Confessions and the Right to a Fair Trial: A Comparative Case Study

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ABSTRACT

In 2015, Amanda Knox was fully acquitted by the Italian Court of Cassation, Italy's court of last resort. The acquittal brought to a close a long ordeal that directed harsh criticism at Italy's criminal justice system. That same year, Brendan Dassey's case was just entering the public consciousness on a global scale a decade after his conviction for murder in the United States. He was convicted just six months before Knox's arrest ignited an international frenzy. But despite the current interest in Dassey's plight, unlike in Knox's case, the original attention to his case did not focus on the flaws riddling his prosecution. Rather, it focused on the gruesome details included in his confession and on the details of his uncle's story.

At first glance, the two cases have little in common other than the brutal murders at the heart of each. They occurred an ocean apart, one in a picturesque hill town in Perugia, Italy; the other in a run-down, rural area of Wisconsin. But Dassey's case encapsulates some of the very same problems that led to criticism of Italian court proceedings—a questionable interrogation coupled with troubling pretrial publicity involving extrajudicial statements related to a confession. Yet, in November of 2007, with all eyes turned abroad to Italy, teenage Dassey quietly began his life sentence after enduring the similar due process violations here in the United States.

Italy has adopted laws that in theory go further than many other countries to protect against the use of unreliable confessions. Yet, even though they were suppressed, it is widely acknowledged that Knox's incriminating statements—even though they were suppressed—and drove the entire investigation and contributed to her initial conviction. Therefore, this Article takes a fresh look at the Knox case and compares it with Dassey's. Rather than viewing the Knox case

DOI: https://dx.doi.org/10.15779/Z38Z02Z85H

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as a condemnation of the Italian system as a whole, this Article uses two cases to compare Italian and American confession law and examines the limits of protection provided by suppression in the confession setting. It also considers how confession law interacts with extrajudicial speech and pre-trial publicity. Ultimately, both cases demonstrate strengths and limitations of existing protections in the confession setting and can inform confession law across borders.

INTRODUCTION

On March 1, 2006, sixteen-year-old Brendan Dassey was arrested for the murder of a young woman, Teresa Halbach, in the rural town of Mishicot, Wisconsin.[1] Halbach disappeared on October 31, 2005, and police later found her remains on the property of Steven Avery, Dassey's adult uncle. Police arrested Dassey months later on the theory that he participated in Halbach's murder and rape at the behest of Avery, who had been arrested for her murder in the days following Halbach's disappearance. On April 26, 2007, roughly a year after

1. Carrie Antlfinger, *Avery's Relative Also Arrested; Teenage Boy to Be Charged*, WIS. ST. J. (Mar. 2, 2006), http://host.madison.com/wsj/news/avery-s-relative-also-arrested-teenage-boy-to-be-charged/article_947e589d-a1cc-53d7-9d19-c58152d5e686.html.

Dassey's arrest, he was tried and convicted of the murder and rape as an adult. His conviction was based upon statements that he made to the police prior to his arrest. He received a life sentence with the possibility of parole after serving a minimum of forty-one years.[2]

In 2015, ten years after Halbach's disappearance, the public would be exposed to—and deeply troubled by—the circumstances surrounding the criminal prosecution of teenage Dassey. At the time of his arrest and conviction, these same circumstances were not the focus of the media's attention on the case. Rather, the focus was on Steven Avery's unusual history; he had been released from prison when he was exonerated through DNA evidence. But in late 2015, Netflix, a United States media entertainment company, released a ten-part documentary series entitled Making a Murderer. The series raised new questions about the convictions of both Avery and Dassey, but particularly about young Dassey's conviction. Following its airing, the nature of the police interrogation and other aspects of his conviction, along with the prosecution's theory of the case, have been the source of controversy and public dismay. The documentary series provided in-depth background on the two convictions. It revealed details about the case and the convictions that were previously unknown—or at least less exposed—to the American public. In doing so, the series spurred an outpouring of public attention and disbelief online.[3] Yet for the ten years prior to its airing, Dassey sat in prison in relative anonymity, tried and convicted in adult court while still a teenager and sentenced to serve at least forty years in prison, seemingly all but forgotten.

Six months after Dassey's conviction, Amanda Knox was arrested for murder in Perugia, Italy, after her British roommate, Meredith Kercher, was murdered and sexually assaulted in their shared apartment. Knox was a twenty-year-old exchange student who had arrived in the early fall to begin her Italian studies. The murder occurred on the night of November 1, 2007, nearly two years to the day after Halbach's disappearance and murder on Halloween in 2005. Knox and her then boyfriend, Raffaele Sollecito, were convicted in 2009. After intermediate court decisions reversing and then reinstating their convictions, they were eventually acquitted in 2015 due to a lack of evidence of their guilt.

Knox's case, unfolding an ocean away from Dassey's, quickly led to a veritable ocean of criticism of the Italian criminal justice system by the American media, commentators, and scholars. The criticism was fast and furious, and it has been enduring. As one scholar summarized: "the Italian criminal justice system was indicted and put on trial in the United States."[4] Another stated, "American

2. *Dassey Will Be Eligible for Parole*, CAP. TIMES, Aug. 2, 2007, at A6.

3. *See, e.g.*, Bill Keveney, "*Making a Murderer" Leads to Calls for Clemency*, USA TODAY (Jan. 6, 2016), https://www.usatoday.com/story/life/tv/2016/01/04/ making-murderer-leads-calls-clemency/78272416/ (discussing petitions at change.org and whitehouse.gov signed by thousands of members of the public in the wake of Netflix releasing *Making a Murderer*).

4. Renata L. Mack, *The Importance of International and Comparative Law: Exploring Complex Issues in a Global Community*, 1 CREIGHTON INT'L & COMP. L.J. 3, 3 (2011).

commentators were aghast."[5] *The Atlantic*, a well-known news magazine in the United States, called the Italian justice system "carnivalesque;" all of this in response to the Knox case.[6]

As a whole, "[m]edia coverage of the [Knox] trial resulted in public perception of Italy as having a lower standard of due process of law in comparison to the United States", a sentiment that endured even after the acquittal.[7] Italy's entire criminal justice system was suddenly at the center of discussions in the United States and the results were not positive. Italy was still adjusting to its sweeping criminal procedural reform that was initiated in 1988. Legislators enacted a new code of criminal procedure,[8] but the reform endured a rocky beginning as conflicts between the legislature and the judiciary hindered its implementation.[9] Some of the commentary suggested that the reforms, which implemented adversarial characteristics within its previously inquisitorial framework,[10] were insufficient.[11] Debates and American commentary that followed this reform often discussed the Italian criminal justice system in the vacuum of Knox's prosecution and initial conviction, characterizing it as structurally insufficient and lacking in procedural protections as a matter of law. In some ways it was; but many of the problems were caused by faulty implementation of the laws, a common problem in the United States as well. And there was little discussion of the philosophical differences undergirding the contrasts with the American adversarial model. But perhaps, most notably, the critical discussion of Knox's case in the United States was—and generally continues to be—void of references to similar and parallel failures that occur in the United States.[12] At the heart of both cases were controversial interrogations

5. James Q. Whitman, *Presumption of Innocence or Presumption of Mercy*, 94 TEX. L. REV. 933, 940 (2016).

6. Olga Khazan, *Amanda Knox and Italy's "Carnivalesque" Justice System*, ATLANTIC MONTHLY (Jan. 30, 2014), https://www.theatlantic.com/international/archive/2014/01/amanda-knox-and-italys-carnivalesque-justice-system/283487/.

7. Mar Jimeno-Bulnes, *American Criminal Procedure in a European Context,* 21 CARDOZO J. INT'L & COMP. L. 409, 415 (2013).

8. *See* William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT'L L. 429 (2004).

9. *See id*.

10. For a detailed description of the Italian system's reform, which first passed into law in 1988 and was implemented in 1989, and the process of reform that followed, see *id*.; Stephen P. Freccero, *An Introduction to the New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 345 (1994); Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227 (2000); William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on A Civil Law Foundation*, 17 YALE J. INT'L L. 1 (1992).

11. *See* Liz Robbins, *An American in the Italian Wheels of Justice*, N.Y. TIMES (Dec. 5, 2009), https://thelede.blogs.nytimes.com/2009/12/05/an-american-in-the-italian-wheels-of-justice/?_r=0 (quoting legal analysts critical of Italy's system of criminal procedure).

12. There are notable exceptions to this phenomenon among legal scholars, particularly those who study confessions; for example, scholarship by confession experts, such as Saul Kassin, discuss Knox's interrogation in the context of the reform that is necessary in the United States to protect against false confessions. *See*, *e.g.,* Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCH. 431 (2012) (contextualizing Knox's interrogation within the broader discussion of

that produced statements of questionable reliability, despite the fact that both countries have confession laws that offer superior procedural protections from a comparative perspective.[13] In both cases, the statements were insidious to the investigations.

This Article proceeds in Part II by first providing context and factual background about the Dassey and Knox cases. Part III then examines the interrogations in both cases and the relevant applicable laws under the Italian and American legal systems. It highlights the fact that some progressive proposals for reform to improve confession reliability in the United States are in place under Italian law, even if implementation has suffered. Part IV turns to the interaction between confessions and prosecutorial speech and the challenges legal regimes have addressing them. Part V argues for more nuanced protections earlier in investigations across legal regimes and apart from suppression. It suggests that research about the impact of confessions on other parts of investigations should provide incentives for law enforcement to be vigilant about the impact of confession evidence on other parts of an investigation.

Countless media accounts, books, and articles have been written about Knox's trial, the accompanying criticism, and the cultural differences between the American and Italian criminal justice systems.[14] This article does not seek to rehash all of those issues nor debate the merits of an adversarial versus inquisitorial system as a whole. Rather, it examines and compares the two cases and their similar impediments to the right to a fair trial as it relates to confessions and extrajudicial speech. It uses the two cases to explore the special challenges that accompany confession law and protection of the presumption of innocence across borders. It also ultimately questions why the United States has been slow to implement reforms to address internal problems that are so readily critiqued when they appear abroad.

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interrogation practices in the United States).

13. *See*, *e.g.*, Stephen C. Thaman, *Contributing Authors: Miranda in Comparative Law*, 45 ST. LOUIS L.J. 581, 594 (2001) (comparing *Miranda* in an international context).

14. *See generally* Julia Grace Mirabella, *Scales of Justice: Assessing Italian Criminal Procedure Through the Amanda Knox Trial*, 30 B.U. INT'L L.J. 229, 251 (2012) (describing criticisms and cultural clashes that played out during the trial and afterward). For examples of opposing views in books about the death of Kercher, see NINA BURLEIGH, THE FATAL GIFT OF BEAUTY (2012) (presenting a critical view of the media portrayal of Knox and accompanying issues related to her interrogation); JOHN FOLLAIN, A DEATH IN ITALY: THE DEFINITIVE ACCOUNT OF THE AMANDA KNOX CASE (2013) (providing an account that is critical of United States media portrayal of Amanda Knox as an innocent person caught up in a witch hunt and ultimately, appearing to disagree with the acquittal of Knox and Sollecito in 2011).

I.
BACKGROUND

A. Italian Criminal Procedural Reform

When the Corte Suprema di Cassazione, Italy's highest court, exonerated Knox and Sollecito in 2015, its opinion was critical of the official investigation and prosecution. Many of the reasons put forth in the opinion paralleled earlier public criticism of the case. Moreover, criticism is not new to Italy's criminal justice system.[15] The Italian system has frequently been held to account by the European Court of Human Rights (ECtHR), most notably for problematic delay and gridlock.[16] Italy is a member of the European Convention for Human Rights and, therefore, subject to financial liability for an adverse finding.[17] Both internal and external forces, such as adverse ECtHR decisions, catalyzed Italy's Criminal Procedural Reform in 1988.

