision with *Davis*. Herschel Hammon was con-

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<sup>101</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2274 (2006).

<sup>102</sup> *Id.* at 2273–74. *Davis* said nothing about statements not made in response to law enforcement questioning, other than to disavow any suggestion that they were “necessarily nontestimonial.” *Id.* at 2274 n.1.

<sup>103</sup> *See id.* at 2271.

<sup>104</sup> *See id.*

<sup>105</sup> *Id.* at 2276 (emphasis omitted).

<sup>106</sup> *Id.* at 2276–77.

<sup>107</sup> 126 S. Ct. 2266 (2006).

victed of battery based on statements his wife, Amy Hammon, had made to police officers who came to the Hammons' house in response to a "domestic disturbance" report.<sup>108</sup> The Court found these facts essentially indistinguishable from the circumstances in *Crawford*. "There was no emergency in progress," so it was "entirely clear . . . that the interrogation was part of an investigation into possibly criminal past conduct."<sup>109</sup> Amy Hammon's statements were therefore testimonial, unlike Michelle McCottry's statements. Justice Thomas, concurring in *Davis* but dissenting in *Hammon*, could not see the difference: neither the 911 call in *Davis* nor the at-the-scene questioning in *Hammon* looked to him much like formal, "civil-law . . . *ex parte* examinations."<sup>110</sup> This was too much originalism even for Justice Scalia, who warned that "[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction."<sup>111</sup> Amy Hammon's statements were formal enough — either (as the Court suggested at one point) because she was questioned away from her husband, in a separate room, "with the officer receiving her replies for use in his 'investigat[ion],"<sup>112</sup> or (as the Court suggested elsewhere) because "lies to [police] officers are criminal offenses."<sup>113</sup>

Put aside for the moment whether the historical claims in *Crawford*, in *Davis*, and in *Giles v. California*<sup>114</sup> — the decision narrowly construing the dying declaration and equitable forfeiture exceptions to the confrontation right — were accurate. Put aside, too, whether those claims justify the Court's new approach to the Confrontation Clause. We will return to those questions later. For now I want to focus on the role that anti-inquisitorialism has played in the Court's overhaul of confrontation law. Several points are worth noting.

First, the Court takes prosecution of a criminal defendant through the use of statements taken in his absence to be a signal feature of the inquisitorial system. The common law, Justice Scalia explains for the Court, "has long differed from continental civil law" in this regard: "[t]he common law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers."<sup>115</sup> Second, the Court interprets the Confrontation Clause to be aimed first and foremost at blocking that sort of private testimony, and by implication the inquisitorial system more

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<sup>108</sup> *Id.* at 2272.

<sup>109</sup> *Id.* at 2278.

<sup>110</sup> *Id.* at 2281 (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting *Crawford v. Washington*, 541 U.S. 36, 50 (2004)) (internal quotation mark omitted).

<sup>111</sup> *Id.* at 2279 n.5 (majority opinion).

<sup>112</sup> *Id.* at 2278 (alteration in original).

<sup>113</sup> *Id.* at 2279 n.5.

<sup>114</sup> 128 S. Ct. 2678 (2008).

<sup>115</sup> *Crawford*, 541 U.S. at 43.

broadly: “the principal 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.”<sup>116</sup> Third, linking the inquisitorial system with the use of statements taken in the defendant’s absence does rhetorical work. It is not strictly necessary for the Court’s historical argument: the Confrontation Clause could have been aimed at blocking the prosecutorial use of *ex parte* witness statements, regardless whether that practice is or was characteristic of the inquisitorial system. But linking unconfrosted statements to civil law trials made confrontation part and parcel of our adversary system; the Supreme Court in *Crawford* and *Davis* “use[d] the perceived failings of the European ‘inquisitorial’ model to reinforce the legitimacy of its own approach.”<sup>117</sup> Anti-inquisitorialism in *Crawford* and *Davis* thus helped free the Court from an obligation it otherwise might have felt — the obligation to explain just what it is about confrontation that merits constitutional protection.

A brief digression is in order about two possible uses of purpose in constitutional adjudication. One use, which the Court rightly rejected in *Crawford*, deems a constitutional provision entirely inapplicable if its underlying purpose is satisfied in other ways. This is the line of thinking Justice Scalia presumably had in mind in *Crawford* when he quipped that “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”<sup>118</sup> Elsewhere the Court conceded that “the Clause’s ultimate goal is to ensure reliability of evidence,” but it reasoned, sensibly enough, that the clause commands “that reliability be assessed in a particular manner” — that is, through confrontation.<sup>119</sup> Constitutional provisions do not apply only when courts think they are truly needed — at least, they do not work that way under any approach to constitutional adjudication that today enjoys significant support.

But there is another way that purpose can figure in constitutional interpretation: it can serve as a guide in resolving textual ambiguities. This use of purpose is uncontroversial, even among dyed-in-the-wool originalists. Take Justice Scalia’s opinion for the Court in *District of Columbia v. Heller*,<sup>120</sup> striking down a local ban on handguns — an originalist decision if ever there was one. Justice Scalia made clear

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<sup>116</sup> *Id.* at 50.

<sup>117</sup> Sarah J. Summers, *The Right to Confrontation After Crawford v. Washington: A “Continental European” Perspective*, 2 INT’L COMMENT. ON EVIDENCE, Issue 1, art. 3, 2004, at 1.

<sup>118</sup> *Crawford*, 541 U.S. at 62.

<sup>119</sup> *Id.* at 61.

<sup>120</sup> 128 S. Ct. 2783 (2008). *Heller* also struck down the District of Columbia’s law requiring that any firearms in the home be kept inoperable.

that eighteenth-century understandings governed the preliminary and long-debated question whether the Second Amendment conferred an individual right or simply a collective right connected to militia service.<sup>121</sup> But once the Court decided that the right in question was held by individuals, and was not dependent on any connection with a state militia, it had to determine whether a ban on *handguns*, but not on rifles or shotguns, amounted to an infringement of the right “to keep and bear Arms.”<sup>122</sup> The text did not answer that question, and Justice Scalia did not pretend that it did. Instead, he stressed that a central purpose of the Second Amendment is to protect “the inherent right of self-defense,”<sup>123</sup> and he noted that “the American people have considered the handgun to be the quintessential self-defense weapon.”<sup>124</sup> *That* was what made “a complete prohibition” of handguns unconstitutional.

Here is another example, closer to home. The Sixth Amendment gives criminal defendants a right to be tried by a “jury.”<sup>125</sup> After the Supreme Court held this right to be “fundamental to the American scheme of justice,” and therefore protected against the states by the Due Process Clause of the Fourteenth Amendment,<sup>126</sup> the Court had to decide what the term “jury” meant — in particular, whether a jury stopped being a jury when it had fewer than twelve members. Common law juries had twelve members, but was this size essential to the very idea of a jury or simply an accident of history? To answer this question, the Court looked to the purpose of jury trials, which it concluded was “to prevent oppression by the Government” by requiring community participation in the determination of guilt or innocence and by applying the common sense of laypeople.<sup>127</sup> The issue thus was how large a jury was required in order “to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community.”<sup>128</sup> The Court found no evidence that a jury of six was inadequate to fulfill these functions, and therefore it held six-member juries constitutionally permissible.<sup>129</sup> Eight years later, though, the Court

<sup>121</sup> *Id.* at 2790–2807.

<sup>122</sup> *Id.* at 2818.

<sup>123</sup> *Id.* at 2817.

<sup>124</sup> *Id.* at 2818.

<sup>125</sup> “In all criminal prosecutions, the accused 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 . . . .” U.S. CONST. amend. VI.

<sup>126</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

<sup>127</sup> *Williams v. Florida*, 399 U.S. 78, 100 (1970) (citing *Duncan*, 391 U.S. at 156); accord *Ballew v. Georgia*, 435 U.S. 223, 229 (1978).

<sup>128</sup> *Williams*, 399 U.S. at 100; accord *Ballew*, 435 U.S. at 230.

<sup>129</sup> See *Williams*, 399 U.S. at 102–03.

concluded that reducing the number of members to five or fewer unduly threatened the ability of a criminal jury to serve its historic purposes, so a panel of five or fewer members could not satisfy the jury right found in the Sixth Amendment.<sup>130</sup>

This kind of appeal to purpose as a guide to constitutional interpretation is all but absent in *Crawford*, *Davis*, and *Giles* — as is any serious effort to identify the underlying point of confrontation. In *Crawford* the Court said in passing that the “ultimate goal” of the Confrontation Clause is to ensure the reliability of evidence used against a criminal defendant,<sup>131</sup> but it also suggested that the aim of the clause is, at least in part, to protect against abuses of power in “politically charged” prosecutions.<sup>132</sup> And elsewhere Justice Scalia has led the Court in stressing the symbolic, dignitary interests protected by the Confrontation Clause: the notion that there simply is “something deep in human nature that regards face-to-face confrontation between accused and accuser as ‘essential to a fair trial in a criminal prosecution.’”<sup>133</sup> The Court made no effort in *Crawford*, *Davis*, or *Giles* to synthesize or reconcile these purposes. It treated that task as unnecessary: whatever the purpose of the Confrontation Clause, the Constitution had already determined how that purpose should be pursued.<sup>134</sup> As Roger Park has put it, confrontation seems to be the Court’s bottom line: “the purpose of confrontation is confrontation.”<sup>135</sup>

The problem with this approach, as Professor Park points out, is that it has left the Court virtually without guidance in delineating the contours of the confrontation right and in defining the critical term “testimonial.”<sup>136</sup> And that lack of guidance may go a long way toward explaining some of the Court’s odd suggestions about what makes an out-of-court statement “testimonial” and therefore subject to the Confrontation Clause — including the counterintuitive idea that formalities involved in taking a statement weigh in favor of treating the

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<sup>130</sup> See *Ballew*, 435 U.S. at 239–45. The Court conceded it could discern no “clear line between six members and five.” *Id.* at 239. But it took note of accumulating social science research raising “substantial doubt about the reliability and appropriate representation of panels smaller than six,” and concluded that “[b]ecause of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance.” *Id.*

<sup>131</sup> *Crawford v. Washington*, 541 U.S. 36, 61 (2004); see also *Giles v. California*, 128 S. Ct. 2678, 2692 (2008) (reasoning that the Confrontation Clause permits a defendant to be convicted only on “the basis of evidence the Constitution deems reliable and admissible”).

<sup>132</sup> *Crawford*, 541 U.S. at 68.

<sup>133</sup> *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)); accord *Maryland v. Craig*, 497 U.S. 836, 847 (1990).

<sup>134</sup> See *Giles*, 128 S. Ct. at 2692; *Crawford*, 541 U.S. at 61.

<sup>135</sup> Park, *supra* note 24, at 466.

<sup>136</sup> See *id.* at 459, 467.

statement as testimonial, even when the formalities seem to make the statement more reliable and less amenable to government manipulation.<sup>137</sup> Granting that formality makes a statement more like the evidence in Sir Walter Raleigh's case and more like the depositions taken by Marian magistrates, and granting even that these should be taken as the paradigmatic evils against which the Confrontation Clause takes aim, Professor Park is plainly right that "similarities that make no functional difference should not matter,"<sup>138</sup> and that deciding which similarities make functional differences requires some reference to underlying goals.

Strictly speaking, the Court's reluctance in *Crawford*, *Davis*, and *Giles* to examine the underlying purpose of confrontation did not depend on the connection *Crawford* drew between a lack of confrontation and inquisitorial justice. The Court could have detached the interpretation of the Confrontation Clause from the goals of the Clause without simultaneously linking the Clause to the adversary system. There was, in fact, little explicit discussion of the inquisitorial system in *Davis*<sup>139</sup> and even less in *Giles*. And rooting the confrontation right in a rejection of inquisitorial process, as the Court did in *Crawford*, might seem simply to reframe the kind of functional analysis required when giving content to the right: now the Court needs an account of what makes the inquisitorial system objectionable. As a practical matter, though, anti-inquisitorialism functioned in *Crawford* as a substitute for an inquiry into purpose. Once confrontation at trial was linked to a rejection of the inquisitorial system, its purpose standing alone seemed either self-evident or beside the point. Confrontation was important because it was part of what distinguished "our" system from "theirs" — and their system was something "to be avoided at all costs."<sup>140</sup>

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<sup>137</sup> See *id.* at 459–62; see also, e.g., *Davis v. Washington*, 126 S. Ct. 2266, 2278 n.5 (2006) (stating that "formality is indeed essential to testimonial utterance"); *id.* at 2276–77 (indicating that recorded statements are more formal and hence more likely to be testimonial). Professor Park notes:

Under the formality-is-bad approach, every effort to improve the accuracy of [a] recording [of a declarant who inculpates the defendant] or to test the declarant's story would only make the evidence more likely to be excluded, until a line is crossed and the formalities become powerful enough to be deemed "confrontation."

Park, *supra* note 24, at 461; see also Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 IND. L.J. 1029, 1055–56 (2007).

<sup>138</sup> Park, *supra* note 24, at 460.

<sup>139</sup> But see *Davis*, 126 S. Ct. at 2278 (stressing that Amy Hammon's statement implicating her husband shared "[w]hat we called the 'striking resemblance' of the *Crawford* statement to civil-law *ex parte* examinations" (quoting *Crawford*, 541 U.S. at 52)).

<sup>140</sup> Summers, *supra* note 117, at 1.

*B. Anti-Inquisitorialism, Sentencing, and Juries*

Outside of the Confrontation Clause, the most dramatic development in constitutional criminal procedure over the past decade has been the Supreme Court's application of the Sixth Amendment jury right to invalidate a wide range of sentencing schemes, including the one that federal courts had used for nearly two decades. This series of cases began in 2000 with *Apprendi v. New Jersey*,<sup>141</sup> which struck down a state law authorizing sentencing enhancements for defendants that trial judges, not juries, determined had carried out hate crimes, and it culminated five years later in *United States v. Booker*,<sup>142</sup> which held the United States Sentencing Guidelines unconstitutional because they made a defendant's presumptive sentencing range depend on facts found by the judge, not by the jury. But the pivotal case in the series was *Blakely v. Washington*, decided the year before *Booker*. *Blakely* made clear the *Apprendi* principle applied to any sentencing scheme that made a defendant's maximum sentence depend on facts found by the judge rather than the jury — not just to schemes, like the one in *Apprendi*, that authorized judges to exceed what would otherwise be the maximum sentence fixed by statute for the defendant's offense. Before *Blakely*, it appeared possible that states could avoid violating *Apprendi* by setting the maximum penalty for every offense high enough to accommodate any enhancements authorized for facts found by the sentencing judge. After *Blakely*, that option was no longer available, and the writing was on the wall for the federal sentencing law.

*Blakely* was a highly contentious, 5-4 decision. The dissenters accused the majority of "doctrinaire formalism,"<sup>143</sup> and it was easy to see why. Neither *Blakely* nor *Booker*, the following year, required sentences to be set by juries, or placed any limits on the considerations a judge could take into account in selecting a sentence. It remains perfectly permissible for a trial judge to increase a defendant's sentence because the judge decides on a preponderance of the evidence that, for example, the defendant lacks remorse, or acted out of racial animus, or showed extreme callousness, or violated a position of trust.<sup>144</sup> All that *Blakely* prohibited was judges exercising that authority pursuant to compulsory sentencing rules. The effect is to prevent legislatures from reining in the sentencing discretion of judges through the use of mandatory penalty ranges, unless the factual determinations that place a defendant in one range rather than another are made by a jury rather

<sup>141</sup> 530 U.S. 466 (2000).

<sup>142</sup> 543 U.S. 220 (2005).

<sup>143</sup> *Blakely v. Washington*, 542 U.S. 296, 321 (2004) (O'Connor, J., dissenting).

<sup>144</sup> See, e.g., Pizzi, *supra* note 23, at 74-76.



than by the judge. Because it is cumbersome to have juries make findings for purposes of sentencing, it was clear from the outset that the practical effect of *Blakely* and *Booker* would be to turn sentencing rules into sentencing suggestions. This was particularly clear in *Booker*, because the remedy imposed by the Court explicitly made the federal sentencing guidelines advisory rather than mandatory.<sup>145</sup> The rhetoric in these cases was all about the allocation of power between judges and juries, but the actual consequence was a reallocation of power from legislatures and their administrative delegates back to judges.<sup>146</sup>

So the reasoning of *Blakely* bears examination. The Court's opinion in *Blakely*, as in *Crawford*, was written by Justice Scalia. And in *Blakely*, as in *Crawford*, Justice Scalia's argument for the Court was, at crucial junctures, anti-inquisitorial. The jury trial would mean little, he suggested, if the jury's verdict simply set the stage for a "judicial inquisition" at the sentencing stage.<sup>147</sup> Later he invoked the contrast model of the inquisitorial system even more explicitly:

Our Constitution and the common-law traditions it entrenches . . . do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury. . . .

