Buffalo Law Review

Volume 26 | Number 2 Article 3

4-1-1977

Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience

Rudolf B. Schlesinger
Hastings College of the Law, University of California

THE 1976 JAMES McCORMICK MITCHELL LECTURE

COMPARATIVE CRIMINAL PROCEDURE: A PLEA FOR UTILIZING FOREIGN EXPERIENCE*

RUDOLF B. SCHLESINGER**

INTRODUCTION

Comparison of different systems of criminal procedure can serve a variety of purposes.[1] With an emphasis on similarities among the legal systems under consideration, the object may be to find a common core of legal solutions and institutions.[2] This, for instance, was one of the main purposes of the studies and negotiations conducted by representatives of the Big Four Allied Powers in preparation for the Nuremberg trials.[3] It is not, however, the purpose of this lecture.

More frequently, comparative research in the area of criminal procedure will focus on differences rather than similarities. Differences, if at all significant, call for explanations.[4] The purpose of such comparative studies may be to explain the differences in terms of their historical roots or in terms of the ideologies and policies underlying the divergent rules and institutions. Again, I must confess that—although historical explanations occasionally will be alluded to—explanation is not my principal objective today.

---

* Presented to the Faculty of Law and Jurisprudence, State University of New York at Buffalo, on October 14, 1976.

** Professor of Law at the Hastings College of the Law, University of California; William Nelson Cromwell Professor of International and Comparative Law Emeritus, Cornell University Law School. D. Jur., Munich, Germany, 1933; LL.B., Columbia University, 1942.

1. For a general discussion of the purposes to be served by comparative legal studies, see R. B. SCHLESINGER, COMPARATIVE LAW 4-37 (3d ed. 1970). *See also Winterton, Comparative Law Teaching,* 23 AM. J. COMP. L. 69 (1975).

2. The purposes and techniques of modern "common core" research are discussed in 1 R.B. SCHLESINGER, FORMATION OF CONTRACTS—A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS 5-58 (1968).

3. *See* Bull, *Nuremberg Trial,* 7 F.R.D. 175 (1948).

4. For a discussion strongly (and perhaps too exclusively) emphasizing explanation as an essential objective of comparative studies, see Merryman, *Comparative Law and Scientific Explanation,* in LAW IN THE UNITED STATES OF AMERICA IN SOCIAL AND TECHNOLOGICAL REVOLUTION 81 (J. Hazard & W. Wagner eds. 1974).

Another possible object of comparison, and especially of multilateral comparison, is the construction of models in order to clarify the important and typical features of several groups of systems.[5] As attempts to escape from the tyranny of unmanageably numerous details, such models may be valuable; but in the area of criminal procedure the modelbuilder encounters exceptionally great difficulties, partly of a semantic nature. The more obvious labels to be pinned on the models—especially "inquisitorial" and "accusatorial," and to some extent even "adversary" and "nonadversary" —have been employed so inconsistently that their meaning has become blurred.[6] Despite these terminological obstacles, some comparativists—notably Professor Damaska—recently have made real progress in such modelbuilding endeavors.[7] Again, however, I must disclaim any intention to contribute to these endeavors here and now.

The purpose of this brief lecture is simpler and less ambitious, but it requires no apology. Ever since Solon of Athens traveled to the other Greek city-states and studied their laws in order to benefit from their experience while he was drafting new laws for his own people, comparative studies have been undertaken for the pragmatic purpose of gaining perspective in critically appraising one's own domestic law. Historically, this is doubtless the oldest of the various objectives to which comparative studies can be directed.[8] In line with this ancient tradition of my craft, I shall explore a few aspects of our law of criminal procedure that, in the light of comparable foreign solutions, appear to me to be intolerably archaic, inefficient, unjust, and indeed perverse.

---

5. Such models constructed on the basis of comparative studies must of course be distinguished from models designed to identify conflicting tendencies within a single legal system, such as the late Herbert Packer's "crime control" and "due process" models. Both of Packer's models, despite their seeming contrasts, are tied to traditional common law thinking. *See* Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process,* 79 YALE L.J. 359 (1970).

6. A less obvious but perhaps more promising approach to modelbuilding might be predicated on the different relative strengths—within various systems of criminal procedure—of the value of truth and of competing "other values." *See* text accompanying notes 97-100 *infra.*

7. *See* Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study,* 121 U. PA. L. REV. 506 (1973) [hereinafter cited as Damaska, *Barriers*]; Damaska, *Structures of Authority and Comparative Criminal Procedure,* 84 YALE L.J. 480 (1975) [hereinafter cited as Damaska, *Structures*]. *See also* Damaska, *Comparative Reflections on Reading the Amended Yugoslav Code: Interrogation of Defendants in Yugoslav Criminal Procedure,* 61 J. CRIM. L.C. & P.S. 168 (1970) [hereinafter cited as Damaska, *Reflections*].

8. *See* R.B. SCHLESINGER, *supra* note 1, at 8.

I realize that I have only a small chance of converting my listeners and readers to my thesis. American lawyers, and Americans generally, as a rule are far from arrogant and are genuinely willing to learn from foreign experience; but when it comes to problems of criminal procedure, they are possessed by a feeling of superiority that seems to grow in direct proportion to the ever-increasing weight of the accumulating evidence demonstrating the total failure of our system of criminal justice. In large part, this feeling of superiority is caused by plain ignorance concerning the details and even the basic nature of the leading foreign systems. A number of seasoned observers, including Judges Walter Schaefer[9] and Marvin Frankel,[10] have commented in recent years on the blindness with which many American lawyers cling to the unfounded belief that modern systems of criminal procedure in civil law countries are still wholly "inquisitorial" and that therefore no part of these systems can be fitted into our allegedly "adversary" criminal process.[11]

This belief, which generates an attitude of unthinking contempt toward foreign systems, is 200 years out of date. As a result of the teachings of 18th-century thinkers such as Montesquieu, and of events set in motion by the French Revolution, most continental legal systems long ago adopted the very centerpiece of the common law adversary process: the jury trial in criminal cases.[12] It is true, of course, that in the body of a civilian system this transplant from English law was bound to undergo considerable modification; and this is indeed what happened in most continental countries.[13] The important point to remember, however, is that some of the central principles and institutions in the present-day continental systems of criminal procedure ultimately stem from the same source as our own criminal process. Moreover, many of the continental countries, by adhering to the European Conven-

9. *See* W. SCHAEFER, THE SUSPECT AND SOCIETY 70-71 (1967).

10. *See* Frankel, *The Search for Truth: An Umpireal View,* 123 U. Pa. L. REV. 1031, 1053 (1975).

11. In reality, there are many (and very important) nonadversary elements in our present-day system of criminal procedure. *See* Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure,* 26 STAN. L. REV. 1009 (1974).

12. *See, e.g.,* G. MUELLER & F. LE POOLE-GRIFFITHS, COMPARATIVE CRIMINAL PROCEDURE 7-8 (1969).

13. *See* R.B. SCHLESINGER, *supra* note 1, at 343; Mannheim, *Trial by Jury in Modern Continental Criminal Law* (pts. 1-2), 53 L.Q. REV. 99, 388 (1937); text accompanying note 25 *infra.*

tion on Human Rights, have subjected themselves to general standards of procedural fairness quite comparable to our due process notions.[14] Civilian systems of criminal procedure thus are not basically alien to our own traditions, and no serious ideological barrier has to be crossed when we compare their solutions with our own.[15]

Of course, one who advocates that we borrow, or in any event learn from, foreign solutions must proceed with caution. Before we select a particular foreign institution as a worthy source of inspiration, we must know its position and function within the entire scheme of the foreign system.[16] For this reason, I shall first try to provide an overall thumbnail sketch of a typical criminal proceeding in one of the more enlightened civil law countries, with apologies for over-condensation forced upon me by the limited time at my disposal. This will be followed by a more detailed comparative discussion of a few institutions recommended for further study.

