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Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective

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SHEDDING SOME LIGHT ON CALLS FOR HEARSAY REFORM: CIVIL LAW HEARSAY RULES IN HISTORICAL AND MODERN PERSPECTIVE

Jeremy A. Blumenthal[†]

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I. INTRODUCTION

It is axiomatic that the Anglo-American (common law) and Continental (civil law) legal systems have different general approaches to trial procedure. More particularly, their perspectives on evidentiary rules, and especially the hearsay rule, differ substantially. In the common law, hearsay is, at least nominally, disallowed.¹ Practically, however, exceptions abound² and the rule is not administered in the strictest manner. The "rule" excluding hearsay testimony is often characterized as an overgrown, "unintelligible thicket,"³ intricate to navigate, replete with at least arguably logical exceptions, diffi-

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¹ See FED. R. EVID. 801-802.

² See FED. R. EVID. 803-805, 807.

³ John M. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 741 (1961).

cult to understand and equally difficult to expound. To shift analogies from land to ocean, one commentator suggested even before recent revisions that "[i]n the sea of admitted hearsay, the rule excluding hearsay is a small and lonely island."⁴ Nevertheless, the exclusion of hearsay is a staple of Anglo-American evidentiary procedure. In a characteristically hyperbolic statement, Wigmore called the hearsay rule "next to jury-trial, the greatest contribution of [the common law system] to the world's jurisprudence of procedure."⁵

In the Continental system, however, hearsay evidence is, again broadly speaking, admissible.⁶ For a variety of reasons, discussed in more detail in Section IV, trial procedure in the civil law system is far more receptive to derivative evidence generally, admitting hearsay evidence at trial and allowing it to go to the weight or credibility of a witness's testimony. Older, rigid, exclusionary rules, as well as most rules of evidence generally, have been rejected by the modern civil law system, leading to a more informal trial that is less geared toward surprising or discrediting witnesses or toward dramatic rhetoric designed to impress a jury.

Observing these differences, some commentators in the Anglo-American system have advocated reform, especially in criminal trials and in the rules determining what evidence may be used at these trials, to more closely approximate the civil law system of trial procedure.⁷ But before agitating for such change, it is important to understand the origin of such differences. Where do these differences come from? What different philosophical perspectives, if any, do they reflect, and what implications do such different approaches have for the advisability of such reform?

The current article reviews potential explanations for the differences between the two systems' treatment of hearsay evi-

⁴ Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 346 (1961).

⁵ John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 458 (1904).

⁶ See Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441 (1997).

⁷ See, e.g., LLOYD L. WEINREB, *DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES* (1977); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403 (1992).

dence, using the hearsay example as demonstrative of broader differences between, or focuses of, the two systems. Before doing so, however, two caveats are in order. First, as discussed below (Section II.C), Continental systems are not entirely a free-for-all in their admission of evidence, even derivative evidence; some limitations do exist on the admission of hearsay. Thus, early statements such as, "of our rules of exclusion as to Hearsay . . . practically not a vestige of resemblance may be traced,"⁸ are clearly exaggerated. Second, there is evidence of some convergence of the two systems, especially in the area of evidentiary proof. On a broad scale, this move has been evident since Beccaria's writings, with his emphasis on public proceedings rather than secret interrogations, a right to counsel, and ensuring an impartial judge.⁹ On a more focused scale, actual procedures are converging. For instance, a decade ago Italy moved toward a criminal trial system that in large part adopted the common law's adversarial procedure, and that incorporated party-driven evidence presentation, opening statements, and direct and cross-examination of witnesses by party counsel.¹⁰ Similarly, international conventions such as the European Convention on Human Rights seem to emphasize the adversarial mode of evidence taking over an inquisitorial one, including some limits on the admission of hearsay evidence.¹¹

In general, however, there is a clear distinction between the approaches taken to the admission of evidence in the two systems. The present paper, although not explicitly passing judgment on either system's approach, focuses on the civil law system of proof at trial. The goal is to evaluate calls for reform of the common law system, specifically in the area of trial procedure, by identifying the underlying bases for the civil law's perspective on hearsay. Thus, the second Section sketches a general outline of the typical civil law procedure at trial.¹² The

⁸ Robert E. Ireton, *HEARSAY EVIDENCE IN EUROPE*, 66 U.S. L. REV. 252, 252-53 (1932).

⁹ See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 128 (2nd ed. 1985).

¹⁰ See Van Kessel, *supra* note 7, at 521.

¹¹ See Nico Jorg et al., *Are Inquisitorial and Adversarial Systems Converging?*, in *CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY* 41, 55-56 (Phil Fennell, et al. eds., 1995).

¹² Familiarity with the common law, Anglo-American procedure, with its emphasis on party-generated, adversarial evidence, cross-examination, exclusionary rules, and the "impressionable" jury, is assumed.

representative Continental approach to hearsay evidence is also reviewed. Section II thus paints with a broad brush, reviewing some basic propositions of trial procedure in the civil law.

The following two Sections examine in more detail where the different treatment of hearsay in the Continental system may have originated. Section III traces a historical review of the Romano-Canonical treatment of hearsay. In more detail, Section IV reviews specific reasons for the more lenient approach to such derivative evidence throughout the development of the civil law. Some, such as the eighteenth century emphasis on natural law and reason, or the concern about hearsay's influence on juries, are deemed insufficient, and I suggest alternative explanations. These include (1) the civil law's general perspective of the trial as a truth-seeking endeavor, rather than a contest or game; and (2) the basic structure of the Continental trial, with its different approach to fact-finding.