The decades prior to Knox's case were a period of exceptional transition for the criminal procedural process in Italy. After two decades of study, Italy passed its new code of criminal procedure, the Nuovo Codice di Procedura Penale in 1988, which dramatically altered its process for trying criminal cases.[18] The new code took effect in 1989 and required several years of additional legal groundwork, including a constitutional amendment, before its changes began to take root.[19]

Italy's reform adopted many aspects of an adversarial system, including some concepts familiar to American courtrooms. While the reform introduced them into Italy's inquisitorial system, Italy's system clearly remains a hybrid system and is unique in its approach—different from other European countries and also distinctly different from the United States. These unique reforms add a layer of complexity to the model and they affected the American view and understanding of the reform goals. Moreover, criticism was arguably tangled up with a long history of anti-inquisitorialism in the United States.[20] Still, it was curious how discussion was often void of reference to parallel problems that exist in the United States.

In the face of that criticism, Brendan Dassey's case is a useful comparative tool for a few reasons. First, although the Knox and Dassey cases were tried under different criminal procedural rubrics—one adversarial and the other a hybrid system with adversarial and inquisitorial features—they raise similar due process

15. *See* Pizzi & Montagna, *supra* note 8, at 437-39.

16. *Id*. (discussing a series of rulings by the European Court of Human Rights holding Italy in violation of the Convention due to lengthy delays which created embarrassment and catalyzed reform).

17. *Id*.

18. *Id*. at 430.

19. *Id*.

20. *See*, *e.g*., David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1668 (2009) (describing aversion to inquisitorial process that is common in the United States legal community).

questions about access to the right to a fair trial, particularly with respect to confessions. Moreover, both cases offer the opportunity to analyze how interrogations and the related "trial by media" threaten the right to a fair trial and influence how two different systems deal with that issue. The Knox trial was often critiqued in the United States and elsewhere for those reasons. Of course, those same flaws in interrogation practices and prejudicial pre-trial publicity are well documented in the United States; the documentary series on Dassey provides evidence of how their presence affected his case. In that way, the flaws in Dassey's case do not withstand the criticism directed against Italy. And yet, at the very same time that the Knox case was hitting the headlines in the United States, the teenage Dassey had endured similar—and arguably worse—circumstances in an American courtroom with little attention to the deficits and pathologies in the system that convicted him.

B. Procedural History and Basic Facts of the Dassey and Knox Convictions

Before delving into the more extensive discussion of the interrogations and pre-trial publicity in these cases, this section describes the basic procedural history of the Knox and Dassey cases. Meredith Kercher's murder was discovered on the morning of November 2, 2007 and Knox was arrested four days later.[21] Knox's boyfriend, whom she met the week prior, Raffaele Sollecito, was also arrested at that time.[22] The media frenzy was almost immediate given the nature of the murder and crime scene, and the unlikely players involved—young foreigners in a small, picturesque Italian town who seemed like average young adults coming into their own.

Eventually, a third individual, Rudy Guede, was also arrested and convicted for the murder of Kercher.[23] Guede's DNA was discovered at the crime scene on Meredith's body and elsewhere in the room. His DNA was the only reliable DNA evidence that law enforcement found at the crime scene.[24] His conviction still stands. He received a reduction in his sentence for choosing a procedural avenue in Italy that allows for a reduced sentence in exchange for a "fast track" trial.

Knox and her co-defendant Sollecito were convicted at trial in 2009.[25] The court originally sentenced Knox to serve twenty-six years in prison.[26] In 2011, however, Knox was acquitted and released from prison, at which point she

21. BURLEIGH, *supra* note 14, at xxiv–xxv.

22. *Id*.

23. *Id*. at xxv–xxvi.

24. Cass. Pen., sez. cinque, 27 marzo 2015, n. 36080 (It.), *translated in* MARASCA-BRUNO MOTIVATIONS REPORT 7, 18 (Injustice Anywhere ed., 2015), http://www.amandaknoxcase.com/wp-content/uploads/2015/09/Marasca-Bruno-Motivations-Report.pdf [hereinafter MARASCA-BRUNO REPORT].

25. BURLEIGH, *supra* note 14, at xxvii.

26. *Id*.

returned to the United States.[27] She spent a total of four years in prison from 2007 to 2011. While she was later re-convicted in 2013, the Corte Suprema di Cassazione overturned that conviction in 2015, bringing her legal ordeal to a close.[28] The Court held that the DNA evidence that the prosecution used to convict Knox and Sollecito was not reliable based upon testimony of scientific experts.[29]

Turning to Dassey's case, police arrested him in March 2006, four months after Teresa Halbach was murdered. Dassey was later convicted in April 2007 after a trial based upon his confession to police detectives. In 2007, Dassey's uncle, Steven Avery, was also convicted for the murder based on the physical evidence that police investigators found on his property. At the time of his arrest, Avery was on the verge of settling a civil lawsuit against the county investigating Halbach's murder. The civil lawsuit was based upon his prior wrongful conviction; two years before his arrest for the death of Halbach, a Wisconsin court exonerated Avery for a prior rape conviction based on DNA evidence.[30] He was released from prison after serving eighteen years for a crime he did not commit.[31] Because of that, his subsequent arrest for Halbach's murder brought national media attention to the investigation.[32]

Dassey's conviction was upheld on appeal by the intermediate appellate court in 2013;[33] the Wisconsin Supreme Court subsequently denied Dassey's request for an appeal.[34] This concluded Dassey's path for appellate relief in state court. His attorneys next sought relief in federal court by filing a petition for a writ of habeas corpus in 2014.[35] Nearly two years later, in 2016, in a somewhat unexpected decision, the United States Court for the District of Wisconsin granted Dassey's petition for a writ of habeas corpus and overturned his conviction.[36] At first, Seventh Circuit United States Court of Appeals upheld the decision but the

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27. *Id*. at xxviii.

28. MARASCA-BRUNO REPORT, *supra* note 24, at 7, 18.

29. *Id*.

30. Monica Davey, *Freed by DNA, Now Charged in New Crime*, N.Y. TIMES (Nov. 23, 2005), http://www.nytimes.com/2005/11/23/us/freed-by-dna-now-charged-in-new-crime.html.

31. *Id*.

32. *See, e.g.*, *Man Cleared of Rape Now to Face Murder Charge*, NBC NEWS (Nov. 11, 2005), http://www.nbcnews.com/id/10003226/ns/us_news-crime_and_courts/t/man-cleared-rape-now-face-murder-charge/#.WMyagjvytEZ.

33. State v. Dassey, 827 N.W.2d 928 (Wis. Ct. App. 2013), *cert denied*, 839 N.W. 2d 866 (Wis. 2013).

34. *Id*.

35. Under federal law, after a petitioner loses his appellate claims in state court, he may then pursue an avenue for relief in Federal Court under 28 U.S.C. §2254. The federal law permits a federal court to grant relief under rare circumstances. In order to grant relief, it must find that the state court's adjudication of the petitioner's claim on the merits (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d) (2012).

36. Dassey v. Dittmann, 201 F.Supp.3d 963 (E.D. Wis. 2016) (hereinafter *Dassey I*).

Court granted the State's request to rehear argument *en banc* and vacated the decision as this Article goes to press.[37]

C. Overarching Criticisms

There were four main areas of criticism of Knox's case: the method of questioning in the interrogation of Knox without counsel; the related prejudicial media coverage fueled in part by the prosecutor and law enforcement; the faulty collection of the physical evidence and the flawed DNA analysis used to support her conviction; and the use of character evidence during the trial.[38] Ten years after Dassey's conviction, similar themes emerged when the Making a Murderer documentary series informed the public about the circumstances of his conviction. The most problematic aspects of his case to viewers around the world[39] were the nature of the police interrogations that led to Dassey's videotaped incriminatory statements made without consulting a lawyer or adult;[40] prosecutorial pre-trial publicity and extra-judicial statements implicating the right to a fair trial;[41] and the shockingly inept legal representation provided to the teenager by his first lawyer.[42]

Two areas of criticism, the interrogations and the prejudicial pre-trial publicity surrounding the Defendants' statements are the focus of this discussion.

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37. Dassey v. Dittmann, 860 F.3d 933 (7th Cir. 2017), *reh'g en banc granted, opinion vacated* (Aug. 4, 2017) (hereinafter *Dassey II*).

38. *See* Mirabella, *supra* note 14, at 247 (describing some of the common criticisms of Italian Criminal Procedure that erupted during the Amanda Knox trial); *see also*, Nick Squires, *Amanda Knox Prosecutors in Italy Hit Back at US Critics*, TELEGRAPH (Dec. 8, 2009), http://www.telegraph.co.uk/news/worldnews/europe/italy/6759992/Amanda-Knox-prosecutors-in-Italy-hit-back-at-US-critics.html (discussing American criticism alleging that Knox was coerced into making incriminatory statements).

39. For examples of attention outside of the United States, *see* Megan Willet, *Lawyers Respond to Making a Murderer: 'I almost got Physically Ill'*, BUS. INSIDER AUSTL. (Jan. 12, 2016) http://www.businessinsider.com.au/lawyers-respond-to-making-a-murderer-i-almost-got-physically-ill-2016-1; John Shammas, *Making a Murderer: Why Steven Avery and Brendan Dassey Supporters are Gathering for Massive Protest in London Today*, DAILY MIRROR (United Kingdom) (Apr. 2, 2016), http://www.mirror.co.uk/news/uk-news/making-murderer-steven-avery-brendan-7674279 (describing protestors' plans to demonstrate on behalf of Avery and Dassey in front of the American Embassy in London in response to the documentary series outlining their convictions).

40. *See* Ashley Louszko, '*Making a Murderer': The Complicated Argument Over Brendan Dassey's Confession*, ABC NEWS (Mar. 8, 2016), http://abcnews.go.com/US/making-murderer-complicated-argument-brendan-dasseys-confession/story?id=37353929 (quoting Professor Richard Ofshe's reaction to the interrogation).

41. John Ferak, *Legal Experts Blast Avery Prosecutor's Conduct*, APPLETON POST CRESCENT, (Jan. 24, 2016) http://www.postcrescent.com/story/news/local/steven-avery/2016/01/15/kratzs-pretrial-behavior-called-unethical/78630248/; *see also*, Section III B, *infra*, for applicable relevant law.

42. The lawyer, Len Kachinsky, was ultimately removed from the case when the Judge determined that his performance had fallen below the standard that is required for competent representation of a defendant and specifically found that it was deficient. Dassey v. Dittmann, 201 F.Supp.3d at 981–82. For examples of public responses, see Ryan Felton, *Controversial Making a Murderer Lawyer 'I Don't Get Netflix at Home'*, GUARDIAN, Jan. 20, 2016 (describing widespread criticism of the lawyer's performance).

First, in both cases the interrogations included tactics from the now controversial Reid technique. This interrogation approach was developed in the 1940s in the United States and it employs specific psychological tactics to induce confessions—but, unfortunately, has many signature traits that are associated with false confessions.[43] The Reid technique is widely used in the United States and has influenced international practice as well. At the same time, the admission into evidence of false confessions is a well-documented problem in the United States.[44] This includes cases where defendants confessed, were sentenced to death, and were later exonerated.

Next, both cases also generated a high level of pre-trial publicity that included controversial extrajudicial statements made by the prosecution specifically about the confessions—statements that implicated the right to a fair trial.[45] The interplay between media and the right to a fair trial demands a delicate balancing of the competing values of a given culture.[46] Certainly, in the United States, courts struggle with the "trial by media" phenomena and extrajudicial speech.[47] Dassey's case and the Halbach investigation demonstrate this tension; the prosecutor held a press conference right after obtaining his confession. By the time his conviction came into the public view, Italy's high court had fully exonerated Knox and Sollecito while Dassey remains in prison.

