

Life, Liberty, and the Pursuit of Justice: A Comparative Legal Study of the Amanda Knox Case

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I. INTRODUCTION

Amanda Knox was an ordinary twenty-year-old college student who left her hometown of Seattle to study abroad in the storybook town of Perugia, Italy.¹ Her life appeared on course with the modern American dream.² However, the brutal murder of her British roommate, Meredith Kercher, a few months into her semester abroad destroyed any semblance of normal in Knox's life.³ Overnight, she went from the girl next-door to the face on the front page of every major newspaper.⁴ It did not take long for the American, Italian, and British media to begin inserting their own sordid narrative into the already gruesome and disturbing murder. With headlines like "*Amanda Knox the She-Devil or the Innocent?*,"⁵ "*The Wild, Raunchy Past of Foxy-Knoxy*,"⁶ and "*Knox: Innocent Abroad or Getting Away with Murder?*,"⁷ it is no surprise that strong emotions and opinions across the globe formed following this media frenzy.

By the time the Italian court eventually tried and found Knox guilty of the murder of Meredith Kercher, everyone was talking—including the American legal community. The American media took an increasingly pro-Knox slant,⁸ fueled in part by some legal commentators who criticized the Italian trial of Amanda Knox.⁹ These criticisms had the obvious effect of upsetting the Italian

1. Laura Smith-Spark, Hada Messia, & Ben Wedeman, *Amanda Knox Vows to Fight on as Italian Judges Over Trial in Murder Case*, CNN (March 27, 2013), <http://www.cnn.com/2013/03/26/world/europe/italy-amanda-knox-case/index.html> (on file with the *McGeorge Law Review*).

2. NINA BURLEIGH, *THE FATAL GIFT OF BEAUTY: THE TRIALS OF AMANDA KNOX* 51–54 (2011) (idyllically describing young Amanda's life and the work she did to achieve her dream of studying in Italy).

3. Smith-Spark et al., *supra* note 1.

4. *Freedom for Unlikely Murder Suspect Amanda Knox*, THE AUSTRALIAN (Oct. 4, 2011, 7:50 AM), <http://www.theaustralian.com.au/news/world/freedom-for-unlikely-murder-suspect-amanda-knox/story-e6frg6so-1226157734621> (on file with the *McGeorge Law Review*).

5. Nick Squires, *Amanda Knox the She-Devil or the Innocent?*, THE TELEGRAPH (Oct. 2, 2011, 8:34 PM), <http://www.telegraph.co.uk/news/worldnews/europe/italy/8802685/Amanda-Knox-the-she-devil-or-the-innocent-Foxy-Knoxys-day-of-judgment.html> (on file with the *McGeorge Law Review*).

6. Andrew Malone, *The Wild, Raunchy Past of Foxy-Knoxy*, THE DAILY MAIL (Dec. 3, 2007, 7:58 AM), <http://www.dailymail.co.uk/femail/article-498853/The-wild-raunchy-past-Foxy-Knoxy.html> (on file with the *McGeorge Law Review*).

7. Andrew Vogt, *Knox: Innocent Abroad or Getting Away with Murder?*, THE WEEK (Sept. 21, 2011, 8:47 AM), <http://www.theweek.co.uk/people-news/amanda-knox-free/2053/knox-innocent-abroad-or-getting-away-murder> (on file with the *McGeorge Law Review*).

8. See Nina Burleigh, *Why There Will Always Be Three Amanda Knoxes*, TIMES (Sept. 30, 2011), <http://www.time.com/time/world/article/0,8599,2095586,00.html> [hereinafter Burleigh, *Three Amanda Knoxes*] (on file with the *McGeorge Law Review*) (stating that Knox received favorable treatment from American network producers and journalists).

9. See e.g., Liz Robbins, *An American in the Italian Wheels of Justice*, N.Y. TIMES (Dec. 5, 2009, 7:24 PM), <http://thelede.blogs.nytimes.com/2009/12/05/an-american-in-the-italian-wheels-of-justice/> (on file with the *McGeorge Law Review*) (citing law professor George P. Fletcher referring to the trial as a "scandal of the first order . . .").

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and British media, which had formed a very negative opinion of Knox early on,¹⁰ but likely had farther-reaching consequences as well.

Much of this criticism was couched in comparative terms, which made clear that the American criminal justice system would never have allowed such an unjust trial, implying, if not outright stating, the American system's superiority.¹¹ This Comment will call into question the veracity of these claims, as well as their ultimate impact. A comparative analysis of the trial's two most pivotal and criticized aspects, involving the admission of two types of evidence, will demonstrate how this evidence could have received similar treatment in a US court, potentially leading to the same "unfair" guilty verdict. Further, a comparative analysis of the appeal will demonstrate that Knox would not have received an acquittal for the same appeal in the American court system and so would likely still be serving her sentence.

This practical example cautions the American legal community against making extensive criticisms of foreign legal systems that either explicitly state or imply that foreign system's inferiority in cases like this one, where the same result could have come in the US trial court, with no chance for Knox to appeal (as she did in the Italian system). Part II begins with an overview of the Amanda Knox trial and appeals in Italy. Part III places the Knox trial in the American court system in order to compare the Italian and American procedural and evidentiary rules at issue. Part IV completes the comparison by placing the Knox appeal in the American appellate system.

II. SEX, DRUGS, AND PUBLIC OPINION: THE ITALIAN TRIAL AND APPEAL OF AMANDA KNOX

The trial and initial appeal of Amanda Knox lasted 1,427 days.¹² The dramatic and emotional trial garnered incredible international media attention.¹³ The trial spurred a zealous response from the American public,¹⁴ while the

10. See Alessandra Rizzo, *Defense: Knox 'Crucified' in Italian Media*, WASHINGTON TIMES, Sept. 29, 2011, <http://www.washingtontimes.com/news/2011/sep/29/defense-knox-crucified-italian-media/?page=all> (on file with the *McGeorge Law Review*) (quoting Knox's lawyer as saying, "Knox has been crucified, impaled in a public square, subjected to the most sinister of speculations" by the Italian media); see also Burleigh, *Three Amanda Knoxes*, *supra* note 8 (stating that in the United Kingdom, Knox is "the exchange-student version of Casey Anthony . . .").

11. See Doug Saunders, *In Knox Case, Europe's Justice System was also on Trial*, THE GLOBE & MAIL (Oct. 3, 2011, 8:50 AM), <http://www.theglobeandmail.com/news/world/in-knox-case-europes-justice-system-was-also-on-trial/article555622/> (on file with the *McGeorge Law Review*) ("The guilty verdict of Ms. Knox in 2009 caused a number of prominent Americans, including celebrity lawyer Alan Dershowitz, to lash out at the European system.").

12. BRUCE FISHER, FINDING JUSTICE IN PERUGIA i (2011).

13. *Id.* ("During that time a movie was made, books were written, Wikipedia went haywire, online blog wars raged on, journalists were harassed, . . . an Anti-Knox hate group was formed, [as well as] a grass roots effort . . . even Italian politicians chimed in . . .").

14. This response was highly polarized. Support groups, such as "Friends of Amanda," sprung up, but so

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American legal community entered the debate with forceful commentary of its own.¹⁵ As the world watched, Knox and her boyfriend, Rafael Sollecito, were convicted in December 2009 for the murder of Meredith Kercher.¹⁶ Their joint appeal began in June of 2011;¹⁷ their murder convictions were eventually reversed in October of 2011.¹⁸

A. The Murder of Meredith Kercher

Meredith Kercher was a twenty-year-old student from the United Kingdom when she arrived in Perugia, Italy in September of 2007 to study political theory and history of cinema at the University of Perugia.¹⁹ Amanda Knox, also twenty, was a junior at the University of Washington when she came to Perugia to study Italian at the Università per Stranieri.²⁰ The two lived together, along with two other roommates, at 7 via della Pergola, the eventual scene of the murder.²¹ Amanda met Raffaele Sollecito, a twenty-three-year-old Italian student at the University of Perugia and her alleged accomplice, on October 25th at a classical music concert at Knox's university.²² Meredith Kercher was found murdered on November 2, 2007 in the bedroom of her Perugia apartment.²³ Her body was discovered on the floor, under a duvet cover, partially dressed and with three knife wounds to the neck.²⁴

According to Knox, on the morning of November 2, she returned home from Sollecito's house (where she had spent the night) to a series of suspicious findings: the front door was open (despite no one being home), a few drops of blood were visible in the bathroom Knox and Kercher shared, and feces were

did anti-Knox groups like "True Justice." Cf FRIENDS OF AMANDA KNOX, http://www.friendsofamanda.org/home_eng.html (last visited March 7, 2013) (on file with the *McGeorge Law Review*) (defining itself as a "site devoted to truth about Amanda Knox and the charges against her"), with TRUE JUSTICE FOR MEREDITH KERCHER, <http://truejustice.org/ee/index.php> (last visited Sept. 16, 2013) (on file with the *McGeorge Law Review*).

15. See generally Robbins, *supra* note 9 (quoting various legal commentators on their opinion of the Amanda Knox trial).

16. FISHER, *supra* note 12.

17. Elisabetta Povoledo, *Amanda Knox's Murder Conviction Appeal Begins in Italy*, N.Y. TIMES, June 28, 2011, at A8, available at http://www.nytimes.com/2011/06/28/world/Europe/28knox.html?_r=0 (on file with the *McGeorge Law Review*).

18. *Id.* Laura Smith-Spark, et al., *supra* note 1.

19. See BURLEIGH, *THE FATAL GIFT OF BEAUTY*, *supra* note 2, at xvii.

20. *Id.*

21. *Id.* at 66–68.

22. *Id.* at xxiv.

23. Squires, *supra* note 5.

24. Tom Kington, *Meredith Kercher Murder: Break-in and Handprint Clues at Isolated Cottage*, THE GUARDIAN (Oct. 3, 2011, 5:50 PM), <http://www.guardian.co.uk/world/2011/oct/03/meredith-kercher-murder-burglary-perugia> (on file with the *McGeorge Law Review*).

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found in the toilet of the other bathroom.²⁵ It was a holiday weekend, and the other two girls sharing the apartment were out of town, as were the four boys who lived below them.²⁶ Knox stated that she returned to Sollecito's to consult with him and that the two decided to revisit the apartment; on their way, they called Sollecito's sister, a police officer, to ask for advice.²⁷ They later called Knox's other roommate and the Italian police. Eventually, after breaking down her locked door, the group found Kercher dead in her room.²⁸ Police took Knox, Sollecito, and the other roommates and friends of Kercher to the station for questioning. Knox was questioned from November 2nd–6th.²⁹ During a late night interrogation on November 5th–6th, she made a highly contested confession that she was present at the scene of the crime during the murder and accused her boss, café owner Patrick Lumumba, of committing the act.³⁰ Following this statement, police arrested Knox.³¹ Police then arrested Patrick Lumumba on November 6th; he was later released on November 20, 2007 when police corroborated his alibi.³²

In December of that year, officials caught Rudy Guede, a known Perugian drug dealer and petty criminal, trying to board a train in Germany without a ticket.³³ Guede had become another of the police's suspects when investigators discovered his bloody fingerprint on a pillow at the crime scene.³⁴ He was extradited back to Italy and taken into police custody.³⁵ Guede was charged in 2008 with first-degree murder and sentenced to sixteen years in prison.³⁶

25. See BURLEIGH, *THE FATAL GIFT OF BEAUTY*, *supra* note 2, at 173.

26. *Id.* at 141–42.

27. *Id.* at 174. Sollecito's sister advised Knox and Sollecito to call the police, which they did. *Id.*

28. BARBIE NADEAU, *ANGEL FACE: THE TRUE STORY OF STUDENT KILLER AMANDA KNOX* 44–45 (2010).

29. See BURLEIGH, *THE FATAL GIFT OF BEAUTY*, *supra* note 2, at 176, 178, 180, 184, 193, 196 (detailing Knox's questioning by police during this timeframe).

30. *Id.* at 196. Amanda wrote in her statement to police: "In my mind I saw Patrik [sic] in flashes of red images. I saw him near the basketball court. I saw him at the front door. I saw myself cowering in the kitchen with my hands over my ears because in my head I could hear Meredith screaming." *Id.* at 167. However, Amanda also wrote: "I've said this many times to make myself clear: these things are unreal to me, like a dream, and I am . . . not sure they are real things that happened or are just dreams my mind has made to try to answer the questions in my head and the questions I am being asked." *Id.*

31. NADEAU, *ANGEL FACE*, *supra* note 28, at 72.

32. *Amanda Knox Trial: Key Dates in Case Against Former American Exchange Student Accused of Roommate's Murder*, NY DAILY NEWS (March 26, 2013), <http://www.nydailynews.com/news/crime/key-dates-amanda-knox-murder-case-article-1.1299223> (on file with the *McGeorge Law Review*); Nick Squires, *Amanda Knox: Guilty or Innocent, Five Reasons Why*, THE TELEGRAPH (Oct. 3, 2011, 12:27), <http://www.telegraph.co.uk/news/worldnews/europe/italy/8803077/Amanda-Knox-Guilty-or-innocent-five-reasons-why.html> (on file with the *McGeorge Law Review*) (stating that Lumumba spent the night of the murder talking with a customer at his bar).