II. MODERN CIVIL LAW TRIAL PROCEDURE

A. *General European Trial Procedure*

Although the European system broadly mirrors the common law process - each has a three-stage process of investigation, some form of probable cause hearing, and trial - a number of differences mark the Continental trial process. In both systems, the police are largely responsible for pre-trial investigation; but in Europe, they perform their investigation under the supervision of an independent, unelected magistrate or public prosecutor. (In France, the *juge d' instruction* oversees the pre-trial process; in Germany, and in Italy before 1988, this responsibility falls to a public prosecutor.¹³) The investigation consists largely of interviewing witnesses and the suspect; from these interviews the *dossier*, a complete written summary of the interviews, is developed. When the dossier is completed, it is reviewed by either the supervising judge or a three-judge panel to which the supervising judge belongs. If the panel believes from the dossier that the accused likely committed the crime, formal charges are filed against him. The accused is invited to make another statement before the panel, after which (contrary to the

¹³ See, e.g., Van Kessel, *supra* note 7, at 422.

U.S. practice) he may view the entire dossier at almost any time.¹⁴

Affording this liberty to the defendant is an important difference between the two systems of procedure — there is deliberately no element of surprise or evidence-hiding. More important, however, is that when formal charges are filed, and the dossier is filed with the Court, responsibility for the administration of the case is transferred from the prosecutor to the Court.¹⁵ The judge, or the presiding judge of the judicial panel, then familiarizes himself with the entire dossier. As detailed further in Section IV, this transfer, and this familiarizing process, has important consequences for the specific fact-finding procedures followed at trial.

Again broadly speaking, there is no actual, one-shot “trial” analogous to that of the common-law. For instance, the German criminal trial often consists of a series of conferences or meetings at which the parties identify witnesses, delineate questions to be asked, call those witnesses one by one and ask those questions, summarize the testimony in written form, and enter it as part of the formal dossier.¹⁶ The French judge similarly calls and interviews witnesses previously identified by the parties.¹⁷ With responsibility for the case transferred to the Court, the civil law judge or judicial panel is far more proactive than the common law judge. The judge questions the witnesses previously interviewed (who are placed under oath), as well as the defendant (who is typically not), largely based on the information set forth in the dossier. Because most of the questioning and evaluation of evidence has been done pre-trial, however, much of the questioning at trial is for the purposes of airing the testimony publicly¹⁸ or supplying evidence that might lead to a

¹⁴ See *id.* at 423.

¹⁵ *E.g.*, Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and The Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 579 (noting that in German criminal trials, “the presiding judge essentially takes over the prosecution once the prosecutor’s office has completed its preliminary investigation and submitted the dossier to the court”).

¹⁶ See Smith, *supra* note 6, at 459-62; Mirjan Damaska, *Of Hearsay and its Analogues*, 76 MINN. L. REV. 425 (1992).

¹⁷ See Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131, 143 (1983).

¹⁸ See MERRYMAN, *supra* note 9, at 130.

more lenient sentence.¹⁹ Generally, after a witness testifies, counsel are allowed to ask him additional questions,²⁰ though after the judge's inquiries, this is often unnecessary. As the witness answers each question, he is allowed to respond in narrative form, rather than brief answers to brief questions. The judge then summarizes what he considers the relevant part of the witness's response, subject to the parties' objections, and enters that into the record as the witness's official testimony. When all the evidence has been submitted, a mixed bench of the judge or judges and several "lay assessors"²¹ reviews it and decide the relevant law and facts, the guilt or innocence, and, if appropriate, the sentence in the same deliberations.²²

B. *Rules Regarding Hearsay*

In the most commonly studied Continental systems, France and Germany, formal, systematized rules governing the admissibility of evidence are lax or non-existent,²³ for multiple reasons. First, much of the actual trial is, again, a public rehashing of the evidence collected in the dossier:

Because of the crucial importance of the *dossier* the public hearing is often much more a verification of its contents, the results of the pre-trial investigation, than the culmination of a contest. Hearsay evidence, being not regarded as fundamentally unreliable, is generally accepted. . . . Why summon [witnesses] if their statements or findings are laid down in clear and unambiguous reports?²⁴

Second, because witnesses are called and, for the most part, questioned only by the Court, they do not have the patina of partiality that is possible if they were called by a particular

¹⁹ See Raneta Lawson Mack, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 7 IND. INT'L & COMP. L. REV. 63, 81 (1996).

²⁰ See Van Kessel, *supra* note 7, at 423.

²¹ See *infra* Section IV.

²² See Mack, *supra* note 19, at 81-82; William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 45 (1996).

²³ In contrast, in the 1988 Italian criminal code, hearsay is explicitly disallowed. See Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMP. L. REV. 1211, 1223 (1989); Damaska, *supra* note 16, at 447 n.63.

²⁴ Jorg et al., *supra* note 11, at 50.

party. Accordingly, their testimony is likely seen as “less contrived as well as less partisan,”²⁵ and thus, even when they do report hearsay testimony, it may appear more reliable. Another consequence of this style of questioning is the narrative format that witnesses’ responses tend to take. Because a witness’s answer to the Court’s question is allowed to be free-flowing and lengthy, uninterrupted by evidentiary objections from opposing counsel, much evidence that otherwise might be prohibited is aired in open court.²⁶ The Court thus sifts through the witness’s statements, and, indeed, because no verbatim transcript is taken and entered into a record (but rather the presiding judge’s summary of the testimony), hearsay evidence may be conflated with the witness’s first-hand testimony, though it may not receive the same weight or credibility.

Finally, most commentators attribute the lax rules about hearsay and other arguably “unreliable” testimony to the fact that no jury exists in the common law sense at a civil law trial.²⁷ Because most commentators on the Anglo-American system of evidence taking attribute the rise of the hearsay rule to a desire not to confuse the jury with unreliable or inappropriate evidence,²⁸ the assumption is that where no jury exists to be confused, such evidence may be admitted, and its evaluation left to the unimpressible, professional judges directing the trial. Although the observation that there is less of a jury to be confused in the Continental system is accurate, as is the observation that the triers of fact are more professional, as a whole this explanation leaves something to be desired, as discussed further in Section IV.

C. *Prohibitions Against Hearsay*

Generally, European courts do not use the complex body of evidentiary rules that the Anglo-American system has devel-

²⁵ Van Kessel, *supra* note 7, at 464.

