
THE PUBLIC DEFENDER AS INTERNATIONAL TRANSPLANT

JOHN D. KING¹

ABSTRACT

The last quarter century has seen countries across Latin America and other parts of the world dramatically transition from an inquisitorial criminal justice system to an adversarial system. As a part of this shift in adjudication, these systems have adopted a key component of the adversarial system: the public defender. But while the formal and structural changes in these systems have been profound, the specter of inquisitorialism haunts the public defender organizations and has impeded the progress that reformers had envisioned.

Largely informed by the United States model, Chile's public defender organization, the Defensoría Penal Pública, was designed to ensure the constitutional right to an attorney in the new adversarial criminal justice system. Although the progress made since the transition to adversarialism has been remarkable, the role of the defense lawyer remains undefined and mired in vestiges of the old

¹ Clinical Professor of Law, Director of Experiential Education, and Director of the Criminal Justice Clinic, Washington and Lee University School of Law. U.S. Fulbright Scholar to Chile, August-December 2014. I would like to thank the many inspiring and pioneering lawyers at the Defensoría Penal Pública who took the time to share their experiences and perspectives with me during my stay in Chile. This Article benefitted greatly from the comments of the participants in the workshop at the Universidad Diego Portales in Santiago, Chile, as well as the thoughtful feedback of Ty Alper and Johanna Bond. I am grateful for the research assistance of Katherine Moss, Alexandra Klein, and Andrew Christensen, and for the further assistance of the Fulbright Foundation and Washington and Lee School of Law's Frances Lewis Law Center.

inquisitorial system. The public defender has not yet become the meaningful counterweight to the state prosecutor that is the theoretical promise of the adversarial system.

This Article examines Chile's transition from an inquisitorial system to an adversarial system, with a particular focus on the public defender and the need for a cultural shift that matches the structural change. This Article discusses the importance of developing a robust criminal defense culture that transforms the public defender from an agent of a state bureaucracy to an active and engaged attorney committed to the interests of her client. The dramatic rise in Chile's incarceration rate since the transition to an adversarial system suggests that a formally adversarial system without a fully engaged criminal defense system may ultimately be less protective of defendants' rights than the old inquisitorial system.

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1. INTRODUCTION

The last quarter century has seen the institution of the American-style public defender spread throughout Latin America and many other parts of the world even as the existing system of indigent criminal defense in the United States has undergone withering criticism.² While academics, practitioners, and the popular press have rightly pointed out the shortcomings of public defender systems throughout the United States, these same systems have served as models for countries transitioning their criminal justice systems from an inquisitorial to an adversarial approach. It could be that the American-style public defender system, to paraphrase Winston Churchill, is the worst way to protect the rights of the indigent accused—except for all of the other systems that have been tried.³ But as countries around the world continue to transition toward oral and adversarial systems of criminal adjudication, the pitfalls, limitations, and occasional successes of American public defender institutions should provide both caution and guidance for the next generation of criminal justice reformers in those countries.

Nowhere have the structural changes to the criminal justice system been more pronounced than in Chile over the past twenty-five years. The 1988 plebiscite ending the Pinochet dictatorship and allowing for the restoration of democratic government ushered in a new movement to modernize and reform many aspects of the Chilean judicial system.⁴ Chile undertook a radical overhaul of

² See, e.g., Donald A. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 894–901 (2013) (explaining that the federal right to adequate counsel has not come to fruition due to a lack of resources, incompetent attorneys, and rising crime rates); Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487, 487 (2010) (proposing legislation that gives a cause of action to criminal defendants based on the chronic inadequacies of the public defense system); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1031–34 (2006) (providing anecdotal and statistical data of people who wrongfully suffer in the criminal justice system due to the unavailability of adequate counsel).

³ Winston Churchill, Speech at House of Commons (Nov. 11, 1947) (“Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.”).

⁴ Carlos Rodrigo de la Barra Cousino, *Adversarial v. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile*, 5 SW. J.L. & TRADE

its criminal justice system in a relatively short period of time. This transformation utilized meaningful input from academics and lawyers within Chile and from other Latin American countries, Europe, and the United States.⁵ These reforms were just one aspect of the broader movement toward the restoration of democracy in Chile. One aspect of the Chilean reforms that has received relatively little attention is its creation of a public defender system, the design of which was heavily influenced by similar institutions in the United States.⁶

The move from a written, inquisitorial system to an oral, adversarial system within Chile mirrored similar projects throughout Latin America in the last two decades of the twentieth century.⁷ After two centuries of strictly inquisitorial criminal justice, the breadth and pace of the change toward adversarialism was breathtaking.⁸ Although the reforms differed slightly from country to country in Latin America, all of the reforms shared certain attributes: a move toward oral and public trials, a profound strengthening of the role of the prosecutor, and the displacement of the power to conduct pretrial investigations and make charging decisions from the judge to the prosecutor. Generally, all of the reforms throughout Latin America augmented the procedural rights of the accused at every stage of the process and introduced concepts of plea bargaining and prosecutorial discretion. To greatly varying degrees, each of the reforms institutionalized the role of the victim as an actor within the adjudication process for the first time.⁹

Chile's new system of adjudication called for the creation of a

AM. 323, 324 (1998) (describing the start of Chilean judicial reforms); Cristian Riego, *Oral Procedures and Case Management: The Innovations of Chile's Reform*, 14 SW. J.L. TRADE AM. 339, 339 (2008) (explaining that the origins of judicial reform grew out of Chile's transition to democracy).

⁵ Maximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617, 656 n.212 (2007) [hereinafter Langer, *Revolution*]; see also Riego, *Oral Procedures*, *supra* note 4, at 343 (explaining that modifications in the Criminal Procedure Code changed as reform groups increased contact with Anglo-Saxon systems and particularly with the systems of the United States and United Kingdom).

⁶ Cousino, *supra* note 4, at 350-51 (advocating for a Chilean public defender system based on the strengths and weaknesses of the system in the United States).

⁷ See Langer, *Revolution* *supra* note 5, at 631 (detailing adoption of accusatorial criminal codes in Latin American countries between 1991 and 2006).

⁸ See *id.* at 618-31 (noting that fourteen Latin American countries adopted adversarial systems within a period of fifteen years).

⁹ See *id.* at 618-19 ("Changes include . . . expanding the victim's role and protection during the criminal process.").

new institution: the public defender. Although the pre-reform inquisitorial systems of adjudication provided some formal representation for those accused of crime, the move toward oral, adversarial proceedings and the restructuring of the focus of these adjudicative systems demanded a more meaningful advocate for the accused. To this end, Chile created the Defensoría Penal Pública, a national public defender agency to protect the rights of the accused within the new system.

The very idea of the criminal defense attorney has shifted profoundly as the country has moved from its inquisitorial system to an adversarial one. Defenders have been required, at least in theory, to wholly redefine their roles, professional self-conceptions, and relationships with the state, the system, and their clients. The radical change in structure and substance of the work of public defenders demands an equally radical shift in the culture of the profession. As important as the changes to the formal architecture of the criminal adjudication system are, meaningful progress also requires redefinition of the culture and self-conception of the public defender. The Chilean experience demonstrates that these cultural changes can be the most difficult to effect. The data showing a dramatic rise in incarceration in Chile after the adoption of the adversarial system suggest that a formal change in the structure of adjudication is of limited value in meaningfully protecting the interests of those involved in the criminal justice system. As countries across Latin America and other parts of the world continue the transition toward adversarialism, they would do well to focus on the cultural aspects of criminal defense lawyering as well as the formal and structural changes that the new systems require.

In Part 2, this Article examines the regional shift from inquisitorialism to adversarialism in criminal procedure throughout Latin America in the last two decades of the twentieth century and discusses the historical and philosophical reasons for such a profound and nearly universal transition during that period. Part 3 more closely evaluates the structural changes in Chile that were debated and discussed during the 1990s and phased in during the first few years of the twenty-first century. Part 4 discusses the role of the public defender in the newly adversarial system and some of the challenges that persist after more than a decade of structural adversarialism. Finally, Part 5 proposes specific reforms to refine and develop the mission of Chile's public defenders to improve their role as a meaningful part of a new system of justice, and argues that a shift in public defender culture is necessary to ensure that

Chile's ambitious reforms accomplish their intended goals.

2. SHIFT FROM INQUISITORIALISM TO ADVERSARIALISM THROUGHOUT LATIN AMERICA

The transition in adjudication systems from inquisitorial to adversarial in Latin America began in the last two decades of the twentieth century.¹⁰ This theoretical and practical shift in the way countries conceived of and carried out their criminal justice systems had several elements common to the countries of Latin America but several notable differences as well. Generally, each shared the objective of transforming criminal trials both into oral, rather than written affairs, and adversarial (or accusatorial) contests, rather than inquisitorial events.¹¹ To accomplish this, each country undertook a radical transformation from a judge-centric system to a party-centric system.¹² The most profound change in this transition was the general displacement of the power to investigate and bring criminal charges from the judiciary to the prosecution.¹³

The inquisitorial system, which evolved from church methods of resolving disputes, treats the adjudication of criminal disputes as fundamentally a public and bureaucratic endeavor, rather than a private matter.¹⁴ In an inquisitorial system, "evidence is gathered

¹⁰ See Mauricio Duce, *Reforma de la justicia penal en América Latina: Una perspectiva panorámica y comparada, examinando su desarrollo, contenidos y desafíos*, Serie de Políticas Públicas UDP Documentos de Trabajo #3, at 5 (2009) (explaining that Latin American reforms generally began in the 1980s and continued into the early 2000s); Cousino, *supra* note 4, at 324 (noting that reforms in Chile began in the 1990s).

¹¹ Jorge Correa Sutil, *Judicial Reforms in Latin America: Good News for the Underprivileged?*, in *THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA* 255, 255-56 (Juan E. Mendez et al., eds. 1999) ("[A] number of [Latin American] countries . . . are making efforts to change their criminal procedures into a more oral and less inquisitorial model[.]").

¹² See generally Langer, *Revolution*, *supra* note 5 at 618-19 ("As such, the reforms share many characteristics, including the introduction of oral, public trials; the introduction and/or strengthening of the office of the prosecutor; and the decision to put the prosecutor instead of the judge in charge of pretrial investigation").

¹³ Cousino, *supra* note 4, at 332 (explaining that the prosecutor's new role is to act as the owner of the public criminal action and as the manager of the investigation).

¹⁴ See Langer, *supra* note 5, *Revolution* at 628-30 (discussing the origins and operation of the inquisitorial system).

by judges or judge-like investigators, public officers who operate under a duty to seek the truth,"¹⁵ the role of the judge is dominant, and the parties and their lawyers play a greatly reduced part in the process. By contrast, an adversarial system is party-driven and centers on the idea that well-motivated and similarly-resourced parties operating within a procedurally fair system is a more effective, accurate, and just way of resolving disputes.¹⁶

The two systems, however, constitute much more than distinct decision-making strategies or ways of structuring trials. They embody two entirely different cultures of understanding disputes and negotiating the relationship between the State and its citizens. As Máximo Langer has described the difference:

[w]hereas the adversarial system conceives criminal procedure as governing a dispute between two parties (prosecution and defense) before a passive decision-maker (the judge and/or the jury), the inquisitorial system conceives criminal procedure as an official investigation, done by one or more impartial officials of the state, in order to determine the truth.¹⁷

This profound distinction in how disputes are to be resolved has cultural implications much deeper than the merely structural

¹⁵ JOHN LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 1 (Oxford University Press 2003); see also James Cooper, *Competing Legal Cultures and Legal Reform: The Battle of Chile*, 29 MICH. J. INT'L L. 501, 519 n.96 ("[T]he inquisitorial criminal process is conducted by an investigating judge who discovers the trust concerning a crime and then sentences the defendant.").

¹⁶ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. BAR. ASS'N 445, 447 (1906).

The sporting theory of justice . . . is so rooted in the profession in America that most of us take it for a fundamental legal tenet . . . Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interests of justice.

See also Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 10 (1975) ("[T]he adversary system only works if each party to the controversy has a lawyer, a person whose institutional role it is to argue, plead and present the merits of his or her case and the demerits of the opponent's.").

¹⁷ Máximo 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, 4 (2004) [hereinafter Langer, *Legal Transplants*]. As a shorthand, Langer refers to the adversarial system as the "model of the dispute" and the inquisitorial system as the "model of the official investigation." *Id.* at 20.

differences in trial procedure.

The shared inheritance of the colonial Spanish judicial tradition lasted without significant challenge until almost the end of the twentieth century.¹⁸ As Latin American states gained their independence in the first years of the nineteenth century, European states had already begun to reform their inquisitorial systems of criminal adjudication.¹⁹ Unrest and public sentiment had caused many of the European countries to modify their strictly inquisitorial systems to better account for evolving conceptions of fairness and individual rights.²⁰ Each newly independent Latin American state had to decide for itself whether to maintain the strict inquisitorial model that Spain had used or to adopt a reformed model, as France had recently implemented. In France, Napoleon's *Code d'Instruction Criminelle* had moved that country away from a strictly inquisitorial system and had introduced reforms from the English system of criminal adjudication.²¹

The leaders of the newly independent Latin American states, however, rejected the more moderate hybrid systems of Europe in favor of a more strictly inquisitorial system.²² Although the hybrid French system was well-known to the Latin American governing class, the newly independent Latin American countries roundly rejected such reforms. According to Máximo Langer,

Latin American elites rejected the more liberal codes mainly because they deeply distrusted and disliked the jury as well as oral and public trials, believing that their populations were not ready for them. Instead, the criminal procedures that the young, independent Latin American republics adopted generally followed the inquisitorial model (created by the Catholic Church and absolutist monarchies) that had

¹⁸ See JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 128 (Stanford University Press 2nd ed. 1985) (describing criminal procedure reforms at the end of the eighteenth century, including the jury trial, oral procedures, the right to counsel, limits on the inquisitorial powers, and other steps towards an oral and public system).

¹⁹ Langer, *Revolution*, *supra* note 5, at 627.

²⁰ MERRYMAN, *THE CIVIL LAW TRADITION*, *supra* note 18.

²¹ Langer, *Revolution*, *supra* note 5, at 627. The code adopted in France under Napoleon maintained the secret written pretrial investigation, but introduced the right to an oral, public trial before a jury. *Id.*

²² See *id.* at 628 (noting that Latin American countries rejected European criminal reforms despite avocation by political actors).

prevailed in continental Europe and the Portuguese and Spanish Americas between the 13th and 19th centuries.²³

Throughout the nineteenth and early twentieth centuries, although every Latin American country tinkered with its criminal adjudication system, none altered the basic inquisitorial structure of the system.²⁴ In the middle of the twentieth century, issues of criminal justice and judicial reform were not on the minds of many in Latin America. Such issues were generally seen as insignificant in comparison to the broader political struggles taking place throughout the continent in the context of Cold War politics.²⁵ Those on the political right saw a more efficient, fair, and meaningful judicial system as a potential threat to the status quo, and those on the political left saw "issues of individual justice" as meaningless when compared with broader issues of structural power imbalances.²⁶ As a result, criminal justice reform in Latin America failed to gain any real momentum until the late twentieth century.

This began to change very quickly, however, during the 1980s. As countries throughout Latin America began to emerge from au-

²³ *Id.* Scholars have also advanced alternate theories to explain the lack of reform upon independence. For instance, some assert that, unlike the American and French wars of independence that took place a few decades earlier, the Latin American wars for independence generally lacked a conscious or "deliberate agenda for social and political change." Felipe Saez Garcia, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations*, 13 AM. U. INT'L. L. REV. 1267, 1282 (1998). Although the independence movements in Latin America might have been "imbued with ideological overtones" from those earlier political movements, Saez Garcia argues that Latin American independence movements stemmed more from the collapse of the Bourbon dynasty in the first years of the nineteenth century. *Id.* Because of this political history, the newly formed governments of Latin America did not alter in any fundamental or radical way the structure of the judicial systems that had been inherited from the Spanish.

No revalorization of the individual vis-à-vis the State took place, there was no development of effective checks and balances among the branches of government, and popular participation in the political decision-making and judicial processes was not encouraged. Instead, after achieving independence, Latin American countries maintained the authoritarian institutional structure of colonial times.

Id. at 1282-83.

²⁴ See Langer, *Revolution* supra note 5, at 630-31 (noting that Latin American countries had inquisitorial systems and ultimately adopted adversarial changes in the late twentieth and early twenty-first century).

²⁵ *Id.* at 644 n.140 ("U.S. national security doctrine during the Cold War established containment and elimination of communist influence as a priority for Latin America.").

²⁶ Sutil, supra note 11, at 258.

thoritarian governments and outright dictatorships, newly democratic governments and citizens began to question the failures of the judiciary during these periods. Virtually every Latin American country began making radical shifts in the philosophical underpinnings of their systems and fundamental changes in the way criminal cases were adjudicated.²⁷

The rhetoric of human rights norms played a powerful role in the fight against dictatorship. As countries transitioned to democracy, government institutions centered their focus on human rights. Reformers began to concentrate on the need for criminal justice systems that complied with international human rights norms and used this argument to reshape systems throughout the region.²⁸ Criminal adjudication processes became a natural target as Latin American countries emerged from years of dictatorship and repressive authoritarian governments. These institutions had not only failed to prevent human rights abuses but had been affirmatively used by the old governments both to suppress dissent, and to avoid culpability for human rights abuses.²⁹ The ineffectual, bureaucratic, and secretive court systems “became a metaphor for the dictatorships.”³⁰ Many saw a move to oral, transparent, and adversarial proceedings as a necessary antidote to the failures of the old system. Indeed, the inability of the judicial systems to respond in any meaningful way to the abuses of dictatorships during the 1970s and 1980s was understood as an indictment not just of those specific national systems but of the inquisitorial approach more generally.³¹ A focus on human rights and due process was

²⁷ See Langer, *Revolution supra* note 5, at 631 (noting the breadth of the change from inquisitorial to adversarial). The first countries to adopt new adversarial codes of criminal procedure were Argentina in 1991 (for its federal courts only) and Guatemala in 1992. *Id.* at 646; see also Steven E. Hendrix, *Innovation in Criminal Procedure in Latin America: Guatemala’s Conversion to the Adversarial System*, 5 SW. J. L. & TRADE AM. 365, 365 (1998) (explaining that Guatemala started to overhaul its procedure codes in 1994 in response to concerns about favoritism, corruption, and security).