33. Nick Pisa, *Rudy Guede: Portrait of Meredith's Murderer As He Begins His 30 Year Sentence*, THE DAILY MAIL (Oct. 29, 2008, 5:20), <http://www.dailymail.co.uk/news/article-1081457/Rudy-Guede-Portrait-Merediths-murderer-begins-30-year-sentence.html> (on file with the *McGeorge Law Review*).

34. *Id.*

35. *Id.*

36. BURLEIGH, *THE FATAL GIFT OF BEAUTY*, *supra* note 2, at xxvi–xxvii. His original sentence was thirty

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B. *The Trial of Knox and Sollecito*

The trial began in January of 2009.³⁷ Perugia's public prosecutor, Giuliano Mignini, presented a case of desire and drama. His theory was that on November 1st, 2007 Knox slit Kercher's throat while Guede and Sollecito restrained Kercher after a sordid sex game.³⁸ He painted Knox as a dangerous she-devil,³⁹ developing this image through extensive evidence, including writings from Knox's MySpace page, her Facebook page, and her prison diary.⁴⁰ The prosecution supplemented its motive theory with evidence taken from the crime scene. This included DNA, said to be Sollecito's, that was discovered on Kercher's bra clasp and DNA allegedly belonging to both Knox and Kercher found on a knife in Sollecito's kitchen.⁴¹ Additionally, the prosecution supplied witnesses placing both Sollecito and Knox near the crime scene that night (contradicting their joint alibi) and at a nearby store the next morning purchasing bleach.⁴² The prosecution's strongest evidence against Knox was her own signed statement placing her at the scene of the crime and accusing her boss, Patrick Lumumba, of committing the murder.⁴³

The defense's case rested on the theory that Rudy Guede committed the murder alone.⁴⁴ The defense highlighted Guede's criminal past of drug dealing and robbery.⁴⁵ They reminded the jury that Guede did not initially implicate Knox as an accomplice, but changed his story before Knox's trial.⁴⁶ They stressed that the only connection the prosecution could form between Guede and Knox was a witness who testified that they had once both attended a party at the flat below

years, but this was eventually reduced to sixteen years. *Id.* at xxvii. Many commentators have posited that the reduction was a "reward for placing [Knox and Sollecito] . . . at the [crime] scene.... NADEAU, ANGEL FACE *supra* note 1, at 110.

37. *Id.*

38. Ann Wise & Nikki Battiste, *Italian Prosecutor Says Amanda Knox Led Sex Assault on 'Prissy' Roommate*, ABC WORLD NEWS (Nov. 20, 2009), <http://abcnews.go.com/WN/International/amanda-knox-summations-focus-break/story?id=9136104> (on file with the *McGeorge Law Review*).

39. Nina Burleigh, *Did Amanda Knox Get a Fair Murder Trial*, TIME (Dec. 5, 2009), <http://www.time.com/time/world/article/0,8599,1945845,00.html> (on file with the *McGeorge Law Review*). At trial, Mignini developed this image so far as to theorize Knox's last words to Kercher: "she probably said, '[y]ou are always behaving like a little saint. Now we will show you, and now we will make you have sex!'" Nina Burleigh, *Amanda Knox Murder Trial Moves Toward A Climax*, TIME (Nov. 30, 2009), <http://www.time.com/time/world/article/0,8599,1945845,00.html> (on file with the *McGeorge Law Review*).

40. Ian Fisher, *Italian Murder Puts American Student in Spotlight*, N.Y. TIMES (Nov. 12, 2007), <http://www.nytimes.com/2007/11/12/world/europe/12iht-journal.4.8301930.html?r=0> (on file with the *McGeorge Law Review*); Burleigh, *Three Amanda Knoxes*, *supra* note 8.

41. Burleigh, *Amanda Knox Murder Trial Moves Toward a Climax*, *supra* note 39.

42. BURLEIGH, *THE FATAL GIFT OF BEAUTY*, *supra* note 2, at 276.

43. See Burleigh, *Did Amanda Knox Get a Fair Murder Trial*, *supra* note 39 (stating that the defense was never able to overcome Knox's incriminating statement).

44. Burleigh, *Did Amanda Knox Get a Fair Murder Trial*, *supra* note 39.

45. *Id.*

46. *Id.*

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Knox's.⁴⁷ Additionally, Guede had "denied ever having known" Sollecito.⁴⁸ The defense also sought to undo the prosecution's theory of motive and the mound of evidence it built against Knox.⁴⁹ It did so by presenting its own evidence corroborating Knox and Sollecito's original alibis and by expert testimony claiming "the amounts of biological material were too small to be verified, and could have been the result of contamination either at the crime scene or in the lab."⁵⁰ The defense also countered the effect of Knox's statement to the police by arguing that the officers had mentally and physically coerced Knox into giving this statement.⁵¹ However, in spite of these efforts, on December 4th, 2009 Knox was convicted of murder and given a twenty-six-year prison sentence; Sollecito was also convicted of murder and received a twenty-five-year sentence.⁵²

C. Major Criticisms of the Trial

While critics of the trial are located worldwide, a stronghold exists in the United States. As one British journalist wrote:

Backed by a well-organised support group of lawyers, scientists and writers, Knox's long divorced parents, Curt and Edda, have given a string of US interviews, reinforcing the message that their daughter was an innocent abroad and expressing their determination that their daughter will not be allowed to rot in an Italian jail as rancid as the justice system that put her there. They are hardly alone in voicing such sentiments. If there are any lawyers in the US who actually agree with the Knox verdict, the TV networks and major newspapers have so far failed to find them.⁵³

While the statement is hyperbolic, its point is not without merit; the American media frequently interviewed experts, specifically legal experts, who argued that the Italian trial was unjust.⁵⁴ For example, George P. Fletcher,

47. John Hooper, *Was There a Plot to Murder Meredith?*, THE GUARDIAN (Feb. 4, 2009), <http://www.guardian.co.uk/world/2009/feb/05/meredith-kercher-murder-trial> (on file with the *McGeorge Law Review*).

48. *Id.*

49. See NADEAU, *ANGEL FACE* *supra* note 1, at 133 (relaying the defense's cross-examination of the state's forensic experts).

50. See Burleigh, *Did Amanda Knox Get a Fair Murder Trial*, *supra* note 39.

51. See *Exclusive, Amanda Knox Statement*, CBS NEWS (Dec. 4, 2009), http://www.cbsnews.com/8301-18559_162-4936228.html (on file with the *McGeorge Law Review*) (reporting Knox's statement to the court that her false confession was the result of her abuse by the Italian police officers).

52. See BURLEIGH, *THE FATAL GIFT OF BEAUTY*, *supra* note 2, at xxvii.

53. Tom Leonard, *Only Doubt Over Knox Conviction is Exactly How They Got It Wrong*, THE TELEGRAPH (Dec. 8, 2009, 7:01 PM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/6763445/Only-doubt-over-Amanda-Knox-conviction-is-exactly-how-they-got-it-wrong.html> (on file with the *McGeorge Law Review*).

54. Burleigh, *See Why There Will Always Be Three Amanda Knoxes*, *supra* note 8 ("In the US, Knox is

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Columbia University's Cardozo Professor of Jurisprudence, referred to the trial as a "scandal of the first order."⁵⁵ Harvard law professor Alan Derschowitz referred to the Italian legal system as "not among Europe's most distinguished."⁵⁶ He claimed that Knox's guilty verdict was "totally predictable," nothing more than "a confirmation" of the questionable investigation.⁵⁷

The major criticisms centered on the following aspects of the Italian trial: the joint trial of civil claims and criminal charges,⁵⁸ the jury composition, the lack of jury sequestration, introduction of character evidence by the prosecution, and admission of Knox's signed statements.⁵⁹

Critics interwove their censures of the justice system with their outrage over the media coverage. Knox's supporters blamed the Italian and British media's portrayal of Knox as a "sex crazed killer," referring to her as "Foxy Knoxy" and the "angel-faced killer," as one reason Knox was doomed to receive an unfair trial from the start.⁶⁰ This image aligned closely with the prosecution's theory of a "sex game gone wrong."⁶¹ Knox's family and supporters strongly protested that this theory was fabricated, along with many other important factors like motive and timing of the murder.⁶² Finally, the credibility of the prosecution's witnesses and the validity of the incriminating DNA evidence were points of contention.⁶³

D. The Italian Appeals

On November 24, 2010, Knox and Sollecito's appeal began.⁶⁴ The judge agreed to require the prosecution's key witness to retake the stand and allowed independent court-appointed experts to retest the controversial DNA evidence.⁶⁵

the victim of a judicial system gone awry.").

55. See Robbins, *supra* note 9.

56. See Leonard, *supra* note 53.

57. *Id.*

58. Unlike the US, Italy allows the joint trial of a civil and criminal claim before the same fact-finders. Julia Grace Mirabella, Comment, *Scales of Justice: Assessing Italian Criminal Procedure Through the Amanda Knox Trial*, 30 B.U. INT'L L.J. 229, 241 (2012).

59. *Id.* at 241–46; see Robbins, *supra* note 9.

60. See FISHER, *supra* note 12, at 48; see also Burleigh, *Did Amanda Knox Get A Fair Murder Trial*, *supra* note 39 ("Many legal observers in the U.S. were dismayed, though not surprised, by the verdict, since they felt all along that Knox had already been convicted in the Italian court of public opinion and had no real shot at a fair trial.").

61. Burleigh, *Did Amanda Knox Get A Fair Murder Trial*, *supra* note 39.

62. See Burleigh, *Did Amanda Knox Get a Fair Murder Trial*, *supra* note 39 ("During closing arguments, prosecutors changed the estimated time of death, pushing it two hours later in order to better match the account of a homeless man who came forward months after the arrests and claimed to have seen Sollecito and Knox near the house where Kercher was stabbed to death on the night after Halloween 2007.").

63. *Id.*

64. See BURLEIGH, *THE FATAL GIFT OF BEAUTY*, *supra* note 2, at xxvii.

65. See FISHER, *supra* note 12, at 9. This request for an independent review of the forensic evidence was denied by the trial judge. *Id.* As will be discussed in more detail *infra*, the Italian system allows fact-finding at the appellate level. See Part IV.A (detailing the Italian appeals process).

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The defense presented new witnesses and cross-examined Rudy Guede in court for the first time.⁶⁶ After hearing this witness and expert testimony during the second trial, the court acquitted Knox and Sollecito of the murder of Meredith Kercher on October 3, 2011.⁶⁷ However, this was not the end of the case. On March 25, 2013, Italy's highest court overturned the acquittal and demanded a retrial.⁶⁸ Knox's retrial began on September 30, 2013.⁶⁹

III. THE AMERICAN WAY: THE TRIAL OF AMANDA KNOX IN AN AMERICAN COURTROOM

Throughout the Italian trial and appeal of Amanda Knox, the focus was often on innocence or guilt.⁷⁰ However, the trial verdict of guilt was the result of procedure and evidence. Determining whether American criticisms of this verdict were fair requires an in-depth look at the legal process leading to the result. This Part will do so by analyzing the two most condemned elements of the trial: the admission of Knox's statement to police during questioning and the admission of character evidence against Knox.⁷¹ First, an explanation for each admission in the Italian system will be given, followed by a consideration of the same evidence under American criminal procedure and evidentiary rules. This process will bring to light the shortcomings of the American criticisms by demonstrating how and why both admissions could have also occurred in the American legal system.

A. Admission of Knox's Statement During Police Questioning

On November 2nd, when the Italian police initially questioned Sollecito, he stated that he and Knox spent the entire evening at his apartment relaxing together; he maintained this story each time he was questioned until November

66. *Id.* at 73.

67. Nick Squires, *Amanda Knox Freed After Jury Overturns Controversial Murder Verdict*, CHRISTIAN SCIENCE MONITOR (Oct. 3 2011), <http://www.csmonitor.com/World/Europe/2011/1003/Amanda-Knox-freed-after-jury-overturns-controversial-murder-verdict> (on file with the *McGeorge Law Review*).

68. Livia Borghese & Jason Hanna, *Italian Court on Reason for Knox's Retrial: Evidence Neglected*, CNN (July 19, 2013), <http://www.cnn.com/2013/06/18/world/europe/italy-amanda-knox-case/index.html> (on file with the *McGeorge Law Review*).