Because the American criticism of the Italian justice system was one catalyst for this comparison, it is worth noting an additional problem that arose in Dassey's case but not for Knox: Dassey's first lawyer's performance was so sorely deficient that the court took the unusual step of removing him from the case six months into his representation.[48] Unfortunately, this was after he had inflicted damage on his client. As soon as the lawyer was assigned the case, he made statements to the news media concluding that his teenage client was "legally and morally" culpable for murder,[49] absent any investigation or client contact. Moreover, later, he allowed police detectives to question his client outside of his presence, without preparation and absent any offer of prosecutorial immunity, which the court found to be "indefensible."[50] Post-conviction hearings also turned up evidence that he

43. For a discussion of the Reid technique, see Richard A. Leo, *Why Interrogation Contamination Occurs*, 11 OHIO STATE J. CRIM. L. 193, 205 (2013).

44. *See*, *e.g.*, Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 487 (2006) (providing examples of false confessions, discussing inadequate safeguards against unreliable confessions in current United States criminal procedure jurisprudence, and suggesting new safeguards); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010).

45. *See* Section IV A, *Infra* (discussing examples of extrajudicial statements in both cases).

46. For a discussion of the trial by media and its implications on due process, *see generally* Giorgio Resta, *Trying Cases in the Media: A Comparative Overview*, 71 L. & CONTEMP. PROBS. 31 (2008) (discussing the issues raised by pre-trial publicity from a global perspective).

47. Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV. 865, 867 (1990) (discussing the conflicts that arise between free speech and the right to a fair trial).

48. *Dassey I*, *supra* note 36, at 981.

49. *Making a Murderer*, Season 1 Episode 3 (Netflix 2015).

50. *Dassey I*, *supra* note 36, at 981 (quoting the trial court's conclusion).

was actively working against the interests of his teenage client in communications with the prosecutor and his investigator.[51] The particular actions of Dassey's counsel were uniquely appalling. Nevertheless, research has thoroughly documented the inadequacies of the infrastructure of the indigent defense system in the United States.[52]

II.
INTERROGATION AND CONFESSIONS IN THE UNITED STATES AND ITALY

> "I was demolished in that interrogation," Amanda Knox later remarked in an interview about the evening she spent at the police station in Perugia.[53]

> "They got into my head," Brendan Dassey said moments after he incriminated himself to police despite his claims that he is innocent.[54]

Both Knox and Dassey maintained their innocence prior to questioning and afterward. But both also expressed how, despite their claimed innocence, the pressure of their interrogations led to their incriminating statements. Their experiences are consistent with research about common traits of interrogations leading to false confessions. This Section considers the two defendants' interrogations, the applicable laws in both countries that dictate the rights of the accused, and the admissibility of statements derived from those interrogations as evidence of guilt.

A. The Interrogations of Knox and Dassey

Like Dassey, Knox's initial arrest was based for the most part upon incriminating statements that Knox made to Italian police and prosecutors during an interrogation. While not a confession, her statements were inculpatory as she indicated that she was present at the time of the murder, though she later recanted. She has described how the tactics used during the questioning eventually broke her down mentally, along with a lack of sleep and the stress associated with the

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51. *Id*. at 976–77 (describing communications between Kachinsky and other parties).

52. *See, e.g.*, Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316 (2013) (discussing the indisputable evidence and near universal agreement that the system of indigent defense in the United States is broken); AM. BAR ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE, i, iv (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf; Robert P. Mosteller, *Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness*, 36 N.C. J. INT'L L. & COM. REG. 319 (2011) ("Without adequate assistance of counsel and supporting services, much of what the American justice system prizes in terms of rights, fairness, and accuracy simply fails to materialize.").

53. Nicki Batiste et al., *Murder Mystery: Amanda Knox Speaks*, ABC NEWS (Apr. 30, 2013), http://abcnews.go.com/US/murder-mystery-amanda-knox-speaks/story?id=19068548.

54. *Making a Murderer*, Season 1 Episode 3 (Netflix 2015).

murder of her new roommate.[55] Critiques of the Knox interrogation have focused on the length, method, and intensity of the questioning.[56]

Although Knox and Italian law enforcement dispute some of the facts about the interrogation, it is not contested that Knox underwent several rounds of questioning in the four days between the discovery of Kercher's murder on November 2 and Knox's arrest on November 6, 2007. On the night of her arrest, Knox had voluntarily accompanied Rafael Sollecito to the police station. The two sides do not agree about the length of time that police questioned Knox, but the questioning began some time before midnight and continued late into the following morning until about 5:45 a.m.[57] Later that same morning, Knox produced a written statement with police that she had visions of being in the house and hearing Meredith scream when another person attacked her. The statement incriminated Patrick Lumumba, Knox's boss at a local bar. But the circumstances leading to Knox's discussion of Lumumba are also disputed. It appeared that police interpreted a text message that Knox exchanged with him on her phone in an incriminating manner and probed her to speak about him in relation to the murder.[58] Her statement incriminating Lumumba would later be the subject of a parallel civil case against Knox litigated before the same jury deciding her criminal case.

Knox has stated that up to twelve people or more took part in the interrogation that night and into the early morning; both sides agree that there were several people who came in and out of the room where law enforcement questioned her. Finally, Knox alleged that police hit or "cuffed" her on the back of the head, fed her ideas, threatened her, and called her a liar.[59] Both sides also dispute whether law enforcement provided Knox with a neutral interpreter during her interrogation. They agree, however, that police conducted much of the questioning in Italian and that an interpreter who was employed by the police department arrived about two hours into the questioning. According to Knox, police personnel asked her to imagine the night of Kercher's murder and what had happened. She states that she grew confused and overwhelmed when police accused her of lying.[60] After Knox's arrest and while she was in jail, law enforcement officers also falsely informed her that she was HIV positive as a means to obtain additional information about her sexual partners.[61]

Knox's statements were ultimately not admissible as evidence against her to prove the murder charges;[62] however, as is often the case with false confessions,

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55. AMANDA KNOX, WAITING TO BE HEARD 1, 103 (2013).

56. *See* Kassin, *supra* note 12.

57. *See* BURLEIGH, *supra* note 14, at 194–98.

58. *See id*.

59. Rachel Donadio, *Student on Trial in Italy Claims Police Pressure*, N.Y. TIMES (June 13, 2009), http://www.nytimes.com/2009/06/14/world/europe/14italy.html; Kassin, *supra* note 12, at 431.

60. KNOX, *supra* note 55, at 103.

61. BURLEIGH, *supra* note 14, at 220.

62. Mirabella, *supra* note 14, at 240–42.

they would quickly shape the basis for the prosecution's theory of the case and, in turn, the beliefs of the public.

Unlike in Kercher's case, where her body was discovered at her apartment, the investigation into Teresa Halbach's murder began as a missing person search.[63] The search for Halbach eventually led to the discovery of her car on the Avery property, along with burned remains that matched her DNA.[64] Thus, apart from the question of who committed the murder, her death presented other basic questions about how she was killed and what happened prior to her death. Police detectives first questioned Dassey during the initial investigation. At that time, however, he stated that he did not notice anything strange on the night of Halbach's disappearance on October 31, 2005. He said that he had assisted his uncle, Steven Avery, in building a bonfire. As they had often built bonfires together in the past, the teenager did not report anything unusual.[65]

Four months later, in February, 2006, police detectives approached Dassey again. The investigation had progressed and they had more information about Halbach's murder, but holes remained. Similar to the process leading up to Knox's incriminating statements, police detectives met with and questioned Dassey four times over a forty-eight hour period between February 27 and March 1, 2006.[66] On February 27, police questioned Dassey during the day and then made arrangements for Dassey and his mother to stay in a hotel room that was guarded by police. After Dassey was released from questioning on February 28, he went to school. The next day, March 1, police returned to his school and brought him to the Manitowoc Police Station for further questioning. During the fourth round of questioning, Dassey made incriminating statements that were contrary to his previous conversations with police. He stated that, at the direction of his uncle, he raped and stabbed Halbach, making him part of the murder on the family property on October 31, 2005.[67]

The police video recorded these statements.[68] The statements were later admitted at trial against Dassey after an unsuccessful motion to suppress their admission.[69] In April, 2007, based upon his statements alone, Dassey was convicted for the rape and murder of Halbach. There was no physical evidence independently corroborating his involvement with the murder.[70]

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63. The facts associated with Dassey's case are derived from court documents filed in the case, court decisions, and the footage of events shown in *Making a Murderer*.

64. *Dassey I*, *supra* note 36, at 967–68.

65. *See* Brief of Defendant-Appellant at 7–8, Wisconsin v. Dassey, 827 N.W.2d 928 (Wis. Ct. App. 2013).

66. *Id*. at 8–20 (describing the exchanges over this period and various parts of the transcriptions).

67. *Dassey I*, *supra* note 36, at 970.

68. *Id*.

69. *Id*.

70. *Id*.

At the post-conviction stage of Dassey's case, Dr. Richard Leo, an expert on confessions and police interrogations, testified about the interrogation. He concluded that Dassey's statements were coerced and that the method police used to question him resulted in statements that were "highly contaminated" when he incriminated himself.[71] Dr. Leo noted that Dassey did not reveal any factual knowledge of the crime that was not already public, a factor that is critical to the assessment of a statement's reliability during police questioning. Rather, Dr. Leo pointed out how, at various points in the exchange, the police provided details to Dassey for his confirmation as they questioned him. In addition, testimony established that Dassey had the intellectual ability of a fourth-grade student.[72]

Even without expert testimony on the psychology of the interrogation, it is difficult to watch the interrogation or read portions of the case materials without an acute sense of Dassey's vulnerability to suggestion and his limited comprehension about what was happening around him. Various comments and questions by Dassey demonstrate a limited grasp of the situation he faced and the words that others were using to explain it. For example, as police detectives prepared to obtain a written statement for Dassey to sign based upon his damaging statements about taking part in a murder, Dassey asked if he could be back at school soon for a presentation about which he was concerned.[73] At one point in his interrogation, Dassey asked how to spell the word "Detective." After Dassey was arrested and awaiting trial, he heard news reports that his statements were being characterized as inconsistent; Dassey asked his mother the meaning of the word "inconsistent."[74]

Just as confession experts point to the coercive psychological tactics that led to Knox's incriminating statement,[75] Dassey's post-conviction attorneys argued that the videotaped confession reveals textbook examples of "fact feeding" and coercion.[76] They argued that as a result, Dassey gave the statement involuntarily in violation of his constitutional rights. As to the fact-feeding argument, the police had bone fragment evidence suggesting that the victim had been shot in the head on the Avery property. Dassey had not previously made any statements that included knowledge of such facts. Detectives asked Dassey repeatedly about what had happened on the evening of the victim's disappearance and murder. Dassey struggled to answer questions about "what else happened" in a way that confirmed their hypothesis. This prompted one of the detectives conducting the interrogation to ask "what else was done to her head?" In doing so, he thus revealed and introduced to Dassey a key fact about the evidence they had already collected.[77]

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71. *See* Brief of Defendant-Appellant, *supra* note 65, at 47 (describing the testimony and conclusion about the interrogations by expert Dr. Richard Leo, who testified on behalf of Brendan Dassey in his post-conviction proceedings).

72. *Id*.

73. *Making a Murderer*, Season 1 Episode 3 (Netflix 2015).

74. *Id*.

75. Kassin, *supra* note 12.

76. *Dassey I*, *supra* note 36, at 996.

77. *Id*. at 972.

As the interrogation continued, so did Dassey's struggle to find an answer that would satisfy his interrogators. As a result, during the video it looks like he was guessing. After repeated prompting, he offered that Avery had cut off her hair and that he had cut her throat at his uncle's direction. He then said that he did not remember anything else. The detective, in an apparent effort to corroborate physical evidence that Halbach was shot twice in the head, finally said at that point, "All right, I'm just gonna come out and ask you. Who shot her in the head?"[78]

But Dassey had not mentioned a shooting or even a head injury until he was asked questions that suggested those two things occurred. It was only after the specific question that Dassey made any statement related to a shooting. That is a critical point of the recording and sequence of events in the interrogation: in false confession cases, suspects often have learned facts from investigators as part of the questioning process, resulting in statements that seem falsely authentic.[79] It feels more like detectives are leading Dassey down a particular path—even if unintentionally—and less like Dassey is giving a coherent sequence of events or introducing any facts of which he is uniquely aware. That is why it is not surprising that at various stages in the investigation Dassey's statements are repeatedly inconsistent.[80]

Once Dassey's state court appeals were exhausted in 2013 and his conviction had been upheld, his attorneys began the next phase of his appeals. When the federal district court issued its opinion in 2016, it overturned Dassey's conviction.[81] The court agreed with Dassey and held that his confession was involuntary based upon the nature of the interrogation and the lack of reliability of the statements. The court further agreed that "as a practical matter, [the confession was] the entirety of the case against him."[82] Accordingly, his conviction was overturned.[83] The ultimate outcome of the case now depends on the rehearing *en banc* before the United States Court of Appeals for the Seventh Circuit.

