
**SCALES OF JUSTICE: ASSESSING ITALIAN CRIMINAL
PROCEDURE THROUGH THE AMANDA
KNOX TRIAL**

JULIA GRACE MIRABELLA*

I.	INTRODUCTION	230	R
II.	THE ITALIAN CRIMINAL PROCEDURE CODE	233	R
	A. <i>The Investigation Phase (indagini preliminari) and the Preliminary Hearing (udienza preliminare)</i>	234	R
	B. <i>The Trial Phase</i>	235	R
	C. <i>The Adversarial Reforms: Reception and Results</i>	237	R
III.	THE AMANDA KNOX CASE AND CRITICISMS OF THE ITALIAN JUDICIAL SYSTEM	239	R
	A. <i>Background to the Trial</i>	239	R
	B. <i>Criticisms of the Trial</i>	241	R
	1. Multiple Lawsuits and Exclusionary Rules	241	R
	2. Character Evidence	242	R
	3. Jury Sequestration	242	R
	C. <i>Review and Criticism of the Court Opinion</i>	243	R
	1. Evidence Against Knox and Sollecito: Witness Testimony and Electronic Evidence	244	R
	2. The Court's Reliance on DNA Evidence	245	R
	3. Motives for the Murder and the Court's Conclusion	246	R
IV.	WHY ARE AMERICANS UNCOMFORTABLE WITH THE ITALIAN SYSTEM?	247	R
	A. <i>Truth and Evidentiary Barriers in Inquisitorial and Adversarial Systems</i>	248	R
	1. The Italian Judiciary	252	R
	2. The Italian Appeals Process	253	R
	B. <i>American Comparative Biases</i>	255	R
V.	CONCLUSION	259	R

ABSTRACT

The Italian criminal procedure code of 1989 reformed Italy's criminal procedure system from an inquisitorial model into a hybrid

* J.D. Candidate 2012, Boston University School of Law. Thank you to Professor di Robilant, Professor Caruso, Daniele Longo, Kyle Thomson, and Anthony Mirabella for all the comments, suggestions, edits, and encouragement.

scheme that draws inspiration from the United States' adversarial system. However, despite including adversarial processes into its criminal procedure code, Italy's inquisitorial foundations have continued to exert considerable influence over trial procedures.

In the wake of the Amanda Knox case Italian criminal procedure has increasingly come under fire. The purpose of this Note is to explore the changes made to the Italian criminal procedure code, to assess the current state of Italian criminal proceedings, and to consider whether proper comparative methodologies have been used in assessing how Italian criminal procedure relates to traditional adversarial systems.

In the United States, Italian criminal procedure had not received much consideration until the details of the Amanda Knox trial became a national sensation. Using the Knox case as a foundation, this Note will explore whether the vehement American critique of the Italian system has merit. The analysis suggests that the criticism may stem from a misunderstanding of how the system works, from a basic disconnect between concepts of "truth" in common law and civil law systems, and from an imperfect comparison of fundamentally different systems of criminal procedure.

I. INTRODUCTION

Americans like to think fondly of Italy; there is a romantic, almost whimsical, conception of the country: its beautiful art, incredible food, quaint piazzas, and Roman grandeur. Along with this romantic notion of Italy, however, is a parallel perception of Italy as a country with a crumbling economy, a vibrant mob culture, and a fragile government which was led, until recently, by the flamboyant Silvio Berlusconi. Recently, some Americans have another perception to add to the list: Italy as a country with a confused, inefficient, and failed criminal justice system.¹

On November 2, 2007, Meredith Kercher, a British study abroad student, was found "under a blood-soaked duvet cover . . . with her throat slashed" in Perugia.² Italian authorities were quick to identify Kercher's roommate, twenty-year-old Amanda Knox from Seattle, Washington, as a suspect. In December of 2009, an Italian court found Amanda Knox, her boyfriend Rafael Sollecito, and a third man, Rudy Guede, guilty of the Kercher murder and sentenced Knox to twenty-six years in an Italian

¹ See Tom Leonard, *Only Doubt Over Knox Conviction is Exactly How They Got it Wrong*, DAILY TELEGRAPH, Dec. 8, 2009, available at <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/6763445/Only-doubt-over-Amanda-Knox-conviction-is-exactly-how-they-got-it-wrong.html>.

² Ian Fisher, *Grisly Murder Case Intrigues Italian University City*, N.Y. TIMES, Nov. 13, 2007, <http://www.nytimes.com/2007/11/13/world/europe/13perugia.html>.

prison.³ The murder investigation, the trial and in particular the beautiful and eerily calm American defendant captivated Italians and Americans alike for four years. The Knox trial and conviction brought increased attention to Italy's criminal procedure system, particularly among the American public. The attention has come primarily as intense criticism for what many Americans consider to be the bungled job of the Knox trial. Rhetoric in American newspapers and tabloids, along with the endless discussion of the lurid details of the case and its prosecution by prominent television personalities, has painted the Italian system as one that is broken, with the wrongful imprisonment of an innocent American symptomatic of the fundamental problems plaguing Italian law. Ask many an American about the Knox case and their first reaction is outrage at the injustice of a system that finds people guilty before they have been tried, but is this perception correct?

The development of the Italian criminal procedure code "ha[s] no modern precedent."⁴ While it may seem unlikely given America's current disdain for Italian criminal justice, the 1989 Italian criminal procedure code used the American adversarial process as its inspiration. Historically, Italy's criminal procedure was similar to other civil law countries with inquisitorial criminal procedure systems. Trials were juryless⁵ and governed by a judge who took the lead in "developing the evidence at trial" and "calling and questioning witnesses."⁶ However, the Italian inquisitorial system was plagued by numerous problems and was failing by the late 1970s.⁷ In the years before reform, the Italian public "was profoundly dissatisfied with a machinery of justice that was . . . perceived as unable to fully protect the defendant's right to a fair trial." Furthermore, Italy was "repeatedly condemned by the European Court of Human Rights for the excessive delay of its criminal justice procedure – a delay that routinely amounted to an astonishing ten years, or longer."⁸

This deep dissatisfaction with the status quo of Italian criminal jurisprudence led to a sweeping overhaul of the Italian inquisitorial system in 1989. Italy wanted to "'open up' its criminal justice system . . . to reflect its status as a modern democratic society and to make a dramatic break" with past practice.⁹ The country's legislators took their inspiration from

³ Rachel Donadio, *Italian Jury Convicts U.S. Student of Murder*, N.Y. TIMES, Dec. 5, 2009, <http://www.nytimes.com/2009/12/05/world/europe/05italy.html>.

⁴ 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, 3 (1992).

⁵ Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227, 228 (2000).

⁶ Pizzi & Marafioti, *supra* note 4, at 7.

⁷ Grande, *supra* note 5, at 228-30.

⁸ *Id.* at 230.

⁹ Pizzi & Marafioti, *supra* note 4, at 6.

the prestigious American legal model, which they “associated with the strength of the United States’ political and economic structure,” as well as its strong legal scholarship.¹⁰ Similarly, there was a belief that the Italian system was not properly protecting the individual, which served to further push Italians towards the American adversarial system, a system strongly associated with “Lockean liberal values, distrust of the state, [and] restraint of state power,” which appeared “to best safeguard the individual against state abuses.”¹¹ The prospect of such a big shift in procedure was historic, with one prominent scholar calling it the “most serious attempt to transfer adversarial criminal procedures into an inquisitorial jurisdiction” since the French Revolution in 1791.¹²

The result of the Italian endeavor, the *Nuovo codice di procedura penale* (the New Criminal Procedure Code), was a hybrid system that incorporated adversarial procedures into an inquisitorial foundation.¹³ While this new procedure has “moved the Italian system in the direction of the American adversarial system much more than any other civil law jurisdiction,” scholars have also been highly critical of it.¹⁴ Part of the criticism stems from the inability to place the Italian hybrid into either an adversarial or inquisitorial mold.¹⁵ Others take issue with the fact that the Italian system failed to fully transplant the adversarial model, and instead only creates an “acoustic imitation,” failing to achieve many of the protections the new criminal procedure code sought to guarantee.¹⁶

The purpose of this Note is to explore the changes made to the Italian criminal procedure code, to assess the state of Italian criminal proceedings at present, and to consider the method used in comparing Italian criminal procedure to adversarial systems. In the United States, Italian criminal procedure had not received much consideration until the details of the Amanda Knox trial became a national sensation. Using the Knox case as a foundation, this Note will explore whether the vehement American critique of the Italian system has merit. The analysis suggests that the criticism may stem from a misunderstanding of how the Italian system works, from a basic disconnect between concepts of “truth” in common law and civil law systems, and from an imperfect comparison of fundamentally different criminal procedure systems.

¹⁰ See Grande, *supra* note 5, at 231.

¹¹ *Id.* at 231.

¹² Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L.J. 1, 47 (2004).

¹³ Grande, *supra* note 5, at 228.

¹⁴ *Id.*

¹⁵ Pizzi & Marafioti, *supra* note 4, at 3 (describing it as “caught between two traditions”).

¹⁶ Grande, *supra* note 5, at 232.

R

R

R

R

Part I briefly summarizes the changes made to the Italian system in 1989. Part II examines the Amanda Knox trial and the court's opinion, highlighting five issues that received criticism in the United States: the system's allowance of multiple lawsuits in one proceeding, the treatment of evidence at trial, the court's decision not to sequester the jury, the court's reliance on DNA evidence, and the opinion's theories on motive. In Part III I posit that American criticism and unease with the Knox trial and the structure of the Italian system may stem from basic disagreements and misunderstandings we have with inquisitorial systems. Furthermore, I suggest that the method with which Americans approach comparing criminal procedure systems may require refinement.