69. *Amanda Knox Retrial Begins in Florence Sept. 30 After Italy's High Court Overturned Acquittal*, STAR TRIBUNE (July 9, 2013), <http://www.foxnews.com/world/2013/07/09/amanda-knox-retrial-begins-in-florence-sept-30-after-italy-high-court/#ixzz2a4pC22D5> (on file with the *McGeorge Law Review*).

70. This was demonstrated by the titles of books and news articles reporting on the trial. *See, e.g.*, FISHER, *supra* note 12, at Preface; Squires, *Amanda Knox the She-Devil or the Innocent?*, *supra* note 5; Vogt, *supra* note 7.

71. Hooper, *Was There a Plot to Murder Meredith?*, *supra* note 47; *See also* Steph Stradley, *The Amanda Knox Case: Character Assassination Versus Evidence*, STRADLEY LAW, <http://www.stradleylaw.com/the-amanda-knox-case-character-assassination-versus-evidence/> (last visited Jan. 3, 2012) (on file with the *McGeorge Law Review*) (summarizing the American news media's criticisms that the prosecution rested its case on "character assassination . . .").

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5th.⁷² On that evening, the police again asked Sollecito to come to the station.⁷³ Amanda Knox came along, doing her homework while she waited.⁷⁴ Around midnight Knox agreed to talk with police in an interrogation room.⁷⁵ Those questioning her eventually informed Knox that Sollecito had changed his story.⁷⁶ He was no longer providing an alibi for her between 9 p.m. and 1 a.m. on the night of the murder, stating that he did not know where Knox was during this time.⁷⁷ At this point, the police and Knox recall different versions of the activities that followed.⁷⁸ The parties agree that throughout the all-night questioning a dozen police officers were in the room.⁷⁹ Knox claims that her interrogators slapped her in the back of the head twice and that she went without food and water for hours.⁸⁰ The police deny these claims and filed slander charges against Knox and her parents for making them.⁸¹

At 1:45 a.m., Amanda Knox signed a statement written by the police in Italian.⁸² The statement detailed the murder: on the night of November 2nd Amanda met her boss, Patrick Lumumba, and at some point Meredith joined them as well; Lumumba had sex with Meredith, and he killed her.⁸³ Amanda signed a second statement, which again stated Lumumba was the murderer, and also wrote three pages of her own describing her “‘vision’ of meeting Patrick, being in the murder house, [and] hearing the screams.”⁸⁴ Critics have referred to the admission of these statements as “the most damning single piece of evidence against the young American.”⁸⁵

72. BURLEIGH, *THE FATAL GIFT OF BEAUTY*, *supra* note 2, at 191.

73. *Id.*

74. *Id.*

75. See Barbie Nadeau, *The Italian Job*, *THE DAILY BEAST* (Oct. 6, 2009, 8:00 PM), <http://www.thedailybeast.com/newsweek/2012/08/12/the-italian-job.html> (on file with the *McGeorge Law Review*).

76. BURLEIGH, *THE FATAL GIFT OF BEAUTY*, *supra* note 2, at 194.

77. *Id.* at 192, 194. Sollecito would later state that police confused him by requiring him to recite where Amanda was on the night before the murder. *Id.* at 193. He would also claim that the police told him they had hard evidence against Amanda and that after many hours of questioning, without sleep or the presence of family or a lawyer, he made this statement. *Id.* at 193.

78. *Id.* at 194.

79. *Id.*

80. *Id.* at 195; Hooper, *Was There a Plot to Murder Meredith?*, *supra* note 47.

81. *Id.* This trial was set to begin February 5, 2013. However, the Knox defense requested a change of venue because of a conflict of interest: the assigned lead prosecutor (Giuliano Mignini) is one of the accusing parties. Nikki Battiste, *Amanda Knox's Slander Trial Moved to Florence*, *ABCNEWS* (Feb. 5, 2013, 4:01 PM), <http://abcnews.go.com/blogs/headlines/2013/02/amanda-knoxs-slander-trial-moved-to-florence/> (on file with the *McGeorge Law Review*).

82. BURLEIGH, *THE FATAL GIFT OF BEAUTY*, *supra* note 2, at 196.

83. *Id.* The statement read: “I remember confusedly that he killed her.” *Id.*

84. *Id.* at 199.

85. Hooper, *Was There a Plot to Murder Meredith?*, *supra* note 47.

*McGeorge Law Review / Vol. 45**1. Admissibility of Knox's Statement in the Italian Criminal System*

As previously stated, the Italian court admitted Knox's statement to the police into evidence at trial.⁸⁶ But the court did not admit the evidence for use in the *criminal* case; the statement was admitted into evidence for the *civil* case only.⁸⁷ The two cases were tried together, however, in front of the same jury.⁸⁸

The Italian system grants a suspect a lawyer from the moment the police question the suspect.⁸⁹ It also requires that an interpreter be present for nonnative speakers.⁹⁰ Thus, police took Amanda Knox's statement in violation of both of these rules, and Italy's highest court did, in fact, pronounce the statements inadmissible in her criminal trial.⁹¹

But because the Italian system tries civil and criminal cases together, the statements were admitted.⁹² Knox's trial included not only the criminal charge against her, but also two civil cases: Lumumba's defamation case filed against Knox for her false statement that he murdered Kercher and Kercher's family's civil suit against Knox. The court deemed the statements admissible for Lumumba's defamation case.⁹³ Thus, the jury heard the statement during the course of the joint trial.

Yet, criticizing the Italian system for allowing evidence because it is admissible for one purpose but not for another hardly seems a fair criticism coming from the American legal community. After all, Federal Rule of Evidence 105 allows the same practice so long as a jury instruction accompanies the evidence.⁹⁴ While not entirely analogous here, as the Italian system has separate *cases* within the same trial rather than separate *purposes* within the same trial, it does at least show that the criticism is misplaced. The potential problem lies not with the Italian system's failure to protect a suspect taken into custody by police, but with its decision to try multiple cases together. As the following analysis of Knox's statement in the American criminal system will demonstrate, the Italian criminal court's approach affords a suspect in Knox's circumstance more protections than the American system.

86. *Id.*

87. *Id.*

88. *Id.*

89. Mirabella, *supra* note 58, at 242 n.79.

90. *Id.*

91. See Hooper, *Was There a Plot to Murder Meredith?*, *supra* note 47.

92. *Id.*

93. *Id.*

94. FED. R. EVID. 105.

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2. Admissibility of Knox's Statement in the American Criminal System

In an American court, one must start with the general rule that all relevant evidence is admissible.⁹⁵ Statements made by defendants to police about the crime are almost always relevant and so the defendant must demonstrate why the court should exclude the statement from evidence. Commonly, defendants object that police violated their constitutional rights in obtaining the statement.⁹⁶ Specifically, they argue that the statement was involuntary or that the police did not provide adequate *Miranda* warnings.⁹⁷ An analysis of both of these possible violations will demonstrate that it is far from certain that either would have kept Knox's statements out of evidence had she been tried in an American court.

i. Inadmissibility of the Statements Due to a Voluntariness Violation

The Supreme Court stated in *Lisenba v. California*⁹⁸ that the 14th Amendment Due Process Clause prohibits the use of undue influence to induce a defendant to confess and refuses to allow said confession into evidence.⁹⁹ At the trial level, the court applies a totality of the circumstances test to determine involuntariness.¹⁰⁰ Factors considered include police methods of coercion (threats of violence, promised incentives, or the relaying of false statements to the suspect), "the defendant's peculiar susceptibility to police coercion," "the defendant's character and life experiences," and other surrounding circumstances.¹⁰¹ In some cases, like torture and prolonged interrogation, the Supreme Court comes close to establishing a *per se* finding of involuntariness, but beyond that, the issue is decided case by case.¹⁰²

95. *Id.* at 402.

96. See RUSSELL L. WEAVER ET. AL., PRINCIPLES OF CRIMINAL PROCEDURE 176–90 (2008) (discussing the constitutional doctrines that support judicial regulation of confessions and interrogations by police).

97. *Id.* at 177–78, 186.

98. 314 U.S. 219, 240–41 (1941).

99. *Id.* at 236–37 ("As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt. We have so held in every instance in which we have set aside for want of due process a conviction based on a confession."). Involuntary confessions are considered inherently untrustworthy. *Spano v. New York*, 360 U.S. 315, 316 (1959) ("Life and liberty can be as much endangered from illegal [police] methods used to convict those thought to be criminals as from the actual criminals themselves.").

100. *Spano*, 360 U.S. at 315 ("[P]etitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused; his confession was not voluntary; and its admission in evidence violated the Due Process Clause of the Fourteenth Amendment.").

101. See WEAVER, *supra* note 96, at 178.

102. See *e.g.*, *Ashcroft v. Tennessee* 322 U.S. 143, 143, 154 (1944) (finding an interrogation involuntary because police questioned defendant for thirty-six consecutive hours).

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In its leading case on the matter, *Spano v. New York*,¹⁰³ the Supreme Court looked to the following facts in finding an involuntary confession: the twenty-five-year old defendant was born outside of the United States, was only in his first year of high school, and had a history of emotional instability.¹⁰⁴ In addition, he was questioned by multiple officers for eight hours—during which he was told his failure to confess would lead to his longtime friend losing his job as a police officer¹⁰⁵—and was subject to “the leading questions of a skillful prosecutor.”¹⁰⁶

Amanda Knox, though younger than the defendant in *Spano*, has long excelled in school, and those who know her consider her bright and motivated.¹⁰⁷ She also has had plenty of work and life experience for someone her age.¹⁰⁸ Unlike the defendant in *Spano*, she has no known history of mental illness or emotional instability. On the night of November 5th, Knox came to the police station voluntarily,¹⁰⁹ not because of an outstanding warrant against her like the defendant in *Spano*.¹¹⁰ When police asked to speak with Knox, they did not inform her that they considered her a suspect, nor that Sollecito had recanted his statements that Knox had been with him the entire night of Kercher’s murder.¹¹¹ Both of these statements would have increased Knox’s sense that she had to cooperate with the officers’ request that she speak to them.

Knox also claimed that she was not fed by officers, was hit on the head twice by an unidentified police officer, was told she would never see her family again, and that obtaining a lawyer would not be in her best interest.¹¹² However, there was conflicting testimony on this, and Knox could not even identify which officer hit her.¹¹³ US courts often have to resolve disputes of conflicting

103. 360 U.S. 315 (1959).

104. *Id.* at 321–22.

105. *Id.* at 322.

106. *Id.*

107. See BURLEIGH, THE FATAL GIFT OF BEAUTY, *supra* note 2, at 50–53 (referring to Amanda as “scholarship smart,” noting that she organized and worked to send herself to study in Italy).

108. See BURLEIGH, THE FATAL GIFT OF BEAUTY, *supra* note 2, at 52.

109. *Exclusive: Amanda Knox Statement*, CBSNEWS (Dec. 4, 2009, 8:52 PM), http://www.cbsnews.com/8301-18559_162-4936228.html (on file with the *McGeorge Law Review*).

110. 360 U.S. at 323.

111. See Nadeau, *The Italian Job*, *supra* note 75 (stating that after Sollecito changed his story the police asked Knox only if they could ask her a few questions); see also *Exclusive: Amanda Knox Statement*, *supra* note 109 (relaying Knox’s statement to the judge that police came into the waiting room, only telling her they wanted to ask her more questions about what she knew and who came to her house).

112. Nikki Batiste & Alyssa Newcomb, *Amanda Knox ‘Loves Italy’ and May Go Back*, ABCNEWS (Jan. 24, 2012), <http://abcnews.go.com/International/amanda-knox-love-italy-return/story?id=15429853#UOXzBY4ctUQ> (on file with the *McGeorge Law Review*).

113. Doug Longhini & Sara Ely, *Raffaele Sollecito Says He was Slapped During Interrogation by Italian Police*, CBSNEWS (Sept. 27, 2012, 12:47 PM), http://www.cbsnews.com/8301-504083_162-57520846-504083/raffaele-sollecito-says-he-was-slapped-during-interrogation-by-italian-police/ (on file with the *McGeorge Law Review*) (stating that police denied Knox’s claims of abuse and filed criminal slander charges against her).

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testimony, and usually they credit the police.¹¹⁴ Therefore, the facts of Knox’s case are not analogous to those of *Spano*, and weigh in favor of a finding of voluntariness.