²⁶ *See id.*

²⁷ *See, e.g.,* H.A. Hammelmann, *Hearsay Evidence, a Comparison*, 67 LAW Q. REV. 67 (1951); Pizzi & Perron, *supra* note 22, at 43; Smith, *supra* note 6, at 465.

²⁸ *See, e.g.,* 2 MCCORMICK ON EVIDENCE § 244 at 91-92 (4th ed. 1992); ANDREW L.-T. CHOO, HEARSAY AND CONFRONTATION IN CRIMINAL TRIALS 3-4 (1996); Wigmore, *supra* note 5, at 441-42; Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L. J. 477, 494 (1998).

oped to prevent hearsay testimony. But such hearsay evidence is not admitted whimsically or without objection, even in these more lenient jurisdictions. As mentioned above, the new Italian criminal code explicitly disallows hearsay.²⁹ Historically, Holland and Hungary have also rejected hearsay evidence.³⁰ German courts are obliged to hear and consider all relevant evidence, and thus may and often do admit hearsay, but they are also obliged to follow the principles of orality and immediacy which, for instance, mandate the in-court examination of an available witness even where his prior statement exists.³¹ Even so, in German courts, where the hearsay exclusion is applied, it is generally to written documents.³² Similarly, in French civil actions, "[o]ral hearsay is everywhere admissible,"³³ and criminal procedure has few limitations.³⁴ Thus, some limits exist on the wholesale admission of hearsay in Continental trial procedure, but for the most part all relevant evidence, including hearsay, is admitted, with its source going toward its weight and credibility rather than leading to its exclusion.

D. Summary

The foregoing has been a rudimentary sketch of Continental trial procedure, designed primarily to emphasize the less restrictive attitude taken, generally speaking, by the civil law to the reception of hearsay evidence. What is of more interest are the potential explanations for this laxer attitude. One, the lack of a jury analogous to that in the Anglo-American system, has been mentioned, and is discussed further in Section IV. But given long-standing objections to hearsay and derivative evidence in the Romano-Canonical tradition — by which the civil law was heavily influenced³⁵ — why is there no longer such con-

²⁹ See Amodio & Selvaggi, *supra* note 23; Damaska, *supra* note 16, at 447 n.63.

³⁰ See Ireton, *supra* note 8, at 255.

³¹ See Pizzi & Perron, *supra* note 22, at 43 n.28; Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 992 (1983).

³² See Damaska, *supra* note 16, at 449-50.

³³ *Id.* at 447 n.60.

³⁴ See Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do The French Do It, How Can We Find Out, And Why Should We Care?*, 78 CALIF. L. REV. 539, 677-78 (1990).

³⁵ See generally ALAN WATSON, *THE MAKING OF THE CIVIL LAW* (1981).

cern about the admission of hearsay? The next Section reviews this historical tradition. Section IV then discusses several possible explanations for its reduced effect in modern Continental trial procedure.

III. HEARSAY IN ROMANO-CANONICAL PROCEDURE

Despite the current situation, it is important to note that the toleration of hearsay evidence is, in one sense, a relatively new development in the civil law. During the classical period of Roman Law (the last part of the Late Republic and the early part of the Principate, approximately the late first century B.C.E.), no such rule existed. Indeed, at that time no formal rules of evidence of any sort existed; however, advocates such as Cicero made use of the hearsay principle by using the absence of a declarant to impeach his credibility during trial.³⁶ Beginning with the reign of Hadrian (117-138 C.E.), however, more specific rules of fact-finding and of evidentiary proof began to be developed, primarily by his issuance of *rescripta* or *responsa*, responses to letters requesting the resolution of a particular judicial point.³⁷ Although confirming the trial judge's broad discretion in admitting or excluding evidence, Hadrian seems to have ordered judges to reject written hearsay;³⁸ this attitude

³⁶ See Frank R. Herrmann, *The Establishment of a Rule Against Hearsay in Romano-Canonical Procedure*, 36 VA. J. INT'L L. 1, 3, 6-13 (1995). In this excellent historical discussion, Professor Herrmann reviews in detail many of the specific prohibitions against hearsay throughout the Roman and medieval periods.

³⁷ Most of the credit for the quality of these *responsa* is given to Hadrian personally, who drew them up "in consultation with [his] legal advisors." *Id.* at 14. Indeed, one commentator has remarked that the "Roman law of evidence owes a good deal to the texts of [Hadrian's] reign, and . . . the legal principles can properly be ascribed to the emperor personally." TONY HONORE, *EMPERORS AND LAWYERS* 12 (2nd ed. 1981). It should be noted, however, that the Roman Emperors authorized some jurists to issue *responsa* in their name; thus, it is not immediately obvious that only Hadrian should receive such praise. See BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 31 (1962).

³⁸ See Herrmann, *supra* note 36, at 15-16. Professor Herrmann there attributes to Hadrian a "clear boundary" excluding written testimony. However, in the quoted responsum, although Hadrian states that written evidence has "no place" in his court, he directs that the reliability of the witnesses in question be inquired into. *Id.* Thus, whether the ban was absolute is at least unclear. See, e.g., Dale A. Nance, *Understanding Responses to Hearsay: An Extension of the Comparative Analysis*, 76 MINN. L. REV. 459, 470 n.40 (1992) (noting that the emperor did not disapprove of the use of the depositions, but only their substitution for the usual in-court testimony of the declarant).

was continued until the collation of Justinian's *Digest* in the early sixth century C.E., about 533. Oral hearsay, however, was not explicitly disallowed, though the *rescript* might be seen to apply to such testimony as well.³⁹

In his *Digest*, and the subsequent *Code* and *Novels*, the Emperor Justinian established what was essentially a massive Restatement of the substantive Roman law to that point.⁴⁰ Each of these compilations addressed in part the testimony of witnesses and, though not explicitly outlining a formal theory of evidence, they did address some basic procedures for the taking of witness testimony. Among the judicial principles included by Justinian was Hadrian's *rescript* disallowing written testimony;⁴¹ Justinian required that witnesses be present in court to give their testimony.⁴² Perhaps, however, because part of Justinian's purpose in developing the *Digest* was to maintain flexibility, to develop a legal code that could serve his modern needs, or perhaps because of a disinclination to formalize a rigid set of rules, that *rescript* was not substantially expanded. Specifically, *oral* hearsay was only excluded in a limited, narrow sense. For instance, if the payment of a debt was casually overheard, the hearer's secondary report of the payment was excluded if a trial ensued disputing that payment; however, if the auditor was reputable and had been specifically summoned to witness the payment, his hearsay testimony would be received.⁴³

