COMMENTS

The Collateral Use of Foreign Convictions in American Criminal Trials

The number of Americans convicted in foreign countries of criminal offenses has increased in recent years with the growth of the American presence overseas. As a result, American courts have been confronted with a substantial number of cases in which the prosecution has sought to introduce prior foreign convictions for collateral purposes. In particular, prosecutors have attempted to introduce these convictions to impeach witnesses,¹ prove intent, knowledge, motive, and the like in the commission of a crime,² or to increase punishment under habitual-offender statutes.³ Within the restrictive bounds set by the rules of evidence,⁴ the courts have been especially sympathetic to the use of these convictions, often

¹ *E.g.*, *United States v. Wilson*, 556 F.2d 1177 (4th Cir. 1977). Formerly, convicted felons were completely barred from testifying; they were treated as incompetents. *See* McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 64 (2d ed. E. Cleary gen. ed. 1972) [hereinafter cited as McCORMICK]. During the nineteenth century, state courts were divided over whether a conviction from a sister state rendered a witness incompetent. *See, e.g.*, J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 92 (8th ed. 1883); J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 522, at 615 n.3 (3d ed. 1940). *Compare* *Commonwealth v. Green*, 17 Mass. 515, 540-41 (1822) (witness competent) *with* *State v. Candler*, 10 N.C. (3 Hawks) 393, 399 (1824) (witness incompetent).

² *E.g.*, *United States v. Ogle*, 587 F.2d 938, 940 (8th Cir. 1978) (per curiam) (used to establish identity); *United States v. Nolan*, 551 F.2d 266, 270-71 (10th Cir.) (used to establish intent and knowledge), *cert. denied*, 434 U.S. 904 (1977).

³ *E.g.*, *United States ex rel. Read v. Martin*, 263 F.2d 606, 606 (2d Cir. 1959) (per curiam); *United States ex rel. Foreman v. Fay*, 184 F. Supp. 535, 536-37 (S.D.N.Y. 1960); *United States ex rel. Dennis v. Murphy*, 184 F. Supp. 384, 385 (N.D.N.Y. 1959); *People v. d'A Philippo*, 220 Cal. 620, 624-25, 32 P.2d 962, 964 (1934) (en banc); *State v. O'Day*, 191 La. 380, 387-88, 185 So. 290, 292 (1938); *People ex rel. Latraverse v. Jackson*, 284 A.D. 822, 822, 132 N.Y.S.2d 115, 116 (1954) (mem.); *People ex rel. Stevens v. Jackson*, 283 A.D. 3, 5, 125 N.Y.S.2d 905, 907 (1953).

⁴ Most American courts narrowly restrict the collateral use of prior convictions, primarily because they tend to create prejudice against an accused. *See* McCORMICK, *supra* note 1, § 43. It is common for a jurisdiction to limit the purposes for which a prior conviction may be introduced, *see, e.g.*, FED. R. EVID. 404(b), and some jurisdictions limit the kind of convictions that may be used for any of the permissible purposes, *see* McCORMICK, *supra* note 1, § 43, at 89. Courts apply various procedures designed to limit any untoward effects at trial. For example, courts ordinarily have wide discretion to exclude a conviction if the danger of prejudice outweighs its probative value. *See, e.g.*, FED. R. EVID. 609(a). In addition, in most cases the facts underlying a conviction will not be admissible since their proof would likely divert the trier from the central issues before it. *See* McCORMICK, *supra* note 1, § 43, at 88.

admitting them without a rigorous examination of the context in which they arose.

The uninformed collateral use of foreign convictions may present serious constitutional questions. In *Burgett v. Texas*,⁵ the Supreme Court held that a state violated due process by using a previous conviction, secured in violation of due process, to enhance punishment under a recidivist statute. Although the Court has since extended this principle to cases in which a constitutionally infirm prior conviction had been used to impeach witnesses⁶ and to impose sentence,⁷ its precise rationale remains obscure. Some lower courts view *Burgett* as barring the use of improperly obtained prior convictions on the ground that to do so would cause the defendant to "suffer anew" the previous deprivation of constitutional rights.⁸ Another interpretation focuses on the unreliability of the prior convictions obtained without certain constitutional protections.⁹

These concerns surrounding the collateral use of domestic convictions become even more problematic in cases involving foreign convictions. Foreign procedures seldom conform to constitutional standards, and if *Burgett* is read to require that prior convictions be constitutionally proper, the use of all foreign convictions in American courts may be precluded. Even if *Burgett* only protects a defendant from the use of unreliable convictions against him, serious practical obstacles are raised against the successful use of foreign convictions.