I. Outline of the Course of a Criminal Proceeding in a Continental Country

In the civilian systems,[17] as in our own, the policeman normally is the first public official to arrive at the scene of an alleged crime, or to receive a report concerning it. He may conduct an informal investigation; but his power to arrest the suspect without a judicial warrant,[18] or to proceed to warrantless searches and

14. *See, e.g.*, Linke, *The Influence of the European Convention of Human Rights on National European Criminal Proceedings*, 21 De Paul L. Rev. 397 (1971).

15. All of the countries to whose laws more than passing reference is made in the present paper are located this side of what used to be called the Iron Curtain. Hence it is not necessary to address here the question of whether and to what extent ideological barriers might make it more difficult for us to utilize experience gained in the socialist systems. For comparative discussion of criminal procedure systems belonging to the common law, civil law and socialist orbits, see the articles by Damaska cited in note 7 *supra*.

16. *See* Uviller, *The Advocate, The Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. Pa. L. Rev. 1067, 1075 (1975).

17. The reader who is interested in details will have to utilize not only the comparative literature cited throughout this article, but also single-country studies, many of which are available in English. For some references, see R.B. Schlesinger, *supra* note 1, at 339-42. *See also* Rosett, *Trial and Discretion in Dutch Criminal Justice*, 19 U.C.L.A.L. Rev. 353 (1972); Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, 56 Va. L. Rev. 239 (1970).

18. *See* G. Mueller & F. Le Poole-Griffiths, *supra* note 12, at 14-19. *See also* text accompanying notes 36-42 *infra*.

seizures, generally is more limited than here. Thus, at least as a rule, it becomes necessary at a very early stage of the investigation to involve the prosecutor and the court.[19]

There is no grand jury. The official phase of the pretrial investigation is in the hands of a judge—whom the French call *juge d'instruction*—or of the prosecutor. Both the judge and the prosecutor are essentially civil servants.[20] The judge enjoys the usual guarantees of judicial independence. The prosecutor does not; he may be a link in a hierarchical chain of command, often leading up to the Minister of Justice. Nevertheless, except perhaps in cases having strong political overtones, the civil-servant prosecutor operating in a continental system can be expected to be reasonably impartial.[21] He does not have to run for re-election; and his promotion within the civil service hierarchy may depend as much on his efficiency in sorting out and dropping investigations mistakenly commenced against innocent suspects as it does on his record of procuring convictions of the guilty.[22]

The magistrate or prosecutor conducting the investigation will build up an impressive dossier by interrogating all available witnesses, including those named by the suspect, and collecting other relevant evidence. The suspect himself will be interrogated, and in the most progressive continental countries such interrogation will take place in the presence of his counsel. In many civil law countries the law expressly provides that the suspect has a right to remain silent and that he must be informed of this right.[23] Of course, there is no physical compulsion to make him talk. Experience in continental countries shows, nevertheless, that in the preliminary investigation as well as at the trial itself the defendant usually does talk. The reasons for this will be explored below.

---

19. *See, e.g.,* Scaparone, *Police Interrogation in Italy,* 1974 CRIM. L. REV. 581; text accompanying notes 38-42 *infra.*

20. *See* R.B. SCHLESINGER, *supra* note 1, at 118-20. *See also* G. MUELLER & F. LE POOLE-GRIFFITHS, *supra* note 12, at 113.

21. *See, e.g.,* Linke, *supra* note 14, at 412.

22. In many of the continental systems, moreover, the discretionary powers of the prosecutor are much more narrowly circumscribed than in this country. *See* Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany,* 41 U. CHI. L. REV. 468 (1974); Langbein, *Controlling Prosecutorial Discretion in Germany,* 41 U. CHI. L. REV. 439 (1974).

23. *See, e.g.,* STRAFPROZESSORDNUNG [STPO] §§ 136, 246, *as re-promulgated by* Law of Jan. 7, 1975, [1975] Bundesgesetzblatt [BGBl] I 129 (W. Ger.). *See also* text accompanying note 73 *infra.*

At the conclusion of the official investigation, the prosecutor (or, in some countries, the investigating magistrate) must decide whether in his judgment the evidence is strong enough to warrant the bringing of formal charges against the suspect. If charges are brought, the accused still does not necessarily have to stand trial. Under the traditional civil law practice, the dossier now goes to a three-judge panel—on a higher level of the judicial hierarchy. Only if this panel, having studied the dossier and having given defense counsel an opportunity to submit arguments and to suggest the taking of additional evidence, determines that there exists what we would call "reasonable cause," will the accused have to stand trial.[24] (It should be noted here how misleading it can be to call the continental procedure "inquisitorial" and to contrast it with our allegedly "adversary" process. Under continental procedure, the accused has a two-fold opportunity to be heard—first in the course of the preliminary investigation, and again when the three-judge panel examines the dossier—*before* any decision is made whether he has to stand trial. This should be compared with the completely nonadversary grand jury proceeding by which a prosecutor under our system can obtain an indictment.)

In every civil law country, counsel for the accused has the absolute right to inspect the whole dossier. This will be discussed later.

At the trial, the bench normally (though not uniformly) will consist of one or three professional judges and a number of lay assessors. The jury system, which was introduced in continental Europe in the wake of the French Revolution, more recently was replaced in most continental countries by the system of the mixed bench.[25] Under this system, the professional judges and the lay assessors together form the court, which as a single body passes on issues of law as well as fact, and determines both guilt and sentence. Thus, the trial does not have to be bifurcated into a first hearing devoted solely to the issue of guilt, and a subsequent second hearing dealing with the sentence. The issue of guilt and the measure of punishment are determined simultaneously and by the same body of adjudicators.

---

24. *See* Pugh, *Administration of Criminal Justice in France: An Introductory Analysis,* 23 LA. L. REV. 1, 23 (1962).

25. *See* R.B. SCHLESINGER, *supra* note 1, at 343; Damaska, *Structures,* at 492-93. For a thorough study of the system of the mixed bench, see Casper & Zeisel, *Lay Judges in the German Criminal Courts,* 1 J. LEG. STUD. 135 (1972).

The dossier, reflecting the pretrial investigation, plays a role during the trial as well. Three of the *dramatis personae* at this point are thoroughly conversant with its contents: the prosecutor, the defendant's counsel, and the Presiding Justice. The Presiding Justice has the dossier in front of him during the trial. On the other hand, the lay judges, and often the professional judges other than the Presiding Justice of the court, are unfamiliar with the dossier. Consequently, only the evidence received in open court (as distinguished from the contents of the dossier) may be considered in reaching a decision.

After a reading of the charges, the Presiding Justice normally will call upon the defendant to give his name and occupation and to make a statement concerning his general background.[26] Then, after a warning that he has the right, at his option, to remain silent concerning the charges against him,[27] the defendant will be asked what (if anything) he wishes to say about the charges.[28] The defendant, who is not put under oath,[29] at this point has the opportunity to tell his side of the story by way of a coherent statement. This will be followed by questions addressed to the defendant. In practice most of the questioning will be done by the Presiding Justice, who is well prepared for this task by previous study of the dossier in his hands. Prosecution and defense counsel may suggest, or be permitted to ask, additional questions.

After this interrogation of the defendant, the witnesses will be examined in similar fashion. Normally, the witnesses will be the same individuals whose preliminary testimony is recorded in the dossier, but additional witnesses, not discovered in the course of the pretrial investigation, may be subpoenaed by the defense or may appear voluntarily at the trial. Nontestimonial evidence, especially physical evidence, also may be produced, and the court may inspect the place of the crime.

No technical rules of evidence impede the process of proof-taking.

---

26. *See, e.g.*, StPO § 243 (4).

27. *See id.*

28. The trial described in this and the following three paragraphs of the text reflects the applicable code provisions. In practice, many of the steps outlined in the text can be omitted or condensed in cases where a confession has been obtained, that is, in the great majority of routine cases. *See* text accompanying note 92 *infra*.