Shortly afterward, Justinian's rule also made its way into emerging Canon law, or the law of the Catholic Church. Early in the seventh century, Pope Gregory I, influenced by his familiarity with Justinian's work, began to systematize and formally articulate the Church's emphasis on proper procedure for trials.⁴⁴ Included in his directions to a papal emissary was an explicit rejection of hearsay in ecclesiastical trials.⁴⁵ Thus, the

³⁹ Herrmann, *supra* note 36, at 17 n.102.

⁴⁰ See, e.g., WATSON, *supra* note 35, at 11-12; HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 128 (1983).

⁴¹ Herrmann, *supra* note 36, at 19.

⁴² See *id.* at 18-19.

⁴³ *Id.* at 20 & n.126.

⁴⁴ *Id.* at 24.

⁴⁵ *Id.* at 25 (quoting Letter of instruction (*commonitorium*) from Pope Gregory to John the Defensor going into Spain (Aug. 603)).

developing Canon law made the ban on hearsay testimony more explicit than had the Roman law.

Moreover, this development took strong root in the evolving Continental approach to trial procedure. Gregory's *com-monitorium*, his directions to that papal emissary, was taken up by succeeding commentators, and after the Fall of Rome and the loss of Justinian's *Digest*, early medieval canonists emphasized Gregory's work in their compilations and reconciliations of Church canons.⁴⁶ The rule against hearsay thus became incorporated into official canonical doctrine about procedure. For instance, two of the most prominent early medieval canonists, Ivo (c. 1095) and Gratian (c. 1140), each repeated either Justinian's or Gregory's prohibition of hearsay.⁴⁷ Their work was profoundly influential in the developing Canon doctrine,⁴⁸ and by the twelfth century, a rule against hearsay — a rule explicitly requiring witnesses to testify solely from their firsthand knowledge to ensure reliability — was entrenched in the dominant procedural system.

This antipathy toward second-hand testimony continued into the later medieval period, through the twelfth and thirteenth centuries;⁴⁹ Ullman has traced it through the works of the influential commentators Cynus, Bartolus, and Baldus into the fourteenth century as well.⁵⁰ But important shifts in canonical procedure had subtly (and not so subtly) changed the emphasis of such trials. First, in 1215, trial by ordeal was formally abolished; secular courts were forced to develop new modes of criminal procedure, and they turned to the ecclesiastical model for guidance.⁵¹ Second, there emerged a focus on the development of a written record or summary of a judicial proceeding. In approximately the twelfth century, the procedural system developed by the canonists for ecclesiastical trials began to focus on written proceedings,⁵² perhaps because writing was largely

⁴⁶ See O.F. ROBINSON ET AL., *EUROPEAN LEGAL HISTORY: SOURCES AND INSTITUTIONS* 10 (2nd ed. 1994).

⁴⁷ See Herrmann, *supra* note 36, at 33, 36.

⁴⁸ See BERMAN, *supra* note 40, at 143-44.

⁴⁹ See Herrmann, *supra* note 36, at 37.

⁵⁰ See W. Ullman, *Medieval Principles of Evidence*, 62 *LAW Q. REV.* 77, 83-84 (1946).

⁵¹ See BERMAN, *supra* note 40, at 251.

⁵² See *id.* at 250.

the province of the clergy.⁵³ Third, the markedly increased participation of the judge reflected the developing attitude that a criminal matter was one between the State and the accused. Whether because of the potential for forfeiture by a convicted defendant — or, more charitably, because of the Church's distinction between secular "sins," i.e., crimes, over which it declined jurisdiction, and religious sins, over which it did exercise jurisdiction — criminal law and procedural law remained areas in which monarchs reserved authority and jurisdiction to themselves. This "rise of statism," combined with increasingly rigorous modes of proof, was integral in eliciting many of the negative features of the inquisitorial system on the Continent.⁵⁴

All of these factors influenced Continental trial procedure in the ensuing centuries. In 1258, French King Louis IX adopted the Romano-Canonical modes of procedure in his secular royal courts, with the goal of appropriating and consolidating judicial power.⁵⁵ Over the next two and a half centuries, these royal courts and the French Crown became the sole source of law, replacing feudal and local judges who had in part administered customary law.⁵⁶ In Germany, similar action was taken by the Emperor Maximilian I. In 1495, he instituted the *Reichskammergericht*, an Imperial Chamber court that also adopted the Romano-Canonical form of procedure,⁵⁷ presumably including the bans on hearsay. As in Church procedure, witnesses were interrogated, a written record of these interrogations was developed, and judges made their decisions based on that written record. Finally, in the Italian city-states, professional judges, and scholars heavily trained in the learned law (in particular canonical forms of procedure), were responsible for much of the decision-making. Written records of the judicial proceedings became emphasized, and, through the works of university

⁵³ Note that this canonical model of reliance on a written record of the proceedings — with the judge depending primarily on examination of witnesses conducted by subordinate court officials-made difficult the maintenance of Justinian's rejection of written hearsay. See Damaska, *supra* note 16, at 436.

⁵⁴ MERRYMAN, *supra* note 9, at 128.

⁵⁵ See BERMAN, *supra* note 40, at 467.

⁵⁶ France was divided, essentially geographically, in its use of Roman versus customary *substantive* law. North of the Loire local customary law was used; in the South Roman law was influential. In both regions, however, courts applied Romano-Canonical *procedure*. See *id.* at 471.