. . . One can certainly argue that both [efficiency and fairness] would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.<sup>148</sup>

The anti-inquisitorialism in *Blakely* does not completely explain why the Court thought it was striking a blow for juries and against judges with a ruling that did nothing to restrict the sentencing power of judges, and gave no new powers to juries, so long as legislatures left judges broad, unfettered discretion to select any sentence below the statutory maximum. But it makes the Court's reasoning more under-

<sup>145</sup> *Booker*, 543 U.S. at 245.

<sup>146</sup> See, e.g., Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 410 (2006); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1481–82, 1484, 1494–95 (2008). In subsequent cases extending and applying *Booker*, "the discretionary license given to district courts" was made even clearer, and "the jury . . . pretty much dropped out of the picture." Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds — The Center Doesn't*, 117 YALE L.J. 1374, 1376 (2008) (discussing *Rita v. United States*, 127 S. Ct. 2456 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007)).

<sup>147</sup> *Blakely*, 542 U.S. at 306–07.

<sup>148</sup> *Id.* at 313.

standable. A system in which judges have unconstrained discretion to sentence as they see fit may seem undemocratic, or inconsistent with the rule of law, but it does not call to mind the inquisitorial tradition.<sup>149</sup> On the other hand, a judge who finds facts and then sentences pursuant to a statutory or administrative code *does* seem to resemble, in some respects, a certain kind of Continental jurist. What is called to mind is a nineteenth-century Napoleonic jurist applying a Beccarian code of penalties — not the notoriously arbitrary judges of the *ancien régime*, and not modern-day European judges, who generally exercise broader sentencing discretion than their American counterparts.<sup>150</sup> Cesare Beccaria and his followers, in contrast, really did pursue an “ideal of administrative perfection.”<sup>151</sup>

Beccaria’s ideas have long been out of favor in Europe.<sup>152</sup> But in *Blakely*, as in *Crawford*, Justice Scalia does what American lawyers generally do: he treats the inquisitorial system as a single, unbroken procedural tradition in Europe, stretching from the Middle Ages to the present day. So the large differences between a Napoleonic judge and a medieval inquisitor or modern European magistrate become blurred; all three are equally “inquisitorial” and equally alien to the adversary system.<sup>153</sup>

Sentencing is not the only area of criminal procedure in which the Court has claimed itself to be defending the “strict division of author-

<sup>149</sup> See, e.g., Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1372 n.73 (1999) (book review) (suggesting that “[a] lawyer from the civil law tradition, with its emphasis on the limited role of judges as interpreters of the law, would find this view of the sentencing judge very puzzling”). But cf. Pizzi, *supra* note 23, at 66, 69–71, 75–78 (arguing that American sentencing procedures are “strongly inquisitorial,” because they are controlled by the judge rather than by the parties).

<sup>150</sup> See KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 12–13 (1998); JAMES Q. WHITMAN, HARSH JUSTICE 53–56, 71–74 (2003); Richard S. Frase, *Comparative Perspectives on Sentencing Policy and Research*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 259, 272–73 (Michael Tonry & Richard S. Frase eds., 2001); Constantijn Kelk, Laurence Koffman & Jos Silvis, *Sentencing Practice, Policy, and Discretion*, in CRIMINAL JUSTICE IN EUROPE 319, 324–27 (Phil Fennel et al. eds., 1995).

<sup>151</sup> See, e.g., WHITMAN, *supra* note 150, at 50–51.

<sup>152</sup> See *id.* at 73–74.

<sup>153</sup> Kate Stith suggests that the mandatory sentencing rules invalidated in *Blakely* and *Booker* were “inquisitorial” rather than “adversarial” because they contemplated that the sentencing judge, with the help of the probation officer, would carry out an independent inquiry into the appropriate sentence, rather than relying on the facts and arguments put forward by the parties. See Stith, *supra* note 146, at 1436–39. But sentencing judges have always had this power, and they retain it today. All that *Blakely* and *Booker* prohibited was legislative or administrative rules prescribing the consequences that sentencing judges must attach to the facts that they find. The federal sentencing scheme struck down in *Booker* might be thought to have heightened the “inquisitorial” nature of sentencing by requiring “real offense” sentencing — that is, requiring judges to sentence based on the actual facts, rather than the facts reflected in the charges or the facts agreed to by the parties. But in practice, as Professor Stith points out, sentencing judges generally accepted any facts about which the parties stipulated. See *id.* at 1450–51.

ity between judge and jury.”<sup>154</sup> *Giles v. California*, the case strictly limiting the equitable forfeiture exception to a defendant’s confrontation rights, never explicitly referred to civil law processes but nonetheless amounted to something of an anti-inquisitorial two-for-one, relying not just on the Confrontation Clause as interpreted in *Crawford* but also on jury-right rhetoric of the sort found in *Blakely*. The State of California argued in *Giles* that the forfeiture doctrine should apply whenever a witness was unavailable because of the defendant’s wrongdoing, even if the wrongdoing had some motive other than preventing the witness from testifying in court.<sup>155</sup> Several lower courts had reached precisely this conclusion in the wake of *Crawford*, but the Supreme Court disagreed — in yet another opinion by Justice Scalia. Part of Justice Scalia’s rationale in *Giles* was that common law courts at the time of the framing and adoption of the Bill of Rights recognized a forfeiture exception to the need for confrontation only if the defendant’s wrongdoing was aimed at keeping the witness off the stand.<sup>156</sup> (At least that was Justice Scalia’s reading of history; the dissenters disagreed.<sup>157</sup>) Another part of the Court’s reasoning, though, was that it did “not sit well with the right to trial by jury” to take away a defendant’s confrontation rights “on the basis of a prior *judicial* assessment that the defendant is guilty as charged.”<sup>158</sup> It was “akin, one might say, to ‘dispensing with jury trial because a defendant is obviously guilty.’”<sup>159</sup>

Criminal juries can be celebrated as a linchpin of our constitutional system without using the civil law tradition as a contrast model. (Akhil Amar has done that at great length.<sup>160</sup>) One might even try to strengthen the case for a broad right to jury trial in criminal cases by noting, with approval, the widespread use of lay adjudicators, either alone or on mixed lay and professional panels, throughout modern

<sup>154</sup> *Blakely v. Washington*, 542 U.S. 296, 313 (2004).

<sup>155</sup> *Giles v. California*, 128 S. Ct. 2678, 2682 (2008).

<sup>156</sup> *Id.* at 2683–86.

<sup>157</sup> *Id.* at 2696–97 (Breyer, J., dissenting).

<sup>158</sup> *Id.* at 2686 (majority opinion).

<sup>159</sup> *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 62 (2004)). Justice Scalia expanded on this point in a later portion of his opinion, joined only by Chief Justice Roberts, Justice Thomas, and Justice Alito: it was “repugnant to our constitutional system of trial by jury” to suggest “murder defendants whom the judge considers guilty (after less than a full trial, mind you, and of course before the jury has pronounced guilt) should be deprived of fair-trial rights, lest they benefit from their judge-determined wrong.” *Id.* at 2691 (opinion of Scalia, J.). “[I]t is most certainly *not* the norm,” Justice Scalia continued, “that trial rights can be ‘forfeited’ on the basis of a prior judicial determination of guilt . . . [A] legislature may not ‘punish’ a defendant for his evil acts by stripping him of the right to have his guilt in a criminal proceeding determined *by a jury*, and on the basis of evidence the Constitution deems reliable and admissible.” *Id.* at 2692.

<sup>160</sup> See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 89–144, 161–78 (1997).

Europe<sup>161</sup> — just as one might bolster an argument for a robust right to confrontation by pointing to the recognition of similar principles in civil law nations.<sup>162</sup> But that might suggest the need to examine the purpose of the right, and to ask whether the purpose would be frustrated by allowing particular practices alleged to compromise the right — the kind of analysis the Supreme Court carried out to decide how small a jury could be and still satisfy the Constitution.<sup>163</sup> In *Blakely*, as in *Crawford*, the Court took a different tack, valuing the right not first and foremost because of any particular functions it performed, but because it was part and parcel of our rejection of the inquisitorial system.

### C. Anti-Inquisitorialism and Procedural Default

Anti-inquisitorialism appeared in a different context, and was employed for different purposes, in *Sanchez-Llamas v. Oregon*, the Supreme Court's 2006 decision on the domestic legal consequences triggered by violations of the Vienna Convention on Consular Relations. Understanding *Sanchez-Llamas* requires a brief detour into the tangled background of the case.

The United States signed the Vienna Convention on Consular Relations in 1963 and ratified it in 1969.<sup>164</sup> Article 36 of the Convention guarantees mutual access between foreign nationals and their consulates, and it sets forth procedures to be followed when a foreign national is arrested or detained. Notification must be given to the appropriate consulate, if the arrestee so requests, and the arrestee must be informed of his or her rights in this regard. The rights granted by Article 36 are to be “exercised in conformity with” domestic law, but domestic law “must enable full effect to be given to the purposes for which the rights . . . are intended.”<sup>165</sup> Along with the Convention, the United States ratified an Optional Protocol giving the International Court of Justice compulsory jurisdiction over “[d]isputes arising out of the interpretation or application of the Convention.”<sup>166</sup>

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<sup>161</sup> See, e.g., MERRYMAN, *supra* note 32, at 138–39; John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83 (2006).

<sup>162</sup> See, e.g., SUMMERS, *supra* note 33, at 47–58, 137–39; TRECHSEL, *supra* note 31, at 291–326; Friedman, *supra* note 45, at 1031 n.96; *supra* note 46 and accompanying text.

<sup>163</sup> See sources cited *supra* notes 125–130 and accompanying text.

<sup>164</sup> See Steven Arrigg Koh, Note, “Respectful Consideration” After *Sanchez-Llamas v. Oregon: Why the Supreme Court Owes More to the International Court of Justice*, 93 CORNELL L. REV. 243, 252 n.63 (2007).

<sup>165</sup> Vienna Convention, *supra* note 12, art. 36(2).

<sup>166</sup> Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487. On the ICJ, see, for example, Mark L. Movsesian, *Judging International Judgments*, 48 VA. J. INT'L L. 65, 73–76 (2007).

Beginning in the late 1990s, a series of challenges in American courts and in the ICJ sought relief from the failure of the United States to notify foreign nationals arrested here of their Vienna Convention rights.<sup>167</sup> Many of these cases involved prisoners who sought to raise the Vienna Convention for the first time on habeas review. Prosecutors argued, and American courts generally agreed, that the prisoners had waived the issue by failing to raise it earlier. Eventually the ICJ ruled, in cases brought by Germany and Mexico, that applying procedural default rules in this manner failed to give Vienna Convention rights the “full effect” that the Convention itself required<sup>168</sup> — at least in cases where the defendant’s failure to make a timely claim could itself be blamed on the authorities’ failure to tell the defendant about his rights under the Convention.<sup>169</sup> The case brought by Germany was moot by the time it was decided, because the two prisoners at issue had already been executed, but the case brought by Mexico involved dozens of Mexican nationals still on death row. The United States responded to the latter ruling with a presidential memorandum directing state courts to give it effect “in accordance with general principles of comity”<sup>170</sup> — and by withdrawing from the Optional Protocol giving the ICJ jurisdiction over Vienna Convention disputes.<sup>171</sup>

Ultimately the United States Supreme Court found the presidential directive ineffective, reasoning that neither the ICJ nor the President could lawfully order state courts to disregard procedural defaults.<sup>172</sup> In the interim, though, the ICJ’s decisions set the stage for *Sanchez-Llamas v. Oregon*, which was actually two consolidated cases, both involving foreign nationals who were arrested without being told of their rights under the Vienna Convention to consular notification and access. Moises Sanchez-Llamas, a Mexican national, was charged with shooting a police officer and convicted after he sought, unsuccessfully, to have his post-arrest statements suppressed because of the violation of Article 36. Mario Bustillo, a Honduran national, was convicted of murder and then petitioned for habeas relief on the ground that he had never been told he could confer with his consulate; Bustillo argued that consular officials could have helped him locate the man he claimed was actually responsible for the killing.<sup>173</sup>

<sup>167</sup> See Movsesian, *supra* note 166, at 76–81; Koh, *supra* note 164, at 252–55.

<sup>168</sup> See *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27); *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

<sup>169</sup> See *LaGrand*, 2001 I.C.J. at 497–98; *Avena*, 2004 I.C.J. at 57.

<sup>170</sup> Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 338 (2008) (quoting Memorandum from President George W. Bush to Alberto R. Gonzales, U.S. Att’y Gen. (Feb. 28, 2005)).

<sup>171</sup> See Movsesian, *supra* note 166, at 80–81.

<sup>172</sup> See *Medellín v. Texas*, 128 S. Ct. 1346 (2008).

<sup>173</sup> *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2675–77 (2006).

The Supreme Court ruled against both defendants. The case of Sanchez-Llamas was the easier of the two: writing for the majority, Chief Justice Roberts simply declined to make the exclusionary rule available for violations of the Vienna Convention. He reasoned that the treaty itself did not require that remedy, and the Court lacked power to impose it unilaterally on the states.<sup>174</sup> Bustillo presented a harder question, because the lower courts had rejected his habeas claim precisely on the grounds of procedural default that the ICJ had concluded were inconsistent with Article 36. Those earlier ICJ rulings did not bind the Supreme Court: not only had the United States withdrawn from the Optional Protocol, but an ICJ decision was in any event controlling only “between the parties and in respect of that particular case,” according to the ICJ’s own rules.<sup>175</sup> Scholars disagreed about how much deference, if any, the Supreme Court should pay rulings of the ICJ,<sup>176</sup> but it was at best awkward to interpret a treaty in a manner directly contrary to the views of the judicial body chiefly responsible for applying it.

One possibility was to dodge the question. Justice Ginsburg, concurring separately, stressed that Bustillo’s trial lawyer knew about the Vienna Convention, so this was *not* a case where the defendant’s failure to raise a timely claim could itself be blamed on the failure of the authorities to provide the notification required by the Convention.<sup>177</sup> But the majority chose to sweep more broadly. Even if Bustillo’s lawyer had been ignorant of the Vienna Convention, Chief Justice Roberts wrote for the Court, “normally applicable procedural default rules” would still apply, notwithstanding the contrary conclusion of the ICJ.<sup>178</sup>

The nub of the matter was that the ICJ’s interpretation of the Vienna Convention, while entitled to “respectful consideration,”<sup>179</sup> was simply wrong. It “overlook[ed] the importance of procedural default rules in an adversary system, which relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication.”<sup>180</sup> Defense counsel’s

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<sup>174</sup> See *id.* at 2678–82. The Court assumed without deciding that the Vienna Convention gave rights to individual criminal defendants, not just to their home countries. See *id.* at 2677–78.

<sup>175</sup> See *id.* at 2684 (quoting Statute of the International Court of Justice, art. 59, June 26, 1945, 59 Stat. 1055, 1062, 3 Bevens 1179, 1190); accord *id.* at 2700 (Breyer, J., dissenting).

<sup>176</sup> Compare, e.g., Brief of International Court of Justice Experts as Amici Curiae in Support of Petitioners, *Sanchez-Llamas*, 126 S. Ct. 2669 (2006) (Nos. 04–10566, 05–51), 2005 WL 3597806, with Brief of Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States as Amici Curiae in Support of Respondents, *Sanchez-Llamas*, 126 S. Ct. 2669 (2006) (Nos. 04–10566, 05–51), 2006 WL 259988.

<sup>177</sup> See *Sanchez-Llamas*, 126 S. Ct. at 2690 (Ginsburg, J., concurring in the judgment).

<sup>178</sup> *Id.* at 2687 (majority opinion).

<sup>179</sup> *Id.* at 2685 (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam)).

<sup>180</sup> *Id.*

ignorance could not excuse a default in a system such as ours, except in the rare case where the overall level of representation fell below the low constitutional floor of effective assistance. In general, “the attorney is the [defendant’s] agent when acting, or failing to act, in furtherance of the litigation, and the [defendant] must ‘bear the risk of attorney error.’”<sup>181</sup>

Not only was the ICJ mistaken, its mistake was predictable. It was the failure of civil law jurists to understand a non-inquisitorial system. Chief Justice Roberts explained that “[p]rocedural default rules generally take on greater importance in an adversary system such as ours than in the sort of magistrate-directed, inquisitorial legal system characteristic of many of the other countries that are signatories to the Vienna Convention.”<sup>182</sup> In civil law countries, “the failure to raise a legal error can in part be attributed to the magistrate, and thus to the state itself,” but in “our system . . . the responsibility for failing to raise an issue generally rests with the parties themselves.”<sup>183</sup>

Two points are worth noting about *Sanchez-Llamas*. First, unlike *Crawford*, which stressed the use that inquisitorial systems make of ex parte, out-of-court statements, and unlike *Blakely*, which emphasized the distinctive reliance on juries in the Anglo-American legal tradition, *Sanchez-Llamas* located the key to the inquisitorial system elsewhere, in the greater responsibility it places on the court vis-à-vis the parties. Quoting Justice Scalia’s opinion fifteen years earlier in an interrogation case, Chief Justice Roberts wrote for the Court in *Sanchez-Llamas* that “[w]hat makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.”<sup>184</sup>

Second, the contrast between the adversary and the inquisitorial traditions was invoked in *Sanchez-Llamas* not just as a way to define our system by describing what it is not, but also as an argument for giving little deference to decisions of tribunals outside the United States. *Sanchez-Llamas* is part of a large and growing debate about how much weight, if any, American courts should give to the decisions of foreign and international tribunals.<sup>185</sup> If our procedural system is

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<sup>181</sup> *Id.* at 2686 n.6 (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)).