This comment argues that, subject to some exceptions, reliability is the proper standard for determining the permissible collateral use of foreign convictions and that wholly unfamiliar procedures used in foreign forums may meet that standard. The practical obstacles to implementing such a standard, however, require a careful limitation of the procedures adopted in overseeing such collateral use. Accordingly, the comment proposes a procedural schema for screening foreign convictions for possible collateral use in American proceedings.

⁵ 389 U.S. 109 (1967).

⁶ *Loper v. Beto*, 405 U.S. 473 (1972) (defendant testifying on his own behalf).

⁷ *United States v. Tucker*, 404 U.S. 443 (1972).

⁸ The "suffer anew" language was used by the Supreme Court in *Burgett*, 389 U.S. at 115. For an example of a lower court applying similar reasoning, see *Beto v. Stacks*, 408 F.2d 313 (5th Cir. 1969).

⁹ See, e.g., *United States v. Penta*, 475 F.2d 92, 96 (1st Cir.) (Aldrich, J., concurring), cert. denied, 414 U.S. 870 (1973).

I. DUE PROCESS THEORY AND COLLATERAL USE

A. The Constitutional Background—*Burgett v. Texas*

In *Burgett v. Texas*,¹⁰ the defendant had been charged with one count of assault with intent to murder and four counts under the Texas recidivist statute.¹¹ The latter counts consisted "of allegations that [the defendant] had incurred four previous felony convictions";¹² a sentence of life imprisonment was mandated if the defendant was convicted of the offense in the first count¹³ and the allegations in the latter counts proved to be true. With respect to the latter counts, the prosecution had introduced evidence of the defendant's prior convictions, one of which had been secured without counsel.¹⁴ Since such a conviction was void under *Gideon v. Wainwright*,¹⁵ the Court reasoned that its use against the defendant "either to support guilt or enhance punishment for another offense . . . is to erode the principle of [*Gideon*]."¹⁶ Moreover, the Court held, "since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of the Sixth Amendment right."¹⁷ Admission of the prior conviction therefore constituted constitutional error.

The *Burgett* Court's reliance on the "erosion" and "suffering anew" language suggests an expansive view of the nature of the due process violation: all of the procedures of the first proceeding are imputed to the second. If the collateral use of a foreign conviction were considered under such a "holistic" analysis,¹⁸ what was origi-

¹⁰ 389 U.S. 109 (1967).

¹¹ Typically, recidivist statutes allow an additional basis for punishing a defendant who has been previously convicted of a felony. For an example of such a statute, see *id.* at 111 n.3. Introduction of prior convictions for purpose of recidivist statutes may result in jury prejudice with respect to the primary, unenhanced charges against the accused. Yet the Supreme Court, in *Spencer v. Texas*, 385 U.S. 554 (1967), held that, with the use of limiting instructions, jurors may be informed of the prior convictions before passing on the accused's guilt or innocence of the primary charge(s).

¹² 389 U.S. at 111.

¹³ *Id.*

¹⁴ The record of the defective conviction indicated on its face that the defendant had been without counsel in the prior proceeding. *Id.* at 112. The Court did not indicate how the existence of a defect in a prior conviction may be proved when such existence is subject to dispute. While this issue has troubled the Court since *Burgett*, see *Loper v. Beto*, 405 U.S. 473, 485 (1972) (White, J., concurring in result), it remains unresolved.

¹⁵ 372 U.S. 335 (1963). See *Burgett*, 389 U.S. at 114.

¹⁶ 389 U.S. at 115.

¹⁷ *Id.* The Court later formulated the problem as the defendant's right to counsel having been "denied anew." *Id.* at 116.

¹⁸ A recent commentator has used the terms "holistic" and "segmented" to describe two approaches to scrutinizing American involvement in foreign procedure when a foreign sen-

nally foreign process, not subject to American constitutional constraints,¹⁹ would become subject to scrutiny under the American Constitution. The principle of *Burgett* would thus also be applied to cases in which the defect in the first proceeding was not absence of counsel.²⁰

Some courts have implicitly adopted this reading of *Burgett*.²¹

tence is executed in the United States under a prisoner exchange treaty. Note, *Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty*, 90 HARV. L. REV. 1500, 1503-06 (1977).

