From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure

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I. Introduction

Since the end of the Second World War, and particularly following the end of the Cold War, the American legal system arguably has become the most influential legal system in the world.1 American influences on the legal systems of other nations have ranged from general influences on jurisprudential approaches to law (e.g., legal realism and pragmatism, law and economics, rights discourse, etc.)2 to influences on specific legal areas (e.g., constituti-

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2. See, e.g., Kennedy, supra note 1; Mattei, Why the Wind Changed, supra note 1.
tional law, tax law, securities law, corporate law, patent law, international commercial arbitration, etc.; from legal education (e.g., a credits system for particular courses, or certain post-graduate studies leading to an LL.M. degree) and the structure of the legal profession (e.g., large law firms or the valorization of private practice) to the reform of the judiciary from specific legal doctrines or legal tools (e.g., constitutional exclusionary rules, the doctrine of "actual malice" in the freedom of speech and of the press, class actions, etc.) to institutional arrangements such as the separation of powers and judicial review. These undeniable American influences on other legal systems have led a number of commentators, both in the United States and abroad, to announce that a substantial number of legal systems, both at the national and the international levels, may gradually come to resemble or mimic the American legal system and thus become


10. See, e.g., Note, The Protectionist Bar against Foreign Lawyers in Japan, China and Korea: Domestic Control in the Face of Internationalization, 16 COLUM. J. ASIAN L. 385, 389 (2003) ("The growing presence of law firms in Japan has encouraged a further Americanization of legal practice, but not without continuing restrictions.").

11. See, e.g., Bernard Michael Ortwein II, The Swedish Legal System: An Introduction, 13 IND. INT'L & COMP. L. REV. 405 (2003) (n.247: "Professor Modeer maintains that 'Americanization' of the Swedish legal profession has resulted in an increase in the number of law school graduates who seek membership into the Swedish Bar Association, hoping to facilitate a career in the private sector of law practice.").


14. For an analysis of the reception of this doctrine by the Supreme Court of Argentina, see, for example, EDUARDO A. BERTONI, LIBERTAD DE EXPRESIÓN EN EL ESTADO DE DERECHO 72–82 (2000).


16. See, e.g., Erhard Blankenburg, Changes in Political Regimes and Continuity of the Rule of Law in Germany, in HERBERT JACOB ET AL., COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE 249, 308 (1996) [hereinafter COURTS, LAW, AND POLITICS].
“Americanized.”17 Other commentators, while acknowledging the predominant influence of the American legal system, have stopped short of asserting that American influence is actually recreating American legal practice in non-American jurisdictions.18

In this Article, I caution against the former thesis of Americanization (the "strong" thesis) through an examination of the introduction of American-style plea bargaining in four civil law countries—Germany, Italy, Argentina, and France.19 The influence of American plea bargaining in all four of these jurisdictions is undeniable. Despite this influence, however, the importation of plea bargaining into these jurisdictions is not likely to reproduce an American model of criminal procedure. Each of these jurisdictions has adopted a form of plea bargaining that contains differences—even substantial differences—from the American model, either because of decisions by the legal reformers in each jurisdiction or because of structural differences between American criminal procedure and the criminal procedures of the civil law tradition. Consequently, some civil law versions of plea bargaining have not resembled the American practice since their inception. In addition, the structural differences between the American adversarial conception of criminal procedure and the continental European and Latin American inquisitorial conception of criminal procedure are so deep that individual reforms inspired by American models are unlikely to push these inquisitorial criminal procedures in the direction of the American adversarial system. Finally, in each of these civil law jurisdictions, some legal actors have distrusted or resisted the adoption of plea bargaining and other consensual mechanisms, either because reforms have threatened their traditional powers within the inquisitorial criminal process or because of their differing legal culture. This distrust and resistance has also played a role in neutralizing the potential for Americanization inherent in some of these criminal procedure reforms.

Although the factors hindering Americanization have been present in each of the civil law jurisdictions examined, they have played out differently in different jurisdictions. Not only has each of these jurisdictions adopted a version of plea bargaining different from the American model, but also, each


19. I have chosen these four jurisdictions for two reasons. First, they have traditionally been considered influential on other countries (France, Germany, and Italy worldwide, and Argentina in Latin America). Thus, to the extent that they still retain part of their ascendancy over other civil law jurisdictions, they may provide a good proxy as to what may happen in a good part of the civil law. Second, each of these jurisdictions provide a different version of how plea bargaining may be imported by civil law countries and what different effects these different versions may produce in each of them.
one of these jurisdictions has adopted forms of plea bargaining different from one another. The German, Italian, Argentine, and French plea bargains differ substantially amongst themselves because of decisions by legal reformers in each of these countries, the differing ways in which the practice has been introduced, and the resistance it has generated. Given the differences among these plea bargains, the adoption of some form of plea bargaining in these jurisdictions may produce different transformations or effects in each jurisdiction. Therefore, the potential influence of American plea bargaining on civil law jurisdictions may not be that civil law systems will gradually resemble the American legal system, but rather that they may begin to differ amongst themselves in aspects on which, until very recently, they have been relatively homogeneous. In other words, the paradoxical effect of American influence on the criminal procedures of the civil law tradition may not be Americanization, but rather fragmentation and divergence within the civil law.

Before beginning the concrete analysis of these importations, it is necessary to address two issues. First, in order to explain and trace the transformations that American plea bargaining has undergone since first adopted by these civil law jurisdictions, it is necessary to explain the historical differences between the American adversarial criminal procedure and the inquisitorial criminal procedures of the civil law tradition. The adversarial and the inquisitorial systems can be understood not only as two different ways to distribute powers and responsibilities between various legal actors—the decision-maker (judge and/or jury), the prosecutor, and the defense—but also as two different procedural cultures and thus, two different sets of basic understandings of how criminal cases should be tried and prosecuted. The major difference between the procedural cultures for the purposes of this Article is that, whereas the adversarial system conceives criminal procedure as governing a dispute between two parties (prosecution and defense) before a passive decision-maker (the judge and/or jury), the prosecutor, and the defense—but also as two different procedural cultures and thus, two different sets of basic understandings of how criminal cases should be tried and prosecuted.20 The major difference between the procedural cultures for the purposes of this Article is that, whereas the adversarial system conceives criminal procedure as governing a dispute between two parties (prosecution and defense) before a passive decision-maker (the judge and/or the jury), the inquisitorial system conceives criminal procedure as an official investigation, done by one or more impartial officials of the state, in order to determine the truth.21

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20. In this sense, it is important to emphasize from the outset that I will use the expression “adversarial system” as a descriptive category, not as a normative ideal. As a normative ideal, the expression is sometimes used in the United States to refer to a criminal procedure where the rights of the defendant are fully respected, see, e.g., Mirjan Damaska, Adversary System, 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 24, 25 (Sanford H. Kadish ed., 1983), and the epitome of the adversarial system is the trial by jury. However, in this Article, I will use the expression “adversarial system” as a descriptive category through which I will explain the current features of American criminal procedure in opposition to the current features of criminal procedure in continental Europe and Latin America. Similarly, the expression “inquisitorial system” is sometimes used in a negative way to refer to authoritarian conceptions of criminal procedure. But in this Article, I will use the expression “inquisitorial system” only as a descriptive category.

21. As I explain later, I do not conceive of the adversarial and inquisitorial systems as homogenous procedural cultures. But these two conceptions have been predominant in the five jurisdictions I will examine in this Article, and thus they are the most relevant for our study.
Given that these cultural differences have been overlooked by traditional comparative criminal procedure scholarship, I propose in this Article a new theoretical framework to reconceptualize the adversarial and the inquisitorial systems. This new theoretical framework will be useful not only to describe the differences between the criminal procedures of the common and civil law traditions but also to analyze some of the transformations that plea bargaining—and potentially other legal institutions—may undergo when transferred from one system to the other. This theoretical framework will also be useful in assessing Americanization, as brought about by the adoption of some form of plea bargaining in these four civil law criminal procedural systems, because it will provide a clear axis of reference in comparing the differences between the adversarial and the inquisitorial systems, and thus, in evaluating whether the latter are moving in the direction of the former.

Second, it is necessary to question and reassess how we think about the circulation of legal ideas between legal systems. The metaphor of the “legal transplant” has been the main device used by comparative law scholars and practitioners when analyzing the importation of foreign legal practices. This metaphor, however, has its shortcomings. Its chief problem is that it conveys the notion that legal ideas and institutions can simply be “cut and pasted” between legal systems. Thus, this metaphor fails to account for the transformation that legal ideas and institutions may undergo when they are transferred between legal systems. In this Article, I propose the metaphor of the “legal translation” as an alternative heuristic device to employ when analyzing the transfer of legal ideas and institutions between legal systems. The adversarial and the inquisitorial systems, understood as two different procedural cultures, can be understood as two different systems of production of meaning. Thus, the transfer of legal institutions from one system to the other can be understood as translations from one system of meaning to the other. Specifically, the transformations that plea bargaining has undergone when transferred to these civil law jurisdictions can be understood either as decisions taken by the “translators” (i.e., legal reformers) or as a

product of the structural differences that exist between the adversarial and inquisitorial “languages.”

In this Article, I show that the influence of American criminal procedure seems to confirm the weak version of the Americanization thesis and that the strong version of the Americanization thesis is inapplicable, or, at least, overly simplistic, with respect to criminal procedure. Despite the influence of American plea bargaining on civil law jurisdictions, the cultural differences between the adversarial and the inquisitorial systems are too deep to be overcome by a single American-inspired reform or even a substantial number of American-inspired reforms. Furthermore, given that each of these civil law jurisdictions has translated plea bargaining in a different way, the ultimate effect of this American influence may end up being a fragmentation and divergence, rather than Americanization, within civil law criminal procedure. The four jurisdictions examined in this Article share a similar predominant procedural culture that regards criminal procedure as an official investigation conducted by impartial officials. However, each jurisdiction has adopted a different version of plea bargaining, and thus, these different reforms may lead them in different directions.

The structure of the Article is as follows. In Parts II and III, I propose a new theoretical framework to conceptualize the adversarial and the inquisitorial systems. The main idea that I defend here is that these categories should be understood not only as two different ways to arrange powers and responsibilities between the main actors of the criminal process (judges, prosecutors, defense attorneys, etc.), but also as two different procedural cultures. Part IV shows the influences that the Anglo-American conception of criminal procedure has had on the inquisitorial criminal procedure of continental Europe and Latin America in recent decades. Part V discusses the problems presented by the metaphor of the “legal transplant” as a heuristic device in analyzing the circulation of legal institutions between legal systems. In its place, I offer the metaphor of the “legal translation” as a more nuanced and productive heuristic device to think about these issues. The transferred legal practice—plea bargaining in this instance—can be thought of as the “text” that has been translated from one “language”—the adversarial system of the United States—to another “language”—the inquisitorial systems of Germany, Italy, Argentina, and France. Part VI explains how plea bargaining could have a potential Americanization effect on civil law jurisdictions if fully accepted by these systems. My argument here is that American plea bargaining assumes an adversarial conception of criminal procedure, and thus, if faithfully translated and fully accepted by civil law jurisdictions, could advance the American conception of criminal procedure in inquisitorial jurisdictions. Parts VII, VIII, IX, and X analyze the German, Italian, Argentine, and French “plea bargains,” and also explain not only why each of these countries has translated American plea bargaining but also why each of them has chosen to translate the practice in a different manner. Here, I also demonstrate how the inquisitorial cultural conception of criminal pro-
procedure has been one of the central reasons why American plea bargains have been both transformed and resisted in these jurisdictions. Finally, Part XI draws together my central argument: Given that each of the jurisdictions examined has translated plea bargaining in a different way, American influences may end up producing the fragmentation and divergence, rather than the Americanization of the criminal law procedures of the civil law tradition.

II. RE-CONCEPTUALIZING THE ADVERSARIAL AND THE INQUISITORIAL AS THEORETICAL CATEGORIES

Traditionally, scholars of comparative law and comparative criminal procedure have employed the theoretical categories of “adversarial” and “inquisitorial” through two primary approaches: 23 the lowest-common-denominator approach and the ideal-type approach.24

According to the lowest-common-denominator approach, the adversarial and the inquisitorial categories simply contain the features common to all criminal procedure systems of the common and civil law, respectively.25 For instance, the trial by jury or the hearsay rule would be features of the adversarial system if all common law jurisdictions included these elements at a certain moment in time. This approach presents several problems. First, each time a particular jurisdiction leaves aside a feature that was part of this minimum common denominator, the proponents of the approach have the following dilemma: either they have to modify the content of the adversarial and the inquisitorial categories, or they have to remove this jurisdiction from either the adversarial or the inquisitorial system. The lowest-common-denominator approach does not provide a clear answer for dealing with this dilemma.26 Second, it is also not clear how to distinguish between the pri-


25. See Mirjan Damška, *Adversary System*, supra note 20, at 28 (giving as an example of this approach; Joachim Herrmann, *Various Models of Criminal Proceedings*, 2 S. Afr. J. Crim. L. & Criminology 3, 4–6 (1978). In order to reject the idea that the exclusion from trial of illegally obtained evidence is not a defining feature of the adversarial approach, Prof. Herrmann mentions that the exclusionary rule has not been adopted by all Anglo-American jurisdictions, and that it has been adopted in the legislation of several European countries. Id. at 18.)

26. See Damška, supra note 24, at 5.
mary and secondary features of both systems. In other words, the lowest-
common-denominator approach does not provide an answer to why certain
features are more relevant than others in distinguishing the two systems.

Third, this approach does not seem useful in analyzing hybrid systems,
which have been influenced by both legal traditions, and perhaps also by
other legal traditions of the world. These mixed systems are very important
phenomena to study now, not only because the incidence of hybrid national
systems is greater than in the past due to mutual influences between the
common and the civil law, but also in order to understand international
criminal tribunals, from Nuremberg to the International Criminal Court,
where rules and legal professionals from different legal traditions meet and
interact. Finally, this approach does not seem to provide a useful theoreti-
cal framework to deal with the phenomena of legal influences and legal
transplantation because the most this approach can offer when a legal prac-
tice (such as plea bargaining) is transferred from an adversarial to an inquisi-
torial jurisdiction is either that the absence of this institution is no longer a
characteristic feature of the inquisitorial system, or that the specific receiv-
ing jurisdiction is no longer a part of the inquisitorial legal family, thus
leading us back to the first problem of the lowest-common-denominator
approach.

The second main approach to comparative criminal procedure has been to
conceptualize the adversarial and the inquisitorial as Weberian ideal-types.
These models do not exactly exist in any historical legal system, but while
the common law jurisdictions would be closer to the adversarial type, the
civil law jurisdictions would be closer to the inquisitorial type.

This theoretical conception is much more promising than the lowest-
common-denominator approach and addresses many of its shortcomings. For

27. See id.
28. For analyses of the procedure and rules of evidence of the different international criminal juris-
dictions based on the dichotomy of the adversarial and the inquisitorial, see, for example, Guillaume Champy,
Inquisitoire-Accusatoire devant les juridictions pénales internationales, 68 INT’L REV. PENAL L. 149 (1997);
Nancy Amoury Combs, Coppying a Plea to Genocide: The Plea Bargaining of International Crimes, 151 U. PA.
L. REV. 1 (2002); Richard May & Marieke Wiarda, Trends in International Criminal Evidence: Nuremberg,
Tokyo, The Hague, and Arusha, 37 COLUM. J. TRANSNAT’L L. 725 (1999); Daryl A. Mundis, From ’Common
367 (2001); Vladimir Tochilovsky, Rules of Procedure for the International Criminal Court: Problems to Address
29. In his classic description of Weber’s methodology, Max Rheinstein writes:

Situation of such “pure” type have never existed in history. They are artificial constructs similar to
the pure constructs of geometry. No pure triangle, cube, or sphere has ever existed. But never could
reality have been penetrated scientifically without the use of the artificial concepts of geometry. For
the “pure” concepts created by him, Weber used the term “ideal type” . . . . The “ideal types” . . .
are simply mental constructs meant to serve as categories of thought the use of which will help us to
catch the infinite manifoldness of reality by comparing its phenomena with those “pure” types
which are used, so to speak, to serve as guide in a filing system.
Max Rheinstein, Introduction to MAX WEBER ON LAW IN ECONOMY AND SOCIETY XXIX–XXX (Edward
30. Mirjan Damask has shown the most sophisticated use of this approach, though he replaces
the adversarial and the inquisitorial with his own categories. See DAMAŠKA, supra note 24.
instance, the use of ideal-types identifies the relevant differences between the adversarial and inquisitorial systems, and a change to the concrete criminal procedure of a system does not necessarily lead to changing or discarding the model. Instead, this approach only labels concrete criminal procedure as closer to or farther from the ideal-type. Additionally, the ideal-type approach may also be fruitful in analyzing hybrid criminal procedures like the international criminal tribunals by identifying those features that correspond with each type. The ideal-type approach also provides a useful framework for analyzing the phenomena of influences and legal transplantation between common and civil law procedures. First, by providing a clear axis of reference, this approach allows us to analyze the extent to which criminal procedures are transformed as a consequence of influences or transplantation. Second, to the extent that the concrete criminal procedures are closer to the ideal types, they explain the incentives and logic of the system so that it is possible to identify in advance potential foci of resistance to reform.

A. Structures of Interpretation and Meaning

Nevertheless, there is one area the ideal-type approach does not address, or leaves in the background, and I would like to bring it to the foreground in this Article. The adversarial and the inquisitorial models are not only two ways to structure criminal proceedings, but also two ways of understanding and representing criminal procedure. For instance, common law judges participate in the interrogation of witnesses much less than do their Continental colleagues, not only because procedural rules give them less power to do so, but also because the role of the judge is understood differently in the common law system. Whereas the inquisitorial system judge is understood and perceived as an active investigator with, consequently, the duty to be active in these interrogations, the adversarial system judge is usually understood as a passive umpire who is not supposed to participate actively in the interrogation of witnesses.

31. See e.g., Tochilovsky, supra note 28.
33. With the re-conceptualization of the adversarial and the inquisitorial systems developed in this Article, I am trying to capture the internal point of view of the legal actors who are part of criminal procedures of the common and the civil law. This distinction between an external and internal point of view has been used in a multiplicity of disciplines. For instance, Max Weber took this distinction into account by including as the object of sociological study not only the external aspect of human behavior but also the meaning that human beings ascribe to their own behavior. See Rheinstein, supra note 29, at XXIX–XXX.

