

TRANSNATIONAL LAW RELEVANT TO BAIL TO JAIL COURSE IN CRIMINAL PROCEDURE

By:

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I. Introduction

A. How USSC used to engage in comparative law analysis, especially during the incorporation debates in the 1930's through 1960's

1. Most often used to show other (civilized) countries give less protection than Federal interpretation of constitutional rights, therefore, no need to extend to the states: *Palko v. CT* (appealing acquittals); commenting on right to silence; jury trial

B. I stress to the students how the modern court by and large refuses to do this today, i.e. to look overseas where some countries might be granting more protection than the U.S. Currently does.

C. I also show how U.S. criminal procedure rules have been adopted overseas, cited in foreign supreme court and constitutional court cases, and how they have taken our earlier precedents and expanded on them while we have narrowed their scope.

D. Comparative law as important in understanding good and bad parts of our system and as a guide to reform

II. Bail to Jail Areas of Interest

A. Charging

1. Compare complete prosecutorial domination of charging in the U.S. with the role of the victim or aggrieved party in Europe.

a. Private prosecution for minor crimes

b. Ability of victim to petition a judge to compel charging: Germany

c. Ability of victim to file own accusatory pleading in Spain

d. Popular prosecution in Spain

2. Comparison of complete prosecutorial discretion in US (opportunity principle) and legality principle in many European countries (mandatory

prosecution)

B. Plea Bargaining

1. Compare wide-open “Wild West” American plea-bargaining more or less completely dominated by the prosecution with European forms, where judge usually has a greater role in appraising factual basis and there are often restrictions on types of cases or amounts of discounts.
2. Italian forms of consensual resolution of cases: 1/3 discount
3. Spanish *conformidad*
4. Proliferation in former Soviet republics
5. German *Absprachen*

C. Trial Issues

1. Division of Labor in the Trial Between Judge, Lay Assessors and Jurors in Marshalling of the Evidence
 - a. The passive American judge vs. the inquisitorial European judge
 - b. The shortshifting of the presumption of innocence in European trials: Judge reads the prosecutor’s file, can investigate, call witnesses, etc.
2. The Use of Written Testimony and Violation of Right to Confrontation in European Trials
 - a. Weak hearsay rules
 - b. Old fondness for the written dossier hard to eliminate
3. The Struggle over Questions of Guilt and Sentence between Professional and Lay Judges
 - a. Comparing European special verdicts (question lists) used by juries and some mixed courts (France) with American general verdict
 - (1) Tendency in Russia for professional judges to reduce lay judges to mere judges of the facts: not guilt.

b. Jury involvement in sentencing in European courts

(1) *Apprendi* and *Booker* and the attempt of American legislator to remove the guilt question and crucial sentencing issues from juror scrutiny

(2) Should we return to jury sentencing in all cases with our Draconian sentencing schemes?

c. The importance of non-appealable acquittals in solidifying the role of the jury as a check against judicial and legislative power

d. Should American guilty verdicts require reasons? Special verdicts? Would this help prevent the conviction of the innocent?