⁵⁷ See ROBINSON ET AL., *supra* note 46, at 112.

scholars, canonical forms of procedure did as well. More formal rules of evidence developed (in part, perhaps, to protect judges who were liable to parties for "wrong" decisions) and, as the works of Bartolus and Baldus were extremely influential,⁵⁸ their statements against hearsay were likely maintained in Italian procedure as well. Throughout the Middle Ages, Roman civil law and Canon law blended in all these countries, developing across Europe the *ius commune* that so influenced the modern civil law.

One final feature of this medieval procedural tradition implicates hearsay directly and was, to some scholars, important in the procedural evolution of the modern civil law system: judicial torture.⁵⁹ With the rise of the inquisitorial process in criminal cases, elaborate safeguards developed to protect the defendant.⁶⁰ But as the rules of proof (e.g., assigning specific weight to the testimony of various classes of witnesses; forbidding a conviction in the absence of two eyewitnesses or a confession) grew more and more complex, fewer and fewer criminal defendants became eligible for conviction. Accordingly, beginning in the thirteenth century and lasting in various parts of Europe through the middle of the eighteenth century, judicial torture of criminal defendants became more acceptable and more consistently used.⁶¹

This increased toleration of judicial torture as a means of eliciting confessions had three important implications for the use of hearsay. First, the formalized canonical rules of logical proof had incorporated a distaste for evidence that was not first-hand. Such procedure was still used in "easy" cases, in which an accused confessed or when two eyewitnesses existed and obviated the need for hearsay.⁶² In parallel cases where decisions

⁵⁸ *Id.* at 110-11.

⁵⁹ See JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME* 3-4 (1977).

⁶⁰ See BERMAN, *supra* note 40, at 252-53; LANGBEIN, *supra* note 59, at 4-5. These safeguards may have developed indirectly, as a result of elaborate provisions having been forged and falsely attributed to early Popes by the pseudo-isidoreans of the ninth century. See Herrmann, *supra* note 36, at 28-32. More charitably, they emerged from the evolving Canonical focus on reason, rational forms of proof at trial, and a progressively more formal, systematized theory of epistemology. See BERMAN, *supra* note 40, at 253.

⁶¹ See LANGBEIN, *supra* note 59, at 5, 10.

⁶² *Id.* at 12.

were more difficult and the punishments more severe, however, circumstantial evidence and hearsay became criteria by which the judge would determine whether torture was permitted.⁶³ This led to the important third implication for the use of hearsay: the rise of the inquisitorial process accorded substantial discretion to the examining judge. Not only could he allow hearsay and determine whether it was reliable or able to be corroborated,⁶⁴ but moreover, the new form of proceeding also encouraged judicial activism in the literal sense. "The judge was [no longer] limited to the role of impartial arbiter, but played an active part in the proceedings and determined their scope and nature."⁶⁵ With the judge no longer impartial, but expressly representing the State against an individual defendant, and with the sharp increase in the use of written records as evidence against that accused, the judges' new authority easily led to secret proceedings that facilitated the use of unsubstantiated hearsay and circumstantial evidence as "proof," to convict or to sanction the use of torture to elicit a confession. For instance, a simple declaration of local knowledge or neighborhood gossip — "fama"⁶⁶ or "infamia"⁶⁷ — could either corroborate hearsay or serve as the foundation to allow it.⁶⁸

Thus, these factors combined during the medieval era to form a system in which formal rules against hearsay and the use of circumstantial evidence existed, but were applied at an investigating judge's discretion. This discretion grew more often abused under the auspices of the Church's Inquisition, under secular judges who were exercising their increased authority, and under the ease with which recourse could be had to judicial torture.⁶⁹

⁶³ See *id.* at 4, 8. These included cases in which death or maiming was the potential punishment. See *id.*

⁶⁴ See Damaska, *supra* note 16, at 440.

⁶⁵ MERRYMAN, *supra* note 9, at 128.

⁶⁶ BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE" 119 (1991); see also Herrmann, *supra* note 36, at 47-49.

⁶⁷ CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., 30 FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6342 at 201 (1997).

⁶⁸ *Id.*; see also ROBINSON ET AL., *supra* note 46, at 243-44. In the U.S., even today, reputation in the community can be allowed as a hearsay exception. See FED. R. EVID. 803(21).

⁶⁹ See LANGBEIN, *supra* note 59.

IV. THE MODERN SYSTEM

The modern legal traditions of Europe owe much to this evolution of the *ius commune*, the blend of Roman civil law and the ecclesiastical Canon law that spread across the Continent in the thirteenth, fourteenth, and fifteenth centuries. Acknowledging such influence, then, the question raised earlier resurfaces: given the influence of the Romano-Canonical legal tradition, including rules of procedure limiting the admission of hearsay and other derivative evidence, why do modern European legal systems admit such evidence so freely?

Some scholars attribute the leniency of modern civil law procedure, especially in criminal trials, to the changes brought about by the French Revolution, with its efforts at wholesale rejection of the *ancien régime*.⁷⁰ In large part, this approach focuses on the influence of the work of the seventeenth and eighteenth century natural lawyers, especially those French scholars drawing on the work of Grotius and Pufendorf.⁷¹ Central to this work was the idea that law in general, and proof in particular, could be derived from the exercise of reason. Moreover, and more important, this exercise of reason was not beyond the ability of laymen; "ordinary people possessed the capability to estimate the probative value of evidence properly."⁷² A demand for openness in such proof was an essential part of the post-Revolution focus in trial procedure. The "free evaluation of evidence"⁷³ was considered paramount, at the expense of the existing more rigid rules of evidence that admitted, prohibited, and weighted testimony according to class, religion, or gender. According to this approach, the natural law focus taken by post-Revolutionary French revisionists suggested that the over-generalized binding rules of evidence that existed (but that were only more or less adhered to), poorly captured the contextual, specific nature of proof in any specific case. Rules that altogether excluded hearsay thus vied with the idea that what con-

⁷⁰ See, e.g., MERRYMAN, *supra* note 9, at 128; see also Damaska, *supra* note 16, at 446.

⁷¹ See ROBINSON ET AL., *supra* note 46, at 255-56.