Both interrogations demonstrate the use of the Reid technique, which puts psychological pressure on the suspect that, while inducing confessions generally, are also associated with false confessions.[84] While the details are clearer in Dassey's case because it was video taped, Knox's account is also consistent with the technique. As Professor Leo describes, "[t]he objective is to use the technique of accusatory interrogation to elicit incriminating statements that confirm the interrogators' pre-existing belief in the suspect's guilt and then build a case

78. *Id*.

79. Garrett, *supra* note 44.

80. *See Dassey I*, *supra* note 36, at 970–75.

81. *Id*. at 1006.

82. *Id*.

83. *Id*.

84. Leo, *supra* note 43, at 205.

around it."[85] The transcript of Dassey's interrogation reveals many examples of this tactic, and the court cited them throughout its opinion finding that his confession was involuntary ten years after his conviction.[86] Similarly, Knox has stated that the interrogators repeatedly told her they knew she was not being truthful until she provided facts that supported their theory of her involvement. They also told her that they had physical evidence that linked her to the crime scene, which was not true, and that Sollecito had retracted her alibi. Similarly, detectives at one point told Dassey that phone records disproved one of his claims that he was on the phone during a critical time period on the evening of the murder. Deception and ploys about false evidence have frequently been linked to false confessions,[87] yet the practice is regularly tolerated by American courts.

There were some clear differences in the interrogations of Knox and Dassey, but common themes were present. One notable difference between Dassey and Knox's experiences was the tone of the interrogators. Knox contended that interrogators questioned her aggressively and yelled at her, even cuffing her on the head.[88] While in Dassey's recordings, detectives took a different tact and used a "paternalistic approach," sometimes patting him on the knee.[89] Instead of yelling at Dassey, the detectives provided reassurances and encouragement as a means of exploiting the absence of an adult looking after his interests.[90] Research has demonstrated that either of these approaches can produce conditions associated with false confessions because psychological risk factors are still present.

B. Comparing Applicable Confession Law in the United States and Italy

The Federal District Court's decision overturning Dassey's conviction was welcome news to many experts and lay people following the case. In light of the difficult legal standard required for a defendant to prove that a confession was involuntary and then succeed at the habeas stage, the decision was somewhat unexpected. The fact that the case will now be argued *en banc* highlights the rough terrain that still exists to prove involuntariness in the United States, even for children unrepresented in coercive environments. On the other hand, the legal framework that applied in the Knox case quickly led to the required suppression of her statement; the problem was that these strong protections with regard to suppression were obscured by other underlying problems in the investigation, poor implementation of applicable Italian law, and the release of her statement to the public.

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85. *Id*.

86. *See Dassey I*, *supra* note 36, at 999–1006.

87. *See* Saul M. Kassin et. al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3 (2010).

88. AMANDA KNOX, WAITING TO BE HEARD, 1, 103 (2013).

89. *Dassey I*, *supra* note 36, at 1000.

90. *Id*. (concluding that Brendan's interrogators exploited his vulnerabilities during interrogation by repeatedly assuring him that everything was ok and that they were in his corner).

1. Confession Law in the United States

In the United States, historically, the Supreme Court has made statements reflecting a belief in the superiority of the American approach to protection against self-incrimination.[91] The language demonstrates a prevailing domestic view that the United States reigns as an international leader of due process rights via the adversarial model of justice.[92] Lawyers in the United States are more or less trained that the adversarial model has superior protections for defendants and is fairer than inquisitorial models, particularly when it comes to confession law.[93] This was especially true in the wake of *Miranda v. Arizona*.[94]

While in American courts a defendant may challenge the admission of his confession on a variety of grounds, this discussion will focus on the two most relevant to the issues presented here. First, he can allege that his rights were violated by the government under *Miranda*.[95] Second, as Dassey did on appeal, he may object to its admission on the grounds that the confession itself was involuntary.[96] In *Miranda*, the Court required that police administer warnings to suspects when the defendant is subject to custodial interrogation. After *Miranda*, suspects must be informed of their Constitutional right against self-incrimination, including the right to remain silent and to have an attorney appointed and present when they are questioned. When the United States Supreme Court decided its famous *Miranda* decision in 1966, it was considered to be in the "vanguard of international criminal procedure reform."[97] Today, it is aptly described as "one of the most praised, most maligned—and probably one of the most misunderstood—Supreme Court cases in American history."[98]

Some critics feared that *Miranda* warnings would hamper the ability of law enforcement to interrogate suspects and conduct investigations.[99] This fear has not been realized. Nor has the decision yielded the kind of protections against unreliable confessions that many of its champions envisioned. In truth, "[i]nterrogation-induced false confession has always been a leading cause of miscarriages of justice in the United States," and that continues to be so decades after *Miranda*.[100]

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91. *See* CRIMINAL PROCEDURE: A WORLDWIDE STUDY xxi–xxii (Craig M. Bradley ed., 2nd ed., 2007).

92. *See id*.

93. See *id*.

94. *See id*.

95. Miranda v. Arizona, 384 U.S. 436 (1966).

96. *See generally*, Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—And What Happened to It*?, 5 OHIO ST. J. CRIM. L. 163 (2007).

97. Craig M. Bradley, *Interrogation and Silence: A Comparative Study*, 27 WIS. INT'L L. J. 271, 272 (2009).

98. Kamisar, *supra* note 96, at 163.

99. *See id*.

100. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 920 (2004).

One of the chief reasons for this is the ease with which a court will find that a suspect has waived the rights afforded under *Miranda*. For example, no court that heard Dassey's case ever found that there had been a violation of *Miranda*,[101] though it is clear that he did not understand his rights. Like Dassey, most suspects waive the rights associated with *Miranda*, thereby rendering *Miranda* warnings a hollow protection in practice.[102] Studies have found that about eighty percent of suspects waive their *Miranda* rights, often because they wish to seem cooperative.[103]

At first, it appeared that the Supreme Court's standard for waivers would set a relatively high bar. *Miranda* states that the government bears a "heavy burden" to prove that a suspect "knowingly and intelligently waived his privilege" against self-incrimination and the right to counsel.[104] However, courts generally find that suspects' *Miranda* waivers meet the legal standard. This is also true for decisions involving interrogations of children, even when conditions seem contrary to Supreme Court decisions that recognize their vulnerabilities.[105] For example, consider a California Court of Appeals case, which held that a twelve-year-old child was "worldly" and, therefore, capable of providing a valid waiver of his *Miranda* rights without any assistance from a parent or counsel.[106] That decision is not at atypical under current American confession law.[107]

The Court has cut back *Miranda*'s protections in other ways that have further contributed to its diminution on the international stage. The Court has given a narrow interpretation to the meaning of "custodial interrogation", the circumstances that necessitate police to provide Miranda warnings.[108] Thus, a defendant who voluntarily arrives at the police station or speaks with the police elsewhere may be questioned without warnings, so long as that person is not considered to be in custody.[109] It also does not bar the admission of physical evidence that is obtained in violation of *Miranda*.[110]

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101. *Dassey I*, *supra* note 36, at 967–85 (describing procedural history in Dassey's case which does not include a present or previous finding of a Miranda violation).

102. Saul M. Kassin et al., Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs, 31 L. & HUM. BEHAV. 381, 383 (2007).

103. *See*, *e.g.*, Richard A. Leo, Inside the *Interrogation* Room, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996).

104. Miranda, *supra* note 95, at 475.

105. Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 L. & SOC'Y REV. 1, 3 (2013).

106. *See*, *e.g.*, In re Charles P., 184 Cal. Rptr. 707 (Cal. Ct. App. 1982).

107. *See*, *e.g.*, Martin Guggenheim & Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J. L. & POL'Y 109, 160–61 (2012) (discussing the challenges and inadequacies of current confession law as applied to minors).

108. *See*, *e.g.*, Illinois v. Perkins, 496 U.S. 292, 297 (1990) (holding that the Defendant was not entitled to receive Miranda warnings because he was not subject to a custodial interrogation when an undercover agent was placed in his cell block to ask him questions).

109. Oregon v. Mathiason, 429 U.S. 492 (1977).

110. Scholars criticize this decision, most notably, Yale Kamisar, *Dickerson v. United States: The Case That Disappointed Miranda's Critics - and Then Its Supporters*, *in* THE REHNQUIST LEGACY

Another avenue for challenging the admission of a confession exists when the defendant can prove that the confession was involuntary.[111] The legal conditions of Dassey's *Miranda* waiver are troubling, but courts uphold waivers like his. Thus, voluntariness was the legal issue that led to the Court to suppress his statement and overturn his conviction. In order to satisfy the voluntariness test, the United States Supreme Court has established that it will depend upon the totality of the circumstances: "the totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation."[112] As the doctrine has evolved, absent overt serious threats or physical coercion, statements given under circumstances such as Dassey's are routinely held to be voluntary in American courtrooms.[113] The threshold for proving involuntariness is so high that the Supreme Court has not suppressed a single "station house" confession for involuntariness since 1972.[114] Moreover, just as courts often deem young children capable of waiving their *Miranda* rights, they routinely find that they have given "voluntary" statements despite questioning that occurs absent a parent, guardian, or attorney.[115] The Supreme Court requires only that a confession must be voluntary under the totality of the circumstances with age among the relevant factors. The law considering age in this and other criminal contexts is applied in a haphazard and perfunctory manner.[116] Finally, even when an involuntary confession was erroneously admitted, a conviction will not be set aside if the court finds that it was a harmless error and that the other evidence was sufficient to result in a conviction.[117]

Thus, it is well established that American courts generally labor under a standard that has been unfriendly to compelling claims like Dassey's. Courts routinely admit confessions into evidence under similar conditions despite claims of involuntariness, for adults and children.[118] The admission of Dassey's statements at trial and the affirmation on direct appeal is not atypical. Like many aspects of criminal procedural law that are generally accepted by courts, voluntariness in the eye of the courts is much different from that of the public.

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106 (Craig M. Bradley ed., 2006).

111. *See*, *e.g.*, Ashcraft v. Tennessee, 322 U.S. 143 (1944) (finding involuntariness under the totality of the circumstances where suspect was questioned for thirty-six consecutive hours); Brown v. Mississippi, 297 U.S. 278 (1936) (finding involuntariness based on brutal physical force).

112. Fare v. Michael C., 442 U.S. 707, 725 (1979).

113. For a discussion of the difficult threshold typically required for suppression, see generally Mark A. Godsey, Rethinking the Involuntary *Confession* Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination, 93 CALIF. L. REV. 465, 470 (2005).

114. Bradley, *supra* note 97, at 272; *but see* Arizona v. Fulminante, 499 U.S. 279 (1991) (upholding a lower court decision which found involuntariness based upon questioning of defendant by informant in prison and applying the harmless error doctrine).

115. Guggenheim & Hertz, *supra* note 107.

116. *Id*. at 160–61 (describing how courts reject involuntariness claims "in all but the most extreme set of circumstances").

117. Arizona v. Fulminante, 499 U.S. at 302 .

118. *See generally*, Godsey, supra *note 113*. For a discussion specific to juveniles, *see also*, Guggenheim & Hertz, *supra* note 107; Feld, *supra* note 105.

This may explain why the Italian system faced so much criticism despite the common reality of analogous domestic cases like Dassey's.