The only uncontroverted factor supporting a hypothetical claim of involuntariness is that her interview took place late at night and lasted for several hours, after police had already questioned her for three consecutive days—and as a result of this and the murder she had not been sleeping well.¹¹⁵ However, the length of questioning, approximately four hours, was far short of the thirty-six consecutive hours of questioning present in *Ashcroft v. State of Tennessee*,¹¹⁶ (which was deemed sufficient alone to render the interview involuntary¹¹⁷), as well as the eight hour questioning in *Spano* (which, as already discussed, had many other factors supporting the finding of involuntariness). Thus, an American court could rationally conclude, in light of *Spano* and *Lisenba*, that Knox’s statement was voluntary. While, on appeal, the conclusion of voluntariness is reviewed de novo,¹¹⁸ an appellate court, based on this entire record, likely would affirm the voluntariness finding.

ii. Inadmissibility of the Statement Due to a Miranda Violation

In *Miranda v. Arizona*,¹¹⁹ the Supreme Court ruled that police must offer adequate protective devices to suspects in custody, otherwise “no statement obtained from a defendant can truly be the product of his free choice.”¹²⁰ These protective devices include informing an interrogated person in custody that she has the right to remain silent (and that anything she says can be used against her in court) and the right to an attorney (or to have one appointed for her if she cannot afford her own).¹²¹ After these warnings are given, the defendant “may knowingly and intelligently waive these rights and agree to answer questions or

114. In fact, many critics claim that “police perjury” is an epidemic in the American criminal court system, one that is tacitly perpetuated by judicial inaction. See Alan M. Dershowitz, *Controlling the Cops; Accomplices to Perjury*, N.Y. TIMES (May 2, 1994), <http://www.nytimes.com/1994/05/02/opinion/controlling-the-cops-accomplices-to-perjury.html> (on file with the *McGeorge Law Review*) (“Without the complicity of judges, police perjury would be reduced considerably. I have seen trial judges pretend to believe officers whose testimony is contradicted by common sense, documentary evidence and even unambiguous tape recordings. . . . Some judges refuse to close their eyes to perjury, but they are the rare exception to the rule of blindness, deafness and muteness that guides the vast majority of judges and prosecutors.”).

115. See generally *Exclusive: Amanda Knox Statement*, *supra* note 107 (providing the transcript of Knox’s statements to Judge Paulo Micheli during the trial of Rudy Guede).

116. 322 U.S. 143 (1944).

117. *Id.* at 154.

118. See *U.S. v. Mills*, 122 F.3d 346, 350 (7th Cir. 1997) (determining on remand—after instruction from the Supreme Court—that voluntariness receives de novo review).

119. 384 U.S. 436 (1996).

120. *Id.* at 458.

121. *Id.* at 444–45.

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make a statement.”¹²² Generally, any statements taken in violation of *Miranda* result in the exclusion of such evidence.¹²³ However, there are exceptions to *Miranda*. For example, statements taken in violation of a defendant’s *Miranda* rights can still be used to impeach the defendant if she testifies.¹²⁴

Before considering whether the state can evoke an exception to *Miranda*, the court must determine whether the defendant was in custody. While these protections may appear both clear and far-reaching on the surface, the legal definition of “custody” can limit *Miranda*’s protections. While the test to determine custody has developed over time, the modern test looks to whether a reasonable person would feel “he or she was not at liberty to terminate the interrogation and leave.”¹²⁵ The court will look to all of the circumstances of the interrogation to see whether there is either a formal arrest or a restriction of free movement comparable to formal arrest.¹²⁶ Not every questioning at a police station triggers the need for *Miranda* warnings.¹²⁷ In *Oregon v. Mathiason*,¹²⁸ the Court found that a defendant invited to come to the station by police did so voluntarily; therefore, *Miranda* warnings were not triggered (even though the defendant was later arrested for his incriminating statements).¹²⁹

If the same factual scenario of Knox’s November 2nd confession had unfolded at an American police station, there are multiple ways the statement could have eventually found its way into an American courtroom. Knox gave her statement at the police station in an interrogation room.¹³⁰ The fact that the police were asking her questions at the police station is enough to establish that the *interrogation* requirement was met.¹³¹ However, as stated above, questioning at a police station is not enough to establish *custody*.¹³² In fact, this situation is similar to that of *Mathiason*. The police did not request that Knox even come to the police station; she came upon her own accord.¹³³ Once there, she was asked to

122. *Id.* at 479.

123. *See Id.* at 476 (“The warnings required and the waiver necessary in accordance with our opinion today are . . . prerequisites to the admissibility of any statement made by a defendant.”).

124. *Harris v. New York*, 401 U.S. 222, 226 (1971).

125. *Thompson v. Keohane*, 516 U.S. 99, 100 (1995).

126. *See* WEAVER, *supra* note 96, at 191.

127. *Miranda*, 384 U.S. at 477–78.

128. 429 U.S. 492 (1977).

129. *Id.* at 495.

130. *See Exclusive: Amanda Knox Statement*, *supra* note 109 (relating Knox’s statements to the judge that police moved her from the waiting room to another room to ask questions).

131. Nevertheless, interrogation may not even matter if custody, as discussed above, was not found first. “The Court often seems to view ‘custody’ and ‘interrogation’ as separate requirements, deciding the ‘custody’ issue first and then, only if the suspect was in custody, addressing the interrogation issue.” JOSHUA DRESSLER & GEORGE C. THOMAS, III, *CRIMINAL PROCEDURE: INVESTIGATING CRIME* 665 (4th ed. 2010).

132. *Mathiason*, 429 U.S. at 495 (finding defendant was not in custody, even though questioning took place at police station).

133. *See Exclusive: Amanda Knox Statement*, *supra* note 109.

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speak with them and agreed to.¹³⁴ By Knox's own admission, she wanted to continue speaking to police to assist them in their hunt for Kercher's murderer.¹³⁵ Thus far, she had spoken with police for this purpose on multiple prior occasions, and each time police allowed her to return home. An American court could find that there was no reason for Knox to suspect that this round of questioning would be any different—especially as it was not she who the police called in, but rather Sollecito.

Despite these facts indicating that “custody” might not exist, admittedly at some point a reasonable person in Knox's situation likely would have felt she could not leave the interrogation room. Knox's testimony about the length and intensive tactics used during the questioning supports this assumption.¹³⁶ The question remains at what point the police would have needed to issue *Miranda* warnings if this same situation had occurred in an American system. Likely, they would not have been required to do so until they viewed Knox as a suspect, that is, when they informed her that Sollecito had destroyed her alibi and began requesting that she tell them a different story than the one she had been relaying to them.

After this, a court would likely find that the custody and interrogation requirements were satisfied in order to trigger the American system's *Miranda* warning requirement. Yet, there are several indicators that Knox would have received these warnings. The Italian police officers believed they had caught the culprit of perhaps the most high-profile murder to ever disturb their city.¹³⁷ They were extremely careful in preserving her sudden and complete “confession.”¹³⁸ Likewise, had such a high-profile murder occurred in an American city, it seems unlikely that police officers would *not* have read her the warnings, especially when she offered to write and sign her new, complete confession.¹³⁹ Nearly half a century after the *Miranda* decision, reading *Miranda* warnings is a thoroughly embedded practice in police procedure.¹⁴⁰ The United States Supreme Court has

134. *Id.*

135. *Id.*

136. See Batiste & Necomb, *supra* note 110 (relaying Knox's accusations that police abused her physically and verbally); Nadeau, *The Italian Job*, *supra* note 73.

137. Lumumba: *The Popular and Gentle Bar Owner Willing to Help Anyone*, THE DAILY MAIL (last updated, Nov. 7, 2007, 11:29), <http://www.dailymail.co.uk/news/article-492165/Lumumba-The-popular-gentle-bar-owner-willing-help-anyone.html> (on file with the *McGeorge Law Review*) (referring to the murder as the “the most shocking murder in the town's memory . . .”).

138. After Knox made an oral confession police wrote out a statement reflecting this and asked her to sign it. See BURLEIGH, *supra* note 2, at 196–98. They called in the Perugian magistrate in charge of investigating and prosecuting the Kercher murder, Giuliano Mignini, who also had Knox sign a statement. *Id.* at 197. The entire thirty-six member police force of Perugia was called in “to sign the arrest document.” *Id.* at 198. Knox herself later offered to write a statement and sign it. *Id.* at 199.

139. *Id.* at 197–99.

140. See Carl A. Benoit, J.D., *The “Public Safety” Exception to Miranda*, FEDERAL BUREAU OF INVESTIGATION LAW ENFORCEMENT BULLETIN (Feb. 2011), available at http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/february2011/legal_digest (on file with the *McGeorge Law Review*)

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even stated that “Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.”¹⁴¹

Even if our hypothetical American officers had given the warnings *after* Knox’s initial oral statements placing her at the scene of the crime and accusing Lumumba of the act, the written statement following the warnings may still have been admissible. When the same statements are made both pre- and post-*Miranda* warnings, the court will find the second statement admissible unless there is a showing of bad faith.¹⁴² Knox suddenly and completely changed her story, confessing to playing a role in the murder. While the police may have suspected this, they had no idea that she would actually give such a confession, or that she would give them Lumumba’s name as the murderer, and so it is unlikely that the police in this situation would be found to have purposefully avoided giving the warnings.

In addition to facts suggesting that *Miranda* warnings would have been given to Knox had she been questioned in an American police station, there are also indications that Knox would have waived her *Miranda* rights once they were given. An overwhelming majority of suspects, 80–90 percent, waive their rights after being *Mirandized*.¹⁴³ Additionally, Knox willingly confessed to police; and while she admitted to being unclear as to some of the details, the one thing she was certain of was that she wanted to explain herself, explain the truth, and to assist the police in finding Meredith’s murderer.¹⁴⁴ This is exactly what she attempted to do by her statement.

Finally, even if *Miranda* applied and police for some reason failed to give the warning, the statement could have still been used for impeachment purposes.¹⁴⁵ In such a case, the evidence would have been inadmissible—because of the *Miranda* violation—in the American court for one purpose (the truth of the

(“[T]he the *Miranda* decision stands as a monolith in police procedure.”).

141. *Dickerson v. U.S.*, 530 U.S. 428, 443 (2000).

142. In *Missouri v. Seibert*, a plurality of the Court ruled that where the officer purposefully obtains the confession without *Miranda* warnings, then follows the confession with the warnings, and immediately asks the suspect to repeat the earlier confession, that *Miranda* is not complied with. 542 U.S. 600 (2004) (plurality decision). However, in *Oregon v. Elstad*, the Court allowed this practice where it was employed as a purposeful tactic. 470 U.S. 298, 301 (1985). In that case, the officer, upon arresting the young defendant in the presence of his mother, stated that he believed the defendant was involved in a burglary. *Id.* The defendant responded that he had been at the scene. *Id.* Later, he made full confession at the police house after being *Mirandized*. *Id.* In *Seibert*, the Court distinguished *Elstad* as a “good-faith” *Miranda* mistake. *Seibert*, 542 U.S. at 600. Here, Knox’s situation aligns much more closely with *Elstad*. The police did not even plan on questioning Knox at all that evening, let alone as a suspect. Moreover, they clearly had no idea about the Lumumba theory of the murder (or they would have arrested him already).

143. DAVID LEVINSON, *ENCYCLOPEDIA OF CRIME AND PUNISHMENT* 930 (Vol. 1 2002).

144. In her statement, Knox wrote: “I . . . want to tell the truth the best that I can . . .” and “I understand how serious this situation is, and as such, I want to give you this information as soon and as clearly as possible.” Malcolm Moore, *Transcript of Amanda Knox’s Note*, THE TELEGRAPH (Nov. 22, 2007, 1:14 PM), <http://www.telegraph.co.uk/news/worldnews/1570225/Transcript-of-Amanda-Knox-note.html> (on file with the *McGeorge Law Review*).

145. *Harris v. New York*, 401 U.S. 222, 226 (1971).

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matter asserted) but admissible for another (impeachment of Knox).¹⁴⁶ This would then mirror the criticized result in the Italian court, where the statement was inadmissible for the purpose of the criminal suit but admissible for purposes of the defamation claim against Knox.¹⁴⁷

Most inquisitorial systems, like the Italian system, do not have evidence codes with strict rules limiting the information that a jury may hear.¹⁴⁸ That is because the jury is composed of both lay people *and* judges.¹⁴⁹ During deliberations, the judges explain the proper weight of the evidence.¹⁵⁰ The appellate court can determine whether the fact-finders made improper use of the evidence by reading the detailed opinion that the jury must prepare justifying the verdict.¹⁵¹ For example, the trial court in the Knox case submitted a four hundred-page report.¹⁵² This safeguard does not exist in the U.S., as its system requires juries only to announce the verdict.¹⁵³ In the American system, there is no written assurance that the jury will read the statement only as proof of Knox's conflicting testimony on the stand (and thus her lack of credibility as a witness) rather than considering the truth of the statement itself.

The analysis of voluntariness and *Miranda* warnings demonstrates that the trial court may have found her statement admissible because it was voluntary; and, furthermore, that if *Miranda* warnings were required there is good reason to think they would have been given and that Knox would have waived them. Or, at the very least, that the prosecution would have used the statement for impeachment purposes. Thus, unlike in the Italian criminal court where the statement was virtually per se inadmissible (and was ruled so by the Italian judge),¹⁵⁴ there are multiple paths by which the statement could have found its way into an American criminal trial. Moreover, the exclusion of Knox's statement in the Italian criminal trial was the result of the Italian procedural

146. *Id.*; FED. R. EVID. 105.