The observation that one man hands to another a piece of greenish paper is as such irrelevant in the study of human relationships. The observed phenomenon does not assume social significance until we know that a large group of human beings, of which our two actors are members, regard the greenish paper as a piece of paper money or, in other words, that they ascribe to it the function of serving as a generally recognized means of exchange and payment. Id. at XX. In jurisprudence, the classic reference is H. L. A. Hart, who used this distinction between
In other words, the adversarial and the inquisitorial can be understood as two different structures of interpretation and meaning through which the actors of a given criminal justice system understand both criminal procedure and their role within the system.34 Within these two procedural structures of interpretation and meaning or “procedural languages,” the same terms or signifiers often have different meanings. For instance, in the adversarial system, the word “prosecutor” means a party in a dispute with an interest at stake in the outcome of the procedure; in the inquisitorial system, however, the word signifies an impartial magistrate of the state whose role is to investigate the truth.35 The word “truth” also has a different meaning in each procedural structure of interpretation and meaning. In the adversarial system, even if the dispute is about “truth,” the prosecution tries to prove that certain events occurred and that the defendant participated in them, while the defense tries to question or disprove this attempt. The adversarial conception of truth is more relative and consensual: if the parties come to an agreement as to the facts of the case, through plea agreements or stipulations, it is less important to determine how events actually occurred.36 In the inquisitorial structure of interpretation and meaning, “truth” is conceived in more absolute terms: the official of the state—traditionally, the judge—is supposed to determine, through an investigation, what really happened,
regardless of the agreements or disagreements that prosecution and defense may have about the event.37

At the same time, there are certain ideas and concepts that exist in one procedural language and not in the other. For instance, the adversarial system includes both the concepts of “confession”—i.e., an admission of guilt before the police—and “guilty plea”—an admission of guilt before the court that, if accepted, has as its consequence the end of the phase of determination of guilt or innocence. The inquisitorial procedural structure of interpretation and meaning or “language,” on the other hand, does not include the concept of the “guilty plea”; it only includes the concept of “confession.”38

In this system, a defendant cannot end the phase of determination of guilt or innocence by admitting his guilt before the court. While the admission of guilt may be very useful to the judge in seeking the truth, the judge still has the final word on the determination of guilt and can thus say, “I believe you, but your confession alone is not proof beyond a reasonable doubt that you did it.” In any case, if an admission of guilt happens during the pre-trial phase, the case must still go to trial before the judge can make a final determination.39

It is important to emphasize that even if it is possible to analyze the adversarial and the inquisitorial structures of interpretation and meaning as abstract systems, these structures only exist within concrete criminal procedures. In other words, it is possible to identify adversarial and inquisitorial systems because the legal actors of the Anglo-American and civil law jurisdictions constantly make use of adversarial and inquisitorial structures of interpretation and meaning in conscious and unconscious ways. Taking a distinction from structuralist linguistics, I could say that while the structures of interpretation and meaning are the langue—the abstract system of differences that establishes a lexicon and a set of potential operations—the practices are the parole—the actual speech acts made possible by the langue.40

B. Individual Dispositions

Just as adversarial and inquisitorial structures of interpretation and meaning are grounded in concrete procedural practices, they are also internalized by the relevant legal actors. I call this the “dimension of individual disposi-


38. See, e.g., Myron Moskovitz, PERSPECTIVE: The O.J. Inquisition: A United States Encounter with Continental Criminal Justice, 28 Vand. J. Transnat’l L. 1121, 1153 (1995). This Article describes the differences between the adversarial and the inquisitorial systems by developing a dramatization of how a case similar to the O. J. Simpson trial might be handled by a civil law European criminal justice system.


These internal dispositions are acquired by the internalization of the procedural structures of interpretation and meaning, through a number of socialization processes (i.e., law schools, judiciary school, prosecutor’s office and law firm training, interaction with the courts, etc.). As a result of this socialization, a substantial number of actors in the criminal justice system are predisposed to understand criminal procedure and the various roles within it in a particular way, and these dispositions become durable over time.

Hence, the idea that the judge is supposed to be a passive umpire in the adversarial system is not only due to the adversarial structure of interpretation and meaning; it is also due to the phenomenon that a substantial number of legal actors have internalized this structure of meaning in a common law jurisdiction, they have come to consider this as the proper role of a judge and will usually act accordingly—i.e., censoring a judge who participates too actively in the interrogation of witnesses. In other words, to the extent that legal actors internalize these structures of meaning and then interpret and interact with reality through them, one could say that these structures of meaning constitute and shape legal actors as subjects.

The dimension of individual dispositions becomes particularly important when studying the transfer of legal ideas, norms, and institutions between adversarial and inquisitorial systems, as well as legal transplants in general. As we will see, part of the literature of the legal transplant discusses the transfer of legal ideas from the common to the civil law, or vice versa, exclusively as interactions and struggles between two abstract systems of meaning. By including this dimension of individual dispositions, I would like to emphasize that besides these interactions between two abstract systems—that again, as I conceive of them, are inscribed in concrete social practices—every legal transplant also involves interactions between concrete people with a concrete set of individual dispositions.

41. My source of inspiration for the development of this dimension of internal dispositions is sociologist Pierre Bourdieu’s concept of habitus which can be defined as "a set of dispositions which induce agents to act and react in certain ways. The dispositions generate practices, perceptions, and attitudes which are 'regular' without being consciously co-ordinated or governed by any 'rule.'" John B. Thompson, Editor’s Introduction to Pierre Bourdieu, Language and Symbolic Power 1, 12 (Gino Raymond & Matthew Adamson trans., John B. Thompson ed. 1991). Pierre Bourdieu describes his notion of habitus in other works as well. Pierre Bourdieu, Raisons Pratiques: Sur La Théorie de l’Action 22–25 (1994); Pierre Bourdieu, Some Properties of Fields, in Sociology in Question 72 (Richard Nice trans., 1993). I say that the dimension of internal dispositions is only inspired by Bourdieu’s concept, because I do not follow his theoretical framework in this paper. Thus, my use of it is idiosyncratic.

42. For a description of how lawyers, judges, prosecutors, and professors are trained and socialized in civil law countries, see, for example, John Henry Merryman, The Civil Law Tradition 101–10 (2d ed. 1985).

43. On the role of the judge in the United States during trial, see, for example, Craig M. Bradley, United States, in Criminal Procedure: A Worldwide Study 395, 421–22 (Craig M. Bradley ed., 1999).

44. For a recent analysis—in the context of the debate in the United States on “broken windows” policing—of how criminal law and criminal justice practices can shape social subjects, see Bernard E. Harcourt, Illusion of Order 160 (2001).

Moreover, this dimension is also important in understanding how procedural systems—and any other structures of interpretation and meaning—can change over time. The relationship between procedural structures of meaning and individual dispositions is one of mutual influence. Individual dispositions are influenced by structures of meaning to the extent that individual actors acquire, through a number of socialization processes, a concrete system of interpretation that, to a certain extent, "sets them up" to act and react in certain ways. But if a significant number of actors internalize a different structure of meaning (i.e., when civil law lawyers study in the United States and partly acquire an adversarial structure of meaning), this may lead them to question the predominant structure of meaning (i.e., the inquisitorial one) and attempt to incorporate practices from other systems—like plea bargaining—into their own legal systems.46

C. Procedural Powers

Finally, the adversarial and the inquisitorial differ at another level that I call the "dimension of procedural power."47 The main actors of the criminal process—judges, prosecutors, defense attorneys, defendants, police, etc.—have different quanta of procedural powers and responsibilities in each system. For example, from this perspective, the inquisitorial decision-maker, as an active investigator, has more procedural power—e.g., to act *sua sponte*—than the adversarial decision maker.48 This also means that both the prosecution and the defense in the inquisitorial system are comparatively less powerful than in the adversarial system. An example of this is the power that the defense has in the adversarial system to do its own pre-trial investigation—a power generally not present in inquisitorial systems.49 The variation of procedural powers at the level of individual actors can also be seen at the institutional level in the relationships of power between the office of the prosecution, the judiciary, the bar, the public defense office, the police, etc.50

46. On the influence that U.S. legal education may have in processes of Americanization of European legal rules and practices, see Wiegand, *Americanization*, supra note 1, at 139–40.

47. This dimension of procedural power has also been relatively overlooked by comparative criminal procedure analyses, and it is central not only to describing the differences between the adversarial and the inquisitorial systems, but also to identifying potential loci of resistance towards judicial reforms in adversarial and inquisitorial institutional settings.

48. This is clear if we compare the active judges of the inquisitorial system with the jury of the adversarial one. The inquisitorial judges are also more powerful than adversarial professional judges because of their power to decide which evidence is produced at trial and the order in which it is presented, as well as through their power to lead the interrogation of witnesses and expert witnesses. However, this last statement must be qualified. The adversarial judges have inherent powers—i.e., contempt powers—that the inquisitorial ones lack. In addition, since there is less hierarchical control over the decisions of the adversarial judges than the inquisitorial judges, the former also have more power in this respect.


50. Though elaborating on this category more extensively is not necessary for the purposes of this Article, I also include within this dimension of procedural and institutional power not only the relationship between the main permanent actors and institutions of the criminal justice system, but also the relation-
This dimension of procedural power also has a relationship of mutual influence with structures of meaning and internal dispositions. For instance, an inquisitorial structure of interpretation and meaning gives the judge broad investigatory powers while giving more limited powers to the prosecution and defense. At the same time, though, any attempt to change this structure of interpretation and meaning will usually generate a reaction by the judges who protest against being disempowered through a new procedural structure of meaning.51

This leads to a very important point. Even though I have presented the dimensions of structure of interpretation and meaning, personal dispositions, and procedural and institutional powers as analytically different, in reality, they operate jointly and tend to reinforce, though also eventually subvert, one another.

D. Other Elements of the Systems

The interactions among these three dimensions have additional implications. The adversarial and the inquisitorial procedural structures of interpretation and meaning are not only the “lenses” through which legal actors understand and operate in reality. They also constitute two normative orders that indicate, to a certain extent, how cases should be handled, what technologies should be used, how each of the actors of the system should behave, etc.

For instance, they determine to a certain degree how material and human resources are structured and managed. Examples of this are the different case-management techniques that exist in each system. In the inquisitorial system, a written dossier is the backbone of the whole process and one of its main case-management tools, from the first stage of the proceeding in which the police intervene, to the phase of appeals against the verdict.52

ships between the permanent professional actors and lay people. In the inquisitorial system, the power of lay people as decision-makers is minimal or entirely non-existent. In the adversarial system, it is much more substantial, at least in comparative terms. See, e.g., Robert A. Kagan, Adversarial Legalism 86–87 (2001).

51. The implementation of the 1998 Code of Criminal Procedure of the Province of Buenos Aires, Argentina, provides an example of this phenomenon. This code moved the responsibility of making the pre-trial investigation from judges to prosecutors. Consequently, a good number of judges resisted this reduction of their procedural powers. This resistance was manifested, for instance, in the so-called “photocopies war.” When requesting search warrants, investigating prosecutors chose to submit to judges certified copies of the written dossier that contained the investigation rather than the originals as a means of speeding up the proceedings. However, a number of judges took this as a symbolic issue about who was really in charge of the investigation. Thus, they said they would not grant any search warrants until they received the original written dossiers. These controversies spoiled several investigations and became such a serious issue that the Supreme Court of the province had to intervene. See, e.g., Rafael Saralegui, Demora judicial en San Isidro por una disputa, La Nación (Arg.), June 6, 2000, at 1, available at http://lanacion.com.ar/Archivo/Nota.asp?nota_id=19704 (last visited Nov. 25, 2003) (on file with the Harvard International Law Journal).

versely, in the adversarial system, oral and public hearings play an important role in the management of cases—even in those that are bargained.\(^{53}\) In a similar way—as we will see in more detail later—plea bargaining has been an unknown case-management tool in inquisitorial systems until recently,\(^ {54}\) but it has been allowed and widely used in Anglo-American jurisdictions.\(^ {55}\)

This does not mean, however, that the dimensions of procedural structure of meaning, internal dispositions, and procedural power, influence the distribution of human and material resources, professional ethics, the internal system of incentives, etc., in a unidirectional way. These sets of factors are mutually influential. For example, the existence of a written dossier, a case-management tool that contains all of the evidence gathered during the pre-trial phase is necessary for the trial judge to behave as an active investigator at trial.\(^ {56}\) If the written dossier did not exist because, for instance, it was suppressed through a legal reform, the trial judge could not behave in such an active way; she could not organize the trial in advance, interrogate the witnesses effectively, etc., and the parties would gain procedural powers at her expense.\(^ {57}\) Provided this reform lasted, it could produce a change in the internal dispositions of the judges, prosecutors, and defense attorney of the inquisitorial system, so that they start to behave in a different way: the judges more passively, the parties more actively, etc. This change in criminal procedure practices (the parler) would then produce a change in the inquisitorial structure of interpretation and meaning (the langue) and in the dimension of procedural power.

Taking into account these multi-directional relations between the three dimensions described and the material and human resources, case-management techniques, professional ethics, etc., will be important in analyzing why and how the adversarial and inquisitorial criminal procedures change over time, including the changes produced by the transfer of legal ideas and institutions.

53. On the preference for oral production of witness testimony in open court in the United States, see Fed. R. Crim. P. 26. On the importance of oral communication in English criminal procedure, see Damaška, supra note 24, at 61.


57. This was precisely the idea behind Article 431 of the Italian Criminal Procedure Code of 1989 that eliminated trial judges’ full access to the written dossier collected during the pre-trial phase. See Codice di procedura penale, art. 431 (2002) (Italy) [C.P.P.]. For an analysis of this reform, see Grande, supra note 32, at 243–44.
E. Points of Emphasis

Two final points deserve emphasis. First, as the adversarial and the inquisitorial categories exist within the concrete criminal procedure practices of common and civil law jurisdictions, they are constantly challenged and subjected to change. For instance, every time a particular U.S. judge actively interrogates witnesses (or allows juries to do it), there is a challenge to the adversarial structure of interpretation and meaning. Nevertheless, the fact that such challenges happen all the time does not mean that the adversarial and the inquisitorial systems do not continue to exist within these criminal procedure practices. The overarching conception of the system may still be highly predominant within these practices even as we find a number of exceptions and challenges. In this sense, I do not believe these procedural cultures—and culture in general—to be homogeneous. My empirical claim is that the adversarial and the inquisitorial procedural cultures remain highly predominant in Anglo-American and civil law jurisdictions of continental Europe and Latin America respectively, even today, at least as concerns the formal proceedings through which guilt or innocence are determined.

Second, even if the adversarial or the inquisitorial categories have been highly predominant during the formal proceedings for determining guilt or innocence, this does not mean that they are the only structures of interpretation and meaning that exist respectively in the criminal justice systems of Anglo-American and civil law jurisdictions.58 Despite the existence of these

58. Addressing this issue in detail is beyond the scope of this Article. But I would like to stress four main points. First, there are local procedural differences that cannot be reduced to these global structures of meaning. For instance, the Office of the Prosecutor is part of the Executive Power in France, of the judiciary in Italy, and an institution independent of the three traditional branches of government in Argentina. These different institutional positions have implications for what a prosecutor is understood to be in these three countries—i.e., how independent they are from the Executive Power (for an analysis of the relationship between prosecutorial independence and the institutional position of the office of the prosecutor in the Latin American context, see Philip B. Heymann, Should Latin American Prosecutors be Independent of the Executive in Prosecuting Government Abuses?, 26 U. MIAMI INTER-AM. L. REV. 535 (1995)—and these different understandings cannot be reduced to the inquisitorial and adversarial structures of meaning. (For an analysis of the consequences of these different institutional positions of prosecutors in France and Italy, see Carlo Guarnieri, Prosecution in Two Civil Law Countries: France and Italy, in COMPARING LEGAL CULTURES 183 (David Nelken ed., 1997)). Second, in every concrete jurisdiction, there are generally other structures of interpretation and meaning in criminal procedure and, more broadly, in the criminal justice system, that compete with or complement the adversarial and the inquisitorial. For example, for most of the twentieth century in the United States, the sentencing phase of the proceedings has not been structured or mainly influenced by the adversarial system, but rather by a paternalistic conception of the proceedings that considered the convicted person as a dangerous or sick person who has to be rehabilitated. (For an analysis of the sentencing phase in the United States during most of this century and how it changed with the introduction of the Federal Sentencing Guidelines, see, for example, Kate Stith & José A. Cabranes, Judging Under the Federal Sentencing Guidelines, 91 NW. U. L. REV. 1247 (1997)). Even in the phase of determination of guilt, where the adversarial system has prevailed for a long time in the United States, there are specific proceedings that are organized according to an inquisitorial structure of meaning, like the ones before the grand jury. On the inquisitorial character of the grand jury, see, for example, Abraham S. Goldstein, Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure, 26 STAN. L. REV. 1009, at 1020 (1974). For a proposal to introduce more adversarial protections in grand jury proceedings, see Peter Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction without Adjudication, 78 MICH. L. REV. 463 (1980).
other structures of interpretation and meaning that operate at the procedural, legal, and social levels, it would be a mistake to underestimate the great importance of the adversarial and inquisitorial ones. The adversarial and the inquisitorial have exerted a very substantial influence on criminal procedure practices, norms, organizational arrangements, systems of incentives, etc., in Anglo-American and civil law jurisdictions, especially during the phase of determination of guilt or innocence. Even if specific analyses have to pay attention to local particularities and to social, economic, and political influences on the criminal process, it would be a mistake not to attend to these substantial global commonalities or differences. Using a metaphor taken from modern systems theory, one could say that the Anglo-American and civil law systems respectively share the same or a similar adversarial or inquisitorial program, even if this program co-exists with other legal and social programs in each particular jurisdiction. 59 These programs have to be adequately conceptualized in order to analyze the similarities and differences between the Anglo-American and civil law jurisdictions and the circulation of legal ideas and institutions between them, as well as to discuss the subtleties of the Americanization thesis.

III. THE CONTENT OF THE DICHTOMY: ADVERSARIAL VS. INQUISITORIAL

Having explained the underpinnings of the adversarial and inquisitorial systems as theoretical categories, there are two binaries that I will use in this Part to explain the main differences between these systems. First, whereas the adversarial system conceives of criminal procedure as a dispute between prosecution and defense before a passive umpire, the inquisitorial system conceives criminal procedure as an official investigation carried out by officials of the state in order to determine the truth. Second, whereas the adversarial system’s decision-maker is a jury that divides its work with a professional judge, the inquisitorial system’s decision-maker is a professional judge or a group of professional judges who do not share their responsibility with any

Third, there are other structures of interpretation and meaning regarding not only the criminal justice system, but also the legal system as a whole. If some of these structures can be reduced to global distinctions between the common and the civil law—i.e., legal reasoning in the former is more based on analogical inferences and in the latter on deductive ones—there are other differences that cannot. For example, while some countries have a federal system, others do not, and this difference does not appear to originate in the adversarial and the inquisitorial systems. Finally, there are also other structures of interpretation and meaning (political, economic, religious, media, etc.) that exceed the legal sphere but that may affect how criminal procedure and criminal justice actors are understood. For instance, the preliminary investigation judge—juge d'instruction in Francophone countries, juez de instrucción in Latin America and Spain—is on many occasions represented in the French social imagination as the small official who “makes the truth stand out” by fighting “against the powerful, the strength of ink and law against that of money and power,” and, at the same time, is an emblematic figure of the provinces in their struggle with Paris. Garapon, supra note 37 at 497–98. This is a social representation of the preliminary investigation judge that is typically not found in other inquisitorial systems, such as Argentina.

other body. These binaries explain some of the critical differences between the adversarial system of the United States and the inquisitorial systems of Germany, Italy, Argentina, and France.