<sup>182</sup> *Id.* at 2686.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* (omission in original) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991)).

<sup>185</sup> On the broader debate, see, for example, JACKSON, *supra* note 39; Roger P. Alford, *Four Mistakes in the Debate on “Outsourcing Authority,”* 69 ALB. L. REV. 653, 661 n.49 (2006); Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335 (2007); Timothy K. Kuhner, *The Foreign Source Doctrine: Explaining the Role of Foreign and International Law in Interpreting the Constitution*, 75 U. CIN.

fundamentally different from the system of most foreign countries, it stands to reason that jurists from those countries are poorly positioned to lend us guidance — that, at least, is the thrust of the Court’s opinion in *Sanchez-Llamas*. In this respect, *Sanchez-Llamas* makes explicit a strain of American exceptionalism and legal isolationism that may be inherent to anti-inquisitorialism, even when it goes unstated. It comes as no surprise that the most anti-inquisitorial of the Justices on the current Court — Justice Scalia, Chief Justice Roberts, and Justice Thomas — have also been the Justices most prominently opposed to relying, even loosely, on foreign and international precedents in interpreting our own Constitution.<sup>186</sup>

#### D. *Anti-Inquisitorialism and Confessions*

The oldest and most extensive use of the inquisitorial contrast model in criminal procedure can be found, not in cases about confrontation, sentencing, juries, or procedural default, but in cases about interrogations and confessions. The rhetorical tradition here stretches back more than a century. As early as 1896 the Supreme Court traced the roots of the Fifth Amendment privilege against compelled self-incrimination:

[It] had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England.<sup>187</sup>

Forty years later, when the Supreme Court first invalidated state convictions based on involuntary confessions, it called coerced self-incrimination “the curse of all countries” and “the chief inequity, the crowning infamy of the Star Chamber, and the Inquisition, and other

L. REV. 1389 (2007); Osmar J. Benvenuto, Note, *Reevaluating the Debate Surrounding the Supreme Court’s Use of Foreign Precedent*, 74 FORDHAM L. REV. 2695 (2006).

<sup>186</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (disparaging the Court’s discussion of foreign views as “meaningless” but “[d]angerous dicta”); *Foster v. Florida*, 537 U.S. 990, 990 n.\* (2002) (Thomas, J., concurring in denial of certiorari) (arguing that the Court “should not impose foreign moods, fads, or fashions on Americans”); Farber, *supra* note 185, at 1343–44. At his confirmation hearing, Chief Justice Roberts explained that he was “concern[ed] . . . about the use of foreign law as precedent,” not only because of “democratic theory” but also because of indeterminacy: “In foreign law you can find anything you want. If you don’t find it in the decisions of France or Italy, it’s in the decisions of Somalia or Japan or Indonesia or whatever. . . . It allows the judge to incorporate his or her own personal preferences, [and] cloak them with the authority of precedent . . .” *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 200–01 (2005) (statement of Judge John G. Roberts, Jr.).

<sup>187</sup> *Brown v. Walker*, 161 U.S. 591, 596 (1896).



similar institutions.”<sup>188</sup> Similar language became common in the many confession cases that followed.<sup>189</sup> By the 1960s it was standard for the Court to list “our preference for an accusatorial rather than an inquisitorial system of criminal justice” as among the “fundamental values and most noble aspirations” underlying the privilege against self-incrimination.<sup>190</sup>

The distinction drawn in many of these cases was historical rather than geographic. The contrast model was the “*old* inquisition practices,”<sup>191</sup> which had been “the curse of *all* countries.”<sup>192</sup> But in other cases the Court underscored the difference in this regard between the Anglo-American and Continental legal traditions. For example, in the widely quoted case of *Watts v. Indiana*,<sup>193</sup> Justice Frankfurter wrote that “[o]urs is the accusatorial as opposed to the inquisitorial system,” and that “[s]uch has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end.”<sup>194</sup> And in *Miranda v. Arizona*,<sup>195</sup> when the Court promulgated its famous rules for police interrogation, it explained that the privilege against self-incrimination must be protected from the time of arrest, because “[i]t is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries.”<sup>196</sup>

There is another ambiguity worth noting in these cases. When the Court first used inquisitorial methods as a contrast model for the protections the Constitution provided against coerced confessions, the methods it had foremost in mind were torture and prolonged questioning in isolation: “[t]he rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular” — tactics that “had left their wake of mutilated bodies and shattered minds

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<sup>188</sup> *Brown v. Mississippi*, 297 U.S. 278, 287 (1936).

<sup>189</sup> See, e.g., *Culombe v. Connecticut*, 367 U.S. 568, 582 (1961) (plurality opinion); *Rogers v. Richmond*, 365 U.S. 534, 541 (1961); *Ashcraft v. Tennessee*, 322 U.S. 143, 152 n.8 (1944).

<sup>190</sup> *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964); accord *United States v. Balsys*, 524 U.S. 666, 690 (1998); *Withrow v. Williams*, 507 U.S. 680, 692 (1993); *Pennsylvania v. Muniz*, 496 U.S. 582, 595 n.8 (1990); *Doe v. United States*, 487 U.S. 201, 212–13 (1988); *Andresen v. Maryland*, 427 U.S. 463, 476 n.8 (1976); *Michigan v. Tucker* 417 U.S. 433, 455 n.2 (1974) (Brennan, J., concurring in the judgment); *Couch v. United States*, 409 U.S. 322, 328 (1973); *Piccirillo v. New York*, 400 U.S. 548, 566 (1971) (Brennan, J., dissenting); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 414 n.12 (1966).

<sup>191</sup> *Ashcraft*, 322 U.S. at 152 n.8 (emphasis added).

<sup>192</sup> *Brown v. Mississippi*, 297 U.S. at 287 (emphasis added).

<sup>193</sup> 338 U.S. 49 (1949).

<sup>194</sup> *Id.* at 54 (plurality opinion).

<sup>195</sup> 384 U.S. 436 (1966).

<sup>196</sup> *Id.* at 477.

along the way to the cross, the guillotine, the stake and the hangman's noose."<sup>197</sup> Over time, though, the lesson broadened, and the difference between the "inquisitorial" and "accusatorial" systems became the difference between a system in which guilt is proven by interrogation of the accused and a system in which "society carries the burden of proving its charge against the accused not out of his own mouth" but "by evidence independently secured through skillful investigation."<sup>198</sup> Occasionally the Court suggested that the Continental approach to criminal adjudication might not be inherently inferior to the Anglo-American approach but merely different, with its own distinctive risks and its own distinctive safeguards. Thus, for example, Justice Frankfurter noted in *Watts* that the inquisitorial system subjects a defendant to judicial interrogation but protects him with "the disinterestedness of the judge in the presence of counsel"; the problem with unfettered interrogation by American police was not just that it "subvert[ed] . . . the accusatorial system" but that it amounted to "the inquisitorial system without its safeguards."<sup>199</sup> But by the time the Court decided *Escobedo v. Illinois*<sup>200</sup> — the immediate predecessor to *Miranda*, and the highpoint of the Court's hostility to interrogations — it found "the lesson of history, ancient and modern," to be less qualified.<sup>201</sup> The lesson was "that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."<sup>202</sup>

Since then the Court's attitude toward interrogations and confessions has softened considerably. The received wisdom today is that police questioning and admissions of guilt are "essential to society's compelling interest in finding, convicting, and punishing those who violate the law."<sup>203</sup> So although the Court continues on occasion to interpret the Fifth Amendment privilege against self-incrimination as

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<sup>197</sup> *Chambers v. Florida*, 309 U.S. 227, 237–38 (1940); *see also, e.g., Ashcraft v. Tennessee*, 322 U.S. 143, 152 n.8 (1944); *Brown v. Mississippi*, 297 U.S. at 287.

<sup>198</sup> *Watts*, 338 U.S. at 54 (plurality opinion); *see also, e.g., Rogers v. Richmond*, 365 U.S. 534, 541 (1961).

<sup>199</sup> 338 U.S. at 55 (plurality opinion); *see also Culombe v. Connecticut*, 367 U.S. 568, 582 n.24 (1961) (Frankfurter, J.) (plurality opinion) (noting "the careful procedural safeguards which the inquisitorial system now maintains," and pointing out that "the continental countries which employ inquisitorial modes of criminal procedure have themselves long ago given up reliance upon the tortures which they once used to wring incriminating information out of the accused and which were a salient feature of the inquisitorial system at the time that the English definitely rejected it in the seventeenth century").

<sup>200</sup> 378 U.S. 478 (1964).

<sup>201</sup> *Id.* at 488.

<sup>202</sup> *Id.* at 488–89 (footnotes omitted).

<sup>203</sup> *Moran v. Burbine*, 475 U.S. 412, 426 (1986); *accord, e.g., Texas v. Cobb*, 532 U.S. 162, 172 (2001); *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991).

“reflect[ing] . . . our preference for an accusatorial rather than an inquisitorial system of criminal justice,”<sup>204</sup> it tends to be vague about just what that means.

But the Court has been reasonably clear about one thing this preference does *not* mean: it does not mean putting lawyers in the interrogation room. Members of the Court, particularly Justice Stevens, have suggested that a critical difference between an adversarial and an inquisitorial system of justice is that the former sees the presence of a lawyer during an interrogation, or any other point in the criminal process, “as an aid to the understanding and protection of constitutional rights,” whereas the latter sees a lawyer solely “as a nettlesome obstacle to the pursuit of wrongdoers.”<sup>205</sup> But those suggestions have come in separate opinions, most often dissents. The one time a majority of the Court addressed the suggestion in the context of an interrogation case, it emphatically rejected it. Writing for the Court in *McNeil v. Wisconsin*,<sup>206</sup> Justice Scalia said:

What makes a system adversarial rather than inquisitorial is not the presence of counsel, much less the presence of counsel where the defendant has not requested it; but rather, the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.<sup>207</sup>

This was the interrogation opinion that Chief Justice Roberts quoted with approval, fifteen years later, in *Sanchez-Llamas*.<sup>208</sup>

## II. ASSESSING ANTI-INQUISITORIALISM

Anti-inquisitorialism is thus a broad and longstanding theme of American criminal procedure, and if anything it has grown more pronounced in recent years. Different features of the inquisitorial system are singled out for attention at different times and in different contexts. Sometimes what is most critical about the inquisitorial system is its substitution of *ex parte* statements for live testimony; sometimes the lack of juries; sometimes the court’s independent responsibility to in-

<sup>204</sup> *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964); *see also* cases cited *supra* note 190. *But cf. McNeil*, 501 U.S. at 181 n.2 (taking the view that “[o]ur system of justice is, and has always been, an inquisitorial one at the investigatory stage” and that “no other disposition is conceivable”).

<sup>205</sup> *McNeil*, 501 U.S. at 189 (Stevens, J., dissenting) (quoting *Burbine*, 475 U.S. at 468 (Stevens, J., dissenting)). For similar sentiments, see *Smith v. Robbins*, 528 U.S. 259, 296–97 (2000) (Souter, J., dissenting); *Nix v. Williams*, 467 U.S. 431, 454–55 (1984) (Stevens, J., concurring in the judgment); *United States v. Gouveia*, 467 U.S. 180, 194 (1984) (Stevens, J., concurring in the judgment).

<sup>206</sup> 501 U.S. 171.

<sup>207</sup> *Id.* at 181 n.2.

<sup>208</sup> *See* case cited *supra* note 184 and accompanying text.

investigate the facts and the law; sometimes a greater comfort with, or a heavier reliance on, coercive interrogation. The precise function of anti-inquisitorialism in criminal procedure cases varies as well. Sometimes, as in *Sanchez-Llamas*, it serves as an argument against giving much weight to the views of foreign jurists. More commonly, as in *Crawford* and *Blakely*, it is an argument for valuing and defending certain features of our own system, the features that make it adversarial rather than inquisitorial. Beneath all this variation, though, lies a single, coherent idea: that the strengths and core commitments of American criminal procedure can best be grasped by focusing on our system's divergence from the separate and distinct procedural tradition of Continental Europe.

The Constitution does not mention the inquisitorial system — or the adversary system, for that matter. But three different arguments — one originalist, one holistic, and one functionalist — might be thought to justify the use of the inquisitorial system as a contrast model for constitutional criminal procedure. Let me say a few words about each of these arguments before examining them in more detail.

The originalist argument appeals to the intent, or to the original understanding, of the constitutional provisions that form the basis of criminal procedure law.<sup>209</sup> The idea is that some or all of the criminal procedure provisions of the Constitution were intended to differentiate our criminal justice system from the inquisitorial system, or at least that they were originally understood to operate in this manner. This is the argument the Supreme Court seemed to put forward in *Crawford* and in *Blakely*.

The holistic argument, by contrast, does not appeal to the original meaning of the Constitution. Instead, it contends that our system of criminal procedure has an organic integrity that should be preserved and respected. The right to a jury trial, the right to confrontation, the right against compelled self-incrimination, the rules of procedural default — these are not isolated, unrelated features of our system; they all fit together and mutually interrelate. Constructing a successful system is not like shopping for clothes; items cannot be mixed and matched. What works in other systems might not work in ours, precisely because the rest of the system is different. It happens that there are two great procedural traditions in Western law, the adversarial and the inquisitorial. Because the two traditions are so different, preserving and respecting the internal integrity of our system means, in large part, taking care not to import inconsistent elements of the rival tradi-

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<sup>209</sup> On varieties of originalism, see, for example, Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

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tion. The holistic argument is not far below the surface of *Sanchez-Llamas*, and the Court has seemed to endorse it elsewhere as well.

The functionalist argument for anti-inquisitorialism appeals neither to original meaning nor to organic integrity. Rather, the argument is that the adversary system is simply better than the inquisitorial system — better at finding the truth, or better at protecting individual rights, or better at guarding against abuses of power, or better at some combination of those tasks. There are hints of this argument, too, in certain decisions of the Supreme Court.

For reasons I will describe below, none of these three arguments is fully convincing. In brief: The originalist argument is vulnerable to the standard objections to originalism as a mode of constitutional interpretation, plus two more specific problems. The first is that the evidence does not support the view that the criminal procedure provisions of the Bill of Rights were originally intended, or originally understood, as a means of protecting against the inquisitorial system. The second is that the Fourth, Fifth, and Sixth Amendments apply to state prosecutions only by virtue of their incorporation in the Fourteenth Amendment, and there is even less reason to think *that* part of the Constitution was intended, or originally understood, as a means of ensuring that American criminal procedure stayed distinct from civil law process. Regarding the holistic argument, the chief problems are, first, that it is harder than might be expected to identify the core elements of the inquisitorial system, and, second, that there is little reason to think that our system of criminal procedure actually has the fragile kind of organic integrity that the argument assumes. Assessing the functionalist argument is more complicated. Elements of the adversary system may in fact have instrumental worth, particularly in protecting against authoritarian abuses. But that is a reason to value those elements of the adversary system, and to value them insofar as they serve other, more fundamental aspirations. It is not an argument for treating the inquisitorial system as a general purpose contrast model for American criminal procedure.

#### A. *The Originalist Argument for Anti-Inquisitorialism*

The originalist argument for anti-inquisitorialism does not require determining the true nature of the adversary system, or what genuinely sets it apart from the inquisitorial system. Nor does it require a belief that the adversary system is in fact superior to the inquisitorial system. The argument is simply that the Constitution, as written and adopted, commits the United States to an adversarial rather than an inquisitorial system of criminal justice.

The Supreme Court has seemed inclined toward this view, and a straightforward case can be made for it. A long tradition, which Justice Scalia and Justice Thomas have done much to revive, understands

the Bill of Rights as entrenching common law privileges.<sup>210</sup> That understanding finds support in the well-known fact that the Revolutionary generation not only knew and revered English common law but considered themselves its defenders, fighting “‘only to keep their old privileges,’ the traditional rights and principles of all Englishmen,” the “common-law rights embedded in the English past.”<sup>211</sup> And the common law rights of the English past were often defined against the rival traditions of civil law nations; anti-inquisitorialism is not an American invention. The received history has English politicians as early as the 1300s jealously guarding their indigenous criminal procedure against Continental imports. Thus William Holdsworth writes that “[i]n the course of the fourteenth and fifteenth centuries the humanity of the English system began to stand out in striking contrast to the continental system; and the records of Parliament show that Englishmen appreciated its advantages at their true value.”<sup>212</sup> The Star Chamber and related Tudor abuses only increased the sense that English “rights and liberties were bound up with the maintenance of the criminal procedure of the common law.”<sup>213</sup> The sentiment endured. In the late nineteenth century, when James Fitzjames Stephen wrote his *History of the Criminal Law of England*, it seemed obvious to him that he could not “criticise the system properly or . . . enter into its spirit except by comparing it with what may be described as the great rival system . . . contained in the French and German Penal Codes.”<sup>214</sup>

The debate over originalism is largely about how much weight it is feasible and wise to give to intent, or to original “public meaning,” when interpreting the Constitution. Almost everyone agrees, though, that the Founding-era understandings count for *something*.<sup>215</sup> So if the Bill of Rights was originally understood to codify the common law, and the common law was to a great extent defined against the inquisitorial system, maybe anti-inquisitorialism is in fact a sensible strategy of constitutional interpretation.