147. Hooper, *Was There a Plot to Murder Meredith?*, *supra* note 47.

148. *Criminal Procedure: Comparative Aspects-Adjudication* JRANK.ORG, <http://law.jrank.org/pages/901/Criminal-Procedure-Comparative-Aspects-Adjudication.html> (last visited Sept. 23, 2013) (on file with the *McGeorge Law Review*) ("In inquisitorial systems, the court has complete freedom in evaluating the evidence."); Dough Saunders, *Amanda Knox & Dominique Strauss Kahn Reveal A Continental Divide over Courts*, DOUGSAUNDERS.NET (Oct. 4, 2011), <http://dougsaunders.net/2011/10/amanda-knox-dominique-strauss-kahn-reveal-continental-divide-courts/> (on file with the *McGeorge Law Review*).

149. *See* Mirabella, *supra* note 58, at 236.

150. *Id.*

151. William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 15 (1992).

152. Tom Kington, *Meredith Kercher Has Been Forgotten, Says Family*, THE GUARDIAN (Oct. 3, 2011, 12:18), <http://www.guardian.co.uk/world/2011/oct/03/meredith-kercher-forgotten-says-family> (on file with the *McGeorge Law Review*).

153. *See* PRINCIPLES FOR JURIES AND JURY TRIALS, AM. BAR ASS'N 22 (2005), available at <http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf> (on file with the *McGeorge Law Review*) (noting that an informal poll may be conducted to determine how each juror will voted but stating nothing about requiring an opinion).

154. *See* Donadio, *supra* note 1.

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requirement that a suspect be given a lawyer and translator immediately upon questioning.¹⁵⁵ In the American system, an uncharged suspect does not receive the right to an attorney unless and until *Miranda* protections are triggered.¹⁵⁶ Thus, the Italian criminal system's protections activate earlier than the American system's and offer more certain protections for defendants. This fact makes the criticisms of the Italian *criminal* system seem biased and poorly directed, at least in so far as the critics position the American system as a superior example.

B. Admission of Character Evidence Against Knox

Many critics found the admission of character evidence against Knox to be the most incriminatory and consequently unfair aspect of the trial.¹⁵⁷ The prosecution introduced posts from Knox's MySpace and Facebook pages.¹⁵⁸ Among these were Knox's references to herself as "Foxy-Knoxy"—which became the Italian media's moniker for the sexy and deviant characterization of Knox it fostered.¹⁵⁹ The prosecution strengthened the nickname with pictures of Knox with a Gatling gun and a drunken video post of her with friends.¹⁶⁰ This characterization, according to Knox supporters, allowed the prosecutor to create a "fictional . . . satanic, ritualistic sex crazed killer," allowing the jury to convict her based on this image alone.¹⁶¹ The court also admitted two short stories, written by Knox, dealing with "rapes, self-cutting, voyeurism, and domestic violence," which have been described as "an intense, detailed description of the physical sensation of suppressed rage."¹⁶²

In addition to Internet sources, the prosecution put Kercher's friends on the stand to paint a picture of Knox as so overtly sexual that she made Kercher

155. Mirabella, *supra* note 58, at 242 n.79.

156. *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1996) (listing right to counsel among the due process protections afforded to an interrogated defendant in custody).

157. See Steph Stradley, *The Amanda Knox Case: Character Assassination Versus Evidence*, STRADLEY LAW, <http://www.stradleylaw.com/the-amanda-knox-case-character-assassination-versus-evidence/> (last visited Jan. 3, 2012) (on file with the *McGeorge Law Review*) (summarizing and seconding the American news media's criticisms that the prosecution rested its case on "character assassination . . .").

158. Hooper, *Was There a Plot to Murder Meredith?*, *supra* note 47. Similar evidence was introduced against Sollecito from his blog sites. *Id.* One especially damaging image was a picture of Sollecito dressed in surgical bandages "wielding a meat cleaver." *Id.*

159. FISHER, *supra* note 12, at 48. Knox and her family stated that the nickname, rather than being a promiscuous one, was given to her when she was eight "for her sly moves on the soccer field." *Id.*

160. Fisher, *Italian Murder Puts American Student in Spotlight*, *supra* note 40.

161. FISHER, *supra* note 12, at 48.

162. BURLEIGH, *THE FATAL GIFT OF BEAUTY*, *supra* note 2, at 60. The first story was of a rapist. *Id.* at 61. The rapist states at one point, "A thing you have to know about chicks is that they don't know what they want." *Id.* The second story was about a young girl involved in a "triangle with her mother . . . and the mother's ex-boyfriend . . . who stalks them and secretly snaps pictures of them while they are asleep and who may have raped [the girl]." *Id.*

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uncomfortable in her own home.¹⁶³ They claimed that Kercher and Knox argued about this, as well as Knox's lack of cleanliness, the men she brought to the apartment, and money that had disappeared from Kercher's room.¹⁶⁴ Friends present after the murder stated that Knox was "strangely unaffected by the murder. . . ."¹⁶⁵ One witness testified that she "found it difficult to be with [Knox] because she showed no emotion when everyone was really upset."¹⁶⁶

Anne Bremner, an American attorney who is the spokeswoman for Friends of Amanda (a Knox support group) and Knox's pro bono counsel, stated that this "character assassination" gave the defense an "uphill battle" before the unsequestered jury.¹⁶⁷ Columbia University Cardozo Professor of Law George P. Fletcher gave the following critique:

In the United States, character evidence does not come into play in the trial unless the defendant puts it in play. The prosecution can't come into court and say my guy is a bad guy. In this case, even if there is a sexual motive, so what if, say, she had a dozen boyfriends? That is not relevant here.¹⁶⁸

However, as the following comparison will demonstrate, the American rules regarding character evidence are not as absolute as Fletcher asserts.¹⁶⁹ Though it

163. See generally NADEAU, ANGEL FACE, *supra* note 28, at 127–30 (describing testimony by Kercher's friends claiming that Knox's sexual character made Kercher uncomfortable). Meredith's friends testified that, "Meredith complained that [Amanda] brought men back to the house. . . . This was something we didn't do, but Amanda was quite open about her sex life." *Id.* at 127. Others explained how Amanda left her vibrator out, making Kercher uncomfortable. *Id.*

164. *Italian Court Gives Briton Murderers Long Sentences*, THE EPOCH TIMES (Dec. 5, 2009), <http://m.theepochtimes.com/n2/united-kingdom/perugia-murder-trial-26066.html> (on file with the *McGeorge Law Review*); Wise & Battiste, *supra* note 38.

165. NADEAU, ANGEL FACE, *supra* note 28, at 128.

166. *Id.* (quoting witness Robyn Butterworth). Critics grouped these statements of Knox's reactions after Meredith was discovered murdered as "character evidence," however this evidence is not character evidence and would be generally admissible as relevant evidence under Federal Rules of Evidence 401 and 402. Rule 402 admits all relevant evidence, unless it falls into another exception. FED. R. EVID. 402. Rule 401 broadly describes "relevant" as encompassing any evidence that "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." *Id.* at 401. Here, this observation by a witness tends to prove a number of important facts, for example, that Knox was not surprised by the murder or that she was not upset by the murder, both of which could go toward proving motive or consciousness or guilt.

167. Tiffany Sharples, *How Strong is the Evidence Against Amanda Knox?*, TIME (June 14, 2009), <http://www.time.com/time/world/article/0,8599,1904571,00.html> (on file with the *McGeorge Law Review*).

168. Robbins, *An American in the Italian Wheels of Justice*, *supra* note 9 (quoting George P. Fletcher).

169. American news outlets quickly picked up on these absolute statements regarding character evidence. For example, as one author from the Seattle Weekly stated, "[w]ith an utter lack of physical evidence tying Knox and Sollecito to the murder, prosecutors instead attacked her character." He argued the prosecution used "all manner of colorful terms, each of which had no legal merit . . . [and] would never fly in an American court." Curtis Cartier, *Top Ten Reasons Amanda Knox's Conviction was Overturned*, SEATTLE WEEKLY (Oct. 3, 2011, 11:47 AM), http://blogs.seattleweekly.com/dailyweekly/2011/10/top_10_reasons_amanda_knox_co.php (on file with the *McGeorge Law Review*) (emphasis added).

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is true the admission of character evidence presented during the Knox trial in the Italian court was the norm, while the admission in the American court would likely stem from an exception of the rules, the fact remains that the same admission could have occurred in an American court.

1. Admissibility of Character Evidence in the Italian Criminal System

Compared to the American adversarial system, the Italian system, as an Inquisitorial system,¹⁷⁰ has traditionally followed much broader, less restrictive rules for evidence considered prejudicial to the defendant.¹⁷¹ Its system believes the fact-finder capable of determining the credibility of relevant evidence.¹⁷² The judge considers whether the evidence has probative value, and if so, will likely allow it.¹⁷³ Italy's Criminal Procedure Code was rewritten in 1989, partially to reflect a more adversarial system, and has since implemented exclusionary rules in certain instances, "such as illegally seized documents and testimonial evidence."¹⁷⁴ However, the Italian system by no means abandoned the Inquisitorial system's tradition of trusting the court as one seeking truth. Thus, its exclusionary rules exist only to forbid fact-finders from using the evidence in reaching their verdict, not from hearing the evidence during the process of truth-seeking.¹⁷⁵ The system relies on the fact that the two judges sitting on the jury panel will guide the jury in the proper method for understanding and weighing the evidence in its decisions.¹⁷⁶ Moreover, because the system also requires that the jury write an opinion detailing its reasons for the verdict, proper reliance can be demonstrated.¹⁷⁷ Though the American system does not hail from the Inquisitorial tradition, its rules are not inflexible when it comes to character evidence.

2. Admissibility of Character Evidence in the American Criminal System

The Federal Rules of Evidence (FRE) prohibit introducing evidence of a person's character to "prove that on a particular occasion the person acted in accordance with the character or trait."¹⁷⁸ This rule also applies to the use of past

170. See Mirabella, *supra* note 58, at 233 (describing the traditional Italian inquisitorial system and its recent adversarial additions).

171. *Id.* at 251.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* ("Italian jurists feel that the mixed jury is capable of knowing about the existence of evidence without making use of that evidence in the deliberation.").

176. *Id.*

177. *Id.* at 236.

178. FED. R. EVID. 404(a)(1).

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“crimes, wrongs, or other acts” as evidence that the defendant acted in accordance with her character.¹⁷⁹ The critics have latched onto this general rule. However, as anyone involved in the American legal field knows, for every given rule there are many more exceptions to that rule. Also, as already stated, evidence inadmissible for one purpose but admissible for another, is admissible.¹⁸⁰

The Fletcher criticism above notes one possible exception, that evidence of a defendant’s relevant character trait is admissible if the defendant first introduces evidence on this trait.¹⁸¹ Obviously, one cannot definitively say whether Knox would have first introduced evidence of her good character; however, her counsel’s statement above (made before trial), regarding the character assassination of her client, indicates her legal team believed it was an issue from the onset of the trial that they needed to address in order to win the case.¹⁸² Giulia Bongiorno, another of Knox’s attorneys, echoed this belief, stating that Amanda’s “image was massacred” by the media and that its attack on her character started before the trial.¹⁸³ In her closing remarks on appeal, Bongiorno stated, “Knox is not the character the *media* has painted her to be.”¹⁸⁴ The fact that she accused the media—rather than the prosecution—for its depiction of Knox’s character further underlines that the defense team believed throughout that it was the media’s statements that mattered most. Indeed, most of the prosecution’s character portrayals of Knox had already circulated the Italian media circuit for over a year before being heard in the Italian courtroom. The Italian (and global) media’s rampage against Amanda’s character had been in full force not only in Italy, but also in America for months before the trial; thus, regardless of an instruction ordering the jury not to read about the proceedings, an American defense team would have faced the same media “character assassination” issue as the Italian defense team did.¹⁸⁵ As a result, the defense may have felt pressed to repair Knox’s character through its own evidence.

179. *Id.* at 404(b).

180. *Id.* at 105.

181. *Id.* at 404(a)(2)(A).

182. See Sharples, *supra* note 166.

183. *Amanda Knox Lawyers Make Final Arguments*, CNN (Sept. 29, 2011, 1:31 PM), <http://www.cnn.com/2011/09/29/world/europe/italy-knox-appeal> (on file with the *McGeorge Law Review*).

184. *Id.* (emphasis added).

185. The American media has its own history of criticized involvement in murder trials, especially when the victim or the alleged murderer is an attractive young female (as with the Amanda Knox case). Consider the OJ Simpson trial, as Harvard law professor Charles J. Ogletree Jr. states, “[t]he most disappointing aspect of this entire trial to me was the role of the media. The press went at this case like a bee going after honey. They were just obsessed with it to the point that facts didn’t matter; tainting evidence didn’t matter; undermining the criminal justice system didn’t matter.” *Frontline, The O.J. Verdict*, PBS (Oct. 4, 2005), <http://www.pbs.org/wgbh/pages/frontline/oj/themes/media.html> (on file with the *McGeorge Law Review*) [hereinafter *Frontline*].

