

THE ADVERSARIAL-ACCUSATORIAL LABEL: A CONSTRAINT ON THE SEARCH FOR TRUTH

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This nation's criminal justice system sorely needs major reforms designed to emphasize the importance of ascertaining truth. Far-reaching reform proposals abound, although not all are prompted in fact by a desire to improve the search for truth.¹ This Article will not discuss the merits of various proposals, but rather will consider whether the nature of our legal system limits the kind of truth-enhancing reforms we may consider.

Aside from constitutional objections, which may or may not be surmountable, many reform proposals immediately confront the objection that they are inquisitorial and thus inconsistent with our society's fundamental commitment to the adversarial or accusatorial system.² However, these labels have little fixed content, and to invoke them, for or against a proposal, often begs the question. The fact is, we are free to adopt almost any

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1. For example, Professor Lloyd Weinreb has called for the creation of a judicial institution that would assume both police investigative functions and the prosecutor's function of proving guilt at trial. See LLOYD L. WEINREB, *DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES* 117-46 (1977). Professor Albert Alschuler, who wants to eliminate plea bargaining, has advocated that the jury be replaced by a "mixed tribunal" of judges and lay persons. See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 995-1013 (1983). Professor Peter Arenella has proposed that the state be required to shoulder a heavier burden in the pre-trial process before it is permitted to encourage the defendant to plead guilty. See Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 523-79 (1980). Coming from a somewhat different direction, I have proposed adopting new ethical restraints on defense counsel's ability to thwart the search for truth. See Joseph D. Grano, *Criminal Procedure: Moving From the Accused as Victim to the Accused as Responsible Party*, 19 HARV. J.L. & PUB. POL'Y 711 (1996). I have also advocated that *Miranda* be overruled and that we revert to the pre-*Escobedo* view that no suspect, rich or poor, has a right to counsel during police interrogation. See JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 199-222 (1993).

2. Actually, Professor Arenella tried to garner support for his proposal by relying on society's purported commitment to the adversary-accusatorial mode of procedure. See Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 213 (1983).

reform proposal except one that conflicts with the few constitutional provisions imposing restraints in this area.

One particularly noteworthy source of constitutional restraints is the Supreme Court's selective incorporation doctrine.³ This is the doctrine that the Court invoked in the 1960s to make most, but not all, of the criminal procedure provisions in the Bill of Rights applicable to the States.⁴ In contemplating the many criminal justice reforms that commentators propose, one comes to appreciate the pernicious federalism-defeating effects of this doctrine. One of the virtues of our federal system is that it allows—more accurately, allowed—States to experiment with different procedures. The selective incorporation doctrine, in combination with the Court's attachment of many procedural requirements to the provisions of the Bill of Rights,⁵ virtually eliminated the States' freedom to try other measures.

Putting aside the Constitution, what are the constraints imposed by referring to the system as adversarial or accusatorial? Are these two terms synonyms, or do they differ in meaning? Responding to my article on the topic of police interrogation,⁶ Professor Peter Arenella once insisted that while *adversarial* procedures would be difficult to apply to police practices, *accusatorial* norms do and should apply.⁷ In Professor Arenella's view, "accusatorial procedure encompasses not only an adversarial trial procedure but other fundamental norms . . . that regulate the balance of advantage between the state and the accused throughout the criminal process."⁸ Even if one yields to Professor Arenella in the battle over terminology, however, the analysis does not change. The notion that ours is an adversarial or accusatorial system does not, by itself, preclude us from making reforms that would facilitate the search for truth.

This is not to deny the rhetorical force of the claim that our system is committed to an accusatorial mode of procedure. In

3. See GRANO, *supra* note 1, at 120-23 (1993); cf. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

4. See generally GERALD GUNTHER, *CONSTITUTIONAL LAW*, 420-21 (12th ed. 1991).

5. For a description of some of these additions, see Stephen J. Markman, *Six Observations on the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 425, 426 n.5 (1997).

6. Joseph D. Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 27 (1979).

7. See Arenella, *supra* note 1, at 466-67 n.10.

8. *Id.* at 465 n.5.

Moran v. Burbine,⁹ the Supreme Court upheld, against Fifth and Sixth Amendment challenges, the use of a confession by a suspect who was not informed that a lawyer retained by his sister had telephoned the police station. Justice Stevens dissented, attacking the majority's opinion as a "startling departure from [the] basic insight" that "'ours is an accusatorial and not an inquisitorial system.'"¹⁰ Justice Stevens asserted that the majority opinion "flouted the spirit of our accusatorial system of justice."¹¹ Justice Stevens insisted that lawyers, though viewed as "nettlesome obstacle[s]" to the discovery of truth in an inquisitorial system, were to be regarded as protectors of rights in an accusatorial system.¹²

Justice Stevens' dissent proves the validity of a point made by Professor Mirjan Damaška that to claim that our system is accusatorial "is not so much analytically precise as it is hortatory and rhetorical, aimed at mobilizing consent and at winning points in legal argumentation."¹³ The most glaring omission from Justice Stevens' dissent is its failure to state the defining characteristics of the competing systems. To be fair, Justice Stevens did quote (in a footnote) from a 1949 Supreme Court opinion that sketched the general characteristics of the accusatorial system:

Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. . . . The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands.¹⁴

9. 475 U.S. 412 (1986).