²⁸ See Duce, *supra* note 10, at 7 (stating that “[a]fter a period characterized by massive [regional] human rights violations, the new democratic governments reacted by adopting policies to improve institutional mechanisms for their protection”).

²⁹ See Cooper, *supra* note 15, at 519 n. 95 (noting that reforms were aimed at ending human rights violations and restraining the violators).

³⁰ *Id.*

³¹ One observer compared the Latin American inquisitorial judicial systems with those of pre-Revolution France, noting that the systems “provided government officials and police with the authority to combat unruly crowds, political

seen as a necessary component of any future criminal adjudication system.³²

At the same time that those on the political left saw reform as a progressive response to the human rights abuses of the past, those on the political right supported reform both as a solution to the perceived problem of rising crime and as a means of “liberalizing” or “modernizing” the economies of Latin American countries.³³ The World Bank and other institutions began promoting judicial reform throughout Latin America as a means to advance free-market ideology and institutions. This neo-liberal position was expressed at the time by an employee of the World Bank:

Acknowledgement of the need for judicial reform is grow-

protests, and, later, union organization and strikes without recourse to regimes of exception.” See Cooper, *supra* note 15, at 519 n.97 (quoting BRIAN LOVEMAN, *THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA* 347 (2003)). Just as public sentiment in late eighteenth century Europe forced reforms in the inquisitorial system during the revolutions in Europe of that era, public opinion in late twentieth century Latin America also forced those countries to abandon inquisitorialism. MERRYMAN, *supra* note 18, at 128. One scholar captures the deeper cultural meanings of the terms “inquisitorial” and “adversarial:”

[T]he expressions ‘adversarial’ (or ‘accusatorial’) and ‘inquisitorial’ are fraught with political and cultural connotations; for instance, the adversarial tradition is usually linked to liberal or democratic conceptions while the inquisitorial tradition is linked to authoritarian conceptions of criminal procedure. This has led to what could be described as a rhetorical struggle for the appropriation of these terms...[A]s a consequence of these connotations, ‘adversarial’ and ‘inquisitorial’ have been central terms or ‘floating signifiers’ through which the actors of the Anglo-American and the civil law systems have defined and differentiated their own identity, both from the identity of their traditions as well as from their own past.

Langer, *Legal Transplants*, *supra* note 17, at 18–19.

³² See Langer, *supra* note 5, at 632 (describing “the increasing recognition of human rights beginning in the 1970s, [which] contributed to the perception among domestic actors that due process standards were too low”).

³³ See Cooper, *supra* note 15, at 516–17 (quoting Joseph Stiglitz as stating “The market system requires clearly established property rights and the courts to enforce them; but often these are absent in developing countries”). The economic argument for court reform explains the vast resources that countries spend in attempts to export their legal cultures and institutions. Using the example of Chile, James Cooper describes this interesting jockeying for influence among international actors, primarily Germany and the United States on the judicial reform process. *Id.* See also Jonathan L. Hafetz, *Pretrial Detention, Human Rights, and Judicial Reform in Latin America*, 26 *FORDHAM INT’L L.J.* 1754, 1761 (2003) (arguing that the Latin American reforms “grew out of two different impulses: the reaction to the human rights abuses of the 1970s and 1980s, and the desire to increase the efficiency of the judicial sector”).

ing because of increasing recognition that political and judicial reform are key corollaries of economic reform. A free and robust market can thrive only in a political system where individual freedoms and property rights are accorded respect and where redress for violations of such rights can be found in fair and equitable courts.³⁴

The United States and European governments also provided incentives to court reform by making it a prerequisite to joining trade alliances like Mercosur, NAFTA, and the World Trade Organization.³⁵

As democratically-elected governments replaced authoritarian regimes throughout Latin America, rates of reported criminal activity and feelings of crime-related insecurity grew throughout the region.³⁶ In Chile, between 1985 and 2001, the homicide rate for

³⁴ Maria Dakolias, *A Strategy for Judicial Reform: The Experience of Latin America*, 36 VA. J. INT'L L. 167, 168 (1995).

³⁵ See *id.* at 169 (explaining that membership in international trade organizations carries a commensurate responsibility to “pursue harmonization of laws”). Efforts of organizations like the World Bank, USAID, and the Inter-American Development Bank to implement judicial reform throughout Latin America began in the 1980s and were primarily economic in objective. See Hafetz, *Pretrial Detention*, *supra* note 33, at 1754–55 (stating that “[t]he principal motive of this movement is economic – that promoting good government and the rule of law will make the region’s legal systems more market-friendly and create the necessary conditions for economic development in today’s global economy.”); see also Joseph H. Thome, *Heading South but Looking North: Globalization and Law Reform in Latin America*, 2000 WIS. L. REV. 691, 697 (2000), stating:

In the view of the [World] Bank, the Latin American judiciary had become an impediment to [its goals of creating a legal environment conducive and friendly to foreign investment] due to its inefficiency, characterized by lengthy case delays, limited access to justice, a lack of transparency and predictability, and poor public confidence in the system.

Describing the reforms to Chile’s criminal justice system as far more broadly significant than in just the criminal context, Chilean President Eduardo Frei called the reforms “a critical step in the process of development, economic growth, and the modernization of the State.” See Mauricio Duce, *La Reforma Procesal Penal Chilena: Gestión y Estado de Avance de un Proceso de Transformación en Marcha*, in EN BUSCA DE UNA JUSTICIA DISTINTA: EXPERIENCIAS DE REFORMA EN AMÉRICA LATINA 195, 199 (Pásara, Luis ed., 2004), <http://biblio.juridicas.unam.mx/libros/4/1509/7.pdf> [<https://perma.cc/Y5Z3-82P5>] (quoting President Frei as stating “[L]a reforma no sólo se justifica por la necesidad de adaptar la legislación chilena a los estándares básicos del debido proceso, sino también como un paso indispensable en el proceso de desarrollo, el crecimiento económico y la modernización del Estado”) (translation by the author).

³⁶ See generally CRIMINALITY, PUBLIC SECURITY, AND THE CHALLENGE TO DEMOCRACY IN LATIN AMERICA (Marcelo Bergman & Laurence Whitehead eds.,

males increased by 72% and the homicide rate for young males increased by 178%.³⁷ The capital city, Santiago, experienced a 49% increase in reported property crimes between 1999 and 2001.³⁸ Many believed that the increase in crime threatened the newly-formed democratic governments and could provide a pretext for a return to authoritarianism if not addressed.³⁹ The erosion of public confidence in state institutions that accompany rising feelings of insecurity may weaken support for nascent human rights standards and “may even allow authoritarian practices to return under the guise of *mano dura* policies purporting to correct weaknesses in the democratic approach to crime control.”⁴⁰

Along with the rising levels of both reported and perceived criminal activity throughout Latin America came high levels of mistrust in police, government, and the criminal justice system generally. By these measures, Chilean state institutions demonstrated greatly varying levels of success when compared to other Latin American countries but still showed a general lack of faith in judicial systems.⁴¹ Although Chilean citizens regard the police rel-

2009). Some argue that Chileans, like people in other countries, have a feeling of insecurity and rising criminality that is exaggerated and inaccurate. See Lucia Dammert, *Citizen In(Security) in Chile, 1980-2007*, in CRIMINALITY, PUBLIC SECURITY, AND THE CHALLENGE TO DEMOCRACY IN LATIN AMERICA, *supra* note 36, at 47. See also *id.* at 55 (comparing surveys and crime statistics and concluding “that levels of citizen fear are higher than actual levels of victimization or the magnitude of criminal activity”). Dammert points out that, although Chile has traditionally had a low crime rate compared to its regional neighbors, around the year 2000, reports of crime began to increase in Chile and the population experienced a collective increase in the sense of insecurity. *Id.* at 47-54.

³⁷ See Marcelo Bergman & Laurence Whitehead, *Introduction: Criminality and Citizen Security in Latin America*, in CRIMINALITY, PUBLIC SECURITY, AND THE CHALLENGE TO DEMOCRACY IN LATIN AMERICA, *supra* note 36, at 1, 5 & tbl. I.1 (citing data from the World Health Organization Mortality Database, WHO 2005).

³⁸ See *id.* at 6 & tbl. I.2 (citing data from the Santiago Ministerio del Interior).

³⁹ See *id.* at 1-2. (discussing the increase in crime in Chile)

⁴⁰ *Id.* at 1-2. Indeed, in 1992, both Alberto Fujimori in Peru and Hugo Chavez in Venezuela alleged that the inability of the judicial systems of their respective countries to deal with corruption and rising crime resulted in a lack of legitimacy and made necessary the suspension of regular systems of government. See Jorge Correa Sutil, *Access to Justice and Judicial Reforms in Latin America: Any Hope of Equality?* 6 (Sela 1999, Equality, Panel 6: Equality in Administration of Justice, La Serena, Chile, Working Paper, 1999) (describing Chavez’s thwarted coup in Venezuela and Fujimori’s decision to interfere with the constitutional function of other branches of the Peruvian government).

⁴¹ In a series of 2003 Latinobarometro surveys measuring citizen trust in the police, fewer Chileans indicated mistrust in the police than in almost any other Latin American country surveyed. 51% of Chileans surveyed responded that they had “little or no trust” in the police. Only Uruguay had a lower level of mistrust

atively favorably,⁴² the criminal justice system in general fared much more poorly in public opinion surveys. When asked in 2003 whether or not they agreed with the statement, "The judicial system punishes delinquents," 69% of Chilean respondents expressed their disagreement. In contrast to the comparatively high levels of trust in the police, the expressed lack of confidence among Chileans in the judicial system was higher than in all but three other Latin American countries included in the survey.⁴³ Clearly in 2003, prior to the full implementation of the criminal procedure reforms, Chilean citizens perceived that the state institutions responsible for adjudicating and punishing criminals were not functioning well. Both the perception and reality of rising crime rates and a system that seemed unable to respond contributed to a momentum for the creation of a more efficient criminal justice system.⁴⁴

in the police, at 49%, and the other fifteen countries included in the survey measured higher levels of citizen mistrust of the police. In Bolivia, mistrust is as high as 84%. Bergman, in *CRIMINALITY, PUBLIC SECURITY*, *supra* note 36, at 7 & tbl.13.

⁴² A 2003 survey of 18 Latin American countries found that only 29% of respondents had much or some confidence in the police and only 20% had much or some confidence in the judicial system. See Hugo Fruhling, *Public Opinion and the Police in Chile*, in *CRIMINALITY, PUBLIC SECURITY*, *supra* note 36, at 119, 124 (citing the 2003 Latinobarometro survey). Looking specifically at Chile, Fruhling also concluded that levels of support for the police at that time were much higher than levels of support for the courts or for the criminal justice system generally. See *id.* at 120 (noting that despite an increase in Chile's crime rate, levels of support for the police was higher than other criminal justice institutions). Fruhling attributes this comparatively high level of support to recent cultural phenomena: "[b]ecause Chile was characterized by political polarization and conflict from the 1960s through the 1980s, Chileans now place a high value on stability and the rule of law." *Id.* at 130; see also Dammert, *supra* note 36, at 58 (citing surveys available at www.cep.cl).

⁴³ *Id.* at 7, tbl.13.

⁴⁴ See Langer, *supra* note 5, at 632-33 (explaining the various motivations for the Latin American reforms); see also Sutil, *Access to Justice*, *supra* note 40, at 6 (describing the "curious alliance" in support of reform between left and right and the tension that has sometimes resulted from these strange bedfellows). On the point of the reform's relationship to increased repressiveness and a growing prison population, see Riego, *supra* note 4, at 355 (citing Javiera Diaz, *Sistema Carcelario, la función punitiva en un estado de derecho*, CRÓNICA DIGITAL, Oct. 6, 2005, <http://www.cronicadigital.cl/2005/10/06/cronica-2005-p1851/> [<https://perma.cc/277V-XEBE>] (last visited Feb. 4, 2017)). See also Part 4.3, *infra* (discussing how a conceptual and real tension between the market orientation and rights orientation has always driven the reforms in Latin America). With the end of the Cold War, many believed that judicial reform could simultaneously satisfy both orientations.

But this apparent harmony of interests, goals, and means may mask conceptual vagueness as well as tensions and contradictions between global and national goals and policies...[For example], a majority population facing rising criminality may use democratic means to push for stricter

For these reasons, reform to the criminal justice system was seen as welcome and necessary by both the left and the right.⁴⁵ The left envisioned a more robust system of procedural safeguards for those accused of crime and the right looked forward to a more modern and efficient way of adjudicating crime, a result that would put Chile in good standing with international bodies and also deal with the increase in criminal activity that had accompanied the transition to democracy.⁴⁶ The broad ideological consensus presented obvious political benefits and led to great momentum leading to the passage of the reform.⁴⁷ Proponents of criminal justice reform consciously appealed to both sides of the political spectrum, arguing that the reforms would increase regard for human rights and would also deal with perceptions of rising criminality as the country continued its transition away from dictatorship.⁴⁸ In a political environment in which right-wing political parties used perceptions of security problems and rising criminality against the governing center-left coalition government, proponents of reform “diminish[ed] the political differences surrounding this type of project by limiting the debate to the logic of efficiency of the justice system.”⁴⁹

and more efficient law enforcement, even at the expense of the human rights of those suspected of criminal activity.

Thome, *Heading South but Looking North*, *supra* note 35, at 692-93.

⁴⁵ See Claudio Pavlic Véliz, *Criminal Procedure Reform: A New Form of Criminal Justice for Chile*, 80 U. CIN. L. REV. 1363, 1364-65 (2012) (stating:

[t]he motives that drove the reforms had the virtue of providing good arguments for the entire political spectrum to be able to agree to support the criminal justice reforms: some in order to improve the country's economic integration into a globalized world, and others to improve the laws protecting constitutional and legal rights, strengthening respect for human beings and their rights).

⁴⁶ See Cousino, *supra* note 4, at 326 (stating that “the criminal procedure reform found a common ground between two issues. First the foundational spirit of democracy and improving human rights standards, and second, coming mostly from the now opposition, the idea of public safety and the need for efficiency in the criminal system”).

⁴⁷ See *id.* at 327 (noting the “broad consensus” that accompanied the reforms).

⁴⁸ See Rafael Blanco, Richard Hutt, & Hugo Rojas, *Reform to the Criminal Justice System in Chile: Evaluation and Challenges*, 2 LOY. U. CHI. INT'L. L. REV. 253, 265-66 (2005) (explaining a history of the strategic and political alliances that led to the passage of the reform bill in Chile).

⁴⁹ Daniel Palacios Muñoz, *Criminal Procedure Reform in Chile: New Agents and the Restructuring of a Field*, in *LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION* 112, 120-21 (Yves Dezalay & Bryant G. Garth, eds., Routledge 2012).

This dualism in those promoting reform may have resulted in some of the critiques of the new system as overly punitive and leading to excessively high rates of incarceration and involvement in the criminal justice system.⁵⁰ It is likely that the focus on achieving and maintaining consensus for strategic electoral purposes blurred the objectives of the reform proposals. Without a more precise delineation of what its primary purpose was, the reform set out to serve two masters and, as a result, failed to fully achieve either of its purposes.⁵¹

3. A RADICALLY NEW CRIMINAL JUSTICE SYSTEM FOR CHILE

Chile's reformation of its criminal justice system was unique in several ways. Because of the duration of the Pinochet dictatorship, Chile was one of the last Latin American countries to begin the transition to an adversarial system and therefore was able to learn from the experiences of other countries in the region. Having seen other countries fail to eradicate the perceived shortcomings of the inquisitorial system and to allow aspects of inquisitorialism to creep into a system that was formally adversarial, Chile's reforms were more profound than its neighbors and its new system more extreme in its embrace of adversarialism.⁵² During the 1990s, Chilean academics, judges, and legal practitioners had the opportunity to think entirely anew about what the roles of the various actors in the criminal justice system should be and how they should interact, to draw on the successes and challenges of other criminal justice systems, and to implement the new structural reforms wholeheartedly. Ultimately, the Chilean reforms borrowed most heavily from the Anglo-American system and ended up importing the model of the public defender largely from the U.S. conception. As described below, however, reformers in Chile focused much less on the de-

⁵⁰ See *infra*, Part 4.3 (discussing how the public defender may play a role in mass incarceration).

⁵¹ On this subject, it is worth noting that the right adopted the theme of rising crime as one of its "battle horses" in criticizing the center-left Concertación government leading up to the 1989 elections. Duce, *supra* note 35, at 220. One wonders if an embrace of "efficiency" and "adversarialism" in the Chilean system will lead ultimately to a "tough-on-crime" orientation and high rates of incarceration.