Attempting to define the adversarial and the inquisitorial systems for the purposes of comparative law is a difficult task for at least four different reasons. First, differences between the criminal procedures of the common and civil law traditions can be traced back to the thirteenth century when England and Europe developed different systems to replace the then prevailing practices that had been in place since the fall of the Western Roman Empire. These differences have evolved over time, and explaining these separate evolutions is beyond the scope of this Article.

Second, as a consequence of phenomena like colonization, civilization, and modernization, these two traditions have each expanded to include a substantial number of countries with varying individual legal rules and practices, thus complicating efforts to capture the differences and similarities between the systems as a whole.

Third, both in Anglo-American and civil law jurisdictions, the expressions “adversarial” (or “accusatorial”) and “inquisitorial” are fraught with

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60. As I explain later, professional judges may share their responsibility with lay people in mixed courts. However, even in this case, professional judges still usually retain control of the decision-making process, given that they are the professional and permanent actors. Furthermore, there is only one decision-making body composed by professional judges and lay people, instead of two—the judge and the jury—as in the adversarial system.

61. The expressions “accusatorial” and “inquisitorial” were already in use during the twelfth century in Europe “to distinguish a process that required the impetus of a private complainant to get under way (processus per accusationem) from a process that could be launched in his absence (processus per inquisitionem).” Damaška, supra note 24, at 3. The modern use of these expressions, that conceives of the accusatorial and the inquisitorial not only as two different ways of initiating procedures, but also as two comprehensive procedural systems, was likely to have developed during the nineteenth century. The first such usage of which I am aware is Faustin Hélie, 5 Traité de l’Instruction Criminelle ou Théorie du Code d’Instruction Criminelle 47–65 (1853).

62. For a description of the system of ordeals, trial by combat, and oaths prevalent in Europe prior to the thirteenth century and an explanation of why this disappeared, see Robert Bartlett, Trial by Fire and Water (1986).


64. On the expansion of the common law throughout the world, see Konrad Zweigert & Hein Kötz, INTRODUCTION TO COMPARATIVE LAW 218–37 (3d ed. 1998). For a description of how the inquisitorial system was imposed and developed in Latin America, see Maier, supra note 63, § 5(D)(8). For an analysis of these developments in a number of African, Asian and Inter-American countries, see Jean Pradel, DROIT PÉNAL COMPARÉ 186–201 (1995).

65. Abraham S. Goldstein tried to establish a distinction between the terms “adversarial”—as a way of
political and cultural connotations; for instance, the adversarial tradition is usually linked to liberal or democratic conceptions while the inquisitorial tradition is linked to authoritarian conceptions of criminal procedure.\(^{66}\) This has led to what could be described as a rhetorical struggle for the appropriation of these terms, that in turn has multiplied the terms’ different uses.\(^{67}\) In fact, as a consequence of these connotations, “adversarial” and “inquisitorial” have been central terms or “floating signifiers” through which the actors of the Anglo-American and the civil law systems have defined and differentiated their own identity, both from the identity of other traditions as well as from their own past.\(^{68}\)

Finally, even if it is possible to identify historical differences between the criminal procedures of the common and the civil law that have lasted until today, it is not always possible to reduce these differences to a common explanatory principle. For example, plea bargains and detailed rules of evi-

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66. For Argentina, see, for example, MAIER, supra note 63, § 5(H)(1)(a)–(b). For France, see, for example, Jean Pradel, Inquisitoire-Accusatoire: une redoutable complexité, 68 INT’L REV. PENAL L. 213, 215 (1997).


68. In the United States, the word “adversarial” has been used in laudatory terms in reference to U.S. criminal process, which had its earliest origins in England in the struggles for rights against the authoritarian monarchy, struggles that continued in the Colonies and that finally found their way into the Bill of Rights. In this construction of the adversarial, the inquisitorial refers to the contemporary criminal procedures of continental Europe that would still be considered authoritarian—i.e., eliciting confessions in a coercive way. For an example of this construction of the adversarial and the inquisitorial in the United States, see Miranda v. Arizona, 384 U.S. 436, 442–43, 459–60 (1966). For another use of the terms in the United States that is not presented in a laudatory way and is focused on the role of the judge in each of these systems, see, for example, McNeil v. Wisconsin, 501 U.S. 171, 181 n.2 (1991.). In continental Europe, one of the most widespread uses of the accusatorial and the inquisitorial for defining the identity of its modern criminal procedure has been the following. The accusatorial is used to refer to the modern Anglo-American criminal procedures—and the ones that prevailed in continental Europe from the fall of the Western Roman Empire until the thirteenth century—that are usually considered inefficient in law enforcement terms; the inquisitorial refers to the criminal procedures that prevailed in continental Europe from the thirteenth to the nineteenth centuries, that are usually characterized as authoritarian; and the modern continental European criminal procedures would constitute a mixed system that would combine the best of the two other systems. For an example of this use in early twentieth-century France, see RENÉ GARraud, 1 Traité Théorique et Pratique d’Instruction Criminelle et de Procédure Pénale 10–22 (1907). HÉlie uses the terms in a similar way, HÉlie, supra note 61, at 47–65. For a contemporary use of these terms in Latin America, see MAIER, supra note 63, § 5(H)(1)(a)–(c), at 443–54, though this author is very critical of the mixed system. I am not aware that anyone else has analyzed the inquisitorial and the adversarial as central terms or signifiers through which the identities of the actors of the common and the civil law traditions have been defined. Understanding these processes of defining identity could open new doors for comparative criminal procedure analyses. For instance, they may be useful in understanding why continental European and Latin American actors have been interested in adopting institutions and ideas from the Anglo-American system, rather than the other way round. For a recent analysis of legal traditions as identities, see H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD (2000).
evidence have traditionally been both associated with the Anglo-American criminal process and considered non-existent in most civil law countries. Nevertheless, the historical and analytical explanations of these two features cannot be reduced to a single source. Plea bargains seem to have their origin in a criminal procedure system understood as a dispute between parties, whereas detailed rules of evidence seem to be mainly linked to the use of a bifurcated court where one organ—the judge—decides what evidence can be introduced at trial, and another organ—the jury—decides the guilt or innocence of the defendant.

In this Article, I address such difficulties as follows. First, regarding the problem of change in the systems over time, I focus on contemporary criminal procedures of civil law systems before they introduced the specific adversarial reforms analyzed in the next Parts. Second, regarding the plurality of jurisdictions that could be included in the adversarial and inquisitorial categories, I have chosen to focus on five jurisdictions. When I refer to the adversarial system, I am referring to U.S. jurisdictions, and when I refer to the inquisitorial system, I am referring to the criminal procedures of Germany, Italy, Argentina, and France. Third, concerning the political connotations of the terms “adversarial” and “inquisitorial,” it is necessary to stress that I use them only as descriptive tools for the purposes of comparative law. Finally, rather than attempting to explain the differences between the systems through one explanatory principle, I instead identify two models within each system as the bases for comparison.

The first pair of models for comparison are the model of the dispute (a feature of the adversarial system) and the model of the official investigation (a feature of the inquisitorial system). According to the first model, the criminal proce-

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69. See, e.g., LANGBEIN, supra note 39, at 68–71.
70. Id. at 70–71. For a study of why the law of evidence in Anglo-American jurisdictions exists in its current form, and how it relates to other features of the Anglo-American system, see MIRJAN R. DAMAŠKA, EVIDENCE LAW ADrift (1997). Damaška does not believe that the existence of the jury has played as central a role as is usually thought. Id. at 26–57.
71. Given my conceptualization of the adversarial and the inquisitorial systems as procedural cultures, there is a fifth problem in giving content to both categories. As explained in Part II, these cultures are not completely homogeneous, and within the criminal procedure practices of the United States, Argentina, France, Germany and Italy, one can identify different visions about what characterizes each of these legal cultures. Thus, giving a particular content to each of these legal cultures may silence or suppress some of these alternate visions and may contribute to make prevail one vision over others. The first way to address this problem is by recognizing it as such, in other words, by being self-conscious and self-reflexive about it. In addition, I think that the adversarial and the inquisitorial systems as I define them in this Part have been overwhelmingly predominant in these five jurisdictions—at least during the phase of determination of guilt and innocence. Therefore, I will concentrate in this Article on these predominant conceptions of the adversarial and inquisitorial because they are the most useful in explaining how most legal actors in each of these jurisdictions understand criminal procedure, and thus how plea bargaining was transformed when adopted by our four civil law countries. Works focused on the dissident cultural voices in each of these jurisdictions and on the heterogeneity of the adversarial and inquisitorial cultures would be very valuable, but these are part of a different endeavor than the one undertaken in this Article.
72. The idea of the dispute and the investigation has been used for comparative law purposes for a long time. See, e.g., HÉLÈN, supra note 61, at 53.
**dure is understood as a dispute or a contest between two parties, prosecution and defense, before a passive decision-maker. The dispute centers around the prosecution’s attempt to prove beyond a reasonable doubt that the defendant committed the offense of which he or she has been accused. If the prosecution succeeds, then the prosecution wins; if it fails, the defendant wins.**

Many characteristic features of Anglo-American criminal procedure can be explained through this model. For instance, broad prosecutorial discretion fits within this model because the prosecution, as one of the parties and owners of the dispute, may not believe that there is controversy in a particular case or may decide that the controversy is not worth pursuing and is thus not obligated to pursue it. Guilty pleas fit into this model because the defense, as the other party to the dispute, may concede that the other party is correct and thus resolve the dispute; the determination of guilt or innocence ends and the case passes to the sentencing stage. If criminal procedure is seen as a dispute, then structuring the process as two competing and clashing cases also fits within this conception. Thus, in Anglo-American jurisdictions, each party to the dispute does its own separate pre-trial investigation, even if the parties must disclose part of the information they gather to the other party through discovery rules and proceedings. The trial is divided into a case for the prosecution and a case for the defense; the parties usually decide in what order the evidence will be presented; the witnesses and expert witnesses belong to the prosecution or the defense and


75. On the duty of the defense attorney in the United States to make reasonable investigations, or to make reasonable decisions that particular investigations are unnecessary, see Wiggins v. Smith, 123 S. Ct. 2527 (2003); Strickland v. Washington, 466 U.S. 668, 691 (1984).


77. On the coaching that lawyers give their witnesses in the United States, see, for example, William T. Pizzi, *Trials without Truth* 21–22 (1999). But see Fed. R. Evid. 614(a) (establishing that the court may, on its own motion, call a witness); Fed. R. Evid. 706(a) (stating that the court may also appoint expert witnesses of its own selection). These powers, however, are seldom used in criminal trials. See, e.g., United States v. Ostrer, 422 F. Supp. 93 (S.D.N.Y. 1976) (stating that although the court has discretion-
the questioning of witnesses is developed as a dispute between two parties, with direct and cross-examination, as well as redirect. Plea bargains can also be explained through the dispute model because it is natural in any dispute that the parties can negotiate a resolution.

In the model of the official investigation, which corresponds to the inquisitorial system, criminal procedure is conceptualized as an inquiry made by one or more officials of the state in order to determine whether a crime was committed and whether the defendant committed it. Numerous elements of the criminal procedure in civil law countries can be explained through the use of this model. Compulsory prosecution is necessary within this model because the proceedings are an investigation to determine the truth, and thus, the case can only be dismissed when there is no evidence that an offense has been committed or that the defendant committed it. The concept of the guilty plea does not exist in this model because, while the admission of guilt by the defendant can be a very important element of proof, it does not necessarily provide a complete version of the truth, which is for the judge to decide. Further, there are no plea bargains, not only because there are no guilty pleas but also because the truth cannot be negotiated or compromised. Finally, the whole procedure is structured and un-

ary power to call a court witness, this power is rarely invoked). For an analysis of the obstacles that judges would face in becoming more active players at trial, see Marvin E. Frankel, The Search for Truth: An Un impartial View, 123 U. Pa. L. Rev. 1031, 1041–45 (1975).

78. See, e.g., Fed. R. Evid. 611. Federal Rule of Evidence 614(b) establishes that “the court may interrogate witnesses, whether called by itself or by a party.” But this power is also infrequently used in criminal trials. See Bradley, supra note 43, at 421.

79. See, e.g., Brady, 397 U.S. 742 (approving, for the first time, the constitutionality of plea bargaining). On the history of plea bargaining in the United States, see the references at supra note 55.

80. For instance, regarding the determination of truth being the goal of criminal procedure in France, see Michèle-Laure Rassat, Traité de Procédure Pénale 297 (2001).

81. Recall that this description refers to the criminal procedures of Argentina, France, Germany, and Italy, as they were before the reforms that I will analyze in this Article. This is particularly important in the case of Italy, which changed many of these features when it moved in the direction of the model of the dispute by introducing its Criminal Procedure Code of 1989. However, even if the description refers to their pre-reform criminal procedures, most of these features are still present today in most of these civil law countries. When I cite rules, I am referring to rules that are still valid today.

82. There are differences in the way the four main civil law jurisdictions discussed in this Article regulate this issue. For jurisdictions establishing rules of compulsory prosecution, see Código Penal [Cód. Pen.] [Penal Code] art. 59.4 (Arg.) (for Argentina); Costituzione della Repubblica Italiana [Cost.] art. 112 (Italy). Germany established a rule of compulsory prosecution as the general rule, although there are exceptions through its opportunity principle. §§ 152–54a STRAFFPROZESSORDNUNG [StPO] [criminal procedure statute] (F.R.G.). In France, the prosecutor has discretion about whether to bring charges initially. Code de procédure pénale [C. pr. pén.] [Criminal procedure code] art. 40 (Fr.). But if the French prosecutor decides to bring charges, he/she cannot dismiss the charges without the acquiescence of the court. See Rassat, supra note 80, at 452–53. (I will not analyze here the powers of the victim regarding this issue). As there is no system that can possibly prosecute all criminal offenses, the rule of compulsory prosecution or limited prosecutorial discretion has been described as a myth. For a debate on this issue in the United States, see Abraham S. Goldstein and Martin Marcus, The Myth of Judicial Supervision in Three “Inquisitorial” Systems: France, Italy, and Germany, 87 YALE L.J. 240 (1977); John H. Langbein & Lloyd L. Weinreb, Continental Criminal Procedure: “Myth” and Reality, 87 YALE L.J. 1549 (1978).

83. See Moskovitz, supra note 38, at 1153. See also LANGBEIN, supra note 39, at 73–74.

84. See, e.g., Langbein, supra note 52.
derstood as a unitary investigation. Thus, there is only one pre-trial investigation, the official one; at trial, there is no case for the prosecution or the defense, only the case of the court; the court decides in what order the evidence is presented at trial; the witnesses and expert witnesses do not correspond to the parties but to the court; and the interrogations are initiated and directed by the court and not by the parties.

The relationships between the actors of the procedure in these two models could schematically be represented in the following way:

**Model of the Dispute**

- Decision-Maker (Judge or Jury)
- Prosecution
- Police
- Defendant/Defense Attorney
- Private Investigator

**Model of the Official Investigation**

- Prosecution
- Police
- Judge (Decision-maker and investigator)
- Defendant/Defense Attorney

In the model of the dispute, the prosecution and the defense are at the same level, both in the sense that they have relatively equal procedural powers and that they both are understood as parties that have an interest at stake.

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85. Regarding France, see, for example, Dervieux, *supra* note 49, at 250.
86. *See id.*
87. *See, e.g.*, Código Procesal Penal de la Nación [CÓD. PROC. PEN. (Criminal Procedure Code)] art. 356 (Arg.). Regarding Germany, see §§ 155 Nr. 2, 244 Nr. 2 StPO (F.R.G.). *See also ROXIN, supra* note 66, § 15, at 95.
88. France is an exception because, during trial, the witnesses belong to the parties. *See, e.g.*, RASSAT, *supra* note 80, at 405–06. However, the witnesses cannot be coached, and it is still the presiding judge who questions witnesses acting *sua sponte* or on the request of the parties. *See C. PR. PÉN. arts. 312, 332, 454, 536 (Fr.). From January 1, 2001, questions can also be put to the witnesses directly by the party. *See Dervieux, supra* note 49, at 258–59.
89. Regarding Argentina, see Código Procesal Penal [CÓD. PROC. PEN.] art. 389 (Arg.). Regarding Germany, see §§ 238 Nr. 1, 240 StPO (F.R.G.). Section 239 of StPO states that interrogatories at trial shall be developed through direct and cross-examination if the prosecution and the defense request it. However, this is rarely applied. *See ROXIN, supra* note 66, § 42, at 343.
90. Depending on the civil law jurisdiction, the police may work under the supervision of the prosecutor or the judge—generally depending on who is in charge of the pre-trial investigation, or both.
in the case. Each of them has its own investigator—the police in the case of the prosecution, a private investigator in the case of the defense. The decision-maker is above them but can only make decisions about the case so long as both parties believe there is a dispute.

There is also a prosecutor in the model of the official investigation. He or she is not seen as a party but rather as another official or magistrate of the state whose role is to determine the truth. There is a sort of division of labor between the prosecutor and the judge: the first requests the investigation of facts, production of evidence, and the application of the law, while the second investigates, produces the evidence, and applies the law. But both are essentially the same: impartial officials of the state whose role is to investigate the truth. In the schematic provided, the defendant is represented below the judge and the prosecutor not because she does not have rights, but rather because she has an interest at stake in the resolution of the case, and because she is not only a subject of rights but also a target of investigation. There is no private investigator for the defense because there is only one official investigation, conducted by the judge, the prosecutor, and the police. If the defense wants certain evidence to be produced, it must request this evidence from the prosecutor or the judge.

The second pair of models that I employ to capture the differences between the criminal procedures of the common and the civil law are what
Professor Damaška calls the coordinate and hierarchical models. According to Professor Damaška, in the coordinate model, authority is exercised by lay decision-makers in relatively horizontal relationships of power amongst themselves who apply community standards in their decisions. In the hierarchical model, authority is exercised by professional legal decision-makers whose relationships are hierarchal and who apply technical standards in their decisions.

I employ these models in slightly modified forms. In the coordinate model, a feature of the adversarial process, I include lay participation through the jury, less hierarchical control, a preference for oral production of the evidence at trials, a bifurcated court composed of a lay organ (the jury) and a professional one (the judge), the absence of a mandatory justification of the verdict, and detailed rules of evidence that filter the elements of proof allowed at trial and that guide the evaluation of the evidence that is finally introduced.