29. For a broad-based historical and comparative discussion of the oath requirement, see Silving, *The Oath* (pts. 1-2), 68 YALE L.J. 1329, 1527 (1959).

After closing arguments by prosecution and defense, and after the defendant has been accorded the last word, the court retires to deliberate. The lay judges, whose vote in most (but not all) continental countries carries the same weight as that of their professional colleagues, may outnumber the latter.[30] In the great majority of civil law countries, the judgment does not have to be unanimous; and the fact that it is not unanimous will not be disclosed. Unless the judgment is one of acquittal, it will pronounce conviction and sentence. It will say, for example, that defendant is found guilty of armed robbery and for such crime is sentenced to four years in the reformatory.

As a rule, the judgment of the court of first instance is subject to an appeal on both the law and the facts.[31] New evidence may be presented to the appellate court, and the proceedings before that court, which has power to review the sentence as well as the determination of guilt or innocence, may amount to a trial de novo. The decision of the appellate court normally can be attacked by a second appeal to a court of last resort, but in this last court only questions of law will be reviewed. The right to appeal is given not only to the defendant but to the prosecutor as well.[32]

---

30. It has been argued, however, that the purposes of lay participation—to keep the professional judges from performing their tasks too routinely, and to increase popular confidence in the administration of justice—can be attained without having the lay members of the panel outnumber (and conceivably outvote) the professional judges. This argument, coupled with the further consideration that historically the inclusion of a lay element in criminal tribunals is but a surviving remnant of the 19th-century transplantation of the English jury trial into the continental systems, recently led the West German Legislature to adopt an important change in the law. Until 1974, the trial court that dealt with the gravest crimes consisted of three professional judges and six lay assessors, but a 1974 amendment, now embodied in GERICHTSVERFASSUNGSGESETZ [GVG] § 76, *as re-promulgated by* Law of May 9, 1975, [1975] BGBl I 1077 (W. Ger.), reduced the number of lay assessors to two. *See* 1 LOEWE-ROSENBERG, DIE STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ, Introduction, ch. 15, annos. 6-9 (23d ed. 1976) [hereinafter cited as LOEWE-ROSENBERG (23d ed.)]. The statement in the text is still correct with respect to other continental countries.

31. In some continental countries, there are exceptions to this rule: the decisions of the courts dealing with the gravest crimes sometimes are subject to an appeal only on points of law. *See* G. MUELLER & F. LE POOLE-GRIFFITHS, *supra* note 12, at 210. These presently illogical exceptions can be explained only on historical grounds. They date back to the 19th-century period when an English-style system of jury trials (which of course precluded appellate review of the jury's express or implied factual findings) prevailed on the continent.

32. In Palko v. Connecticut, 302 U.S. 319 (1937), upholding the constitutionality of a statute permitting appeals by the state in criminal cases, Mr. Justice Cardozo called attention to the practice of civil law countries, where the prosecutor generally has the right to appeal from an acquittal or even from a judgment of conviction if he regards the sentence as too mild. *See* R.B. SCHLESINGER, *supra* note 1, at 6. More recently, how-

In concluding this brief overview, I should like to stress again that it is too highly abbreviated to be totally accurate, and that it does not make sufficient allowance for the considerable differences that exist among the various civil law systems of criminal procedure. My hope is that despite such over-generalization I have been able to highlight some of the important features that are common to a number of the civil law systems and set them apart from our procedure.

II. Arrest and Pretrial Detention in Civil-Law Countries

With the above comments as a background, let me now turn to a discussion of some of the procedural devices and arrangements to be found in civil law countries that might provide American reformers with food for thought.

The first two items—treated together because they are so closely connected—are arrest and pretrial detention.

In this country, it is still the general rule that criminal proceedings routinely "start with the harsh, and in itself degrading, measure of physical arrest."[33] In the federal courts, and in less than one-half of the states, this brutal and (as a rule) unnecessary routine has been modified by statutory provisions that in certain situations authorize the issuance of a summons in lieu of arrest.[34] But these modifications are halfhearted; frequently they are limited to cases of minor violations, and most of the relevant provisions leave it to the discretion of the police or the prosecutor whether a summons should take the place of physical arrest.[35]

---

ever, the Supreme Court has shown itself more parochial and has paid little attention to standards of fairness developed in the criminal procedure of other countries. In line with this more recent attitude of the Court, the *Palko* holding has come under attack. The extent to which it must be regarded as overruled has been staked out by a triad of recent cases: United States v. Wilson, 420 U.S. 332 (1975); United States v. Jenkins, 420 U.S. 358 (1975); and Serfass v. United States, 420 U.S. 377 (1975). Although at least in part overruled, *Palko* still seems to exert some influence from its grave. *See* United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925, 929 (2d Cir. 1974).

33. Cohn, *"Criminal Records"—A Comparative Approach,* 4 GA. J. INT. COMP. L. 116 (1974).

34. *See* FED. R. CRIM. P. 4, 9, *as amended* by Pub. L. No. 94-64, 89 Stat. 370 (1975). As to state law, see Feeney, *Citation in Lieu of Arrest,* 25 VAND. L. REV. 367 (1972); LaFave, *Alternatives to the Present Bail System,* 1965 U. ILL. L.F. 8, 12.

35. Current reform proposals are conveniently collected and surveyed by D. EPSTEIN & D. AUSTERN, UNIFORM RULES OF CRIMINAL PROCEDURE: ABA CRIMINAL JUSTICE

The civil law countries, on the other hand, unanimously recognize that the initiation of a judicial proceeding, whether civil or criminal, never requires the defendant's physical arrest. It follows, according to civilian thinking, that the necessary notification of the defendant is to be effected by a summons, in criminal as well as civil proceedings,[36] and that it is unthinkable to use physical arrest as a routine measure against a suspect who has not yet been tried and who, consequently, must be presumed innocent.[37]

The question whether a suspect should be detained pending trial is, in the civilians' view, completely separate and distinct from the routine of initiating the proceeding. Such detention is regarded as the exception rather than the rule. Except in carefully defined emergency situations, a judicial order is required to detain the suspect before trial.[38] The requirements for the issuance of such an order are strict. In West Germany, for instance, it can be issued only if the court, by definite findings of fact, determines that the following three elements exist: First, there must be strong reasons for believing that the suspect has committed the crime.[39] Second, the evidence before the court must show a specific, rational ground for pretrial detention, such as danger of flight or danger of tampering with the evidence.[40] Third, such detention must meet the requirement of proportionality; that is, it will not be

---

SECTION COMPARISON 7-15 (1975). These proposals, if adopted, would bring about substantial improvement. Unfortunately, however, it appears that American legislators generally continue to impose severe restrictions on the use of a summons in lieu of arrest, even though experience has shown that very few of the defendants thus summoned (or released after an initial arrest) fail to appear at the trial. *See* Baron, *Workshop: Establishing Bail Projects,* 1965 U. ILL. L.F. 42, 45; Feeney, *supra* note 34, at 374-79. *See also* articles cited note 44 *infra.*

The strength of the continuing opposition to a more liberal use of the summons procedure is illustrated by the history of recent attempts to reform rules 4 and 9 of the Federal Rules of Criminal Procedure. In the early 1970's, the Advisory Committee on Criminal Rules of the Judicial Conference of the United States drafted, and in 1974 the Supreme Court promulgated, a much liberalized version of these rules. *See* H.R. REP. No. 94-247, 94th Cong., 1st Sess. 2-3, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 674-77; *cf.* Frankel, *Bench Warrants Upon the Prosecutor's Demand: A View from the Bench,* 71 COLUM. L. REV. 403, 415 (1971). But the opposition to this revision prevailed when rules 4 and 9 received their present form in Pub. L. No. 94-64, 89 Stat. 370 (1975).

36. *See* LOEWE-ROSENBERG (23d ed.), Introduction, ch. 13, annos. 79-82.