⁵² See Riego, *supra* note 4, at 346 (explaining that although Chile's new system "maintain[s] several elements of the Continental European tradition," it is a "much more adversarial model" than other Latin American systems).

sign and objectives of the defense lawyer's role in the new system as compared with the new prosecutorial and judicial roles.⁵³

The structural changes in Chile's criminal justice system could not have been more profound. They are correctly described by observers as "radical,"⁵⁴ a "revolutionary change"⁵⁵ and "a complete paradigm shift."⁵⁶ Beyond simply a reallocation of power within an existing system, the changes in structure require an entirely different understanding of what it means to adjudicate criminality, "a new cultural vision of the criminal justice system."⁵⁷

Discussions of criminal justice reform began in Chile almost immediately upon the end of the Pinochet dictatorship. Chilean intellectuals, government officials, and the public quickly reached a consensus on the need for radical reform. As described more generally in Part 2, above, "[t]here was widespread dissatisfaction with the passivity of the judiciary during the dictatorship when there was absolutely no protection for the most basic of human rights."⁵⁸ A prominent reformer explained that, by the end of the Pinochet dictatorship, the Chilean criminal justice system "was considered obsolete and contrary to individuals' basic human rights."⁵⁹ Chilean President Ricardo Lagos illustrated this view in his 1995 speech to Congress upon presenting the initial judicial reform bill:

The most important political change in Chile has been the strengthening of the democratic model, which posits respect for human rights as a fundamental principle of legitimacy. Both phenomena present growing demands on the

⁵³ See Part 4.1, *infra* (discussing how public defenders lack a clear mission and what impact the lack of a clear mission has on the criminal justice system).

⁵⁴ See *id.* at 339.

⁵⁵ Cousino, *supra* note 4, at 327.

⁵⁶ Blanco et al., *supra* note 48, at 253.

⁵⁷ *Id.* at 266. Blanco and others also predict that the reforms "will produce significant change both institutionally and culturally." *Id.* at 254. Mauricio Duce describes the reforms as a reconceptualization of the relationship between the state and its people, and a democratization of the state. See Duce, *supra* note 35, at 195 (stating that "no sólo constituyen un trabajo técnico de mejoramiento y modernización del sistema de administración de justicia, sino que se enmarcan en un proceso mayor: el de reconfiguración, modernización, y democratización del Estado.")).

⁵⁸ Blanco et al, *supra* note 48, at 254 & n.4 (citing INFORME DE LA COMISIÓN NACIONAL SOBRE VERDAD, JUSTICIA Y RECONCILIACIÓN (2001)).

⁵⁹ Riego, *supra* note 4, at 339.

justice administration system, making it necessary to modernize it, about which an important consensus in the country has developed...The political changes, for their part, require a justice system that is accessible, impartial, egalitarian and maximizes guarantees. The need to prevent corruption presupposes the active participation of citizens in the oversight of power and that increases the need for an efficient and independent Judicial Branch...⁶⁰

Chile's first democratic president after the Pinochet dictatorship "was emphatic in criticism of the Judiciary, and in particular of the Supreme Court" because of the Court's failure to stop the human rights abuses of the former regime.⁶¹ The Rettig Report, produced by Chile's National Commission for Truth and Reconciliation, was intended to document human rights abuses that occurred during Pinochet's military dictatorship.⁶² The Rettig Report was harsh and blunt in its denunciation of the judiciary's performance during the Pinochet years.⁶³ Because of the acquiescence or

⁶⁰ *Id.* at 339 n.1.

⁶¹ TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 475 (Neil J. Kritz ed., 1995). On the judiciary's acquiescence in the dictatorship, see also the Rettig Report, which is reproduced in part at TRANSITIONAL JUSTICE, *supra* note 61, at 467.

⁶² The Commission was in operation from May 1990 until February 1991, when it released the Rettig Report. See *Truth Commission: Chile 90*, U.S. INST. OF PEACE, <http://www.usip.org/publications/truth-commission-chile-90> [<https://perma.cc/JB3Y-LCFM>] (last visited Dec. 13, 2015). The entire report is available from the U.S. Institute of Peace.

⁶³ As the Rettig Report put it:

The Judicial Power was the only one of the three Powers of State that continued functioning without being intervened or dissolved...Interest in maintaining a structure or image of legality, on the new military authorities' part, made them especially careful with members of the judiciary. . . . This would have permitted the Judicial Power to assume a more resolute attitude in defense of the human rights that were being violated. However, and although jurisdictional activities continued functioning normally in almost all areas of national concern whose conflicts arrived at the courts, in the area of human rights violated by agents of authority in a magnitude unknown before, jurisdictional oversight was notoriously insufficient...

The attitude adopted during the military regime by the Judicial Power produced, to an important and involuntary extent, an aggravation of the process of systematic violations of human rights, both in the short term - in not lending protection to detainees in denounced cases - and insofar as it offered repressive agents an increasing certainty of impunity for their criminal actions, whatever form of aggression might be employed.

outright support that members of the judiciary had shown for the Pinochet regime, the judicial system generally was held in very low esteem by Chilean citizens as the country transitioned back to democracy.⁶⁴

Prior to the 2000 reforms, Chilean criminal procedure had been governed by the 1906 Código de Procedimiento Penal⁶⁵ ("CPP"), which had codified much of the inquisitorial system that Chile had adopted from Spain during colonial times and maintained after

Rettig Report, vol. I, ch. IV, A & B.1(b.3), *reprinted in* TRANSITIONAL JUSTICE, *supra* note 61, at 467. Unsurprisingly, one of the recommendations of the Rettig Report was reforming and ensuring the future independence of the judiciary. *See also* Edmundo Fuenzalida Faivovich, *Law and Legal Culture in Chile, 1974-1999*, in LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE 108, 116 (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003)

In brief, the superior courts, as components of the legal system, did not perform their role and allowed the military government to pursue a policy of elimination of the opposition. As a large number of citizens disappeared or were exiled, the majority of judges and judicial functionaries did not raise their voices in protest. They could not have done much more, given the concentration of power in the hands of the military, but this gesture would have been important for the internal and external legal culture: a change from a historical attitude of respect toward the superior courts to a vision increasingly more critical of their behavior.

⁶⁴ *See, e.g., Human Rights and the "Politics of Agreements": Chile During President Aylwin's First Year*, HUMAN RIGHTS WATCH (1991), *reprinted in* TRANSITIONAL JUSTICE, *supra* note 61. One example of the attitude of the judiciary toward the widespread human rights abuses of the early years of the dictatorship is shown in a 1975 speech given by the Chief Justice of the Chilean Supreme Court:

[T]he Appellate Court in Santiago and the Supreme Court had both been pestered in their work by the numerous habeas corpus presented to them, on the pretexts of arrests ordered by the Executive. This has disrupted the work of the Courts, interfering with their duty to occupy themselves on the urgent matters of their jurisdiction.

Jorge C. Sutil, *Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship*, 67 NOTRE DAME L. REV. 1455, 1464 & n. 41 (1992) (quoting the Chief Justice's speech). In 1996, the National Corporation for Reconciliation and Reparation concluded that 3,197 people had died or disappeared during the Pinochet regime. 1,102 were identified as disappearances and 2,095 as deaths. *Pinochet's Chile*, WASH. POST (2000), <http://www.washingtonpost.com/wp-srv/inatl/longterm/pinochet/overview.htm> (last visited Dec. 13, 2015) [<https://perma.cc/Q472-B7NW>]. For more detailed information regarding the human rights violations in Chile, *see generally* REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION ("Rettig Report") (Feb. 1991), http://www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf [<https://perma.cc/6ZU6-F3CG>] (explaining "the rationale and effects of the Aylwin administration's overall human rights policy").

⁶⁵ Law No. 1853, Febrero 13, 1906, DIARIO OFICIAL [D.O.] (Chile), <http://www.wipo.int/edocs/lexdocs/laws/es/cl/cl022es.pdf> [<https://perma.cc/J2YT-PA3Q>].

achieving its independence.⁶⁶ Amendments to the Chilean Constitution in 1980 left the specifics of the 1906 CPP unchanged but purported to give additional protections to criminal defendants.⁶⁷ These constitutional provisions proved ineffective in altering criminal procedures in any meaningful way.⁶⁸

After his election in 1989, Chilean President Patricio Aylwin proposed a series of procedural changes in the criminal adjudication system, some (but not all) of which were passed. The *Leyes Cumplidos* of 1991 provided for strict time limits on how long a defendant could be held before seeing a judge and before being arraigned, prompt access to counsel, and the right to be free from torture.⁶⁹ Although much more modest than the package of reforms that would come a decade later, Aylwin's reforms to these aspects of criminal procedure set the stage for the more radical overhaul to follow.

In spite of the 1991 legal reforms, much remained unchanged in the criminal courts, with defendants still unable to secure either counsel or prompt hearings.⁷⁰ Article 19(3) of the Constitution had guaranteed the right to an attorney since 1980,⁷¹ but even on the eve of the reforms, many of those accused of serious crimes were being represented, if at all, by law students.⁷² One central criticism was the duration of even simple criminal matters and the widespread use and abuse of pretrial detention while cases dragged on.

⁶⁶ Cousino, *supra* note 4, at 325.

⁶⁷ See Lydia B. Tiede, *Committing to Justice: An Analysis of Criminal Law Reforms in Chile 9* (Ctr. for Iberian and Latin American Studies, Working Paper, 2004) (describing the laws, which included "attempt[s] to reduce the time period for completion of criminal proceedings").

⁶⁸ See *id.* (explaining that although the 1980 changes theoretically increased defendants' rights, "these rights were seldom recognized").

⁶⁹ Law No.19.047, Febrero 1, 1991, DIARIO OFICIAL [D.O.] (Chile), <http://bcn.cl/1vw3o> [<https://perma.cc/2QNN-PVQK>].

⁷⁰ Tiede, *supra* note 67, at 10.

⁷¹ See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19(3), available at http://www.oas.org/dil/esp/Constitucion_Chile.pdf [<https://perma.cc/U5KL-6QS7>] (affirming that "Any person accused of a crime has the irrenounceable right to be assisted by a suitable defending attorney . . .").

⁷² See U.S. DEPT. OF STATE, U.S. DEP'T OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2000 - CHILE (2001), <http://www.refworld.org/docid/3ae6aa9318.html> [<https://perma.cc/7ZLS-8CMR>] (explaining that "The Constitution provides for the right to legal counsel, but indigent defendants do not always receive effective legal representation. Indigent defendants . . . may be represented by law students doing practical training, on occasion by a court-appointed lawyer, or by a lawyer from the Government's legal assistance corporation."); see also Veliz, *supra* note 45, at 1366 (noting that law students served as public defenders).

In the years immediately prior to the reform, almost 60% of Chile's incarcerated population was awaiting either trial or sentencing.⁷³

The Chilean reform process began in earnest in 1992 after similar reforms had been enacted in El Salvador and Guatemala.⁷⁴ Only during President Eduardo Frei's term (1994–2000) did the reforms finally become a matter of public debate and, later, governmental action. In June 1995, the reform proposal became the subject of congressional debate and one of the principal priorities of President Frei's administration.⁷⁵ Chile differed from some of its neighbors in how it characterized the reforms to the public. While some reformers wanted to pursue a political strategy of characterizing the reforms as merely technical or routine, this approach was rejected and the reformers instead embraced the radical nature of the proposed change, embarking on a broad campaign of public relations to gather popular support.⁷⁶ The reformers argued that the reforms were a political change that was necessary to reflect the changed politics of the new Chilean state.⁷⁷ The reforms of the late 1990s were incomparable to any previous reforms in the country both in scope and in the approach reformers took to their proposal and implementation. Broad popular support was built through newspapers, seminars, and a conscious marketing campaign, as well as the unique historical momentum throughout Latin America as many countries emerged from years of dictatorship.⁷⁸

Because many of the earlier attempts at reform by other countries had resulted in relatively superficial changes in the criminal justice systems, Chile enacted a series of more radical reforms. Be-

⁷³ CRISTIÁN RIEGO & MAURICIO DUCE, *PRISIÓN PREVENTIVA Y REFORMA PROCESAL PENAL EN AMÉRICA LATINA: EVALUACIÓN Y PERSPECTIVAS* 156 (2009) (citing the Estadísticas Gendarmería de Chile detailing the makeup of the Chilean prison population).

⁷⁴ See Duce, *supra* note 35, at 196 (“The debate in Chile began at the end of 1992, when reforms like those in El Salvador and Guatemala had reached very advanced stages, and a new Code was adopted in the Argentinian federal system.”).

⁷⁵ See *id.* at 197 (discussing when the Chilean reform efforts became a subject for public debate).

⁷⁶ See *id.* at 200 (discussing media strategies and the reforms).

⁷⁷ See *id.* at 202 (quoting Hammergren, Duce writes, “judicial reform is political, not in the sense of having political preferences, but because, as in politics, it is about the legitimate allocation of values or about who gets what, when, and how.”).

⁷⁸ See *id.* at 215 (discussing the role of the media in building support for the reform).

tween the introduction of the first reform bill in 1995 and its eventual passage in 2000, Chile's reform package continued to evolve in a direction more adversarial and extreme than other projects in Latin America, and more similar to an American-style tradition than a tradition of Continental Europe.⁷⁹ Pro-reform groups were increasingly influenced by American and British systems and less reliant on the German and Italian influences that had animated the initial proposals.⁸⁰ The reforms that ultimately passed in Chile resulted in a "much more adversarial model"⁸¹ than in other Latin American countries.

Several reasons are possible for the increased Anglo-American influence during the later stages of the drafting of the reform, including the fact that key members of the team drafting the reform proposals pursued graduate legal studies at law schools in the United States during this time and imported elements from those systems into their proposals.⁸² Members of the Chilean judicial

⁷⁹ See Riego, *supra* note 4, at 346 (discussing the elements of the new regulations that were imported from adversarial traditions).

⁸⁰ See Muñoz, *supra* note 49, at 122-23 (discussing Anglo-American influence on the reforms).

⁸¹ Riego, *supra* note 4, at 346.

⁸² See Muñoz, *supra* note 49, at 122-23 (discussing individuals who were significant in the reform and their training and experience in the United States, including Andres Bateyman, Mauricio Duce, Juan Enrique Vargas, and Cristian Riego). In recent decades, Latin American legal culture has turned increasingly away from a European focus toward a more American focus. Beginning around the mid-1980s,

[G]raduate legal studies in the United States [became] increasingly popular, not only for Latin American business lawyers and political leaders, but also for scholars and academics. In the past, the latter usually headed to continental Europe for advanced degrees. Now increasing exposure to Anglo-American legal culture has resulted in a greater focus on adjudication and its related set of concerns

Jorge L. Esquirol, *The Turn to Legal Interpretation in Latin America*, 26 AM. U. INT'L. L. REV. 1031, 1032 (2011), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1722&context=auilr> [<https://perma.cc/G94S-ZRVX>]. Esquirol refers to these relationships as part of a "growing discursive community" that looks more toward the United States than toward continental Europe. *Id.* at 1032-33; see also Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUDS. 383, 384 (2002), <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1260&context=ijgls> [<https://perma.cc/6TSY-NL54>] (stating that "The years following the Second World War have shown a dramatic change in the pattern of world hegemony in the law [concentrating in the United States as producer of legal culture and ideas.]). Mattei argues that U.S. adversarialism is a fundamental and constitutive structure underlying the neo-liberal restructuring of the global economy and a basic constitutive structure of U.S. hegemony. The "adversarial legalism" that de-

system received information and financial assistance from the United States. For example, the U.S. embassy in Santiago provided funding with the intention of "strengthening democratic institutions, with particular emphasis on the judicial system."⁸³ During the 1990s, the U.S. spent a great deal of time training members of the Chilean judicial sector in adversarial skills necessary to "sustain the reform and ensure that new oral trials would be implemented effectively."⁸⁴

During this same period, Chilean observers were able to see problems emerging in other countries that had adopted less radical reforms. One such problem was the tendency of systems that had previously embraced wholly written proceedings to slide back into such a system by simply reading into court the written file, which remained the salient determinant in criminal adjudication.⁸⁵ Such a practice resulted in meaningless oral trials and severely undercut the practical impact of the reforms in other countries, leading one Chilean reformer to describe the new system of oral trials in those countries as "little more than the acting out of the file produced during earlier stages."⁸⁶ As a reaction to these problems, and as a result of the increasing Anglo-American influence, Chile's reforms eventually came to include restrictions on the judges' access to the case file, strict limitations on the use of out-of-court statements at trial, and a system of adjudication driven much more by the parties than by the judges.⁸⁷ Ultimately, although the Chilean reform bill was the product of a mix of influences both domestic and international, the end result reflected a heightened adversarialism and showed the powerful role that institutions and structures from United States systems came to play.⁸⁸

finer U.S. legal culture "cannot be seen as a mere feature of American law, but is actually the fundamental philosophy of globalization that, as a new layer of legal systems forms worldwide, pushes for a complex variety of processes of privatization of the legal system. *Id.* at 390 n.27.

⁸³ Cooper, *supra* note 15, at 540. The Embassy donated approximately \$1 million to programs that included drafting the new code and training legal practitioners. *Id.*

⁸⁴ *Id.*

⁸⁵ See Riego, *supra* note 4, at 345 (explaining that due to European influence and "Latin American tradition[s] of written practice," the first oral trials in Latin America tended to rely on the written file).

⁸⁶ *Id.*

⁸⁷ *Id.* at 346-47 & nn. 48-54 (listing reforms to Chilean procedure that favored oral, adversarial practice).

⁸⁸ See Muñoz, *supra* note 49, at 123 (describing the new Chilean criminal pro-

The new criminal procedure code was first introduced in Congress in 1995 and was passed in 2000.⁸⁹ The reforms in Chile set out to completely divorce the prosecution from the judiciary by creating a Public Ministry to carry out prosecutorial duties and by explicitly limiting the powers of the judiciary.⁹⁰ In the new system, the prosecutor takes on the role of investigating and collecting evidence, rather than the judge.⁹¹ The law also introduced the concept of prosecutorial discretion, codifying its acceptability within the new system as well as attempting to regulate and constrain its use.⁹² The prosecutor may, for example, opt to dismiss cases involving minor offenses under certain conditions.⁹³

In December 2000, Chile began to phase in its new criminal justice system through pilot programs in certain geographic areas, with the understanding that the new system would be gradually phased in over several years, ultimately including Santiago in its

cedure code as “a translation of ideas that were imported and adapted to Chile’s reality”).