In the hierarchical model—part of the inquisitorial process—I include professional decision-makers, greater hierarchical control, an acceptance of the elements of proof gathered during the pre-trial investigation and

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96. See Damaška, supra note 24, at 16–71.
97. See id. at 17.
98. See id.
100. See id. at 17.
101. See id.
102. See id.
103. See, e.g., U.S. Const. amend. VI; Duncan v. Louisiana, 391 U.S. 145 (1968).
105. See, e.g., Fed. R. Evid.
106. The province of Cordoba in Argentina, France, Germany, and Italy have mixed courts—comprised of professional and lay judges—to try the most serious criminal cases. But in these mixed courts, the professional judges are still the most influential decision-makers given their legal knowledge and experience, and because professional and lay judges deliberate together. For an analysis of mixed courts, see John H. Langbein, Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?, 1981 Am. B. Found. Res. J. 195 (1981). A substantial number of the inquisitorial systems of continental Europe tried to import the jury during the nineteenth century. The precursor was France, who set up the jury twice, in 1791 and 1808. Other countries, like Germany, followed its example. Nevertheless, today most inquisitorial systems have replaced the jury with mixed courts or do not have any kind of lay participation in the criminal justice system. (As I will mention later, two exceptions are Russia and Spain, who introduced the jury into their respective systems in 1995 and 1995.) For accounts of the introduction of the jury by France and Germany during the nineteenth century, see the articles included in The Trial by Jury in England, France, Germany 1700–1900 (Antonio Pado Schioppa ed., 1987). For an explanation of why France and Germany finally rejected this institution and adopted mixed courts, see Otto Kahn-Freund, On Uses and Misuses of Comparative Law, in SELECTED WRITINGS 294, 310 (1978). For an analysis of the turn against the jury court on the part of liberal and conservative legal actors alike after about 1900, see Benjamin C. Hett, Death in Tiergarten and Other Stories: Murder and Criminal Justice in Berlin, 1891–1935, 543–45 (2001) (unpublished Ph.D. dissertation, Harvard University) (on file with the Harvard International Law Journal). For an analysis of the history of the jury in Germany and its link to contemporary debates on political philosophy, see Markus Dirk Dubber, The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology, 45 AM. J. COMP. L. 227 (1995).
107. See, e.g., LANGBEIN, supra note 39, at 84–85.
documented in a written dossier, a unitary court that decides what evidence is admitted at trial and determines the verdict and sentence, the written justification of that verdict, and few rules of evidence to filter what elements of proof are introduced at trial and how they must be evaluated.

This description of the hierarchical and the coordinate models is, obviously, short and schematic. Nevertheless, a more detailed description of both categories is not necessary because I make limited use of them in this Article. As will be clear later, the central categories to analyze the transfer of plea bargaining from the adversarial to the inquisitorial system will be the models of the dispute and of the official investigation.

IV. Recent Reforms in the Inquisitorial System and the Americanization Thesis

If the Americanization thesis is to hold any weight, even in its weak form, some elaboration of the influence of the adversarial system on civil law systems is necessary. This Part describes such influences in the realm of criminal procedure. In the last three decades, and depending on the region and jurisdiction, a significant number of civil law countries introduced adversarial reforms into their inquisitorial criminal procedures, which go both in the direction of the dispute model and the direction of the coordinate model.
In moving toward the model of the dispute, a substantial number of continental European and Latin American countries have tried to make the judge a more passive actor by increasingly relying on the prosecution and the defense for fact-finding and conducting proceedings. For instance, a significant number of countries have eliminated the preliminary investigation judge—a symbol of the inquisitorial process—and have attempted to replace this figure with a pre-trial investigation developed by the prosecution and, in some cases, by the defense. During the pre-trial phase, the role of the judge is now largely limited to decisions about issuing search-and-seizure warrants, arrests, and pre-trial detentions and bails, much like the Anglo-American model. Germany (1975), Italy (1989), Guatemala (1994), the provinces of Buenos Aires and Cordoba in Argentina (1998), Costa Rica (1998), Venezuela (1999), and Chile (2000–2003), among others, have moved in this direction.

Moreover, a number of jurisdictions have also altered the relative roles of the prosecution and defense during trial. For example, Italy has introduced direct and cross-examination into its trial proceedings and has allowed both the prosecution and defense to call witnesses. Italy has also structured its trials by dividing them into a case for the prosecution and a case for


112. This figure is known as the *Juge d'Instruction* in France, the *Untersuchungsrichter* in Germany, the *Giudice Istruttore* in Italy, and the *Juez de Instrucción* in Latin America.

113. For instance, Costa Rica has put the prosecutor in charge of the pre-trial investigation. See *Código Procesal Penal de Costa Rica* [Cód. Proc. Pen.] [Code of Criminal Procedure] arts. 290–91 (Costa Rica). However, the defense is not supposed to do its own pre-trial investigation; if the defense wants that certain elements of proof be gathered during the pre-trial phase, it has to request this gathering from the prosecution. See *Cód. Proc. Pen.* art. 292 (Costa Rica). But in the new Italian criminal procedure in which the prosecution is in charge of the pre-trial investigation, the defense can gather its own elements of proof during the pre-trial phase. See infra notes 164 and 225.

114. See *Rokin, supra* note 66, § 72, at 533.


121. *C.P.P.* art. 498 (Italy).

122. *Id.*
the defense, as in the U.S. adversarial system. Civil law countries have also begun to eliminate or soften the rule of compulsory prosecution, another characteristic feature of the inquisitorial system; examples include Guatemala (1994), Costa Rica (1998) and Chile (2000–2003).

Important to this study, a number of countries have introduced consensual mechanisms inspired by plea bargaining, including Germany (during the 1970s), Italy (1989), Guatemala (1994), Argentina (1998), Costa Rica (1998), and France (1998). There have also been significant moves toward the coordinate ideal. A number of countries have introduced the jury into their criminal process, such as Russia (1993) and Spain (1995). A substantial number of civil law jurisdictions have also tried to introduce more oral case-management techniques from the coordinate model and to reduce the traditional importance of the written dossier in their inquisitorial systems. Examples of these jurisdictions include Italy (1989), Argentina (federal system, 1992), Guatemala (1994), the province of Buenos Aires in Argentina (1998), Paraguay (1999), Venezuela (1999), and Chile (2000–2003).

Both with respect to the model of the dispute and the coordinate model, recent reforms in civil law jurisdictions seem to confirm the weak version of the Americanization thesis in criminal procedure. However, they do not necessarily confirm the strong version of the Americanization thesis, which posits that the legal practices and cultures of the influenced jurisdictions will eventually resemble or imitate their American counterparts. A rigorous assessment of the strong thesis requires more detailed study of how legal ideas, rules and institutions travel or circulate among legal systems as well as the kinds of transformations that occur during this process. In other words, be-

123. Id. arts. 493, 498.
127. For an analysis of this mechanism in Guatemala, see Alberto Bovino, Temas de Derecho Procesal Penal Guatemalteco 141–64 (1996).
132. See, e.g., Guariglia & Bertoni, supra note 117, at 64–65.
133. See Ramírez García & Urbina, supra note 116, at 80–81.
135. See, e.g., Brown Cellino, supra note 119, at 806–07.
136. See, e.g., Riego, Chile, in Las Reformas, supra note 116, at 167, 179.
sides studying and identifying the influences of the Anglo-American system, it is necessary to understand how these influences have been translated and what kinds of interactions have occurred between these reforms and the pre-existing practices of the receiving criminal justice systems.

V. THE CIRCULATION OF LEGAL IDEAS: FROM LEGAL TRANSPLANTS TO LEGAL TRANSLATIONS

Until now, the metaphor of the legal transplant—popularized by Alan Watson—has been the dominant metaphor in analyzing the circulation of legal institutions among legal systems. Through numerous books and articles, Watson has shown that the transfer, borrowing, and imposition of legal rules have been common since time immemorial, and he has used the metaphor of the transplant to explain such occurrences. The success of Watson’s proposal is attributable to a number of causes, and multiple commentators in very diverse fields of law have adopted it. Nonetheless, in this Part, I challenge the metaphor’s adequacy in discussing the circulation of legal institutions and instead propose the model of the legal translation as a new heuristic device for approaching these issues.

There are a number of reasons for the success of the transplant metaphor. First, the substantial increase in the circulation of legal ideas and institutions because of globalization, has created a need for and interest in ways of conceptualizing this phenomenon; the transplant metaphor’s popularity is...
due, in part, to the necessity of filling the gap between theory and practice. Second, the transplant metaphor is powerful because of its inherently comparative nature: the transplant, as a medical or botanical metaphor, supposes an original body or environment and a receiving one. Thus, the metaphor allows for the comparison between both the original and receiving legal systems as well as comparison between the original and transplanted legal rules, ideas or institutions. This can be a particularly interesting approach to comparative law and a useful way to analyze the phenomena of cultural legal influences—like Americanization—and other theses concerning the trend of legal globalization (such as the convergence thesis). Finally, the idea of the transplant is also powerful because, as a medical and botanical metaphor, it includes the transferred legal rule’s necessity for adjustment to the new organism or environment—the practices of an existing legal system—and, at the same time, the possibility of rejection by the receiving organism or environment—the receiving legal system.

Nevertheless, the metaphor of the legal transplant presents several shortcomings. It fails to account for the possibility that, in many cases, legal concepts and practices are transferred on some conceptual levels but not others. For example, constitutional review is an idea and an institutional mechanism that was “transplanted” from the United States to continental Europe. However, the system of constitutional review in continental Europe presents substantial differences from the American version: (a) whereas in the United States every court can hold certain statutes or state practices to be unconstitutional, in continental Europe, generally only one centralized constitutional court can do it; (b) while in the United States the courts that serve the constitutional judicial review function are part of the judiciary, in continental Europe this is not always the case.

The metaphor of the transplant is not flexible enough to capture these subtleties and conveys the misleading notion that the same concepts and practices of “constitutional review,” exist in both the United States and continental Europe. A kidney or an elm will look essentially alike in its original and receiving body or environment, but this frequently does not happen.


142. Not surprisingly, the most interesting debate on legal transplants during the 1970s was about the potential rejection of transplanted legal rules or ideas. Compare Otto Kahn-Freund, On Uses and Misuses of Comparative Law, in SELECTED WRITINGS 294, 310 (1978), with Alan Watson, Legal Transplants and Law Reform, 92 LAW Q. REV. 79 (1976).

143. See Blankenburg, supra note 16.

144. For an analysis of the French Constitutional Council, see, for example, Doris Marie Provine, Courts in the Political Process in France, in COURTS, LAW, AND POLITICS 177, 190–93.
with legal institutions and ideas, which are imitated at certain conceptual levels but not at others.

Another problem with the metaphor of the transplant is that even when the reformers try to imitate a legal idea or practice as closely as possible, this new legal idea may still be transformed by the structure(s) of meaning, individual dispositions, institutional and power arrangements, systems of incentives, etc., present within the receiving legal system.\textsuperscript{145} For instance, as discussed before, Italian reformers tried to import an adversarial trial by introducing the principle that evidence produced at trial has to be requested by the parties before its production can be ordered by the judge.\textsuperscript{146} However, the criminal procedure code also provided an exception to this principle, allowing the trial court, if absolutely necessary, to order, even \textit{sua sponte}, the production of new evidence.\textsuperscript{147} While this exception is not unusual in U.S. rules of procedure,\textsuperscript{148} it is rarely exercised by American judges.\textsuperscript{149} Yet in Italy, because a substantial number of legal actors are accustomed to the inquisitorial model (and thus possess a predominantly inquisitorial set of internal dispositions) this exception has been interpreted as giving the court large scope to order new evidence.\textsuperscript{150} The result seems to be a trial that is sometimes interpreted through the model of the dispute—as was originally envisioned by the reformers—but is as often interpreted and understood through the model of the official investigation.\textsuperscript{151}

Given the theoretical framework developed in Part II, this transformation is not surprising in a country such as Italy, where the inquisitorial system was clearly predominant as a structure of interpretation of meaning, in the individual dispositions of most legal actors, and in the distribution of procedural powers. However, the point I want to emphasize here is that the metaphor of the transplant seems to be, again, too rigid to capture the transformations to which the U.S. trial has been subjected in Italy as a consequence

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\textsuperscript{145} This is why Pierre Legrand has pointed out that legal transplants are impossible. The meaning of a legal rule is not determined—or not only determined—by the words that express that rule, but by the rest of the context of meaning—i.e., the legal system—in which this rule is situated. Therefore, every time that words which express a legal rule are transferred from legal system A to legal system B, the meaning of these words will change because there are no two legal systems exactly alike in regard to contexts of meaning. The transformation of the transferred rule—and thus the impossibility of the legal transplant—will be even greater when moving from a common to a civil law system or vice versa, given the traditionally deep differences between both kinds of legal systems. See Pierre Legrand, \textit{The Impossibility of Legal Transplants}, \textit{4 Maastricht J. Eur. \\& Comp. L.} 111 (1997).
\textsuperscript{146} C.C.P. arts. 190.1, 493.1 & 495.1. (2002) (Italy).
\textsuperscript{147} C.C.P. art. 507. (2002) (Italy).
\textsuperscript{148} See, e.g., Fed. R. Evid. 614(a).
\textsuperscript{149} See United States v. Ostrer, 422 F. Supp. 93 (S.D.N.Y. 1976) (stating that although the court has discretionary power to call a court witness, this power is rarely invoked).
\textsuperscript{151} See Grande, supra note 32, at 246–47.
\end{flushleft}
of its interactions with pre-existing, predominantly inquisitorial, criminal justice practices.

A third problem with the metaphor of the transplant is that the transference of legal rules, ideas and practices, may produce a deep transformation not only in the transferred practice itself but also in the receiving legal system as a whole. For instance, in the previous example, not only has the imported U.S. trial been transformed in its new Italian context, but it has also introduced some elements of the dispute into the Italian system. If these elements are incorporated into the internal dispositions of judges, prosecutors, and defense attorneys, this may produce changes in a system where the inquisitorial structure of meaning has been clearly predominant; this may, in turn, redefine the way power is distributed among legal actors. The metaphor of the transplant does not seem to be flexible enough to capture this phenomenon either.152 Even if a human body has to adjust itself to a new organ, it will still remain essentially unchanged. The changes produced in a legal system by the transference of legal rules, ideas, and institutions, however, may go much deeper than that.

As a consequence of the legal transplant metaphor’s limitations, Günther Teubner has proposed the expression “legal irritant” to capture this phenomenon.153 The legal irritant metaphor clearly avoids most of the problems associated with the transplant metaphor. Particularly, it is able to convey the idea that the transfer of the legal rule or doctrine may prompt a series of transformations in the receiving legal and social systems. Nevertheless, the legal irritant metaphor presents important shortcomings, the foremost of which is that it loses the comparative dimension that has made the metaphor of the transplant so powerful. An irritant does not necessarily come from another (legal) system or from outside the system it irritates. Thus, the comparative dimension of the metaphor is lost regarding both between the original and receiving legal systems and between the original idea or practice and the transferred one.

Given the limitations of both the transplant and irritant metaphors, I propose the metaphor of the translation as a superior heuristic device to analyze the circulation of legal ideas, rules, practices, and institutions.154

152. Understood in botanic terms, the metaphor of the transplant may be more able to answer this particular critique. The transplantation of a certain species from environment A to environment B can produce deep changes in the latter.
153. Teubner, supra note 45.
The metaphor of the translation retains the comparative dimension that has made the metaphor of the transplant so powerful and that the legal irritant metaphor lacks. With respect to legal systems, the translation metaphor distinguishes the source language or legal system—where the legal idea or institution comes from—from the target one—into which the legal idea or institution is translated.155 The translation metaphor also allows a distinction to be made between the original "text"—the legal idea or institution as developed in the source legal system—and the translated text.

In drawing our attention to the differences between the original and translated text, the metaphor of the translation also distinguishes the transformations the legal idea may undergo when initially transferred from the source to the target legal system.156 The first set of transformations finds its origin in the skills and decisions of the translators, i.e., legal reformers.157 The theory and history of translation have presented three main approaches to translation: (1) strict literalism, a "word-by-word matching" between the original and the translated texts; (2) "faithful but autonomous restatement," where the translator still tries to be faithful to the original but composes, at the same time, a text that is equally powerful in the target language; and (3) substantial recreation, variations, etc., where the idea of fidelity to the original is weakened or directly disappears, and the focus is to create a text that is powerful or appealing in the target language.158 Taking the examples examined in this Part, the translation from the United States to Italy of the principle that evidence is produced at trial at the request of the parties, instead of by order of the judge sua sponte, falls between the first and the sec-
The translation of the American practice of constitutional review to the continental European context is closer to the third.

The second set of initial text transformations may have its origin in differences between the source and target languages—the source and the target structures of interpretation and meaning. For instance, the word "derecho" in Spanish means both "right" and "law" in English. Therefore, if we want to translate it from Spanish to English, something will probably be lost along the way in choosing only one of the word’s two meanings.\footnote{161}

Moreover, the metaphor of the translation also captures the transformations that the legal idea or practice may undergo in its exchanges with the target legal system after its initial translation. These transformations may include the total neutralization of the translated "text"—the legal rule or practice—by either ostracism (disuse or desuetude)\footnote{162} or censorship (i.e., stating that the practice is unconstitutional).\footnote{163} In addition, these transformations may also include a struggle between different actors and groups within the target legal system over the meaning of the translated institution.\footnote{164}

Finally, the metaphor of the translation is also apt to describe the transformation that the receiving linguistic and social practices may undergo un-

\footnote{160. Id. at 266 ("The dividing lines between the three types are necessarily blurred."). However, the distinction between the three types can still be useful to analyze processes of translation.}

\footnote{161. For analyses of the obstacles that the differences between languages present for translations, see, for example, Roman Jakobson, On Linguistic Aspects of Translation, in Theories of Translation 144, 146–51 (Rainer Schulte & John Biguenet eds., 1992). The idea of untranslatability of texts finds its origin in these obstacles because it assumes that these differences between languages make translations impossible. However, most translation studies today reject this idea of untranslatability. See e.g., Hugo Friedrich, On the Art of Translation, in Theories of Translation, supra, at 11, 14–15.}

\footnote{162. An example of this case of neutralization is the German StPO section 239, which states interrogatories at trial shall be developed through direct and cross-examination at the request of the prosecution and the defense, a rule translated from the Anglo-American adversarial system. However, this rule is rarely applied since, according to Roxin, it does not fit within the structure of German criminal procedure because it takes away the managing of the trial from the presiding judge. See ROXIN, supra note 66, § 42, at 343.}

\footnote{163. An example of this is the 1989 “translation” of American rules of evidence into Italian criminal procedure, like hearsay, which allowed the in-trial use of depositions collected during the pre-trial phase only for impeachment purposes. The Italian Constitutional Court, in its decision 255/1992, held unconstitutional art. 500.3 that had introduced such a limitation. Corte cost., 18 mag. 1992, n.255, 104 Racc. uff. corte cost. 1992, 7 [hereinafter Decision 255/1992]. For a more detailed analysis of this issue, see infra note 223.}

\footnote{164. For instance, the American practice of the defense team making its own pre-trial investigation was translated to the Italian practices in 1989. D.L.vo 28 lug. 1989, n.271, art. 38, Raccolta Ufficiale degli Atti Normativi della Repubblica Italiana [Racc. Uff.] 1989, vol. 8, 3772, 3780, published in Gazzetta Ufficiale della Repubblica Italiana [Gazz. Uff.] 5 ago. 1989, n.182 [hereinafter Law 271/1989]. Since these practices went against the inquisitorial structure of meaning and internal dispositions of a substantial number of legal actors, these actors interpreted that the elements of proof collected by the defense attorney had less probative value than the ones collected by the prosecutor. Conversely, the supporters of the adversarial reform maintained that the elements of proof collected by the defense had the same probative value as those collected by the prosecutor. The latter finally imposed their interpretation of the translated practice with the enactment of articles 391-bis-ducies of the C.P.P. in D.L.vo 7 dic. 2000, n.397, published in Gazz. Uff. 3 gen. 2001, n.2 [hereinafter Law 397/2000].}
Consider the influence that the translation of texts by such thinkers as Beccaria, Montesquieu, and Voltaire into English had, not only on political vocabulary, but also on the political thought of Revolutionary America. Similarly, the translation into French of Blackstone’s *Commentaries on the Laws of England* (1765) had an impact not only on the French legal vocabulary but also resulted in the positive estimation of the English system by a number of French actors, which culminated in the importation of the trial by jury two years after the French Revolution. The translation of legal ideas and institutions between legal systems can also have an impact not only on the vocabulary but also on the real practices of the receiving system—i.e., moving formerly inquisitorial practices in the direction of the adversarial system.