II. THE ITALIAN CRIMINAL PROCEDURE CODE¹⁷

The *Nuovo codice di procedura penale* focused on injecting adversarial procedures into the Italian judicial structure. Under the previous code, the Italian criminal process was a classic inquisitorial system similar to that of France or Germany. In an inquisitorial system judges lead the development of the case and “[t]he involvement of the public prosecutor and defense attorney [is] generally limited to asking occasional follow-up questions or suggesting other lines of inquiry.”¹⁸ Furthermore, the civil law system's emphasis on “ascertaining the truth at trial” means that there is “no equivalent of the [United States'] Federal Rules of Evidence, since fixed evidentiary rules might lead to the exclusion of important probative evidence.”¹⁹ Perhaps because the inquisitorial system places such trust in the abilities of judges to make reasoned decisions, worries about neutrality led Italy to introduce adversarial elements.²⁰ In particular, the reforms attempted to create a “clear-cut separation between the body responsible for investigating and prosecuting a crime and the body responsible for adjudicating the case.”²¹ As it stands today, Italian criminal proceedings “can be divided into three . . . separate phases: (1) the preliminary investigation phase (*indagini preliminari*); (2) the preliminary hearing phase (*udienza preliminare*); and (3) the trial phase (*dibattimento*).”²²

¹⁷ See generally INTRODUCTION TO ITALIAN LAW (Jeffrey S. Lena & Ugo Mattei eds., 2002); THOMAS GLYN WATKINS, THE ITALIAN LEGAL TRADITION (1997).

¹⁸ Pizzi & Marafioti, *supra* note 4, at 7.

¹⁹ *Id.*

²⁰ Elisabetta Grande, *Criminal Justice: The Resistance of a Mentality*, in INTRODUCTION TO ITALIAN LAW 181, 183-84 (Jeffrey S. Lena & Ugo Mattei eds., 2002).

²¹ Ennio Amodio, *The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy*, 52 AM. J. COMP. L. 489, 490 (2004).

²² Stephen P. Freccero, *An Introduction to the New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 345, 362 (1994).

A. *The Investigation Phase (indagini preliminari) and the Preliminary Hearing (udienza preliminare)*

A hallmark of an accusatorial system is the “clear barrier between the investigatory stage and the following trial phase, so that at the trial the information collected in the preliminary stage is not the basis for the decision.”²³ In order to emphasize the judge’s neutrality, the Italians placed investigative responsibilities in the hands of the public prosecutor, rather than delegating that power to the judge or the police.²⁴ Within forty-eight hours of a crime being reported, the police are required to notify the public prosecutor who then has six months in which to complete an investigation and gather evidence.²⁵ For witnesses or evidence that may not be available at trial, prosecutors can request an *incidente probatorio*, which allows for “the hearing of testimony from a witness,” thus preserving a witness’s testimony for future trial proceedings.²⁶ The testimony is then included in a file for the trial.²⁷ Since the Italian system requires mandatory prosecution, a prosecutor must explicitly request a dismissal from a judge if they believe the case is weak.²⁸

During the investigation prosecutors gather both inculpatory and exculpatory evidence for presentation during a preliminary hearing that determines whether a case will go forward to trial.²⁹ At the conclusion of the prosecutor’s investigation, and prior to the preliminary hearing, the defendant is notified of the pending charges against him, may provide additional evidence to the prosecutor, and may request that the prosecutor proceed further with the investigation for an additional thirty days.³⁰

Even after the reforms, judges continue to be involved in the preliminary investigation, but at arms length. A preliminary investigation judge (*giudice per le indagini preliminari*, or “*gip*”) is assigned to each investigation.³¹ The *gip* determines any precautionary measures (*misure cautelari*) that need to be taken, such as determining whether the defendant should stay in jail, and provides a check on the powers of the prosecutor by reviewing prosecutorial requests that could restrain or invade upon per-

²³ Giulio Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, 4 WASH. U. GLOBAL STUD. L. REV. 567, 569-70 (2005).

²⁴ Pizzi & Marafioti, *supra* note 4, at 11.

²⁵ Grande, *supra* note 5, at 233.

²⁶ Pizzi & Marafioti, *supra* note 4, at 12.

²⁷ *Id.*

²⁸ WATKINS, *supra* note 17, at 138; Pizzi & Marafioti, *supra* note 4, at 13.

²⁹ *Id.*

³⁰ C.p.p., art. 415bis (Avviso all’indagato della conclusione delle indagini preliminari).

³¹ Pizzi & Marafioti, *supra* note 4, at 11-12; Grande, *supra* note 5, at 233.

R

R

R

R

R

sonal freedoms, such as wiretapping.³² At the preliminary hearing, a new preliminary hearing judge (*giudice per l'udienza preliminare* or *gup*) evaluates all the evidence collected by the prosecutor and decides whether to continue to trial, to drop the charges (*rinvio a giudizio*) or archive the case.³³ This judicial supervision greatly limits the prosecutor's powers compared to Italy's past inquisitorial system.

B. *The Trial Phase*

The 1989 revision made a concerted effort to separate the preliminary investigation from the trial. In the previous system the file prepared after the investigation for the preliminary hearing was delivered to the judge at the beginning of trial.³⁴ The new code restricts access to the file,³⁵ with the expectation that the judge will approach the case as a *tabula rasa*.³⁶ Rather than providing the judge with a comprehensive file, the new system calls for evidence to be produced by the parties at trial.³⁷

Furthermore, the addition of adversarial procedures affected the way evidence was presented at trial. The 1989 criminal procedure code is based on "principles of 'orality,' adopting evidentiary precepts that prevent the use of written testimony except for impeachment purposes and forbidding judges from considering evidence" not raised during trial.³⁸ While judges used to lead the proceedings and the introduction of evidence, the new rules have the parties present opening statements, introduce witnesses and evidence, cross-examine witnesses, and provide closing statements.³⁹

However, while certain procedures have an adversarial structure, the Code has integrated those structures into a system with inquisitorial foundations, thus allowing for significant aspects of the inquisitorial process to remain in place at trial. First, the judge is allowed to "question witnesses at the conclusion of the examination" and can "indicate to the parties new issues that need to be addressed."⁴⁰ Additionally, as in the previous system, defendants are allowed to "speak at any point in the trial to challenge a witness's testimony" (*dichiarazioni spontanee dell'imputato*).⁴¹

³² Grande, *supra* note 5, at 233; WATKINS, *supra* note 17, at 138. For more information on *gup* powers see C.p.p., artt. 272-315. R

³³ Grande, *supra* note 5, at 234; C.p.p., artt. 405-415bis. Archival (*archiviazione*) of a case allows the prosecutor to reopen the investigation if more evidence comes to light and no double jeopardy applies. C.p.p., artt. 405-415bis. R

³⁴ *Id.*

³⁵ Pizzi & Marafioti, *supra* note 4, at 13. R

³⁶ Grande, *supra* note 5, at 243; WATKINS, *supra* note 17, at 138-39. R

³⁷ Grande, *supra* note 5, at 243. R

³⁸ Freccero, *supra* note 22, at 368 (internal quotation marks omitted). R

³⁹ Grande, *supra* note 20, at 199; Pizzi & Marafioti, *supra* note 4, at 14. R

⁴⁰ Grande, *supra* note 5, at 245. R

⁴¹ *Id.*

Finally, unlike the American adversarial system, defendants are not under an obligation to tell the truth.⁴²

Regarding judicial deliberation, inquisitorial systems historically do not have juries, however the Italian criminal procedure code created a hybrid system of deliberation for adjudication of serious crimes such as treason, homicide, and kidnapping.⁴³ For these crimes juries are a mix of two judges and six civilians.⁴⁴ One of the judges acts as the President of the court while the lay jurors (*giudici popolari*) are randomly selected from electoral lists.⁴⁵ Together, the professional judges and lay jurors decide both the factual and legal issues in criminal cases.⁴⁶ The jury does “not need to be unanimous [for conviction] but only needs a majority to convict on murder.”⁴⁷ Finally, unlike in the United States, the jurors (both professional judges and civilians) are required to produce an “opinion that reviews the evidence and explains in detail the grounds (*motivazione*) for the decision.”⁴⁸ The opinions, which can be hundreds of pages in length, provide detailed insight into the deliberation process should the case be appealed.⁴⁹

⁴² See Freccero, *supra* note 22, at 360 (“As defined by the Code of Criminal Procedure, a defendant is never considered a witness (*testimone*), and may never be required to take an oath before answering questions or making declarations. Thus, a defendant may never be prosecuted for having given false testimony during his own criminal trial.”).

R

⁴³ William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT’L L. 429, 430 (2003-2004). See also C.p.p., art. 5. Crimes with jury trials are heard in a lower court, the *corte di assise*, and an appeals court, the *corte di assise d’appello*. *Id.* Despite the presence of juries for serious crimes, in Italy a jury is still the exception and not the rule. For all other crimes the subject-matter jurisdiction is divided between two courts: the *tribunale in composizione collegiale* (three judges, no jury) and the *tribunale in composizione monocratica* (one judge, no jury). C.p.p., art. 33-33ter.

⁴⁴ Liz Robbins, *An American in the Italian Wheels of Justice*, N.Y. TIMES THE LEDE (Dec. 5, 2009, 7:24 PM), <http://thelede.blogs.nytimes.com/2009/12/05/an-american-in-the-italian-wheels-of-justice>.

⁴⁵ WATKINS, *supra* note 17, at 129; Freccero, *supra* note 22, at 351. Lay jurors must have a basic secondary education, be between the ages of thirty and sixty-five, and have no blemishes on their civic record. *Id.*

R

⁴⁶ *Id.*; Freccero, *supra* note 22, at 351. While the lay jurors and professional judges collaborate on both questions of law and fact, only one of the professional judges draws up the judgment of the court, “which must, [be] in accordance with the Constitution.” WATKINS, *supra* note 17, at 129.

R

⁴⁷ *Id.*

R

⁴⁸ Pizzi & Marafioti, *supra* note 4, at 15.

R

⁴⁹ *Id.*

C. *The Adversarial Reforms: Reception and Results*

Italy had high expectations for its new criminal procedure code, but the reception in Italy was decidedly mixed. Over the last thirty years the code has struggled to maintain force in the face of Constitutional Court decisions, Parliamentary legislation, and judicial activism.