⁷² Damaska, *supra* note 16, at 443.

⁷³ *Id.* at 444.

stitutes proof cannot be captured in a systematized, *a priori* way.⁷⁴

Closely related to this notion of laymen being able to identify and understand "truth" on their own was the virulent anti-judicial approach taken by the French Revolutionaries.⁷⁵ This antipathy had two aspects: first, judges in the ancien régime were seen as too activist, too aristocratic, too ready to legislate judicially. In an atmosphere lionizing codification and the importance of legislators in making law, this last attribute was especially distasteful.⁷⁶ But this could as easily have led to a system that emphasized codified rules of evidence designed to keep those judges in check. More important for hearsay admission and the formation of laxer rules of evidence, was the distrust of judges and magistrates as *middlemen* between witnesses and their testimony — the "principle of immediacy" that developed in the post-Revolutionary era was conceived as a narrow precaution against the abuses of investigating judges.⁷⁷ Similar to the objection to secret proceedings, its focus was that "there be direct contact between decision makers and their sources of information" — that the best evidence that could be found, be brought in open court, whether that evidence was hearsay or not.⁷⁸ Thus, the new focus on lay evaluation of any relevant evidence relaxed the more stringent rules that had existed in Romano-Canonical procedure.

Finally, these scholars saw the relaxation of evidentiary rules in the late eighteenth century broadly, as an example of the more general European *Zeitgeist* espousing natural law precepts (this philosophy was also embraced in Italy and in Germany). More narrowly, they saw the relaxation of rules as reflecting the success of Napoleon's military efforts, as specific legislation and attitudes toward procedure were gradually incorporated into the legal traditions of the conquered countries.

Although this explanation does identify many of the motivating forces in the move from the previous exclusion of hearsay to the freer admission characteristic of modern civil law proce-

⁷⁴ *Id.* at 445.

⁷⁵ *See id.* at 446-47; ROBINSON ET AL., *supra* note 46, at 271.

⁷⁶ MERRYMAN, *supra* note 9.

⁷⁷ *Cf.* Damaska, *supra* note 16, at 446-47.

⁷⁸ *See id.*

ture, the account is nevertheless incomplete. The French Revolutionary period and the consequent adoption by many European states of the *Code Civile*, as well as their antipathy toward earlier modes of trial, were influential, but much of this approach was present even before the Revolution.⁷⁹ At the same time, not all of the pre-Revolution procedures were swept away by the new regime, and much of what existed before the Revolution even today motivates laxer rules of evidence and the admission of hearsay. For instance, it is clear that even before Beccaria and Voltaire published their influential criticisms of the contemporary system of procedure, authors had expressed distrust of the judiciary, denouncing judicial torture, secret proceedings, and similar abuses.⁸⁰ Further, in the late seventeenth century, John Locke emphasized the importance of separation of powers in government. Montesquieu and Rousseau, crucial intellectual forebears of the Revolution, wrote in this vein as well, noting the importance of checks and balances to regulate the judiciary.⁸¹

How did this antipathy to the judiciary lead to the freer admission of hearsay evidence? One answer is that when the Revolutionaries removed such authority and discretion from the judiciary, the judge's role became more mechanical, more routine, more bureaucratic. His role became that of applying a set piece of legislation to a given factual situation.⁸² To do so, all evidence had to be admitted. Where the judge was now being trained in a specific, more professional way, and was more clearly subject to legislative supervision, he might more easily be trusted to weigh that evidence and assign it its proper credibility, depending on its source —essentially, emphasizing the presumption that "the trial judge [will disregard] all inadmissible evidence in reaching his decision."⁸³

A second, perhaps more direct, answer is that despite this increased trust, this focus on regulating the judiciary led to a

⁷⁹ See, e.g., Robert A. Pascal, *Louisiana Civil Law and its Study*, 60 LA. L. REV. 1, 3 (1999) (noting that the principles of the civil law predate the French Revolution and "date from earliest times"); LANGBEIN, *supra* note 59, at 10-11.

⁸⁰ See LANGBEIN, *supra* note 59, at 9.

⁸¹ MERRYMAN, *supra* note 9, at 15-16.

⁸² See *id.* at 36.

⁸³ Konstantinos D. Kerameus, *A Civilian Lawyer Looks at Common Law Procedure*, 47 LA. L. REV. 493, 500 (1987).

compromise developing between vesting authority in this newly professionalized judge and relying entirely on a lay jury.⁸⁴ To hear cases, a mixed bench of professional judges and "lay assessors" began to be used. Thus, in the modern Continental procedure, as a check on the judiciary, laymen are appointed to sit with professionally trained judges, and decide both the facts and the law of the case before them.⁸⁵

In a common law system, this feature of trial procedure would most likely lead to detailed rules of evidence designed to exclude testimony that might confuse such impressionable laymen; as noted above, the jury is the generally accepted reason that the Anglo-American system has such complex rules of evidence. An additional explanation for the laxer rules on the Continent, therefore, is the lack of a similarly impressionable jury and the presence of a mixed bench of professional and lay judges. Of course, if the role of such lay assessors were identical to that of lay jurors in the common law system, this would be a disingenuous explanation — such laymen would be just as impressionable, and thus, just as in need of prophylactic evidentiary rules to exclude confusing evidence. There are two important differences, however, between the systems. First, in Germany, and to a lesser extent in Italy (when used), such lay assessors could be considered "semi-professional" — that is, they are typically appointed for lengthy terms during which they hear multiple cases (perhaps somewhat analogous to the Anglo-American grand jury). Thus, over time, they become more familiar than a common law jury might with trial procedure and with the reception and evaluation of evidence, and learn to weigh the credibility of hearsay evidence appropriately.⁸⁶ Second, in all systems that use such lay assessors, the judges who sit with them are able to explain to them the dangers of hearsay as well.⁸⁷ In any event, though, the presence or

⁸⁴ Especially in France, and primarily in criminal cases, some European countries experimented briefly with a jury analogous to that in the common law system. See, e.g., Van Kessel, *supra* note 7, at 459; Damaska, *supra* note 16, at 444 n.55.