⁸⁹ Riego, *supra* note 4, at 340. Law 19.640 created the agency empowered to prosecute crimes, while Law 19.718 subsequently created the national system of public defenders and appointed criminal defense lawyers. *Id.* at 340 n.10.

⁹⁰ See generally CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA ch. VI-Am; Ley Orgánica Constitucional del Ministerio Público, Law 19.640, Octubre 8, 1999, DIARIO OFICIAL [D.O.] Chile, available at <http://web.uchile.cl/archivos/derecho/CEDI/Normativa/Ley%2019.640%20Ley%20Org%E1nica%20Constitucional%20Del%20Ministerio%20Publico.pdf> [<https://perma.cc/FZ4Z-NV6Y>]; CÓD. PROC. PEN. [C.P.P.], as amended DIARIO OFICIAL [D.O.], Octubre 12, 2000 (Chile), <http://bcn.cl/1uvvn> [<https://perma.cc/5KCM-65UV>]; Código Procesal Penal, <http://bcn.cl/1uvvn> [<https://perma.cc/5KCM-65UV>]; see also Blanco et al, *supra* note 48, at 255 (explaining that “The Public Ministry was created, with constitutional autonomy, to take on prosecutorial duties. This agency was created to resolve issues of impartiality and objectivity within the area of criminal investigation.”).

⁹¹ See Riego, *supra* note 4, at 341 (discussing the changes in evidence procedure).

⁹² See CÓD. PROC. PEN. arts. 168–70 (giving the prosecutor certain discretionary powers); see also Cousino, *supra* note 4, at 338–46 (providing an overview of role of increased prosecutorial discretion in the Chilean reforms); Blanco et al, *supra* note 48, at 257 (explaining the scope of prosecutorial discretion not to proceed in a case, specifically when no crime has been committed, the statute of limitation has expired, insufficient evidence, or when it is not in the public interest to prosecute minor crimes).

⁹³ See Riego, *supra* note 4, at 341 (noting that the Code “introduces limited expressions of discretion for the prosecutor who may opt to dismiss a case (as long as it involves a minor offense) under certain conditions”); see also Blanco et al, *supra* note 48, at 257 (explaining that minor offenses “carry sentences of less than eighteen months” and this discretion may not be exercised in prosecuting “public officials accused of official wrongdoing”).

final phase.⁹⁴ This progressive implementation of the reforms allowed actors in the criminal justice system to make adjustments in response to challenges and problems as they arose in practice.⁹⁵

The new Criminal Procedure Code allowed for plea bargaining for the first time, although its use is limited by statute and it is still relatively rare.⁹⁶ The Code now authorizes a "procedimiento abreviado," in which the accused agrees to accept the facts as alleged in the indictment and in return, if convicted, receives a sentence previously agreed upon by the accused and the prosecutor.⁹⁷ This procedure cannot be used, however, in cases where the maximum sentencing range exceeds five years.⁹⁸ At least in theory and structure, judges have been converted from controlling and managing the investigation and presentation of cases into "independent, impartial referees."⁹⁹

The most fundamental changes characterizing the new system are the introduction of transparent, oral, public trials to adjudicate all criminal allegations, as well as elimination of the role of the judge in collecting evidence.¹⁰⁰ Serious cases are tried before a panel of three judges known as the "tribunal oral," while less seri-

⁹⁴ See Blanco et al, *supra* note 48, at 254 (describing the gradual transition of the legal reforms). See also Antonio Marangunic & Todd Foglesong, CHARTING JUSTICE REFORM IN CHILE: A COMPARISON OF THE OLD AND NEW SYSTEMS OF CRIMINAL PROCEDURE, VERA INSTITUTE OF JUSTICE 1 (2004) (noting that the system will be complete in 2005 when it reaches Santiago).

⁹⁵ The gradual implementation of the system was held up as an important means of allowing the system to succeed and to gain public support. See Interview with Claudio Perez, in Santiago, Chile (Oct. 28, 2014).

⁹⁶ Law No. 19.696, Febrero 1, 1991, DIARIO OFICIAL [D.O.] (Chile), <https://www.leychile.cl/Navegar?idNorma=176595&tipoVersion=0> [<https://perma.cc/KWB4-WRY3>]; see also Jan-Michael Simon, *The Punishment of Serious Crimes in Chile*, in ULRICH SIEBER, THE PUNISHMENT OF SERIOUS CRIMES: VOLUME 2: COUNTRY REPORTS 4 (Ulrich Sieber ed., 2004) (stating that "[T]he defendant agrees to have his case put on trial under the abbreviated procedure and accepts the facts as established in the indictment. . . . [T]his procedure is limited to those cases where the previously fixed final sentence is under 5 years . . .").

⁹⁷ See Simon, *The Punishment of Serious Crimes in Chile*, *supra* note 96, at 4 (citing Book 4, Title III of the New C.P.P.).

⁹⁸ Riego, *supra* note 4, at 341; COD. PROC. PEN.CPP arts. 388 & 406; see also Simon, *The Punishment of Serious Crimes in Chile*, *supra* note 96, at 4. Chile divides crimes into three categories: *crímenes*, *delitos simples*, and *faltas*, which can be conceived roughly into serious felonies, general felonies, and misdemeanors. See *id.* at 2 (citing Article 3 of the C.P.P.).

⁹⁹ See Hafetz, *Pretrial Detention*, *supra* note 33, at 1761 (citing Cousino, *supra* note 4, at 353).

¹⁰⁰ Riego, *supra* note 4, at 341 (citing C.P.P. art. 1 regarding oral and public trials, and C.P.P. arts. 70, 77 & 79 regarding changes to the judge's role).

ous charges are tried to a single judge known as the “juez de garantías.”¹⁰¹ In a radical departure from prior practice, only that evidence introduced at the oral trial has evidentiary value in the case against the accused.¹⁰²

Shortly after the creation of the new prosecutorial agency, Chile established a national public defender agency, the Defensoría Penal Pública.¹⁰³ The law creates a national agency of public defenders. The office is headed by a presidentially-appointed national director who supervises several regional defenders, who in turn supervise offices of public defenders at the local level.¹⁰⁴ In addition to the public defenders employed by the DPP, the new system created a network of private court-appointed defense lawyers known as *licitados*, to complement the work of the DPP lawyers.¹⁰⁵ Many observers see this hybrid arrangement as a strength of the new system of indigent defense in Chile, as it allows for a degree of competition and innovation among the different categories of defense lawyers.¹⁰⁶ Ideally, a network of private defense lawyers can provide an energy and a level of independence from government

¹⁰¹ *Id.* at 341 & n.14.

¹⁰² *See id.* at 341 (explaining that “evidence gathered by the prosecutor has no value unless it is introduced at trial”). The pre-reform system in Chile was dominated by the “juez de instrucción,” a single judge who was empowered to gather evidence, lead the police investigation, decide which charges would be brought (if any), and ultimately render a verdict and impose sentence. *See id.* at 339–40 & nn.3–6 (citing the old Código Procesal Penal). All evidence gathered against the accused was done in writing and the accused had no access to the written file until after the evidence-gathering phase had concluded and charges had been brought. *Id.* All of the proceedings were conducted in writing and at the direction of a single judge. *See Cousino, supra* note 4, at 325 (noting the central role the judge plays in the inquisitorial system).

¹⁰³ Law No. 19.718, Febrero 27, 2001, DIARIO OFICIAL [D.O.] (Chile), <https://www.leychile.cl/Navegar?idNorma=182755&tipoVersion=0> [<https://perma.cc/PY9X-NSSU>].

¹⁰⁴ *See Estructura organizacional, DEFENSORIA PENAL PUBLICA*, <http://www.dpp.cl/pag/78/81/organigrama> [<https://perma.cc/F3M8-W9JL>] (last visited Dec. 13, 2015) (providing an organizational chart of the Chilean public defender offices).

¹⁰⁵ *See id.*; *see also* Blanco et al, *supra* note 48, at 256 (noting that the public defender system is enhanced by “licitaciones publicas” – the “public system of contract attorneys”).

¹⁰⁶ *See* Interview with Juan Enrique Vargas, Dean of the School of Law, Diego Portales University, in Santiago, Chile (Oct. 21, 2014) (expressing hope that this hybrid system would allow for an evaluation of the relative benefits of each group and a general improvement in the level of representation from both groups as a result).

control.¹⁰⁷ One important aspect of the Chilean law is the endowment of the right of the accused to a change of appointed counsel—a personal right that does not require the accused to provide a reason—at least in the first instance.¹⁰⁸ The Defensorías Regionales maintain a list of private attorneys who can handle criminal cases. Those accused of a crime can select from this list, and if available, that attorney will be appointed.¹⁰⁹

There can be little doubt that the reforms to the criminal justice system in Chile have improved the quality of justice from virtually all perspectives. Criminal charges are resolved much more quickly than under the old system, rates of pretrial detention are far lower than in the old system,¹¹⁰ and the public has expressed widespread support for the reforms.¹¹¹ According to opinion polls, the reforms to the criminal justice system are popular with the Chilean public, with strong majorities expressing the opinion that the new system is quicker, more transparent, and generally preferable to the old system.¹¹² In contrast to the pre-reform system, Chilean arrest and trial procedures are now uniformly regarded as in compliance with international norms of fairness.¹¹³ Notwithstanding these impres-

¹⁰⁷ See Interview with Cristian Riego, Professor, Diego Portales University, in Santiago, Chile (Aug. 28, 2014) (describing the current system as too large and too public, and explaining that it could be strengthened by cultivating a more robust group of independent lawyers).

¹⁰⁸ Alex Carocca Pérez, *La Nueva Defensa Penal Pública* 13 (2004), http://w1.cejamericas.org/index.php/biblioteca/biblioteca-virtual/doc_view/859-la-nueva-defensa-penal-p%C3%BAblica.html [https://perma.cc/Q6B5-GNZM].

¹⁰⁹ RAÚL TAVOLARI OLIVEROS, *INSTITUCIONES DEL NUEVO PROCESO PENAL: CUESTIONES Y CASOS* 44 (Editorial Jurídica de Chile, 2005).

¹¹⁰ See Riego, *supra* note 4, at 352–53 (estimating that three quarters of inmates have been sentenced under the new reforms, whereas prior to the reforms, half of all inmates were waiting for sentencing).

¹¹¹ See *id.* at 347–48 (noting the community's preference for public trials).

¹¹² See *id.* at 348 & n.59 (2008) (citing polls from 2004 and 2006 that measured Chilean satisfaction with the judicial reforms).

¹¹³ See, e.g., UNITED STATES DEPARTMENT OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2013: CHILE*, at 7–8 (2014), <https://www.state.gov/documents/organization/220640.pdf> [https://perma.cc/CB7Y-8A8J].

The law provides for the right to legal counsel, and public defenders' offices across the country provided professional legal counsel to anyone seeking such assistance. . . . Defendants can confront or question adverse witnesses and present witnesses and evidence on their behalf, although the law provides for secret witnesses in certain circumstances. Defendants and their attorneys generally have access to government-held evidence relevant to their cases.

sive achievements, the system now faces very real challenges in attaining a truly adversarial justice system.

4. LIMITATIONS AND CHALLENGES OF THE NEWLY ADVERSARIAL DEFENSE LAWYER

Although Chile has established new procedures intended to provide meaningful and equal representation for criminal defendants, the reforms are facing a challenge: transitioning from the inquisitorial culture and expectations to an adversarial culture. An adversarial defense attorney cannot truly be effective unless she embraces adversarialism and all that it entails. This includes conducting factual investigations to challenge the prosecutor's narrative, developing a coherent and compelling theory of the case, challenging the prosecutor's legal arguments, and advocating for the client's expressed interests. During the reforms, the prosecutor gained significant power. Although the creation of a public defender's office was an important step in systemic reform, many defenders retain a self-conception of the defense lawyer as a reactive or passive player in the system, and remain entrenched in the inquisitorial mindset. Without a zealous and adversarial defense, the new prosecutorial power goes unchecked and the impact of imbalance in the judicial system may be manifesting in an increase in Chile's prison population.

For better or for worse, Chile has been used for many decades as a laboratory for ideas about reform. A positive explanation for this history is that Chile has a long tradition of openness to outside influences and ideas, and a willingness to experiment with proposals for radical reform.¹¹⁴ Legal reforms are one area in which the country has a long history of receptivity to external influences.¹¹⁵ Although this seems to present an overly optimistic take on recent history in view of the 1973 coup and covert activity on the part of the United States over the last half of the twentieth century, it is true that Chileans have traditionally been receptive to re-

¹¹⁴ See Cooper, *supra* note 15, at 521-22 (noting Chile's historical tendencies towards legal transplantation).

¹¹⁵ *Id.* at 521 (stating that "Chileans are often celebrated as the best adapters and adopters of legal reforms because they have strong institutions to support democratic government and the rule of law. Chile has had a history of legal transplantation since it first declared independence in 1810.").

ceiving and implementing outside ideas and proposals.¹¹⁶ Whether this is due primarily to outside influence or domestic willingness, Chile “has long been a testing ground for judicial reform, the creation of markets, and economic integration.”¹¹⁷

In addition to the broad changes in formal procedure, Chile had to create new institutions that would administer the new adversarial system of justice. As noted above, the legislature created the new prosecutorial agency, the Ministerio Público, in 2000,¹¹⁸ and then the new public defender agency, the Defensoría Penal Pública, in 2001.¹¹⁹ These entirely new institutions constituted a clear break with historical antecedents and presented an opportunity to define the goals and objectives of each new player in the reformed criminal justice system.¹²⁰ True reform in Chile required a radical redefinition of the roles of the prosecutors, judges, and defense lawyers, and the various institutions differed in the degree of success with which they carried out this redefinition.¹²¹

Based on several months of firsthand observations and inter-

¹¹⁶ *Id.* at 521-24 (discussing the impact of the 1973 military coup on Chile’s legal system).

¹¹⁷ *Id.* at 521; see also YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 141 (2002) (referring to Chile as a “laboratory in which contenders for legitimate state expertise in the north invested heavily”). Obviously, Chile was used as a testing ground for radical neo-liberal economic policies from 1973 until 1990 under the Pinochet dictatorship, but it is difficult to argue that this was anything but an externally-imposed experiment and certainly cannot be explained by evidence of the country’s “strong institutions to support democratic government.”

¹¹⁸ Law No. 19.640, Octubre 15, 1999, D.O. (Chile), <https://www.leychile.cl/Navegar?idNorma=145437&tipoVersion=0> [<https://perma.cc/PF5C-LM9M>]; see also Riego, *supra* note 4, at 340 (describing how “[i]n 2000, after a long debate, Congress introduced a new Criminal Procedure Code and created a new prosecutorial agency and public defense system.”).

¹¹⁹ Law No. 19.718, Marzo 10, 2001, D.O. (Chile), <https://www.leychile.cl/Navegar?idNorma=182755&tipoVersion=0> [<https://perma.cc/P8D3-MZLB>].

¹²⁰ See Duce, *supra* note 10, at 1.

¹²¹ See Cousino, *supra* note 4, at 331:

“While suppressing the inquisitorial system, the reform should result in the establishment of the basis for a new definition of roles in the criminal justice system. This definition may take different specific directions, but the sole existence of three different institutional actors such as Judges, the Prosecutors and the Public Defenders are bases on which it is possible to build a more sophisticated system that may develop a balance between the effectiveness and respect of individual rights.”

(quoting Cristián Riego, The Chilean Criminal Procedure Reform 34 (1997) (unpublished L.L.M. thesis, University of Wisconsin Law School)).

views that I conducted, as well as existing scholarship, I analyze the challenges facing public defenders in Chile in three broad categories: (1) a lack of a clear mission or set of objectives for the public defender within the new system; (2) an anachronistic understanding of the role of the public defender as purely reactive and passive, an orientation that is most likely a vestige of the role of the defense lawyer in an inquisitorial system; and (3) an under-theorization of the motivations of public defenders and indigent defense organizations. These three critiques of the public defender in today's Chile are obviously interrelated and present challenges to the fulfillment of the promise of the defense lawyer within an adversarial system.

4.1 *Lack of a Clear Mission*

In creating the new institutions, Chilean reformers and legislators devoted far more thought, and expended much more energy, on the design and definition of the prosecutorial entity than on its defensive counterpart.¹²² The Defensoría Penal Pública appears in the reforms as both a literal and a substantive afterthought. One architect of the reforms put it quite bluntly: “[w]e knew that we needed a defense lawyer, but we did not focus on the details.”¹²³ The legislation authorizing and creating the agency literally came after the other substantive reforms.¹²⁴ More importantly, the design and creation of the Defensoría Penal Pública lacked a full conceptualization of what kind of defense services, indeed, what kind of defense lawyer, the new system anticipated. One observer identified the heart of the problem: “[t]he public defender institution has a problem of defining its mission or role.”¹²⁵

An example of the under-theorizing of the defense lawyer in the new system can be seen in the intellectual history of the reforms. Professor Mauricio Duce, one of the central leaders of the reforms, has described the beginnings of the discussions about re-

¹²² See *id.* at 330 (explaining that the reforms require the prosecutors to handle the most difficult tasks, including absorption of judicial powers).

¹²³ Interview with Vargas, *supra* note 106.

¹²⁴ See *supra* notes 95–103 (discussing the development of the reforms for the prosecutor and defense agencies).

¹²⁵ Interview with Mauricio Duce, Professor, Diego Portales University, in Santiago, Chile (Aug. 29, 2014).

form among Chilean academics.¹²⁶ Duce describes the first public discussion of such a reform in a November 1992 conference organized by the Corporación de Promoción Universitaria (CPU).¹²⁷ This conference introduced the topic of a possible Chilean reform in general terms, while a subsequent series of discussions in 1993 dealt with particular aspects of the reform proposal in more detail, inviting both Chilean and international experts to take up certain critical aspects of the reform.¹²⁸ According to Duce, the group then met on nine occasions between 1993 and 1994 to design the new system, discussing topics such as the general functioning of the Chilean criminal justice system, general principles of oral trials, rules of evidence, prosecutorial discretion, and the role of the prosecutor.¹²⁹ Nowhere, however, does Duce discuss any attempts to address the role of the defense lawyer or of the national public defender institution during any of these early theoretical discussions.