*How* sensible depends in part on how much weight one attaches to Founding-era understandings, and that in turn depends in part on one’s broader views on originalism. But even for someone well disposed toward originalism in general, there are two serious objections

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<sup>210</sup> See, e.g., Sklansky, *supra* note 91, at 1757–61.

<sup>211</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 10, 13 (1969) (quoting JOHN ADAMS, *NOVANGLUS* (1774), *reprinted in* 4 *THE WORKS OF JOHN ADAMS* 3, 131 (1851)).

<sup>212</sup> 5 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 177 (2d ed., rev. 1937).

<sup>213</sup> *Id.* at 170.

<sup>214</sup> 1 SIR JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* x (1883).

<sup>215</sup> See Farber, *supra* note 209, at 1086; Mitchell N. Berman, *Originalism Is Bunk* (Dec. 30, 2007) (unpublished manuscript, on file with the Harvard Law School Library).

to the originalist argument for anti-inquisitorialism. The first is that the argument exaggerates the degree to which the inquisitorial system functioned as a contrast model in the 1790s; the second is that it exaggerates the importance of the 1790s, even for originalists. Let me take each of these objections in turn.

The suspicion of European modes of trial plainly did cross the Atlantic. The Anti-Federalist pamphleteer "Federal Farmer," for example, warned that "wherever the civil law has been adopted, torture has been admitted,"<sup>216</sup> and he blamed "the intrigues of the popish clergy, and of the Norman lawyers," for the introduction of civil law procedures "in maritime, ecclesiastical, and military courts."<sup>217</sup> But there is little evidence that the criminal procedure provisions of the Bill of Rights were intended or originally understood as bulwarks against Continental process. The debates over ratification of the original Constitution make frequent reference to the civil law system, but almost always in connection with an issue tangential to trial process: the power of the Supreme Court. Anti-Federalists feared that giving the Supreme Court "appellate Jurisdiction, both as to Law and Fact,"<sup>218</sup> would lead to prolonged, prohibitively burdensome proceedings and would effectively abrogate trial by jury. In both respects, Anti-Federalists complained that the Constitution substituted "the well-known principles of the *civil law*" for common law modes of trial.<sup>219</sup> This was what the Federal Farmer was concerned about when he spoke of the use of civil law procedures in maritime, ecclesiastical, and military courts.<sup>220</sup> The complaints were loud enough that Alexander Hamilton felt called upon to answer them in Federalist No. 81.<sup>221</sup> The clause in question meant only, he explained, that the Supreme Court would be empowered to review whatever part of the case is properly reviewable under custom or statute.<sup>222</sup> Thus, in appeals from trials following common law procedures, "the revision of the law only will

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<sup>216</sup> Letters from the Federal Farmer, Letter VIII (Jan. 3, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 270, 271 (Herbert J. Storing ed., 1981).

<sup>217</sup> Letters from the Federal Farmer, Letter XV, (Jan. 18, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 216, at 315, 320.

<sup>218</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>219</sup> The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents (Dec. 18, 1787), reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 216, at 145, 159; see also Essays of Brutus, Essay XIV (Feb. 28, 1788, and Mar. 6, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 216, at 431, 431-35.

<sup>220</sup> See Letters from the Federal Farmer, Letter XV (Jan. 18, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 216, at 315, 319-20.

<sup>221</sup> See THE FEDERALIST NO. 81, at 487-90 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>222</sup> *Id.* at 488-89.

be, generally speaking, the proper province of the Supreme Court.”<sup>223</sup> Furthermore, he explained:

[If] the re-examination of a fact once determined by a jury should in any case be admitted under the proposed Constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court.<sup>224</sup>

This was the only occasion on which the Federalist authors saw the need to address concerns about civil law process.

Inquisitorial process occasionally was invoked in other contexts, but generally only as a loose form of disapprobation. When Abraham Holmes spoke against ratification in the Massachusetts convention, for example, he complained about a whole litany of criminal procedure protections missing from the Constitution, including jury trial, local venue, restrictions on warrants, access to counsel, guarantees of confrontation and cross-examination, and security against compelled self-incrimination.<sup>225</sup> The result, he suggested, was that the Constitution would permit court systems “little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom,” namely “that diabolical institution the INQUISITION.”<sup>226</sup>

Holmes later practiced law and served briefly as a local judge, but at the time of the ratification debates “he had done no more than begin to read a few law books; none of them concerned criminal law, criminal procedure, or evidence.”<sup>227</sup> Like most participants in that debate and in the subsequent adoption of the Bill of Rights, he spoke as a nonlawyer, with only the “smattering” of familiarity that well-educated Americans of the time typically had with the common law.<sup>228</sup> The Founding generation tended to think of the common law less as a time-tested collection of detailed rules and procedures than as a judicial tradition of respect for fundamental liberties — the eighteenth-century equivalent, in some ways, to modern invocations of the “rule of law.”<sup>229</sup> Even specific procedural protections, like the right to con-

<sup>223</sup> *Id.* at 489.

<sup>224</sup> *Id.* at 488.

<sup>225</sup> Abraham Holmes and Christopher Gore on the Possible Abuses of the Federal Judiciary (Jan. 30, 1788), reprinted in 1 THE DEBATE ON THE CONSTITUTION 910, 910–11 (Bernard Bailyn ed., 1993).

<sup>226</sup> *Id.* at 911.

<sup>227</sup> Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 79 (2005).

<sup>228</sup> Edmund Burke, *Speech in Support of Resolutions for Conciliation with the American Colonies*, in ON THE AMERICAN REVOLUTION 70, 85 (Elliott Robert Barkan ed., 1966); see Sklansky, *supra* note 91, at 1776 & n.228; cf. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 206 n.11 (1980).

<sup>229</sup> See, e.g., BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 175–89 (1967); WOOD, *supra* note 211, at 9–10; Harry W. Jones, *The Common Law in the*



frontation, were rarely discussed at “the level of technical detail that might have been of interest to lawyers and meaningful to judges.”<sup>230</sup> Instead, they were catalogued as a way of gesturing toward abstract commitments hard to define except by reference to their commonly understood particulars, much as we might today say that the “rule of law” depends on “the separation of powers system, . . . an independent judiciary, the jury trial, judicial review, universal access to courts, procedural due process, and so on,”<sup>231</sup> without worrying too much about precisely what those terms mean. And there is little indication that the broader commitment toward which drafters and ratifiers of the Bill of Rights meant to gesture, or were understood at the time to be gesturing, was a rejection of European-style criminal procedure. When the inquisitorial system was invoked in debates over the new Constitution, it was either a loose, historical metaphor for flagrant unfairness (“that diabolical institution the INQUISITION”), or in connection with a particular procedural feature — appellate review — that today is almost never mentioned when distinguishing inquisitorial from adversarial justice. None of the first ten amendments (or any other part of the Constitution) mentions the civil law system. The common law system, for its part, is invoked explicitly only by the Seventh Amendment, which guarantees the right to a jury trial “in Suits at common law” and — responding to the Anti-Federalist concerns discussed above — preserves “the rules of the common law” regarding judicial reconsideration of a jury’s factual findings.

That is the first problem with the originalist argument for anti-inquisitorialism: the argument exaggerates the importance of Continental criminal procedure to the Founding generation. The second problem is that the argument exaggerates the importance of the Founding generation. It is easy to forget when reading cases like *Crawford*, *Davis*, and *Blakely* — or pretty much any other constitutional criminal procedure decision by the Supreme Court — that the first ten amendments apply of their own force only to the federal government; the Bill of Rights places limits on state criminal proceedings

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*United States: English Themes and American Variations*, in POLITICAL SEPARATION AND LEGAL CONTINUITY 91, 110 (Harry W. Jones ed., 1976); Sklansky, *supra* note 91, at 1787.

<sup>230</sup> Kirst, *supra* note 227, at 82.

<sup>231</sup> Frank Lovett, *A Positivist Account of the Rule of Law*, 27 LAW & SOC. INQUIRY 41, 66 (2002); see also, e.g., Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275, 2284 n.43 (2003) (suggesting that “[t]o most in the foreign-policy community, the rule of law . . . involves laws that comport with basic notions of human rights,” as well as “statutes, rules known in advance, courts, [a] politically independent judiciary with powers of judicial review, etc.”). Lovett, it should be noted, argues that the institutional requirements for the rule of law are contingent on circumstances: “While securing the Rule of Law might be impossible as a practical matter without an independent judiciary, universal access to courts, and so on, the Rule of Law is not identical with having these institutions.” Lovett, *supra*, at 66–67.

only by virtue of its “selective incorporation” in Section 1 of the Fourteenth Amendment. It is easy to forget this fact because the Supreme Court itself routinely ignores it, perhaps out of embarrassment. When the Supreme Court in the 1960s began finding certain provisions of the Bill of Rights incorporated within the Due Process Clause of the Fourteenth Amendment, the scholarly consensus was that this approach lacked any historical support.<sup>232</sup> The embarrassment is probably unjustified: more recent work suggests that some version of selective incorporation is the best understanding of what the backers of Section 1 of the Fourteenth Amendment hoped to achieve.<sup>233</sup> But the Justices may have retained a sense that the selective incorporation doctrine would collapse if too closely examined. For whatever reason, they customarily assess the constitutionality of state criminal proceedings — the bulk of all criminal proceedings, and the bulk of the Supreme Court’s criminal docket — without reference to the Fourteenth Amendment. They simply write as though the Fourth, Fifth, and Sixth Amendments applied directly to the states.<sup>234</sup>

No one believes that though. Everyone agrees that the basis for constitutional review of state criminal proceedings is Section 1 of the Fourteenth Amendment — either the Due Process Clause (the textual hook on which the Supreme Court relied in developing the theory of selective incorporation<sup>235</sup>) or the Privileges and Immunities Clause (which the Supreme Court rendered virtually toothless in the late nineteenth century,<sup>236</sup> but which many scholars now think was intended to incorporate much if not all of the Bill of Rights<sup>237</sup>). This means that any coherent appeal to original intent or original understanding in constitutional criminal procedure cases — at least when those cases arise, as they usually do, from state prosecutions — must be to the original intent or the original understanding of the Fourteenth Amendment.

If there is little evidence that the Bill of Rights had, or was understood to have, an overriding goal of protecting Americans from inquisi-

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<sup>232</sup> See, e.g., Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 934 (1965); Louis Henkin, “*Selective Incorporation*” in *the Fourteenth Amendment*, 73 YALE L.J. 74, 77–78 (1963).

<sup>233</sup> See AMAR, *supra* note 43, at 137–307; MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 257–59 (1988); Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 274 (1984). But see James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435 (1985).

<sup>234</sup> For a recent, illustrative example, see *Virginia v. Moore*, 128 S. Ct. 1598 (2008).

<sup>235</sup> See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>236</sup> See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

<sup>237</sup> See, e.g., AMAR, *supra* note 43, at 181–206; CURTIS, *supra* note 233.

torial justice, there is even less evidence that drafters and adopters of the Fourteenth Amendment, the preeminent constitutional product of Reconstruction, were preoccupied by the dangers of the civil law mode of criminal procedure. They had different contrast models in mind: first of all slavery, and second of all its residue, the postwar Southern regime of thoroughgoing white supremacy, “enforced by a police apparatus and judicial system in which blacks enjoyed virtually no voice whatever.”<sup>238</sup> The weight of the evidence suggests the drafters and adopters of the Fourteenth Amendment aimed to attack that regime in part by guaranteeing, as against the states, some or all of the rights protected against the federal government by the first ten amendments to the Constitution.<sup>239</sup> But there is scant suggestion in the historical record that they thought of the rights they were extending as protections against European-style criminal procedure, or that they aimed to extend to the states not only the restrictions imposed by the Bill of Rights, but also the way those restrictions were understood by eighteenth-century common law judges. On the contrary, the framers and adopters of the Fourteenth Amendment saw themselves as blocking state violations of fundamental human rights.<sup>240</sup> And “[e]ven moderates . . . understood Reconstruction as a dynamic process” and “preferred to allow both Congress and the federal courts maximum flexibility in implementing the Amendment’s provisions and combating the multitude of injustices that confronted blacks in many parts of the South.”<sup>241</sup>

The way that the framers and adopters of the Fourteenth Amendment thought about rights poses a challenge for any version of originalism in constitutional criminal procedure. The original understanding of the Constitution and its first ten amendments may itself have been anti-originalist,<sup>242</sup> but the problem is, if anything, more acute with regard to the Reconstruction amendments. Reconstruction Republicans thought the rights they aimed to protect preexisted, not in the decisions of common law judges, nor even in the specific expectations of the framers and adopters of the Bill of Rights, but as bedrock principles of fair governance — that is, as a kind of natural law. They explicitly invoked the ideals of the Revolutionary generation, particularly the egalitarianism and the social contract theories of the Declaration of Independence.<sup>243</sup> But they spent little

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<sup>238</sup> FONER, *supra* note 233, at 203.

<sup>239</sup> See sources cited *supra* note 233.

<sup>240</sup> See Farber & Muench, *supra* note 233, at 277.

<sup>241</sup> FONER, *supra* note 233, at 258; see also, e.g., Farber & Muench, *supra* note 233, at 274–75.

<sup>242</sup> See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

<sup>243</sup> See Farber & Muench, *supra* note 233, at 257–58.

time discussing the specific rights that the Fourteenth Amendment would protect, because they thought they were “providing a mechanism to protect rights rather than creating new rights”;<sup>244</sup> the “entire theory behind the amendment argues against giving it an unduly crabbed interpretation.”<sup>245</sup>

But that takes us further than we need to go. The important point for present purposes is that the Fourteenth Amendment was not intended or understood either as a protection against the inquisitorial system or as a codification and extension of eighteenth-century common law. Even if the originalist argument for anti-inquisitorialism made sense as applied to federal criminal proceedings — and it does not — it still would be unpersuasive in the great majority of criminal procedure cases, because they arise from state prosecutions.<sup>246</sup>

### B. *The Holistic Argument for Anti-Inquisitorialism*

Anti-inquisitorialism might be justified as a tool of constitutional interpretation not by appeal to original intentions or original understandings but instead by appeal to a certain notion of organic integrity. The argument would go like this: Legal systems are complex, interdependent systems. They are too complex to be engineered from the top down; they are “grown,” not “made.”<sup>247</sup> This means that legal reformers must proceed humbly, respecting the internal ecology of their systems; otherwise they can do great damage and at best will prove ineffective. As the Supreme Court once remarked in connection with the law of evidence, “[t]o pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between

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<sup>244</sup> *Id.* at 277.

<sup>245</sup> *Id.* at 275.

<sup>246</sup> There is a variant of the originalist argument worth considering in passing. Originalism is often defended as a necessary constraint on judicial lawmaking. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 40–47 (Amy Gutmann ed., 1997). So even someone agnostic about the actual intentions and understandings of the Constitution’s framers and adopters might worry that criminal procedure *without* the contrast model of inquisitorialism would be too open-ended, too arbitrary, too much the product of the Justices’ personal preferences. But that is an argument for retaining *some* constraint, not necessarily anti-inquisitorialism. There are more appealing candidates. See *infra* Part III, pp. 1688–1703. The problem with using the inquisitorial contrast model to constrain judicial lawmaking is not just that the contrast model points us in the wrong directions, but that the guidance it provides is fuzzy; it points us in too many directions at once. See *infra* pp.1680–82.

<sup>247</sup> 1 F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 35–54 (1973); see also Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 *ST. JOHN’S L. REV.* 1149, 1194–1202 (1998); Mark F. Grady, *Positive Theories and Grown Order Conceptions of the Law*, 23 *SW. U. L. REV.* 461, 461 (1994).

adverse interests than to establish a rational edifice.”<sup>248</sup> It is all too easy to wind up with “the constitutional equivalent of introducing rabbits into Australia.”<sup>249</sup> When evaluating suggested changes to any legal system, the first and most important thing is to understand and to respect “the true nature of the system.”<sup>250</sup> Understanding and appreciating the true nature of our system of criminal procedure requires seeing what it is not. And it is not the inquisitorial system of Continental Europe.