**VI. Plea Bargaining as a Trojan Horse of the Adversarial System**

American plea bargaining is a procedural mechanism through which the prosecution and defense can reach an agreement for the disposition of a case, subject to the approval of the court. The agreement may present itself in several forms, but it usually consists of the defendant pleading guilty to an offense or a number of offenses. In exchange, the prosecutor drops other charges, accepts that the defendant pleads guilty to a lesser offense, or requests that—or does not object if—the defendant receives a certain sentence.

The importation of plea bargaining exemplifies the translation of a legal practice that could potentially Americanize inquisitorial jurisdictions. There are few mechanisms or institutions more characteristic of the U.S. adversarial system and, more specifically, of the model of the dispute. By definition,
American plea bargaining, assumes an adversarial conception of criminal procedure as a dispute between two parties facing a passive decision-maker. It makes sense in a dispute model that the parties be allowed to reach an agreement over a plea bargain. That is, the parties may negotiate in order to reach such an agreement, and if the parties agree that the dispute is over, the decision-maker should not have any power (or only a relatively minor and formal power) to reject this decision.\textsuperscript{171}

Furthermore, features from the model of the dispute are conditions that enable the possibility of developing plea bargaining. For example, the guilty plea, which enables the defendant to end the determination of guilt or innocence, has provided the defense with a bargaining tool in its negotiations with the prosecution. In addition, the fact that the judge, as a passive decision-maker, usually accepts the agreement reached by the parties (the real owners of the process) also provides an incentive for the development of such practices.\textsuperscript{172} Given the usual deference of the judge toward the requests of the parties, the defendant can be relatively certain that the bargain struck with the prosecutor will be fulfilled, even in those situations in which the judge may not be limited by the requests of the parties, as with certain sentencing bargains.\textsuperscript{173} In addition, because the prosecutor has the power to drop charges or lessen a charge, the broad prosecutorial discretion found in the model of the dispute provides the prosecutor with powerful and flexible tools to negotiate with the defense toward a guilty plea.\textsuperscript{174}

Conversely, there are few practices that are more incompatible with the inquisitorial system and the model of the official investigation than plea

\textsuperscript{171} In the U.S. federal system, the court must advise the defendant about the waiver of rights, check the voluntariness of the guilty plea, and determine whether there is a factual basis for it. See generally Fed. R. Crim. P. 11. However, courts usually defer to agreements reached by the parties.

\textsuperscript{172} Conversely, an extended practice of plea bargaining between the parties also reinforces the conception of the judge as a passive umpire.

\textsuperscript{173} See, e.g., Fed. R. Crim. P. 11(c), that includes two kinds of sentencing recommendations that the prosecutor can make: the first does not bind the court at all while the second binds the court only after it has accepted the plea agreement. For a proposal to allow the prosecutor to set the maximum sentence, see Scott & Stuntz, supra note 170, at 1955–57.

\textsuperscript{174} Commentators have identified this link between prosecutorial discretion and plea bargains. See, e.g., Tracey L. Meares, Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 Fordham L. Rev. 851, 862–73 (1995).
bargaining. First, the very concept of the guilty plea does not exist in the inquisitorial system.\textsuperscript{175} Second, there are no two parties who negotiate and bargain, as in the adversarial system, and who could reach a compromise not only about their respective claims but also about the facts of the case. In the model of the official investigation, the prosecutor is not a party to the case but rather another official, who, like the judge, has to determine what has happened.\textsuperscript{176} In this model, the “real” truth has to be determined by the prosecutor; it cannot be negotiated and compromised. In any case, the judge has the final word on the investigation’s conclusions. Furthermore, the very act of negotiating with the defendant has traditionally been considered improper conduct by these officials. In negotiations and bargains, the parties have to recognize each other as equals, at least on a certain level. But in the model of the official investigation, the prosecutor, the judge, and the defendant are not equals because the latter has an interest at stake in the process that the former do not.

Moreover, most of the conditions required for the potential development of plea bargaining do not exist in the inquisitorial system. Not only does the concept of the guilty plea not exist in that system, but the prosecutor also has more limited discretion to decide what cases and charges she wants to move forward, as symbolized and regulated by the rule of compulsory prosecution.\textsuperscript{177} Furthermore, judges do not usually feel constrained by requests the parties may make regarding sentencing.

Nevertheless, despite this apparent incompatibility between plea bargaining and the model of the official investigation, a substantial number of civil law countries have recently shown an interest in translating this mechanism into their procedures. The reasons vary from jurisdiction to jurisdiction, but one common reason has been increasing crime rates in most of these countries in recent years.\textsuperscript{178} This situation has produced an increasing burden on their criminal procedures, requiring them to handle more criminal cases in less time than before.\textsuperscript{179} Obtaining a defendant’s consent, therefore, through negotiations or the offering of benefits, could render unnecessary, or provide a justification to simplify or directly avoid, the regular inquisitorial criminal proceedings. Understood within this context, the intro-

\textsuperscript{175}. See Langbein, supra note 39, at 73–74; Moskovitz, supra note 58, at 1153.
\textsuperscript{176}. See Weigend, supra note 35, at 1233–34.
\textsuperscript{177}. See supra note 82.
\textsuperscript{178}. For an analysis of other reasons that continental European jurisdictions have translated plea bargains to accommodate their procedures, see, for example, Françoise Tulkens, Negotiated Justice, in EUROPEAN CRIMINAL PROCEDURES, supra note 49, at 645–49.
\textsuperscript{179}. Regarding Argentina, see infra note 284. In France, the project that introduced French “plea bargaining” was aimed at strengthening the efficiency of the criminal procedure. See Jean Cedras, L’hypothèse de l’aménaçanisation du droit pénal français, 45 ARCHIVES DE PHILOSOPHIE DU DROIT 149, 156 (2001). Regarding Germany, see infra note 184 and accompanying text. Concerning Italy, see, for example, Paolo Ferrua, La Giustizia Negoziata nella Crisi della Funzione Cognitiva del Processo Penale, 3 STUDI SUL PROCESO PENALE 131, 134 (1997).
duction of consensual negotiating mechanisms has been seen as a way of making the rigid inquisitorial systems more flexible.

The introduction of plea bargaining in continental Europe and Latin America is particularly relevant to an analysis of the Americanization thesis. The very fact that U.S. plea bargaining has become such an important point of reference in recent reforms in the civil law world supports the weak version of this thesis. One could also think, though, that the spread of plea bargaining would also support the thesis’s strong version. United States plea bargaining assumes an adversarial conception of the criminal process. If civil law countries translated this mechanism faithfully and did not reject it afterwards, the effect of this import could be that the prosecution and the defense would begin to think of themselves as parties in a dispute and be perceived by the other legal actors as such, and something similar would develop with the judge as a passive umpire. If this happened, it would alter the internal dispositions of legal actors and would produce a change or at least a serious challenge to the substructure of meaning of the official investigation by the substructure of the dispute. This could produce, then, a change in the classic relations of power from one structure to the other, as well as changes in the organization of human and material resources, including case-management techniques, among other elements.

In other words, one could think about plea bargaining as a Trojan horse that can potentially bring, concealed within it, the logic of the adversarial system to the inquisitorial one. If this happened, then the Americanization thesis would be valid even in its strong version because inquisitorial systems that translate plea bargaining would gradually become “Americanized” by adopting an adversarial conception of criminal procedure.

The following Parts analyze four specific plea bargaining translations that demonstrate the complex effects of plea bargaining’s circulation among civil law jurisdictions. These Parts support the notion that Americanization is not taking place in all the jurisdictions that have developed mechanisms inspired by plea bargaining in recent years, even if it may be happening in some of them. The four examples analyzed are the so-called Absprachen in Germany, the patteggiamento in Italy, the procedimiento abreviado in Argentina, and the composition in France. These four mechanisms either have been explicitly labeled as “plea bargaining” or have been considered close to it in each of these four countries and, in some cases, in the United States.180

Analysis of each of these translations is divided into two main parts. The first part analyzes the similarities and differences between U.S. plea bargaining and the Absprachen, patteggiamento, procedimiento abreviado, and composition.

180. Regarding the Absprachen, see, for example, Herrmann, Bargaining Justice, infra note 183; Schünemann, Die Absprachen im Strafverfahren, infra note 186, at 527. Regarding the patteggiamento, see, for example, Ferrajoli, supra note 56. Regarding the procedimiento abreviado, see, for example, Gabriel Ignacio Anitua, El juicio abreviado como una de las reformas penales de inspiración estadounidense que posibilitan la expansión punitiva, in El Procedimiento Abreviado, supra note 23, at 137, 144 (Julio B. J. Maier & Alberto Bovino eds., 2001). Regarding the composition, see, for example, Merle & Vitu, supra note 109, at 396.
sition. The second part analyzes the kinds of transformations these translations may produce in the German, Italian, Argentine, and French criminal procedures. The central question in this part is whether these inquisitorial procedures are keeping their traditional model of the investigation, whether they are moving in the direction of the American model of the dispute, or whether they are moving in a direction different from either one of these two. This study will enable us to examine what changes these reforms may be producing in the criminal procedures of the civil law tradition.

VII. GERMAN “Plea Bargaining”

As one of the jurisdictions where the model of the official investigation prevailed, the German system did not lend itself to the possibility of bargaining with the defendant.181 In fact, at the end of the 1970s, one of the most distinguished American comparativists referred to Germany as a “land without plea bargaining.”182 Nevertheless, during the 1970s, judges, prosecutors and defense attorneys of the German criminal justice system began developing bargains, or Absprachen, on the quiet before and during trial.183 Influencing this development was the increasing number of criminal cases and the difficulties and length of criminal trials for economic, environmental, and drug offenses.184 In this sense, the practice seems to have arisen as a response to practical needs, rather than as a product of deep cultural influences of the American system over the German one. The practice was kept quiet until 1982, when the first article on the subject was published under a pseudonym, indicating that this was a delicate practice to discuss, given that it went against the basic assumptions of the German criminal procedure.185 Since then, a lively debate has ensued, in which important commentators have criticized and opposed the practice while courts have generally upheld it, though imposing certain limits to the practice.186
Although the form and content of German negotiations and agreements vary, the basic idea is the following: during trial preparation or during trial, the defendant may make an offer to confess at trial, in exchange for a guarantee by the judge that the sentence will not exceed a certain limit or that a number of charges will be dismissed by the prosecutor. These bargains may be initiated by the defense, the judge, or the prosecutor. Not all of the actors must participate in the bargaining, so they may develop between the trial judge and the defense. However, all of the actors in the case must be informed of any bargains in open court. Furthermore, the agreements require cooperation and mutual trust between the judge, the prosecution and the defense.

As is clear from this description, the transformations that U.S. plea bargaining underwent when translated into German criminal procedure are substantial. First, German bargains or Absprachen are not about guilty pleas but about confessions. Therefore, by making it easier to prove the indicted facts through a confession, the agreement generally shortens the trial but does not replace the trial altogether. Second, since the defense has full access to the written dossier that contains the pre-trial investigation—there is full discovery from the prosecution to the defense in the German system—the defense has better knowledge of the case than its U.S. counterpart during the negotiations. Third, the presiding trial judge is usually an ac-
tive participant in these bargains and agreements. The two main actors negotiating in the German system are not usually the prosecutor and the defense as in the U.S. model, but rather the presiding trial judge and the defense.194

These substantial differences between U.S. plea bargaining and the German *Absprachen* reveal the inadequacy of the “legal transplant metaphor” in capturing this phenomenon of legal influences. It is misleading to state that U.S. plea bargaining has been transplanted to Germany because this statement conveys the false notion that the same legal mechanism exists in both countries. Conversely, the translation metaphor accounts for the possibility that substantial differences can develop between the original and the translated legal practice. Through the metaphor of translation, the differences between U.S. and German “plea bargains” can be explained by the transformations that this mechanism underwent when translated from a system with a prevailing adversarial structure of interpretation and meaning to a system where an inquisitorial structure of meaning dominates. The German “plea bargaining” translators quietly introduced the practice, aware that its legitimacy and meaning within the German inquisitorial structure of interpretation were questionable. Thus, for example, they had no power to formally change other aspects of German criminal procedure through a reform of the German Criminal Procedure Code. These restrictions limited their range of decision-making power and precluded the possibility of fidelity to U.S. plea bargaining model when translating the new practice.

This limited power meant that the translators had to negotiate substantially with the pre-existing inquisitorial structure of interpretation and meaning, predominant internal dispositions among German legal actors, and structure of procedural power. For instance, German criminal procedure did not include the concept of the guilty plea and there was no statutory reform that could introduce the concept. Therefore, the translators had to treat the bargained admission of guilt not as a guilty plea but as a confession. This means that trials still have to be conducted, even if they can be shortened through the *Absprachen*. Moreover, in the inquisitorial structure of interpretation and meaning, the judge is an active, and the most powerful, player in the trial.195 Consequently, any workable bargains to dispose of cases in an expedient fashion must include him, and in practice, the judge plays a central role in negotiations; only the judge can assure the defendant that the sentence will not rise above a certain limit, and only the judge has control over the power of the prosecutor to dismiss charges in the trial phase. Thus, the translation of plea bargaining to German practices had to be adapted to the pre-existing distribution of procedural powers where the judge stands as the most important figure at trial.

195. See, e.g., ROXIN, *supra* note 66, §15 at 95.
The next issue to explore is the types of transformations these practices may produce in the German criminal procedure in the future. United States plea bargaining has the potential to transform Germany’s structure of interpretation and meaning, the internal dispositions of its legal actors, and the distribution of procedural powers among them. In this case, however, the German Absprachen does not appear to be a Trojan horse for the U.S. model of the dispute. The German judge is still the most active player at trial and has not become a passive umpire. Therefore, even if the widespread adoption of this practice affects the way German judges perceive their roles and are perceived by other legal actors, the final result will still not be a passive decision-maker.196

However, would the judge still be an official investigator of the truth if this practice imposed its logic on the rest of the German criminal justice system? In other words, can the model of the official investigation absorb and survive this translation, or will it be radically transformed by it? Either scenario is possible.

The model of the official investigation can absorb confession agreements, so long as most legal actors understand and use the agreements as a tool to discover the truth instead of as a mechanism to dispose of criminal cases quickly.197 In fact, the offer of benefits to the defendant in exchange for a detailed confession, which would serve as an attenuating circumstance for purposes of sentencing, is not new at all within the model of the official investigation. Thus, confession agreements could be interpreted as an extension of this practice.

Two important court decisions provide indications that a substantial number of legal actors in the German criminal justice system are trying to interpret and drive the confession agreements in this direction. First, the Federal Constitutional Court (BverfG), in its only decision on this issue,198 stated that these agreements are admissible so long as they do not violate the

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196. While there are no official data on how widely this practice is employed, according to Weigend, various estimates and surveys indicate that about every fourth trial is settled. Weigend, supra note 191, at 774. This indicates that judges, prosecutors, and defense attorneys have widely accepted the new practice. The incentives that the new practice generates for judges, prosecutors, and defense attorneys—i.e., the reduction of their caseload and the acceleration of the disposition of cases—seems to be the main reason for this widespread acceptance. For an analysis of these incentives, see Bernd Schünemann, Die Absprachen im Strafverfahren, in Festschrift für Peter Riess 525, 533–34 (Ernst-Walter Hanack et al. eds., 2002).

197. The system of the official investigation could also survive if the bargaining practices were censored—i.e., through a legal prohibition of them. Even if some law professors have suggested this possibility, the discussion between judges, prosecutors, and defense attorneys has focused not on the elimination of the bargaining practices, but in how the translated practices should be interpreted. The explanation for this limitation of the discussion seems to be rooted in the incentives that judges, prosecutors, and defense attorneys have had to support the bargaining practices. Arguably because law professors are not under the same system of incentives, they have been more faithful to their pre-existing inquisitorial internal dispositions than the practitioners. On the deep division between the positions of most law professors and practitioners regarding the agreements, see, for example, Thomas Weigend, Eine Prozessordnung für abgesprochene Urteile?, 19 NEUE ZEITSCHRIFT FÜR STRAFRECHT (NStZ) 27 (1999).

constitutional notion of the Rechtstaat—rule of law—and a number of substantive and procedural principles. Among these principles, the BVerfG mentioned the principle of the duty of the judge and prosecutor to investigate the material truth. Therefore, because of this duty to investigate the truth, the judge cannot convict a defendant based on a confession agreement if the judge should have considered himself obliged to hear further evidence.

In addition, the German Federal Supreme Court in its decision of August 28, 1997, analyzed in detail for the first time the requirements these agreements must meet in order to be admissible. Among these requirements, there must be no violation of the judicial duty to determine the truth. This means, for instance, that the court cannot base its verdict only on a confession obtained through a bargain; the court has to examine the credibility of such a confession and, eventually, order the production of additional evidence at trial.

It is reasonable to say, then, that these two decisions conceive the confession obtained as something different than a guilty plea. The confession agreement cannot just be a procedural excuse to dispose of a criminal case. It has to provide elements of proof and be credible enough to support a criminal conviction. Otherwise, the court has to produce additional elements of proof at trial.

Nevertheless, there has been a second tendency within the German criminal procedure to interpret these bargained confessions as the equivalent of a guilty plea. An example of this tendency is the decision of June 10, 1998, issued by a different senate of the Federal Supreme Court. In this case, after the reading of the information (indictment) at the beginning of the trial, the trial court asked the defendant whether the information was correct, to which he answered affirmatively. Based on this simple acceptance of the information, the trial court convicted the defendant, and sentenced him to eight years in prison. The BGHSt, Second Chamber, upheld the decision.
The interpretation of what constitutes this bargained confession is at the center of a discussion between two different conceptions of the criminal process. According to the first conception, which has been predominant in Germany for a long time, the criminal procedure is an investigation conducted by the judge and the prosecutor to determine the truth. In this context, the bargained confession can be adapted to this procedural structure of interpretation and meaning, if it is interpreted and used as a tool to discover the truth.

According to the second conception, the criminal process is just an "assembly line" that processes criminal cases as quickly as possible. It is important to remember, though, that the main manager of the "assembly line" in German plea bargaining is not the prosecutor, as it is in the U.S. model of the dispute, but rather the trial judge. Furthermore, although the trial judge is the main manager, she still needs the cooperation of the defense and the prosecution because the disposition of the case is only possible through their participation. This means that if this tendency prevailed in Germany, its predominant structure of interpretation and meaning would be neither the model of the official investigation—nor the model of the dispute. It would be something different that I will provisionally call the "model of the judge-manager based on cooperation."