Within four years of enactment, Italy's criminal procedure code was being systematically un-done by the Constitutional Court and Parliament. The Italian Constitutional Court undermined much of the separation between the preliminary investigation and trial phases with decisions that allowed hearsay and out-of-court statements to be admitted, and found the criminal procedure code's exclusionary rules to be unconstitutional.⁵⁰ Furthermore, the Italian legislature mounted numerous attempts to amend the criminal procedure code in reaction to increased and deadly attacks by the Mafia in the 1990s.⁵¹ These attacks led to widespread calls for justice and resulted in legislation that "increased the exceptions to the rule that the only evidence admissible was that collected at trial."⁵² However, by 1999 Italy again focused on reforming its criminal proceedings, this time for good.⁵³ Parliament's due process reforms (*la riforma del*

⁵⁰ Freccero, *supra* note 22, at 354. The Italian Constitutional Court "has exclusive authority to determine the conformity of [] legislation with the Constitution and acts as the final interpretive authority on any constitutional provision." *Id.* In particular three of the Constitutional Court's decisions did the most damage: Decision 24/1992, Decision 254/1992, and Decision 255/1992. Corte cost., 22 January 1992, n. 24, G.U., 5 Feb 1992 (finding the hearsay rules in Article 195, section 4 to be unconstitutional because they lacked reasonable justification and did not put adequate emphasis on finding the truth at trial); Corte cost., 18 May 1992, n. 254, 103 Racc. uff. corte cost. 1992 (finding unconstitutional Article 513, section 2, which restricted the use of an accomplice's out-of-court statements at trial if the accomplice asserted his right to remain silent); Corte cost., 18 May 1992, n. 255, 104 Racc. uff. corte cost. 1992 (finding unconstitutional Article 500, section 3, which required that out-of-court statements used on cross-examination be used only for impeachment and credibility purposes, and not as substantive evidence). For more information on the Italian Constitutional Court's decisions, see William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT'L L. 429, 449-53 (2004).

⁵¹ In the early 1990s, Italy experienced a series of serious attacks from organized crime. See Freccero, *supra* note 22, at 346. In 1992, "Italy's two leading anti-mafia magistrates, Giovanni Falcone and Paolo Borsellino, were assassinated in separate car bombings." *Id.* This was followed by a car bomb in 1993 that was "detonated in the center of Florence, Italy, killing an entire family and devastating the west wing of the Uffizi Gallery." *Id.*

⁵² Illuminati, *supra* note 23, at 575.

⁵³ Seeking to avoid any more adverse rulings by the Constitutional Court, Parliament's first step was to amend the Constitution. In early 1999 it did just that, adopting Constitutional Law 2/1999, which reformed Article 111 of the Italian Constitution. *Id.* at 576-77; Constitutional Law 23 November 1999, n. 2, G.U. n. 300, 23 Dec. 1999. The amended Article 111 has five sections that entrench adversarial processes in the Italian legal structure:

R

R

giusto processo) “restored most of the provisions struck down by the Constitutional Court in 1992” and amendments of the Constitution led to the Constitutional Court upholding the “return to the accusatorial-adversarial system.”⁵⁴

Even with these adversarial reforms finally firmly in place, adversarial procedures still face significant difficulties when judges apply them in practice. Italian judges who have traditionally “conceived of their role as one of seeking the truth” have struggled with their new passive roles and have generally sought to maintain as much power over the trial process as possible.⁵⁵ In particular, Italian judges have seized on Article 507 of the criminal procedure code, which authorizes judges to examine proof *sua sponte* “after all the evidence has been produced in court.”⁵⁶ As conceived, Article 507 was meant to be a narrow exception, used sparingly by the courts. In practice, judges, given their history with an inquisitorial structure for criminal proceedings, have interpreted Article 507 broadly, “effectively turn[ing] the provision into an avenue for extensive judicial inquiry.”⁵⁷ In all, judicial activism remains highly prevalent in Italy’s system, with the country struggling more than expected to install neutrality and passivity.

(1) Every judicial matter should be carried out under the principle of due process of law;

(2) Every trial should guarantee each party equal standing to offer evidence or contrary evidence in front of an impartial judge;

(3) In the criminal trial the law guarantees that a person accused of a crime should be privately informed as soon as possible of the nature and the reasons for the charges against him; that the accused should be assured enough time and suitable conditions to prepare his defense; that the accused should be allowed the opportunity, before the judge, to examine or to have examined any witnesses against him; that the accused be assisted by a translator at trial if he does not understand or speak the language used in the trial;

(4) The criminal trial is based on the principle that evidence should be heard in front of the parties and each party should be able to offer contrary evidence and to challenge opposing evidence. The accused cannot be proven guilty upon declarations of anyone who willingly avoided being examined by the accused or by his lawyer;

(5) The law regulates cases in which evidence is not presented in a manner such that the accused may challenge the evidence at trial by consent of the accused, due to verified objective impossibility or as a result of proven illicit conduct.

Cost., art. 111; *see also* Pizzi & Montagna, *supra* note 50, at 460-61.

⁵⁴ Illuminati, *supra* note 23, at 577-78; Corte cost., 26 February 2002 n. 36, G.U., la serie speciale, 6 March 2002, n. 10, 47 Giur. cost. 320 (2002). The “fair trial reform” of Article 111 ensured that “evidence in criminal cases [would] only be heard in front of the parties and an impartial judge” and guaranteed defendants the right to confront their accuser. *Id.* at 576-77; *see also* Pizzi & Montagna, *supra* note 50, at 449-53.

⁵⁵ Illuminati, *supra* note 23, at 573.

⁵⁶ Grande, *supra* note 5, at 246; C.p.p., art. 507 (stating that the judge has discretion, if it appears absolutely necessary, to ask for the production of additional evidence after both parties have finished presenting).

⁵⁷ Grande, *supra* note 5, at 247.

R

R

R

R

R

R

III. THE AMANDA KNOX CASE AND CRITICISMS OF THE ITALIAN JUDICIAL SYSTEM

Perugia is a small Italian village, the manifestation of the American ideal of the old world, and perhaps the perfect place for a college girl seeking to learn the language and live out a romantic notion of the Italian adventure.

On November 2, 2007, Meredith Kercher, a British study abroad student, was found “strangled and with her throat cut, wrapped in a duvet” in the apartment which she shared with an American student and two legal assistants.⁵⁸ The murder shocked the town and the international community, and the events gained further attention with the identification of the prime suspect in the investigation, Kercher’s American roommate, Amanda Knox. The investigation of Knox and the long trial of Knox and her boyfriend, Raffaele Sollecito, were widely followed by both the Italian and American media.

This section reviews some of the background details of the investigation and trial and then considers American criticisms surrounding the Knox case. First, I identify three general criticisms of the case: the allowance of mixed criminal and civil trials, the admission of character evidence at trial, and the court’s failure to sequester the jury. Then, I briefly review the court’s opinion and reasoning which identifies two additional criticisms: the court’s reliance on DNA evidence and the court’s assumptions on Knox and Sollecito’s motives.

A. *Background to the Trial*

Perhaps some of the skepticism surrounding the Amanda Knox conviction arose from the fact that she does not seem like a murderer. A twenty year old from Seattle, Washington, Knox was “well-off and pretty,” with blond hair and blue eyes that quickly earned her the nickname “Angel face” from the Italian media.⁵⁹ Knox had come to Perugia for a semester abroad to study Italian and German and was living with three women – two legal assistants, Filomena Romanelli and Laura Mezzetti, and an ERASMUS student Meredith Kercher – on the picturesque Via Pergola.⁶⁰ Knox quickly found a job as a bartender at a club called *Le Chic* and was enjoying her life as a carefree foreign student.⁶¹ On October 25, 2007, Knox met Raffaele Sollecito, a twenty-three-year-old Italian from Bari, while attending a classical music concert, and the two

⁵⁸ Rachel Donadio, *Details Only Add to Puzzle in Umbrian Murder Case*, N.Y. TIMES, Sept. 30, 2008, <http://www.nytimes.com/2008/09/30/world/europe/30perugia.html>.

⁵⁹ Fisher, *supra* note 2.

⁶⁰ BARBIE LATZA NADEAU, ANGEL FACE: THE TRUE STORY OF STUDENT KILLER AMANDA KNOX 10, 13 (2010).

⁶¹ *Id.*

quickly became inseparable in the week leading up to the murder.⁶² Just one week later, on November 2, it was Knox and Sollecito who called the police to report a break-in at Knox and Kercher's apartment.⁶³ Not long afterwards, as more and more bizarre and contradictory facts began to accumulate, the couple was under suspicion by the authorities.

Early into the investigation Knox gained the attention of the police by behaving erratically when interrogated.⁶⁴ First, Knox claimed she was at Sollecito's house the night of the killing.⁶⁵ Later, in an interrogation that was eventually ruled inadmissible at trial, Knox claimed she was at her house during the killing, and accused her boss, Diya Lumumba of the murder.⁶⁶ Lumumba, an immigrant from the Congo and a "musician and club owner" in Perugia,⁶⁷ was taken into custody but soon cleared of any suspicion, only increasing the police's suspicion of Knox.⁶⁸

Yet despite the odd display of behavior from Knox, the evidence and motive remained elusive. Early DNA tests were able to link a third person, Rudy Hermann Guede, a neighbor and an immigrant from the Ivory Coast, to the murder scene.⁶⁹ Guede lived nearby and was friendly with the boys who lived in the apartment below Knox and Kercher's apartment, even interacting with the girls on several occasions.⁷⁰ At the time Knox, Sollecito, and Guede were detained, the police still had "no clear motive, no precise time of death and no definitive murder weapon" that could explain how these three unlikely people committed such a gruesome murder.⁷¹

Guede was tried separately in an expedited trial and convicted of murder and sexual assault in late 2008.⁷² He is currently serving sixteen years

⁶² *Id.* at 31-33.

⁶³ *Id.*

⁶⁴ Beyond acting strangely during interrogation, Knox drew attention to herself by being overly romantic with Sollecito in the police station in the days following the murder and also by doing cartwheels at the station as she waited to be interrogated. Federico Zirilli, *The Neverending Nightmare of Amanda Knox*, ROLLING STONE, June 27, 2011, <http://www.rollingstone.com/culture/news/the-neverending-nightmare-of-amanda-knox-20110627> ("Officers would later complain that Knox, after sitting for hours in the stiff waiting-room chairs, had started to do cartwheels and even splits. Convinced that she was psychotic, the guards begged her to stop, explaining that such behavior was 'inappropriate.'").

⁶⁵ Donadio, *supra* note 58.

⁶⁶ Fisher, *supra* note 2.

⁶⁷ Ian Fisher, *German Police Arrest Third Suspect in Perugia Murder Case*, N.Y. TIMES, Nov. 21, 2007, <http://www.nytimes.com/2007/11/21/world/europe/21italy.html>.

⁶⁸ *Id.*

⁶⁹ Ian Fisher, *supra* note 67.

⁷⁰ NADEAU, *supra* note 60, at 103.

⁷¹ Fisher, *supra* note 2.