Without an articulation of the objectives of the DPP or individual public defenders, no clear criteria exist upon which to evaluate whether the institution and the individuals within it are succeeding. Attempts to define success in this regard seem invariably to retreat into the bureaucratic. An early effort by the first national director of the agency, Alex Carroca Perez, laid out three criteria by which public defenders or private attorneys contracting to provide indigent defense services should be evaluated: (1) the professional quality of the services provided, including the promptness and attention that the attorneys pay to their clients; (2) orderliness and efficiency of the management of resources; and (3) the soundness of the internal management methods employed.¹³⁰ Like the legislation creating the DPP, the formula reads bureaucratically, without any guidance as to the real role of the public defender with regard either to the client or the system generally.

The law establishing the DPP and its accompanying legislative history spend a remarkable number of pages on necessary reports,

¹²⁶ See generally Duce, *supra* note 35 (discussing the reform process of Chile's criminal justice system).

¹²⁷ See *id.* at 204 ("The first public event that established the need to discuss structural reform of the criminal justice system was an international seminar organized by CPU in November 1992.").

¹²⁸ See *id.* (discussing the 1993 conference).

¹²⁹ See *id.* at 205, n.13 (describing the general topics discussed during the nine meetings).

¹³⁰ See Pérez, *supra* note 108, at 13 (discussing ways of implementing a new public criminal defense system)._

inspections, and management of the bureaucracy of the DPP, with virtually no mention of what either the individual public defender or the institution is expected to *do* in the new system.¹³¹ The law reflects a troubling lack of specificity or vision in articulating the expectations for the new institution. The stated objective in the legislation was simply to provide criminal defense to anyone accused of a criminal offense of any sort who does not have a lawyer.¹³² The legislation goes to great lengths to lay out the bureaucratic structure of the office and the three levels of national administration, but never elaborates on the goals, aspirations, or expectations of the office, or any individual public defender beyond the most basic goal: providing a warm body to defend the accused.

A common and profound problem among countries that have moved to an ostensibly adversarial system from an inquisitorial system is the lack of training for defense lawyers on how and why to conduct fact investigations.¹³³ This phenomenon is likely a cultural holdover from the old system, in which the defense lawyer was intended to play a purely reactive role.¹³⁴ Describing problems in moving Mexico's criminal justice system from inquisitorialism to adversarialism, Carlos Ríos Espinoza argued for "the need to empower the defense to develop a parallel or verification investigation that serves as a counterbalance to the prosecution's investigation, and allows the defense to develop and present evidence if it so chooses."¹³⁵ The impediments to this kind of change are cul-

¹³¹ See generally Law No. 19.718, Febrero 27, 2001, D.O. (Chile), <https://www.leychile.cl/Navegar?idNorma=182755&tipoVersion=0> [<https://perma.cc/3KWZ-RBR9>] (creating the public defender's office).

¹³² See *id.* at art. 2:

The Public Defenders' Office aims to provide criminal defense to those charged or accused of committing a crime, misdemeanor or offence, in the context of plea bargaining or a criminal trial in their respective tribunals, as required, to those who lack legal counsel.

¹³³ See Cousino, *supra* note 4, at 350-51 (explaining that criticism of the public defense agency stems from "the economical situation . . . [and] the absence of institutional structures at the federal level to support and provide the minimum training, guidelines, and development of local agencies.").

¹³⁴ See Riego, *supra* note 4, at 340 (explaining that under the inquisitorial system, the defendant could respond only when the judge had completed the investigation and determined which charges to bring).

¹³⁵ Carlos Ríos Espinoza, *Redesigning Mexico's Criminal Procedure: The States' Turning Point*, 15 SW. J. INT'L L. 53, 81 (2008), http://heinonline.org/HOL/Page?handle=hein.journals/sjlta15&start_page=53&collection=journals&id=55 [<https://perma.cc/8PXJ-E2PH>].

tural rather than structural, however, as the procedural framework does exist in the new systems for defense lawyers to interview and subpoena witnesses and conduct other fact investigations.¹³⁶ The scarcity of examples of such lawyering is not a result of the written law, but of the practiced understanding of the role of the defense lawyer. For example, public defenders in Chile have the right to ask for money for expert witnesses, but very few do so.¹³⁷ This demonstrates that the problems facing the public defender system in Chile are not as connected to a lack of resources as they are to cultural challenges: individual public defenders still tend to conceive of their role as passive rather than active.¹³⁸

Many Chilean public defenders fail to conduct an independent factual investigation into their cases. According to Leonardo Moreno, former head of the Santiago North office of the Defensoría Penal Pública, it is almost unheard of for defense lawyers to investigate their cases. Public defender offices do not keep investigators on staff, and although defense lawyers can ask for funds to hire investigators, most will not. Moreno estimates that less than 1% of the budget for hiring outside experts is spent on investigators. After the reforms, several universities opened programs for training criminal investigators, but ultimately closed the programs because their graduates could not find jobs.¹³⁹ Chilean public defenders also struggle with the ability to develop and navigate a defense case to counter the prosecution's case. Some Chilean defense lawyers do not understand that they are required to take an active role in defending their client, and seem to have a hard time discarding the inquisitorial and bureaucratic mentality.¹⁴⁰

To their credit, the reformers in Chile realized immediately that the actors in the criminal justice system would lack certain skills, expertise, and experience necessary to fulfill their intended functions in the new system.¹⁴¹ Many resources were devoted to

¹³⁶ See Katherine Kauffman, *Chile's Revamped Criminal Justice System*, SUMMIT 621, 631–40 (Nov. 8, 2012), <http://thesummit.gjil.org/2012/10/articles-chiles-revamped-criminal.html> [<https://perma.cc/4YDS-GS6G>] (last visited Feb. 1, 2017) (describing the new Chilean criminal procedure).

¹³⁷ See Interview with Mauricio Duce, *supra* note 125.

¹³⁸ *Id.*

¹³⁹ Interview with Leonardo Moreno, Professor, Alberto Hurtado University in Santiago, Chile (Oct. 27, 2014).

¹⁴⁰ Interview with Claudio Pérez, *supra* note 95.

¹⁴¹ See Cousino, *supra* note 4, at 333–34 (explaining that the most difficult challenge for the Chilean reformers is changing the legal culture and addressing skill deficiencies).

filling this gap in terms of “skills training.” The majority of the training, however, has focused on trial skills and lawyering within the courtroom, with not enough focus on what the lawyer does outside of the courtroom. In an interview, Mauricio Duce expressed that, “Training is not culture.”¹⁴² According to Duce, both the DPP and the Ministerio Público seized the initiative and trained themselves, thereby losing contact with (and input from) universities and other outside influences.¹⁴³ Legal training focuses primarily on black-letter law and, to some extent, trial advocacy, but does not explore anything more complex. Duce explains that, “Probably they perceive that there is no problem. It is invisible to them.”¹⁴⁴ After the institutions were created and became independent, their evolution stopped. This focus on trial skills to the exclusion of ethical or cultural education has failed to convey the importance of lawyering outside of the courtroom and of thinking broadly and creatively about the role of the defense lawyer in an adversarial setting.

Many Latin American countries have created public defender offices similar to those in the United States, including the widespread funding and resource problems found in many such United States institutions. Throughout most of Latin America (as well as the United States), public defender offices lack the support, both financial and otherwise, enjoyed by the prosecution and the judiciary.¹⁴⁵ Although creating a system of public defenders is a step towards equal justice, the mere presence of a poorly funded public defender organization within a system, or an overworked and underpaid public defender in the courtroom, is not a significant or meaningful step toward protecting the rights and interests of the accused.¹⁴⁶ In many Latin American countries that have created

¹⁴² Interview with Mauricio Duce, *supra* note 125.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See Margaret Popkin, *Acceso a la justicia, gobernabilidad democrática y sociedad civil*, in JUSTICIA: UN VÍNCULO PENDIENTE ENTRE ESTADO, CIUDADANÍA, Y DESARROLLO 177, 193 (Carlos Cordovez, ed. 2007), <https://publications.iadb.org/bitstream/handle/11319/250/Justicia.pdf;jsessionid=B82991CF6829406E3C367FFCB02BD4E2?sequence=1> [<https://perma.cc/LR5Y-TQQR>].

¹⁴⁶ See generally John D. King, *Recognizing the Limits of the Right to Counsel as a Guarantee of Justice*, in LA REVISTA DE DERECHOS FUNDAMENTALES 67 (2014), <https://poseidon01.ssrn.com/delivery.php?ID=68911009811200500703102907800507307503900601400706406609306907606902602111200009408103803500004310600304607001911509108808111702705308208402207006611909511610008703806404511209107511200207301908611202701911808910909212111406811008406608107306508>

public defender institutions, because of inadequate funding, "legal representation remains more a formality than a guarantee of a serious defense."¹⁴⁷ Fortunately, Chile has not yet encountered the problem of inadequate resources in funding its criminal justice system generally, or its indigent defense system specifically.¹⁴⁸ Although the costs of the criminal justice system post-reform is substantially higher than the costs of the pre-reform system,¹⁴⁹ there seems to be no push to reduce funding for indigent criminal defense, and few complaints from public defenders about levels of funding.¹⁵⁰

The real problem facing the Chilean public defender system is not a funding shortage or a crippling workload, as it is in many other Latin American countries and the United States. The absence of factual investigation by defense lawyers in Chile is due to a failure to adopt certain facets of adversarial legal culture: zealous advocacy, investigation, and independent factual inquiry to challenge the prosecutor's claims. To complete the transformation, Chilean attorneys must reconsider their expectations and understanding of advocacy and reject the traditional inquisitorial approach to the

9017&EXT=pdf [https://perma.cc/3CV7-TELH] (comparing the Chilean justice system and counsel's role in providing justice to that of the United States).

¹⁴⁷ Popkin, *supra* note 145, at 194 (citing Cristián Riego & Fernando Santelices Arizita, *Informe Comparativo: Proyecto seguimiento de los procesos de reforma judicial en América Latina*, in *SISTEMAS JUDICIALES* 2(3) (2002)).

¹⁴⁸ See Interview with Vargas, *supra* note 106; see also Interview with Claudio Pérez, *supra* note 95. In the interview, Perez said that the DPP lawyers are well-trained and now there are plenty of them. At the beginning, there were insufficient lawyers for the caseloads, but that problem has now been solved. With the increasing numbers of defense lawyers in the DPP, however, he has seen a new problem. While the initial energy and impetus for defense work was very strong, the intensity has diminished. The level of zeal (my word, not his) has decreased since the reforms as the momentum and excitement of the new system has dissipated. *Id.*

¹⁴⁹ The annual operating cost of the old Chilean criminal justice system was USD \$50M, approximately 0.8% of the national budget. The cost of the new Chilean criminal justice system in 2008 was USD \$212M, approximately 2.0% of the national budget. See Riego, *supra* note 4, at 342 n.26 (discussing the Chilean criminal justice budget); see also Duce, *supra* note 35, at 233 (discussing the reform process of Chile's justice system). It is worth noting that the Chilean reform process has occurred within the context of a strong and growing national economy, without which it might have been much less popular and maybe not even possible. See Riego, *supra* note 4 at 355 (explaining that "... Chile's reform was produced in a context of great political and economic stability." (citing MAURICIO DUCE & CRISTIAN RIEGO, *PROCESO PENAL*, 76 (2007))).

¹⁵⁰ *But see* Véliz, *supra* note 45, at 1372 (complaining about underfunding in the Defensoría Penal Pública and noting budget shortages).

role of the defense lawyer.

4.2 Passivity

Vestiges of Chile's inquisitorial past haunt the post-reform system, especially regarding the role of the public defender. Defense lawyers in the modern Chilean system remain generally passive and reactive in their approach to lawyering and generally have a quite restrictive view of what the job of the defense lawyer entails. Under the old inquisitorial system, of course, there existed very little room for active or zealous defense lawyering.¹⁵¹

Defense lawyers in the Chilean system have been slow to change in many of these respects. An early evaluation of the reforms by two leading Chilean academics found problems in the quality of the public defenders within the new system, "especially in the development of a proactive role during the preliminary stages of the process and in the development of the capacity to counter in a meaningful manner the prosecution's cases."¹⁵² Based on observations over several months and conversations with many actors in the Chilean criminal justice system, this problem persists.

The critique of Chilean defense lawyers as "generally passive" is a common one. In an interview, Duce elaborated on this description and the rationales:

Generally speaking, public defenders in Chile are extremely passive ["extremadamente pasivo"]. They do not conduct their own investigations and still do not even ask the prosecutors to review the government's investigation prior to trial. The central question to study regarding public defenders in Chile is one of passivity versus action ["pasividad vs. actividad"].¹⁵³

During the planning of the reforms in Chile, there was virtually

¹⁵¹ See Blanco et al, *supra* note 48, at 255 (describing the inquisitorial system).

¹⁵² Duce, *supra* note 35 at 242 (citing Andres Baytelman & Mauricio Duce, *Evaluacion de la Reforma Procesal Penal: Estado de una Reforma en Marcha*, Santiago, Chile (2003)) (translation by the author).

¹⁵³ Interview with Duce, *supra* note 125.

no debate regarding the scope of the right to appointed counsel.¹⁵⁴ As a result, that right is as broad as it possibly could be, covering every type of crime regardless of possible punishment and covering every defendant regardless of ability to pay.¹⁵⁵ Many have argued that the scope of this right is overly broad and financially unsustainable.¹⁵⁶ A more profound critique is that this indiscriminate breadth of the right to appointed counsel has perpetuated a bureaucratic mindset among Chile's public defenders that continues today.¹⁵⁷

In observing court proceedings in Chile, it is clear why Chilean defense lawyers are described as passive. Juan Enrique Vargas, one of the architects of the criminal justice reforms, decried the "automatic nature" of the work of many public defenders. Vargas described many of today's defense lawyers in Chile as feeling that, because the results are preordained in their cases, it makes no sense to put in much effort.¹⁵⁸ Others go further and describe the role of the public defender in Chile as simply legitimizing the process without providing much real benefit to the accused.¹⁵⁹

¹⁵⁴ See generally King, *supra* note 146 (discussing how the Chilean adversarial system could be changed to be more just).

¹⁵⁵ See *id.* (comparing the justice system in the United States and Chile to discern how the Chilean system can be made more just); see also RAÚL TAVOLARI OLIVEROS, INSTITUCIONES DEL NUEVO PROCESO PENAL: CUESTIONES Y CASOS 69 (Editorial Jurídica de Chile, 2005).

¹⁵⁶ See OLIVEROS, *supra* note 155, at 69 (arguing that such a broad promise of representation will lead either to a financially unsustainable system, or a deterioration in the quality of defense representation, or both). Oliveros proposes that Chile follow the lead of many developed countries and restrict the availability of court-appointed counsel to serious cases, in order to save money and to maintain a high level of representation. *Id.* See also Interview with Riego, *supra* note 107.

¹⁵⁷ See Interview with Riego, *supra* note 107 (describing an industrial or bureaucratic mindset that continues within the DPP).

¹⁵⁸ See Interview with Vargas, *supra* note 106 ("The routine is a great enemy of quality.").

¹⁵⁹ See OLIVEROS, *supra* note 155, at 43. Defense lawyers can serve this "legitimizing" function in the United States as well. In his dissent in *Lafler v. Cooper*, Justice Scalia argued that even though counsel allegedly provided incompetent advice to reject a plea bargain, Cooper "received the exorbitant gold standard of American justice—a full-dress criminal trial with its innumerable constitutional and statutory limitations upon the evidence that the prosecution can bring forward . . ." *Lafler v. Cooper*, 132 S. Ct. 1376, 1398 (2012) (Scalia, J., dissenting). Even in the companion case, *Missouri v. Frye*, in which counsel did not even tell the client about a plea offer, Justice Scalia argued that "the process was fair, [and] the defendant acknowledged the correctness of the conviction." *Missouri v. Frye*, 132 S. Ct. 1399, 1412 (2012) (Scalia, J., dissenting). Justice Scalia acknowledged that Frye's attorney made a mistake, but it "did not deprive Frye of any substantive or procedural right . . ." *Id.* Some scholars argue that the attorney is compliant in

The issue of passivity includes an overly restrictive view of the work of the defense lawyer as limited to inside of the courtroom. Although some Chilean observers have made this point, the change has been slow to develop. It is crucial to understand that the professional role of the public defender is broader than simply being present at court proceedings. It encompasses everything, beginning with the investigation. A defense lawyer must be actively involved in the case long before trial.¹⁶⁰

For the defense to play its envisioned role in the structure of Chile's adversarial system, a next generation of reforms must focus on empowering defense lawyers to play a more active, creative, and comprehensive part in the adjudication of crimes.¹⁶¹ In order to provide a meaningful check on the growing power of the prosecutor, Chilean public defenders should commit to an active defense based on independent investigations and the gathering of defense evidence to counter the prosecution theory.¹⁶² Unlike the inquisito-

this system of "legitimacy" by continuing in representations that may be limited by lack of resources. See Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1124-25 (2013), http://0-heinonline.org.lola.law.upenn.edu/HOL/Page?handle=hein.journals/waslee70&div=26&start_page=1089&collection=journals&set_as_cursor=0&men_tab=srchresults [http://perma.cc/V4YB-EHLH] (suggesting that by fulfilling ethical obligations, public defenders could "'cease to be an essential part of a fraudulent cover-up of the denial of fundamental rights to countless poor people who are caught up in a criminal justice system that is unethical, unconstitutional, and intolerably cruel.'" (quoting MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 71 (3d ed. 2004))). In deciding several important cases relating to defendants' rights, the U.S. Supreme Court "reiterate[d] the traditional legal conception of a defense lawyer based on the ideological perception of a criminal case as an *adversary, combative* proceeding in which counsel for the defense assiduously musters all the admittedly limited resources at his command" Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC. REV. 15, 18 (1967) (emphasis in original). Blumberg wonders, however, if "the Supreme Court's conception of the role of counsel in a criminal case square[s] with social reality[.]" *Id.*

¹⁶⁰ See OLIVEROS, *supra* note 155, at 215:

If any person has the right to legal defense and if the right to know the evidence constitutes a modality of such right, the investigation carried out by the defense lawyer, in order to determine the facts and the means by which they can be corroborated, shall not be considered effective unless fully realized, as the constitutional promise of acknowledgement to the right to defense.