In this judge-manager system, the role of the judge is to be neither a passive umpire between the parties nor an active investigator. Rather, it is to assure that criminal cases are processed as quickly as possible. The judge, using his larger power, subtly (or not so subtly) presses the prosecution and defense to collaborate in the swift disposition of the case. The prosecutor

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208. The reference is, of course, to Herbert Packer's famous Crime Control Model that conceives criminal procedure as an "assembly line" and is opposed to the Due Process Model that conceives it as an "obstacle course." See Packer, supra note 21. However, as I will explain, this German model differs from Packer's Crime Control Model, even if they share the goal of disposing criminal cases swiftly.

209. This active role of the judge distinguishes this tendency in German criminal procedure from Packer's Crime Control Model. Packer's Crime Control Model presupposes the existence of the adversarial system, see id. at 157, and thus of a relatively passive judge. But since the judge is active in this German model, the German model differs from Packer's.

210. The model of the judge-manager based on coordination presents similarities to tendencies in American civil procedure of the judge being an active manager of the controversy rather than a passive umpire as in the adversarial system. Among the seminal articles that describe some of these changes in U.S. civil procedure, see, for example, Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Owen M. Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1979); and Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374 (1982). For an analysis that challenges the view that these developments are entirely new to American civil procedure, see Theodore Eisenberg & Stephen C. Yezell, The Ordinary and the Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465 (1980). For an analysis that questions whether these developments adequately describe contemporary complex U.S. civil litigation, see William B. Rubenstein, A Transactional Model of Adjudication, 89 Geo. L.J. 371 (2001).

211. Though most U.S. plea bargains happen through negotiations conducted exclusively between the prosecution and the defense, there are judges who, in certain cases, encourage the parties to reach an agreement in order to avoid the trial. In this sense, the system of the judge-manager based on cooperation may also have some presence in the United States. Nevertheless, this practice is relatively minor among U.S. plea bargains, at least within the regular criminal justice system, and the system of the dispute is
is conceived of as a collaborator with the judge who also contributes to the rapid processing of criminal cases. The defense attorney is both an agent of the defendant who has to get the best possible outcome for his principal as well as a professional legal actor who has a duty to collaborate with the other professional legal actors in the swift disposition of cases.²¹²

This does not mean, however, that the truth does not play any role in this model. As in the model of the dispute and the model of the official investigation, nobody wants to convict an innocent person or to acquit a guilty one. However, finding the truth is a goal at least as important as the expedient disposition of the case, and the procedure is thus not structured as an investigation.²¹³

The actual importance of the system of judge-manager based on cooperation in current German criminal procedure poses an empirical question beyond the scope of this Article.²¹⁴ The points that need to be emphasized here are that there are already indications that this system has a certain presence, at least in an incipient form, in contemporary German criminal procedure and that this system is different from both the model of the dispute and the model of the official investigation. Also, to a certain extent, it seems to have been developed as a consequence of the translation of the bargained agreements in that country during the 1970s, and as a consequence of the negotiations that the legal translators had to make with the pre-existing inquisitorial structure of interpretation and meaning, predominant internal dispositions among legal actors, and the distribution of procedural powers.

To summarize, during the 1970s, the inquisitorial system, with its model of the official investigation, was the prevailing procedural structure of interpretation and meaning in Germany, and most actors had incorporated this structure into their internal dispositions. Due to external societal changes that increased the number and complexity of criminal cases, German legal

still predominant in this country. These kinds of practices are more extensive in U.S. civil cases. See, e.g., Resnik, supra note 210.

²¹². On the redefinition of the role of the defense attorney in the German agreements, see Weigend, supra note 191, at 779.

²¹³. The conception of truth in the model of the judge-manager based on cooperation is more relative and consensual than in the inquisitorial system. If the prosecutor, the defense, and the court agree that events transpired in a certain way—i.e., through agreed confessions—how events actually happened becomes less relevant. In this sense, the conception of truth in this model presents similarities to the conception of truth in the adversarial system. Therefore, even if the translation of confession agreements is not pushing German practices in the direction of the model of the dispute, the Absprachen have the potential to introduce a conception of truth closer to that of the adversarial system. If this potential were fulfilled, the result would be an Americanization of the German system regarding the conception of truth even if there were no Americanization regarding the model of the dispute. This shows that Americanization is not an all-or-nothing game. The introduction of the German Absprachen could eventually create new divergences with the American model of the dispute because of the advancement of the model of the judge-manager based on cooperation and, at the same time, a convergence with the American adversarial system on a more relative and consensual conception of truth.

²¹⁴. I leave for future work a more detailed analysis of the model of the judge-manager based on cooperation, as well as the question of whether it may be developing in other jurisdictions besides Germany.
actors received strong incentives to change their attitudes toward bargains and agreements with the defendant. Nevertheless, plea bargaining suffered a deep transformation when it was translated from the adversarial structure of meaning to an inquisitorial setting because of the pre-existing inquisitorial structure of interpretation and meaning, predominant individual dispositions and structure of procedural power, which neutralized, to a certain extent, its potential Americanization or adversarialization effect on the German criminal process.

However, this new mechanism did present a challenge to the prevailing inquisitorial structure of meaning based on the model of the official investigation. The seriousness of this challenge is a question that has yet to be determined through empirical studies. However, since the introduction of the Absprachen, there has been a struggle between the model of the official investigation to adapt the new mechanism to its own logic and the model of the judge-manager based on cooperation to interpret this mechanism in a different direction. This struggle should be understood not only in abstract terms as a clash between two structures of interpretation of meaning. It should also be understood as a struggle between legal actors with internal dispositions that correspond to these structures of meaning.\textsuperscript{215} The interactions between these two structures of meaning—and other structures that are present in German criminal procedure and society—may also have an impact on other aspects of German criminal justice practices, such as the organization of human and material resources, legal ethics, etc. An analysis of these changes should be included in a larger study on the transformations produced by the translation of plea bargaining into Germany.

From the perspective of the Americanization thesis debate, the German example shows that, due to the transformation that it suffered in its translation and the interactions that followed, the German Absprachen have not Americanized German criminal procedure, in the sense that it has not introduced a cultural conception of criminal procedure as a dispute between prosecution and defense before a passive decision-maker. Rather, due to this legal translation, this procedure may be at a crossroads between its traditional inquisitorial model of criminal procedure and a model that is neither inquisitorial nor adversarial.

\textbf{VIII. Italian “Plea Bargaining”}

Compared to the German Absprachen, Italian plea bargaining, or patteggiamento, has been much more faithful to the American model, even if it presents substantial differences from the American practice. Italian legal translators had much more power than German translators in advancing their reform, and were able to introduce Italian plea bargaining as part of deeper

\textsuperscript{215} The struggle may occur not only between individual legal actors but also within individual legal actors who possess internal ambivalence about both systems.
and broader criminal procedure reforms inspired by the American adversarial system. Thus, Italian reformers had to compromise much less than German translators, and they had much more power to change the pre-existing inquisitorial structure of meaning, distribution of procedural powers, etc. Since these adversarial reforms have had substantial political support, they have moved the Italian system in the direction of the American adversarial system much more than any other civil law jurisdiction. However, even in the Italian system today, many legal actors are still moved by a predominantly inquisitorial set of internal dispositions. Furthermore, the inquisitorial structures of interpretation and meaning and procedural power remain present.

In 1989, Italy adopted a new criminal procedure code that replaced the Rocco Criminal Procedure Code enacted during Mussolini’s regime. This new code represented the most serious attempt to transfer adversarial criminal procedures into an inquisitorial jurisdiction since 1791, when the French attempted to import the English system during the heat of the Revolution. The Italian reform was justified both on due process and efficiency grounds, but had a predominantly due process inspiration. American criminal procedure was the main model for these adversarial reforms because of the prestige that the U.S. legal system in general, and U.S. criminal procedure in particular, enjoyed among a substantial number of legal actors since the end of the Second World War.

The adversarial reforms can be described and analyzed by using the two pairs of models developed in Part III: the coordinate model vs. the hierarchical model and the model of the dispute vs. the model of the official investigation.

Regarding the first pair, the reformers tried to import the oral case-management technique of the coordinate model by reducing the importance of the evidence collected during the pre-trial phase in the distinctively inquisitorial written dossier. They did so by ordering the preparation of a special written dossier for the trial so that the trial court did not have knowledge of the testimonies collected during the pre-trial phase prior to the trial, as well as by introducing rules of evidence such as hearsay that

216. In that sense, the introduction of the code could be analyzed as part of the transition to democracy that Italy began after the Second World War.
217. The classic account of this importation is Esmein, supra note 63, at 399–480.
218. See Vassalli, supra note 115.
221. See, e.g., Amodio & Selvaggi, supra note 115, at 1217.
222. C.P.P. art. 431 (1989) (Italy).
prevented pre-trial testimony from being admitted at trial, save for impeachment purposes.\textsuperscript{223}

Regarding the second subsystem, Italian legal reformers have introduced numerous reforms to advance the model of the dispute within the Italian system. First, the parties are now supposed to develop the fact-finding process, both at the pre-trial phase and at trial. This has eliminated the preliminary investigation judge (\textit{giudice istruttore}) as the fact-gatherer during the pre-trial phase,\textsuperscript{224} replacing him with the prosecutor and defense attorney, who can now conduct their own investigations.\textsuperscript{225} It has also entailed the organization of the trial into a case for the prosecution and a case for the defense,\textsuperscript{226} and introduced direct and cross-examination as the way to interrogate witnesses at trial.\textsuperscript{227} Besides these and other reforms, the Italian Code includes a rule establishing that the judge can only order the production of evidence requested by the parties; only in exceptional circumstances can the judge do so \textit{sua sponte}.\textsuperscript{228}

Second, the reform has also introduced a number of simplifying and consensual mechanisms through which the prosecution and defense can bargain and agree to avoid the regular proceedings.\textsuperscript{229} The introduction of these simplifying mechanisms has been justified on efficiency grounds.\textsuperscript{230} However, they are also part of this broader reform of Italian criminal procedure in which the cultural influences of the American model—as a system that has symbolized democratic values and efficiency in dealing with crime—has played an important role. These mechanisms have included the \textit{applicazione della pena sulla rechiesta delle parti}—application of the punishment upon the request of the parties\textsuperscript{231}—that is usually called Italian plea bargaining, or simply \textit{patteggiamento}, which means “bargain” in Italian.\textsuperscript{232}

\begin{itemize}
  \item \textsuperscript{223} C.P.P. arts. 500, 503 (1989) (Italy). The inquisitorial reaction against these ideas—combined with a delicate political situation in which two of the main anti-Mafia judges had been assassinated—came a few years after the reform when the Italian Constitutional Court, in its decisions 254/1992 and 255/1992, held unconstitutional art. 513.2 and arts. 500.3 and 500.4. Decision 255/1992, supra note 163; Corte cost., 18 mag. 1992, n.254, 103 Racc. uff. corte cost. 1992, 809. Nevertheless, in 1999, the Italian Parliament introduced a new Article 111 to the Italian Constitution, backing the original direction of the 1989 reforms toward an increasing role for the oral case-management techniques of the coordinate system.
  \item \textsuperscript{224} See Vassalli, supra note 115, at 6.
  \item \textsuperscript{225} Regarding the power of the prosecution to make the pre-trial investigation, see C.P.P. art. 358 (Italy). The investigatory powers of the defense were included in Law 271/1989, supra note 164, and later incorporated in the Criminal Procedure Code, articles 391-\textit{bis}-\textit{decies} by Law 397/2000, supra note 164.
  \item \textsuperscript{226} C.P.P. art. 496.1 (Italy).
  \item \textsuperscript{227} C.P.P. art. 498 (Italy).
  \item \textsuperscript{228} C.P.P. arts. 190, 493.1, 495.1, 507 (Italy).
  \item \textsuperscript{229} C.P.P. arts. 438–64 (Italy).
  \item \textsuperscript{230} See, e.g., Vassalli, supra note 115, at 7.
  \item \textsuperscript{231} A forerunner of this institution was the \textit{applicazione di sanzioni sostitutive su richiesta dell'imputato} introduced in 1981 by L.vo 24 nov. 1981, n.689, Racc. Uff. 1981, vol. 13, 3657, published in Gazz. Uff., 30 nov. 1981, n.529. The scope of this mechanism was very limited because it only applied to offenses punishable by up to three months in prison. See, e.g., Pizzi & Mariafoi, supra note 220, at 22.
  \item \textsuperscript{232} Besides the \textit{patteggiamento}, the 1989 reform introduced two other mechanisms that may be compared to plea bargaining because they included potential negotiations between prosecution and defense,
One crucial difference between the introduction of the German Absprachen and the patteggiamento is that the latter was introduced by statute and as part of a reform that had substantial political support. In this sense, the translators had much more freedom to decide the extent to which they wanted to be faithful to U.S. plea bargaining. Moreover, the Italian reformers had a very sophisticated knowledge of the U.S. criminal justice system, which coupled with their legislative freedom, allowed them to design a mechanism that was much more similar to U.S. plea bargaining than the German Absprachen while still taking into account the pre-existing inquisitorial structure of meaning, internal dispositions, and structure of power.

Under the patteggiamento, the defense and the prosecution can reach an agreement about a sentence and request that it be imposed by the judge. Through this agreement, the regular sentence can be reduced by up to one third if the reduced sentence will not exceed five years of imprisonment. and required the consent of the defendant to be applied. The first was the procedimento per decreto. C.P.P. arts. 459–64 (Italy) (similar to the German penal order analyzed in Herrmann, Bargaining Justice, supra note 183). The second is the giudizio abbreviato. C.P.P. arts. 438–43 (Italy) (in which the defendant waives the right to trial and accepts being tried in the preliminary hearing). In exchange, he receives a reduction of one third of the regular sentence. This mechanism initially required the consent of the prosecution for its application, and thus it opened the door for negotiations between prosecution and defense. Nevertheless, since then, first the courts and finally the Parliament have limited the consent of the prosecution as a requirement for its application. For an analysis of this process, see Elena Maria Catalano, Il Giudizio Abbreviato, in GIUDICE UNICO E GARANZIE DEFENSIVE 117 (Ennio Amodio & Novella Galantini eds., 2000). For space limitations, I will not analyze these two mechanisms in the main text but they should be included in a larger work.

233. The Italian Criminal Procedure Code was drafted by a Commission designated by d.m. (ministerial decree) of March 3, 1987, and was composed by nine law professors: Giandomenico Pisapia (President), Delfino Siracusano (Vice-president), Ennio Amadio, Vincenzo Cavallari, Mario Chiavario, Oreste Dominioni, Vittorio Grevi, Guido Neppi Modona, and Mario Pisani; eight judges: Giancarlo Caselli, Enrico Di Nicola, Liliana Ferraro, Giuseppe La Greca, Giorio Lattanzi, Ennemerto Lupio, Vittorio Mele, and Piero Luigi Vigna; and a lawyer: Giusepe Frigo. See Vassalli, supra note 115, at 3.

234. For example, Prof. Ennio Amadio was member of the Ministerial Commission that designed the reforms and is, at the same time, a sophisticated comparativist. See, e.g., Ennio Amodio, Il Modello Accusatorio Statunitense e il Nuovo Processo Penale Italiano: Miti e Realtà della Giustizia Americana, in IL PROCESSO PENALE NEGLI STATI UNITI D’AMERICA VII (Ennio Amodio & M. Cherif Bassioune eds., 1988).

235. The patteggiamento is regulated in articles 444–48 of the Italian Criminal Procedure Code. For a detailed analysis of these articles, see Franco Cordero, PROCEDURA PENALE 960–73 (5th ed. 2000) (Professor Cordero, however, does not include in his analysis the reforms introduced by law 134/2003, which I analyze infra, note 236.). In the original code, the parties could request the application of the mechanism until the opening of the trial. The law n. 479/1999 limited this term to the end of the preliminary hearing (with exceptions I will not analyze here). L.vo 16 dic. 1999, n.479, Racc. Uff., 1999, vol. 13, 6496, published in Gazz. Uff., 18 dic. 1999, n.296. The more recent reform to the patteggiamento introduced by law 134/2003 has not changed this aspect, and as a general rule, the parties can request the application of this mechanism only until the end of the preliminary hearing. See C.P.P. art. 446.1 (Italy). The parties cannot request the application of the patteggiamento after they have made their conclusions in the preliminary hearing.

236. C.P.P. art. 444.1 (Italy). The limitation of up to five years of imprisonment was introduced by statute in June 2003. See Lvo 12 giu. 2003, n.134, art. 1, 1962, published in Gazz. Uff., 14 giu. 2003, n.156 [hereinafter Law 134/2003] (if the agreed sentence is between two and five years of imprisonment, certain offenses, such as terrorism and organized crime, are excluded). Before this last reform, the bargained sentence could not exceed two years of imprisonment—after the sentence reduction—and thus was limited to minor crimes. The two justifications given to extend the application of the patteggiamento to more offenses were reducing the caseload of the criminal justice system and limiting the use of full
If, upon examining the case’s dossier, the judge does not find any sufficient reasons to acquit the defendant\(^{237}\) and considers the charge and sentence to be proportional to the offense, she will apply the requested punishment.\(^{238}\)

Though much more similar to U.S. plea bargaining than the German Absprachen, there are several differences between the patteggiamento and American plea bargaining that reflect, in part, the ambivalence of Italian translators toward the very mechanism they introduced. First, the patteggiamento is more limited in scope and less flexible. It can only be applied in cases where the sentence does not exceed five years of imprisonment after sentence reduction, and the sentence reduction bargained for by the parties cannot be greater than one-third of the regular sentence for the case.\(^{239}\) Furthermore, at least as it was originally conceived by the reformers, the bargain can only concern the sentence, not the charge or charges.\(^{240}\) The decision of the translators to establish these limitations likely reflects two different concerns. On the one hand, the translators were ambivalent toward this bargaining mechanism because they were aware of the due process problems that plea bargaining was generating in the United States.\(^{241}\) On the other hand, they were conscious that legal actors with an inquisitorial set of internal dispositions (and accustomed to an inquisitorial distribution of procedural powers) might resist the translated institution. Thus, they decided to introduce it only for minor offenses and to limit the practice to sentencing bargains.\(^{242}\) Also, even if a recent reform has expanded the number of offenses that can be negoti-

\(^{237}\). C.P.P. arts. 444.2, 129 (Italy).

\(^{238}\). C.P.P. art. 444.2 (Italy). If the agreed sentence is for up to two years of imprisonment, the judge can replace it with a substitute punishment such as semi-detention (for sentences of up to two years of imprisonment), freedom under surveillance (for sentences of up to one year of imprisonment), or a fine (for sentences of up to six months of imprisonment). See Law 134/2003, supra note 236, art. 4.1(a).

\(^{239}\). C.P.P. art. 444.1 (Italy).

\(^{240}\). See, e.g., Pizzi & Marafioti, supra note 220, at 22. However, there are indications that charge bargains may have been introduced by practitioners and accepted by the courts. See Cass. pen., sez. cin., 7 ott. 1998, n.12743.