The general public, along with legal experts, were troubled—even stunned, sickened, and "ashamed"[119]—watching the clips of a naïve teen with a below average intellect struggling through police questioning without a lawyer or adult protecting his interests. Dr. Richard Ofshe, a professor and confession expert, reflecting on the videotaped confessions given by Dassey, stated, "I see something that almost makes one ashamed to be an American."[120] And yet, the Wisconsin state court system permitted the conviction to stand uninterrupted based upon the admission of that statement, and Dassey faces a significant hurdle to have the decision overturned in federal court. Nevertheless, the Federal District Court saw grounds to suppress Dassey's confession. The opinion used the recording of Dassey's interrogation to explain the finding that Dassey's confession lacked indicia of reliability and voluntariness. Given the high standard for involuntariness and the standard of review the court must use in *habeas corpus* petitions, it remains difficult to predict the ultimate outcome of Dassey's plight in federal court.[121] One the other hand, the United States Supreme Court has been consistent in its recent reminders to lower courts about the constitutional import of age and the special considerations that should be afforded to the vulnerabilities of youth.[122] But lower courts are often loathe to offer additional protections in the confession setting.

2. Confession Law in Italy

First, the Italian Code of Criminal Procedure requires that an accused only be interrogated with an attorney present.[123] Unlike *Miranda's* right to counsel, this requirement is not waivable in Italy. So, despite the criticism or perception about lesser due process protections afforded by Italy's system of Criminal Procedure, in Italy Dassey's questionable statements could not have been admitted against him as evidence of guilt, just as Knox's were not. In Italy, if a person is questioned without the opportunity to consult a lawyer, the statement is

119. Willet, *supra* note 39; Louszko, *supra* note 40 (quoting Professor Richard Ofshe of the University of California, Berkeley).

120. *See* Louszko *supra*, note 40 (quoting legal experts).

121. Under Section 2254(d)(2) of the Antiterrorism and Effective Death Penalty Act, which dictates the standard for Dassey's petition, the petitioner must show that the state court decision involved an unreasonable determination of the facts. That standard is met if it rests on fact-finding that ignores the clear and convincing weight of the evidence." Bailey v. Lemke, 735 F.3d 945, 949-50 (7th Cir. 2013).

122. *See*, *e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (banning the execution of juvenile offenders); Graham v. Florida, 130 S. Ct. 2011 (2010) (banning life without parole for non-homicide juvenile offenders); J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (requiring age consideration in the *Miranda* custody analysis).

123. COD. PROC. PEN. ART. 350 (It.).

not admissible as evidence of guilt,[124] whereas in the United States it is routine police practice to encourage suspects to waive their *Miranda* rights.[125]

Furthermore, under Italian law, there is no additional requirement to show that the subject was undergoing a "custodial interrogation" in order to invoke a right to counsel. Rather, under Italian law, all suspects have this right, so even spontaneous statements cannot be used against the accused if counsel were absent.[126] In Italy, as in the United States, the accused also has an absolute right to silence.[127] Additionally, confessions must be recorded in writing or audio for their use against the defendant, under penalty of exclusion.[128]

Finally, Italian law requires an interpreter during questioning for non-native speakers. Fidelity to this principle is not clear. Knox's lawyers have argued that the police did not provide a neutral interpreter during her interrogation and that the interrogation began without an interpreter of any kind. This was another frequent source of American criticism since Knox's Italian language skills were limited. But in the United States, there is no constitutional right to a neutral or certified interpreter during interrogation.[129] The government must only prove that the suspect properly waived his or her *Miranda* rights.[130] Generally speaking, if it is proven that the rights were explained in a language the person understood, courts will uphold the waiver without requiring a neutral or official interpreter.[131]

In Knox's case, there was no need to litigate questions about coercion and proper waiver of counsel to determine the admissibility of the confession, both of which pose a high bar for defendants in the United States. If a suspect does not have counsel and the statement is not recorded, as was the case for Knox, the statements could not be and were not actually admitted to prove her guilt.[132]

An additional provision of Italian law was relevant to Knox's statement and, in her case, it worked against other protections in place. There was a civil case against Knox pursued by a third party, Patrick Lumumba. The civil case was based upon her initial statements during police questioning that her boss, Lumumba, had

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124. *Id*.

125. *Id*.

126. COD. PROC. PEN. ART. 350(7) (It.).

127. *See* Mirabella, *supra* note 14, at 251.

128. COD. PROC. PEN. ART. 357, 134 (It.).

129. *See* United States v. Silva-Arzeta, 602 F.3d 1208, 1217 (10th Cir. 2010) ("We can agree with Mr. Silva–Arzeta that the use of certified interpreters and recording devices during interrogation could improve the accuracy of evidence at trial. We cannot, however, hold that their use is constitutionally required."); *see also*, Floralynn Einesma, *Confessions and Culture: The Interaction of Miranda and Diversity*, 90 J. CRIM. L. & CRIMINOLOGY 1, 27 (1999) (explaining that it is not unconstitutional for a police officer to serve as an interpreter during custodial interrogation).

130. *Id*.

131. *See, e.g., id*.

132. Giulio Iluminati & Michele Caianiello, *The Investigative Stage of the Criminal Process in Italy*, *in* SUSPECTS IN EUROPE: PROCEDURAL RIGHTS AT THE INVESTIGATIVE STAGE OF THE CRIMINAL PROCESS IN THE EUROPEAN UNION (Ed Cape et. al. eds., 2007) (discussing the right to counsel in Italy).

been present at the home when Kercher was murdered.[133] The statement was later proven false. Under Italian law, the fact finders in murder cases like Kercher's include a mixed jury of laypersons and members of the judiciary. If there are accompanying civil claims, as here, they proceed in tandem with the criminal charges before the same jury.[134] The practice of admitting evidence in the parallel civil case before the same jury finds its rationale under the theory that the fact finder is able to separate the evidence in the civil and criminal cases, particularly under the direction of the judicial jury members.

Next, Italian law requires a written record of the jury's decision which must articulate the specific evidence that justifies a finding of guilt.[135] In a case like Knox's, the jury had to articulate the basis for a conviction in a written decision using only evidence admissible as to the criminal matters. Therefore, the decision could not overtly refer to the evidence that was admissible in the civil case to support a guilty finding. Regardless, its potential to influence jurors and their view of other evidence suggests that the requirement of a written decision does not cure the potential for bias.[136]

There appear to be three main reasons why the protections offered under Italian law failed to protect Knox when she was originally convicted. First, the procedural law was clearly flouted during the interrogation itself. The officials did not provide counsel, they failed to record the interrogation, and there were questions about proper access to an interpreter. Yet because of these violations, Knox gained suppression. Second, the admissibility of Knox's statement into evidence in the parallel civil case resulted in its exposure to the jury deciding her guilt.[137] Finally, the rampant pre-trial publicity about her statement likely influenced many aspects of the investigation and impacted the case against her.[138]

When Knox's incriminatory statements were admitted in the parallel civil case against her, this practice spurred a great deal of criticism in the United States. Nevertheless, the practice is consistent with the inquisitorial model's philosophy, which allows the fact finder to weigh all existing evidence and then credit the most persuasive. Confirmation bias research, however, demonstrates that it is difficult for fact finders to disregard knowledge about confessions when weighing other evidence.[139] Given the research, even if the written jury decision required in

133. BURLEIGH, *supra* note 14, at 194–98, 267.

134. Mirabella, *supra* note 14, at 251.

135. Pizzi & Marafioti, *supra* note 10, at 15 ("Following trial, the court must explain its decision in an opinion that reviews the evidence and explains in detail the grounds ('motivazione') for the decision.").

136. *See* Kassin, *Why Confessions Trump Innocence*, *supra* note 12, at 433–434.

137. Mirabella, *supra* note 14, at 251.

138. *Cf.* Kassin, *supra* note 12 (discussing the ways in which the existence of an incriminating statement can contaminate many areas of an investigation and suggesting ways to mitigate its potential influence).

139. *See generally*, *id.* (discussing the confirmation biases that are associated with confessions and the rippling effects of their contamination throughout a case).

Italy articulates that a conviction was based upon admissible evidence, it is still likely tainted by knowledge of the confession.[140]

The unique influence of confessions on confirmation bias makes it difficult to defend the merits of exposure of confession evidence to the same jury, even across different philosophical models of criminal and evidentiary procedure. Dr. Kassin's research supports the argument that the criminal procedural process and investigation should consider the special potential for confession contamination bias on decision makers at all points of an investigation. This is true whether it is under an adversarial model or quasi-inquisitorial model.

The critique of a practice that exposed the fact finder to inadmissible evidence during the Knox trial also illuminates a similar practice permitted in American jurisdictions. Throughout the United States, an analogous procedure is permitted in two distinct instances. First, when a defendant forgoes a jury trial and opts to have her case heard by a judicial fact finder, the same judge is permitted to decide both questions of law and fact. As such, the judge is exposed to evidence that she can later rule inadmissible for her consideration at trial. Therefore, just as Knox's fact finder was exposed to otherwise inadmissible evidence, so are judges in these bench trials; admittedly, this occurs in the United States only if the defendant chooses to forgo her jury trial.

Second, judges in juvenile delinquency courts across the United States are permitted to hear the same potentially inadmissible evidence despite their dual role as fact finders. Indeed, in juvenile courts, judges regularly decide suppression issues and then serve as finders-of-fact at trial.[141] In these cases, judges are routinely exposed to evidence—confessions and other tangible evidence—which they must later disregard when they decide whether or not the juvenile defendant is guilty.[142] Courts have upheld this practice in juvenile courts and in bench trials where Defendants elect to forgo a jury trial.[143] Research casts doubt on the rationale used to support this practice.[144] The criticism of this practice directed abroad in light of the Knox case may be a worthy catalyst for its reexamination in domestic contexts, particularly as it applies to confession evidence. In the United States, the contradiction could be at least partially resolved by having a different judge decide the suppression issues prior to trial, even if only as to the admission of incriminating statements. Therefore, both countries would benefit from reexamination of rules that allow a fact finder to be exposed to potentially inadmissible confessions.

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140. *Id*.

141. Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 571–73 (1998).

142. *Id*.

143. *Id*.

144. Id. at 568-571.

III.
CONFESSIONS AND PRE-TRIAL PUBLICITY

As Knox's case demonstrates, suppression does not fully resolve the damaging effect of statements, particularly in high profile cases aired in the media. In an age of "the twenty-four media cycle," people are accustomed to "saturation coverage,"[145] whether in the United States or abroad. The particular details of the deaths of Halbach and Kercher, both involving the murders of young women in communities unaccustomed to such violent and disturbing allegations, contributed to the intense media interest and coverage. In the case of Knox, the international element of the case added to the media fervor. In the Halbach investigation, the fact that Steven Avery was exonerated for another crime only two years prior to his arrest for murder after serving eighteen years in prison in error positioned the case for national attention. Intense interest in the details unfolding in criminal investigations of high profile murders leads to a familiar "trial by media" phenomenon. Its accompanying tension with the rights of the accused extends across borders.[146]

This section addresses extra-judicial statements by the prosecution related to confessions and their unique place in regulations associated with the pre-trial publicity. The two carry conflicting rights with which modern societies grapple across cultures. In reality, whether or not a confession is entered into evidence at trial is only part of the analysis of its impact on a case. The potential for a flawed confession to negatively influence an investigation, the collection of other evidence, and the jury pool, all begins the moment it is uttered. The Kercher and Halbach investigations are powerful cross-cultural examples of this. The elicitation of confessions tends to set in motion a "hypothesis-confirming investigation, prosecution, and conviction."[147] The confession is aired to the press and a trial-by-media quickly follows.[148] This discussion focuses on the relationship between prosecutorial speech and confessions because of the way that pre-trial publicity can tend to perpetuate the harm of unreliable confessions, even if a statement is later suppressed at trial.