37. *See* G. MUELLER & F. LE POOLE-GRIFFITHS, *supra* note 12, at 15-19.

38. *See id.* at 93-101.

39. STPO § 112(1), first sentence.

40. *Id.* § 112(2). In homicide cases, this requirement is eliminated. In cases involving certain other types of very serious crimes the suspect may be detained upon a finding that he would be likely to commit similar offenses if he were released. *Id.* §§ 112(3), 112a.

ordered if the hardship caused by it is disproportionate to the gravity of the offense.[41] The order, which must state the grounds on which each of these requirements is thought to be met, is subject to immediate appeal.[42]

Compare this rational system of pretrial detention to our traditional bail procedure, still prevailing in the majority of states, under which the wealthy suspect will be released even though he is likely to flee or to intimidate witnesses, while the indigent defendant will be kept in jail despite the absence of any rational justification for detaining him. It is true that recently, through the 1966 Federal Bail Reform Act[43] and similar legislation in a minority of states,[44] we have made some progress in this area. But note that the provisions of the federal Act as well as those of state statutes authorizing so-called "Own Recognizance" (O.R.) releases normally become operative only *after* the suspect has been subjected to the (frequently unnecessary) indignity of the initial arrest.[45] Note further that—again in contrast to continental practice—an application for "O.R." release may be denied without any statement of reasons, and that at least in some of the jurisdictions in question the burden is upon the arrestee to show good cause why he should be released.[46] It follows, I submit, that even in our most liberal jurisdictions something might yet be gained by comparative study of the subject of arrest and pretrial detention.[47]

III. The Prosecutor's and the Defendant's Contribution to the Search for Truth

The two remaining topics I should like to discuss have one feature in common: both of them bear, directly and importantly,

41. *Id.* § 112(1), second sentence. *See also id.* § 113 (precluding pretrial detention in most of the cases in which the maximum sentence does not exceed six months).

42. *Id.* §§ 114, 117. According to the latter section, the detainee also has the right at any time to demand a judicial inquiry into the continuing existence of all the requirements for detention.

43. 18 U.S.C. §§ 3146-52 (1970).

44. *See, e.g.*, Berger, *Bail in Missouri Revisited*, 43 U.M.K.C.L. Rev. 40 (1974); Murphy, *Revision of State Bail Laws*, 32 Ohio St. L.J. 451 (1971); Snouffer, *An Article of Faith Abolishes Bail in Oregon*, 53 Ore. L. Rev. 273 (1974); Comment, *Trends in Own Recognizance Releases: From Manhattan to California*, 5 Pac. L.J. 675 (1974).

45. *See* notes 43 & 44 *supra*.

46. *E.g.*, Kawaichi v. Madigan, 53 Cal. App. 3d 461, 126 Cal. Rptr. 63 (1975).

47. The reform proposals mentioned in note 35 *supra*, many of which are excellent, perhaps would have a better chance of widespread adoption if they were supported by studies of actual experience in some of the more enlightened foreign countries.

upon the central function of the criminal process, the ascertainment of truth.

A. *Discovery*

The first of these two related topics comes under the heading of "discovery." The continental systems invariably provide that at an early stage of the proceedings, and in any event well before the trial, the defendant and his counsel acquire an absolute and unlimited right to inspect the entire dossier, that is, all of the evidence collected by the prosecution and the investigating magistrate.[48] Thus it is simply impossible to obtain a conviction by a strategy of surprise.[49] It must be remembered, moreover, that in most cases there can be a trial de novo on appeal, which, of course, acts as a second barrier against the successful use of surprise evidence.

To facilitate inspection of the dossier by defense counsel, German law provides that upon his request he should normally be allowed to take the dossier to his office or home for thorough and unhurried study.[50]

Concerning this latter point, and generally concerning details of inspection procedure, other continental systems may not go quite so far as the German Code. But defense counsel's basic right to timely inspection of the entire dossier has become an article of faith throughout the civil law world—and, indeed, in the socialist orbit as well. This is well illustrated by an incident that occurred during World War II, when representatives of the United States, Great Britain, France and Soviet Russia met in London to prepare the Charter of the International Tribunal which later tried the principal war criminals at Nuremberg. Among other issues of procedure, the question of discovery came up for discussion. Mr. Jus-

48. *See* Damaska, *Barriers*, at 533-34. A good example of a code provision spelling out the details of this right of inspection is StPO § 147.

The prosecutor must include in the dossier every document that contains any information relating to the investigation; nothing except purely internal instructions and communications among members of the prosecutorial staff may be kept from the defendant. *See* 1 LOEWE-ROSENBERG, DIE STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ § 147, anno. 2 (22d ed. 1973) [hereinafter cited as LOEWE-ROSENBERG (22d ed.)].

49. *See, e.g.*, Murray, *A Survey of Criminal Procedure in Spain and Some Comparisons with Criminal Procedure in the United States*, 40 N.D.L. REV. 7, 9, 13 (1964).

50. StPO § 147(4). "Dossier" does not in this case include physical evidence. The physical evidence may, however, be inspected. *See id.* § 147(1).

tice Jackson, who attended the meeting as the representative of the United States, later reported that at that point

> the Soviet Delegation objected to our practice on the ground that it is not fair to defendants. Under the Soviet system when an indictment is filed every document and the statement of every witness which is expected to be used against the defendant must be filed with the court and made known to the defense. It was objected that under our system the accused does not know the statements of accusing witnesses nor the documents that may be used against him, that such evidence is first made known to him at the trial too late to prepare a defense, and that this tends to make the trial something of a game instead of a real inquest into guilt. It must be admitted that there is a great deal of truth in this criticism.[51]

So far as the Nuremberg trial was concerned, the problem was overcome by a compromise between the common law and civil law positions. What seems significant beyond the immediate context, however, is the fact that Mr. Justice Jackson had to listen to, and did not have much of an answer for, this lecture on due process delivered by his Soviet counterpart.

In its aversion to unlimited pretrial discovery in criminal proceedings, the American legal system today stands virtually alone. In England, the older common law tradition of trial by surprise has long been abandoned, and present English practice, by a combination of procedural devices and informal arrangements, permits defense counsel, well before the trial, to become fully familiar with every element of the facts known to the prosecution.[52]

In this country, although we are ahead of the rest of the world with respect to discovery in civil procedure, we have been remarkably slow in taking the blindfolds from the eyes of the criminal defendant.[53] Many states have not even begun to devise effective tools for criminal discovery.[54]

---

51. *Quoted in* Bull, *supra* note 3, at 178.

52. *See* Prevezer, *England: Pre-Trial Procedure,* in THE ACCUSED—A COMPARATIVE STUDY 21, 24-26 (J. Coutts ed. 1966); ANGLO-AMERICAN CRIMINAL JUSTICE 158-61 (D. Karlen, G. Sawyer & E. Wise eds. 1967); Norton, *Discovery in the Criminal Process,* 61 J. CRIM. L.C. & P.S. 11, 12 (1970), where further authorities are cited.

53. This is so even though there has been no dearth of reform proposals, some of which are sponsored by prestigious organizations. For a helpful recent survey of current proposals seeking to liberalize discovery in criminal proceedings, see D. EPSTEIN & D. AUSTERN, *supra* note 35, at 61-65.