\(^{241}\). Recall that the reform had a clear garantista—due process—inspiration.

\(^{242}\). On these criticisms in the United States, see the bibliography cited supra note 170.

\(^{243}\). Charge bargains usually compromise the material truth more than sentencing bargains. Thus, the latter would be more acceptable from an inquisitorial perspective.
ated through the *patteggiamento*, the practice still does not apply to all offenses.244

Second, in the *patteggiamento* there is no guilty plea or explicit admission of guilt by the defendant.245 By requesting the application of the sentence, the defendant waives his right to a trial and may be implicitly admitting his guilt. However, the judge can still decide to acquit the defendant after examining the evidence collected in the written dossier and before accepting the agreement.246 This decision not to introduce an explicit admission of guilt with the *patteggiamento* is another reflection of due process concerns. The drafters feared that an admission of guilt would undermine the presumption of innocence guaranteed to all defendants in the Italian Constitution.247 In this sense, the absence of an explicit admission of guilt makes the Italian *patteggiamento* more similar to U.S. negotiations about *nolo contendere* than about guilty pleas.

Third, when the prosecutor does not accept an agreement with the defendant, the latter can ask the judge at the end of the trial to examine the reasons given by the prosecutor to reject such an agreement, and to give him the benefit of the one-third reduction of the sentence.248 This difference reflects the influence of the model of the official investigation on the internal dispositions of the translators.249 As explained above, granting benefits to the defendant in exchange for admissions of guilt—in this case, implicit admissions of guilt—is not unknown in the Italian structure. What is foreign, though, is the negotiation of a sentence that dispossesses the judge of her powers over it. Even if the *patteggiamento* generally empowers the parties against the powers of the judge, this rule affirms that the judge still conserves a certain quantum of power in the application of this mechanism, and that the mechanism is not only a bargaining procedure but also a benefit that the judge may concede to the defendant.

Finally, the sentence pronounced under this procedure250 does not have any effect on civil and administrative proceedings,251 which again makes the

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244. On this reform, see C.P.P. 444.1 (Italy).
245. See, e.g., Pizzi & Marafoiti, infra note 220, at 23.
246. C.P.P. arts. 444.2, 129 (Italy).
247. See Pizzi & Marafoiti, supra note 220, at 23.
248. C.P.P. art. 448.1 (Italy).
249. As Pizzi & Marafoiti have noted,

The intent of the Italian Code is to make sentence reduction available to all defendants who wish to plea bargain, whether or not the prosecutor agrees. This arrangement reflects the traditional civil law distrust of prosecutorial discretion and commitment to uniform treatment of defendants—that defendants would receive different sentences simply because of a prosecutor’s whim is anathema to civil law.

Pizzi & Marafoiti, infra note 220, at 22–23
250. The verdict based on a *patteggiamento* is considered “equivalent to a verdict of guilt” (C.P.P. art. 445.1-bis (Italy)), but it is not like the verdict issued after the regular trial. This explains the more limited effects that the verdict and sentence based on a *patteggiamento* have and shows, again, the distrust and ambivalence that the reformers had towards this mechanism.
251. C.P.P. art. 445.1-bis (Italy). The only exception to this rule is that the bargained sentence constitutes *re iudicata* for disciplinary proceedings before the public authorities. See C.P.P. arts. 445.1-bis,
patteggiamento closer to the U.S. nolo contendere than to a plea bargain. This limitation of the legal effects of the mechanism may also reflect the ambivalence the translators had toward it, both because of due process concerns and the influence of the model of the investigation on their internal dispositions.

Nevertheless, despite their ambivalence, the Italian translation of plea bargaining is faithful to the original American mechanism in that it is a procedure through which the prosecution and the defense can actively negotiate sentences and the judge is assigned a relatively passive position. In this sense, the adoption of the patteggiamento has had, from the very beginning, a potential Americanization effect; if accepted and internalized by Italian legal actors as a negotiating mechanism, and accompanied by the other adversarial reforms, the patteggiamento has the potential to move Italian criminal procedure practices toward the model of the dispute, replacing the predominant inquisitorial internal dispositions of the legal actors and the structure of interpretation and meaning, and shifting the distribution of procedural power.

It is not surprising, then, that there has been some resistance to this new procedure, both among legal commentators and the courts.252 The most important reaction of the courts thus far has been the Italian Constitutional Court’s 313/1990 decision, issued the year after the new Italian Code introduced the patteggiamento.253 In this decision, after repeatedly stating that the judge’s power of control over the agreement was not just a formality,254 the Constitutional Court held that art. 444.2 of the Italian Criminal Procedure Code, which regulated the patteggiamento, was unconstitutional because it did not expressly give the judge the power to control the congruence between the sentence agreed upon by the parties and the seriousness of the offense, and thus deprived the judge of the power to enforce art. 27.3 of the Italian Constitution, which establishes that the goal of punishment is the rehabilitation of the convicted person.255 Therefore, this decision attempted to reaffirm and increase the powers of the judge against the parties regarding the patteggiamento.

Despite this reaction, Italian legal actors have used the patteggiamento quite extensively. Between 1990 and 1998, the number of cases disposed through this procedure before the pretura (misdemeanor jurisdiction) was between 17 and 21%; and, in the case of the tribunale (the jurisdiction for all

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252. Among the criticisms from commentators, see Ferrajoli, supra note 66; and Ferrua, supra note 179. Both cited criticisms have their origin in their defense of the substructure of the official investigation because both point out how bargaining mechanisms compromise the real truth. Their critique, however, is inspired by due process concerns because both commentators understand the truth—as the cognitive role of the judge—as a protection for the accused. For a very sophisticated defense of this (garanzista) conception of the criminal process, see Ferrajoli, supra note 66.


254. See e.g., id. at 97–98.

255. Id. at 102–05.
the crimes except the most serious ones) was between 34 and 42%. Now that the application of the *patteggiamento* has been extended to more serious offenses, the Italian actors are likely to use it even more widely.

This indicates that the model of the dispute, understood as a structure of interpretation and meaning, has been accepted and internalized, at least to a certain extent, by a substantial number of Italian legal actors. Furthermore, as a consequence of the reform to the Italian criminal procedure which began in 1989, there are other indications that the model of the dispute has a substantial presence in Italian criminal proceedings. These include the possibility of the prosecution and the defense doing their own pre-trial investigation, the organization of the trial into the case of the prosecution and the case of the defense, and the introduction of direct and cross-examination, as mentioned above.

However, this does not mean that the model of the official investigation lacks a substantial presence in Italian criminal procedure and in the individual dispositions of a significant number of legal actors. Many Italian judges, for instance, still believe they have a duty to ensure that the truth prevails and thus participate actively in the fact-finding process. Furthermore, both Italian prosecutors and judges remain members of the judiciary and are trained together. Thus, many Italian prosecutors still consider themselves, and are considered by judges, to be magistrates whose role is to investigate the truth, and not as mere parties to a dispute.

Analyzing in detail these particular struggles between the dispute model and the official investigation model is beyond the scope of this Article. The purpose of this Part has been to show how U.S. plea bargaining has been translated into the Italian system and the kinds of transformations this translation may be producing. From the perspective of the debate about the Americanization thesis, the *patteggiamento* and other reforms have indeed advanced the model of the dispute as a structure of interpretation and meaning. In no other civil law country has this structure arguably attained such an important status. In this sense, the development of the 1989 reform seems to have put Italy at a cross-roads between the adversarial and inquisitorial systems.

IX. **Argentine "Plea Bargaining"**

Of the four systems examined in this Article, Argentina’s plea bargaining system has been the most faithful translation of U.S. plea bargaining. However, this reform represents one of a very small number of Argentine reforms in the direction of the adversarial system. Given that the pre-existing in-

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256. For statistical information for 1990 and 1991, see ISTITUTO CENTRALE DE STATISTICA, STATISTICHIE GIUDIZIARIE; for 1992 to 1998, see ISTITUTO NAZIONALE DI STATISTICA, STATISTICHE GIUDIZIARIE PENALI. I do not include statistics from 1989 because the total number of sample cases is much smaller for that year than for the other years.

257. See supra note 236 on the Legge, 12 giugno 2003, n.134, art. 1.

258. See, e.g., Grande, supra note 32, at 250–51.

259. About these and other resistances resulting from the structure of the official investigation, see Grande, supra note 32.
quisitorial structure of interpretation and meaning, internal dispositions, and structure of procedural power of the Argentine system remain predominant, it is highly unlikely that this adversarial reform alone will Americanize Argentine criminal procedure in the sense of moving its criminal procedure practices and culture in the direction of the model of the dispute.

In June of 1997, Argentina incorporated into its Federal Code of Criminal Procedure the so-called *procedimiento abreviado* in order to speed up proceedings and reduce the caseload of trial courts. This mechanism seems to have been adopted mainly for pragmatic reasons rather than as a result of deep cultural influences of the American system on the Argentine system, though these influences indeed have been present. In any case, American plea bargaining has been an important source for the development of the Argentine practice. According to the *procedimiento abreviado*, the prosecution and the defense can reach an agreement about the sentence at any time between the production of the information (indictment) at the end of the pre-trial phase and the determination of the date for trial. This negotiated sentence cannot be greater than six years of imprisonment. As part of the agreement, the defendant must admit to the offense and his participation in it as described in the indictment. The trial court can reject the agreement if it considers the production of additional evidence necessary, or if it fundamentally disagrees with the charges. However, if the trial court accepts the agreement, it must reach a verdict based on the evidence collected in the written dossier.

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260. Argentina is a federal state consisting of 23 provinces. There is one Code of Criminal Law for all these jurisdictions. But each province has its own code of criminal procedure and its own system of courts. The Federal Code of Criminal Procedure regulates the proceedings of the federal courts and of the courts of the city of Buenos Aires. In this Article, I will concentrate on these proceedings.

261. The *procedimiento abreviado* is also called *juicio abreviado*. See *Cód. Proc. Pen.* art. 431 (Arg.).

262. Besides these two goals, other goals that were considered during the hearings of the Argentine Congress on this institution were reducing the number of pre-trial detentions, reducing the cost of criminal trials, rationalizing the use of criminal procedure resources, and giving defendants the opportunity to receive a reduction in their potential sentences. See “Wasylyzyn, M.A.,” *Trib. Oral Crim.* no. 20, 8a Cuadernos de Doctrina y Jurisprudencia Penal 623, 628 (1998) (describing the intervention by the representative José I. Cafferata Nores in the parliamentary debate of October 23, 1996). See also José I. Cafferata Nores, *Cuestiones actuales sobre el proceso penal* 143 (2d ed. 1998).

263. The American criminal justice system has had a deep cultural influence on the precedents of the Argentine Supreme Court concerning constitutional rights in criminal procedure (searches and seizures, the right against compelled self-incrimination, exclusionary rules, fruit of the poisonous tree doctrine, etc.). For an analysis of these types of decisions by the Argentine Supreme Court, see generally Alejandro Carrío, *Garantías constitucionales en el proceso penal* (3d ed. 1997). Concerning the influence of U.S. Supreme Court precedents on the Supreme Court of Argentina, see Carlos Ignacio Suárez Anzorena, *Transnational Precedents: The Argentinian Case* 26–40 (1998) (unpublished LL.M. thesis, Harvard Law School) (on file with the Harvard Law School Library). However, the American criminal justice system has not been as influential as it was in the Italian case. The Italian system has imported very substantial parts of American criminal procedure, rather than just selected pieces of it.


265. Id.

266. *Cód. Proc. Pen.* art. 431 bis. 2 (Arg.).


victed, the defendant’s sentence cannot exceed the length agreed to by the parties.269

Of all the legal translations analyzed in this Article, the Argentine procedimiento abreviado seems to be the most faithful to U.S. plea bargaining, or more specifically, to U.S. sentencing bargaining.270 The prosecution and defense have active roles in the negotiations about the sentence and the admission of guilt while the tribunal’s role is basically limited to that of formal control. In addition, the procedimiento abreviado includes an admission of guilt by the defendant similar to a guilty plea. Furthermore, because the parties can agree on a sentence of up to six years, the procedimiento abreviado can be applied to some, though not all, serious offenses.271

However, there are differences between the procedimiento abreviado and U.S. plea bargaining that reveal how the decisions made by Argentine translators and the pre-existing Argentine inquisitorial structure of interpretation and meaning and distribution of procedural power transformed the practice.272 First, there is a temporal limitation as to when the parties can reach an agreement, making the entire procedure less flexible.273 Second, in the procedimiento abreviado, the judge can still acquit the defendant.274 The admission of guilt, then, is not understood exactly as a guilty plea like that in the United States, but rather as a confession that may be disregarded by the court, exemplifying the influence of the pre-existing inquisitorial structure of meaning on the practice. Third, the trial court has to respect, as an upper

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269. Id.
270. U.S. plea bargaining was an important source for the development of the procedimiento abreviado. See “Wasylyszyn, M.A.,” supra note 262, at 628–29.
271. The procedure can be applied, for instance, to manslaughter, rape, and aggravated robbery.
272. The two individuals who introduced the procedimiento abreviado in Argentina were Professors Julio B. J. Maier (who included a similar mechanism in his drafted Federal Criminal Procedure Code of 1986, which the Congress did not enact, and in the Model Criminal Procedure Code for Ibero-America) and José I. Cafferata Nores (university professor, former minister of justice of the province of Cordoba and member of the Federal House of Representatives when the procedimiento abreviado was enacted). Both of them conceived of the institution only for minor cases. For instance, in Article 371 of his drafted Federal Criminal Procedure Code, Prof. Maier conceived of it for handling cases where the sentence was not greater than one year of imprisonment. Julio B. J. MAIER, EL PROYECTO DE CÓDIGO PROCESAL PENAL DE LA NACIÓN: PRESENTACIÓN DE JULIO B. J. MAIER, EXPOSICIÓN DE MOTIVOS, TEXTO COMPLETO DEL PROYECTO 764 (Cuadernos de la Revista Doctrina Penal, Series No.1, 1987). They believed that this mechanism would be useful to handle minor cases faster, but they also distrusted it because they were conscious that the mechanism implied a completely different conception of criminal procedure. For instance, Maier clearly saw that the mechanism implied a more consensual and relative conception of truth. See Julio B. J. Maier, Mecanismos de Simplificación del Procedimiento Penal, in 8a CUADERNOS DE DOCTRINA Y JURISPRUDENCIA PENAL, supra note 267, at 433, 435 (1998). The distrust of Maier and Cafferata Nores toward the institution was also based on due process concerns because they knew of the critiques that these kinds of agreements were generating in the United States and elsewhere. Despite their attempts to introduce the mechanism only for minor cases, the Argentine Congress has extended its application to relatively serious crimes.
273. See CÓD. PROC. PEN. art. 431 bis. 1 (Arg.).
274. CÓD. PROC. PEN. art. 431 bis. 5 (Arg.) states that once the prosecution and defense have reached their agreement, the court still has to decide its verdict. Thus, it is technically possible that the court will decide to acquit the defendant after the agreement. However, the law in action regarding this issue is that courts usually issue a conviction.
limit, the sentence agreed upon by the parties.\(^{275}\) This limitation does not always apply in U.S. sentencing bargaining, though most judges respect it \textit{de facto}.\(^{276}\) Fourth, in a case with more than one defendant, the mechanism can be applied only if accepted by each defendant.\(^{277}\) This shows distrust toward the mechanism from a due process perspective.\(^{278}\)

Apart from these differences, the \textit{procedimiento abreviado} is a faithful translation of U.S. plea bargaining. As such, it assumes the model of the dispute in the sense that both parties control the case and that the judge has a relatively passive role. In this sense, the \textit{procedimiento abreviado} could be considered something of a Trojan horse for the model of the dispute in the Argentine inquisitorial model of the official investigation.\(^{279}\) If Argentine legal actors accept and internalize this mechanism, the reform could potentially Americanize (or adversarialize) Argentine criminal procedure.

The model of the official investigation has always been predominant in Argentine criminal procedure.\(^{280}\) Thus, it is not surprising that a number of commentators strongly criticized the introduction of a mechanism so clearly inspired by the model of the dispute.\(^{281}\) Nevertheless, legal practitioners, prosecutors, and judges have generally accepted and used it.\(^{282}\) For instance, in the first semester of 2000, 22\% of the cases before the misdemeanors trial courts of the city of Buenos Aires were disposed of through the \textit{procedimiento abreviado}; 52\% of the cases before the crimes trial courts in the same juris-

\(^{275}\) Id.
\(^{276}\) For a proposal to incorporate this limitation into the U.S. system, see Scott & Stuntz, \textit{supra} note 170 at 1953–57.
\(^{277}\) Cód. Proc. Pen. art. 431 bis 8 (Arg.).
\(^{278}\) The requirement that all defendants have to accept to participate in the agreements may have been aimed at avoiding use of the \textit{procedimiento abreviado} for investigative purposes, i.e., for making a defendant testify against another.
\(^{279}\) For an analysis of the potential effects of the incorporation of the \textit{procedimiento abreviado} in Argentina, see Langer, \textit{supra} note 23, at 124.
\(^{281}\) See, e.g., Francisco J. D’Álboro, \textit{El proceso penal y los juicios abreviados}, in \textit{Cuadernos de Doctrina y Jurisprudencia Penal}, \textit{supra} note 262, at 457, 463 (1998); Leopoldo H. Schiffrin, \textit{Corsi e revisiones de las garantías penales en la Argentina}, in \textit{Cuadernos de Doctrina y Jurisprudencia Penal}, \textit{supra} note 266, at 481, 484 (1998). As in the Italian example, part of this critique was also based on due process concerns because a number of commentators have recognized the due process criticism that plea bargaining has received in the United States.
\(^{282}\) The resistance against the \textit{procedimiento abreviado} has mainly come from individual members of a few trial courts. In Argentina, trial courts for medium and serious offenses are composed of three judges. There have been some dissenting opinions from members of these courts stating that the \textit{procedimiento abreviado} is unconstitutional because a real trial is a necessary condition for a criminal conviction, which cannot be replaced by an agreement between prosecution and defense. See, e.g., “Dos Santos Amaral, M.,” Trib. Pen. Económico no. 3, \textit{Cuadernos de Doctrina y Jurisprudencia Penal}, \textit{supra} note 262, at 633 (1998); “Wasyliszyn, M.A.,” \textit{supra} note 262; “Osorio Sosa, A.,” Trib. Oral Crim. no. 23, \textit{Cuadernos de Doctrina y Jurisprudencia Penal}, \textit{supra} note 266, at 636 (1998). In addition, some trial courts have also held the \textit{procedimiento abreviado} unconstitutional. See, e.g., “Yunez, R.D.,” Trib. Oral Crim. Fed. [1999-C] L.L. 335.
diction were disposed of in the same manner. One of the main reasons for this widespread acceptance likely comes from strong external incentives: between 1990 and 2000, the number of offenses that entered into the criminal justice system of the city of Buenos Aires increased from 61,203 to 191,755 (313%). In a situation like this, almost any mechanism to dispose of criminal cases quickly would be welcome, even if it existed in tension with the prevailing structure of interpretation and meaning, internal dispositions, and distribution of procedural powers.