⁷² Rachel Donadio, *American Testifies in Her Murder Trial in Italy*, N.Y. TIMES, June 13, 2009, <http://www.nytimes.com/2009/06/13/world/europe/13italy.html>.

R
R

R
R
R

for Kercher's murder.⁷³ Knox and Sollecito were tried alongside each other and at the end of an eleven-month trial were found guilty of the Kercher murder, receiving respective sentences of twenty-six years and twenty-five years in jail on December 5, 2010.⁷⁴

B. *Criticisms of the Trial*

The investigation and trial immediately elicited criticism from Americans, who claimed the case had been a "scandal of the first order" and implied that there had been a miscarriage of justice.⁷⁵ Of these criticisms, three in particular stand out.

1. Multiple Lawsuits and Exclusionary Rules

The first criticism of the trial stemmed from the fact that in the Italian legal system, civil and criminal trials can be tried together.⁷⁶ Thus, the Knox trial consisted of three trials, a criminal trial for the Kercher murder, a civil suit by the Kercher family, and a defamation case brought by Diya Lumumba for Knox's comments that led to his arrest.⁷⁷ Allowing multiple suits to be placed together in one trial meant that certain evidence which would be probative for a civil suit or for the defamation case could potentially get more weight in the criminal verdict, even if that same evidence would not be considered probative or might be considered unduly prejudicial in an American criminal trial.⁷⁸ One key example is Knox's comments during the interrogation, which placed Knox at her and Kercher's apartment on the night of the murder and identified Lumumba as the murderer. These comments were excluded for purposes of the

⁷³ Rachel Donadio, *American Didn't Plan to Kill, Italy Judges Say*, N.Y. TIMES, Mar. 4, 2010, <http://www.nytimes.com/2010/03/05/world/europe/05knox.html>. Rudy Guede chose to have an expedited trial process separate from Knox and Sollecito. In 2008, he was convicted and given 30 years for Kercher's murder but on appeal the sentence was reduced to 16 years because fast-track defendants in Italy automatically receive a one-third reduction in their sentence on appeal. NADEAU, *supra* note 60, at 117. R

⁷⁴ Sentenza della Corte d'Ass., 4 Marzo 2010, n. 7/2009, 1, 425-26 (It.), available at <http://www.perugiamurderfile.org/download/file.php?id=1902&sid=a1344c3d364ff8cc7fdce0344d2abd30>. On October 3, 2011 this conviction was overturned. Elisabetta Povoledo, *Amanda Knox Freed After Appeal in Italian Court*, N.Y. TIMES, Oct. 3, 2010, <http://www.nytimes.com/2011/10/04/world/europe/amanda-knox-defends-herself-in-italian-court.html?ref=amandaknox>.

⁷⁵ Leonard, *supra*, note 1. R

⁷⁶ NADEAU, *supra* note 60, at 122. R

⁷⁷ *Id.*

⁷⁸ See FED. R. EVID. 403 (allowing for the exclusion of otherwise probative evidence that is substantially outweighed by the prejudicial, confusing or misleading effect it may have on the jury).

criminal trial⁷⁹ but were necessary for Lumumba's defamation suit and therefore the jury was not shielded from the impact of that particular piece of evidence.

2. Character Evidence

A second criticism stemmed from the prosecution's use of character evidence at trial. Perhaps the most damaging evidence was the defendants' use of social networking media, which had left them open to critique by the Italian media. Knox's Facebook and Myspace posts, which included pictures with a Gatling gun, references to Knox as "Foxyknoxy," and drunken video posts, were particularly damaging to Knox's character.⁸⁰ Just as harmful were the portrayals of Knox as overtly erotic and sexually adventurous. Kercher's friends testified to Amanda's sexual nature, describing how Knox and Sollecito "hugged and kissed each other constantly" in the police station on the day Kercher's body was found.⁸¹ Internet searches of Sollecito produced similarly damaging, if not outright bizarre, material. On his Myspace page Sollecito "bragged about spending '80 percent of his waking hours high'" and had posted a photo of himself "[w]rapped in surgical bandages . . . brandish[ing] a meat cleaver."⁸²

During the trial, the prosecution capitalized on Knox's personality by repeatedly and emphatically referring to her perceived promiscuity and odd behavior. From the outset of the trial, Knox was portrayed as "promiscuous and wanton."⁸³ The rhetoric only continued to mount as prosecutors and plaintiffs' attorneys referred to Knox as "a talented and calculated liar," repeatedly referenced her hygiene, and asked the jury to consider whether Knox was a "she-devil focused on sex, drugs, and alcohol, living life on the edge."⁸⁴ This widespread use of character evidence and highly sensational rhetoric, based both in fact and in fiction, was disturbing for most American observers whose own experiences with strict evidentiary rules led them to believe character evidence should not be admissible at trial at all, let alone be used in this manner.⁸⁵

3. Jury Sequestration

An additional criticism centered around the court's refusal to sequester the jury. Character evidence that was not admitted at trial was sensationalized in the Italian media, which played upon Knox's sexuality, her good

⁷⁹ Knox's statements were inadmissible because Knox "had been questioned without a lawyer or an interpreter." Donadio, *supra* note 58.

⁸⁰ Fisher, *supra* note 2.

⁸¹ NADEAU, *supra* note 60, at 55.

⁸² *Id.* at 83.

⁸³ Robbins, *supra* note 44.

⁸⁴ NADEAU, *supra* note 60, at 125.

⁸⁵ Robbins, *supra* note 44; *see generally* FED. R. EVID. 404, 405.

looks, and her nickname, Foxyknoxy.⁸⁶ The judges made the decision at the start of trial not to sequester the jury until it was time to deliberate.⁸⁷ This decision meant the jury could be exposed and potentially influenced by the sensationalism occurring outside of the courtroom, creating a major source of American criticism.⁸⁸

C. *Review and Criticism of the Court Opinion*

In May of 2009 the judges released an opinion to support their guilty verdict. At four hundred and twenty-seven pages, the opinion is a point-by-point recitation of the jury's process and deliberations, as well as a summary of the evidence that was taken into consideration.⁸⁹ This opinion offers a unique opportunity to analyze jury deliberation. The court spent hundreds of pages reviewing witness testimonies, evaluating telephone and other electronic records, and examining intricate details of the DNA testing.⁹⁰ When an issue required the use of expert witnesses, the court first evaluated the testimony of each witness and then came to its own conclusions.⁹¹ At the end of the opinion the court supplied a summary of the conclusions it made that resulted in the verdict.

While Knox provided conflicting alibis over the course of the investigation, by the time she testified at trial Knox had a hard alibi. The court was aware of the inadmissible interrogation of Knox, but only focused on the alibi she gave at trial.⁹² Knox said that on the night of the murder she had been at Sollecito's house where the two had cooked dinner around 9 p.m., watched a film, smoked marijuana, had sex, and gone to bed.⁹³ Knox stated that she did not wake up until 10:30 a.m. the next morning, at which point she left Sollecito sleeping and returned home to shower and get a change of clothes in preparation for a trip that she and Sollecito were going to take to Gubbio.⁹⁴ When Knox arrived home she found the door ajar but assumed that someone had gone to take out the trash or just had not closed the door properly.⁹⁵ Knox asked if anyone was home and when she got no answer she took a shower in the bathroom, which was located right next to Kercher's closed bedroom door.⁹⁶ It was only

⁸⁶ See generally NADEAU, *supra* note 60.

⁸⁷ Robbins, *supra* note 44.

⁸⁸ *Id.*

⁸⁹ See generally Sentenza della Corte d'Ass., 4 Marzo 2010, n. 7/2009, 1 (It.), available at <http://www.perugiamurderfile.org/download/file.php?id=1902&sid=a1344c3d364ff8cc7fdce0344d2abd30>.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 56.

⁹³ *Id.* at 59.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 59-60.

upon exiting the shower that she noticed drops of blood around the sink and on the bathmat.⁹⁷ Finding the whole situation odd she left the house, calling one of her roommates, Filomena Romanelli, who was away for the weekend.⁹⁸ When Knox did not get an answer from Kercher's phone, she returned back to her apartment with Sollecito where they noticed that Romanelli's window had been broken and her room ransacked.⁹⁹ Convinced that a burglary had occurred, Knox and Sollecito checked the other rooms and upon finding Kercher's door locked and Kercher unresponsive, they tried to break it down.¹⁰⁰ Unable to enter Kercher's room, the two called the police as well as Knox's two other roommates, telling them they should come back to the city.¹⁰¹

1. Evidence Against Knox and Sollecito: Witness Testimony and Electronic Evidence.

The *corte di assise* took issue with a number of inconsistencies in Knox's alibi, conclusions that were supported through witness testimony, electronic evidence, and DNA evidence.¹⁰² Testimony from Sollecito's neighbor, Jovana Popovic, and from Sollecito's father, who called the night of the murder, places Knox and Sollecito at Sollecito's apartment at 8:30 p.m. on November 1, 2007.¹⁰³ However, testimony from a homeless man, Antonio Curatolo, called Knox's alibi into question. Curatolo claimed to have seen Sollecito and Knox in a square located between Knox and Sollecito's apartments between 9:30 and 11 p.m. that night.¹⁰⁴ The court did not find any reason to believe that Curatolo's testimony was untrustworthy and found him to be a "qualified observer."¹⁰⁵ Furthermore, Marco Quintavalle, the owner of a store near Sollecito's apartment, testified to seeing Knox in his store when he opened at 7:35 a.m. that morning.¹⁰⁶ While this evidence did not conclusively place Knox and Sollecito in Knox's apartment, the court felt it was compelling evidence demonstrating that the defendants had not remained at Sollecito's on the night of the murder.

The court next considered evidence taken from electronic devices at Sollecito's residence. There was no indication that Knox and Sollecito were in his apartment after 9:15 p.m. when Sollecito's phone and com-

⁹⁷ *Id.* at 60.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 63.

¹⁰¹ *Id.* at 64.

¹⁰² *Id.*

¹⁰³ *Id.* at 52-53.

¹⁰⁴ *Id.* at 69-70.

¹⁰⁵ *Id.* at 70.

¹⁰⁶ *Id.* at 74.

puter were last used for the night.¹⁰⁷ The opinion examines in detail the phone records and electronic usage in Sollecito's apartment showing Sollecito's computer was used to play music at 5:30 a.m. that morning and that Sollecito's phone was turned back on at 6 a.m., proving Sollecito was awake before 10:30 a.m.¹⁰⁸ Each of these pieces of evidence undermined Knox's claim that she and Sollecito were not awake until 10:30 the next morning.