A. Extra-Judicial Speech in the Knox and Dassey Investigations

No more than two weeks after her arrest, the statements that Knox made to the police were reported verbatim in the press after their release by law enforcement.[149] The statements were quickly accessible to the public in the

145. *See* Resta, *supra* note 46.

146. *Id*.

147. *See*, *e.g*., Kassin, *supra* note 12, at 431 (describing the sequence of events in the Knox case).

148. *Id*.

149. *See*, *e.g.,* Malcolm Moore, *Transcript of Amanda Knox's Note*, TELEGRAPH (Nov. 27, 2007), http://www.telegraph.co.uk/news/worldnews/1570225/Transcript-of-Amanda-Knoxs-note.html (relaying a complete transcript of a statement Knox wrote in a note to police on the night of her arrest).

newspaper without information about the circumstances of the questioning that were later revealed. Moreover, Italian Prosecutor, Giuliano Mignini, quickly shared his theories about Knox's motive with the press.[150] Swiftly, Mignini's theories created a media narrative about the crime that was not rooted in the evidence.[151] Specifically, according to the media, the police and prosecution leaked theories that Kercher's murder involved an erotic sex game fueled by drugs and that Knox was a promiscuous and satanic deviant.[152] Mignini openly posited that the two other accused suspects, Raffaele Sollecito and Rudy Guede, had participated in the murder to please Knox after an argument regarding Knox's sexual practices. As just one example of many, Newsweek reported that "prosecutors believe [Kercher] died during an extreme sex session gone wrong."[153] Although there was no evidence to support it, the theory advanced by the prosecution to the media quickly took hold. Its power endured during the two years leading up to the trial of Knox and Sollecito, and beyond.

As the Knox trial wore on, one writer covering the trial noted, "it was almost impossible to find a person who would consider the possibility that the narrative of the crime [as crafted by the prosecution], which they had been reading about . . . might not be the truth."[154] And yet there was no reliable physical evidence connecting Knox or Raffaele to the room where Kercher's violent murder occurred. There was simply her statement, placing her at the home at the time of the murder. Mignini was also a controversial figure because, at the time of Knox's prosecution, he was under investigation for allegations that he abused his powers through his use of wire-tapping.

Back in Wisconsin, Kenneth Kratz, the District Attorney who pursued Dassey's conviction, delivered comprehensive details about the existence and contents of Dassey's statements to police detectives shortly after Dassey was arrested. First, he called a press conference, along with the Calumet County Sheriff, on March 1, 2006. In that press conference, he prepared the media for a subsequent press conference he would hold the following day. Kratz declared that he and law enforcement officers now "know" details about the crime. On March 2, he then made detailed statements of fact without any qualifying language using all the details in Dassey's statement. Indeed, he began by stating: "We have now determined what occurred sometime between 3:45 and 10 or 11 p.m. on the 31st of October." He paired this introductory statement with a preliminary warning

150. David Harrison & Philip Sherwell, *Amanda Knox: 'Foxy Knoxy' Was an Innocent Abroad, Say US Supporters*, TELEGRAPH (Dec. 5, 2009), http://www.telegraph.co.uk/news/6736512/Amanda-Knox-Foxy-Knoxy-was-an-innocent-abroad-say-US-supporters.html (stating that "[l]eaks from the police and prosecution teams suggested lurid motivations for Knox's role in the brutal killing ranging from satanic sex games that went wrong to frictions over housework"); Barbie Nadeau, *Sex Murder Prison Diaries*, NEWSWEEK (Jan. 16, 2008), http://www.newsweek.com/sex-murder-prison-diaries-87481.

151. *See* Harrison & Sherwell, *supra* note 150.

152. *See id*.

153. Nadeau, *supra* note 150.

154. BURLEIGH, *supra* note 14, at 13.

that children under age fifteen and acquaintances of Teresa Halbach should not watch the press conference because of the grisly details that would follow. At that point, he provided a detailed narration using the statement that Dassey eventually made to the detectives, knowing that it would be televised and covered in the media.

As in Knox's case, Kratz's delivery of the information fueled a new narrative of Halbach's murder. The prosecution now alleged that the murder involved two perpetrators, with sixteen-year-old Dassey participating at the direction of Avery. In his press conference, Kratz described in vivid detail a violent murder and rape scene that included, as he put it, physical "torture" and a victim pleading for her life. He delivered details that came exclusively from Dassey's statement as facts. Importantly, there was no physical evidence supporting that theory other than the bone fragments indicating that the victim had been shot in her head.

The prosecution in both cases aired the salacious theories they had developed in part based upon the confessions and both did so even when presented with contrary physical evidence. In Kercher's murder, for example, the investigators did have physical evidence that Kercher was stabbed to death and sexually assaulted by her assailant because they found her body at the crime scene. But the physical evidence did not support the theory of the case aired to the press that that were multiple killers. It pointed to one perpetrator, Rudy Guede, whose DNA was present at the crime scene and on Kercher's body, which led to his conviction for the murder.[155] But with Knox's incriminating statement placing her in the house at the time of the murder, the prosecution appeared to have crafted a story to corroborate it.[156]

In Dassey's case, Kratz's narrative came directly from Dassey's inconsistent statements. As in the Kercher investigation, the narrative was not born out in the physical evidence. There was no physical evidence, DNA or otherwise, supporting a theory of the case that Dassey had raped and stabbed Halbach in Avery's trailer. Moreover, there was also no physical evidence that the victim herself was ever in the trailer.

Nevertheless, the Kratz narration bolstered the credibility of the confession. He announced the information with no qualifying statement as to its truthfulness, as required under the applicable ethical rules.[157] As one reporter stated in reference to the press conference on March 2, 2006, "We had no idea that Ken Kratz was going to sit there and basically, in graphic detail, give his version of the way this went down. The degree of detail that he gave there was honestly a shock to me."[158]

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155. *Id*.

156. *Id*.

157. *See infra* Section IV. B (discussing applicable ethical rules).

158. Tessa Stuart, '*Making a Murderer Trial' Inspired Reporter to Go Into Law*, ROLLING STONE MAGAZINE (Jan. 26, 2016), http://www.rollingstone.com/tv/news/making-a-murderer-trial-inspired-reporter-to-go-into-law-20160126.

Because of Kratz's public statements, Avery's defense lawyers sought an order limiting public comment by Kratz and the Sheriff's department.[159] At first, the judge denied counsel's motion for an order limiting speech. Eventually, however, based upon the prejudicial effect of extrajudicial statements, the court took the unusual step of issuing an order requiring the Sheriff's Department to cease comment on the investigation of Teresa Halbach's death.[160] At that point, however, much of the damage had been done. Moreover, the enforcement of the order terminated with the conviction of Avery, prior to the commencement of Dassey's case.

Dassey's post-conviction attorney, Steven Drizin, concluded that viewing the March 2nd press conference on video underscored the deleterious effects of the prosecutor's extrajudicial statements in the case. In his words, "the release of these gory details coupled with [Kratz's] confidence in their truth all but sewed shut any chance that Dassey or Steven could get a fair trial."[161] In that way, like the trials of Knox and Sollecito in Italy, Dassey's trial appeared to be an exercise of confirmation of guilt despite rules in both countries protecting the presumption of innocence. And both prosecutions show the current limits of the court's ability to regulate the impact of prejudicial pretrial statements.

B. Law Regulating Extra-Judicial Speech and Implications on the Right to a Fair Trial

Whether they employ an inquisitorial, adversarial, or a hybrid system, the United States and continental jurisdictions all have regulations addressing extrajudicial speech and its interaction with the rights of the accused.[162] In the age of the twenty-four hour news cycle, it is increasingly difficult to find the appropriate balance between a free press and the rights of the accused, particularly with respect to the presumption of innocence.[163] As a whole, the approaches in the United States and European countries vary according to jurisdiction and are tempered by the values of each culture.[164]

In the United States, the law balances the First Amendment right to free speech and the constitutional right to a fair trial under the Sixth Amendment. By comparison, in Europe, Professor Resta writes that while similar fundamental concerns exist, the regulatory schemes of continental jurisdictions focus on "the need for safeguarding the privacy, personal dignity, and presumption of innocence

159. Defendant's Motion for an Order Limiting Public Disclosure, March 8, 2016. *See also*, Defendant's Memorandum on Examples of Pretrial Publicity, (July 13, 2006) (on file with journal).

160. Order Limiting Public Disclosure, (September 11, 2006) (on file with journal).

161. Steven Drizin, *Theft by Press Conference: Stealing a Defendant's Presumption of Innocence With Prejudicial Pre-Trial Publicity*, HUFFINGTON POST BLOG (Jan. 29, 2017), http://www.huffingtonpost.com/steve-drizin/theft-by-press-conference_b_9108060.html.

162. *See generally*, Resta, *supra* note 46.

163. *Id*.

164. *Id*.

of trial participants against interference by the media."[165] Nevertheless, across cultures, regulations are in place to address extrajudicial speech. Literature on extrajudicial speech focuses primarily on the regulation of prosecutor speech. That is because in most jurisdictions prosecutors and law enforcement are the source of much of the information the media receives and disperses about criminal proceedings.[166]

In Italy, there are three applicable sources of regulations or guiding principles regulating prosecutorial speech; one is domestic law and two others originate from international agreements. First, Italy's Code of Criminal Procedure restricts certain kinds of pre-trial publicity by the judiciary and law enforcement.[167] The Italian Code of Criminal Procedure (Code) prohibits the disclosure of evidence until it is provided to the accused.[168] The Code also forbids the partial or total publication of documents covered by the rules, such as witness statements and wiretapping transcripts.[169] It imposes specific penalties if the rules are violated and information is leaked.[170]

Next, Italy is subject to the European Convention for Human Rights (The Convention). The Convention curtails pre-trial publicity that will violate the suspect's presumption of innocence.[171] The provision applies to statements that are deemed the equivalent of premature declarations of guilt by the state. In short, if prosecutorial speech suggests unequivocal guilt of a defendant as Kratz's did, it is a violation of the Convention.[172] Under the Convention, citizens have the opportunity to apply for monetary relief if their rights are violated, but it does not control their adjudication of guilt.

Finally, the Committee of Ministers of the Council of Europe issued a universal recommendation to provide guidance to member countries, which includes Italy. The Council's recommendations contain language similar to that found in the American Bar Association Model Rules of Professional Conduct. Specifically, the Council's Principle 10 states that "in the context of criminal proceedings, particularly those involving juries or lay judges, judicial authorities and police services should abstain from publicly providing information which bears a risk of substantial prejudice to the fairness of the proceedings."[173]

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165. *Id*. at 40.

166. *Id*. at 49–50 (citing studies and research from a variety of global jurisdictions, including the United States and Italy).

167. *Id*. at 45–56.

168. COD. PROC. PEN. ART. 329 (It.).

169. *Id*. at 114, 339.

170. *Id*. at 684.

171. European Convention on Human Rights, §§ 6.2, 6.1; *Allenet de Ribemont v. France*, §§ 39–41.

172. European Convention on Human Rights, §§ 6.2, 6.1.

173. COUNCIL OF EUROPE, RECOMMENDATION REC (2003) 13 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE PROVISION OF INFORMATION THROUGH THE MEDIA IN RELATION TO CRIMINAL PROCEEDINGS, PRINCIPLE 10 (adopted July 10, 2003).

Despite the domestic law and Convention regulations that would have prohibited or curtailed much of the information stated to the press about Knox, enforcement is difficult and disconnected from the litigation itself. As a result, the regulations in Italy are routinely flouted.[174] For example, in Italy, witness statements and wiretapping transcripts are frequently published in the media without consequence, even though it is illegal to do so.[175]

In its final decision acquitting Knox and Sollecito in 2015, the Corte Suprema di Cassazione was ultimately highly critical of the evidence used by the prosecution.[176] The court concluded that the "media clamor" contributed to the problems in the investigation.[177] It also noted the "stunning" flaws in the investigation and evidence used to convict them.[178] The opinion did not formally discuss the airing of salacious theories to the media but it recognized the lack of evidence to support the theories of conviction in the case and was critical of the prosecution as a whole.[179] In 2015, the Italian Council of Magistrates formally reprimanded Mignini for procedural violations related to the Kercher investigation.