⁸⁵ See Smith, *supra* note 6, at 461-62; Damaska, *supra* note 16, at 427; Van Kessel, *supra* note 7, at 459.

⁸⁶ See Smith, *supra* note 6, at 462.

⁸⁷ Of course, some point out that even the professional judge may be subject to such confusion or bias as well. See Van Kessel, *supra* note 7, at 418 n.55.

absence of a jury or of lay assessors, while supplying one explanation for the toleration of hearsay, cannot be the focal explanation. As has been consistently noted, and as demonstrated above, the hearsay rule in the civil law evolved independent of the existence or non-existence of a jury.⁸⁸

Thus, to briefly summarize this point, features of the Revolution and the Enlightenment periods, such as distrust of the judiciary and the consequent checks placed upon it (i.e., the reduction of its authority and the addition of lay evaluators of evidence) did serve to lessen the strictures imposed on the admission of evidence. But a full answer cannot be found there. Distrust of the judiciary was present before the Revolution, and other features than the lay jury clearly influenced the presence and then the absence of a rule against hearsay.

Accordingly, it is also important to note that the "Revolution as motivating force" account is incomplete because despite the Revolutionaries' efforts, there was not wholesale change of the procedure that had gone before. Experimentation with a jury system eventually failed.⁸⁹ And, importantly, the inquisitorial system was hardly abandoned altogether; the new ideas that developed nevertheless retained a great deal of the Romano-Canonical model.⁹⁰ For instance, as commentators have noted, there was certainly an explicit rejection of that model's rigid, quantified rules of proof.⁹¹ Yet one alternative, the Anglo-American adversary system that was developing—with a body of evidentiary rules that was only gradually cohering during the late seventeenth century⁹² — was never adopted. It may, thus, simply be that the maintenance of the inquisitorial system, with some adaptations, better reflects the reasons that hearsay evidence is broadly admissible on the modern Continent.

⁸⁸ See, e.g., Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 514 n.9 (1973) [hereinafter *Evidentiary Barriers to Conviction*]; Hammelmann, *supra* note 27.

⁸⁹ See Van Kessel, *supra* note 7, at 459.

⁹⁰ Damaska, *supra* note 16, at 444.

⁹¹ *Id.*; see also LANGBEIN, *supra* note 59, at 9.

⁹² Cf. Jeremy A. Blumenthal, Comment, *Reading the Text of the Confrontation Clause: "To Be" or Not "To Be"?*, 3 U. PA. J. CONST. L. 722, 741 (2001) (noting the late development of common law hearsay rules).

As one of the leading evidence scholars, Mirjan Damaska has explained, two related reasons to support this idea. First, as many commentators suggest, a hallmark of the modern European inquisitorial system, as opposed to the modern Anglo-American system, is the paramount importance placed on achieving the "truth," rather than on partisan proceedings.⁹³ In the adversarial system, for instance, there is less focus on problems of proof and knowledge and more on whether parties adhere to the "rules of battle." The proceeding becomes less "a pronouncement on the true facts of the case" and more "a decision *between* the parties."⁹⁴ The trial is explicitly structured as a contest, each party seeking to best the other by gamesmanship or craft or surprise. In contrast, the goal of the inquisitorial system is identifying what actually happened — indeed, the investigating judge is duty bound to seek the actual truth, accounting in part for his active role in the proceedings.⁹⁵ Moreover, focusing on identifying what actually happened, rather than on "playing the game,"⁹⁶ permits — or even mandates — that all evidence that might come in do so, including hearsay and other derivative evidence. Only if an adjudicator is exposed to all the evidence, and may sift among it and weigh its credibility, may the truth be known. In contrast to the characterization of the adversary trial as a "truth-determining process,"⁹⁷ adherence to formalized, complex rules of evidence, may in that sense impede reaching the truth.

Intertwined with this ideological goal of the civil law trial is its fundamental structure. The reason there is little or no opportunity for surprise and gamesmanship is the lesser focus on

⁹³ *Evidentiary Barriers to Conviction*, *supra* note 88, at 578-87. See also Pizzi & Perron, *supra* note 22, at 51-52; Mack, *supra* note 19, at 70; Frank J. Macchiarola, *Finding the Truth in an American Criminal Trial: Some Observations*, 5 CARDOZO J. INT'L & COMP. L. 97, 98 (1997).

⁹⁴ *Evidentiary Barriers to Conviction*, *supra* note 88, at 581-82 (emphasis in original).

⁹⁵ See, e.g., Myron Moskovitz, *The O.J. Inquisition: A United States Encounter with Continental Criminal Justice*, 28 VAND. J. TRANSNAT'L L. 1121, 1128 (1995).

⁹⁶ Or, indeed, on safeguarding the rights of even a guilty defendant—the detailed exclusionary rules for improperly obtained evidence, for instance, are explicitly geared toward protection rather than truth-seeking; the adversary system is, in theory, more tolerant of releasing a guilty person rather than allowing the violation of a right.

⁹⁷ See *Dutton v. Evans*, 400 U.S. 74, 89 (1970).

partisanship. Where the Court is responsible for the evidence being adduced, whether pre-trial or during the trial proceeding, and where both sides are familiar with the questions to be asked,⁹⁸ neither party has the opportunity to surprise the other, and no incentive for the use of craft exists. More important, witnesses are less identified with a particular party. This can substantially increase the trial's tolerance for otherwise confusing hearsay evidence, because the necessity of challenging or discrediting a witness as biased is drastically reduced.⁹⁹ Thus, one important structural feature leading to the increased admission of hearsay is that the Court, rather than the parties, elicits the evidence at trial.