54. The preliminary hearing, in its American form (as distinguished from the English version), is not an effective discovery device. *See* Goldstein, *The State and the*

The hope that broad criminal discovery would be forced on the states by the Supreme Court has not been fulfilled. The contours of the limited constitutional right recognized in cases such as *Brady v. Maryland*[55] are so blurred that—except in cases of outrageous suppressive tactics employed by the prosecution—this constitutional doctrine supplies no reliable basis for discovery.[56]

A few jurisdictions, including the federal courts,[57] have progressed beyond the Neanderthal stage.[58] But under the Federal Rules the defendant is still precluded from getting a pretrial look at the most vital materials—the statements made by government witnesses or prospective government witnesses.[59] With very few exceptions,[60] state discovery practice in the so-called liberal states is subject to similar limitations, and in some American jurisdictions even the names of the People's witnesses cannot be obtained as of right before trial.[61]

In no American jurisdiction does the defendant have a right to continental-style inspection, to discovery routinely obtained and unlimited in scope.[62]

I submit that experience gained under the continental systems could be exceedingly useful in dealing with the classical anti-dis-

---

Accused: Balance of Advantage in Criminal Procedure, 69 YALE L.J. 1149, 1183 (1960); *cf.* Adams v. Illinois, 405 U.S. 278, 282 (1972), *id.* at 292 (Douglas, J., dissenting). Moreover, under present law the prosecutor can cut off the defendant's right to a preliminary hearing by securing an indictment. *See* A.L.I., A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 592 (1975), and authorities cited therein. Nor is the motion to inspect grand jury minutes a viable discovery tool. *See, e.g.*, Proskin v. County Court, 30 N.Y.2d 15, 280 N.E.2d 875, 330 N.Y.S.2d 44 (1972).

55. 373 U.S. 83 (1963).

56. *See, e.g.*, People v. Stridiron, 33 N.Y.2d 287, 292-93, 307 N.E.2d 242, 245, 352 N.Y.S.2d 179, 182-83 (1973). For a thorough discussion of the case law, see Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. REV. 437 (1972); Comment, *Pretrial Discovery Under the Proposed Amendments to the Federal Rules of Criminal Procedure*, 46 MISS. L.J. 302, 309-10 (1975).

57. *See* FED. R. CRIM. P. 16.

58. The more progressive jurisdictions are listed by Nakell, *supra* note 56, at 439, and by Norton, *supra* note 52, at 16. *See also* N.Y. CRIM. PROC. LAW art. 240 (McKinney 1971); Note, *Criminal Procedure—Discovery—Movement Toward Full Disclosure*, 77 W. VA. L. REV. 561 (1975).

59. *See especially* FED. R. CRIM. P. 16(a)(2), in conjunction with 18 U.S.C. § 3500(a) (1970). To the same effect, see N.Y. CRIM. PROC. LAW §§ 240.10(3), 240.20(3) (McKinney 1971).

60. *See, e.g.*, COLO. REV. STAT. § 16-5-203 (1973) (discovery of names of state's witnesses). For a discussion of the relatively liberal, judge-made rules prevailing in California, see D. LOUISELL & B. WALLY, MODERN CALIFORNIA DISCOVERY § 14.03 (2d ed. 1972 & Supp. 1975).

61. *See* Comment, *supra* note 56, at 317-18.

62. *See* Damaska, *Barriers*, at 534.

covery arguments that continue to mold the attitude of our courts and legislators.[63] Let us look, first of all, at the "abuse" argument, which is born of the fear that the defendant, once he is apprised of the State's evidence, will be enabled to prepare perjured testimony and to bribe or intimidate, or perhaps even eliminate, the witnesses for the prosecution. It must be conceded that in many situations, and especially in cases involving organized crime, this danger is real. American advocates of discovery have replied that the danger can be minimized by giving the court discretionary power to issue protective orders.[64] *Quaere,* however, whether it is a satisfactory solution to leave everything to the court's discretion. The civil law has a better answer to the "abuse" argument. Under the continental systems—and I shall soon explain this more thoroughly—the defendant normally will have stated his own version of the facts in considerable detail at a very early stage of the proceedings. Thus, at the time when he or his counsel inspects the dossier, his position has assumed a sufficiently firm shape so that it can no longer be effectively improved by fabrications.[65] The further danger, that prosecution witnesses might be bribed or intimidated, usually is neutralized in the civil law systems by the sensible rule that if at the trial the witness suddenly suffers a loss of memory or seeks to contradict his prior statements, his previous testimony can be used not only to assist his power of recall but even as substantive evidence.[66] A slight modernization of our antediluvian rules of evidence (including the rule against impeaching one's own witness) would permit our courts to reach the same result.[67]

---

63. For discussion of these arguments, and many further references, see Nakell, *supra* note 56, at 442-49, and Norton, *supra* note 52, at 12-16.

64. *See, e.g.,* Nakell, *supra* note 56, at 445, 448; Norton, *supra* note 52, at 14-15. The Federal Rules already authorize such protective orders. *See* FED. R. CRIM. P. 16(d)(1).

65. It must be remembered that in a continental country the judge presiding at the trial has the dossier in his hands and is thoroughly familiar with its contents. Thus, if at the trial the defendant should present a recently fabricated story, the Presiding Justice may remind him of any contradictions between that story and his previous testimony, or of the fact that he failed to mention the point when he previously talked with investigating officials. Should the defendant deny the accuracy or completeness of the portions of the dossier to which the Presiding Justice refers, the officials who recorded the previous statements of the accused may be called as witnesses. *See* LOEWE-ROSENBERG (22d ed.) § 254, anno. 6. Thus, any attempt to change his original position may well hurt rather than help the defendant, unless the change is satisfactorily explained. Where the change is a fabrication, it is unlikely that such an explanation can be presented.

66. *See* LOEWE-ROSENBERG (22d ed.) § 253, anno. 1.

67. These antediluvian rules were applied, assertedly under statutory compulsion, by the majority of the New York Court of Appeals in the recent case of People v. Fitz-

To kill or incapacitate a prosecution witness before the trial, again will not help the defendant at all in a civil law country; the previous testimony of the witness is recorded in the dossier, and if the witness in the meantime has become unavailable, this particular portion of the dossier may be read at the trial.[68]

In our system, the problem of utilizing pretrial depositions is somewhat more difficult because of the constitutional confrontation requirement. But the Supreme Court's 1970 decision in *California v. Green*[69] makes it clear that, subject to certain safeguards, the deposition of an unavailable witness may be used at the trial even under our system. In some situations such use now is authorized by the Federal Rules.[70]

It follows, I submit, that the answers by which the civilians have neutralized the "abuse" argument against effective discovery are relevant in our system as well.

The only other respectable argument against unlimited discovery is that of prosecutors crying "one-way-street." Even if one is free from prosecutorial bias, one must wonder why, in an allegedly adversary system, one party should have to play with completely open cards, while the other party—the party who presumably has the most intimate knowledge of the facts—has the right to sit back and in effect to limit his utterances to two taunting words: "Prove it." Some writers have attempted to answer this question within

---

patrick, 40 N.Y.2d 44, 351 N.E.2d 675, 386 N.Y.S.2d 28 (1976). More sensible results, similar to the German approach mentioned in the text accompanying note 66 *supra*, have been reached in some other American jurisdictions. *See* McCORMICK ON EVIDENCE §§ 38, 39, 251 (2d ed. E. Cleary 1972). Under the Federal Rules of Evidence the prior statement can be used for impeachment purposes (rule 607), but under rule 801(d)(1)(A), as a House-Senate Conference Committee phrased it after long and bitter controversy, it is admissible as substantive evidence only if originally made under oath. Thus a prior inconsistent statement, contained in unsworn testimony given to the police by a witness (before he was intimidated or bribed), cannot be used as substantive evidence under the Federal Rules. Regarding the admissibility of *sworn* prior statements, see United States v. Castro-Ayon, 537 F.2d 1058 (9th Cir. 1976).

68. *See* Damaska, *Barriers,* at 519-20, and authorities cited therein.

69. 399 U.S. 149 (1970).

70. FED. R. CRIM. P. 15(e). Note, however, that this rule, although liberal by comparison with our traditional approach, is more restrictive than the practice in continental countries, where even unsworn statements made by the witness to the police or the prosecutor can be read at the trial if the witness in the meantime has died or if for other reasons his testimony has become difficult to obtain. *See, e.g.,* StPO § 251(2).