¹⁹ Unless a foreign court can be shown to have acted as an American agent, it is a creature of a foreign sovereign and is not subject to constitutional constraints. See, e.g., *In re Ross*, 140 U.S. 453, 464 (1891); *United States v. Toscanino*, 500 F.2d 267, 280 n.9 (2d Cir. 1974); *Brennan v. University of Kan.*, 451 F.2d 1287, 1289-90 (10th Cir. 1971); *Birdsell v. United States*, 346 F.2d 775, 783 (5th Cir.), cert. denied, 382 U.S. 963 (1965).

To be sure, the Constitution does accompany the American government abroad. See *Reid v. Covert*, 354 U.S. 1, 5-6 (1957). An incidental presence, however, is usually insufficient to result in application of the Constitution if the acts in question are primarily those of a foreign sovereign. See, e.g., *Stonehill v. United States*, 405 F.2d 738, 743 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1969).

The territorial limitation on the reach of the Constitution is paralleled in other areas as well. For example, while there are some areas of the law in which United States courts may legitimately exercise jurisdiction over matters occurring abroad, see, e.g., RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18, Comment f, Illustration 9 (1965) (antitrust violation abroad having effect within United States); *id.* § 33, Reporter's Note (proscription of perjury abroad before diplomatic or consular officer of the United States), jurisdiction over less unusual crimes—for example, rape, murder, or larceny—is strictly territorial, *id.* § 18. Even the bases of jurisdiction reveal a consciousness of the limits of sovereignty, limiting jurisdiction to territory, citizens, special security concerns, *id.* § 10, and certain areas of general interests such as piracy, *id.* § 34.

Another parallel to territorial limits on the Constitution's reach is present in the rule of statutory construction that American statutes, both state and federal, "apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute." *Id.* § 38.

²⁰ The circuits have split regarding the question whether a prior domestic conviction suffering from some other constitutional defect is within the scope of the *Burgett* rule. Compare *United States v. Penta*, 475 F.2d 92-94 (1st Cir.), cert. denied, 414 U.S. 870 (1973) with *Beto v. Stacks*, 408 F.2d 313, 316-17 (5th Cir. 1969).

It should also be noted that the principle in *Burgett* has not been extended to cases in which a prior conviction is used to impeach a prosecution witness. In considering when due process permits the admission of a prosecution witness's prior conviction, courts have balanced the defendant's sixth amendment right to confrontation (including his right to impeach by introducing evidence casting doubt on the credibility of a witness) against the state's interests in the witness's privacy. See *Davis v. Alaska*, 415 U.S. 308 (1974). Since the right to confront prosecution witnesses is constitutionally guaranteed and since defendants are exposed to the serious risk of penal sanctions, the Court has struck this balance strongly in favor of disclosure of prosecution witnesses' convictions. See *id.* While it might be possible in extreme cases to exclude a prosecution witness's foreign conviction if it had been secured in such an unreliable fashion as to make it unlikely that the witness actually committed the crime, foreign convictions should almost always be admitted when used to impeach prosecution witnesses.

²¹ See, e.g., *Beto v. Stacks*, 408 F.2d 313, 316-17 (5th Cir. 1969). In *United States ex rel. LaNear v. LaVallee*, 306 F.2d 417 (2d Cir. 1962), a habeas corpus decision antedating *Burgett*,

Yet the holistic approach seems unacceptably formalistic and fails to define precisely the nature of the due process question involved. The approach permits two alternative and contradictory views of a due process violation that results from the collateral use of a foreign conviction. The familiar characterization is that by using the conviction, the domestic court has adopted the foreign procedures as its own. Both the domestic and foreign procedures are then subject to due process scrutiny. Alternatively, some courts have treated the defective prior conviction as "invalid,"²² thereby vitiating the second conviction. But, since the American Constitution does not apply to the legal processes of foreign countries,²³ a foreign conviction is not void in relation to American law and the second proceeding remains untainted. Ultimately, both theories are excessively formalistic, turning on legal fictions.

Apart from the ambiguity of the holistic analysis, a construction of *Burgett* subjecting the original foreign procedures to rigid due process scrutiny because domestic courts have in some sense used them is inconsistent with prevailing doctrine in other cases involving domestic reliance upon foreign conduct. In decisions remi-

the Second Circuit considered the collateral use of an uncounselled Missouri conviction in New York. Responding to New York's contention that its use of the Missouri conviction did not render it responsible for the Missouri procedure, Judge Friendly held that the violation of due process was by New York, not Missouri. *Id.* at 420. He relied for this result on two earlier habeas corpus cases, *United States ex rel. Dennis v. Murphy*, 265 F.2d 57 (2d Cir. 1959); *United States ex rel. Foreman v. Fay*, 184 F. Supp. 535 (S.D.N.Y. 1960), involving the use of Canadian convictions obtained against juveniles who did not have counsel at their trials, and the statement in *United States ex rel. Savini v. Jackson*, 250 F.2d 349 (2d Cir. 1957), a case similar to *LaNear*, that "'to the extent that any State makes its penal sanctions depend in part on the fact of prior convictions elsewhere, necessarily it must assume the burden of meeting attacks on the constitutionality of such prior convictions.'" *LaNear*, 306 F.2d at 421 (quoting *Savini*, 250 F.2d at 355).