2. The Court's Reliance on DNA Evidence.

Ultimately, DNA evidence was central to the court's conclusion that Knox and Sollecito were a part of the Kercher murder.¹⁰⁹ Both the DNA evidence itself and the evidentiary weight it was accorded by the court were major sources of controversy. American commentators and Knox's defense team contended that the DNA evidence collected at the scene should not have been admissible and would not have been admitted in the United States because its collection left doubts about its accuracy, the amount of DNA available for testing was minimal, and the DNA tests were weak.¹¹⁰ First, none of Knox's DNA evidence was found inside Kercher's room where the murder occurred.¹¹¹ Second, the prosecution argued that mixed drops of blood containing both Kercher and Knox's DNA were found in the sink in their shared bathroom and a partial footprint was found on the bathmat, but video of the crime scene investigators gathering evidence revealed investigators "failed to change cotton swabs before collecting" samples of each individual drop of blood.¹¹² Furthermore, Luminol¹¹³ findings of a female's footprint in the hall of the

¹⁰⁷ *Id.* at 68, 327, 338-44.

¹⁰⁸ *Id.* at 338-44.

¹⁰⁹ *Id.* at 299 ("Ritiene invece questa Corte che la presenza delle tracce biologiche rinvenute abbia una elevata importanza.").

¹¹⁰ See Rachel Donadio, *U.S. Student Delivers Appeal at End of Italian Trial*, N.Y. TIMES, Dec. 4, 2009, <http://www.nytimes.com/2009/12/04/world/europe/04italy.html>; Fisher, *supra* note 2; Stephan Faris, *Amanda Knox Appeal: A Case of Too Little DNA?*, TIME, Mar. 26, 2011, <http://www.time.com/time/world/article/0,8599,2061544,00.html>.

¹¹¹ NADEAU, *supra* note 60, at 50.

¹¹² *Id.* at 51.

¹¹³ Luminol is a chemical agent used by forensic scientists to detect blood and DNA traces. When sprayed on a surface Luminol glows under a black light and can detect blood traces – "bloodstained areas that may have been washed . . . [or] blood that has flown between the floor cracks." Ann M. Gross, Katy A. Harris & Gary L. Kaldun, *The Effect of Luminol on Presumptive Tests and DNA Analysis Using the Polymerase Chain Reaction*, 44 J. FORENSIC SCI. 837, 837 (1999), available at <http://projects.nfstc.org/workshops/resources/literature/The%20Effect%20of%20Luminol%20on%20Presumptive%20Tests%20and%20pdf>. However, other substances, such as bleach, can also trigger Luminol, thus making it unreliable as a presumptive test for blood. Erina J.M. Kent, Douglas A. Elliot & Gordon M. Miskelly, *Inhibition of*

apartment, which was attributed to Knox, were never tested to see if they were made in Kercher's blood.¹¹⁴ Neglecting to test the Luminol footprints for blood was a problem because Luminol can identify substances other than blood, such as bleach.¹¹⁵ Finally, a knife was recovered from Sollecito's house that was found to have Kercher's DNA on the tip and Knox's DNA on the handle; however, the defense contended that mismanaged custody of the knife during the investigation led to contamination of the knife,¹¹⁶ and the DNA evidence collected was not only improperly tested, but was too small a sample to be reliable.¹¹⁷

While the court's opinion reviewed the testimony of the defense's DNA experts, Dr. Sarah Gino and Professor Tagliabracci, who criticized the DNA collection technique and testing, the court ultimately chose to believe the testimony of the lead collector and tester of DNA for the government, Dr. Patrizia Stefanoni of the Forensic Genetics section of the Scientific Police of Rome (*la sezione di Genetica Forense del servizio Polizia Scientifica di Roma*).¹¹⁸ Dr. Stefanoni explained at trial that the collection of the blood drops in the bathroom on the same swab was appropriate because the blood drops were the same color and physically similar, indicating they had come from the same source.¹¹⁹ Furthermore, the fact that there were only small samples of DNA that were not tested on multiple occasions posed no problems for the court, which found the tests met the standards required by Article 360 of the Criminal procedure code.¹²⁰

3. Motives for the Murder and the Court's Conclusion

In the end the court found that all the evidence, when considered as a whole, presented a "complete and unitary picture without holes or inconsistencies" that could be attributed to the defendants.¹²¹ However, while

Bleach-Induced Luminol Chemiluminescence, 48 J. FORENSIC SCI. 1 (2009), available at http://www.hartnell.edu/faculty/jhughey/Files/Luminol_Inhibition.pdf.

¹¹⁴ NADEAU, *supra* note 60, at 53.

¹¹⁵ Sentenza della Corte d'Ass., 4 Marzo 2010, n. 7/2009, 1, 200 (It.), available at <http://www.perugiamurderfile.org/viewtopic.php?f=20&t=259> (follow "Original Italian Version" hyperlink).

¹¹⁶ NADEAU, *supra* note 60, at 131.

¹¹⁷ Sentenza della Corte d'Ass. n. 7/2009, at 248.

¹¹⁸ *Id.* at 183.

¹¹⁹ *Id.* at 212, 228.

¹²⁰ *Id.* at 280. The court was also dismissive of the defense's arguments that they were not present at the time of the DNA testing when the reliability of the evidence was at issue. The court pointed out that the defense attorneys were offered the opportunity to watch over the procedures but declined to be present for the lab tests and had failed to object to the standards of the Genetica Forense. *Id.* at 280-81.

¹²¹ *Id.* at 417 ("L'insieme degli elementi esposti e che sono singolarmente valutati evidenzia un quadro complessivo e unitario, senza vuoti e incongruenze, e comporta come esito necessario e strettamente consequenziale l'attribuzione dei fatti reato

R

R

the entire opinion was a step-by-step, tempered review of the evidence and how it supported the verdict, in the concluding portion of the opinion, the court made a few bold jumps in logic when hypothesizing about the motives of Knox, Sollecito, and Guede.

Witness testimony, electronic evidence, and DNA evidence support the court's conclusion that Knox was not at Sollecito's on the night of the murder, but it does not explain how Knox, Sollecito, and Guede came together, nor does it provide an adequate motive for why the defendants would have killed Kercher. The court ultimately resolved that it was "not possible to know the reason Rudy [Guede] ended up in the house on Via della Pergola" though it hypothesized several scenarios in which Guede could have tried to visit the boys in the apartment below, stopped by Kercher's to use the bathroom, or met Knox and Sollecito by the basketball courts in the square and decided to hang out with them.¹²²

Instead, the court assumed that Knox and Sollecito's amorous attitude toward each other probably incited Guede's interest in Kercher who was at home in her room, leading Guede to seek her out.¹²³ The opinion stated that hearing the commotion in Kercher's room, Knox and Sollecito probably became involved because they were under the influence of drugs (both admitted to smoking marijuana the night of the murder) and thus were particularly open to participating in Rudy's aggression against Meredith.¹²⁴ The court's hypothesizing had no basis in the evidence it had spent time carefully reviewing earlier in the opinion, another source of criticism.

IV. WHY ARE AMERICANS UNCOMFORTABLE WITH THE ITALIAN SYSTEM?

As it stands today, the Italian criminal procedure code is neither a fully inquisitorial system nor an adversarial system; it is a hybrid. The criminal procedure code has been criticized in the United States for failing to create a truly adversarial system – a complaint that reached a crescendo in the publicity surrounding the Amanda Knox case. Watching the trial take place, Americans were appalled by the foreign and seemingly relaxed evidentiary rules, provoking widespread outrage in the American media and the viewing public. Criticism of the mixed civil and criminal trials, the admission of character evidence without any real objection from the defense attorneys, the lack of jury sequestration, the use of the DNA evidence, and the court's assumptions on motive led to widespread

ipotizzati ad entrambi gl'imputati dei quali va quindi dichiarata la penal responsabilità.”).

¹²² *Id.* at 386, 388. Note that Rudy Guede was unavailable to testify during the trial because he had refused Knox and Sollecito's requests for testimony. *Id.* at 388-89.

¹²³ *Id.* at 391.

¹²⁴ *Id.* at 392-94.

denouncement of the verdict in the United States. Meanwhile, Italians expressed belief that the trial was fair.¹²⁵ The anger felt over the verdict in the United States translated into a focus on the weaknesses of the 1989 Italian criminal procedure code as a whole, with commentators attributing the verdict to the fact that Italy had not adapted “the American judicial system” correctly.¹²⁶ Some scholars even suggested condemning the trial and verdict as a means to dissuade other countries or international courts that may be interested in instituting reforms from using the Italian hybrid system as a model.¹²⁷ It would be a mistake, however, to equate these differences in American and Italian procedure with a failure of the Italian system as a whole. I have thus far raised five criticisms of the Knox trial that have been discussed in popular culture and legal circles. Stepping back from the Knox case I believe the five criticisms and general condemnations of the court’s proceedings can be explained, for the most part, by the inherent differences between adversarial and inquisitorial systems, and the comparative biases students of adversarial systems bring with them when considering the Italian system.

A. *Truth and Evidentiary Barriers in Inquisitorial and Adversarial Systems*

Many criticisms of the Knox trial and court opinion stem from Italy’s differing criminal procedure experience. Italy has historically had an inquisitorial system, which is pervasive throughout continental Europe. Perhaps the most fundamental difference between inquisitorial and

¹²⁵ Rachel Donadio, *supra* note 72. Even Carlo Della Vedova, Knox’s defense attorney, said that “he believed the trial was fair. He added that he ‘disagreed’ with new media coverage that depicted it otherwise.” *Id.* Amanda Knox also voiced similar opinions, telling Walter Verini, an Italian MP, that she felt “[t]he trial was carried out correctly . . . [m]y rights were respected, I believe so.” Nick Squires, *Amanda Knox Says She Has No Complaints About The Trial*, THE TELEGRAPH, Dec. 9, 2009, <http://www.telegraph.co.uk/news/worldnews/Europe/italy/6769626/Amanda-Knox-says-she-has-no-complaints-about-trial.html>. Some Italians have argued that American criticisms stem from a misunderstanding of Italian culture rather than from valid problems with the Italian criminal justice system. Rachel Donadio, *As Amanda Knox Heads Home, the Debate is Just Getting Started*, N.Y. TIMES, (Oct. 4, 2011), <http://www.nytimes.com/2011/10/05/world/europe/amanda-knox-freed-after-appeal-in-italian-court.html> (As Vittorio Zucconi wrote, “[i]n the end, it was the trial of a different culture, a class of cultures more than a legal case . . . [t]he same girl whom prosecutors depicted as a she-devil starved for sex and orgies, grew, in inverse proportion in American public as a chaste diva who fell into a hornets’ nest of inept, evil men”).