¹⁶¹ See *id.* at 69 ("The defense quality of those charged or accused may be improved by means of a more creative and innovative approach that increases the level of debate and the requirements regarding the investigation and criminal prosecution.").

¹⁶² *Id.*

rial system, which is imagined as a neutral inquiry, the adversarial system is often compared to a game or contest between competitors:

As with other contests, such as football games, cricket matches, or even pool, a large number of procedural rules are necessary to ensure that the contest will be well-run and fair to all sides. As with other contests, fairness can be achieved only if the lawyers representing the respective parties are of equal ability and have equal resources.¹⁶³

Inquisitorialism envisions a passive defense lawyer, whose job is merely to ensure that the State administrators have complied with the appropriate procedures in reaching their conclusion. But adversarialism generally absolves the State of the responsibility of reaching the correct substantive conclusion, instead relying on the parties to reach an accurate result through a fairly administered process. For this reason, a passive defense lawyer can cause much more harm in an adversarial than an inquisitorial system.

4.3 *The Passive Defender and Mass Incarceration*

The Chilean public defender system was modeled in large part on the United States' public defender system. In the years since it adopted the adversarial system of criminal adjudication and the new system of criminal defense, Chile has struggled with a problem that exists in the United States: mass incarceration.¹⁶⁴

The prison population can be used as a marker for progress of the Chilean reforms in two ways. First, changes in prisoner composition indicate that the system is moving individuals through the criminal justice system more rapidly.¹⁶⁵ The majority

¹⁶³ James W. Diehm, *The Introduction of Jury Trials and Adversarial Elements into the Former Soviet Union and Other Inquisitorial Countries*, 11 J. TRANSNAT'L L. & POLY. 1, 6 (2001) (citing BARTON INGRAHAM, *THE STRUCTURE OF CRIMINAL PROCEDURE* 26–30 (1987)); see also JOHN LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 58 (1977) (providing an overview of Germany's criminal procedure system).

¹⁶⁴ See RIEGO, *supra* note 4, at 355 (discussing the growing concern regarding the relationship between the Chilean criminal justice reforms and the increase in the country's prison population).

¹⁶⁵ See RIEGO & DUCE, *supra* note 73 and accompanying text (discussing and evaluating the reform of preventive detention and criminal procedures in Chile and other parts of Latin America).

of inmates have already been sentenced.¹⁶⁶ The old codes of procedure took a long time to resolve cases even with the defendant in custody—only 6.9% of cases were closed in under fifteen months.¹⁶⁷ As of 2007, under the new procedural codes, 36.4% of cases in which the defendant was in custody were closed within fifteen months.¹⁶⁸ One of the goals of the reform was to “manag[e] and reduc[e] the backlog of the criminal courts and minimiz[e] the number of cases ending without adjudication or sentence.”¹⁶⁹ Increasing access to justice is an important part of improving the judicial system. This efficiency, however, may also relate to the second marker of Chilean “progress”—the prison population has increased significantly since the reforms.¹⁷⁰

| Year | Prison Population Total | Prison Population Rate (Per 100,000 of national population) |
|------|-------------------------|---|
| 1980 | 15,230 | 136 |
| 1985 | 20,235 | 167 |
| 1990 | 22,593 | 171 |
| 1995 | 22,027 | 153 |
| 2000 | 33,050 | 215 |
| 2002 | 34,901 | 222 |
| 2004 | 36,374 | 226 |
| 2006 | 39,417 | 240 |
| 2008 | 48,826 | 291 |
| 2010 | 54,628 | 320 |
| 2012 | 51,882 | 298 |
| 2014 | 45,501 | 257 |

Although the prison population has declined somewhat in the last few years, it still remains significantly higher than in the

¹⁶⁶ See Riego, *supra* note 4, at 352–53 (explaining that, in 2007–2008, approximately three-quarters of inmates had been sentenced while the rest awaited trial); see also *World Prison Brief: Chile*, INST. FOR CRIMINAL POL’Y RESEARCH, <http://www.prisonstudies.org/country/chile> [https://perma.cc/PS9R-U7WJ] (last visited Jan. 17, 2017) [hereinafter *World Prison Brief*] (listing a pretrial detainee rate of 33.8% as of November 30, 2016).

¹⁶⁷ Riego, *supra* note 4, at 352.

¹⁶⁸ *Id.*

¹⁶⁹ Cousino, *supra* note 4, at 328.

¹⁷⁰ *World Prison Brief*, *supra* note 166.

pre-reform years.¹⁷¹ This increase in the prison population is likely due to a number of factors, but the procedural reforms seem likely to have played a major role.

Chile is one of the safer countries in Latin America, with an average homicide rate of fewer than four per 100,000 inhabitants per year for almost the last decade (2005–2012).¹⁷² Chile, however, has a relatively high prison population rate. Some of this is certainly due to harsh drug laws. In 2005, Chile passed Law 20.000, which increased penalties for possession of drugs like marijuana and established penalties for “micro-trafficking” – possession of smaller quantities of drugs.¹⁷³ Both the United States and Chile have struggled with mass incarceration, and harsh drug laws appear to be a factor in the size of both countries’ prison populations.¹⁷⁴

¹⁷¹ *Id.*

¹⁷² *Intentional Homicides (per 100,000 people)*, WORLD BANK, <http://data.worldbank.org/indicator/VC.IHR.PSRC.P5> [<https://perma.cc/Y6KE-WHNW>] (last visited Nov. 16, 2015).

¹⁷³ *Current Drug Laws in Chile*, TNI, (Jan. 1, 2010), <https://www.tni.org/en/article/current-drug-laws-chile> [<https://perma.cc/TKM5-85BH>] (last visited Nov. 16, 2015). See Jorge Kawas, *Harsher Prison Sentences Don't Curb Crime*, AMERICAS Q. (Winter 2015), <http://www.americasquarterly.org/content/harsher-prison-sentences-dont-curb-crime> [<https://perma.cc/9GXB-CHPG>] (last visited Nov. 16, 2015) (discussing the relationship between harsher drug sentencing laws and Chile’s prison conditions). As can be seen in the table above, the number of individuals incarcerated increased substantially between 2004 and 2006. Chile’s prison population, however, has declined since 2012. This may be due to a 2013 amendment to Law 18.216, providing alternative sentences for drug- and alcohol-related offenses. Law No. 18.216, as amended by Decreto No. 629, Septiembre 17, 2013, D.O. (Chile). See Javiera Blanco Suarez, *Medias alternativas a la reclusión: Freno a la delincuencia*, DERECHO PENAL 20, 22 (Apr. 4, 2011), http://www.pazciudadana.cl/wp-content/uploads/2013/07/2011-04-04_Medidas-alternativas-a-la-reclusi%C3%83%C2%B3n-freno-a-la-delincuencia.pdf [<https://perma.cc/3ANQ-YHBX>] (contemplating alternatives to incarceration, such as rehabilitation); see also Javier E. Velasquez Valenzuela, *Origen del Paradigma de Riesgo*, 9 POL. CRIM. ONLINE 58, 59 (2014), <http://www.scielo.cl/pdf/politcrim/v9n17/art03.pdf> [<https://perma.cc/5HEV-LXCA>] (noting changes to Law 18.216 and discussing the origin and effect of technologies predicting recidivism of criminals). See generally Law No. 20.000, Febrero 2, 2005, D.O. (Chile) (indicating that harsher drug laws may certainly be a contributing factor to the increase in Chile’s prison population – individuals sentenced for drug offenses increased significantly in the five years following the passage of Law 20.000).

¹⁷⁴ Kawas, *supra* note 173 (explaining that harsher drug laws created a “substantial” impact on Chile’s prison system). See Ernest Drucker, *Drug Law, Mass Incarceration, and Public Health*, 91 OR. L. REV. 1097, 1099 (2013) (quoting “The U.S. incarceration rate climbed steadily throughout a thirty-year period beginning in the mid-1970s – coinciding with the most aggressive era of the United States’ War on Drugs.”); but see John Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1237, 1239–40 (2012) (exploring the variety of causes, including in-

The Chilean adversarial system was intended to expedite adjudication and deliver justice more efficiently.¹⁷⁵ From the standpoint of efficiency alone, it has succeeded. The reformers introduced a number of innovations intended to “make conflict resolution more efficient, without necessarily going all the way through to sentencing at trial.”¹⁷⁶ Some of those innovations include “conditional suspension of proceedings (similar to probation),” and the “abbreviated proceeding (similar to a plea bargain).”¹⁷⁷ Treating efficiency as a premium was intended to remedy some of the worst abuses of the inquisitorial system—namely slow and “exceedingly bureaucratic proceedings” that left a substantial percentage of prisoners awaiting sentencing for an indefinite period of time.¹⁷⁸ The old system was also shockingly one-sided.¹⁷⁹ The new system is certainly efficient, and is facially less one-sided, but these changes may have had an unintended consequence in that they appear to have streamlined convictions, resulting in a substantial increase in Chile’s prison population.¹⁸⁰ For that reason, efficiency may not be the best marker of reform. Instead, examining the nature of the process itself as well as whether its participants—judges, prosecutors, and defenders—are truly invested in that process may be a better way to identify whether meaningful change has occurred.¹⁸¹

The other primary goal of the reforms was improving protections for individual rights, including “basic due process standards

creased prosecution rates, increased crime rates, and changes in economic conditions, political attitudes, and racial policies, behind the rise in prison growth).

¹⁷⁵ See Véliz, *supra* note 45, at 1367 (noting that the new system emphasizes immediacy, transparency, and efficiency); see also Cousino, *supra* note 4, at 328 (explaining that one of the main goals of the reform was “efficiency, including managing and reducing the backlog of the criminal courts and minimizing the number of cases ending without adjudication or sentence”).

¹⁷⁶ Véliz, *supra* note 45, at 1367.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1365.

¹⁷⁹ See U.S. DEP’T OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, *supra* note 72 and accompanying text (discussing inequalities in the old justice system—specifically the use of law students as defenders).

¹⁸⁰ See Cousino, *supra* note 4, at 328 (explaining that the reforms were intended to lead to decisive conclusions for each criminal matter). It is not unreasonable to infer that the prison population would increase under those circumstances, particularly after implementation of harsher drug laws. See also *supra* notes 173–174 and accompanying text (discussing Chile’s drug laws).

¹⁸¹ See *infra* Part 5 (discussing reforms in the public defender systems of various countries).

for criminal procedure such as the right to a trial, judicial review, access to counsel and an impartial court.”¹⁸² There is, however, a tendency to confuse procedural reforms with true substantive change in the justice system. As important as procedure is to the justice system, it is meaningless without actual substance and investment by the members of the system.¹⁸³

Participants in any criminal system may “rely on doctrine to assure themselves that the sanctions they inflict follow inevitably from the demands of neutral, disinterested legal principles rather than from their own choice and power.”¹⁸⁴ Despite improved procedural guarantees, Chile’s reforms may not be providing *substantive* justice.¹⁸⁵ Instead, it has created a series of formal procedures that are observed as individuals are charged, tried, and sentenced.¹⁸⁶ Although the judiciary and the prosecutor have em-

¹⁸² Cousino, *supra* note 4, at 328.

¹⁸³ *Infra* Part 5. An example of this phenomenon is the experience of the United States with capital punishment over the past four decades. Since the United States Supreme Court held that the then-existing system of capital punishment violated the prohibition against cruel and unusual punishment in 1972 in *Furman v. Georgia*, 408 U.S. 238 (1972), states have implemented a panoply of procedural developments – bifurcated sentencing proceedings, proportionality review, and enhanced abilities for defendants to introduce mitigation evidence, and others – aimed at rationalizing the decision to impose death and at creating certainty. See *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (holding that the Eighth Amendment prohibits the imposition of the death penalty on juveniles); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (concluding that the Eighth Amendment prohibits capital punishment of intellectually disabled persons). The Court has reduced the number of individuals eligible for the death penalty, but some of the same overrepresentation issues remain. See also Jordan Steiker & Carol Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 358 (1995) (explaining that the *Furman* decision, along with other decisions, spawned an “overly complex, absurdly arcane, and minutely detailed body of constitutional law”). But see *id.* at 358–59 (noting that some critics believe that the additional procedure has done nothing to remedy disparate overrepresentation on death row and that the “Court has done no more than ‘tinker with the machinery of death’” (quoting *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting))). Despite these enhanced protections, many believe that the current system continues to produce unjust, racially disparate, and irrational outcomes.

¹⁸⁴ Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 384–85 (1983).

¹⁸⁵ Chile does have certain failings, including problems with eyewitness identification procedures and a lack of protocols for dealing with false confessions. See Véliz, *supra* note 45, at 1371 (2012) (noting the key issues that lead to wrongful convictions). These are mainly implicated in dealings with police officers, but Véliz reports “problems with the relationship between prosecutors and police,” specifically that prosecutors will report to the judge that the police complied with the law even if their conduct violated the law. *Id.*

¹⁸⁶ See Riego, *supra* note 4, at 351 (discussing the implementation of new pro-

braced their roles in the system, the residual passivity and deference of defense attorneys have created a system in which, although the letter of the law is followed, the spirit is a secondary consideration.¹⁸⁷ True judicial reform requires more than a procedural framework and cannot occur until new principles and cultural norms are well-established.¹⁸⁸ In his discussion of the Chilean reforms, Carlos Rodrigo de la Barra Cousino noted that Cristian Riego believed that the “high standards for defendant’s rights introduced with the Reform should diminish the system’s effectiveness on sending people to jail.”¹⁸⁹ Cousino, however, believed that “[t]he tensions between the two driving sources of the Reform, efficiency and protection, will clash and the outcome is likely to be an increased rate of incarceration.”¹⁹⁰ Based on the increase in incarceration, Cousino’s hypothesis appears to be correct.

The new system could theoretically operate more effectively both in reducing the number of people in jail and ensuring a swift process if defense attorneys could embrace the adversarial challenge head-on and engage in greater investigation and more energetic and zealous advocacy.¹⁹¹ Enthusiasm alone, however, is insufficient. Although the United States has a number of active, energetic, and committed public defenders and indigent defense organizations, it also has the highest prison population rate in the world.¹⁹² United States public defender organizations are chroni-

cedures in regards to case management). Riego explains that the new procedures for case management have:

“[a]llowed a large number of cases to be absorbed in the system, produced significant decreases in case duration and, in general, made Chile’s criminal justice system appear to be effective in terms of its ability to complete the procedures provided for by law for an enormous volume of cases and in turn producing decisions for each of them.”

Id.

¹⁸⁷ Véliz, *supra* note 45, at 1366 (“A justice system may be theoretically perfect and fail to provide its benefits to society due to the failings of those charged with performing the primary functions the justice system entails.”).

¹⁸⁸ See Jonathan L. Hafetz, *supra* note 33, at 1770–71 (indicating that “Judicial reform may prove more political and cultural than technical in nature . . . [M]odernization of the judiciary [in the case of Peruvian reforms] will not bring about meaningful reform in pretrial detention and other areas unless the underlying principle of judicial independence is firmly established”).

¹⁸⁹ Cousino, *supra* note 4, at 346.

¹⁹⁰ *Id.*

¹⁹¹ See *supra* Part 4.1–2 and accompanying text (discussing the defenders’ lack of a clear mission).

¹⁹² See Roy Walmsley, WORLD PRISON POPULATION. LIST 1 (2013) (reporting the

cally underfunded, and defenders are overworked and underpaid.¹⁹³ By contrast, the Chilean public defense system has access to funding that goes unused and is seen as a valuable government job by aspirants.¹⁹⁴ Although an increase in investigation may create some delays for adjudication, this could lead to better outcomes for defendants and potentially reduce incarceration. For Chile's reforms to be truly effective, its defenders must embrace their new roles and use available resources to develop knowledge, skills, and attitudes that are commensurate with the responsibilities that they are expected to handle in the new adversarial system.

4.4 Motivation and Idealism among Public Defenders

Any effective indigent defense organization must grapple with the issue of motivation.¹⁹⁵ The decades-long experiment with public defenders in the United States has shown that inadequate funding alone is not the reason for a generally ineffective system.¹⁹⁶ The role of "defender" in a truly adversarial system requires an intrinsic motivation that is more a product of culture than of legislation. Absent a strong culture of zealous representation, evidence suggests that individual defenders and defender organizations are unable to sustain a truly adversarial stance. Defense lawyers tend to adapt to the system within which they operate or else give up alto-

United States rate of incarceration as 716 per 100,000 inhabitants).

¹⁹³ See *infra* notes 217–218 and accompanying text (discussing the "burnout" phenomenon among public defenders).

¹⁹⁴ See *supra* Part 4.3 (stating that although the motivation appears to be financial, nurturing a culture of defender idealism may inspire more students to seek these positions and engage more fully with the issues).

¹⁹⁵ See Charles Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1240, 1240–41 (1993) (discussing the difficulty many public defenders face in maintaining enthusiasm and motivation); see generally Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161 (2009) (indicating that a change in cultural values must occur in order to provide satisfactory defense for indigent clients); Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177 (2008) (arguing that cultural factors play a large role in the inadequacy of representation of indigent defendants).