One should not conclude from *LaNear* that a holistic approach for scrutinizing due process objections to the collateral use of prior convictions traces its genealogy to a pre-*Burgett* era. *LaNear* dealt with the requirement that there be an exhaustion of state court remedies before a federal court can grant an application for a writ of habeas corpus, see 28 U.S.C. § 2254(b) (1976). The defendant had exhausted his remedies with respect to the New York conviction, but had failed to do so with respect to the prior conviction in Missouri. Relying on the holistic principle, Judge Friendly concluded that the defendant was not barred from seeking a writ of habeas corpus despite his failure to exhaust state court remedies with respect to the Missouri conviction. The application of the holistic approach by Judge Friendly to the habeas corpus exhaustion requirement, however, does not necessarily mean that such an approach is appropriate for resolving due process concerns attending the collateral use of foreign convictions. Furthermore, both *LaNear* and the two decisions cited involved cases in which, as in *Burgett*, the defect in the prior conviction was the absence of counsel. Thus, these cases are in substance, if not in their language, consistent with the "segmented" approach to prior convictions discussed below, see text and notes at notes 29-32 *infra*.

²² See, e.g., *United States v. Martinez*, 413 F.2d 61 (7th Cir. 1969) (dictum).

²³ See note 19 *supra*.

niscent of the old "silver platter doctrine,"²⁴ American courts have, for example, rejected application of the exclusionary rule to evidence garnered by foreign officials in violation of the fourth and fifth amendments.²⁵ Exclusion of such evidence is properly viewed as unlikely to deter foreign misconduct,²⁶ and this perception of the interests involved has prevailed over any abstract formulations about participation in the foreign process.²⁷ Foreign and domestic activities remain separate and distinct despite the reliance of the later proceeding on the first.²⁸

These difficulties with a holistic approach to the due process question suggest that too literal a reading of the "suffers anew" language in *Burgett* may obscure the interests truly implicated in that case. A better construction of *Burgett* may instead rest on the unreliability of the prior conviction.²⁹ In asserting that collateral use

²⁴ During part of the era in which the exclusionary rule was not applicable to the states, the doctrine made it "permissible for federal courts to receive into evidence items which were obtained in a state search by means which, if engaged in by federal officers, would constitute a violation of the Fourth Amendment." 1 W. LAFAVE, SEARCH AND SEIZURE § 1.3(c), at 50 (1978). The doctrine was abolished by the Supreme Court in *Elkins v. United States*, 364 U.S. 206 (1960).

²⁵ See, e.g., *Commonwealth v. Wallace*, 356 Mass. 92, 248 N.E.2d 246 (1969). The level of involvement typically necessary to be characterized as government involvement calling for application of the Constitution is quite high. See note 19 *supra*.

²⁶ See *Commonwealth v. Wallace*, 356 Mass. 92, 248 N.E.2d 246 (1969). Deterrence fails only if American agents are not involved.

²⁷ See, e.g., *United States v. Cotroni*, 527 F.2d 708, 711-12 (2d Cir. 1975), *cert. denied*, 426 U.S. 906 (1976); *Commonwealth v. Wallace*, 356 Mass. 92, 95, 248 N.E.2d 246, 247-48 (1969). See generally 1 W. LAFAVE, *supra* note 24, § 1.6(g). See also *id.* § 1.7(a); Comment, *Jurisdiction Following Illegal Extraterritorial Seizure: International Human Rights Obligations as an Alternative to Constitutional Stalemate*, 54 TEX. L. REV. 1439 (1976).

²⁸ The principle that foreign and domestic proceedings are separate and distinct also seems to underlie *Neely v. Henkel*, 180 U.S. 109 (1901). In *Neely*, the Supreme Court rejected a challenge to an extradition act that the act failed to ensure that the accused's constitutional rights would be secure in the foreign tribunal.