Some consider the OJ Simpson trial as creating a new norm. Alan Dershowitz, member of the Simpson defense team and Harvard law professor explains,

“I think after the O.J. Simpson case, the media realized it was on to something that Americans love: trials of celebrities. If [you’re] not a celebrity, we’ll make you a celebrity. The Scott Peterson case—

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If so, the prosecution then would have been free to offer its evidence against the defense's evidence of Knox's good character. Its evidence could take multiple forms under the Federal Rules of Evidence. The prosecution could have put on witnesses testifying to either Knox's reputation or their opinions of Knox (depending on which of these Knox presented on her behalf in her case-in-chief).¹⁸⁶ During the actual Italian trial, Knox's team presented opinion and reputation witnesses to demonstrate that there was "no basis for the sleazy tabloid narrative that instantly superglued itself to" Knox, but rather that she was a "nice girl from Seattle," hardworking, "studious," and friendly, with "[n]o violent background."¹⁸⁷

In response, the prosecution could have presented opinion and reputation witnesses rebutting the same traits.¹⁸⁸ For example, the testimony by Knox's boss that he had to remind her "to take care of the customers" and that he was planning on firing Amanda¹⁸⁹ could easily translate to his opinion that she was not hardworking. Meredith's friends testified that Amanda was a wild partier, equally easy to translate into not "studious."

However, it is not even necessary to turn their statements into pure "opinion statements,"¹⁹⁰ for specific instances of Knox's character could have also been admitted through cross-examination of her own good character witnesses.¹⁹¹ Under this theory, the defense could impeach the truthfulness of Knox's witnesses. For example, when her college friend Madison Paxton stated that Knox was hardworking, the defense could impeach Paxton's truthfulness by asking whether she knew that Knox's boss intended to fire her for failure to perform her duties.¹⁹² While it is true that if Paxton denied this, the defense could

he wasn't a celebrity; he became a celebrity. And I think media-driven trials have now become a reality. You get to be tried both in the court of public opinion, by the talking heads on television, and you get to be tried in front of the jurors. *The danger is that the jurors will be influenced by the talking heads and by the media coverage and that tactical decisions will be made by lawyers and by judges based on the media focus on the case.* And that can be a great danger."

Id. (emphasis added).

186. FED. R. EVID. 405(a). The prosecution would need to demonstrate that these witnesses had the proper knowledge to testify to either of these matters. For a reputation witness, the prosecution must demonstrate that the witness and the defendant are from the same community, that the witness has been a member of that community for a certain length of time, that the defendant has a reputation for this character trait, and that the witness knows of that reputation. For an opinion witness, all that is required is to show the witness has known the defendant for a sufficiently long period of time. This time period varies; less time is required if the relationship is of a close nature. *Michelson v. United States*, 335 U.S. 469, 477-78 (1948).

187. Dennis Murphy, *The Trial of Amanda Knox: After Yearlong Trial in the Murder of a Housemate, American Gets a Verdict*, NBC NEWS (Dec. 5, 2009), <http://www.king5.com/news/investigators/60680637.html> (on file with the *McGeorge Law Review*) (transcript of Dateline NBC report, aired Dec. 4, 2009) (quoting Anne Bremner).

188. FED. R. EVID. 404(a)(2)(A).

189. Murphy, *supra* note 187.

190. *See supra* note 186 and accompanying text.

191. FED. R. EVID. 405(a).

192. *See* Lind Byran, *Investigators: Family, Friends Defend Amanda Knox's Character*, KING5 (Nov. 13,

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not put Lumumba on the stand to counter her denial,¹⁹³ this is hardly necessary. The question itself brings in the information and regardless of Paxton's answer, the result is a bad one for the defense: if Paxton answers no, the jury questions whether she truly knows Amanda well enough to testify to her character; if Paxton answers yes, it discredits Paxton's testimony.

While under this theory of impeachment, the jury is told only to consider the information for purposes of determining the credibility of Knox's character witness, almost every trial attorney will attest to the widely-held doubt that juries in the American criminal system are capable of hearing evidence for one purpose but not for another.¹⁹⁴ As Dr. Joel Lieberman, an expert researcher and professor in the area of jury decisionmaking, states, "[w]ith few exceptions, empirical research has repeatedly demonstrated that limiting instructions" explaining to jurors that they are only to use evidence for one purpose "are unsuccessful at controlling jurors' cognitive processes."¹⁹⁵

Thus, this circumstance is quite similar to the Italian system's handling of the admission—where character evidence is admitted only to be heard but not to form the jury's verdict (that is, they cannot list it in the written opinion as reason for the verdict).¹⁹⁶ The difference lies in each system's safeguard against the jury's improper use of the prejudicial evidence. The American system provides a jury instruction; however, as noted above, the effectiveness of these instructions is demonstrably low.¹⁹⁷ The Italian system, on the other hand, requires a written explanation for the decision that can be reviewed by an appellate court, forcing the jury to prove it truly considered the evidence in its proper, limited light when reaching its decision.¹⁹⁸

2009, 12:16 PM) <http://www.king5.com/news/investigators/60680637.html> (on file with the *McGeorge Law Review*) (interviewing Madison Paxton); Murphy, *supra* note 187 (citing Patrick Lumumba's interview with NBC).

193. *Michelson v. United States*, 335 U.S. 469, 479 (1948) (stating a "hazard" the defendant faces is that "his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion").

194. Joel D. Liberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions*, 6 J. OF PSYCHOL., PUB. POL'Y, & L. 677, 678, 686 (2000). For recent studies demonstrating this *See generally* Jennifer S. Hunt & Thomas Lee Budeshheim, *How Jurors Use and Misuse Character Evidence*, 89 J. OF APPLIED PSYCHOL. 2 (2004) (detailing their studies showing negative character evidence increases juror impressions of guilt, despite instructions that the evidence is limited-use evidence only).

195. *See* Liberman & Arndt, *supra* note 194.

196. *See supra* note 175 and accompanying text.

197. *See* Liberman & Arndt, *supra* note 194, at 678. "[A] large body of research indicates that jurors have great difficulty ignoring information once they have become aware of it. Several social psychological theories offer potential explanations as to why jurors are unable to ignore inadmissible information and why they sometimes pay greater attention to this evidence when an admonition is given than when a judge says nothing at all." *Id.* This tendency is known as the "backfire effect." *Id.* at 689.

198. Pizzi & Marafioti, *supra* note 151, at 14–15. In addition to their verdict, the two judge and six jurors issued a four hundred-page document giving the reasons for the conviction. Kington, *Meredith Kercher Has Been Forgotten, Says Family*, *supra* note 152. The American procedural system not only does not require a

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Even if Knox's legal team did not put her character in issue—though the statements by her attorneys strongly indicate they would have—at least some of the evidence could have also come in under another exception. While FRE 404(b) prohibits the use of past crimes, wrongs, or acts by the defendant to demonstrate that the defendant acted in conformity with her character, it does allow this evidence for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or lack of accident.¹⁹⁹ This list, stated in the rule, is “illustrative rather than exhaustive,”²⁰⁰ meaning that it is not restrictive; the only limit is relevance.²⁰¹ The motive for the murder, according to the prosecution's case, came from the disagreements between Kercher and Knox.²⁰² Thus, the testimony of Kercher and Knox's disagreements over Knox's sexuality and many sexual partners, her lack of cleanliness, and money could have been admitted to demonstrate motive. At trial, the prosecution developed this revenge theory so far as to speculate Knox's last words to Kercher: “She probably said, ‘[y]ou are always behaving like a little saint. Now we will show you, and now we will make you have sex!’”²⁰³ As former prosecutor and reporter for Newsweek, Barbie Nadeau (who was present for the prosecution's case) reported, the theory was one of “[d]rugs fueling a violent payback: Amanda getting even with the roommate who nagged her about her drug use and the strange men she brought home. Amanda losing it in her rage.”²⁰⁴ This evidence would also be limited in that the jury would be told only to consider it for the purpose of demonstrating motive, *not* for its truth, but as stated above, the likelihood that the jury does so, or is even capable of doing so, is highly unlikely.

One final hurdle the evidence of Knox's past bad acts would need to overcome in the American system would be the requirement that the probative value of the evidence not be substantially outweighed by the danger of “unfair prejudice, confusion of the issues, or misleading the jury or considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”²⁰⁵ While there is no arguing that this evidence does *not* raise a risk of unfair prejudice against Knox, the question is: would it be enough to *substantially*

written opinion, but “[u]pon an inquiry into the validity of a verdict,” does not allow any evidence “to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.” PRINCIPLES FOR JURIES AND JURY TRIALS, *supra* note 153, at 24. Thus, it essentially bans the safeguarding the Italian system requires.

199. FED. R. EVID. 404(b)(2).

200. JOHN E.B. MYERS, MYERS ON EVIDENCE, DOMESTIC, AND ELDER ABUSE CASES 677 (Vol 1. 2005).

201. *Id.*

202. *See infra* note 204 and accompanying text.

203. Burleigh, *Amanda Knox Trial Moves Toward Climax*, *supra* note 39.

204. *See Wise & Battiste*, *supra* note 38 (quoting Prosecutor Mignini's theory during trial that “[t]here could have been an argument between Meredith and Amanda that then degenerated because of the rental money that had disappeared or maybe Meredith was annoyed by the mere presence of Rudy. . .”).

205. FED. R. EVID. 403.

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outweigh its probative value? The judge would consider the probative value of the evidence, the importance of the fact to be proven, less discriminatory alternative means for proving the point, whether the fact is disputed, and the “degree to which a jury is likely to follow a limiting instruction.”²⁰⁶

The prosecution in an American court could have argued that motive, while not a technical element of the crime, was an incredibly important fact to be proven, and that no less discriminatory evidence could replace this to demonstrate Knox’s motive to seek revenge against Meredith in a deadly sex game. The prosecution could argue that this is clearly a disputed fact that cannot be ignored (as the defense claimed Knox was a young, peaceful, and kind woman who considered the victim a friend), and that concerns over the jury misusing the evidence could adequately be dissuaded by a limiting instruction. Thus, the prosecution would have valid arguments to combat the defense’s claim that the prejudicial value substantially outweighed the probative value of the above evidence of character and past bad acts.

It is true, under either the impeachment or past bad acts theory, likely not all of the evidence would be admitted. For example, the Facebook pictures and Myspace posts, especially the picture with the gun and Knox’s stories detailing the violent rapes of young women, likely would not have come in. However, given that these images had already fueled the media’s portrayal of her as a “sex crazed American,” and her own character witnesses feared their ability to overcome it,²⁰⁷ it is hard not to question whether the jury—Italian or American—had essentially viewed the “evidence” already.²⁰⁸ Even if we are to focus solely on the *trial* (rather than the media backdrop against which the trial took place) as the complete culprit in Knox’s character assassination, it is incorrect to say that the American system simply would not allow anything of this sort to be admitted against Knox. It is also incorrect to say that the American safeguard of jury instructions would act as an effective protectant, especially when compared to the Italian safeguard of a written jury opinion.²⁰⁹

206. MYERS, *supra* note 199, at 680–82.

207. See Byran, *supra* note 191 (interviewing Knox’s college friends Ben Parker and Madison Paxton before they testified as character witnesses in Knox’s trial).

208. See *Frontline*, *supra* note 184 (detailing the heavy role the American media plays in forming jurors’ opinions and quoting celebrity defense attorney and legal commentator, Mickey Sherman, predicting that the American media’s “contamination of jurors—or as [he] like[s] to say, the media-ization of jurors—will continue. . .”).

209. See *supra* notes 193–97 and accompanying text (discussing research indicating that jury instructions are ineffective devices for preventing the misuse of character evidence).