Turning to the United States, a defendant's right to a fair trial exists under the Sixth and Fourteenth Amendments of the United States Constitution.[180] Any attempt to limit speech related to a criminal trial balances the First Amendment rights of the attorneys and the right of the accused to a fair trial.[181] Specific to extrajudicial speech by the attorneys, each state has an ethical code of conduct that attorneys must follow. The state codes are modeled after the American Bar Association's Model Rules of Professional Conduct (MRPC).

MRPC Rules 3.6 and 3.8 generally govern the rules relevant to the extrajudicial statements made in Dassey's case. They are similar to the Council recommendations that exist as persuasive authority in Italy: a lawyer may not make public statements that the lawyer "knows or reasonably should know will be disseminated by means of public communication and will have substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[182] Moreover, the rule provides specific examples, one being that the attorney should not discuss the contents of a confession, admission, or statement by the defendant or suspect.[183]

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174. Resta, *supra* note 46, at 47.

175. *Id*.

176. Elisabetta Povoledo, *Italy's High Court Explains Decision to Clear Amanda Knox*, N.Y. TIMES, Sept. 7, 2015, at A9.

177. MARASCA-BRUNO REPORT, *supra* note 24, at 25 (2015).

178. *Id*.

179. *Id*.

180. Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

181. *Id*. For the view opposing any curtailment of the First Amendment, *cf*. Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 862–67 (1998).

182. MODEL RULES OF PROF'L CONDUCT r. 3.6(a) (2009).

183. *Id*. at 3.6(2)(b).

MRPC Rule 3.8 addresses prosecutor speech specifically and states that prosecutors should refrain from making public statements which have a "substantial likelihood of heightening public condemnation of the accused. . .".[184] The reasoning supporting the rule is straightforward: the public knows that prosecutors have "special access to information [such that] any statements made by a prosecutor may be regarded as especially accurate."[185] The Supreme Court has recognized that prejudice from media accounts of evidence "may indeed be greater than when it is part of the prosecution's evidence [at trial] for it is not then tempered by protective procedures."[186]

Within the limitations above, the ethical rules recognize that prosecutors may comment upon information in the public record.[187] The ethical rules also recognize that prosecutors may inform the public about a criminal investigation,[188] and in some cases, there may be compelling reasons why they must. Under the rules, they must refrain from expressing a definitive opinion about guilt or innocence of the defendant. That limitation recognizes the danger of contaminating the potential juror pool, witnesses, or alibis who may be influenced by prosecutorial opinion.

As in Italy, similar enforcement problems exist for limiting extrajudicial speech in the pretrial context and with prosecutorial misconduct as a whole. Despite ethical rules addressing extrajudicial discussion of confessions, discipline and enforcement in the United States is "extraordinarily rare."[189] This is true for many reasons, but two are most prominent. First, courts are loath to infringe upon attorney speech pursuant to the First Amendment.[190] The Supreme Court is vigilant about the application of rules and policies that curtail speech. The Court, however, has upheld the language in the model rules so long as the rule is applied properly within the confines of the First Amendment.[191] Secondly, the United States system of justice operates largely on an assumption that prosecutors can self-regulate and will act in accordance with the pursuit of justice and within the applicable ethical boundaries. In general, prosecutors are rarely held accountable for misconduct even beyond the admittedly more nuanced issue presented by extrajudicial speech.[192]

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184. *Id*. at 3.8 cmt f.

185. Margaret Tarkington, *Lost in Compromise: Free Speech, Criminal Justice, and Attorney Pretrial Publicity*, 66 FL. L. REV. 1873, 1902–03 (2014).

186. Marshall v. United States, 360 U.S. 310 (1959) (setting conviction aside where jurors received extraneous case information through news accounts).

187. MODEL RULES OF PROF'L CONDUCT r. 3.6(b)(2).

188. *Id*. at cmt 1. (noting that the public has "a right to know about threats to its safety and measures aimed at assuring its security.").

189. Laurie L. Levenson, *Prosecutorial Sound Bites: When Do They Cross the Line?*, 44 GA. L. REV. 1021, 1024 (2010) (Professor Levenson notes "it is extraordinarily rare for prosecutors to be disciplined for violating those rules.").

190. *Id*.

191. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1076 (1991).

192. *See* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721,

As to Dassey's case, Kratz was never sanctioned for his behavior, in contrast to Mignini. But there is case law strongly supporting the conclusion that Kratz violated ethical rules.[193] In *Maryland v. Gansler*, the Supreme Court agreed that there was prosecutorial misconduct where the prosecutor not only "announce[d] the existence of [defendant] Cook's confession, but also furnished specific information of the surrounding circumstances, including that Cook provided 'incredible details that only the murderer would have known."[194] The *Gansler* court also noted that the prosecutor "magnified the prejudicial effect of his statements by bolstering the believability of the confession."[195]

The substance of confessions are especially sensitive prior to trial because suppression issues have yet to be litigated, as was true in the Halbach and Kercher investigations; moreover, confessions influence public perception about the facts of a case and in turn, jurors' opinions, about guilt or innocence.[196] False confessions, or knowledge of confessions in general, can also contaminate other evidence in the case.[197] In many cases, evidence of a confession is almost impossible to overcome even in the face of powerful contradictory evidence that disconfirms the confession.[198] "Part of the reason confessions stick like glue is that once people form a strong opinion of guilt, they tend to interpret contradictory facts in ways that reinforce that perception."[199] For the most part, people do not believe that anyone would confess to a crime that he or she did not commit, despite the evidence proving otherwise. This is one of the critical reasons for limiting pre-trial discussion of confessions. They may prove to be untrue or inadmissible, but once they are in the public domain *and* bolstered by the prosecutor's view of their veracity, people are unlikely to accept an alternative possibility about the crime.[200]

The documentary series about Dassey's case provides objective evidence, specifically footage of the press conference, which allows any viewer to make his or her own assessment about whether Kratz's statements parallel the description

723 (2001) (noting the lack of disciplinary action against prosecutors). Recent examples of prosecutorial misconduct recently led the New York Times Editorial Board to call for the federal government to "step in and monitor some of the worst actors." Editorial Board, *To Stop Bad Prosecutors, Call the Feds*, N.Y. TIMES (June 6, 2016), https://www.nytimes.com/2016/06/06/opinion/to-stop-bad-prosecutors-call-the-feds.html.

193. *See* Att'y Grievance Comm'n of Maryland v. Gansler, 835 A.2d 548, 570 (Md. 2003).

194. *Id*.

195. *Id*.

196. Drizin & Leo, *supra* note 100, at 922–23.

197. Stéphanie B. Marion et al., *Lost Proof of Innocence: Impact of Confessions on Alibi Witnesses*, 40 L. & HUM. BEHAV. 65 (2016).

198. Drizin & Leo, *supra* note 100, at 922–23 ("Confession evidence (regardless of how it was obtained) is so biasing that juries will convict on the basis of confession alone, even when no significant or credible evidence confirms the disputed confession and considerable significant and credible evidence disconfirms it."); Kassin, *supra* note 12, at 433 (explaining that studies show that confessions have more impact than any form of evidence and "people do not adequately discount confessions—even when they are retracted and judged to be the result of coercion").

199. Saul M. Kassin, *Inside Interrogation: Why Innocent People Confess*, 32 AM. J. TRIAL ADVOC. 525, 538 (2009).

200. *Id*.

in *Gansler*. In sum, it is difficult to argue that his delivery at the press conference did not bolster the believability of the confession when he relayed the details of the statements as a recitation of facts.[201] Moreover, it was clear that he included statements that were likely to increase condemnation of the accused and were unrelated to an assessment of probable cause.[202] For example, statements about the victim allegedly screaming for mercy did not relate to probable cause and were not supported by other evidence in the case.

But even if Kratz had been sanctioned for his behavior during the case or after the conviction, as in *Gansler*, an ethical sanction alone does nothing to cure the prejudicial effect of the statement. As for trial remedies, the trial judge is required to protect the judicial process from "prejudicial outside interferences."[203] Available remedies to limit the effect of prejudicial pre-trial publicity include change of venue, jury sequestration, or granting a new trial.[204] The Supreme Court views this function seriously, but the remedies are growing less effective and less pragmatic given the pervasive availability of information in print and online media. Moreover, courts rarely administer the most drastic sanction available for potentially prejudicial pretrial publicity, which is to grant a new trial to a defendant for a violation of his right to a fair trial.[205]

Kratz's extrajudicial speech in Dassey's case is not necessarily common in the United States but neither is it an anomaly. Consider the infamous prosecution of five teenagers who came to be known as "The Central Park Five" in 1989—nearly twenty years before Dassey's case. It is best known because the five teenagers falsely confessed to attacking a female jogger. Police interrogated them without lawyers and several of them without even a parent present. The brutality of the attack on the jogger brought pressure to solve the case; this led to intense questioning of the juvenile suspects. Years later, all five were exonerated when the real perpetrator confessed and his DNA then matched the DNA found on the jogger after she was raped.

There, too, extrajudicial statements to the media by prosecutors and law enforcement compounded the harm of the false confessions. In fact, on the day of the assault, a senior police investigator expressed his disapproval of law enforcement statements to the media, stating that they "went over the line" and

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201. *See Making a Murderer*, Season 1 Episode 4 (Netflix 2015).

202. *Id*. (For example, Kratz's narration was spoken using the present tense with phrases like, "As Brendan approaches the trailer and hears louder screams for help, he recognizes it to be of a female individual and he knocks on Steven Avery's trailer doorFalse[until] a person he knows to be his uncle, who is partially dressed and full of sweat, opens the door and greets his sixteen-year-old nephew.").

203. Sheppard v. Maxwell, 384 U.S. 333 (1966).

204. *Id*.

205. *See* Joanne Armstrong Branwood, *You Say "Fair Trial" and I Say "Free Press": British and American Approaches to Protecting Defendants' Rights in High Profile Trials*, 75 N.Y.U. L. REV. 1412, 1424 (2000); *see also*, Murphy v. Florida, 421 U.S. 794 (1975) (creating a high standard of proof for defendants attempting to prove prejudice via pretrial publicity).

could tarnish the ongoing investigation.[206] Law enforcement and prosecutors had provided conclusory statements to the media about the guilt of five teenagers arrested shortly after the assault. They also commented on the demeanor of the juveniles to the newspaper, which directly contradicts the ethical rules prohibiting statements that could heighten condemnation against the accused: "police and prosecutors said [the suspects] laughed and joked while in police custody and that only one expressed any sorrow."[207] As in Dassey's case, there was no disciplinary action addressing the propriety of the extrajudicial statements and its effect on the investigation or the presumption of innocence on future jurors.

It is well documented that once a confession is released, it is nearly impossible to remedy its effects, even long after it is proven false.[208] The existence of a confession leads prosecutors to disregard other flaws or leads in the case.[209] Instead of pursuing alternative facts, the statements tend to create tunnel vision on the part of the investigators. There is a discernible pattern that repeats itself across jurisdictions. The Knox case resembled that same pattern, like the Central Park Jogger case that occurred so many years before it in New York City: the prosecution releases incriminating statements to the press, thereby "setting the story in stone" before any alternative view can take hold.[210]

In sum, courts and disciplinary bodies rarely impose the remedies that are available for sanctioning or curtailing prosecutorial statements when they come up against ethical boundaries. Examples of prosecutorial misconduct, including improper forensic practices,[211] particularly in light of proven false convictions, has led to calls for reform to create better remedies.[212] The current approaches to governing prosecutorial conduct are not sufficient[213] and regulating speech is one of the most difficult areas to address.

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206. David E. Pitt, *2 Are Indicted in Brutal Rape in Central Park*, N.Y. TIMES (Apr. 27, 1989), http://www.nytimes.com/1989/04/27/nyregion/2-are-indicted-in-brutal-rape-in-central-park.html.