While examination of a sister state's tribunal is impermissible, see *Michigan v. Doran*, 439 U.S. 282 (1978), the Second Circuit has recently expressed a willingness to examine foreign process in particularly compelling cases, see, e.g., *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925, 928 (2d Cir. 1974); *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir.) (dictum), *cert. denied*, 364 U.S. 851 (1960).

²⁹ There is some evidence that the phrase "suffers anew" was directed at the problem of jury prejudice. As has been noted, see note 11 *supra*, *Burgett* arose only after the Court had decided *Spencer v. Texas*, 385 U.S. 554 (1967), in which it approved the Texas procedure that allowed the introduction into evidence of properly obtained prior convictions (for the purpose of Texas's recidivist statutes) before jury determination of guilt or innocence on the primary charge or charges. It is thus possible that the risk of prejudice from a defective conviction, especially when coupled with the importance of the *Gideon* principles, is what motivated the Court's choice of language in *Burgett*. The Court was perhaps primarily concerned not with the effect of the prior conviction under the recidivist statute but with its prejudicial impact on the jury in deliberating on the primary charges in the second trial. That the Court raised

of an improperly obtained conviction causes the accused to "suffer anew" from the constitutional defect, the Court linked its conclusion directly to the type of violation at issue, the denial of the right to counsel.³⁰ Since the principle of *Gideon v. Wainwright* rests on the proposition that counsel is essential to a trustworthy verdict,³¹ the Court may have been indicating its concern, not with the use of a defective prior conviction per se, but with the use of a prior conviction grounded in procedures that call into question the reliability of the verdict. Collateral use of such a conviction introduces into the second trial the danger that a second false conviction may be the result of the original due process violation; thus, the defendant may "suffer anew" from the denial of his constitutional rights in the prior proceeding.³²

This reading of *Burgett* focuses on the character of the defective conviction and its role in the second proceeding rather than on the mere existence of the defect in the first. It is a "segmented" approach to the problem in that it treats the two proceedings as distinct, acknowledging only that the earlier proceeding has an impact on the subsequent one. Directed toward correct results rather than procedural purity, this approach necessarily looks to the policies and interests underlying the constitutional protection to determine whether the absence of that protection may distort the outcome of the second case. Ultimately, it distinguishes between two classes of defects: those that threaten the reliability of the judicial proceeding and those that reflect American conceptions about the proper relationship between citizen and state. As the next section will demonstrate, this latter category of due process violations—collectively referred to as "the political element of fairness"—is largely irrelevant to cases involving prosecution of an American citizen in a foreign country.

B. The Political Element of Fairness

In modern American jurisprudence, the guarantee of due pro-

the prejudice issues explicitly in the sentence immediately following the language on suffering anew supports this interpretation. 389 U.S. at 115.

Where the collateral use of a prior conviction is not affected by the unreliability of the conviction, however, *Burgett* would not be controlling. See *Lewis v. United States*, 48 U.S.L.W. 4205, 4208 (U.S. Feb. 27, 1980) (No. 78-1595) (permitting the use of an allegedly uncounseled prior conviction as the predicate for subsequent conviction under a firearms statute). But see *id.* at 4210 (Brennan, J., dissenting).

³⁰ *Burgett*, 389 U.S. at 115.

³¹ See *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

³² For example, based on a false conviction, an accused may be convicted of being a

cess has been dominated by the concept of fundamental fairness,³³ a concept that does not lend itself to simple theoretical analysis.³⁴ Nevertheless, the manner in which the due process clause has been applied to criminal procedure in recent years suggests that a clear distinction between the reliability and political elements of fundamental fairness underlies Supreme Court decisions.³⁵ On one hand, the Court has examined the constitutionality of defects in criminal procedure that impair the accuracy of the factfinding process and increase the risk that an innocent person may be convicted.³⁶ Such defects go to the heart of the legal process and ordinarily call for careful scrutiny of their impact. On the other hand, some defects in criminal procedure are significant primarily from the standpoint of the relationship of the government to its citizens. Restrictions on search and seizure and the privilege against self-incrimination, for example, do not relate directly to the reliability of the factfinding process.³⁷ Rather, they represent conscious decisions about the proper relationship between the state and the individual.³⁸

habitual offender under a recidivist statute. Another possibility is that an innocent defendant may be convicted through the use of a false prior conviction to impeach his alibi or other exculpatory testimony. Similar problems are raised in other contexts in which a false conviction is relied on.

³³ The Court has described this concept in a number of ways. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-8, at 506-07 (1978).

³⁴ See generally Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *YALE L.J.* 319 (1957).