Unlike the originalist argument for anti-inquisitorialism, the holistic argument offers support not just for decisions like *Crawford* and *Blakely*, which employ anti-inquisitorialism as a tool of constitutional interpretation, but also for decisions like *Sanchez-Llamas*, which use anti-inquisitorialism to justify the disregard of foreign or international precedents. And the holistic argument can find a good deal of academic support. If scholars of comparative law agree on anything, it is the hazards of “legal transplants,” particularly “between the two Western legal families.”<sup>251</sup> Here is a preeminent theorist of comparative criminal procedure, for example, warning about the “serious strains” that can result from “transplantation of factfinding arrangements between common law and civil law systems”:<sup>252</sup>

[E]xperience has shown how easily an imported evidentiary doctrine, or practice, alters its character in interaction with the new environment. Even textually identical rules acquire a different meaning and produce different consequences in the changed institutional setting. . . .

. . . .

<sup>248</sup> *Michelson v. United States*, 335 U.S. 469, 486 (1948). The Court was referring specifically to rules governing the use of character evidence, but similar arguments have been made from time to time for the entire system of evidence law. For example, Frederick Schauer argues that we may be best off keeping pretty much all of our current evidence rules, “warts and all”:

The very existence of the full set of evidence rules we happen to possess breeds a familiarity that increases understanding, and has developed in such a way over time that the common law process has served to remove many of the most obvious defects. . . . [T]he mistakes embedded in a distinctly non-ideal set of rules may turn out to be less than the mistakes that would come from empowering some non-ideal group of rule makers to start anew, or from expecting some nonideal group of rule appliers to apply an array of newer rules with which they are much less familiar.

Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 194–95 (2006).

<sup>249</sup> Allen & Rosenberg, *supra* note 247, at 1161; *see also id.* at 1197–98 (“Made orders usually possess a limited number of variables, and thus those variables may be manipulated in order to produce predictable outcomes. . . . Unintended, unanticipated consequences are much more likely to result from the introduction of change into a spontaneous order than a made order.”).

<sup>250</sup> *Id.* at 1200.

<sup>251</sup> Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 839 (1997).

<sup>252</sup> *Id.* at 851.

... [R]eformers beware! ... [I]t is an illusion to think that this is a boutique in which one is always free to purchase some items and reject others. An arrangement stemming from a partial purchase — a legal pastiche — can produce a far less satisfactory factfinding result in practice than under either continental or Anglo-American evidentiary arrangements in their unadulterated form.<sup>253</sup>

Among scholars of comparative law this has become very much the orthodox view, often reiterated and rarely if ever questioned. A well-informed Italian scholar, for example, finds it completely predictable that introducing elements of the adversary system into her country's system of criminal procedure produced "the worst of both worlds."<sup>254</sup> What surprises her is that it was even "thought possible to import the adversary model by importing just some of its features and by transplanting them into a non-adversary institutional context."<sup>255</sup> A sophisticated American scholar objects even to the terminology "legal transplant" on the ground that it fails to capture the full "transformation that legal ideas and institutions may undergo when they are transferred between legal systems."<sup>256</sup> "The adversarial and the inquisitorial systems," he argues, are "two different procedural cultures" and "two different systems of production of meaning"; transfers of legal institutions between the two settings can best be understood "as translations from one system of meaning to the other."<sup>257</sup> All the more reason that procedural features cannot "simply be 'cut and pasted' between legal systems."<sup>258</sup>

Related sentiments can be found in some of the Supreme Court's leading decisions on the meaning of "due process" in state criminal cases. Early opinions suggested that the Fourteenth Amendment incorporated only those protections essential to *any* "fair and enlightened system of justice."<sup>259</sup> Justice Frankfurter, in contrast, repeatedly suggested that the meaning of "due process" must be found in the traditions of "English-speaking peoples"<sup>260</sup> — the traditions, that is to say,

<sup>253</sup> *Id.* at 839–40, 851–52 (footnote omitted).

<sup>254</sup> Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227, 251 (2000).

<sup>255</sup> *Id.* at 232.

<sup>256</sup> Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 5 (2004).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*; see also, e.g., Jackson, *supra* note 32, at 738 (noting the "growing scepticism in much recent comparative scholarship about the effects of 'transplanting' processes and procedures from one national and legal culture into another").

<sup>259</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); see also, e.g., *Adamson v. California*, 332 U.S. 46, 54 (1947).

<sup>260</sup> E.g., *Rochin v. California*, 342 U.S. 165, 169 (1952); *Wolf v. Colorado*, 338 U.S. 25, 28–29 (1949); *Malinski v. New York*, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring).

of the Anglo-American, common law system of adjudication. The rival system of Continental Europe had developed its own “careful procedural safeguards”<sup>261</sup> — carrying out interrogations, for example, before a “disinterested[] . . . judge in the presence of counsel.”<sup>262</sup> But that was not our tradition, and the Court needed to stand guard against “the inquisitorial system without its safeguards” — protracted interrogation before a police officer, for example, without direct judicial oversight.<sup>263</sup> Ultimately, the Court came around to Justice Frankfurter’s view. In the Warren Court’s leading decision on incorporation, Justice White wrote for the majority that “state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country.”<sup>264</sup> The critical inquiry, therefore, “is whether given this kind of system a particular procedure is fundamental — whether, that is, a procedure is necessary to an *Anglo-American* regime of ordered liberty.”<sup>265</sup> Or, as Justice Powell later put it, “the focus is . . . on the fundamentality of that element viewed in the context of the basic Anglo-American jurisprudential system common to the States.”<sup>266</sup>

But it is one thing to say the states share a specifically “Anglo-American jurisprudential system,” historically divergent from the inquisitorial system, and quite a different thing to insist our system can best be understood and preserved by keeping it distinct from its Continental counterpart. The holistic argument for the latter proposition has two serious problems. The first is definitional and the second is empirical.

Take the definitional problem first. Protecting the organic integrity of our legal system by guarding against inquisitorialism makes sense only if the key characteristics of inquisitorialism can be identified. And that proves surprisingly difficult. The confusion among the Justices is illustrative. Consider, for example, the question whether criminal suspects should have lawyers present when they are interrogated. Justice Stevens says interrogation in the absence of counsel smacks of the inquisitorial system.<sup>267</sup> Justice Frankfurter, though, says the presence of counsel during interrogation is a characteristic, distinguishing safeguard of the modern inquisitorial system.<sup>268</sup> And Justice Scalia

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<sup>261</sup> *Culombe v. Connecticut*, 367 U.S. 568, 582 n.24 (1961) (Frankfurter, J.) (plurality opinion).

<sup>262</sup> *Watts v. Indiana*, 338 U.S. 49, 55 (1949) (Frankfurter, J.) (plurality opinion).

<sup>263</sup> *Id.*

<sup>264</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

<sup>265</sup> *Id.* (emphasis added); *accord, e.g.*, *Benton v. Maryland*, 395 U.S. 784, 795 (1969).

<sup>266</sup> *Johnson v. Louisiana*, 406 U.S. 356, 372 n.9 (1972) (Powell, J., concurring).

<sup>267</sup> *See, e.g.*, *McNeil v. Wisconsin*, 501 U.S. 171, 183, 189 (1991) (Stevens, J., dissenting); *Moran v. Burbine*, 475 U.S. 412, 468 (1986) (Stevens, J., dissenting).

<sup>268</sup> *See Watts*, 338 U.S. at 55 (plurality opinion).

says neither the presence nor the absence of counsel during interrogation is particularly characteristic of the inquisitorial system.<sup>269</sup> The inquisitorial system, he says, is defined by the absence of an “impartial” judicial figure, “who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.”<sup>270</sup> But Justice Frankfurter takes the participation of a disinterested judge in interrogations to be another mark of a modern inquisitorial system.<sup>271</sup> And Justice Scalia, as we have seen, later proceeds on the assumption that at least one defining feature of “the civil-law mode of criminal procedure” is the “use of *ex parte* examinations as evidence against the accused.”<sup>272</sup> Elsewhere the Court finds the key distinguishing feature of the “inquisitorial system” in the reliance on confessions,<sup>273</sup> or in the trust placed in professional factfinders rather than lay jurors,<sup>274</sup> or in the reliance on judges instead of the parties to identify and analyze significant issues.<sup>275</sup>

Part of the difficulty is that there are important differences among the criminal adjudication systems found in different European nations — not to mention in civil law jurisdictions elsewhere in the world. A larger problem is that the adversarial and inquisitorial systems, even conceived as broad traditions, are moving targets. European systems of criminal justice underwent major reforms in the nineteenth century,<sup>276</sup> and a similar wave of reform has more recently swept through Latin America.<sup>277</sup> Many of these reforms incorporated procedural guarantees traditionally associated with the common law system, including not only public trials, oral proof, judicial impartiality, and protections against compelled self-incrimination, but also “an increasing prominence given to parties and their lawyers.”<sup>278</sup> Then, too, as the Supreme Court has recognized, our own system has long included features that seem stereotypically “inquisitorial,” most notably the grand jury.<sup>279</sup> So the essential, alien features of “the inquisitorial system” are

<sup>269</sup> *McNeil*, 501 U.S. at 181 n.2.

<sup>270</sup> *Id.*

<sup>271</sup> See *Watts*, 338 U.S. at 55 (plurality opinion).

<sup>272</sup> *Crawford v. Washington*, 541 U.S. 36, 50 (2004); accord *Davis v. Washington*, 126 S. Ct. 2266, 2278 (2006).

<sup>273</sup> E.g., *Rogers v. Richmond*, 365 U.S. 534, 541 (1961).

<sup>274</sup> E.g., *Blakely v. Washington*, 542 U.S. 296, 313 (2004); see *supra* p. 1658.

<sup>275</sup> See *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2685–86 (2006).

<sup>276</sup> See MERRYMAN, *supra* note 32, at 15–19, 132, 136–39; SUMMERS, *supra* note 33, at 21–59.

<sup>277</sup> See Langer, *supra* note 32.

<sup>278</sup> Jackson, *supra* note 32, at 738; cf., e.g., DAMAŠKA, *supra* note 32, at 4 n.4; MERRYMAN, *supra* note 32; Langer, *supra* note 32; Nijboer, *supra* note 32, at 308, 334.

<sup>279</sup> See, e.g., *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991); *United States v. John Doe, Inc.*, 481 U.S. 102, 118–19, 123 (1987) (Brennan, J., dissenting) (quoting *Blair v. United States*,



hard to identify. And it is perilous to assume — as the Court seemed to in *Sanchez-Llamas* — that jurists trained in variants of that system are likely, for that reason, to misunderstand our system.

That would be a doubtful assumption in any case, given the increasing exposure that Continental jurists have to common law legal systems, especially those of the United Kingdom. U.K. decisions are routinely reviewed by, for example, the European Court of Justice and the European Court of Human Rights, where U.K. judges sit alongside judges from the Continent.<sup>280</sup> The same kind of interchange can happen on the ICJ: of the fifteen judges currently sitting on the ICJ, one is from the United States, one is from New Zealand, and one — the tribunal's president — is from the U.K.<sup>281</sup> Even aside from interactions of this sort, the hodgepodge nature of modern inquisitorial systems and their longstanding incorporation of many elements that we tend to think of as characteristically adversarial make it hard to justify the Supreme Court's disregard in *Sanchez-Llamas* for the views of the ICJ.

I do not want to overstate. No one denies that important differences remain between European systems of criminal justice, taken as a group, and their common law counterparts. No one denies that one of those differences is that common law systems of criminal adjudication, especially in the United States, generally place more responsibility on the litigants, and less responsibility on the judge, to raise and research both factual issues and points of law. Common law jurisdictions, even today, are more apt than civil law jurisdictions to treat a criminal case as essentially a “bipolar dispute,” with the judge serving as a neutral referee;<sup>282</sup> civil law criminal procedure still tends, more than common law criminal procedure, to reflect “the model of the official investigation” rather than “the model of the dispute.”<sup>283</sup> This is one of two grand axes along which comparative law scholars, following Mirjan Damaška, tend to divide adversarial, common law process from inquisitorial, civil law process; the other axis distinguishes the “hierarchical” organization of civil law adjudication from the flatter, more “coordinate” organization traditionally associated with common law

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250 U.S. 273, 282 (1919)); *Escobedo v. Illinois*, 378 U.S. 478, 497–98 (1964) (White, J., dissenting); *In re Oliver*, 333 U.S. 257, 262, 264 (1948).

<sup>280</sup> Cf., e.g., Amann, *supra* note 33, at 832–33. See generally Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 290–98 (1997); Gordon Slynn, *The Development of Human Rights in the United Kingdom*, 28 FORDHAM INT'L L.J. 477 (2005).

<sup>281</sup> See International Court of Justice, *The Court: Current Members*, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1> (last visited Mar. 7, 2009).

<sup>282</sup> See DAMAŠKA, *supra* note 32, at 69, 97–146.

<sup>283</sup> Langer, *supra* note 256, at 20 (emphases omitted); see also Jackson, *supra* note 32, at 742. See generally DAMAŠKA, *supra* note 32, at 147–80.

courts.<sup>284</sup> But these are very rough generalizations, intended more as analytic tools — “ideal types” — than as nuanced descriptions of actual, existing legal systems.<sup>285</sup> In the real world things are much messier, complicating any effort to preserve the organic integrity of our system by guarding against inquisitorialism.

Even if the essential attributes of the civil law system of criminal procedure could be identified, there is a second problem with the holistic argument for anti-inquisitorialism — also related to the messy, hodgepodge nature of real-world legal systems. The holistic argument assumes that our system of criminal procedure has a deep, underlying interconnectivity — either a fragile interconnectivity, like an ecosystem vulnerable to destruction when a single exotic species is introduced, or a tougher, more resilient interconnectivity, which means that efforts to “transplant” elements of a completely different procedural tradition, like the civil law mode of criminal procedure, are likely to fail. But experience suggests something different: frequent and often successful borrowing of procedural features across the adversarial-inquisitorial divide.

The modern, “mixed” criminal procedure systems of Continental Europe, and more recently Latin America, offer the most obvious examples.<sup>286</sup> But there are also the aspects of our own system often described as “inquisitorial”: the grand jury,<sup>287</sup> coroners’ in-

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<sup>284</sup> See Jackson, *supra* note 32, at 745; Langer, *supra* note 256, at 24–26. See generally DAMAŠKA, *supra* note 32, at 16–46.

<sup>285</sup> See DAMAŠKA, *supra* note 32, at 5, 9; Jackson, *supra* note 32, at 741–42; Langer, *supra* note 256, at 8. On ideal types, see 1 MAX WEBER, *ECONOMY AND SOCIETY 20–21* (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press ed. 1978); and Susan J. Hekman, *Weber’s Ideal Type: A Contemporary Reassessment*, 16 *POLITY* 119 (1983).

<sup>286</sup> See, e.g., John Jackson, *Transnational Faces of Justice: Two Attempts to Build Common Standards Beyond National Boundaries*, in *CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT* 221, 224 (John Jackson, Máximo Langer & Peter Tillers eds., 2008). European borrowing of common law trial procedures is not just a thing of the past. Recent constitutional amendments in Italy, for example, have strengthened the requirement of oral proof in criminal trials and significantly restricted the admissibility of out-of-court statements — developments widely viewed as “putting . . . adversarial protections on a much more secure footing.” William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 *MICH. J. INT’L L.* 429, 466 (2004); see also Giulio Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, 4 *WASH. U. GLOBAL STUD. L. REV.* 567 (2005). But cf. 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, 622–23 (2005) (expressing doubt). One sign of the changes is the emergence of an Italian version of anti-inquisitorialism: scholars have begun to criticize procedural innovations they oppose as “reintroduc[ing] the inquisitorial style of criminal procedure from which Italy wanted to depart.” *Id.* at 621.

<sup>287</sup> See, e.g., *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991); *United States v. John Doe, Inc.*, 481 U.S. 102, 118–19, 123 (1987) (Brennan, J., dissenting); *In re Oliver*, 333 U.S. 257, 262, 264 (1948); *Blair v. United States*, 250 U.S. 273, 280–82 (1919); Goldstein, *supra* note 37, at 1020; Langer, *supra* note 256, at 16 n.58. But cf. Niki Kuckes, *The Democratic Prosecutor: Explaining*

quests,<sup>288</sup> perhaps the office of the public prosecutor,<sup>289</sup> and arguably the modern phenomenon of “managerial judging.”<sup>290</sup> Then there are the hybrid procedures followed at the Nuremberg war crimes trials and more recently by the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the new International Criminal Court.<sup>291</sup> So thoroughly have these tribunals blended common law and civil law modes of criminal procedure that scholars cannot agree whether the end result is predominantly adversarial, predominantly Continental, or something else entirely.<sup>292</sup> The fairness of the hybrid procedures employed by international criminal tribunals continues to be a matter of controversy, but even critics have tended to be impressed with the bottom line: “an international legal community sharply divided by tradition . . . has managed to agree [to] a set of detailed rules of procedure and evidence and [bring] a number of persons to justice . . . within a relatively short period of time.”<sup>293</sup>

And there is considerably less controversy about the emerging jurisprudence of the European Court of Human Rights (ECHR), which implements the European Convention on Human Rights.<sup>294</sup> Every indication is that over the last twenty years the court has improved the fairness of criminal proceedings both in the United Kingdom and on the Continent by blending common law and civil law traditions in interpreting the fair trial provisions of the Convention.<sup>295</sup> The best evi-

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*the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1277 (2006) (arguing that “[i]t is more accurate to say that the grand jury’s prosecution-driven secret indictment process is ‘pre-adversary’ than to call it ‘inquisitorial’”).