Besides the introduction of the *procedimiento abreviado*, there have been two other tendencies that could potentially move Argentine criminal procedure in the direction of the adversarial model of dispute. First, the rule of compulsory prosecution did not apply at trial for several years. Second, since 1994, there has been a very clear institutional distinction between prosecutors and judges that may contribute to differentiating both roles within the criminal process, a condition that makes the model of the dispute possible.

Nevertheless, it is important not to overemphasize the significance of these changes, including the introduction of the *procedimiento abreviado*. These have been practically the only reforms introduced that could potentially lead the Argentine legal system in the direction of the model of the dispute. In the rest of Argentine criminal procedure practices found in the federal jurisdiction and in the jurisdiction of the city of Buenos Aires, the inquisitorial structure of interpretation and meaning, internal dispositions, and distribution of procedural power remain predominant. For instance, the model of the official investigation is still quite evident in the role played by the

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286. See Const. Arg. art. 120, amended by Law No. 24.309, Aug. 23, 1994, B.O. (Arg.) (establishing that the Office of the Attorney General is part of neither the Executive power nor the Judiciary, but a separate branch of government).

287. Several other Argentine jurisdictions have introduced additional adversarial reforms in their criminal procedures during the 1990s, including the Province of Buenos Aires (1997) and the Province of Córdoba (1991). However, these reforms are beyond the scope of this Article. These reforms have eliminated the preliminary investigation judge in most cases and put the prosecutor in charge of the investigation during the pre-trial phase, see, e.g., Fabricio Guariglia & Eduardo Bertoni, supra note 117, at 66–67. However, even in these jurisdictions, the model of the official investigation is still very predominant, and, thus, these reforms do not modify my main conclusions.
judge, who is still in charge of the pre-trial investigation; and at trial, the court decides what evidence will be produced and in what order, and has an active role in the interrogation of witnesses, including expert witnesses. Therefore, despite the procedimiento abreviado’s similarity to U.S. sentencing bargaining, the model of the official investigation is still much more predominant in Argentina than in Italy. While the dispute model has appeared in Argentine federal criminal procedures, its presence is still minor.

From the perspective of the Americanization thesis debate, Argentine federal criminal procedure has not been Americanized; the model of the official investigation is still overwhelmingly the conception of criminal procedure within Argentine legal practices. The main reason for this seems to be that even if the translation of U.S. plea bargaining has remained quite faithful to the original text, very few other reforms with a potential adversarialization effect have been introduced. The differences between the adversarial and the inquisitorial cultures are so deep that the Americanization effect of a single adversarial reform like the procedimiento abreviado are likely to be easily neutralized. The wooden horse has been brought within the walls of the Argentine criminal procedure, but the soldiers in its belly have not been enough to take Troy, or even a substantial part of the city. Only time will tell whether new Trojan horses will appear in the future.

X. French “Plea Bargaining”

French “plea bargaining” or composition hardly resembles the American model. It differs from U.S. practice in that it is more of a tool for diverting cases from formal criminal proceedings than a way of disposing of cases after they have entered such proceedings. Therefore, this plea bargaining translation arguably will not move the predominantly inquisitorial French criminal procedure in the direction of the American adversarial system.

291. The French Minister of Justice, Dominique Perben, has presented a bill that is pending before the French Congress (as of Oct. 24, 2003), proposing substantial reforms to French criminal procedure. See Projet de loi portant adaptation de la justice aux évolutions de la criminalité at http://www.assemblee-nat.fr/12/pdf/projets/pl0784.pdf (last visited Dec. 3, 2003). This proposed statute, known as the “Perben Bill” (“projet de loi Perben”), has been presented as an attempt at “adaptation of the administration of justice to the evolution of criminality.” This proposal includes the possibility of the defendant pleading guilty for crimes of up to five years of imprisonment. Since this is just a proposal that has not yet been approved, I do not analyze it in detail in this Article. Another attempt to introduce a mechanism similar to guilty pleas happened at the end of the 1980s and the beginning of the 1990s, when a Commission of the French Minister of Justice—usually known as the Delmas-Marty Commission—proposed the introduction of a mechanism similar to the U.S. guilty plea, though it specifically rejected the introduction of plea bargaining. See Commission Justice Pénale et Droits de l’Homme, La “Mise en État” des Affaires Pénales (1991). Two of the reasons that French legal actors rejected these proposals were that they saw them as foreign and that they had an attachment to the existing inquisitorial system (see Denis Salas, La justice entre les deux “corps” de la démocratie, in LA JUSTICE, UNE RÉVOLUTION DÉMOCRATIQUE 20 (Denis Salas ed., 2001). For a brief analysis of the proposal of the Delmas-Marty Commission regarding guilty pleas, see Tulkens, supra note 178, at 672.
At the end of June 1999, the *composition* was introduced in arts. 41-2 and 41-3 of the French Criminal Procedure Code, with the goal of reducing the caseload of the courts. This mechanism has been considered a homologue of U.S. plea bargaining because it gives room for negotiations between the prosecution and the defense. According to the *composition*, before the beginning of the formal proceedings, the prosecution may offer the defendant the option of diverting his case from the standard criminal trial in exchange for an admission of guilt and the fulfillment of a condition such as paying a fine, turning over any objects used to commit the offense (or objects obtained in the course of the offense), forfeiting his driving or hunting license for a certain period of time, doing community service work, and/or repairing the damage done to the victim. If the defendant accepts the offer, the prosecutor requests that it be validated by the judge. If the defendant does not accept the offer, or does not fulfill the conditions of the agreement, the prosecutor can simply initiate the formal proceedings.

The *composition* can only be applied to certain offenses specifically listed in the French Code, such as simple assault, threats, simple robbery, criminal damages, criminal libel and slander, cruelty against animals, possession of certain weapons, or driving while intoxicated, among others. Further, it is to be applied only to non-serious offenses.

292. Law No. 99-515 of June 23, 1999, J.O., June 24, 1999, p. 9207. The predecessor of the *composition pénale* was the *injonction pénale* voted by law on December 22, 1994. However, on February 2, 1995, the Constitutional Court (Conseil Constitutionnel) held the *injonction* unconstitutional saying that it went against the presumption of innocence and that it gave the prosecutor the power to try cases and impose sanctions that should be imposed by the courts. See Merle & Vitu, supra note 109, at 396.


294. Merle & Vitu, supra note 109, at 396; Cedras, supra note 179, at 156–57; Jean-Claude Magendie, L’américanisation du droit ou la création d’un mythe, 45 Archives de Philosophie du Droit 13, 18–19 (R. Sève et al. eds., 2001). There are other mechanisms in French criminal procedure that give room for negotiations between the prosecutor, the defendant, and even the victim and the judge, such as the *médiation pénale*, *correctionnalisation*, and *comparution immédiate*. See Tulkens, supra note 178, at 660–61, 672–73. I will not analyze them here, and, to my knowledge, they have not been inspired by, or considered analogous to, plea bargaining. For analyses of the role of negotiation not only in criminal law but also in other legal fields, see, generally, the articles included in Droit Négocié, Droit Imposé (Philippe Gérard et al. eds., 1996).

295. C. pr. pén. art. 41–42 (2002) (France). For a detailed analysis of this mechanism, see Ministère de la Justice, Circulaires de la direction des Affaires criminelles et des Grâces, 83 Bulletin Officiel du Ministère de la Justice 25 (2001), available at http://www.justice.gouv.fr/actua/bo/dacg83c.htm (last visited Nov. 25, 2003). The proposal cannot be made when the defendant is under arrest. The prosecutor or his representative has to inform the defendant of his right to be assisted by an attorney.

296. The defendant and the victim alike can request a hearing from the judge before she decides about the agreement. However, this hearing is not conducted if it is not specifically requested. See C. pr. pén. art. 41–42 (Fr.). Because the *composition* was introduced as a way to deal more effectively with minor crime, it is assumed that a hearing with the defendant and/or the victim before validating the agreement is exceptional. Ministère de la Justice, supra note 295, at 96.

297. While the conditions of the agreement are being fulfilled, the statute of limitations is suspended.

298. C. pr. pén. art. 41–42 (Fr.), Ministère de la Justice, supra note 295, at 69–70.

299. Ministère de la Justice, supra note 295, at 68. Besides proposing the introduction of a new mechanism similar to the American guilty plea (reconnaissance préalable de culpabilité), see Perben, infra note 300, the “Perben Bill” also proposes an extension of the *composition* to all offenses of up to five years of
As is already clear from this description, one could only refer to the composition as “plea bargaining” in a very loose way. Here, again, it is clear how inadequate the idea of the legal transplant is to capture the phenomenon of circulating legal ideas and practices. There are some similarities between the procedures of American plea bargaining and the composition: both can include negotiations between the prosecutor and the defendant, and the latter has to admit his guilt as part of the agreement. This, however, is the extent of their similarity.

The differences between U.S. plea bargaining and the composition are significant. First, while the application of plea bargaining shortens the regular criminal proceedings in the sense that a trial is not necessary to determine guilt or innocence, the application of the composition directly avoids such proceedings. Second, though the application of American plea bargaining means that the defendant is found legally guilty and then punished, the application of the composition does not have the legal effect of a guilty verdict. If the defendant fulfills the conditions of the agreement, the case is dismissed with prejudice. Third, in plea bargaining, the prosecutor is understood to be in an equal bargaining position with the defense. In the composition, the prosecutor does not negotiate with an equal but is more akin to a diversion officer to exert control over a person who has broken the law and may commit new offenses in the future. The defendant must accept the prosecutor’s offer and admit his guilt, not as a party who can end the dispute with his consent, but rather as part of his own process of neutralization, rehabilitation, and reparation to the victim.

Through the composition, French legislators have translated U.S. plea bargaining not from the adversarial procedural structure of meaning to an inquisitorial one, but rather from the adversarial system to what can be called the “depenalization model.” In the second half of the twentieth century, several European countries witnessed a movement toward the depenalization of imprisonment. See Dominique Perben, Projet de loi portant adaptation de la justice aux évolutions de la criminalité, tit. II, ch. 1, sec. 2 (“Dispositions relatives à la composition pénale et aux autres procédures alternatives aux poursuites”) (proposing a new text for art. 41-2.1 of the French Code of Criminal Procedure), available at http://www.assemblee-nat.fr/12/projets/pl0784.asp (last visited Nov. 25, 2003) (on file with the Harvard International Law Journal).

300. The mechanism proposed by the “Perben Bill,” see supra note 295, is much more similar to the American plea bargain because it includes negotiations between the prosecution and the defense regarding punishment in exchange for an admission of guilt within the formal criminal proceedings, and the court has a limited role in the negotiations. See Dominique Perben, Projet de loi portant adaptation de la justice aux évolutions de la criminalité, ch. IV, sec. 1, art. 61, sec. VIII (“De la comparution sur reconnaissance préalable de culpabilité”), available at http://www.assemblee-nat.fr/12/projets/pl0784.asp (last visited Nov. 25, 2003) (on file with the Harvard International Law Journal). If ultimately adopted, the “Perben Bill” could potentially have an “adversarialization effect” that the composition does not seem to have.

301. See Merle & Vitu, supra note 109, at 396.

302. C. pr. pén. art. 41–42 (2002) (Fr.).

303. The admission of guilt by the defendant has a pedagogic character. Ministère de la Justice, supra note 295, at 65.
less serious offenses. According to the depenalization model, the regular criminal justice system, with its imprisonment penalties, is too harsh and at the same time ineffective in dealing with non-serious criminality. Fines, community work, and reparation to the victim, among other remedies, have been proposed to replace imprisonment. A number of diversion systems have also been designed to allow administrative, civil, and mediation courts to handle cases that were traditionally adjudicated through the criminal process.

The depenalization model does not attempt to abolish or entirely replace the criminal justice system and its proceedings. Rather, it tries to limit their scope while functioning in a complementary fashion. It does not adopt any specific kind of procedure. It may work comfortably with relatively inquisitorial administrative proceedings, with civil proceedings structured according to the adversarial model of the dispute, or with mediation programs. The depenalization model aims to take less serious offenses out of formal criminal proceedings and to avoid recourse to imprisonment, while at the same time maintaining a certain formal control over these cases; therefore, there is a multiplicity of procedures through which these aims can be achieved.

The composition can be included within this depenalization model. Therefore, even if the composition is finally successful and widely used, it is unlikely that it will move the regular French inquisitorial criminal proceedings in the direction of the model of the dispute; rather, it is likely to strengthen the depenalization model within France. First, as we already analyzed, the composition itself, even if inspired by plea bargaining, does not assume the model of the dispute, mainly because it does not treat the defendant as a party equal to the prosecution. In this sense, the composition does not appear to have a potential adversarialization or Americanization effect. Second, even if it did, the very fact that the composition is not applied within

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304. For an analysis of the development of this model in Europe, see Mireille Delmas-Marty, Les Grands Systèmes de Politique Criminelle 159–63, 278–93 (1992). In the United States, there have been certain tendencies in the same direction. For instance, the introduction of diversion mechanisms in recent years for dealing with drug, domestic violence, and juvenile cases could be considered part of a similar development. For an analysis of the expansion of diversion in the United States in the last three decades, see, for example, Miller et al., supra note 76, at 663–65.

305. See, e.g., Tulkens, supra note 178, at 648–49.

306. Professor Delmas-Marty makes a distinction between depenalization and decriminalization. While the former could serve as a recourse complementary to the criminal justice system, the latter would present itself as an alternative to it. See Delmas-Marty, supra note 304, at 278–79.

307. The composition is part of the depenalization model because it attempts to take certain cases out of the regular criminal justice system while keeping these cases under a soft criminal justice control. On this double goal of the composition, see Conte & Maistre du Chambon, supra note 293, at 209.

308. So far, empirical evidence shows that the composition has been used sparingly. There are official statistics about the use of this practice only for the year 2001. Out of 893,373 cases prosecuted, the composition was used in only 1511 (0.17%). See Ministère de la Justice, Annuaire Statistique de la Justice 2003, available at http://www.justice.gouv.fr/publicat/m-activparquets.pdf (last visited Nov. 25, 2003) (on file with the Harvard International Law Journal).
regular criminal proceedings would also make its potential to move the French model of the official investigation in that direction unlikely.

The translation of plea bargaining to France, then, does not seem to represent a challenge to its predominant model of the official investigation in criminal procedure, even less of a challenge than the introduction of the *procedimiento abreviado* to Argentina.

**XI. Conclusion: Fragmentation in the Civil Law?**

In the last four Parts, I have shown how, in recent times, the civil law jurisdictions of Germany, Italy, Argentina, and France have translated American plea bargaining into their jurisdictions in different ways and how these mechanisms, in their interactions with the legal actors and practices of the receiving criminal justice system and other factors, may be producing different outcomes in each of these jurisdictions.

In the case of Germany, the *Absprachen* brought the development of a new criminal procedural system—the model of the judge-manager based on cooperation—that now co-exists and challenges the traditional German inquisitorial model of the official investigation. In the case of Italy, the *patteggiamento*, acting jointly with other reforms, introduced the model of the dispute that now represents a serious challenge to the traditionally predominant model of the official investigation.

In the case of Argentina, the *procedimiento abreviado* has introduced and reinforced elements of the model of the dispute in federal criminal procedure, though the model of the official investigation is still predominant, much more so than in Italy. Finally, in the case of France, the *composition* may reinforce the depenalization model and reduce the range of cases processed through the model of the official investigation. Nevertheless, this last model is still highly predominant in regular criminal proceedings.

This analysis demonstrates that there now appear to be important differences among these jurisdictions and that these differences are something new within a civil law world that has long been a relatively homogeneous legal culture. While there were differences among civil law jurisdictions, and challenges to the inquisitorial procedural culture within each of them, in all four jurisdictions examined here, criminal procedure was still overwhelmingly conceptualized around the model of the official investigation. It is on this deep common conception of criminal procedure that these four civil law jurisdictions are beginning to differ.

Thus, while American influences on the civil law world have been undeniable, at least in its formal criminal procedures, they are not producing a strong Americanization, or adversarialization, of the civil law, but rather its fragmentation. This fragmentation is due at least in part to the fact that inquisitorial systems have “translated” American adversarial influences in different ways. In its interactions with the receiving criminal procedure, each translated mechanism has the potential to both transform and be
transformed by the inquisitorial system in different ways. As a result, the criminal procedures of the civil law tradition have already begun a process of differentiation.

This phenomenon has important consequences in the debate on the Americanization thesis. While it supports the weak version of the Americanization thesis in that it substantiates the adversarial influences on inquisitorial systems, it should also lead to a revision and a more concrete and subtle analysis of the strong version of this thesis. As shown by this discussion, the influences of the American system on other legal systems may produce different effects in each of them depending on the decisions made by legal translators, how much power they have had to advance their reforms, how much resistance there has been against them, etc. Furthermore, this study demonstrates that Americanization is not an all-or-nothing game. In other words, the practices of the receiving legal system may move in the direction of the American system at one level of procedure, but not at another, as in the case of the German system, where the Absprachen is unlikely to advance the American model of the dispute but may advance a more consensual and relative conception of truth like that which prevails in the American system.

In making my argument, I have also made two additional points worth reiterating here. First, I have discussed some of the shortcomings of the metaphor of the legal transplant as a means of understanding the circulation of legal institutions between legal systems, and I have proposed the metaphor of the legal translation as an alternative heuristic device to approach these issues. Some may consider this discussion of metaphors as a word game without much substantive value, but this would be a mistake. Metaphors matter because we think through them and because they highlight different aspects of reality. The main concept that I seek to emphasize through the metaphor of the legal translation is that legal practices and institutions may be transformed when translated between legal systems either because of decisions by the reformers (translators) or structural differences between the original and receiving legal systems (languages). Furthermore, the translated legal institution may produce a chain of changes—even unexpected ones as in the case of the German Absprachen—in the receiving legal system. Given that these transformations have been overlooked by many scholars and policy-makers, the translation metaphor is useful to highlight such changes.

Second, I have shown that the adversarial and inquisitorial systems can be analyzed not only as two different ways to distribute powers and responsibilities between the main actors of the criminal process, but also as two procedural cultures—two different conceptions of how criminal cases should be tried and prosecuted. Even if these procedural cultures are not entirely homogeneous, certain conceptions of criminal procedure have clearly prevailed in the United States and in the four civil law jurisdictions examined here. I have proposed a new theoretical framework to analyze these predominant procedural cultures and have used it to explain some of the transformations that plea bargaining has undergone when translated to the civil law jurisdic-
tions of Germany, Italy, Argentina, and France. This conceptualization of the adversarial and the inquisitorial systems has also provided us with a clear axis of reference to assess whether our four civil law jurisdictions are moving or have moved in the direction of the American system.

The conceptualization of the adversarial and the inquisitorial systems as procedural cultures is also important for other reasons. The debate about Americanization of law is, to a great extent, a debate about legal cultures. In other words, it is a debate about how law is understood, thought of, and practiced in different jurisdictions, as well as about how certain conceptions of legal phenomena that prevail in the United States may overcome other conceptions. A theoretical conceptualization of the adversarial and inquisitorial systems of the sort offered in this Article is thus necessary to fully participate in any such debate.