A second feature is that the Court, rather than the parties, is primarily responsible for gathering evidence *before* trial as well. This is in contrast to common law discovery procedures or pre-trial briefing of witnesses by one party. The opportunity to thus generate evidence at a controlled pace allows substantiation of questionable testimony. When presented with hearsay evidence before trial,

there is usually enough time for the factfinder to seek out the original declarant for production in court at the next phase in proceedings. If the declarant's testimony deviates from that of the hearsay witness, the factfinder can hear them both in court and evaluate their credibility. Even if the [hearsay] declarant is unavailable, there is sufficient time before the next stage of the [case] to collect information to gauge the trustworthiness of the out-of court declaration.¹⁰⁰

Thus, avoiding party-generated evidence before trial as well as during trial, allows an adjudicator to consider all the potentially relevant evidence, weighing it and even balancing various pieces against each other. Exclusionary rules of evidence are in this context thus unhelpful, and hearsay may and should enter into such consideration.¹⁰¹

⁹⁸ See text accompanying note 14, *supra*.

⁹⁹ Damaska, *supra* note 16, at 433-34. Moreover, when the Court has completed its questioning, there is typically little or no need for further questioning by the parties. See Hammelmann, *supra* note 27.

¹⁰⁰ Damaska, *supra* note 16, at 428-29.

¹⁰¹ This is perhaps reminiscent of the U.S. trial judge's role in making preliminary evidentiary decisions under Federal Rule of Evidence 104(a), under which she is otherwise not bound by rules of evidence. See FED. R. EVID. 104(a).

Finally, a third structural aspect of the inquisitorial system that leads to the broad admission of hearsay is the mechanisms, and scope, of review by appellate courts. There is, of course, appellate review of trial court judgments in the modern systems of both the common and civil law. Traditionally, however, such review emerged earlier in the latter,¹⁰² with implications for the admission of hearsay: where the accuracy of a trial judgment could not be validated on review, the evidence on which it was to be based needed to be subjected to greater scrutiny. Common law judges thus exercised greater caution about admitting derivative evidence,¹⁰³ a tradition that continues today even with the reviewing courts. In the traditional Continental system of appellate review, however, higher courts have always served as a stronger “backstop” for judging a verdict’s validity, arguably reducing the need to rigorously establish reliability at trial. This is closely linked to the fact that the trial court finds both the facts and the law, rather than the jury finding the facts as in the Anglo-American system. Accordingly, less deference need be placed on the court’s factual findings, and civil law appellate courts may consider *de novo* even factual findings. At both levels, the admission of hearsay evidence, where necessary, allows a broader picture than the limiting evidentiary rules of the common law. Where bits of evidence must be evaluated seriatim, as in the common law, their probative value cannot be assessed in light of “the whole picture.” In contrast, neither the reviewing court, nor the trial court, need be so constrained on the Continent; both can evaluate even hearsay testimony in light of all the other evidence.¹⁰⁴

This broader review of the evidence may reflect in part the older distrust of the trial judge. But closely related to both these principles is the Continental trial court’s obligation to explicitly justify its findings. This feature has implications for hearsay, though perhaps more as a qualifying principle. Perhaps because there is a mixed bench fact-finder, rather than a wholly lay jury that may not be able to fully articulate its rea-

¹⁰² Cf. Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913 (1997) (noting that civilian forms of appellate review predated common law forms).

¹⁰³ Damaska, *supra* note 16, at 429.

¹⁰⁴ *Id.* at 430.

soning, Continental courts give details of their reasoning for both legal and factual findings.¹⁰⁵ In particular, judges must “justify their reliance on particular informational sources,” including explaining why they relied on hearsay.¹⁰⁶ This almost reverses the old system of rigorous rules that could nevertheless be evaded. There is now wide latitude to admit evidence, but there are also important constraints on that discretion by the requirement that it be justified. Thus, this feature itself ties together a number of the factors described earlier — the focus on truth, the consequent broad scope for evidence to come in, and nevertheless the maintenance of checks on the trial judge. Each of these structural and ideological factors contributes to a more lenient attitude toward hearsay. Together, they lead to the very different perspective on admissibility of derivative evidence on the Continent.

V. SUMMARY AND CONCLUSION

My goal in the present paper was to facilitate the assessment of calls for reform suggesting that Anglo-American trial procedure be adapted to reflect the more lenient admission of evidence characteristic of the Continental civil law system. Inveighing against the complexity, the apparent inefficiency, and the arguably unfair consequences of the Anglo-American rules of evidence, in particular the rule against hearsay, several commentators have suggested their reform.¹⁰⁷

To help with this assessment, I reviewed historical and modern Continental perspectives on the admissibility of hearsay, giving an account of the evolution of this freer system of evaluating evidence. I identified ideological factors that some scholars have suggested led to changes since the French Revolution, including a distrust of the judiciary and the confidence placed in human reason for discerning proof. However, I raised questions about the Revolution as the motivating factor for these changes. One reason was that such factors were present even before the Revolution, but another was that various structural features of the Continental system more convincingly explain the expansive attitude toward the admission of derivative

¹⁰⁵ *Id.* at 448.

¹⁰⁶ *Id.*

¹⁰⁷ *See supra*, note 7 and accompanying text.

evidence. Closely linked to these structural factors is an additional ideological factor, the focus in the civil law system on ascertaining the truth at trial. Together, these aspects of procedure in the civil law help account for the lack of a rigid hearsay rule.

This discussion has clear implications for calls for procedural reform of the adversarial system. Such reform seems difficult because the Continental ideology is based, especially in the case of the jury, on a different history and, more fundamentally, on different values. Thus, rather than the eighteenth century rejection of the Romano-Canonical tradition, it has been a rejection of the Anglo-American adversarial system, that freed European trial procedure from that system's rigors of proof. The inquisitorial system involves structural features that facilitate and even encourage the admission of any and all evidence, including hearsay. Where it is maintained, hearsay is allowed. Where a move from the inquisitorial toward the adversarial system occurs, as in Italy, rules against hearsay develop. Thus, with the proposed reform, more would have to be abandoned than particular rules of evidence. The two systems are based on solidly different perspectives and philosophical traditions — the search for truth through a rational decision-making process versus the focus on letting facts emerge through the trial as contest — and to move from one to the other would entail perhaps too drastic an ideological change.