<sup>288</sup> See, e.g., *Oliver*, 333 U.S. at 262; John Thibaut, Laurens Walker & E. Allan Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 388 n.7 (1972); Myles Leslie, Book Review, 47 BRIT. J. CRIMINOLOGY 359, 362 (2007). But cf. Jerold H. Israel, *Cornerstones of the Judicial Process*, 2 KAN. J.L. & PUB. POL’Y 5, 26 n.97 (1993) (suggesting that “[r]eliance on . . . inquisitorial proceedings, such as the coroner’s inquest, has . . . diminished”).

<sup>289</sup> See, e.g., Françoise Tulkens, *Criminal Procedure: Main Comparable Features of the National Systems*, in THE CRIMINAL PROCESS AND HUMAN RIGHTS 5, 8 (Mireille Delmas-Marty ed., 1995); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998); cf. Langer, *supra* note 256, at 24 n.94.

<sup>290</sup> See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); see also MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 134–38 (1997); DAMAŠKA, *supra* note 32, at 237–38; Jackson, *supra* note 32, at 738. But cf. Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835 (2005) (arguing that managerial judging is neither adversarial nor inquisitorial).

<sup>291</sup> See, e.g., Amann, *supra* note 33, at 818–20, 841–45; Jackson, *supra* note 286, at 236–41.

<sup>292</sup> See Amann, *supra* note 33, at 843 & nn.212–13; Langer, *supra* note 290.

<sup>293</sup> Jackson, *supra* note 286, at 241–42. The International Criminal Court is off to a rocky start, but that is due more to practices and policies of the office of the prosecutor than to trial procedures. See Heikelina Verrijn Stuart, *The ICC in Trouble*, 6 J. INT’L CRIM. JUST. 409 (2008).

<sup>294</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; see also Amann, *supra* note 33, at 826–27.

<sup>295</sup> See, e.g., Amann, *supra* note 33, at 826–30; Jackson, *supra* note 286, at 227–35.

dence of the ECHR's success is the broad respect its decisions have received. Not only has the court "established a rule of law that all forty-one states now subject to its jurisdiction must abide," but "states not party to a case often enact laws conforming to the court's interpretation of the Convention. . . . Even in England, long a laggard in the European integration process, a [1998] statute increased the Convention's domestic applicability."<sup>296</sup> Decisions of the ECHR have guided national courts outside Europe and the ad hoc international criminal tribunals, and the terms of the Convention have inspired other regional human rights accords.<sup>297</sup> The success of the Convention and its implementing tribunal is widely attributed not to their respect for the organic integrity of the adversarial or inquisitorial model, but precisely to the opposite: to the way the Convention and the ECHR have transcended the adversarial-inquisitorial divide to establish an innovative jurisprudence of procedural fairness rooted in philosophical and political traditions from both sides of the English Channel.<sup>298</sup>

None of this is to deny that blending adversarial and inquisitorial traditions can be difficult. But those difficulties are often overstated. Legal systems are not precariously balanced ecosystems, easily thrown out of kilter by the introduction of a foreign species.<sup>299</sup> Neither are they closed, self-replicating universes, impervious to innovations from without. "Adversarial" and "inquisitorial" systems have borrowed successfully from each other in the past, and it is not clear that the process could be stopped, even if we wanted it to be.

### C. *The Functionalist Argument for Anti-Inquisitorialism*

We have examined two possible justifications for anti-inquisitorialism in American criminal procedure — two arguments for treating the civil law mode of criminal procedure as a reliable guide to what our own system should eschew. The first argument was originalist, appealing to the intent behind, or original understanding of, the provisions of our Constitution governing criminal trials. The second argument was holistic, contending that our adversary system of criminal procedure has an organic, internal logic, which should be respected and preserved. Both arguments were found wanting.

There remains a third argument, in some ways the most straightforward, for avoiding inquisitorialism. The argument is that the com-

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<sup>296</sup> Amann, *supra* note 33, at 828–29.

<sup>297</sup> See *id.* at 829–30.

<sup>298</sup> See SUMMERS, *supra* note 33, at 16–17; Amann, *supra* note 33, at 828–30, 833–34; Mireille Delmas-Marty, *Toward a European Model of the Criminal Trial*, in *THE CRIMINAL PROCESS AND HUMAN RIGHTS* 191 (Mireille Delmas-Marty ed., 1995); Jackson, *supra* note 32, at 757–64.

<sup>299</sup> It is not even clear that actual ecosystems tend to function this way. See Carl Zimmer, *Friendly Invaders*, N.Y. TIMES, Sept. 9, 2008, at F1.

mon law mode of criminal procedure is just *better* than the civil law mode: fairer, more accurate, more humane, or more congenial to liberal, democratic values.

This is not a view limited to chauvinists and Europhobes. Europeans themselves have sometimes looked enviously across the Channel, and later across the Atlantic, at the protections provided for individual rights by Anglo-American courts. To be sure, there has been plenty of condescension toward the inefficiency of common law criminal procedure, its rough-and-tumble coarseness, and the advantages it provides, particularly in the United States, to wealthy defendants. Common law lawyers are not the only ones prone to “legal nationalism.”<sup>300</sup> But there is also a long tradition, stretching back at least to Voltaire, of European admiration for the fairness and transparency of common law criminal trials.<sup>301</sup> That admiration, in fact, helped drive the wave of reforms in the nineteenth century that transformed the Continent’s medieval systems of criminal procedure — the systems Europeans have in mind when they use the term “inquisitorial” — into the “mixed systems” found today, not only in Europe, but also throughout Latin America.<sup>302</sup>

Arguments for the superiority of common law criminal trials vary along two dimensions: the particular features singled out for praise and the nature of the advantage those features are said to offer. As to the first, at various times defenders and admirers of Anglo-American criminal procedure have focused on each of the following characteristics of common law trials: (1) the use of lay jurors; (2) the public nature of the proceedings; (3) the reliance on oral testimony rather than a written dossier; (4) the detachment and institutional independence of the judge; (5) the regard for the defendant’s autonomy, both in gathering evidence and with respect to procedural choices; and (6) the vigorous, partisan advocacy provided by defense counsel. Four different kinds of advantages have been claimed for these procedural features: (1) improved accuracy in factfinding; (2) more meaningful participation by the defendant and the public; (3) stronger checks against abuse of power; and (4) greater respect for human dignity.<sup>303</sup> At one time or another, each of these four advantages has been claimed for each of the common law trial’s celebrated features — with a few minor exceptions. (I am unaware, for example, of any claim that the detachment and institutional independence of trial judges have made common law

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<sup>300</sup> SUMMERS, *supra* note 33, at 11–13; *see also, e.g.*, Malcolm Feeley, *The Adversary System*, in 2 ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM 753 (Robert J. Janosik ed., 1987).

<sup>301</sup> *See, e.g.*, SUMMERS, *supra* note 33, at 40–41. On Voltaire’s impression of British laws and customs, *see generally* IAN BURUMA, *ANGLOMANIA* 21–49 (1998).

<sup>302</sup> *See sources cited supra* notes 32–33 and accompanying text.

<sup>303</sup> *See, e.g.*, Feeley, *supra* note 300.

criminal proceedings more participatory — although the argument may well have been made.) A six-by-four matrix could be constructed, pairing each institutional characteristic with each kind of advantage, and it would not be difficult to fill in most, if not all, of the boxes with arguments found in court cases, treatises, and legal scholarship.

This is not the place to assess each of these twenty-four subclaims. The important point for present purposes is that the claims are mutually independent. It may well be that lay jurors provide an important check against abuses of government authority, and it may well be that the reliance on oral testimony provides a check as well — but neither claim entails the other. Still less does either claim depend on an assumption that juries, or oral testimony, or any other feature of common law trials makes those proceedings more *accurate* than their civil law analogues.<sup>304</sup> One kind of advantage can exist without the others; indeed, there may be tradeoffs. And while certain components of the traditional adversary system may function better together than separately — lay jurors, for example, may conceivably be better at assessing oral testimony than written proof — none of that is self-evident. In fact, for reasons we have already canvassed, the various features traditionally identified with Anglo-American criminal procedure are likely to be far less intertwined than commonly believed. Each should stand on its own feet.

That means that an argument for strengthening juries, or expanding the role of defense counsel, or insisting on live testimony, should rest on the advantages of juries, defense counsel, or oral proof. It should not rest on the assumed superiority of the adversary system or the “pejorative aura” surrounding the term “inquisitorial.”<sup>305</sup> It should not take an enthusiast for Continental criminal procedure to recognize that “[o]verblown rhetoric in praise of ‘our adversary system’ clouds particular issues about how a trial should be conducted, most of which can be answered much more variously than just yes or no.”<sup>306</sup>

The problem with overblown rhetoric about the advantages of the adversary system is not just that it lumps together questions best considered separately. It can also mix together myth and reality, papering over the notorious gaps between an idealized version of the American adversary system and the system’s actual, day-to-day operation. Two of those gaps merit special mention. First, most criminal defendants in the United States do not confront their accusers in court, or have their guilt assessed by a jury, or enjoy any other protections we tend to associate with the adversary criminal trial, because most criminal cases

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<sup>304</sup> See, e.g., Carol S. Steiker, “*First Principles*” of Constitutional Criminal Procedure: A *Mis-take?*, 112 HARV. L. REV. 680, 689 (1999) (book review).

<sup>305</sup> DAMAŠKA, *supra* note 32, at 88 n.28; see also, e.g., WEINREB, *supra* note 22, at 11.

<sup>306</sup> WEINREB, *supra* note 22, at 105–06.

in the United States are resolved through plea bargaining.<sup>307</sup> Second, public defenders and other court-appointed counsel — who collectively represent a majority of criminal defendants in the United States — are so chronically and drastically underfunded that there is strong reason to doubt the vigor and effectiveness of the advocacy they can provide, in plea bargaining or at trial.<sup>308</sup> These features of our system could be criticized, of course, as departures from the “adversary ideal,” assuming we could reach agreement on the elements of that ideal. But even with that assumption, any argument that the “adversary system,” in whole or in part, should be preferred over its rivals because it is simply *better* — fairer, more accurate, more humane, or more congenial to democracy — would need to take account of how the adversary system operates in practice, not just in theory.

### III. FORGOING ANTI-INQUISITORIALISM

How much has anti-inquisitorialism really mattered? Put differently, what would American criminal procedure look like *without* the use of civil law criminal process as a contrast model? I will attempt an answer below by returning to each of the four doctrinal areas addressed in Part I of this Article — confrontation, sentencing, procedural default, and confessions — and describing how things might change in the absence of anti-inquisitorialism.

A few generalizations are possible at the outset. Anti-inquisitorialism is a set of implicit assumptions, not a formal principle of constitutional criminal procedure, so the consequences of its abandonment cannot be traced mechanically. If substantive changes come, they will come indirectly; what we can expect in the first instance are changes in patterns of argument. In particular, dropping the use of civil law criminal procedure as a contrast model could put more pressure on the Supreme Court and its commentators to develop finer-grained and more persuasive justifications for positions now justified in large part by appealing to the supposedly self-evident evil of the inquisitorial system.

#### A. Confrontation

The Supreme Court’s recent confrontation cases often read as though the Court believes that applying the Confrontation Clause is,

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<sup>307</sup> See, e.g., David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 696 & n.37 (2006).

<sup>308</sup> See, e.g., David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1279–81 (2002); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997); Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1.

or should be, a relatively simple enterprise. All we need do, the Court seems to suggest, is stop worrying about “reliability” and just make sure that criminal defendants get what the Sixth Amendment promises them: confrontation of adverse witnesses. But the meaning of “confrontation” and “witnesses” is far from transparent. There is little direct evidence of what the framers of the Confrontation Clause had in mind. There is even less evidence of what the framers of the Fourteenth Amendment thought about the contours of the confrontation right, if they thought about it at all. Despite the Court’s suggestions, there is little reason to think that the Sixth Amendment, let alone the Fourteenth Amendment, was intended or originally understood to codify Founding-era case law, with all its quirks and inconsistencies. Those eighteenth-century Americans who revered the “common law” — and not all did — revered it as a set of general principles, not a compendium of specific rules and practices.<sup>309</sup> Plainly the framers and ratifiers of the Sixth Amendment intended to safeguard the right of a criminal defendant to confront the witnesses against him, for they said as much. But it is much less clear how, precisely, they believed that right operated. Most of them were not lawyers, and it is unlikely they gave the question any consideration. It is even less likely that the framers and ratifiers of the Fourteenth Amendment gave appreciable thought to how the confrontation right would operate in the context of state criminal proceedings.

It is therefore understandable that the Court and its commentators have turned so often to Raleigh’s trial,<sup>310</sup> and the widespread condemnation it received, for guidance in interpreting the Confrontation Clause. It seems a safe assumption that if eighteenth-century Americans had *any* expectations about the Confrontation Clause, they expected it to prevent abuses like Raleigh’s trial — at least in federal court. Something similar can be said about the framers and ratifiers of the Fourteenth Amendment: if they had any ideas at all about the confrontation right, they likely thought it was aimed at preventing the kind of thing that happened to Raleigh. And if the search for an original understanding of the Confrontation Clause right is abandoned as hopeless, or beside the point, a good case could still be made for interpreting the clause in light of the most infamous denial of confrontation in the history of Anglo-American law. It surely tells us *something* that people have long found Raleigh’s treatment flagrantly unjust. Either way — as evidence of a certain kind of original understanding (what Jed Rubenfeld calls a “core, actuating application,” a “foundational

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<sup>309</sup> See, e.g., PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA* 105–06 (1965); Sklansky, *supra* note 91, at 1787–88, 1790.

<sup>310</sup> See *supra* pp. 1646–47.



paradigm case<sup>311</sup>) or as a time-tested, tradition-sanctioned example of a confrontation violation<sup>312</sup> — Raleigh's trial can sensibly be used to flesh out the meaning of the Confrontation Clause.

Like any paradigmatic case, though, Raleigh's trial itself needs glossing. We need to decide precisely what was wrong with it — what features a new case needs in order to be, for practical purposes, just like what happened to Sir Walter Raleigh.<sup>313</sup> Was it the failure of the Crown to call Lord Cobham as a prosecution witness, or the refusal to bring him to the courtroom when Raleigh asked to confront him? What kind of “confrontation” should have been required: cross-examination under oath, a face-to-face meeting in the courtroom, an unstructured opportunity for Raleigh to argue with Cobham, or some combination of these procedures? Was confrontation so important because Cobham had provided key evidence against Raleigh, because Cobham was in Crown custody, because Cobham reportedly had retracted his incriminating statements, or simply because Cobham had provided statements the prosecution chose to introduce against Raleigh?

Following and expanding on Wigmore's lead, the Supreme Court's recent confrontation cases view Raleigh's case through the lens of anti-inquisitorialism. If Raleigh's mistreatment reflected Continental contamination of English criminal procedure, then the confrontation Raleigh was unfairly denied must be cross-examination, that most characteristic and most celebrated of Anglo-American trial features. It could not be the loose, face-to-face altercation that survived much longer in Europe than in Britain.<sup>314</sup> And since common law criminal trials have long been marked by an insistence on oral testimony, and the absence of the kind of written dossier prepared and relied upon in Continental trials, the confrontation right must have been triggered in Raleigh's case simply by the reliance on a written statement in lieu of live testimony. The violation would have occurred regardless whether Raleigh asked to have Cobham brought to the courtroom, regardless whether Cobham was in Crown custody at the time of the trial, and regardless how central the evidence was to the prosecution's case.

Renouncing anti-inquisitorialism would not mean renouncing the use of Raleigh's trial as a paradigm case for application of the Con-

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<sup>311</sup> JED RUBENFELD, *REVOLUTION BY JUDICIARY* 119, 134 (2005).

<sup>312</sup> Professor Rubenfeld argues that “it just so happens that there were [core, actuating applications] for just about every one of the Constitution's most important rights and powers.” *Id.* at 119. But he also suggests that the paradigmatic cases can be created by tradition, not just as a matter of original understanding; indeed, he argues that new paradigm cases emerge subsequent to enactment. *See id.* at 120–22.

<sup>313</sup> *See Park*, *supra* note 24, at 460.