¹⁹⁶ See generally Rapping, *Shaky Ground*, *supra* note 195; Rapping, *Directing the Winds of Change*, *supra* note 195 (providing an overview of why the public defender system in the United States is generally ineffective).

gether.¹⁹⁷

Those familiar with the Chilean system agree: motivation is a consistent problem for defenders. Georgy Schubert, former national head of the Chilean public defender system, described problems that public defenders experience in remaining motivated every day, due to the stresses inherent in the job. Schubert said that some well-meaning lawyers eventually conclude that the effort is just not worth the result.¹⁹⁸ Schubert argued, however, that everyone in the justice system has a responsibility to change that attitude and to encourage the work of public defenders actually playing an adversarial role within the system.¹⁹⁹

Problems of social stigma and motivation among public defenders are global and intractable. A study of public defenders in Venezuela in 1993 could unfortunately have been written today about the problems facing public defenders in many parts of the United States and other countries. The Venezuelan public defenders in the study “sense a great social distance between themselves and their clients, view them as guilty and clearly are not disposed to make any effort to defend them.”²⁰⁰ The attitude of the lawyers described above has a predictable counterpart in the attitude of their clients:

Contact between defendants and public defenders is so superficial that many interviewed prisoners ignore the fact that they have public counsel and when asked about the role of the public defender at court hearings where the presence of counsel is required, the prisoners make no distinction among the roles [of the judge and public defender]; rather, all of the judicial functionaries are viewed together as ‘those who want to screw’ [the prisoners.]²⁰¹

Similar descriptions of the difficulties facing public defenders

¹⁹⁷ See Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1206–07 (2004) (analyzing the reasons behind public defenders’ decisions to “defect” to another field); see generally AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* (2009) (examining everyday courtroom failures).

¹⁹⁸ Interview with Georgy Schubert, former national head of the Chilean public defender system (Oct. 27, 2014).

¹⁹⁹ *Id.*

²⁰⁰ See Sutil, *supra* note 11, at 283 n.20 (quoting Rafael Pérez Perdomo, *Informe sobre Venezuela*, in SITUACIÓN Y POLÍTICAS JUDICIALES EN AMÉRICA LATINA, CUADERNOS DE ANÁLISIS JURÍDICO 588 (Jorge Correa Sutil, ed., 1993)).

²⁰¹ *Id.*

abound, both in the U.S. context and in Latin America.²⁰²

Those lawyers who become public defenders for idealistic reasons in Chile tend to describe their motivations in the language of human rights.²⁰³ Perez described one of the primary motivations for idealistic new public defenders as protection of their clients' human rights.²⁰⁴ According to Schubert, the source of inspiration is more a sense of human rights, and he believes that this is true all over Latin America.²⁰⁵ The ideals of dignity and equality animate people to do this kind of work. "The inspiration is that if the new system respects the rights of this defendant, then we are strengthening society."²⁰⁶ One can expect, however, that as the era of dictatorship and gross human rights violations in Chile and throughout Latin America recedes further into history, a motivation based entirely on maintenance of human rights norms will lose its salience and immediacy, and new motivations for public defenders will be needed.

Leonardo Moreno agrees with this characterization. He thinks that the type of person who chooses a career in criminal defense in Chile has already changed significantly in the years since the passage of the reforms.²⁰⁷ Moreno explained that immediately after the creation of the DPP and other reforms, everyone who was hired or began to do this work had a natural propensity for criminal defense.²⁰⁸ Today, it has become more of a civil service job for many, without any deeper desire or internal motivation to engage in criminal defense work.²⁰⁹ Moreno said that he believes that there are now two distinct classes of lawyers who do criminal defense in Chile: those who are committed for reasons of idealism, and those who are drawn to the steady paycheck and job securi-

²⁰² *Id.* at 283 n. 18-20:

"Almost invariably, the quality of the legal representation provided by these government lawyers is very low – the office of the public defender is likely to be understaffed and overburdened and the nature of the public defender's function or service is often negatively perceived by both the public defender and the person whom he or she represents."

²⁰³ *Id.*

²⁰⁴ Interview with Perez, *supra* note 95.

²⁰⁵ Interview with Schubert, *supra* note 198.

²⁰⁶ *Id.* (author's translation).

²⁰⁷ Interview with Leonardo Moreno, Professor, Alberto Hurtado University in Santiago, Chile (Oct. 27, 2014), *supra* note 139.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

ty.²¹⁰

But as the system continues the transition from an inquisitorial to an adversarial system, different challenges, stresses, and motivations will confront the people who seek to occupy the role of the public defender. As the focus of adjudication becomes public, oral, and lawyer-centered, the day-to-day job of the public defender becomes more stressful. And as the ethical model more wholly embraces a zealous defense committed exclusively to the wishes of the client (as opposed to the interests of the state in an inquisitorial model), public defenders in Chile and other newly adversarial systems will likely face the social stigma and potential burnout that has accompanied other adversarial defenders. The defense lawyer in an adversarial system has greater moral leeway than a lawyer in any other context, which can lead to a more stressful and more stigmatized professional life. The defense lawyer has been called an “amoral technician”²¹¹ whose work, although unquestionably justified, can lead to moral unease.²¹² Almost a half-century ago, in *United States v. Wade*,²¹³ Justice White articulated the proper role of a defense attorney in an adversarial system:

[D]efense counsel has no . . . obligation to ascertain or present the truth. . . . If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State’s case in the worst possible light, regardless of what he thinks or know to be the truth.²¹⁴

Although few today would question the ethical appropriateness of such conduct by a defense attorney, there has been far less examination into the moral dissonance that a public defender might experience while undertaking such activities in the course of representing a client, and how this phenomenon contributes to rates of burnout among young public defenders.

The related issues of justification, motivation, and inspiration

²¹⁰ *Id.*

²¹¹ Ogletree, *supra* note 195, at 1248 (quoting Wasserstrom, *supra* note 16, at 6).

²¹² *See id.* at 1249 (discussing ethical and moral issues that plague public defenders).

²¹³ *United States v. Wade*, 388 U.S. 218 (1967).

²¹⁴ *Id.* at 256–58.

of public defenders have been topics of scholarship in the United States for at least two decades.²¹⁵ Newly adversarial systems can expect to encounter many of the same problems as their systems mature into adolescence and beyond. By examining the problems encountered in the United States and proposals for reform, Chile and other such countries may be able to address these problems early and incorporate some of the successful ideas into the training and culture of public defender offices.

Charles Ogletree pointed out the vacuum in legal literature on motivations for those involved in indigent criminal defense. In an adversarial system, virtually everybody agrees on the moral justification and the practical need for vigorous and competent criminal defense lawyering. This focus on justification, Ogletree explains, ignores the more important and vital question of motivation. The theoretical justifications for criminal defense lawyering in an adversarial system are by now well-settled, but these justifications “are insufficient to ensure that people will become and remain public defenders”²¹⁶ and to engage in the zealous lawyering that an adversarial system demands.

Examining the indigent defense systems in the United States, Ogletree describes the troubling phenomenon of “burnout” among public defenders and attributes the cause, at least in part, to the failure of legal scholars “to develop sufficient motivations for lawyers to engage in criminal defense—particularly defense of the indigent.”²¹⁷ As he deploys the term, “burnout” refers both to public

²¹⁵ See, e.g., Barbara Allen Babcock, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267 (2006) (describing the history of the public defender); Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104 (2009) (explaining the impact of the public defender’s excessive caseload); Ogletree, *supra* note 195 (examining the problem of burnout amongst public defenders); Sadiq Reza, *Religion and the Public Defender*, 26 FORDHAM URB. L.J. 1051 (1999) (discussing the role of religion in relation to public defender motivation and conduct); Rodney Thaxton, *Professionalism and Life in the Trenches: The Case of the Public Defender*, 8 ST. THOMAS L. REV. 185, 185–86 (1995) (noting the perception that public defenders are not “real lawyers”).

²¹⁶ Ogletree, *supra* note 195, at 1294. Ogletree adds:

Even if she agrees (as nearly all public defenders do) that vigorous defense of the guilty is morally justified in our adversary system, that lawyer may not zealously represent a criminal defendant absent a sufficiently compelling *motivation*— an impetus to do the work, rather than a theory that merely argues that it is *defensible*, *excusable*, or *laudable* for someone to do that work.

Ogletree, *supra* note 195, at 1242.

²¹⁷ *Id.*

defenders moving on to other areas of practice which might be more lucrative and less stressful and to public defenders remaining on the job but providing underzealous representation for their clients. In this context, Ogletree defines “burnout” as “the failure of one’s moral justification for undertaking indigent defense work to provide a day-to-day motivation for getting up each morning, putting on a suit, and going to the office or to court.”²¹⁸

Ogletree distinguishes between a justification as “a morally or legally acceptable reason for taking action” whereas a motivation “persuades a particular person to take a certain action.”²¹⁹ A justification answers the question “why should it be done?” and a motivation answers the question “why should I do it?”²²⁰ A misplaced continued focus on developing justifications for zealous criminal defense has led to a failure to address the more pressing question of motivation and contributed to the current crisis in indigent criminal defense in the United States.

In an effort to redirect the scholarly focus from justifications to motivations, Ogletree offers the dual motivations of empathy and heroism. He defines empathy as “understanding the experiences, behavior and feelings of others as they experience them.”²²¹ Empathy in action for Ogletree meant treating his clients as friends; because of this bond, he felt greater motivation to communicate with his clients and assist them—even clients accused of committing terrible acts.²²² When an attorney builds a caring and empathetic relationship with a client “not only does she want to assist him through the complex maze of our legal system, but she also wants him to succeed; as a result, her defense is zealous.”²²³ Ogletree argues that empathy transforms attorneys into good attorneys and resolves the problem of burnout.²²⁴ The other motivation, heroism, taps into an individual’s competitive nature. Some public defenders find “glory in the ‘David versus Goliath’ challenge of fighting the state and the battle of wits that characterizes the courtroom

²¹⁸ *Id.* at 1267–68.

²¹⁹ *Id.* at 1244. Barbara Allen Babcock describes one justification as “The Garbage Collector’s Reason.” Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 177 (1983). To put it simply, “it is dirty work, but someone must do it.”

²²⁰ Ogletree, *supra* note 195, at 1244.

²²¹ *Id.* at 1271–72.

²²² *Id.* at 1272–73.

²²³ *Id.* at 1274.

²²⁴ *See id.* at 1274–75 (listing ways in which empathy enhances attorney skill).

drama."²²⁵ Heroism allows an attorney to "argue more forcefully and persuasively."²²⁶ It motivates an attorney because he feels needed and understands that his client relies on him.²²⁷

In a response to Ogletree, Abbe Smith examines some stated motivations for public defenders and discusses those that tend to sustain over time and, by contrast, those that either fail to sustain or in fact prove to be counter-productive.²²⁸ Smith takes as her starting point Ogletree's paradigm of heroism and empathy as motivating values for modern public defenders and critiques it as unrealistic and perhaps even counter-productive in that it asks too much of public defenders and thus hastens feelings of burnout and shortens the amount of time that good lawyers will remain public defenders.²²⁹ Empathy and heroism may not be strong enough motivation to counter the stress and stigma attached to being a defense attorney in an adversarial system.²³⁰ Public defenders face long hours and low wages. Public defenders lose often and may feel overwhelmed and at a disadvantage when comparing the resources available to prosecutors.²³¹ The adversarial system functions best when both parties are equally prepared, something that may be nearly impossible for public defenders, regardless of personal diligence or motivation.²³² It is easy to lose heart in the face of those odds. By contrast, defenders in the inquisitorial system may not experience the same stresses. The length of time required for inquisitorial matters means that defenders in that system may not be as overworked. Their role is often formal and does not embrace the model of zealous advocacy that can be as exhausting for

²²⁵ *Id.* at 1276.

²²⁶ *Id.* at 1277.

²²⁷ *Id.*

²²⁸ Smith, *supra* note 197, at 1208-18 (discussing various motivations for public defenders).

²²⁹ *See id.* at 1238 (theorizing that the Ogletree model is primarily aimed at encouraging young lawyers to do defense work for short periods of time, rather than building a career in the field).

²³⁰ *See* Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 451 (1999) [hereinafter Smith and Montross, *Calling*] ("[O]n the whole, criminal defense lawyers are [regarded as] dishonorable or disreputable, immoral or amoral, manipulative or heartless.").

²³¹ *See* Ogletree, *supra* note 195, at 1240-41 (discussing problems generally faced by public defenders).

²³² *Supra* Part 2 (discussing the theories behind the adversarial system); *see also* Ogletree, *supra* note 195, at 1276 (explaining that some lawyers become public defenders because they understand the disadvantages defendants face and want to balance the scales by representing the underdog).

the attorney as it is beneficial to the client.

Smith first takes a look at the “classic motivations” that are given by public defenders, foremost among them a focus on civil libertarianism. An exclusive philosophical focus on civil liberties or rights comes up wanting as a means to sustain public defenders through the difficulties of their work.²³³ Concluding that “constitutional ideals alone are insufficient to sustain a career in criminal defense,”²³⁴ Smith quotes a former public defender who quit after four years to become a prosecutor: “I am at a point right now where I need more than a philosophical construct, even one as noble as the Sixth Amendment. I want direct . . . evidence that I am doing good, that I am doing justice.”²³⁵ Of those public defenders in Chile who express their motivations in terms of idealism, most express them in terms close to these, or in terms of norms of international human rights. Either way, the reliance on a philosophical construct alone is likely to fall short in the manner Smith describes in providing a long-term motivation and inspiration for a public defender in a truly adversarial system.²³⁶

Smith then challenges Ogletree’s paradigm. Empathy, she concludes, “is often difficult to sustain in view of the volume and nature of the work”²³⁷ and ultimately blurs personal and professional boundaries in a way that can increase the difficult and all-consuming nature of the work of the public defender.²³⁸ The extreme empathy Ogletree prescribes for each and every client that a public defender represents greatly increases the already-heavy burden on the defender’s shoulders and can end up shortening her career, rather than sustaining her energy.²³⁹ Heroism proves to be an unsatisfying motivation for Smith, as its extreme focus of “win-

²³³ See Smith, *supra* note 197, at 1211 (“Inevitably, idealism (seeing things as they should be rather than as they are) comes up against bitter contrasting reality (admitting ‘the noble purpose of our criminal courts . . . has gone awry’), causing disillusionment.”).

²³⁴ *Id.*

²³⁵ *Id.* at 1210–11 & n.26.

²³⁶ Smith does not completely discount idealism as motivation, noting that “[b]elieving that the fight itself makes a difference, whether or not one prevails in the end, is both powerful and essential for defenders.” *Id.* at 1211.

²³⁷ *Id.* at 1222.

²³⁸ *Id.* at 1220–24.

²³⁹ *Id.* at 1227 (“If Professor Ogletree was ‘devastated’ by the conviction of a client who was not terribly sympathetic and was likely guilty—how much more devastation could he withstand?”).

ning against all odds” provides a lift that is “fleeting at best”²⁴⁰ and limited in the broader context of an economic and criminal justice system that so wholly disempowers and devalues the lives of those who are the subjects of the criminal justice system.²⁴¹

In place of heroism and empathy, Smith proposes a three-part paradigm of motivations: respect for one’s client, pride in the professional craft of criminal defense, and a sense of outrage at the injustices of the system.²⁴² Respect “embrac[es] the client’s dignity, autonomy, and humanity.”²⁴³ Smith argues that the attorney’s role is as an advocate, not a friend.²⁴⁴ Maintaining appropriate boundaries while respecting the client’s choices as an independent person increases a lawyer’s efficacy and career longevity.²⁴⁵

Craft, as defined by Smith, is much broader than trial skills and courtroom advocacy; she proposes that “the craft of defending can be summarized as the ability to work with sometimes difficult people and get them to make better decisions than they would otherwise make.”²⁴⁶ Taking pride in one’s professional craft—in a “job well done” is important to defenders because they often lose.²⁴⁷ Smith concludes that “[a] central part of the craft of defending is pushing the criminal justice system to step up. Defenders are the ‘institutional opposition.’”²⁴⁸ Finally, Smith sees outrage as a motivation and an inspiration to action.²⁴⁹ She explains that clients face hopeless circumstances and overwhelming odds. “Outrage motivates [defenders] time and time again to put [themselves] between [their] clients and the threat of loss of liberty.”²⁵⁰

More than a half-century after *Gideon v. Wainwright*,²⁵¹ scholars and lawyers in the United States continue to struggle with not only the formal but also the cultural aspects of indigent defense lawyering. Other countries that have moved recently toward an adver-

²⁴⁰ *Id.* at 1234–35.

²⁴¹ *Id.* at 1237–38.

²⁴² *Id.* at 1243–64.

²⁴³ *Id.* at 1244.

²⁴⁴ *Id.* at 1246.

²⁴⁵ *Id.* at 1250.

²⁴⁶ *Id.* at 1256. Smith includes “clients, prosecutors, court staff, and judges” in her category of “sometimes difficult people.” *Id.*

²⁴⁷ *Id.* at 1252.

²⁴⁸ *Id.* at 1255.

²⁴⁹ *Id.* at 1259–60.

²⁵⁰ *Id.* at 1263.

²⁵¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

sarial system have done so for reasons distinct from the United States and within very different historical contexts. The cultural motivations that might make sense in the United States context might have very little resonance in a system as different as that in Chile or other Latin American countries. My argument is not that Chile should adopt a model of public defender culture embracing heroism and empathy; nor one focused on craft, professionalism, and outrage; nor another model entirely. But what has not yet happened in Chile and other countries with a newly adversarial criminal justice system is the engagement with these broad questions: What do we want our public defenders to do? By what do we want them to be motivated? And how will we know when they are succeeding? The conversation that has developed in the United States over the past couple of decades has provided a starting point for this conversation, a conversation that remains unsettled and active in the United States. But the motivations that served for defense lawyers in an inquisitorial system are entirely insufficient and ill-suited for those working within an adversarial system. For Chile to define the role of the public defender, it needs to engage these questions openly and broadly.