IV. TRY, TRY AGAIN: THE ITALIAN APPEALS OF AMANDA KNOX IN AN AMERICAN COURTROOM

A. *Knox's Intermediate-Level Appeal in the Italian Criminal System*

The Italian Appeals system grants two automatic appeals.²¹⁰ In the first appeal, all evidence and testimony that the judge approves is completely retried and reexamined.²¹¹ The second appeal is brought before the Italian Supreme Court and runs much more like an appeal in the American system, as the court only reviews procedure and application of the law rather than re-examining the entire body of evidence.²¹² While the judge presiding over the first appeal in the Knox case did not grant all of the defense's requests, he did order the prosecution's crucial witness, Antonio Curatolo, to take the stand for re-questioning and independent experts appointed by the court to reexamine DNA evidence presented by the prosecution.²¹³ In addition, the defense offered new witnesses and questioned Rudy Guede in court for the first time.²¹⁴

During his reexamination by the judge, Curatolo proved unreliable and inconsistent, stating that he was "certain" he saw Knox and Sollecito near the scene of the murder on October 31st (the murder did not occur until November 1st).²¹⁵ The independent experts found the DNA results inconclusive at best.²¹⁶ Guede's testimony maintained that Knox and Sollecito were present at the murder scene, but the defense produced five of Guede's fellow inmates who testified that he had told them Knox and Sollecito were not involved in the murder of Meredith Kercher.²¹⁷ The court acquitted Knox and Sollecito of the murder of Meredith Kercher on October 3, 2011.²¹⁸

Despite the near constant criticism by American journalists and some of the legal community up until that point in the trial, a telling lack of commentary on the legal process followed Knox's acquittal.²¹⁹ Perhaps this silence reflected an

210. FISHER, *supra* note 12, at 2.

211. *Id.*

212. *Id.*

213. *Id.* at 9. This request for an independent review of the forensic evidence was denied by the trial judge. *Id.*

214. *Id.* at 71, 73.

215. *Id.* at 43.

216. *Id.* at 82–83, 89–90.

217. *Id.* at 71–72.

218. Squires, *Amanda Knox Freed After Jury Overturns Controversial Murder Verdict*, *supra* note 67.

219. Media coverage instead focused solely on Knox's emotional release and return to her family and home in Seattle. *See, i.e.* Elisabetta Povoledo, *Amanda Knox Freed After Appeal in Italian Court*, NY TIMES, Oct. 3, 2011, http://www.nytimes.com/2011/10/04/world/europe/amanda-knox-defends-herself-in-italian-court.html?pagewanted=all&_r=0 (on file with the *McGeorge Law Review*) (stating that upon hearing the news "a deeply stressed Ms. Knox slumped in her chair and began to sob, before falling into the arms of one of her lawyers. . ."); *Emotional Pressure Eases as Knox Goes Free*, MSNBC (Oct. 5, 2011, 6:46 AM), http://www.nbcnews.com/id/44782652/ns/us_news-life/t/emotional-pressure-eases-knox-goes-free/ (on file with the

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understanding that Knox's ultimate acquittal came because of the Italian system's *de novo* review of the case, which destroyed the prosecution's DNA evidence and eyewitness accounts placing Knox and Sollecito at the scene of the crime. Furthermore, the silence may demonstrate comprehension that this detailed review of trial evidence is a purposeful mechanism of the overall Italian system. As Grace Mirabella states,

The detailed appellate review of the first Knox verdict must be viewed as part of the plurality of voices the Italian justice system deems necessary to provide fairness and determine the truth rather than as a separate and distinct procedure from the first trial.²²⁰

Or, as the next Section will demonstrate, perhaps this silence reflected an even stronger realization: that the American system could not have overturned Knox's verdict because it would not hear such an appeal.

B. Knox's Intermediate-Level Appeal in the American Criminal System

In the American criminal system, while the defendant has the right to appeal a guilty verdict to the intermediate appellate court, she is not guaranteed an appeal to the higher court, but instead must be granted one.²²¹ The appellate court looks for reversible error.²²² While different standards govern what qualifies as "reversible error," it requires that the error had some substantial "injurious effect or influence in determining the jury's verdict."²²³ In making this decision, the court will look only at the trial record; it will not "receive additional evidence or hear witnesses."²²⁴ The trial court largely reviews only legal error; it may review factual findings "but typically may only overturn a decision on factual grounds if the findings were 'clearly erroneous.'"²²⁵

For purposes of this comparison, the most important limitation on appealing cases in the American criminal system is that appellate courts review issues of law, not fact.²²⁶ A factual issue is one that confronts a factual finding made by the

McGeorge Law Review) (detailing Knox's emotional reunion with her family).

220. Mirabella, *supra* note 58, at 254–55.

221. WEAVER, *supra* note 96, at 422.

222. *Id.* at 421.

223. *United States v. Lane*, 474 U.S. 438, 449 (1986) (quoting *Kotteakos v. United States*, 328 U.S. 750, 777(1946).

224. *The Appeals Process*, Federal Courts, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/TheAppealsProcess.aspx> (last visited Dec. 26, 2012) (on file with the *McGeorge Law Review*).

225. *Id.*

226. MICHAEL R. FONTHAM, MICHAEL VITIELLO, & DAVID W. MILLER, PERSUASIVE WRITTEN AND ORAL ADVOCACY IN TRIAL AND APPELLATE COURTS 266 (2007) ("Resolving factual disputes is uniquely within the province of trial courts. . . . [A]ppellate courts . . . generally restrict the scope of review of factual decisions.").

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trial court.²²⁷ Appealing an issue of fact is “not a good issue on appeal unless the ruling is unsupported” by any evidence.²²⁸

Knox’s defense team appealed the evidentiary, factual findings regarding the DNA evidence and the credibility of the prosecution’s witnesses.²²⁹ The appellate court reheard testimony of these witnesses and allowed retesting of the DNA evidence, as well as testimony from the DNA experts who performed the retesting.²³⁰ The court also heard from new witnesses not presented at trial: Rudy Guede and prison inmates claiming to have spoken with Guede.²³¹ All of these appeals are ones of fact. And while the defense was able to discredit the prosecution’s witness during the appeal and the DNA retesting proved inconclusive, the initial testimony and DNA findings were neither “clearly erroneous” nor unsupported by any evidence.²³² Hence, an American appellate court would almost certainly not have heard Knox’s appeal on these grounds and could not have overturned her verdict.²³³

Thus, in the context of this case, the Italian appeals system’s review of both substance (fact) and procedure (law) seems far more “just.” In response to this point, some Knox supporters have “stress[ed] the importance of getting it right the first time instead of relying on the appeals courts to clean up the mess.”²³⁴ Likewise, proponents of the American appellate system state, “[a] contest-based adversarial system will naturally produce a procedural focus [on appeal],” believing that the adversarial trial provided a fair contest and thus a fair result.²³⁵ However, as law professor George C. Thomas states, the danger to this approach is that “[a] procedural focus on appeal is indifferent to innocence.”²³⁶ It seems, at the very least, ironic that the pro-Knox/anti-Italian system group—so concerned with the innocence of Knox—should champion the adversarial system

227. *Id.*

228. *Id.*

229. FISHER, *supra* note 12, at 9.

230. *Id.* at 9, 82.

231. *Id.* at 71–73.

232. For example, the original DNA testing showed “Sollecito’s DNA on the clasp of [Kercher’s] bra, Guede’s DNA on [Kercher’s] body, Knox’s DNA on the handle of a knife, Barbie Nadeau, *Trial of the Century*, THE DAILY BEAST (Dec. 30, 2008, 7:00 PM), <http://www.thedailybeast.com/newsweek/2008/12/30/trial-of-the-century.html> (on file with the *McGeorge Law Review*). The same knife, which was found in Sollecito’s apartment, [had] what could be Kercher’s DNA on the blade.” *Id.* The DNA findings were collaborated with other evidence of “fingerprints, bloody Nike sneaker footprints and mixed blood droplets on a bathroom faucet Kercher shared with Knox . . .” and the prosecution’s eyewitnesses, who claimed to have seen Knox and Sollecito near the crime scene. *Id.* Thus, rather than being “clearly erroneous,” the original testing was supported by a multitude of findings.

233. This is not to say that no possible valid appeal could exist if an American trial were to occur, but that none of the appeals presented in the actual trial would have worked in an American appeals system.

234. FISHER, *supra* note 12, at 2.

235. GEORGE C. THOMAS III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS, 214 (2008).

236. *Id.*

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(“indifferent to innocence”²³⁷) over the Italian inquisitorial system that eventually acquitted her.

C. Knox’s High-Level Appeal in the Italian Criminal System

As this Article goes to print, the Knox case has come before two more courts: the Italian high court (known as the Court of Cassation²³⁸) and the Italian appeals court once again. As stated above, the Italian system grants two automatic appeals.²³⁹ Knox’s initial appeal ended on October 3, 2011 with the overturning of her guilty verdict.²⁴⁰ On March 25, 2013, Italy’s highest court heard the prosecution’s argument to overturn the acquittal.²⁴¹ The world watched as less than twenty-four hours later the high court overturned Knox’s acquittal and demanded a retrial.²⁴² The high court explained its decision (which was based solely on procedural error²⁴³) in a seventy-four-page opinion, criticizing the appellate jury for “deficiencies, contradictions and illogical” conclusions.²⁴⁴ Knox’s retrial began on September 30, 2013.²⁴⁵ The appeals court may affirm Knox’s acquittal or find her guilty upon its review; this decision can then once again be appealed to the high court.²⁴⁶

The announcement of Knox’s retrial resulted in immediate blowback from the American legal community and media.²⁴⁷ The headlines continue to ring with accusations of double jeopardy—that is, that Knox’s retrial violates the

237. *Id.*

238. THE ITALIAN COURT SYSTEM, UNIDROIT 1, available at www.unidroit.info/mm/TheItalianJudicialSystem.pdf (last visited July 25, 2013) (on file with the *McGeorge Law Review*).

239. See FISHER, *supra* note 12, at 2 (stating that Italy offers two automatic appeals).

240. Squires, *Amanda Knox Freed After Jury Overturns Controversial Murder Verdict*, *supra* note 67.

241. Frances D’emilio, *Amanda Knox Trial: Italy’s Top Criminal Court Hears Appeal* HUFFINGTON POST, Mar. 25, 2013, http://www.huffingtonpost.com/2013/03/25/amanda-knox-appeal-verdict-italy-court-of-cassation_n_2947605.html (on file with *McGeorge Law Review*).

242. Livia Borghese & Jason Hanna, *Italian Court on Reason for Knox’s Retrial: Evidence Neglected*, CNN (July 19, 2013), <http://www.cnn.com/2013/06/18/world/europe/italy-amanda-knox-case/index.html> (on file with the *McGeorge Law Review*).

243. See *supra* note 211 (explaining that the second appeal reviews only procedural error).

244. Livia Borghese & Jason Hanna, *supra* note 241.

245. *Amanda Knox Retrial Begins in Florence Sept. 30 After Italy’s High Court Overturned Acquittal*, STAR TRIBUNE, July 9, 2013, <http://www.foxnews.com/world/2013/07/09/amanda-knox-retrial-begins-in-florence-sept-30-after-italy-high-court/#ixzz2a4pC22D5> (on file with the *McGeorge Law Review*).

246. *Transcript: Supreme Court Examines Same-Sex Marriage; Italy to Retry Amanda Knox*, ANDERSON COOPER 360 DEGREES (aired March 26, 2013), available at <http://transcripts.cnn.com/TRANSCRIPTS/130326/acd.02.html> [hereinafter *Transcript*] (on file with the *McGeorge Law Review*).

247. The following headlines provide a snapshot of the media response: Graham Wench, *In Italy, Double Jeopardy for Amanda Knox?*, HLN (April 8, 2013), <http://www.hlnv.com/article/2013/03/25/amanda-knox-double-jeopardy-retrial-innocent-or-guilty> (on file with the *McGeorge Law Review*); Mary Noble, *Is Amanda Knox Facing Double Jeopardy?*, POLITIX (March 27, 2013), <http://politix.topix.com/homepage/5308-is-amanda-knox-facing-double-jeopardy> (on file with the *McGeorge Law Review*); Sharon Rice, *Amanda Knox to Face Double Jeopardy in Italy*, DUQUESNE LAW BLOG (March 26, 2013), <http://www.duqlawblogs.org/duqcrim/2013/03/amanda-knox-to-face-double-jeopardy-in-italy/> (on file with the *McGeorge Law Review*).

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fundamental right for criminal defendants in the United States not to be tried for the same crime twice.²⁴⁸

As former professor of political science at Harvard University Edward Jay Epstein stated,

[t]he revival of the baseless charges against Knox, and the tabloid frenzy it will no doubt stoke, proceeds from a five-year-long judicial circus in Italy.... The United States Constitution, under its double jeopardy provisions, protects individuals from being retried for crimes of which they have been acquitted. It would be a violation of Knox's constitutional rights as a United States citizen to return her to Italy to be tried again. It would also, of course, be a travesty of justice for an Italian prosecutor to use her case as a means to revive a [sic] his reputation, as an advocate of Satanic and "she-devil" conspiracy theory.²⁴⁹

Thus, in vehement terms, the American news outlets and legal community have once again denounced the Italian criminal legal system as unjust (and conspiracy-based), while at the same time glorifying the American system. Yet again, their criticisms reflect misunderstanding of both the foreign legal system at work and the domestic system they pit as its superior.