¹²⁶ Robbins, *supra* note 44 (quoting Professor George Fletcher from Columbia University).

¹²⁷ *Id.* (quoting Professor George Fletcher: “I think we have to have the courage to condemn this proceeding because we do not want international courts paying attention to this kind of interaction between the common law and civil law systems.”).

R

R

adversarial systems is that the inquisitorial system puts a strong emphasis on the discovery of truth in criminal proceedings.¹²⁸ To a student of American law, this statement will initially ring false, for Americans generally believe that when we go to trial we also seek the truth. However, the development of the adversarial criminal procedure model differs from the inquisitorial model in its willingness to recognize other criminal procedure goals beyond the naked pursuit of truth.

Initially quite similar systems, continental European and English criminal procedure diverged during the Enlightenment when the continent experienced problems with medieval evidentiary law.¹²⁹ Medieval law had “rigid rules concerning the quantity and quality of proof needed for a conviction,” with circumstantial evidence being insufficient for proving guilt.¹³⁰ The rigidity of the rules led to a great dissatisfaction during the Enlightenment as scholars felt the “fact-finders’ ability to make a subjective evaluation of the evidence was disregarded” leading to “widespread use of torture, which . . . was often the sole means of obtaining the required proof for conviction.”¹³¹ Reacting to these concerns, continental countries began relaxing their proof standards, allowing for broad discovery in the hopes of ascertaining truth. Furthermore, the rejection of Medieval “rules was predicated on the belief that it is impossible to determine satisfactorily in advance the impact of particular evidentiary material on the factfinder.”¹³² The outcome of this relaxation led to the development of an attitude which Karl Llewellyn termed a “parental” system of criminal justice.¹³³

The parental or pluralistic system rests on an idea of “togetherness . . . between the miscreant and the group-government. The defendant is viewed as an integral part of the community, a member of a going team.”¹³⁴ Furthermore, the fact-finder, the judge, is viewed as capable of maintaining neutrality while assessing all evidence and allocating appropriate weight to each piece of evidence during deliberations.¹³⁵ In response to worries about providing the fact-finder with too much power, inquisitorial countries increased “the plurality of perspectives upon which judgments could be based” in order to create a feeling of a “common enterprise of discovering the truth,” instead of restricting evidence stan-

¹²⁸ See generally Grande, *supra* note 5.

¹²⁹ Mirjan R. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 515 n.10 (1973).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 571.

¹³⁴ *Id.*

¹³⁵ *Id.*

dards.¹³⁶ To further enhance the pluralism of the inquiry, and therefore neutrality, continental systems created fragmented official review of the trial through layers of appellate supervision of criminal courts.”¹³⁷

While the continent’s reaction to the Enlightenment and classical liberalism was a broadening of evidentiary standards and an emphasis on plurality to enhance truth-finding, English criminal procedure was greatly influenced by classic English liberalism in an entirely different direction. Lockean liberal values instilled an understanding that “[t]he government was to be kept out of the citizen’s life as much as possible and [that] the role of the judge was to be limited in the criminal process.”¹³⁸ These liberal values led the English to restructure their criminal trials into a contest and relegated the third party, the judge, to a neutral, passive position. From this foundation the adversarial system evolved and has come to embody two, sometimes conflicting, models of adversary justice, what Richard Leo calls the “government control” and “truth” models.¹³⁹ The government control model seeks to limit unchecked government power and in doing so often undermines truth-seeking inquiries.¹⁴⁰ The fear of persecution and uncontrollable State power has led adversarial systems to install safeguards and emphasize process in order to “preclude conviction of an innocent person at the social expense of acquitting some guilty defendants.”¹⁴¹

The opposite of the government control model is the truth model. While inquisitorial countries were skeptical of the ability to determine the weight of evidentiary material in advance, the adversarial system took the opposite view, believing that because “evidence is rarely unflawed and unambiguous” a fact-finder’s ability to ascertain the objective “truth” is often unachievable.¹⁴² Given that belief, the adversary system reconstructed the criminal process around the concept of fair competition and the “adversary’s partisan pursuit of their clients’ self-interest.”¹⁴³ However, placing the burden of truth-finding on the parties also affects the way in which the defendant is viewed. Instead of being part of a truth-finding community, the adversarial system creates an arms-length attitude, with the defendant not being viewed as part of the community, but as outside of the group.¹⁴⁴

¹³⁶ Elisabetta Grande, *Dances of Justice: Tango and Rumba in Comparative Criminal Procedure*, 9 GLOBAL JURIST, art. 6, 11 (2009).

¹³⁷ *Id.* at 10-11.

¹³⁸ *Id.* at 7.

¹³⁹ RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 13 (HARVARD UNIV. PRESS ed. 2008).

¹⁴⁰ *Id.* at 15.

¹⁴¹ H. Richard Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel’s Idea*, 123 U. PA. L. REV. 1067, 1078 (1975).

¹⁴² *Id.* at 1079.

¹⁴³ Damaška, *supra* note 129; *see also* Uviller, *supra* note 141, at 1079.

¹⁴⁴ Damaška, *supra* note 129, at 571.

The different backgrounds and beliefs of the inquisitorial and adversarial models have led to vastly different understandings about how evidence should be controlled at trial and explains many of the aspects of the Knox case that seem unjust to American observers. Since inquisitorial countries trust in the impartiality of the fact-finder, continental procedures do not “contain rules excluding relevant evidence on the ground that fact-finders might erroneously assess its credibility and thus endanger fact-finding precision.”¹⁴⁵ Meanwhile, adversarial systems believe exclusionary rules for evidence are necessary to “exclude certain classes of logically relevant evidence largely on the theory that its impact on the trier of fact may be stronger than its actual probative weight.”¹⁴⁶

In Italy, adversarial influence has led to the exclusion of many types of evidence, such as illegally seized documents and testimonial evidence.¹⁴⁷ However, because professional and lay judges are expected to make findings of fact *and* law, the Italian exclusionary rules are not aimed at “insulat[ing] the trier of fact from the impact of admissible evidence,” but serve only to prevent the use of evidence in the deliberations for the verdict.¹⁴⁸ From the American point of view, an exclusionary rule that does not prevent evidence from reaching the fact-finder is no exclusionary rule at all. By contrast, in the European continental tradition, the inquisitorial structure implicitly trusts the State and, thus, the judge. Therefore, unsurprisingly, 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. Since the professional judges sit with the lay jurors, it is expected that the professional judges will properly guide discussion and explain the weight that ought to be given to each piece of evidence.

Given Italy’s historical procedural foundations it does not seem improper in the Italian system when, for example, the jurors in the Knox trial were aware of Knox’s inconsistent statements during interrogation, which were relevant to the defamation case, but were instructed to exclude the statements in making their decision on the criminal trial verdict. By the same token, the highly criticized admission of character evidence can also be understood when viewed through an inquisitorial lens. Since inquisitorial countries lean towards admitting more evidence in hopes of finding the truth and rely on judges to guide the exclusion of evidence that is not probative, the character evidence admitted against Knox and Sollecito was not as invidious to the Italians as it was to Americans.

The Italian court’s allowance of multiple lawsuits and the admission of character evidence and possibly faulty DNA evidence may be further

¹⁴⁵ *Id.* at 514.

¹⁴⁶ *Id.*

¹⁴⁷ Grande, *supra* note 5, at 249.

¹⁴⁸ *Id.* at 247-48.

understood by looking closely at the Italian judiciary and the Italian appeals process.

1. The Italian Judiciary

The Italian judiciary can only be properly understood by considering how the role of judges developed in Italy and within the context of the Italian hybrid structure. Historically, the Italian judiciary has been highly respected by Italian society as a trustworthy and independent government body. Part of this trust derives from the technical and non-political process of judicial selection and management, which are separate from the political branches of government. Judges are recruited right after graduation from university through the administration of a “competitive examination,” which “produces a wide cross-section of political sympathies and makes it more difficult to control for political reliability.”¹⁴⁹ Meanwhile, judicial training is handled internally¹⁵⁰ and judicial discipline and promotion are the “exclusive prerogative of the Supreme Council of Judges.”¹⁵¹ The 1989 criminal procedure code removed much of the bureaucratic structure of the judiciary, which exists in many civil law countries, and, unlike common law systems, left the judiciary “completely removed from any institutional intervention on the part of the political environment.”¹⁵²

The Italian judiciary won further favor with the Italian public in the 1990s when it began a movement to “remoralize Italian public life” in the face of serious corruption on the part of political parties and acts of terrorism by the Mafia.¹⁵³ The resulting “*mani pulite*” (clean hands) movement led to a two-year period in Italian politics where “all the established parties of government in Italy were swept away in the course of judicial investigations,” and during which the Italian public “tended to view the role of the judges as defenders of citizens in the face of a corrupt political

¹⁴⁹ David Nelken, *The Judges and Political Corruption in Italy*, 23 J.L. Soc’y 95, 99 (1996). See also Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103, 107-08 (2009).

¹⁵⁰ Carlo Guarnieri, *Justice and Politics: The Italian Case in a Comparative Perspective*, 4 IND. INT’L & COMP. L. REV. 241, 249 (1993).

¹⁵¹ Nelken, *supra* note 149, at 100. The independence and separateness of the Italian judiciary distinguishes it from other civil law countries and is another part of Italian law that reflects a mix of continental and common law structures. Guarnieri, *supra* note 150, at 249.

¹⁵² Guarnieri, *supra* note 150, at 248. Also, unlike common law countries, judges “are recruited by competitive examination straight after university (as in most civil-law countries), a method which produces a wide cross-section of political sympathies and makes it more difficult to control for political ‘reliability.’” Nelken, *supra* note 149, at 99.

¹⁵³ Nelken, *supra* note 149, at 95.

R

R

R

R

R

class.”¹⁵⁴ Both the structure of the Italian judiciary and the role it has taken in shaping political culture reinforce the Italian public’s trust in the institution.