<sup>314</sup> *See* sources cited *supra* note 46 and accompanying text.

frontation Clause, but it would mean reexamining the glosses the Supreme Court has given to the case. It would mean taking a fresh look at what made the confrontation of Cobham important, and what kind of confrontation should have been allowed. Answering those questions would require precisely what the Court has almost entirely avoided in its recent confrontation cases: discussion of the underlying purpose of confrontation. The kind of confrontation it makes sense to require, and the circumstances when it makes sense to require it, will depend in part on the point of confrontation — whether, as the Court sometimes says, it is a means of ensuring accuracy,<sup>315</sup> or whether, as the Court suggests at other times, it is a protection against the abuse of government power,<sup>316</sup> or a matter of respect for basic intuitions of fairness.<sup>317</sup>

I will not pursue these questions here, except to note that taking accuracy, plain and simple, as the goal of the Confrontation Clause may replicate, on a smaller scale, part of what makes anti-inquisitorialism unattractive as a broad strategy of constitutional interpretation. One thing we generally should want in a broad principle of constitutional law is that it make sense *as a constitutional principle* — that is to say, as a legal proposition placed beyond the reach of ordinary democratic politics. The most common justifications for handling certain principles in this way are that they are fundamental to the very project of democratic self-government, or that they reflect values that electoral politics is likely to undervalue. Avoiding Continental trial procedures does not seem to fall in either of these categories — unless those procedures are thought peculiarly amenable to authoritarian abuse, or peculiarly and falsely attractive to democratic majorities. The same thing can be said about requiring confrontation in a criminal trial. If the problem with eliminating confrontation is simply that trials are likely to prove less accurate, it is hard to see why this is a determination appropriately made at a constitutional level. Accurate trials are something that democratic majorities can generally be expected to favor. But if the point of confrontation is to protect against a certain *kind* of inaccuracy, associated with the authoritarian misuse of power, it is easier to see why the mechanism deserves constitutional protection. Tools of authoritarian abuse may or may not be particularly attractive to democratic majorities, but they certainly can hold an appeal for government officials, elected or otherwise.

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<sup>315</sup> See, e.g., Crawford v. Washington, 541 U.S. 36, 61 (2004).

<sup>316</sup> See *id.* at 56 n.7.

<sup>317</sup> See, e.g., Coy v. Iowa, 487 U.S. 1012, 1017 (1988) (“[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as ‘essential to a fair trial in a criminal prosecution.’” (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965))).

Reframing the confrontation right as a matter of fairness and a protection against the abuse of power, and stripping the right of its anti-inquisitorial gloss, would require rethinking some of the contours of the right. It also might make the right more secure, and not just because what the Court said about it would make more sense. If the Court were to stop treating the Continental criminal justice system as a “shadowy,” vaguely defined set of procedures “to be avoided at all costs,”<sup>318</sup> it might take notice of the emerging confrontation jurisprudence of the European Court of Human Rights. For more than a decade now, the ECHR has interpreted the fair trial provisions of the European Human Rights Convention to require, as a general matter, that evidence “be produced at a public hearing, in the presence of the accused” and that “the accused . . . be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage.”<sup>319</sup>

In giving content to these rights, and to other trial rights enjoyed by criminal defendants, the ECHR has taken an approach very different from the Supreme Court’s. Instead of defining these rights through the use of a procedural contrast model — a rival legal system taken as self-evidently inferior — the ECHR, which hears cases from both common law and civil law jurisdictions, has limited itself to vindicating rights so fundamental they transcend the adversarial-inquisitorial divide. This was the same approach that was taken in drafting the Convention that the ECHR interprets and applies.<sup>320</sup> It can therefore surprise American lawyers to learn that the Convention gives a criminal defendant a right “to examine or have examined witnesses against him”<sup>321</sup> and that the ECHR has interpreted this provision, in conjunction with the Convention’s catchall requirement of “a fair and public hearing . . . by an independent and impartial tribunal,”<sup>322</sup> as providing a broad guarantee of “confrontation.”<sup>323</sup> That guarantee has been found abridged, for example, when informants have been questioned but their identities not disclosed to the de-

<sup>318</sup> Summers, *supra* note 117, at 1.

<sup>319</sup> *PS. v. Germany*, App. No. 33900/96, para. 21 (Eur. Ct. H.R. Dec. 20, 2001), <http://www.echr.coe.int>; *accord, e.g., Kostovski v. Netherlands*, App. No. 1145/85, 12 Eur. H.R. Rep. 434, 447, para. 41 (1989). For helpful overviews of the case law, see TRECHSEL, *supra* note 31, at 291–326; Roger W. Kirst, *Hearsay and the Right of Confrontation in the European Court of Human Rights*, 21 QUINNIPIAC L. REV. 777 (2003); and Summers, *supra* note 117.

<sup>320</sup> See SUMMERS, *supra* note 33, at xix; Summers, *supra* note 117, at 4–5.

<sup>321</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, § 3(d), Nov. 4, 1950, 213 U.N.T.S. 221.

<sup>322</sup> *Id.* art. 6, § 1.

<sup>323</sup> See *Saidi v. France*, App. No. 14647/89, 17 Eur. H.R. Rep. 251, 270, para. 44 (1993).

fense,<sup>324</sup> and when alleged victims of child sexual abuse have been questioned by police officers but not by magistrates.<sup>325</sup>

To an American reader, the ECHR decisions on confrontation can seem even vaguer than the line the Supreme Court drew in *Crawford* and *Davis* between “testimonial” and “non-testimonial” statements.<sup>326</sup> The ECHR has said little about who counts as a “witness” against the accused<sup>327</sup> and what makes an opportunity for confrontation “adequate.” On top of that, the ECHR has interpreted the European Human Rights Convention to be violated by a criminal prosecution only when “the proceedings considered as a whole” are unfair,<sup>328</sup> and as a result the court has found confrontation violations only when a conviction has been based “to a decisive extent” on statements from an unchallenged witness.<sup>329</sup> That limitation amounts to a very strong rule of harmless error, and it may well be unjustified.<sup>330</sup>

All of this is to say that there will be limits to the guidance that can be drawn from the ECHR’s confrontation decisions. Still, an American jurisprudence of confrontation informed by the ECHR’s decisions would be sounder and more persuasive than the existing jurisprudence, rooted in an archaic caricature of Continental criminal procedure. It might also reach more sensible results. Because the European confrontation right is very much a procedural right, not a rule of evidentiary admissibility,<sup>331</sup> it has little if anything to say about the admissibility of out-of-court statements by a witness who is now dead or otherwise unavailable. It does not require, in other words, the strong version of the hearsay rule found today in the United States but virtually nowhere else in the world. A case like *Giles v. California*, disallowing evidence of a murder victim’s complaints to the police before she was killed,<sup>332</sup> is hard to imagine in the

<sup>324</sup> See *Saidi*, 17 Eur. H.R. Rep. at 268, para. 44; *Kostovski*, 12 Eur. H.R. Rep. at 447, para. 38.

<sup>325</sup> See *P.S. v. Germany*, App. No. 33900/96 (Eur. Ct. H.R. Dec. 20, 2001), <http://www.echr.coe.int>; *A.M. v. Italy*, 1999-IX Eur. Ct. H.R. 45.

<sup>326</sup> See, e.g., Richard D. Friedman, *The Confrontation Right Across the Systemic Divide*, in *CRIME, PROCEDURE, AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT* 261, 269 (John Jackson, Máximo Langer & Peter Tillers eds., 2008).

<sup>327</sup> *But see* *Windisch v. Austria*, App. No. 12489/86, 13 Eur. H.R. Rep. 281, 286, para. 23 (1990) (“Although the two unidentified persons did not give direct evidence in court, they are to be regarded . . . as witnesses . . . since their statements, as reported by the police officers, were in fact before the Regional Court, which took them into consideration.”).

<sup>328</sup> E.g., *Kostovski*, 12 Eur. H.R. Rep. at 447, para. 39.

<sup>329</sup> *Id.* at 449, para. 44 (emphasis added) (internal quotation marks omitted); see *Summers, supra* note 117, at 6.

<sup>330</sup> See *Summers, supra* note 117, at 13.

<sup>331</sup> See *Friedman, supra* note 326, at 268.

<sup>332</sup> The Supreme Court assumed without deciding in *Giles* that the victim’s statements to the police three weeks before her death, reporting that the defendant had attacked and threatened her, were “testimonial.” The State of California did not contend otherwise. See 128 S. Ct. 2678, 2682 (2008).

ECHR<sup>333</sup> — or, for that matter, in any of the domestic courts it oversees.<sup>334</sup> It is equally hard to imagine any of those courts having difficulty deciding whether to admit an autopsy report by a pathologist who has since died.<sup>335</sup> Suppressing the statements of a murder victim, or an autopsy report filed by a medical examiner who can no longer testify, is just the kind of counterintuitive result apt to be defended in the United States as part and parcel of the adversary system, a reflection of our rejection of inquisitorial justice. But, for the very reasons it is counterintuitive, it may also be the kind of result our constitutional law should hesitate to mandate.

### B. Sentencing

The Supreme Court's new constitutional law of sentencing — announced in the line of cases that began with *Apprendi v. New Jersey* and culminated with *Blakely v. Washington* and *United States v. Booker* — trades on a crucial ambiguity in the contrast model of Continental criminal justice. On the one hand, European systems of criminal justice have never embraced lay jurors as fully as the American system. Neither, for that matter, have other common law systems, including Great Britain's; the contrast between the inquisitorial system and the *American* system is stronger in this regard than the contrast between the inquisitorial system and the "common law system," taken as a whole. Still, enthusiasm for criminal juries is a genuine point of difference between the Anglo-American legal tradition and the European legal tradition, if only as a matter of degree. So it made a certain amount of sense for the Court to observe in *Blakely* that "leaving jus-

<sup>333</sup> See, e.g., Friedman, *supra* note 326, at 269 (noting that the ECHR sometimes treats the "unavailability of the witness through the fault of neither party" as "enough to excuse the absence of an opportunity for confrontation"); cf. Ferrantelli & Santangelo v. Italy, App. No. 19874/92, 23 Eur. H.R. Rep. 288, 309, para. 52 (1996) (finding no error in introduction of accomplice's confession against defendants, in part because the confession was corroborated, and in part because "the judicial authorities . . . cannot be held responsible for" the accomplice's death before the defendants' trial).

<sup>334</sup> The United Kingdom, for example, no longer bars evidence of hearsay statements made by witnesses who die before a criminal trial or otherwise become unavailable to testify. See Criminal Justice Act, 2003, c. 44, § 116 (U.K.); Criminal Justice (Scotland) Act, 1995, c. 20, § 17 (U.K.). Recent constitutional amendments in Italy significantly restrict the admissibility of out-of-court statements, but they do not apply when "examination of the witness is impossible for objective reasons independent of the parties' will." Panzavolta, *supra* note 286, at 611–12; see also, e.g., Pizzi & Montagna, *supra* note 286, at 462.

<sup>335</sup> On the controversy surrounding this question in the United States after *Crawford* and *Davis*, see Carolyn Zabrycki, Comment, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 CAL. L. REV. 1093 (2008). A case currently pending before the Supreme Court raises the related question whether a forensic chemist's laboratory report is "testimonial" for purposes of the Confrontation Clause. See *Commonwealth v. Melendez-Diaz*, No. 05-P-1213, 2007 WL 2189152 (Mass. App. Ct. July 31, 2007), *cert. granted*, 128 S. Ct. 1647 (2008).

tice entirely in the hands of professionals” fit “civil-law traditions” better than our own.<sup>336</sup>

It made a certain amount of sense, too, for the Court to link the Continental legal tradition with an “ideal of administrative perfection.”<sup>337</sup> That was the ideal pursued by Europe’s most important writer on crime and punishment, Cesare Beccaria, “the boy genius of Enlightenment criminal law thought.”<sup>338</sup> And it was the ideal reflected in France’s Napoleonic codes and the broader, continent-wide movement they began toward rationalization and codification.<sup>339</sup> But those codes also began to narrow the difference between Continental criminal procedure and Anglo-American criminal procedure by mixing older European legal institutions with a range of institutions borrowed from England and America — including limited use of lay jurors in criminal trials.<sup>340</sup> The civil law system that serves as a contrast model in *Blakely* is a pastiche, blending *ancien régime* hostility to lay decisionmakers with the Enlightenment pursuit of administrative rationality.

The pastiche obscures something important: not every step away from formal, administrative rationality is a step toward lay decision-making. By and large, *Apprendi*, *Blakely*, and *Booker* have shifted power not from judges to juries, or from legislatures to juries, but from legislatures to judges. Sentencing has been steered away from the “ideal of administrative perfection,” but has been left largely “in the hands of professionals.” It is hard to describe a transfer of sentencing power from legislatures to judges as a blow against legal professionalism.

Dropping the rhetoric of anti-inquisitorialism from discussions of sentencing procedures would be a step toward clarity. It would make more apparent that the choice in the *Apprendi* line of cases was not between lay and professional decisionmaking, but instead between greater and lesser latitude on the part of legislatures to tell judges how to make sentencing decisions. Like the question of confrontation rights, this is not an issue that maps well onto the distinction between common law and civil law modes of criminal procedure.

Still, there *is* one respect in which the net result of *Blakely* and *Booker* — the shift of sentencing power back to judges and away from legislatures — makes sense as a reaffirmation of the common law system and a rejection of its Continental rival. It has to do with the role

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<sup>336</sup> *Blakely v. Washington*, 542 U.S. 296, 313 (2004).

<sup>337</sup> *Id.*

<sup>338</sup> WHITMAN, *supra* note 150, at 50.

<sup>339</sup> *See, e.g., id.* at 117–19.

<sup>340</sup> *See, e.g.,* MERRYMAN, *supra* note 32, at 15–19, 132, 136–39; Langer, *supra* note 32, at 627. On the use of lay adjudicators in Europe today, see Jackson & Kovalev, *supra* note 161.

of the judge. Judges are the heroes of the common law tradition; the civil law tradition, in contrast, tends to picture the judge “as an operator of a machine designed and built by legislators.”<sup>341</sup> So freeing judges from legislative constraints might indeed be thought an exercise in anti-inquisitorialism, broadly construed — a return to the tradition that honors and respects judicial independence.

The problem with this version of anti-inquisitorialism is not just that it fits poorly with the facts on the ground, given the comparatively wide latitude that modern European judges exercise when sentencing — far greater latitude than most American judges, even after *Blakely* and *Booker*.<sup>342</sup> The bigger difficulty is that the loudest voices for anti-inquisitorialism on today’s Supreme Court — Justice Scalia, Justice Thomas, and Chief Justice Roberts — are no fans of broad judicial discretion. Justice Scalia, in particular, has made it plain that this is one part of the common law tradition he finds outdated and antidemocratic. “[P]laying common law judge,” he has argued, means “playing king — devising, out of the brilliance of one’s own mind, those laws that ought to govern mankind.”<sup>343</sup> That kind of judicial role may have made sense centuries ago, but it is anachronistic in “an age of legislation.”<sup>344</sup> We still have common law courts, but they operate now in what amounts to a civil law system — and they would do better to adapt.<sup>345</sup> That, at least, is the argument Justice Scalia has put forward. It is an argument, if anything, for *emulating* Continental law, both in criminal cases and in civil cases — at least in certain respects.

Of course, there is nothing incoherent or inconsistent about admiring some civil law traditions (for example, the view of the judge as subservient to the legislature) while rejecting others (for example, the more grudging use of lay factfinders). But that is just the point: the civil law system serves poorly as a general-purpose contrast model. Partly this is because the civil law tradition, like the common law tradition, is not monolithic; partly it is because the various strands of our own tradition may be less interdependent than is often supposed; and partly it is because the civil law tradition, from almost anyone’s perspective, is not all bad.

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<sup>341</sup> MERRYMAN, *supra* note 32, at 38. See generally Mary Ann Glendon, *Comment, in A MATTER OF INTERPRETATION*, *supra* note 246, at 95.

<sup>342</sup> See sources cited *supra* note 150 and accompanying text.

<sup>343</sup> Scalia, *supra* note 246, at 7.

<sup>344</sup> *Id.* at 13.

<sup>345</sup> *Id.* at 3–14.

*C. Procedural Default*

Anti-inquisitorialism performed two functions for the Supreme Court in *Sanchez-Llamas v. Oregon*. First, it buttressed the argument for a strong procedural default rule for Vienna Convention violations, and in particular for a rule that would operate even when the reason for the default was, in effect, the violation itself — that is, even in cases where neither the defendant nor defense counsel knew about the right to consular access and assistance, because the government failed to provide the required notification. The argument for that result rested in large part on the notion that strong procedural default rules are part and parcel of the adversary system, and a key feature distinguishing our system from the inquisitorial system. In our system the judge is simply a neutral umpire, so “the responsibility for failing to raise an issue generally rests with the parties themselves.”<sup>346</sup> And since the attorney is the defendant’s agent, the defendant must “bear the risk of attorney error”<sup>347</sup> — including errors resulting from a defense attorney’s ignorance of international law. Second, anti-inquisitorialism helped justify the low level of deference the Supreme Court gave to the views of the International Court of Justice, which had concluded that applying procedural default rules in this way violated the requirement in the Vienna Convention that “full effect” be given to the rights granted by the Convention and to the purposes underlying those rights.<sup>348</sup> An international body like the ICJ could not be expected to appreciate the special importance of procedural default rules in an adversary system, given that so many of the other signatories to agreements like the Vienna Convention had a “magistrate-directed, inquisitorial legal system,”<sup>349</sup> where “the failure to raise a legal error can in part be attributed to the magistrate, and thus to the state itself.”<sup>350</sup>

Without the influence of anti-inquisitorialism, the holding in *Sanchez-Llamas* might be the same, but the argument for it would have to be different. The Supreme Court could not simply point out that the common law system, unlike the civil law system, has strong rules of procedural default. It would need to explain why this particular procedural default rule is justified, and why it is consistent with the requirement in the Vienna Convention that “full effect” be provided to

<sup>346</sup> *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2686 (2006); see also *id.* at 2685.