5. SECOND-GENERATION REFORMS FOR THE DEFENSE LAWYER IN A NEWLY ADVERSARIAL SYSTEM

Many adversarial systems pay lip service to the ideal of an active, zealous, and adversarial public defender as essential to the process while not providing either the resources or the legal culture to allow for the realization of such an ideal.²⁵² Every system

²⁵² See, e.g., Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 60 (1991) ("A criminal justice system may theoretically survive by creating the perception of adherence to fair process norms. However, in an adversary system, where Sixth Amendment rights are at the fulcrum of the process, mere 'perception' is not sufficient."); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 513 (1993) (arguing that the current system of providing defense attorneys is hampered by the idea that "lawyers are qualified to do anything" regardless of individual attorney competency in criminal matters); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 627 (1986) (arguing that underfunding of defense agencies threatens the Sixth Amendment right to effective assistance of counsel); Kenneth B. Nunn, *The Trial as Text: Allegory, Myth, and Symbol in the Adversarial Criminal Process – A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 802 (1995) ("[v]irtually every public defender office in the country is vastly underfunded.").

embodies some disconnect between the rhetoric of the system and the reality of practice. While the formal structures of an adversarial system can appear to be set up to favor the rights of the individual accused over the interests of the state, the reality is often quite different. The passive, acquiescent, and ineffective public defender in any system can function as a fig leaf, masking and legitimizing the injustice of the system as it truly functions.²⁵³ At the time of the reforms, some Chilean academics were aware of this phenomenon in the United States criminal justice system and concerned about replicating a system in which the defense lawyer is relatively powerless compared to the prosecutor. Under these circumstances, the resulting process is not a battle between two equal adversaries, as the rhetoric of the system would have it appear.²⁵⁴

One observer believed that Chile's inquisitorial tradition might be harnessed to serve the objectives of the new adversarialism:

The greatest challenge in reconstructing the public defenders will be to set up the minimum conditions to bring the rhetorical advances to reality. Here, the inquisitorial tradition may play an important role if managed in the correct direction. The active inquisitorial judges should readjust their capacity in order to be the guardians of the minimum standards for defense at trial.²⁵⁵

Such prescriptions were correctly grounded in observations of the United States' experience with public defenders. Although some are quite successful in providing the meaningful check on

²⁵³ Public defenders willing to take risks may be able to achieve significant change given their importance in the justice system. Abbe Smith relates one anecdote describing an effective defender response to injustice. After significant budget cuts, the Jefferson County Public Defender's office stopped representing indigent people in involuntary commitment proceedings. "The result was the release of four involuntarily committed former clients and an order by the Chief Jefferson District Judge that the official in charge of the state budget either restore the public defenders' funds or be held in contempt." Smith, *supra* note 197, at 1257 n.296.

²⁵⁴ See Cousino, *supra* note 4, at 349:

[T]he unequal social distribution; the power to define the crimes; the biased and oversimplified media coverage of the criminal issue; the selective police enforcement; limited access to counsel among poor people; and the extensive prosecutorial advantages in the investigative tools and resources. All these factors, in one way or another, favors the prosecutor.

²⁵⁵ *Id.* at 350. The emphasis on the judiciary as the guardians of "minimum standards" suggests that someone anticipated that public defenders culture might remain grounded in a passive, inquisitorial mode.

state power that the system articulates as its objective, the reality in most jurisdictions is a system in which public defenders are in a “diminished position”²⁵⁶ relative to the prosecution, meaning they suffer from resource problems and a lack of qualified or sufficiently trained lawyers to make the rhetoric of the right to counsel a reality.

Aside from the well-documented financial challenges of public defenders in the United States, Chilean academics and reformers were aware of non-financial challenges that could best be described as cultural. While the reforms were being debated prior to their implementation, Carlos Rodrigo de la Barra Cousino noted the “hostile environment” that public defenders in the United States face due to the public’s perception of their role within the system.²⁵⁷ Cousino described the difficulties that U.S. public defenders face in establishing productive relationships with their clients due to heavy caseloads, and describes the job as placing a “heavy psychological burden” on those who do it.²⁵⁸ As a result, Cousino writes, many public defenders either leave that job or “develop a disillusioned and cynical approach about themselves.”²⁵⁹ Taking the United States experience as a cautionary tale, Cousino argues that Chile must create a public defender equal to the prosecutor “not only at the rhetorical level but also at implementation,” which would mean “a central institutional office, with a high prestige profile similar to the prosecutors.”²⁶⁰

²⁵⁶ See *Id.* at 350–51 (discussing challenges U.S. public defenders face and the consequences of these challenges).

²⁵⁷ *Id.* at 351 (“The public’s perception about their role creates a hostile environment against their function. As stated by Ogletree, ‘public defenders are criticized at least as much for doing their job well as for doing it poorly.’” (quoting Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 87 (1995))).

²⁵⁸ *Id.* (explaining that “complexities and limitations that public defenders face inside and outside the trial place a heavy psychological burden on the individuals . . . [t]hese aspects must be considered when reconstructing the public defenders since the magnitude of this task under the adversarial premises is as important as the prosecutor’s case.”).

²⁵⁹ *Id.* (citing Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBLEMS 81, 87–89 (1995)).

²⁶⁰ *Id.* One of the criticisms of the Chilean reforms is that the DPP lacks equivalent constitutional status with the prosecutorial and judicial branches. Interview with Claudio Perez, *supra* note 95 (stating that “concretely” they have not had any problems due to this lack of symmetrical authority, but that it could conceivably become a problem under future administrations. So far, though, the DPP has not had any problems with its budget and he has seen no difference in treatment of the DPP by the various national governments that have been in power

In recent years, scholars and leaders in the defense bar in the United States have increasingly focused on culture as a critical element to any successful public defender system. Robin Steinberg, the founder and executive director of Bronx Defenders, noted in 2004 that “[p]ublic defenders everywhere are starting to reassess the most fundamental questions of what it means to provide effective representation for their clients.”²⁶¹ Steinberg compares the culture of a “traditional defender” office to that of a “client-centered defender” office, and demonstrates both the advantages of the client-centered model and the crucial need to transform the culture of criminal defense practice to achieve a client-centered, community-based, and holistic approach.²⁶²

A focus on trial skills and courtroom advocacy has been central to traditional public defender offices, and excellence inside of the courtroom has generally been considered the hallmark of an effective defense lawyer. While acknowledging the importance of courtroom results for those charged with crimes, Steinberg calls for leaders of public defender offices to broaden their ideas of what effective public defenders do and, indeed, what it means to be a public defender.²⁶³ She argues for full integration of investigators and social workers into the work of the lawyers in the office and celebration of successes outside of the courtroom as much as the acquittals inside of the courtroom.²⁶⁴

The modern vision of the public defender office embraces interdisciplinary work, a broad understanding of what legal representation means, a client-centered approach to legal advocacy, and a component of community outreach.²⁶⁵ Because this represents a profound cultural shift in the work and vision of a public defender,

since the implementation of the reforms).

²⁶¹ Robin Steinberg and David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 123 (2004).

²⁶² See *Id.* at 123–25 (comparing the “traditional” defender office with a “client-centered” and “community-based” model and concluding that a client-centric office leaves advocates “better equipped to simultaneously engender compassion from judges and acquittals from juries”).

²⁶³ See *Id.* at 124 (explaining that a holistic approach helps professionals more efficiently and effectively assess and meet client needs).

²⁶⁴ See *Id.* at 128–29 (providing as an example a typical office email from the Bronx Defenders celebrating the informal advocacy of a team that convinced the local Board of Education to pay for a residential treatment program for a client who had earlier pleaded guilty).

²⁶⁵ See *Id.* at 125–28 (describing implementation strategies for creating community-centered public defender offices).

it is critical that leaders of public defender offices are purposeful and deliberate in effecting this cultural change. Steinberg notes that it is “of paramount importance to commit time and resources to creating this vision at the top,”²⁶⁶ and that the leaders of the institution must “address the fundamental questions of what the office should be, what it should do for clients, and what it should become . . .”²⁶⁷

During the transition from an inquisitorial system to an adversarial system, Chilean reformers devoted much energy to training lawyers and judges in the new legal structures and trial procedures. Specific training programs, many sponsored by U.S. law schools and other organizations, focused on oral advocacy and adversarial trial skills.²⁶⁸ One of the main challenges with the transition to the new adversarial system was the lack of attorneys trained to litigate in this fashion. Prosecutors in the old system had played a very passive role and defense attorneys were entirely untrained both in an adversarial style of litigation and in investigating the cases against their clients. The system of adjudication that existed for two centuries in Chile vested almost all power in the judge and provided an extremely limited role for the defense counsel.²⁶⁹ In the years prior to the criminal justice reforms in Chile, much of the role of the defense attorney was in fact played by recent law school graduates completing an obligatory period of post-graduate internship prior to being fully certified to practice law.²⁷⁰

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ Cooper, *supra* note 15, at 544-45 & nn. 250-51 (describing legal training programs). Some notable examples of legal training programs are the oral advocacy training programs sponsored by Loyola Chicago Law School of Law, McGeorge Law School, and California Western School of Law. The latter has also played a role in “second-generation reforms,” which include evidentiary innovations such as DNA testing.

²⁶⁹ See Cousino, *supra* note 4, at 352 (“[I]t is clear that the shift from a judge-oriented model to a more adversarial one will take some prerogatives from the judges to the prosecutors.”).

²⁷⁰ See Véliz, *supra* note 45, at 1366 (“Nor were there attorneys trained to provide legal defense for the accused, should the accused be unable to pay for an attorney, as law students completing their legal internships performed the function of public defender.”). Prior to the reform in Chile, both civil and criminal legal aid was provided first through the Servicio de Asistencia Judicial (SAJ) and then, after 1981, by the Corporaciones de Asistencia Judicial (CAJ). See Garro, *supra* note 200, at 283 n.24 (citing Michael A. Samway, *Access to Justice: A Study of Legal Assistance Programs for the Poor in Santiago, Chile*, 6 DUKE J. INT’L & COMP. L. 347, 347-49 (1996)). The system was regarded as unsuitable in meeting the needs of the nation’s poor, with badly paid and overburdened attorneys and substandard

Compared to the focus on training lawyers for the skills needed and the black-letter procedural law that would govern the post-reform criminal justice system, very little training focused on role formation, professional identity, or other cultural aspects of the new roles that lawyers would be asked to play within the new system. Of course, the focus on nuts-and-bolts training concerning, for example, how to conduct a cross-examination and limits on judicial conduct in trial, is understandable given the profundity of the changes that were being implemented to the adjudication system. But to have a truly adversarial system, one must accurately and precisely define what is expected of the various roles. Now that the structure and substance of the adversarial system are well-understood and ingrained in the legal culture of Chile, an important second-generation reform would be a focus on cultural aspects of the public defender. The Chilean criminal justice system would be well-served to now devote resources to training this generation of public defenders to be active, creative, and zealous in their representation of their clients both inside and outside of the courtroom.

During the entire history of Chilean criminal justice prior to the recent reforms, the roles of the prosecutor and of the defense lawyer within the system were essentially bureaucratic.²⁷¹ The culture of prosecutors may have changed organically as their new responsibilities (deciding on which charges to bring, conducting fact investigations of alleged criminal activity, presenting evidence to obtain convictions) required a more active role. Changing the bureaucratic mindset of defense lawyers, however, cannot be done by legislation but requires a shift in culture. Without this change in the role of the defense lawyer, however, the logic of the adversarial system falls apart and the reformed criminal justice system

offices. *Id.* at 89 (explaining that “[t]he attitude of recent law graduates toward SAJ is not one of dedication to the task of assisting the poor while perfecting professional skills.” (citing LEGAL AID AND WORLD POVERTY: A SURVEY OF ASIA, AFRICA, AND LATIN AMERICA 89 (C. Foster Knight ed., (1974))). Although the study is from 1974, similar criticisms were consistently levelled at the CAJs until the creation of the DPP. Also, as in prior years, the CAJs continued to rely on the services of unpaid recent law graduates (“postulantes”) until the creation of the DPP. *See id.* at 283 n.24; *see also* Michael A. Samway, *Access to Justice: A Study of Legal Assistance Programs for the Poor in Santiago, Chile*, 6 DUKE J. INT’L & COMP. L. 347, 358 (1996) (describing the situation as “of mid-1995, [where] 234 students worked for the Corporations for Judicial Assistance, and comprised 68 percent of those who attended to clients.”).

²⁷¹ *See* Duce, *supra* note 10, at 2,21 (explaining the history of the Chilean criminal justice system).

will provide no greater protections for the accused than the old inquisitorial system.²⁷²

Some have pointed out the need to consciously address the creation of a culture of criminal defense in the context of the Chilean reforms, but there is little evidence that any concrete steps have been taken in this direction. Writing before the reforms had even been implemented, Carlos Rodrigo de la Barra Cousino pointed out the importance of public defenders developing “a special office culture” under the new system and argued that such issues were as important as the formal, structural changes brought by the legislation:

Aside from the institutional setting, public defenders should be provided with specific and comprehensive training programs to develop the required skills to investigate and advocate in trial. At the organizational level, the public defenders should develop a special office culture based on the adversarial role expected under the reform. The development of this culture should create a strong identity required to overcome the disadvantages that taint the public defender’s role in the new model. The importance in reconstructing a strong public defender to suit the expectations that the adversarial system puts on the parties may be the most important way to secure the protection goal of reform, a goal that the adversarial system by itself seems unable to ensure.²⁷³

As in the United States or other adversarial systems, public defenders in the new Chilean system face a hostile environment both inside and outside of the courtroom. Creation of a supportive and mutually reinforcing culture of zealous criminal defense should be seen as a critical component to ensuring the vitality and success of this branch of the criminal justice system.

The change from inquisitorialism to adversarialism is far deeper than a tactical or procedural shift, but instead constitutes a new way of producing meaning, a renegotiation of state power, and a profound challenge to the unchecked power of the state. How, then, do defense lawyers (and the very idea of defense lawyering) need to evolve to play a meaningful role within the new system? The most obvious ways involve tactical methods: defense lawyers

²⁷² *Id.*

²⁷³ Cousino, *supra* note 4, at 352.

must learn the trial skills necessary to succeed in the courtroom, including public speaking and argumentation, negotiation with the prosecutors over reduced charges or sentences, learning about alternative means for resolving criminal disputes, and confronting the evidence put on by the government in a meaningful way.²⁷⁴ More deeply, the defense lawyer in a newly adversarial system must learn to investigate cases, interview witnesses, and structure the presentation, when appropriate, of an alternative set of facts to challenge the theory of the government. All of these are aspects of the more active, engaged, and pervasive role of the defense lawyer in the adversarial system.

6. CONCLUSION

Understanding a key difference in history and tradition between the United States and Latin America aids in understanding many of the problems in transplanting an institution like the public defender to a Latin American context. The U.S. criminal justice system, like its system of government generally, was founded on a deep philosophical and historical mistrust of government.²⁷⁵ This philosophical orientation, deeply rooted in the origin myth of the United States, naturally leads to an adversarial procedural system and an oral tradition rooted in a clear division between the goals and loyalty of the parties. The European tradition of inquisitorialism, however, is rooted deeply in a belief and trust in the ability of government actors to apply the law correctly and justly. In this tradition, the various players in the criminal adjudication system are not adversaries but teammates, working together for the right result.²⁷⁶ This self-conception of the actors in the criminal justice

²⁷⁴ Commenting on the credibility of witnesses based on how they testify and respond to cross-examination is something that will be new to lawyers in Chile's new adversarial system.

²⁷⁵ *United States v. Wade*, 388 U.S. 218, 224 (explaining that "[t]he Framers of the Bill of Rights envisaged a broader role for counsel than under the practice then prevailing in England . . . 'the colonists appreciated that if a defendant were forced to stand alone against the state, his case was foredoomed.'" (quoting Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1040-42 (1964))).

²⁷⁶ See Sutil, *supra* note 11, at 257 (explaining that "[t]he continental European model our codifiers of the [nineteenth] century were following was not that of a branch of government that could control the others, as in the United States, but that of 'inanimated figures' who would mechanically apply the law.").

system as functionaries or bureaucrats (certainly a pejorative term in the United States) has proven difficult to change as Latin American countries move to a system that is adversarial in structure. The ideological or cultural transition has proven more resistant to change than have the transitions in the structure and substance of the criminal adjudication systems.

As Chile emerged from the Pinochet dictatorship and began the process of legal reform, the country “cherry-picked the best aspects of a variety of models in the private law field (most of which emanated from the United States)” to develop a new adversarial legal system.²⁷⁷ The same happened in the area of criminal procedure as Chile created its own unique model of hybrid adversarialism. As Chile and other countries continue to experiment with adversarialism, they should continue this tradition and practice of borrowing from other criminal adjudication systems, learning and adopting what works, and abandoning what does not. Implementing reforms in the culture and training of criminal defense lawyers working within the new adversarial system is the critical next generation of reforms for Chile and other countries that have moved away from inquisitorialism.

The main motivation behind the shift from inquisitorialism to adversarialism is the notion that an adversarial system is more protective and respectful of individual rights. But this is only true, and the adversarial system only works, if the accused is meaningfully represented by a competent defense lawyer properly confronting the state. If not, then the adversarial system is only a fig leaf hiding the true injustice of the system. Furthermore, it is potentially a much more tyrannical system, because the judge has been converted from an active to a passive participant, and the prosecutor is much more invested and incentivized to go after the accused, as opposed to being more of a civil servant and impartial bureaucrat. Adversarialism without meaningful defense lawyering can be as inhumane and lead to as many injustices as the now-rejected inquisitorial systems.

²⁷⁷ Cooper, *supra* note 15, at 523.