10. *Id.* at 434 (Stevens, J., dissenting) (quoting *Miller v. Fenton*, 474 U.S. 104, 110 (1985), in turn quoting *Rogers v. Richmond*, 365 U.S. 534, 541 (1961)).

11. *Id.* at 468 (Stevens, J., dissenting).

12. *See id.*

13. Mirjan R. Damaška, *Adversary System*, in 1 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 24, 26 (1983).

14. *Burbine*, 475 U.S. at 434-35 n.1 (Stevens, J., dissenting) (quoting *Watts v. Indiana*,

The problem with this quotation is that many so-called inquisitorial systems also require specific charges and also adhere to the axiom that the defendant should be accorded the benefit of factual doubt. Indeed, as Professor Damaška has remarked, "[t]hat continental criminal law has discarded guilt-presumptive devices while common law courts frequently operate with them is by now a cliché of comparative law."¹⁵ Continental systems also recognize a right to appointed counsel, prohibit coerced confessions, and recognize that the accused may be questioned at trial but cannot be required to answer questions.

Furthermore, although the passage quoted by Justice Stevens makes reference to the right to counsel and to the duty to advise individuals of their constitutional rights, it neither defines when the right to counsel attaches nor particularizes what constitutional rights individuals have. This is significant, especially when one recalls that the passage was written in 1949, when the Supreme Court neither recognized a right to counsel during police interrogation, nor required the police to give the suspect warnings of any kind.¹⁶ In fact, nine years after the passage was written, the Supreme Court upheld the use of a confession even though the police denied the defendant access to a lawyer who had actually come to the police station demanding to see his client.¹⁷ As late as 1961, Justice Frankfurter, who wrote the passage quoted by Justice Stevens, accurately and approvingly observed that the Supreme Court's cases provided no litmus test for impermissible interrogation; neither extensive cross-questioning, failure to provide warnings, nor denial of consultation with friends or counsel necessarily sufficed to render a confession inadmissible.¹⁸

The definitional issue can also be examined by focusing on some features of American criminal procedure that could be labeled "inquisitorial." These include the investigative grand

338 U.S. 49, 54 (1949)).

15. Mirjan R. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 546 (1973).

16. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966); *Massiah v. United States*, 377 U.S. 201 (1964); *Watts v. Indiana*, 338 U.S. 49, 54 (1949).

17. See *Cicenia v. Lagay*, 357 U.S. 504 (1958).

18. See *Culombe v. Connecticut*, 367 U.S. 568, 606 (1961) (stating that "judgment as to legal voluntariness *vel non* under the Due Process Clause is drawn from the totality of the circumstances").

jury, the modern common-law requirement that an accused must testify under oath (a requirement that some continentals have described as unfair and inhumane),¹⁹ plea bargaining, and the American reliance on guilty pleas. Other inquisitorial features include the constitutional doctrine that “permits the state to compel individuals to produce evidence against themselves.”²⁰ For example, the government can require an accused “not only to participate passively in a lineup but to utter words used by the offender; to provide blood, fingerprint, handwriting, and voice samples; to provide pretrial disclosure of certain defenses and witnesses; and to respond to certain subpoenas for documentary evidence.”²¹

Even this limited discussion demonstrates the circular and question-begging nature of the accusatorial system argument. Typically, as in Justice Stevens’ *Burbine* dissent, expansive interpretations of the Constitution are justified by the claim that ours is an accusatorial and not an inquisitorial system. When commentators identify inquisitorial elements in our system, however, the temptation is to respond that these elements are not really inquisitorial because the Constitution permits them. The circularity comes from attempting both to define the Constitution by reference to our accusatorial system and to define our accusatorial system by reference to the Constitution.

In *McNeil v. Wisconsin*,²² a right to counsel-confessions case, Justice Stevens again accused a majority opinion, this time written by Justice Scalia, of revealing “a preference for an inquisitorial system.”²³ Justice Scalia replied in a devastating footnote that the majority could not imagine what Justice Stevens meant.²⁴ After observing that the terms *accusatorial* and *inquisitorial* have little fixed content and that our system has always had both accusatorial and inquisitorial traits, Justice Scalia added, “If all the dissent means by a ‘preference for an

19. See Damaška, *supra* note 15, at 515-16 & n.13, 526-30.

20. GRANO, *supra* note 1, at 51.

21. GRANO, *supra* note 1, at 51-52 & n.143 (citing *Fisher v. United States*, 425 U.S. 391 (1976) (documents); *United States v. Mara*, 410 U.S. 19 (1973) (handwriting); *United States v. Dionisio*, 410 U.S. 1 (1973) (voice); *United States v. Wade*, 388 U.S. 218 (1967) (lineup); *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting); *Schmerber v. California*, 384 U.S. 757 (1966) (blood, as well as dictum about fingerprints)).

22. 501 U.S. 171 (1991).

23. *Id.* at 183 (Stevens, J., dissenting).

24. See *id.* at 181 n.2.

inquisitorial system' is a preference not to require the presence of counsel during an investigatory interview where the interviewee has not requested it—that is a strange way to put it, but we are guilty."²⁵

Nothing more need be said. Let the task of truth-enhancing reform begin free from any preconceived constraints stemming from the claim that ours is an adversarial or an accusatorial system.

25. *Id.*