The restrictions built into rule 15(e) reflect the Supreme Court's interpretation of the due process and confrontation clauses. *See* California v. Green, 399 U.S. 149 (1970). Keeping in mind, however, the need for the protection of witnesses who are willing to testify against powerful and ruthless criminals, a strong argument can be made in favor of the less restrictive German rule.

the framework of our system,[71] but their answers have largely failed to persuade our courts and legislators. As a practical matter, it does not seem likely that unlimited discovery—the hallmark of civilized criminal procedure—will be widely and effectively introduced into our system unless the "one-way-street" argument can be laid to rest.[72] To do that, one must take a fresh look, aided by comparison, at the whole problem of the defendant's contribution to the ascertainment of the true facts. This brings me to the final topic of the present discussion.

B. *The Accused as a Source of Information*

The role of the accused as a source of information in the truth-finding process is an important and thorny topic in any system of criminal procedure. It is also the topic concerning which—upon superficial inspection—the gap between common law and civil law appears most unbridgeable.

Closer analysis, however, shows that the rock-bottom principle that is the foundation of all specific rules in this area of the law today is shared by virtually all civilized legal systems: no physical compulsion may be used to make the suspect talk. In this sense, almost all civilized legal systems give the suspect, even before he becomes the defendant, the right to remain silent.[73] The more enlightened legal systems, whether of the common law or the civil law variety, also are in agreement today on the principle that from the very beginning of the investigation the accused is entitled to the assistance of counsel.[74] It follows that when the suspect, at

---

71. *See, e.g.*, Nakell, *supra* note 56, at 442-44.

72. The basis of the argument against "one-way-street" discovery is plain enough. If a criminal proceeding is regarded as essentially a sporting contest between opposing counsel, it follows that no greater burden of making pretrial disclosures should be imposed on the prosecution than is imposed on the defense. If, on the other hand, the ascertainment of truth is perceived as the major and essential objective of such a proceeding, then it is clear that defendant's silence is at least as inimical to the attainment of that objective as lack of discovery, because "[m]any offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." Kastigar v. United States, 406 U.S. 441 (1972), *quoted with approval in* United States v. Mandujano, 96 S. Ct. 1768, 1775 (1976).

73. *See* Pieck, *The Accused's Privilege Against Self-Incrimination in the Civil Law*, 11 AM. J. COMP. L. 585 (1962).

74. *See, e.g.*, H. NIEBLER, THE GERMAN CODE OF CRIMINAL PROCEDURE 77 (1965), where the following English translation of StPO § 136 (a provision not substantially changed since the date of the translation) can be found:

> At the commencement of the first examination the accused shall be informed of the act with which he is charged and of the applicable penal pro-

any stage of the proceedings, is called upon to exercise his all-important option—to talk or not to talk—at least the more enlightened legal systems will make it possible for him to be guided by counsel's advice.

Up to this point, I repeat, there is a large measure of agreement among civilized and enlightened legal systems, regardless of whether they belong to the common law or the civil law orbit. Crucial differences, however, come to light when we ask the next question: Which course will counsel advise the defendant to take? Under our system, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."[75] Quite often, counsel will keep his client equally silent at the trial; indeed, in the many cases where the client has a criminal record, our rule permitting the prosecution to unearth such record on cross-examination[76] makes it almost impossible for counsel to let the defendant take the stand. In its perverse striving to keep the defendant silent, our law, furthermore, seeks to assure the defendant and his counsel that legal rules can repeal the laws of logic, and that by legal rules the jury can be induced not to draw the natural inferences from defendant's silence. In *Griffin v. California*[77] the Warren Court—over a powerful dissent by Mr. Justice Stewart—held that no state may permit intelligent judicial comment upon defendant's failure to testify.

In thus encouraging the accused to remain silent, our legal system stands virtually alone. In England, defendants rarely opt for silence, because English law differs from ours in two crucial respects. If the accused takes the stand, the English rule is to the effect that he cannot by reason of that alone be cross-examined as to previous convictions.[78] And if he remains silent, the judge is authorized by English law to "suggest to the jury that it draw an

---

visions. It shall be pointed out to him that the law grants him the right to respond to the accusation, or not to answer regarding the charge, and at all times, even before his examination, to consult with defense counsel of his choice.

75. Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting). *See also* Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1064 (1975).

76. *See* MCCORMICK, *supra* note 67, § 43.

77. 380 U.S. 609 (1965). The arguments against this holding are cogently stated in Justice Stewart's dissent, *id.* at 617, and even more elaborately in Chief Justice Traynor's opinion in People v. Modesto, 62 Cal. 2d 436, 398 P.2d 753, 42 Cal. Rptr. 417 (1965).

78. *See* ANGLO-AMERICAN CRIMINAL JUSTICE, *supra* note 52, at 185.

adverse inference from the defendant's failure to explain away the evidence against him."[79]

Implementing a similar policy by partly different techniques, the continental systems likewise discourage the accused from standing mute. In many (though not all) of those systems the defendant's silence may serve as corroborating evidence of guilt.[80] Even where, as in West Germany, this traditional rule has been modified, a defendant generally is not well advised to remain silent. At the very outset of the trial, he has to stand in front of the judges, to be questioned by the Presiding Justice of the court.[81] True, he may refuse to answer any questions relating to the charges against him; but he must announce such refusal in open court and cannot simply, as he might under a common law system, remove himself from the questioning process by deciding not to take the stand.[82] Moreover, only in the event of a *total* refusal by the defendant to answer any questions relating to the charges does German law prohibit the drawing of inferences from his silence.[83] If he answers any of such questions, but then refuses to answer others, the court

---

79. *Id.* at 184. *See also* Tierney, *Transatlantic Attitudes Toward Self-Incrimination,* 6 AM. CRIM. L.Q. 26 (1967). The Canadian courts, despite a statutory provision against comment by the judge, have reached results more consonant with the English than with the American view on this point. *See* Ratushny, *Is There a Right Against Self-Incrimination in Canada?,* 19 MCGILL L.J. 1, 33-39 (1973).

It is interesting to note that the trend of law reform in Great Britain is to move even further away from the preconceptions that presently dominate the treatment of the subject in this country. In June 1972, the British Law Revision Committee in its Eleventh Report, dealing with evidence, Cmnd. 4991, proposed that at the trial, after the prosecution has proved a prima facie case and the court has concluded that "there is a case for the defense to answer," the court should call on the accused to give evidence. If the accused then remains silent, the prosecutor as well as the judge could comment on such silence, and the accused's failure to testify could be treated as corroboration. *Id.* at 68-70. Pursuant to another proposal made by the same distinguished Committee, *id.* at 16-26, an inference adverse to the accused might be drawn from the circumstance that exculpating facts he tries to prove at the trial have not previously been mentioned by him to the interrogating authorities.

80. Ten years ago, a thorough comparative study showed that the majority of civil law (and Scandinavian) legal systems continue to adhere to the rule that the trier of fact may draw inferences from the silence of the accused. *See* Jescheck, *Rechtsvergleichendes Generalgutachten zum Thema "Beweisverbote im Strafprozess,"* 1 VERHANDLUNGEN DES 46. DEUTSCHEN JURISTENTAGES, part 38, at 32-35 (1966). *See also* Pieck, *supra* note 73, at 598-600 (1962) (still valuable, although since its publication a few continental countries have somewhat modified their rules).

81. *See* text accompanying notes 26-29 *supra.*

82. *See* Damaska, *Barriers,* at 527-30.

83. Judgment of Oct. 15, 1970, Bundesgerichtshof, W. Ger., [1970] BGHSt 23, 342, *summarized in* [1971] MDR 15, at 18. *See* LOEWE-ROSENBERG (23d ed.), Introduction, ch. 14, annos. 33-37.

may draw logical inferences from his refusal.[84] Thus, selective silence is strongly discouraged. Total silence of the defendant (although in theory under the present German rule it does not support adverse inferences) will occur only rarely in a German court because it carries with it a grave disadvantage for the defendant: since there will be no separate hearing regarding the sentence,[85] a totally silent defendant may forfeit the opportunity to present facts tending to mitigate his punishment.[86]

The continental systems, moreover, reject our dysfunctional rule that previous convictions of the defendant can be proved if, but only if, he takes the stand. The rules developed in those systems regarding admissibility of previous convictions are neither simple nor uniform, but they exhibit unanimity on the crucial point: the admissibility of previous convictions *never* hinges on whether or not the defendant testifies.[87] Thus he will never be dissuaded from testifying by the fear that his decision to do so will open the door to evidence of his criminal record.