<sup>347</sup> *Id.* at 2686 n.6 (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)) (internal quotation marks omitted).

<sup>348</sup> Vienna Convention, *supra* note 12, art. 36, ¶ 2; see also *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 56–57 (Mar. 31); *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 497–98 (June 27).

<sup>349</sup> *Sanchez-Llamas*, 126 S. Ct. at 2686.

<sup>350</sup> *Id.*



the terms and objectives of the Convention. And in doing so the Court would need to take seriously the contrary conclusion of the ICJ. Renouncing anti-inquisitorialism would not, by itself, require the Court to follow the ICJ, but it would at least require the Justices to engage with the reasoning of the ICJ, explaining what steps or assumptions in the ICJ's argument the Justices find erroneous.<sup>351</sup>

The errors are not obvious. It is not obvious why our system could not function with a rule that permitted defendants to raise Vienna Convention claims belatedly, particularly when the delay is attributable in part to the government's failure to provide the notifications the Convention itself requires. It is not obvious, for that matter, why our system needs such strong rules of procedural default more generally — but that is a broader point. Even if our waiver rules in the aggregate are taken as sensible, there is still a serious question whether there is cause for strong waiver rules in the particular context of rights provided by an international agreement, especially when the notifications required by that agreement are not given. It is hardly implausible to conclude, as the ICJ did, that applying a procedural default rule in such circumstances has “the effect of preventing ‘full effect [from being] given to the purposes for which the rights accorded under [the Vienna Convention] are intended,’” as the Convention itself requires.<sup>352</sup>

Perhaps “full effect” should be interpreted to mean “full effect, subject to any applicable rules of procedural default.” But if so, the Court should explain why. It should not suffice to say, as Chief Justice Roberts said for the Court in *Sanchez-Llamas*, that procedural default rules serve an interest in finality.<sup>353</sup> The question is what balance to strike between that interest and the purposes of the Vienna Convention. Everyone agrees that sometimes rules of procedural default should give way, even in an adversary system. The Court itself acknowledged in *Sanchez-Llamas*, for example, that a claim that the prosecution failed to turn over exculpatory evidence cannot be raised, as a practical matter, until the defendant or his counsel learn about the evidence, and treating the claim as procedurally defaulted at that point would make little sense, notwithstanding the interest in finality.<sup>354</sup>

The Chief Justice reasoned that a failure to provide the notice required by the Vienna Convention is not like a failure to disclose evidence, and more closely resembles a failure to provide *Miranda* warn-

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<sup>351</sup> Cf. JACKSON, *supra* note 39 (manuscript, intro., at 25, 32) (arguing generally that “the most appropriate posture” for courts to take toward transnational legal norms “is one of engagement,” remaining “open to the possibilities of either harmony or dissonance”).

<sup>352</sup> *LaGrand*, 2001 I.C.J. at 497–98 (first alteration in original) (quoting Vienna Convention, *supra* note 12, art. 36, ¶ 2).

<sup>353</sup> *Sanchez-Llamas*, 126 S. Ct. at 2685.

<sup>354</sup> *See id.* at 2687 (citing *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)).

ings.<sup>355</sup> *That* kind of violation *is* subject to procedural default, because even if the defendant is never told about his *Miranda* rights, we assume his lawyer knows about those rights, or should know about them, and can therefore be required to raise them in a timely manner.<sup>356</sup> The critical difference, the Chief Justice suggested, is between “a *factual* matter” that government misconduct keeps from the defendant and a “*legal*” notification that the government improperly fails to provide.<sup>357</sup>

The problem with this reasoning is not that it is incoherent, but that it is at best incomplete. To be sure, laws usually are easier than facts for a lawyer to research. So, broadly speaking, it may well be that procedural default rules are more appropriately waived when the government fails to disclose facts than when it fails to disclose entitlements. But that will not always be true. Some facts are relatively easy to discover, and some laws can be cloaked by obscurity. Even a very good criminal defense attorney might not have thought to research, say, international treaty obligations — at least not until Vienna Convention cases began to percolate up to the Supreme Court, and maybe not even today.<sup>358</sup> Indeed, the Court in *Sanchez-Llamas* all but assumed as much, for otherwise the failure of defense counsel to raise the Vienna Convention might well have violated the Sixth Amendment right to effective assistance of counsel — a right that plainly *can* be raised for the first time in postconviction proceedings and typically, in fact, is not entertained earlier.<sup>359</sup>

The more important point is that, as the Court itself pointed out in *Sanchez-Llamas*, the adversary system generally relies on the parties and their lawyers to conduct *both* the “factual” and the “legal investigation.”<sup>360</sup> So *any* waiver of procedural default rules, even for alleged failures to disclose exculpatory evidence, could be said to conflict with “the role of counsel in our system.”<sup>361</sup> Simply identifying the conflict does not tell us how it should be resolved. Perhaps Vienna Convention claims should be treated the same way as *Miranda* claims are treated

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<sup>355</sup> *Id.* (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

<sup>356</sup> *Id.* (citing *Wainright v. Sykes*, 433 U.S. 72, 87 (1977)).

<sup>357</sup> *Id.*

<sup>358</sup> *But cf.* *Osagiede v. United States*, 543 F.3d 399, 411 (7th Cir. 2008) (holding that, by 2003, reasonably competent criminal defense attorneys representing foreign nationals in Illinois would have known to advise their clients of their Vienna Convention rights).

<sup>359</sup> *See, e.g., Sanchez-Llamas*, 126 S. Ct. at 2686 n.6. *See generally Dominguez Benitez*, 542 U.S. at 83 n.9; Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007). At least one federal court of appeals has since held that failure to invoke the Vienna Convention can in fact constitute ineffective assistance of counsel. *See Osagiede*, 543 F.3d at 411.

<sup>360</sup> *Sanchez-Llamas*, 126 S. Ct. at 2686 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991)).

<sup>361</sup> *Id.* at 2686 n.6.

in this respect, but that is far from obvious. A criminal defense attorney who did not know about *Miranda* rights plainly *would* be incompetent, even under the low threshold the Supreme Court has set for constitutionally adequate assistance of counsel.<sup>362</sup> The rights conferred by the Vienna Convention are not in the same category. Then, too, the Vienna Convention, unlike *Miranda*, is an international obligation, which might well be thought to require different treatment of the rights it creates.<sup>363</sup> And part of the premise of the Vienna Convention rights is that a domestic lawyer may not suffice to protect the rights of a foreign national caught up in criminal proceedings; that is the point of providing consular access.

None of this means that the Court was necessarily wrong to conclude in *Sanchez-Llamas* that state procedural default rules should apply in full to Vienna Convention claims. It simply means that the issue is considerably harder than the Court suggested. The issue cannot be resolved simply by asserting that waiving procedural default rules, even in part, would violate “the basic framework of an adversary system” and that the ICJ’s contrary conclusion shows its failure to appreciate the differences between “an adversary system such as ours” and “the sort of magistrate-directed, inquisitorial legal system characteristic of many of the other countries that are signatories to the Vienna Convention.”<sup>364</sup> The issue cannot be resolved, in short, by appealing to a pervasive, fundamental, and unbridgeable divide between the Continental legal tradition and our own.

#### D. Self-Incrimination

The privilege against compelled self-incrimination has long been the subject of collective embarrassment. Most people, lawyers and nonlawyers alike, instinctively believe that the privilege is important. But there is widespread uneasiness about its rationale. The most well-known treatment of the issue, written by David Dolinko more than twenty years ago, concludes that the privilege “cannot be justified either functionally or conceptually.”<sup>365</sup> That has become more or less the scholarly consensus: “most people familiar with the doctrine surrounding the privilege against self-incrimination believe that it cannot be squared with any rational theory,”<sup>366</sup> at least not with its present contours, and possibly not at all.

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<sup>362</sup> See *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>363</sup> See *Sanchez-Llamas*, 126 S. Ct. at 2705 (Breyer, J., dissenting).

<sup>364</sup> *Id.* at 2686 (majority opinion).

<sup>365</sup> David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1147 (1986).

<sup>366</sup> William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1228 (1988); see also, e.g., Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege*

Renouncing anti-inquisitorialism would not automatically place the privilege against self-incrimination on firmer footing, or lead to a clearer understanding of its weaknesses. But it might help.

Professor Dolinko thought the anti-inquisitorial argument for the privilege — the notion that it reflects a “preference for an accusatorial rather than an inquisitorial system of criminal justice”<sup>367</sup> — was “circular, because some version of the privilege is a defining characteristic of an ‘accusatorial’ system.”<sup>368</sup> That may not be quite right. Calling the privilege against self-incrimination a key component of the adversary system at least gestures at an argument for its preservation. In fact, it gestures at three — an originalist argument, a holistic argument, and a functionalist argument.<sup>369</sup> But none of these arguments does much to justify the privilege, certainly not as the privilege is presently configured, and maybe not at all. The first problem is that each of these arguments for shunning all aspects of the inquisitorial system has critical weaknesses.<sup>370</sup> The second problem is that it is not clear that the privilege against self-incrimination actually *is* “a defining characteristic of an ‘accusatorial’ system,” if by “an ‘accusatorial’ system” we mean what distinguishes criminal adjudication in the Anglo-American legal tradition from its analogues in Continental Europe. Protections against compelled self-incrimination have been in place throughout Europe since the nineteenth century; they were part of the reforms that created the modern “mixed” systems now also found throughout Latin America.<sup>371</sup> So the anti-inquisitorial justification for the privilege against self-incrimination is in a sense worse than circular. Beyond its internal weaknesses, the argument points us in the wrong direction: toward what we imagine distinguishes our procedural tradition from its chief rival, and away from what, at least since the nineteenth century, we have held in common.

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*Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 6–10 (1986); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1024 (1995).

<sup>367</sup> *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964); *see also supra* p. 1636.

<sup>368</sup> Dolinko, *supra* note 365, at 1067 n.24.

<sup>369</sup> *See supra* Part II, pp. 1668–88.

<sup>370</sup> If anti-inquisitorialism is used as an argument for the privilege against self-incrimination, and the functionalist argument is used to justify anti-inquisitorialism, then the problem *is* a kind of circularity, because the functionalist argument for anti-inquisitorialism ultimately amounts to the claim that particular elements of the inquisitorial system — such as compelled self-incrimination — are themselves unjust or undesirable. *See supra* section II.C, pp. 1685–88. But if the originalist or holistic arguments are invoked for anti-inquisitorialism, then the problem is not circularity; it is simply that the argument is unconvincing. *See supra* sections II.A–B, pp. 1670–85.

<sup>371</sup> *See supra* notes 32, 33, and 286 and accompanying text. Regarding the privilege against self-incrimination in the European Court of Human Rights — developed, notably, in the absence of any specific mention of the privilege in the European Human Rights Convention — *see* TRECHSEL, *supra* note 31, at 340–59.

The point is not that the Europeans have done a better job articulating the basis for the privilege against self-incrimination and giving it sensible contours. In some respects that may be so. The European Court of Human Rights, for example, has sought forthrightly to distinguish between “improper compulsion” and an acceptable degree of “indirect compulsion,”<sup>372</sup> rather than indulge in the transparent fiction that most statements to the police are fully voluntary — the route taken by the United States Supreme Court.<sup>373</sup> Candor here seems the preferable course. But the ECHR has been criticized for categorizing too much compulsion as permissible, and it is debatable whether distinguishing between “indirect” and “direct” compulsion is a sensible way to sort good compulsion from bad.<sup>374</sup> Perhaps we can learn something from the way the privilege against self-incrimination is handled in civil law countries, but it is not clear how much.

The point, rather, is that the underlying basis for the privilege against self-incrimination, to the extent one exists, is likely to be found not in the way the privilege marks out our procedural tradition from the civil law tradition, or even from the “inquisitorial system” as it existed before the nineteenth-century wave of reforms, but instead in fundamental values that the privilege protects, expresses, or vindicates — values that are broadly shared by liberal democracies throughout the world. Thinking about the privilege in this manner may not bring us to a better understanding of its underpinnings, but it at least will put us on the right path.

It might lead, for example, to more fruitful discussion of the largest and most longstanding point of controversy in modern interrogation law: how desirable it is for suspects to have lawyers with them during police questioning. Debating whether uncounseled interrogations are inconsistent with an adversary system has gotten the Court nowhere.<sup>375</sup> Here, as elsewhere, the objection that particular practices are “inquisitorial” may stand in for other, more fundamental objections: for example, that lawyers can make our criminal justice system less mechanical, less bureaucratic, or less prone to abuses of power. How effectively defense counsel actually serve these functions, or could serve these functions, is itself debatable. But that is a debate worth having.

Thinking about self-incrimination without the crutch of anti-inquisitorialism might help, too, in guarding against a certain kind of smugness, the assurance that American criminal procedure is “the gold

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<sup>372</sup> See SUMMERS, *supra* note 33, at 156–60.

<sup>373</sup> See, e.g., *Moran v. Burbine*, 475 U.S. 412, 424 (1986); *Oregon v. Elstad*, 470 U.S. 298, 312–14 (1985).

<sup>374</sup> See SUMMERS, *supra* note 33, at 156–63.

<sup>375</sup> See *supra* p. 1668.

standard for the sort of transparent, rigorous and accurate procedures that should be afforded an individual before he or she may be deprived of liberty or life.”<sup>376</sup> One reason scholars of comparative criminal law have grown increasingly wary of the adversarial-inquisitorial distinction, beyond the oversimplification it entails, is that it distracts attention from a more important divide. This divide is defined by whether a system seeks to comply with basic requirements of fairness, visibility, impartiality, and human dignity — requirements that can be loosely identified with the Western, post-Enlightenment tradition, but that increasingly are the subject of regional treaties throughout the world, and of international agreements “aspir[ing] to universal application.”<sup>377</sup> The United States has historically, and with some justification, seen itself as leading the movement toward greater respect for the rudiments of fair and humane process, including protections against compelled self-incrimination. In ways that are still coming to light, though, the “war on terror” has thrown that status into doubt, and it has certainly underscored the value, for any society, of external benchmarks for the respect that society shows for human rights.<sup>378</sup>

Rooting the privilege against self-incrimination in a rejection of the inquisitorial tradition and a preference for our own, accusatorial system, makes us the privilege’s anointed guardians; it suggests, subtly or not so subtly, that we are the best judges of its content and its reach. Here as elsewhere, anti-inquisitorialism sets us on the path of legal isolationism, and if the years since September 11, 2001, have taught us anything, they have taught us the dangers of that course.

## CONCLUSION

Contrast models are ubiquitous in political and legal thought, and they may be unavoidable. Nor are they always unhelpful. The contrast model of Old World aristocracy was indispensable to Tocqueville in crafting his enduring ideal of American democracy;<sup>379</sup> the contrast model of southern slavery gave Reconstruction Republicans their radical and far-seeing conception of democratic equality;<sup>380</sup> European totalitarianism served in the middle decades of the twentieth cen-

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<sup>376</sup> Charles D. Weisselberg, *Terror in the Courts: Beginning To Assess the Impact of Terrorism-Related Prosecutions on Domestic Criminal Law and Procedure in the USA*, 50 CRIME, L. & SOC. CHANGE 25, 25 (2008) (voicing skepticism).

<sup>377</sup> TRECHSEL, *supra* note 31, at 3; *see also, e.g.*, Amann, *supra* note 33, at 851–62; Jackson, *supra* note 32.

<sup>378</sup> *See, e.g.*, NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT 459–505 (3d ed. 2008).

<sup>379</sup> *See* Connolly, *supra* note 1, at 4–8.

<sup>380</sup> *See, e.g.*, FONER, *supra* note 233; Farber & Muench, *supra* note 233.

ture as a critical, if overused, contrast model for modern American democracy.<sup>381</sup>

But enemies need to be chosen with care. The contrast model of inquisitorialism has not proven useful in American criminal procedure. Partly this is because the “inquisitorial system” is so ill-defined, but mostly it is because the broad and continuing legal tradition with which it is identified is not so self-evidently bad. Whether or not that tradition has elements worth emulating, it is not a reliable guide to what our system of criminal justice should strain to avoid. Anti-inquisitorialism long ago outlived whatever value it had.

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<sup>381</sup> See, e.g., BRIAN CHAPMAN, POLICE STATE (1970); Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423 (1996); Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193 (1998). On the use of contrast models of inequality in shaping the democratic ideal, see generally W.B. Gallie, *Essentially Contested Concepts*, in THE IMPORTANCE OF LANGUAGE 121, 134–36 (Max Black ed., 1962); and Ian Shapiro, *Three Ways To Be a Democrat*, 22 POL. THEORY 124, 138–39 (1994).