2. The Italian Appeals Process

Another factor mitigating the negative American view of the Italian criminal procedure system is the core role of the Italian appeals process. Given that Italy’s procedure has emerged from inquisitorial foundations it is important to look at the criminal processes in the Knox trial on a broader level than just the trial itself. The community and plurality concepts central to the inquisitorial system ensure that the appeals process plays as large a part in the effort to ascertain truth as the trial itself.

In adversarial systems, efforts to prevent insufficiently probative evidence and provide fair process creates an assumption that “whenever fair rules have been applied in the trial contest . . . the result is necessarily just.”¹⁵⁵ As a result, trials in the United States can only be appealed on narrow questions of law, not fact, and claims of innocence are not considered constitutional questions.¹⁵⁶ The adversarial system stands in stark contrast to continental systems and Italian criminal procedure, where “re-opening criminal proceedings is always available after the trial to the innocent wrongly convicted, even where the defence [sic] were in possession of evidence pointing to innocence during the trial but failed to bring it to the attention of the trial court.”¹⁵⁷ In Italy, when *corte di assise* cases are appealed, the criminal appellate court, the *corte di assise d’appello*, reviews both findings of law and fact, allowing “supervision of the trial fact-finder’s use of the evidentiary material, the rationality of his enquiry into the facts, and whether the data that his judgment is based on are complete.”¹⁵⁸ Thus, Knox’s criminal trial was in no way her last chance to provide or contest the evidence against her; the case was not over as it might have been in the American adversarial system.

In December of 2010, Knox and Sollecito’s appeals process began, finally concluding with their acquittal on October 3, 2011.¹⁵⁹ The broad

¹⁵⁴ *Id.*; Donatella Della Porta, *A Judges’ Revolution? Political Corruption and the Judiciary in Italy*, 39 EUR. J. POL. RES. 1, 5-6 (2001).

¹⁵⁵ Grande, *supra* note 136, at 15.

¹⁵⁶ *Id.* at 16. *See also* Herrera v. Collins, 506 U.S. 390 (1993) (holding a claim of actual innocence based on newly discovered evidence does not state a ground for federal habeas relief).

¹⁵⁷ *Id.* at 17.

¹⁵⁸ WATKINS, *supra* note 17, at 130. A *Corte d’assise d’appello* sits in every circuit and is also composed of two judges and six lay jurors. *Id.* However, the jurors must now have had full, not just basic, secondary education. *Id.*

¹⁵⁹ Barbie Latza Nadeau, *Amanda Knox’s Tearful Appeal*, THE DAILY BEAST (Dec. 11, 2010, 5:55 AM), <http://www.thedailybeast.com/blogs-and-stories/2010-12-11/amanda-knox-appeal-will-she-go-free/2/>.

R

R

appellate review of the evidence provided Knox with a second chance on all matters of law *and* fact. The court of appeals judges allowed retesting of the DNA evidence by independent experts, allowed important witnesses to re-testify, and allowed new witnesses to be introduced.¹⁶⁰ This broad, *de novo* review of the entire case is central to the proper functioning of the Italian justice system, and for Knox it ultimately led to discrediting the evidence that had played a key part in the first judgment. First, the independent forensic experts who retested the DNA submitted a report to the court in July finding they could not “exclude that the results obtained could have been derived from phenomena of environmental contamination and/or contamination, which could have taken place in any of the phases of the evidence gathering and/or manipulation.”¹⁶¹ Second, in March of 2011, Antonio Curatolo, the homeless man who placed Knox in the square on the night of the murder, provided additional testimony that was inconsistent with his testimony at the first trial.¹⁶² Knox’s attorneys were able to use Curatolo’s inconsistency, as well as his history of drug addiction, to discredit much of his damaging testimony from the first trial.¹⁶³ Finally, Knox’s attorneys introduced new witnesses, including Mario Alessi, a prison-mate of the convicted Rudy Guede, who testified that Guede had confessed to committing the murder with a different accomplice, not Knox or Sollecito.¹⁶⁴ In the one hundred and forty-three page opinion released supporting the acquittal, Judge Claudio Pratillo Hellmann was swayed by the new evidence, finding that the original DNA evidence was “compromised by substandard police and forensic work” and that prior testimony by witnesses like Curatolo was not credible.¹⁶⁵

The detailed appellate review of the first Knox verdict must be viewed as part of the plurality of voices the Italian justice system deems neces-

¹⁶⁰ *Amanda Knox Appeal: Key Evidence to be Reviewed*, CBS NEWS.COM, (Jan. 22, 2011, 10:54 PM), <http://www.cbsnews.com/stories/2011/01/22/earlyshow/saturday/main7271841.shtml>.

¹⁶¹ *Amanda Knox Scores Legal Coup*, THE DAILY BEAST, (June 29, 2011, 10:04AM), <http://www.thedailybeast.com/cheats/2011/06/29/amanda-knox-scores-legal-coup.html>; *Amanda Knox: DNA Evidence May Be Contaminated*, BBC NEWS, (July 25, 2011, 01:12PM), <http://www.bbc.co.uk/news/uk-14282751>.

¹⁶² See Barbie Latza Nadeau, *Could a Homeless Man Free Amanda Knox?*, THE DAILY BEAST, (Mar. 28, 2011), <http://www.thedailybeast.com/blogs-and-stories/2011-03-28/amanda-knox-appeal-homeless-mans-contradictory-testimony/>.

¹⁶³ *Id.*

¹⁶⁴ Alessandra Rizzo, *Amanda Knox Trial: Witness Mario Alessi Says He Can Clear Her*, THE HUFFINGTON POST, (June 18, 2011), http://www.huffingtonpost.com/2011/06/18/amanda-knox-trial-witness_1_n_879697.html.

¹⁶⁵ Barbie Latza Nadeau, *Judge in Amanda Knox Trial Publishes Reasoning Behind Acquittal*, THE DAILY BEAST, (Dec. 15, 2011), <http://www.thedailybeast.com/articles/2011/12/15/judge-in-amanda-knox-trial-publishes-reasoning-behind-acquittal.html>.

sary to provide fairness and determine the truth rather than as a separate and distinct procedure from the first trial.¹⁶⁶

B. *American Comparative Biases*

While differing foundations in inquisitorial and adversarial systems explain much of the perceived peculiarities of the Amanda Knox trial, the general criticism of the trial is inevitably informed by the biases Americans bring to the table in their analysis of the Italian criminal system. In particular, lawyers face two major challenges when attempting to assess a foreign legal system: (1) parochialism and (2) the “endowment effect.”

Parochialism describes an individual’s limitation in understanding a new culture’s processes because of sheer ignorance and the weight of his or her own experiences. It takes a great deal of effort to gain a deep understanding of how a foreign country’s legal processes work and have evolved. By contrast, it is easy to fall into the trap of drawing broad generalizations or type-casting a country and its institutions. To judge the Italian reform of criminal procedure simply on the basis of how closely it resembles the U.S. model misses a crucial insight of contemporary comparative methodology: wholesale “transplants” are impossible. Instead, legal concepts are “translated” from one legal culture into another,¹⁶⁷ and in the process of translation different but equally plausible legal categories may come into being.¹⁶⁸ In adopting features of the adversarial system, Italy did not simply transplant U.S. features into its legal system;¹⁶⁹ rather, it translated such features into an entirely different legal language.

¹⁶⁶ WATKINS, *supra* note 17, at 130. The appeals court is “composed of two career judges and six popular judges” with one of the career judges coming from the highest court in Italy, the *Corte di cassazione*. Freccero, *supra* note 22, at 351. While the lay judges in the *Corte d’assise* are only required to have degrees through junior high, jurors at the appeals level are required to have high school degrees. *Id.*

¹⁶⁷ Langer, *supra* note 12.

¹⁶⁸ See generally Diego López-Medina, *Comparative Jurisprudence: Reception and Misreading of Transnational Legal Theory in Latin America* (2001) (unpublished S.J.D. thesis, Harvard Law School) (on file with Harvard Law School Library, Harvard University).

¹⁶⁹ Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 321 (1978). Comparative law is plagued with the difficulty of assessing the transfer of legal ideas or innovative legal developments and part of the problem may be the metaphors used to think about these developments. Generally, Alan Watson’s metaphor of legal transplants has shaped the way comparative lawyers assess new systems. *Id.* In the 1970’s Watson posited that legal ideas could be “transplanted” with ease across societies and that these transplants were governed by certain criteria. *Id.* While the metaphor of the legal transplant provides an attractive way to structure comparative analysis, recent scholars have criticized the metaphor’s inflexibility, noting that the metaphor frames discussion in terms of success or failure; either an idea is transplanted fully and therefore successfully, or it is not a successful transplant. Langer, *supra* note 12, at 30. See also López-Medina, *supra* note 168. Thus, the

R

R

R

R

One manifestation of parochialism in American criticism of the trial is the way in which Americans measured the success of Italy's new adversarial procedures. In assessing the Italian judicial process as it functioned for Amanda Knox, Americans were, in large part, disappointed that Italy's adversarial elements did not work exactly the same way as their U.S. equivalents.¹⁷⁰ In fact, it is unclear what exactly should constitute an adversarial system¹⁷¹ – must an adversarial system have the exact same trial practices as the United States to be valid? Or, alternatively, are successful adversarial systems ones that place emphasis on separating preliminary investigations from the trial and insist on preventing the introduction of inflammatory evidence in court? Most of the criticism surrounding the Knox case drew explicit comparisons to the U.S., intimating that Italy had not transplanted American criminal procedure successfully. Meanwhile, little of the criticism around the Knox case analyzed Italian criminal procedure as a new (and translated) form of

metaphor “fails to account for the possibility that, in many cases, legal concepts and practices are transferred on some conceptual levels but not others.” *Id.* Much of the scholarly discussion of Italian criminal procedure has been structured in terms of legal transplants. *See, e.g.,* Grande, *supra* note 5. However, for the purposes of discussing Italian criminal procedure, the transplant theory may be too restrictive. **R**

In recent years scholars, such as Maximo Langer, have put forward a metaphor to compete with the Watson's “transplants”: the translation metaphor. *See generally* Langer, *supra* note 12. The legal translation metaphor, in contrast to legal transplants, provides the flexibility in which to consider alterations from the originally transferred legal concepts without declaring the endeavor a failure. *Id.* at 30. The metaphor “distinguishes the transformations the legal idea may undergo when initially transferred from the source to the target legal system” and allows for “distinction[s] to be made between the original ‘text’ – the legal idea or institution as developed in the source legal system – and the translated text.” Langer, *supra* note 12, at 33. In this way, legal translations may be the better metaphor in which to look at Italian criminal developments afresh. **R**