The Italian system grants two automatic appeals for both the prosecution and the defense after trial.²⁵⁰ As former Italian prosecutor Barbie Nadeau explained to news anchor Anderson Cooper,

Italy has a three-tier system in which there are really three levels to every single criminal trial In the first case, the lower court makes a decision. In this case, Amanda Knox and Raffaele Sollecito were convicted of the murder. In the second level, which is a right by every defendant to appeal their first conviction if it's a conviction or for the prosecutor to appeal an acquittal in that case, they were acquitted of the murder of Meredith Kercher. No case is considered to be complete unless and until it finishes that third level, the high court decision In fact, it's possible for these two levels, for the appellate level and the high court level, to go back and forth as many as two or three times, if that's what is indicated by the evidence and by the way these trials go. So they have basically sent it back. The trial is still within the same cycle of the original trial, so she's not being tried again for the same crime. Her

248. See U.S. CONST. art. V (granting the right for criminal defendants to be free from double jeopardy).

249. Edward Jay Epstein, *The Amanda Knox Circus—Again*, HUFFINGTON POST BLOG (April 29, 2013), http://www.huffingtonpost.com/ed-epstein/amanda-knox-italy_b_3174771.html (on file with the *McGeorge Law Review*).

250. See FISHER, *supra* note 12, at 2 (stating that Italy offers two automatic appeals).

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original trial has not yet been completed under the Italian judicial standard.²⁵¹

Knox's own attorneys agree, admitting that "the high court's decision does not raise a double jeopardy problem because the retrial would not be a new case but rather a continuation of the same case on appeal."²⁵² Thus, as a result of the Italian dual automatic appeal system, the Knox case could continue for years. While this might be a valid criticism of the system in and of itself, this is *not* the criticism articulated by the US media and legal commentators. Moreover, it seems hypocritical to criticize only those aspects of a foreign appellate system that work against one's compatriot. That is, the lack of criticism after Knox's initial acquittal, and the major celebrations upon her return, indicated that the United States media/legal pundits had no complaints about the Italian appellate system, which allowed an acquittal that could not have occurred in the American system.²⁵³ And yet, now, two years later, the Italian appellate system is suddenly inept and unjust.

The American critics not only misunderstand the Italian system, they also misunderstand their own. First, and most importantly, the American criminal system—even with its double jeopardy protection—does allow for a similar procedural process to that of Knox's Italian case. For example, a defendant can be convicted of a crime at the trial court level. If this conviction is then appealed—as Knox's conviction was—the appellate court could overturn the conviction for insufficient evidence.²⁵⁴ This would effectively dismiss the case. However, the prosecution could still appeal the finding of insufficient evidence. The high-level appellate court could then reverse the intermediate appellate court's finding of insufficient evidence, and the conviction would stand.²⁵⁵ No double jeopardy violation would exist.

Despite the fact that this same procedural process could occur in the American criminal system, commentators persist in arguing that if Knox is found

251. *Transcript, supra* note 246.

252. See Terry Baynes, *Analysis: Knox Case Could Pit Extradition Treaty Against U.S. Constitution*, REUTERS (March 26, 2013, 8:25 PM), <http://www.reuters.com/article/2013/03/27/us-italy-knox-extradition-idUSBRE92Q01020130327> (on file with the *McGeorge Law Review*) (quoting Knox's attorney, Carlo Dalla Vedova).

253. See *supra* Part IV (explaining the Italian appeal and determining that the same appeal would not be heard in an American court).

254. See, *i.e.*, *Jackson v. Virginia*, 443 U.S. 307 (1979). In this case, the defendant, like Knox, was convicted of murder; he then brought a federal habeas corpus petition. *Id.* The federal district court found insufficient evidence for premeditation and granted the writ. *Id.* The Court of Appeals reversed, holding that there was some evidence of defendant's intent to kill the victim. *Id.* The Supreme Court upheld this decision. *Id.* Thus, the conviction was upheld, despite the finding at one point in the procedural process that there was insufficient evidence to support the murder conviction. This is similar to the scenario witnessed in the Knox appeals.

255. *Id.*

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guilty by the appellate court that the United States would not extradite her.²⁵⁶ They base this legal conclusion on the extradition treaty currently in force between Italy and the United States.²⁵⁷ Article VI of this treaty states, “Extradition shall not be granted when the person sought has been convicted, acquitted or pardoned, or has served the sentence imposed, by the *Requested Party* for the same acts for which extradition is requested.”²⁵⁸ The “requested party” is the state *receiving* the request—here, the United States.²⁵⁹ Thus, the treaty only excuses extradition of a US citizen by the US State Department when that citizen has already been convicted, acquitted, or served her sentence under the US court system.²⁶⁰ While American legal pundits may be unwilling to accept that under the Italian system Knox has not suffered a form of double jeopardy, they cannot deny that she has not completed *any* form of judicial proceeding in the United States that would amount to double jeopardy. Therefore, there is no language justifying extradition refusal (if the request is ever made). In fact, in 2010, a federal court in California found that a man acquitted of murder in Mexico and later convicted after Mexican prosecutors appealed the acquittal could not claim double jeopardy to avoid extradition to Mexico.²⁶¹ That court cited a 1974 decision from the Second Circuit Court of Appeals in New York that reached the same conclusion with respect to Canadian law, which also allows the government to appeal an acquittal.²⁶² Thus, the U.S. has a history of upholding similar extradition requests under treaties like that of the Italy-United States Extradition Treaty, even where the defendant submits to a retrial after acquittal. Consequently, it is not surprising that the US State Department has refused to affirmatively state that it would deny a request to extradite Knox.²⁶³

As the Italian appeals court retries the Knox case in September of 2013, there is no question that the world will continue to watch—and inevitably remark upon—the proceedings. The only question is whether the legal commentary will seek a more enlightened path upon this retrying.

256. See Baynes, *supra* note 252 (quoting Christopher Blakesley, a law professor at the University of Nevada Las Vegas, as stating, “‘If Knox is found guilty, there’s still a whole lot of room for battle before she would ever be extradited. . .”).

257. Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, U.S.-Italy, April 18, 1984.

258. *Id.* at art. VI (emphasis added).

259. See *generally id.* (using “requested party” throughout the treaty to refer to the state receiving the request)

260. *Id.* at art. VI.

261. Baynes, *supra* note 251.

262. *Id.*

263. *Id.*

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V. CONCLUSION

Amanda Knox's "nightmare" began in 2007.²⁶⁴ Her saga continues six long years later in the Italian appellate court. And yet, the criticisms of the Italian criminal justice system will likely outlast Knox's ordeal.²⁶⁵ While the appellate process will eventually end for Amanda and her family, the effects of the American legal community's critiques will continue. Today's globalized world ensures that interactions between foreign legal systems are a modern certainty. These contacts have the ability to foster communication and understanding between two or more countries, that no doubt must deal with one another on a multitude of other critical matters: economic trade, foreign diplomatic ties, and national security—to name but a few. Showing respect in the judicial realm is central to demonstrating respect for a country itself.

This is not to say that legal minds of any nation should not feel free to criticize the judicial system of another country (whether or not it stems from the trial of one of their own citizens in that foreign country). Making assertions, backed by research, that a foreign legal system's procedural and evidentiary processes fall short of achieving justice or fairness is an entirely respectable practice. As the Amanda Knox trial demonstrates, however, framing this criticism as a demonstration of the superiority of one's own legal system is not the best method for this practice.

Two of the most criticized aspects of the trial—the admission of Knox's statements to police and the admission of character evidence and past bad acts—could have been admitted in an American criminal court. The Italian criminal system did, in fact, protect Knox by refusing to admit her statements to police (under *per se* protections she would not have received in the United States).²⁶⁶ The statements were ultimately let in because of the Italian judicial system's practice of combining civil and criminal trials.²⁶⁷ Perhaps this practice leads to unjust results. However, this was not the criticism made by the American legal community.

And while the American exclusionary rules are much stricter than those of the Italian system that remains one aspect of a justice system intended to operate as a whole. As demonstrated, for every reason the American system has for questioning the reliability or fairness of character evidence, the Italian system has

264. D'Emilio, *supra* note 241.

265. Even upon her release, Knox herself made "a veiled attack on the Italian justice system. 'I trusted them completely,' she said of the Italian police and legal system. 'I was betrayed on the night of November 5. I was manipulated. I am not who they say I am. I did not do the things attributed to me.' Her frustration, echoed by many Americans and people from English-speaking countries, was directed squarely at an Italian legal system that seems alien and menacing to outsiders." *Saunders, Amanda Knox & Dominique Strauss Kahn Reveal A Continental Divide over Courts*, *supra* note 146.

266. Hooper, *Was There a Plot to Murder Meredith?*, *supra* note 47.

267. *Id.*

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a counter reason for allowing this evidence. The Inquisitorial system considers the judge and fact-finders as capable of hearing evidence without necessarily using it.²⁶⁸ This belief undergirds its less strict exclusionary rules. Perhaps this is naïve or unjust as well, but as noted, the American system could have also admitted much of this evidence and, as sociological research has established, has poor protections (jury instructions) against its misuse by jurors.²⁶⁹

Moreover, as the analysis of Knox's initial appeal validated, the trial is but one part of an overall judicial system. The Italian system is aware of its leniency in allowing evidence and testimony in, and so ensures protections by its equally lenient appellate process.²⁷⁰ Ultimately, this granted an appellate result—the *just* result these critics argued for—that would have never come in an American court. And while the current dialogue of “double jeopardy” has once again painted the Italian system as unjust, this too is an incorrect assessment of the Italian system.

The point here is not necessarily to praise the Italian criminal justice system or to question the American criminal justice system, but rather to learn from the heated, often vitriolic exchange between the United States and Italy that continues to dominate the Amanda Knox trial. This atmosphere lingers and spreads, despite—as the above exercise established—the fact that neither side really has reason for anger. The Italian criminal trial of Amanda Knox has proceeded according to the evidentiary and procedural rules of that system, rules which are grounded in that nation's traditions, beliefs, and culture. The trial may or may not have gone differently in the United States, but it is entirely possible, at the very least, that some of the most criticized aspects would have received the same treatment, while the sought-after overturning of Knox's guilty verdict would not have received the same treatment.

Despite this, it is likely that the next trial of an American in Europe or of an European in America is already stained with the negativity and anger that has arisen in the Amanda Knox trial, casting a shadow over a proceeding that has not even begun.²⁷¹ Unless, of course, both choose to learn from this past interaction

268. See Mirabella, *supra* note 58, at 251.

269. See Liberman & Arndt, *supra* note 193–97 and accompanying text (discussing the ineffectiveness of jury instructions).

270. See *supra* note Part III (discussing Italian appellate review of factual issues and American appellate review of primarily legal issues only).

271. It seems, in fact, that this has already occurred. Throughout the summer of 2012, “Europeans looked at the adversarial judicial system used in English-speaking countries with shock and dismay,” as a result of the Dominique Strauss-Kahn case. Mr. Strauss-Kahn, a then French presidential candidate and managing director of the International Monetary Fund, was accused of raping a hotel maid in New York. *Saunders, Amanda Knox & Dominique Strauss Kahn Reveal A Continental Divide over Courts*, *supra* note 148. Europeans spoke out against the adversarial system's lack of truth seeking. Celebrity philosopher Bernard-Henri Lévy wrote, “I am troubled by a system of justice modestly termed ‘adversary,’ meaning that anyone can come along and accuse another fellow of any crime – and it will be up to the accused to prove that the accusation is false and without basis in fact....” *Id.* The European critics believed “Mr. Strauss-Kahn . . . was paraded before cameras and subjected to lurid accusations from the prosecutor. In an inquisitive system, they argued, the judge would have

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by replacing hostile, biased comparison with reasoned research and understanding of the other's judicial system *before* speaking to that system's flaws. Such a practice allows the focus to remain on the judicial proceeding itself, and thus to focus on the real issues up for debate.

Throughout the Amanda Knox debacle, Meredith Kercher's family often stated they felt as if their innocent daughter, the victim of the heinous crime and the actual reason for the trial, was entirely forgotten amidst the cacophony of media and talking legal heads.²⁷² In the future, let us hope that the American legal community will stop to first listen and learn before becoming a notable noise-maker in a trial involving one of its citizens abroad. This should be done out of respect for those involved in the proceeding itself, but also for the broader legal system that proceeding is a part of. Out of this initial silence, much may be gained.

dismissed the accusations before they had a chance to damage the reputation of Mr. Strauss-Kahn. In New York, the charges were only thrown out afterward." *Id.*

This critique mirrors the Amanda Knox case in that it criticizes the foreign system by exemplifying its own superior system—all without reference to the theory behind that nation's legal system. In this case, the critics failed to understand that in an adversarial system, "the prosecution and defense are both allowed an equal say, and an equal chance to denounce or defend the accused, before a neutral judge and jury who are simply asked to weigh the strongest argument. There is no central effort to determine the absolute truth of the case. . . [because] it is assumed that this truth will emerge from the process of deliberation and evidence presentation between the two sides." *Id.*

272. Kington, *Meredith Kercher Has Been Forgotten, Says Family*, *supra* note 152.