Nor does a defendant who decides to testify before a continental court have to dread that a prosecution for perjury might arise out of such testimony. What he says in his defense is not under oath.[88]

---

84. Judgment of Dec. 3, 1965, Bundesgerichtshof, W. Ger., [1965] BGHSt 20, 298, especially at 300. *See* Maiwald, *Zur gerichtlichen Fürsorgepflicht im Strafprozess und ihren Grenzen,* in FESTSCHRIFT FÜR RICHARD LANGE 745, 757 (1976).

85. *See* text following note 25 *supra.*

86. Under German law the questioning of the defendant at the trial is divided into two phases. *See* StPO § 243. The first deals with his personal history and general circumstances, while the second phase centers on the charges against him. His right to remain silent comes into play only when the second phase is reached. It follows that those mitigating facts that relate to defendant's personal history and general circumstances (for example, poverty or lack of education) can always be mentioned by him during the first phase. But mitigating facts connected with the crime itself (for example, that he was only a minor participant; that he tried to persuade his accomplices not to hurt the victim; that he is remorseful) cannot be brought out by his testimony if he decides to remain completely silent during the second phase of the questioning, the phase dealing with the charges against him.

Defendant's right to have the "last word," StPO § 258, furnishes no substitute for such testimony. Section 258 makes it clear that whatever the defendant says by way of his "last word" is not evidence; it is part of the parties' argumentative summing-up, which according to that provision occurs "after the end of the proof-taking phase of the trial".

The disadvantage thus suffered by a silent defendant is further accentuated in those legal systems where a confession in itself would be treated as a mitigating circumstance. *See, e.g.,* Huston, *A Preliminary Survey of the Criminal Procedure in Thailand,* 16 SYRACUSE L. REV. 505, 524-25 (1965).

87. *See* Damaska, *Barriers,* at 518.

88. *See* R.B. SCHLESINGER, *supra* note 1, at 342 ("In their free evaluation of the evidence the triers of the facts must weigh the accused's statement along with all other items of proof; and no adverse inference can be drawn from the fact that the

Thus the inducement to speak, and not to stand mute, is very strong in the civil law systems. Experience shows that "almost all continental defendants choose to testify" at the trial.[89] This being so, the accused normally has little to lose and much to gain by presenting his side of the story not only at the trial, but also in the earlier phases of the proceeding.[90] If the accused is innocent, this may lead to an early dismissal of the charges. In any event, the combination of a talking defendant and unlimited discovery will clarify the issues well before trial and make the trial both shorter and more informative—much to the benefit of an innocent defendant.

In cases where the accused is clearly guilty, the same combination of factors will prove equally potent. Through active colloquies between the accused and the investigator, combined with inspection of the dossier, such an accused and his counsel are apt to become persuaded that a denial of guilt simply will not stand up. The usual result is a confession, followed by an attempt to present evidence of mitigating circumstances.

Thus, by combining unlimited discovery for the benefit of the defense with rules making it advantageous for the accused to talk, the continental systems have fashioned a highly efficient vehicle for the ascertainment of truth. If the accused is in fact innocent, unlimited pretrial discovery will give him the best possible chance —a much better chance than he would have under a system of trial by surprise—to meet whatever evidence there may be against him. And if he is guilty, the unavailability of silence as a viable strategy will make his conviction more probable and less time consuming.

statement is unsworn, because the accused is not eligible to be put under oath."). *See also* Silving, *Testing of the Unconscious in Criminal Cases,* 69 HARV. L. REV. 683, 696 (1956), and the same author's article cited *supra* note 29.

There is a fine comparative discussion of the point in an appendix forming part of the late Judge Jerome Frank's dissenting opinion in United States v. Grunewald, 233 F.2d 556, 587-92 (2d Cir. 1956). Judge Frank's dissent ultimately prevailed: the decision of the majority of the court of appeals was unanimously reversed by the Supreme Court, 353 U.S. 391 (1957).

89. Damaska, *Barriers,* at 527.

90. It should be remembered that in some of the continental countries the pretrial investigation is conducted by a judge, and that the same judge may have the power to determine whether the accused should be detained (and remain detained) pending trial. Thus, at least from the subjective standpoint of the accused, it may well appear unwise to incur the judge's displeasure by a stubborn refusal to help in clearing up the facts. The investigating judge is apt to be quite impartial, in the sense that it makes no difference to him whether the facts he unearths ultimately will show guilt or innocence. But he does have a personal and professional interest in clearing up the case as expeditiously as possible and may become irritated when he sees his investigation obstructed.

IV. The Teachings of Foreign Experience

In appraising the continental principles favoring discovery and disfavoring silence,[91] we should keep in mind that procedural and evidentiary rules promoting the ascertainment of truth not only serve the cause of justice, but at the same time tend to expedite criminal proceedings—a point that seems to me to be of crucial importance at a time when, because of problems of overload, our whole system of criminal justice is uncomfortably close to collapse.

That the rules governing the ascertainment of truth have a powerful impact upon the expeditiousness with which cases flow through the criminal justice system will become clear to anyone who spends just a few hours in a French courtroom. There the observer will find that although the continental systems do not recognize a plea of guilty, so that no defendant can be convicted or sentenced without an actual trial, most criminal cases are handled with surprising dispatch. A single tribunal, acting without undue haste, often disposes of 20 or more cases during one morning. The explanation is that, for reasons I described, the defendants in the vast majority of cases have confessed prior to the trial, with the result that the precious hours or minutes of the trial itself can be devoted almost exclusively to an exploration of the factors which affect the measure of punishment.[92] In this way, the French system is able to process the ever-growing mass of routine cases without throwing justice and judicial dignity to the winds—without, in other words, resorting to the plea bargain.[93]

91. With respect to arrest and pretrial detention *(discussed in Section* II *supra),* the lesson to be derived from comparison is too obvious to require much elaboration. The discussion that follows in the text therefore will be limited to what foreign experience can teach us regarding discovery and the treatment of the accused's silence, addressed in Section III *supra.*

There are, of course, many other aspects of the criminal process that should be studied comparatively, so that foreign solutions—often superior to our own—can be brought to the attention of those responsible for the development of our law. The recent article on criminal records by Professor S.A. Cohn, *supra* note 33, is an example of an excellent study of this kind. It may have influenced the ameliorative legislation just adopted in New York. N.Y. Crim. Proc. Law § 160.50 (McKinney Supp. 1976-77). The following are random samples of further fruitful topics for such studies: (1) The accused's right to be heard before he is ordered to stand trial. (2) The exclusionary rule. *See* Damaska, *Reflections,* at 179-80. (3) The "fruit of the poisonous tree" doctrine. For a continental view of the doctrine, see Loewe-Rosenberg (23d ed.), Introduction, ch. 14, annos. 40-43. (4) The exonerated defendant's right to recover costs, including reasonable attorneys' fees. (5) The exonerated defendant's right to compensation for pretrial detention suffered by him. (6) The victim's right to compensation.

92. *See* Pugh, *supra* note 24, at 22-23.

93. Under our present system, defense counsel advises his client to remain silent, knowing that no inference may be drawn from such silence and that—in contrast to

From the standpoint of our own legal system, do these comparative observations lead to a practical lesson? Surely, wholesale adoption of one of the continental systems would be neither feasible nor desirable. Yet a practical lesson is learned if in the light of the comparison we recognize that without the twin principles of *unlimited discovery* and *discouragement of silence,* in an intolerably large number of cases the true facts will remain hidden.