¹⁷⁰ Robbins, *supra* note 44, at 2 (quoting Alan Dershowitz as saying “[w]e are the only country in the world that has a real jury system”). **R**

¹⁷¹ A parallel question that should also be asked is “what is an inquisitorial system?” As Craig M. Bradley notes, “[t]he notion that an ‘inquisitorial’ system of justice was inextricably linked to torture and unreliable results, combined with Americans’ traditional ignorance of other languages and cultures, and the elimination of states as ‘laboratories’ due to the national uniformity of criminal procedure rules enforced by the U.S. Supreme Court, mean[s] that Americans really [have] no sense of alternatives to the classic common law system. The U.S. adversarial/jury system, while often unpopular is nevertheless generally thought to be the only fair way to proceed.” Craig M. Bradley, *The Convergence of the Continental and Common Law Model of Criminal Procedure*, 7 CRIM. L.F. 471, 478 (1996) (book review). *See also* David A. Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1639, 1634-1704 (2009) (finding there is no standard account of “what makes inquisitorial process so objectionable . . . [n]or is there even agreement about what makes a procedural system inquisitorial”).

criminal procedure to be assessed on its own merits – one that may be criticized for not meeting core adversarial goals unrelated to American processes.¹⁷²

Another instance of parochial bias is Americans' discomfort with the fact that the trial court openly hypothesized about motive in the published opinion. However, these critics are ignoring one key fact: in the American jury system the jury is a black box. Juries in the United States are not required to explain what evidence they use to support their conclusions. Americans cannot restrict hypothesizing similar to that of the Italian court, because no one knows the type of discussion that takes place in the jury room and jurors do not need to release a written opinion. Thus, jurors could possibly draw on their own experiences or their own ideas in discussion and no one outside the jury room could prevent it. In the Italian system, while the hypothesizing is strange, it provides a record from which the defense can appeal when inappropriate evidence is used. Furthermore, if mistakes in the use of evidence consistently occur, the Italian legislature could potentially amend the evidentiary rules in the future. A parochial analysis ignores these redeeming qualities of a foreign system.

A second methodological shortcoming evident in the American criticism of the Knox trial lies in what economists have termed “the endowment effect;”¹⁷³ people tend to overestimate the value of what they possess. In legal comparisons, this means assuming that the legal system with which one is familiar is the better system. When Americans compare the proceedings in the Knox case to American trials they tend to be disappointed in the outcome of the Italian process. Their comparison juxtaposes highly idealized versions of adversarial and inquisitorial systems, leaving little space for recognition of mixed systems and assuming only the best of adversarial processes.

The skepticism surrounding Italy's mixed criminal procedure system is founded in the American anti-inquisitorial tradition. As David Sklansky noted, Americans have generally considered inquisitorial procedural structures by looking to “the Continental, inquisitorial system of criminal adjudication for negative guidance about [American] ideals” and thus “[a]voiding inquisitorialism is taken to be a core commitment of [American] legal heritage.”¹⁷⁴ Thus, in comparing the American system against the Italian system in the Knox case, Americans often seem to be comparing a utopian ideal of the adversarial system to the facts of the actual Italian case. In reality, the “American adversary system in practice often fails to deliver anything remotely close to the kind of substantive or pro-

¹⁷² Robbins, *supra* note 44, at 2.

¹⁷³ Richard Thaler, *Towards a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAVIOR & ORG. 44, 39-60 (1980).

¹⁷⁴ *Id.*

cedural justice it promises in theory.”¹⁷⁵ Economic inequalities are the norm in the adversarial process with a prosecutorial team that “typically has greater resources than the defense, including a professional police force to carry out investigations and a whole legal department of well-paid prosecutors who are generally skilled and enthusiastic,” a far cry from defendants who are often represented by overworked court-appointed attorneys.¹⁷⁶ These inequities compromise the goals of the adversarial system of protecting defendant rights, controlling government power, and finding the truth – instead, the “unfair procedures and unreliable outcomes . . . undermine the system’s legitimacy.”¹⁷⁷ Faced with these deficiencies, defendants like Knox could be convicted under the same circumstances here in the United States.¹⁷⁸

The same “endowment effect” informs American criticism of the Italian court’s “failure” to sequester the Knox jury. What many Americans do not realize is that in the United States, jury sequestration has “fallen so far out of favor that judges rarely bother anymore,” even when faced with high profile cases.¹⁷⁹ Research has found that removing jurors from

¹⁷⁵ Grande, *supra* note 136, at 18.

¹⁷⁶ Bradley, *supra* note 171, at 473.

¹⁷⁷ LEO, *supra* note 139, at 19-20. Plea-bargaining also undermines the adversarial process where “90 to 95 percent of all criminal cases are resolved through plea bargains.” *Id.* at 18. Because of plea-bargaining “most criminal defendants in the United States do not confront their accusers in court, or have their guilt assessed by a jury, or enjoy any other protections we tend to associate with the adversary criminal trial.” Sklansky, *supra* note 171, at 1687.

¹⁷⁸ *Anderson Cooper 360* (CNN television broadcast Dec. 5, 2009), available at http://www.youtube.com/watch?v=6HGqyENJdKQ&feature=player_embedded (When asked whether the Knox verdict could have happened in the United States, Lisa Bloom said it would be “[v]ery likely . . . I’ve seen it many times . . . and I hope we would be as outraged when it happens in our country”).

¹⁷⁹ Brendan I. Koerner, *When Do Judges Sequester Juries?*, SLATE (Nov. 14, 2003), <http://www.slate.com/id/2091241>. Jury sequestration began to be increasingly questioned in the aftermath of the O.J. Simpson trial, where the 266-day sequestration set a record in the United States and was regarded by some as “counterproductive.” James P. Levine, *The Impact of Sequestration on Juries*, 79 JUDICATURE 266, 267 (1995).

The hesitation to sequester juries was seen most recently in the Conrad Murray trial in Fall 2011. Conrad Murray was charged with manslaughter after Michael Jackson’s death from an overdose of propofol in July 2009. Pre-trial, Murray’s defense attorneys argued for jury sequestration saying that the trial would be “the most publicized in history” given that Michael Jackson is “one of the most well-known figures in the world.” Michael Martinez, *Judge Denies Conrad Murray’s Request to Sequester Jury*, CNN.COM, (Aug. 25, 2011), http://articles.cnn.com/2011-08-25/justice/california.murray.case_1_nareg-gourjian-sequester-jury-jury-selection?_s=PM:

CRIME. However, Los Angeles County Judge Michael E. Pastor refused to sequester the jury saying he did not want the jury to feel like “inmates” and that jury sequestration is an “extreme measure.” *Id.*; Anthony McCartney, *Jackson Doctor*

R
R
R

R

their personal lives through jury sequestration accentuates the stress jurors already experience because of the intensity of trial testimony and the weight of their decisions.¹⁸⁰ The stress may lead to fights between jurors, rushed deliberations, or resentment of the defendant “who is blamed for having caused the entire unpleasant situation,” which may ultimately undermine the “justice” sequestration was meant to achieve.¹⁸¹ The Knox case was held twice a week and lasted for over eleven months; such a burden on jurors would have been extreme and an American judge faced with the same situation would probably have ruled against sequestration.

V. CONCLUSION

The 1989 Italian criminal procedure code made broad and bold reforms to its previously inquisitorial system, debuting to mixed results. While making great efforts to instill adversarial processes into the system, Italy’s inquisitorial foundations have remained strong with the current criminal procedure code creating a hybrid system, which neither common law nor civil law comparativists know how best to discuss.

The Amanda Knox case and the resulting criticism of Italian criminal procedure have led scholars to question the entire Italian criminal system. Before engaging in a hasty denouncement, however, it is first necessary to understand the background of the Italian code and recognize the biases we bring to bear when engaging in comparison. As Mirjan Damaška has rightly noted, the dichotomy that Americans see between adversarial and inquisitorial (and now between adversarial and hybrid systems) “seems to suggest that the only alternative to some lofty conceptions of Due Process is lapse into the horrors of a procedural system where charges are not specific, the accused is not accorded the benefit of the doubt, his confession is coerced, his detention before trial is unlimited, he has no right to counsel and is not advised of his constitutional rights.”¹⁸² Despite the media frenzy and flood of opinions on the Knox trial, the procedures of the court and the opinion accompanying the verdict did not represent either an invidious criminal procedure, or a country out to convict an innocent. Instead, the differences in procedure from the American trial

Asks to Sequester Jury During Trial, BOSTON.COM, (Aug. 19, 2011), http://articles.boston.com/2011-08-19/ae/29906271_1_sequester-jurors-sequester-jury-casey-anthony-case.

¹⁸⁰ Levine, *supra* note 179, at 269.

¹⁸¹ *Id.* An additional concern is that increased interaction with law enforcement during sequestration may sway the jury in favor of the prosecution because of friendships developed between the jury members and the court personnel. *Id.* at 270.

¹⁸² Damaška, *supra* note 129, at 569. The reality comparativists must come to face is that differences “between the Anglo-American and the continental system have begun to diminish,” and the trend is towards a common middle. *See* Bradley, *supra* note 171, at 474.

R

R

R

process represent choices by a country with different procedural foundations but with a similar goal, justice. Criticism can and should be given to the Italian system,¹⁸³ and already the Knox case has created a debate in Italy over possible reforms,¹⁸⁴ but criticism abroad should be conducted in a forum open to reasoned debate and on a level that accounts for historical differences and personal biases.

¹⁸³ For example, while the overhaul did succeed in separating the trial's access to investigation materials by drawing a clear line between the preliminary investigation and trial and by requiring arguments be raised by the parties, in terms of achieving the goal of reducing backlog, the reforms failed. A new case tends to spend around 381 days in the prosecutors office, and an average trial is 398 days long. Illuminati, *supra* note 23, at 580.

¹⁸⁴ Donadio, *supra* note 125. As commentator Vittorio Macioce wrote in *Il Giornale* the day after Knox's acquittal:

The only certainty is that at the end of this story without pity is that Meredith died at age 22 and did not get justice, and Amanda and Raffaele were put in prison for four years without a definitive sentence . . . It's the law . . . but maybe in Italian justice there's a black hole where uncertainty reigns. *Id.*