207. David E. Pitt, *Gang Attack: Unusual for its Viciousness*, N.Y. TIMES, Apr. 25, 1989, at B11.

208. *See*, *e.g.*, Kassin, *supra* note 12, at 433–34.

209. *Id*.

210. Timothy Egan, *Good Cops, Bad Cops*, N.Y. TIMES (Apr. 25, 2013), https://opinionator.blogs.nytimes.com/2013/04/25/good-cops-bad-cops/ (characterizing the actions by Perugian police in the Amanda Knox case and the New York Police Department in the Central Park Five cases).

211. COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCE COMMUNITY, NATIONAL ACADEMY OF SCIENCES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, (2009) (concluding that methods of forensic investigation in many United States laboratories were flawed and lacked adequate oversight). Although it is beyond the scope of this Article, many pointed out that the DNA results used to convict Knox and Raffaele would not have been admitted in the United States. In light of the study by the National Academy of Sciences critical of American practices, it is another area worthy of comparison in future work.

212. *See*, *e.g.*, Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for A Broken System*, 2006 WIS. L. REV. 399 (2006); Levenson, *supra* note 189.

213. Joy, *supra* note 212; *see also*, Editorial Board, *To Stop Bad Prosecutors, Call the Feds*, *supra* note 192.(discussing the case of David Brown where the prosecutor withheld the transcript of an interview with another prisoner implicating two other men exclusively in the murder).

The criticisms about the extrajudicial speech by the Italian prosecution team in the Knox case were well founded. But, as Dassey's case exemplifies, prejudicial prosecutorial speech is also a problem for domestic defendants. Prosecutorial violations of rules related to constitutional rights of defendants recently led a federal judge to conclude that they are an "epidemic."[214] Rather than proving that domestic adjudication is far superior, comparison of the two cases and the problems they represent highlights parallel shortcomings and challenges in the United States.[215]

IV.
REFORM ACROSS BORDERS: DASSEY AND KNOX

Despite commentary that was highly critical of the Italian criminal justice system in its totality, Italy has interrogation laws with features that, when correctly implemented, are even more protective than those existing in the United States. Italy's interrogation protections have—at least on paper—been characterized as "the most radical" among jurisdictions when compared to the United States and other European jurisdictions.[216] This includes the non-waivable right to counsel during interrogation and the requirement that law enforcement record interrogations; the absence of either triggers automatic suppression.

These protections initially failed Knox, however, and she suffered consequences of the illegal interrogation even after suppression. Her case in Italy, along with Dassey's in the United States, demonstrates flaws in confession protections in both systems that lawmakers and courts must address and monitor. Moreover, reform measures around confessions in either country must be considered in tandem with the challenges presented by trial by media.

First, confession experts Professors Richard Leo and Steven Drizin have written that "[t]he risk of harm caused by false confessions could be greatly reduced if police were required to electronically record the entirety of all custodial interrogation of suspects."[217] Recorded interrogations are required in Italy but the law does not specify that they must be electronic recordings.[218] Failure to record Knox's interrogation whether by audio or written transcription left endless

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214. United States v. Olsen, 737 F. 3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting) (concluding that *Brady v. Maryland* violations had reached an epidemic in the United States); *see e.g*, Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010); David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. ThompsonL Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L. J. 203 (2011).

215. *See*, *e.g*., Joy, *supra* note 212, at 400 (Joy argues that three of the principle reasons for prosecutorial misconduct are "vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct, which create perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct.").

216. Thaman, *supra* note 13, at 594 (comparing *Miranda* in an international context).

217. *Id*.

218. Codice di Procedura Penale, Articles 357, 134.

disputes about what occurred on the evening of her questioning. In most American jurisdictions, the law does not yet require recorded interrogations. In Dassey's case, it was videotaped only because of a new state law that had passed in Wisconsin shortly before his interrogation and, even then, only because he was a juvenile.[219] More than half of the states and the federal government do not require recorded confessions.[220] Both of these cases are rich examples of why video recordings are a critical tool in litigating confession issues and policy makers in both countries should consider their increased use.

Just as recordings bring an enormous benefit to courts and fact finders who consider the weight or admissibility of the evidence, access to them must be carefully regulated to prevent release pre-trial. In Italy, the transcript of Knox's written statement was released to the media almost immediately, suggesting that a recording may have suffered the same fate. Similarly, Attorney Kratz gave practically a verbatim iteration of Dassey's statement to the media and the public before the trial. These examples do not counter against recording statements, rather, they expose some potential harms that can be actively counteracted. The emerging research about the potential contamination that confession evidence can have on the integrity of an investigation presents new incentives for law enforcement and prosecutors to adhere to restrictions set forth in ethical standards and to implement other protections.

If a statement is widely exposed prior to trial, it can impact the integrity of investigations and convictions even if the statement is suppressed at trial, suggesting that strong suppression laws alone, as exist in Italy, are only part of improving access to a fair trial.[221] The immediate public airing and bolstering of Knox and Dassey's statements by the prosecution also illustrate this point. The effects of the statement can still permeate the case. Efforts to curtail and control prosecutor speech have been ineffectual in both countries, even when they seek to address confessions very specifically.[222] But emerging research about the way that confessions can contaminate other evidence demonstrates that the prosecution itself also benefits from better protection of statements before trial. For example, there is evidence that knowledge of statements influences witness testimony,[223] potentially corrupts evaluation of DNA evidence,[224] and creates tunnel vision on the part of investigators.[225] The scientific research about the ways that confessions

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219. WIS. STAT. § 938.195 *et seq*.

220. Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 417-418 n. 96-98 (2015). Although the federal government recently changed course and created a presumption for recordings, there is not a law requiring them to do so.

221. *See, e.g*., Marion, *supra* note 197; Sara C. Appleby & Saul M. Kassin, *When Self-Report Trumps Science: Effects of Confessions, DNA, and Prosecutorial Theories on Perceptions of Guilt*, 22 PSYCHOL., PUB. POL'Y & L. 127 (2016); Richard A. Leo et. al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 487 (2006).

222. *See* Sections IV. A. & B, *supra* (discussing applicable ethical rules).

223. *See* Marion, *supra* note 197, at 68.

224. Appleby, *supra* note 221, at 137.

225. Kassin, *Why Confessions Trump Innocence*, supra note 12, at 433-434.

can contaminate other forms of evidence[226] provides new incentives for prosecutors to minimize extra-judicial speech about confessions to minimize their own vulnerabilities to future challenges. Moreover, the research supports the creation of internal procedures by law enforcement to protect the evaluation of other evidence in investigations, such as DNA testing. If the personnel conducting the tests are screened from the statements in the case, it will reduce the possibility of faulty analysis at various points of the investigation.[227] Thus, law enforcement evidence will be less vulnerable to future challenges on the basis of contamination at trial. This potential benefit to law enforcement, not just defendants, should motivate improvements in policy and practice. The conflation of interests could create a path to reform across borders. Both the Knox and Dassey cases are lessons in the deficits of the laws that currently exist in both countries.

One essential purpose of comparative law is to enhance awareness of one system of justice and its systemic successes and failures,[228] allowing us to escape the "conceptual cage of our own tradition."[229] In Justice O'Connor's view, "[o]ur society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent."[230] This confidence is not always warranted and a willingness to recognize domestic deficiencies can promote a willingness to learn from other systems.

Scholars have amassed ample documentation of innocent defendants convicted and later exonerated who had, nevertheless, made false confessions.[231] This leaves no question that the problem goes well beyond the two cases at hand. There is scientific evidence supporting the need to implement better domestic protections against false confessions.[232] Proposed protections include requiring the recording of interrogations;[233] requiring a separate judicial finding of reliability before the admission of statements at trial;[234] reinvigorating the standard for voluntariness in a way that recognizes the relationship between coercive questioning and unreliable confessions; prohibiting the use of deception during questioning; and creating investigatory norms that protect case evidence from being contaminated by the existence of a confession.[235] In addition, there is

226. *See* Marion, *supra* note 197, at 68.

227. *Id*. at 69-70; *see also* Appleby, *supra* note 221.

228. Mack, *supra* note 4, at 3. *Cf,* James Q. Whitman, *Presumption of Innocence or Presumption of Mercy: Weighing Two Western Modes of Justice*, TEXAS L. REV. 933 (2016).

229. Whitman, *supra* note 228, at 984.

230. Herrera v. Collins, 506 U.S. 390, 420 (1993) (O'Connor, J. concurring).

231. *See generally*, Leo, et al, *Bringing Reliability Back In, supra* note 27 (documenting false confessions).

232. *Id*; Drizin & Leo, supra note 49, *The Problem of False Confessions*.

233. *See* Leo, et al, *Bringing Reliability Back In, supra* note 44; Drizin & Leo, *The Problem of False Confessions, supra* note 100.

234. *See* Leo, et al, *Reliability*, supra note 44.

235. Kassin, *supra* note 12, at 441.

a need for improved use and regulation of interpreters during police questioning.[236]

Advocates for reform also argue that the Reid technique creates unacceptable risk of producing unreliable statements and should be replaced with other interrogation approaches.[237] Research about false and unreliable confessions, confession contamination bias in general, and its potential to damage the integrity of investigations provide new incentives to reform interrogation methods. The data are an impetus across borders for removing the use of deception and other psychological pressures that were employed in cases like Dassey's and Knox's, thus reducing the production of potentially unreliable statements in the first place.

CONCLUSION

For Dassey, the public attention to the disquieting characteristics of his conviction has come a decade after the case was tried and it came just as Knox's ordeal had finally come to a close. In the Knox case, criticism was fast and furious, implicating the entire Italian system of justice. The reaction to the convictions for the two murders, occurring almost exactly two years apart, provides a compelling irony: at a time when American commentary fixated on an international spectacle overseas, a teenager whose conviction raises serious questions about due process and his right to a fair trial in the United States quietly began his life sentence in a state prison in Wisconsin. It is only through highly skilled representation and special considerations in juvenile law that his conviction has the potential to be overturned depending on the outcome of his *en banc* hearing.

The ultimate result in Dassey's case is unclear as the protections against unreliable confessions in the United States have large gaps. This is particularly true in cases like Dassey's, where the defendant is young, lacks sophistication about the law, and receives "only" psychological pressure from his interrogators. The original admission of his confession, the unwillingness of the state courts to exclude such statements, and the current uncertain posture of his case are emblematic of American law. Already he has served nearly half of the twenty-six year sentence that Amanda Knox originally received. Knox, on the other hand, served four years in prison before her release in 2011 after her first acquittal. In 2016, she received her final acquittal. Her conviction deserved criticism and revealed important flaws in the implementation of Italian laws. But a closer inspection of Italian law presents an opportunity to understand what went wrong despite the existence of strong confession laws.

I do not argue that because of imperfections at home, commentary should turn a blind eye to potential injustices or flaws in systems of justice around the

236. *See*, *e.g.*, Alison R. Perez, *Understanding Miranda: Interpreter Rights During Interrogation for Spanish-Speaking Suspects in Iowa*, 12 J. GENDER RACE & JUST. 603 (2009) (discussing deficiencies in the constitutional and statutory regulation of interpreter use during the pre-trial criminal phase and arguing that stricter requirements would benefit both the state and defendants).

237. Richard A. Leo, *Why Interrogation Contamination Occurs*, 11 OHIO STATE J. OF CRIM. L. 193, 205 (2013).

globe. To the contrary, it was necessary to highlight the failings in judicial process in Knox's case, even though those were later noted and corrected by Italy's own high court. Rather, the purpose here is to argue that while domestic criticism was heaped upon the Italian system based upon the failings of the Knox and Sollecito prosecutions, we are often loathe to apply the same level of scrutiny in domestic cases, even when evidence supports the conclusion that the problems are widespread. The circumstances of the Dassey conviction should be an incentive to interrogate systemic domestic flaws with the same rigor directed toward other countries. In the meantime, the due process afforded to defendants like Brendan Dassey feels more tragic than "carnivalesque."