Comparison makes us see more clearly that under our present system the innocent defendant is in grave danger of being railroaded to jail by surprise evidence, the kind of evidence of which he would have been forewarned and which (being in fact innocent) he could have torn to shreds under the continental system.

Comparison also teaches us that, while we treat the innocent defendant unfairly, we lavish too much tenderness upon those whose only hope lies in suppressing the facts, that is, the guilty. I am not about to join the company of the many eminent scholars and judges who have advocated repeal or substantial modification of the fifth amendment privilege.[94] It seems to me that, while remaining faithful to the existing text of the amendment, we could and should revise those of our rules which directly discourage the accused from testifying and encourage him to remain silent.[95]

---

civil law procedure—even a silent defendant can preserve his option to take the stand until the prosecution has proved a prima facie case at the trial. Thus, no matter how obvious the defendant's guilt, defense counsel can always force the prosecution to prove its case without any help from the defendant and without the benefit of any inference that might be drawn from defendant's silence. It is obvious that if prosecutors attempted thus to try and prove every case, the criminal justice system would totally collapse. In the great majority of run-of-the-mill cases, defense counsel's threat to put the prosecutor to his proof is not made in the honest hope of winning the case on the merits, but as a form of legalized blackmail, used to obtain a sentence considerably milder than justice would dictate. Prosecutors, whose staffs and other resources often are not sufficient to try more than a small fraction of their cases, are forced to submit to this blackmail by entering into plea-bargains. The fact that in many American communities over 90 percent of all criminal cases presently have to be resolved by this much-lamented method in itself may furnish a good reason for re-examining our system.

94. Among the most severe critics of the fifth amendment privilege we find men of the stature of Dean Wigmore, Dean Pound, Mr. Justice Cardozo, and Judge Friendly. For a more complete roster, and a discussion of the views of these eminent jurists, see S. Schlesinger, *Witness Against Himself: The Self-Incrimination Privilege As Public Policy,* 3 CLAREMONT J. 55, especially at 56-60 (1975).

95. *See* text accompanying notes 75-77 *supra.* In order to bring about the changes advocated here, it would be necessary, first and foremost, to overrule the unfortunate holding of Griffin v. California, 380 U.S. 609 (1965).

One may surmise that the majority of the present Court is no longer completely sure of the soundness of the majority opinion in *Griffin.* Even the present Court, however, in a recent 6-to-3 decision showed itself opposed to the drawing of any inferences from the accused's silence in the face of *police* interrogation. *See* Doyle v. Ohio, 96 S. Ct.

Until these revisions are accomplished, our system will remain suffocated by overload and will continue to underemphasize the principal objective of the criminal process: the ascertainment of truth.

I realize, of course, that other values may compete with the value of truth. The truth may have to remain hidden if it can be brought out into the open only at the expense of human dignity or of other values held sacred in our society. But, as English and continental experience shows, the defendant's dignity is not diminished, and no other basic values are seriously jeopardized, by rules which in a civilized manner discourage silence, for example, by a rule permitting the trier of the facts to draw whatever inferences may be dictated by logic and reason.[96]

In every system of criminal procedure, the ultimate policy issues are bound to center on the conflict between the value of truth and the competing "other values." A comparative approach, I submit, demonstrates that—for historical and political reasons that are complex and require further elucidation—the tendency is stronger in our system than in any other to sacrifice truth to the "other values."[97] This in itself does not prove that the position of the majority of legal systems is superior to our minority view. But it does call for reflection and open-minded rethinking of many of

---

2240 (1976). Concerning this issue, which is more difficult than that posed by *Griffin*, the highest court of West Germany in effect reached the same result as the United States Supreme Court. *See* Judgment of Oct. 26, 1965, Bundesgerichtshof, W. Ger., [1965] BGHSt 20, 281. Compare, however, as looking in the opposite direction, the proposals (and the strong supporting arguments) recently made by the British Law Revision Committee, *supra* note 79.

96. It has been argued that to permit such inferences would violate the principle of adversariness. But that so-called principle, which even today we honor only selectively (*see* note 11 *supra* & text following note 24), is not an end in itself. It is a mere tool, to be employed for the purpose of ascertaining the truth and to be left unused in situations where it would not serve its purpose. *See* THE AMERICAN ASSEMBLY, LAW AND A CHANGING SOCIETY 12 (1975); Oaks, *Ethics, Morality, and Professional Responsibility*, 1975 B.Y.U.L. REV. 591, 596, *quoted with approval in* Mr. Justice Powell's majority opinion in Stone v. Powell, 96 S. Ct. 3037, at 3050 n.30 (1976). Even strong proponents of "process values" will not contend otherwise. *See* Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 13, 43-44 (1974).

97. *See* Frankel, *supra* note 10; Oaks, *supra* note 96. The tendency of our courts to sacrifice the value of truth to (often ill-defined) "other values" is strikingly illustrated by Griffin v. California, 380 U.S. 609 (1965). Writing for the majority of the Court, Mr. Justice White recently recognized, and indeed strongly emphasized, the truth-defeating nature of the *Griffin* rule. *See* Baxter v. Palmigiano, 96 S. Ct. 1551, 1558 (1976). Despite this recognition, however, the Court merely refused to extend the rule to prison disciplinary hearings and was not ready to re-examine the rule itself.

our assumptions, including those which lazy traditionalism would label as "fundamental."

Such rethinking, using comparison as one of its tools, will have to begin by classifying every rule of criminal procedure and evidence as truth-seeking or truth-defeating.[98] Every rule (or lack thereof) recognized as truth-defeating should be seriously re-examined and should be preserved only if it meets three minimum requirements: First, the "other value" invoked as overcoming the value of truth must be clearly spelled out.[99] Secondly, it must be shown in the light of reason and experience that the truth-defeating rule actually serves such other value.[100] And thirdly, the other value must be found to be so strong that it justifies suppression of the truth, even though such suppression may lead to conviction of the innocent or to massive release of the guilty.

As a result of such re-examination, if it is ever undertaken, our system of criminal procedure will become more rational, more efficient, more just—and, I strongly believe, quite different from what it is today.

---

98. Among the prime examples of truth-defeating rules are the exclusionary rule, *see* note 100 *infra,* and the rule prohibiting the drawing of natural inferences from the silence of the accused, *see* note 97 *supra.* In his majority opinion in *Griffin,* Mr. Justice Douglas attempted to justify the latter rule on grounds consistent with the pursuit of truth by arguing that a defendant who takes the stand can be cross-examined regarding previous convictions and thus may incur the risk of being found guilty on the strength of his criminal record. 380 U.S. at 615. With due respect, it must be pointed out that the argument is specious. Perhaps there is a danger in some cases that the accused might be convicted on the strength of his previous record, and it may be arguable that due process requires the court to obviate such danger. But the way to obviate it is to exclude any evidence relating to prior convictions, and not to prohibit the drawing of reasonable and logical inferences from defendant's failure to provide information.

99. *Griffin* again comes to mind as an example. The majority opinion in that case announces a clearly truth-defeating rule, *see* notes 97, 98 *supra,* and yet wholly fails to indicate the nature of the competing values which were thought to overcome the value of truth.

100. This point is crucial in the ongoing debate concerning the question of whether and to what extent the Supreme Court should preserve the rule of Mapp v. Ohio, 367 U.S. 643 (1961).

Although it would be tempting to enter into a thorough comparative discussion of the exclusionary rule, *see* note 91 *supra,* limitations of time and space make it impossible to present such a discussion here. Nevertheless, in connection with the general statement made in the text, it is interesting to note the Court's own doubts as to whether in the light of experience the exclusionary rule actually serves its announced principal purpose—the deterrence of unlawful police conduct. *See* Stone v. Powell, 96 S. Ct. 3037, 3048-52 (1976). *See also* Chief Justice Burger's concurring opinion, *id.* at 3054-55, and Mr. Justice White's dissent, *id.* at 3072-74.