³⁵ This distinction has been most evident in decisions involving retroactive application of Court decisions that incorporated Bill of Rights safeguards into the fourteenth amendment. As a general rule, the Court has granted retroactive application only to those decisions that concerned rights affecting reliability, such as the right of an indigent to a trial record for use on appeal, *Eskridge v. Washington Bd. of Prison Terms & Paroles*, 357 U.S. 214 (1958) (per curiam) (extending *Griffin v. Illinois*, 351 U.S. 12 (1956)). The Court has refused such application in cases involving the political element of fairness. *E.g.*, *United States v. Peltier*, 422 U.S. 531 (1975) (refusing to extend *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)); *Johnson v. New Jersey*, 384 U.S. 719 (1966) (refusing to extend *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Escobedo v. Illinois*, 378 U.S. 478 (1964)); *Linkletter v. Walker*, 381 U.S. 618 (1965) (refusing to extend *Mapp v. Ohio*, 367 U.S. 643 (1961)).

The distinction was also somewhat evident in decisions predating the adoption of the Federal Rules of Evidence that involved the use for impeachment purposes of convictions subsequently reversed on appeals. Some of the decisions suggested that convictions overturned for reasons unrelated to reliability may be admitted. See, e.g., *Smith v. Spina*, 477 F.2d 1140, 1147-48 (3d Cir. 1973); *United States v. Penta*, 475 F.2d 92 (1st Cir.), cert. denied, 414 U.S. 870 (1973); *State v. Murray*, 86 Wash. 2d 165, 167, 543 P.2d 332, 334-35 (1975) (en banc). But see *Beto v. Stacks*, 408 F.2d 313 (5th Cir. 1969).

³⁶ See *Williams v. United States*, 401 U.S. 646, 653 (1971); *Linkletter v. Walker*, 381 U.S. 618, 638-39 (1965).

³⁷ Prohibitions against coerced confessions must be excepted, of course, for they are likely to be unreliable.

³⁸ See generally *Addington v. Texas*, 441 U.S. 418 (1979); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 *YALE L.J.* 1299, 1307-08 (1977) (reasons for beyond-reasonable-doubt standard of proof).

In considering the permissible uses of foreign convictions, American courts have placed greater emphasis on the reliability component than on the political element of fairness. Since prior convictions can play a significant role in the guilt determination or sentencing of an accused and since the evidentiary rules ordinarily prevent effective examination of the facts underlying them, an unreliable prior conviction has a potentially powerful distorting effect on the later proceeding.³⁹ In the case of a recidivist statute, the impact may even be conclusive.⁴⁰

The failure of foreign procedures to satisfy the political element of fairness is, however, less significant. The reach of the Constitution is limited to national boundaries and simply does not govern political relationships abroad.⁴¹ It is futile to require that foreign convictions the prosecution seeks to use for collateral purposes satisfy the political element of fairness. An illustrative example is that of a foreign conviction based on evidence that would have been excluded on fourth amendment grounds at an American trial. The foreign country has completely vindicated its own interest by convicting and punishing the defendant as its law demands. The subsequent use to which the conviction is put by an American court should be of little interest to the foreign country, since it does not

³⁹ See note 32 *supra*. This concern underlies the decision in *Loper v. Beto*, 405 U.S. 473 (1972), a case involving the collateral use of a domestic conviction. In *Loper*, the defendant charged with rape had taken the stand as the sole witness in his own defense. During cross-examination, the defendant "admitted in damaging detail," *id.* at 474, to four prior felony convictions, all of which had allegedly been obtained at proceedings in which the defendant had been denied his right to counsel. The defendant was convicted. Given the distorting effect the earlier *Gideon* violations might have had on the reliability of the rape conviction, the Supreme Court set aside the judgment of the court of appeals denying the defendant a writ of habeas corpus and remanded for further proceedings.

⁴⁰ Its conclusiveness depends on the theory or theories underlying recidivist statutes. One commentator has identified four possible justifications for these statutes. R. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* 67-74 (1979). The first is that the repeat offender is more blameworthy since he had notice through his prior conviction of the seriousness of the criminal law. *Id.* at 68. The second is a variant of the first, and relies upon an analogy to the treatment of juveniles: a first offender, like a juvenile, is less blameworthy since he does not appreciate the full import of his behavior. *Id.* at 71. Under either variation, the use of an unreliable prior conviction to enhance punishment under a recidivist statute remains proper. If the concern of recidivist statutes is merely the naiveté of the accused, then a prior conviction, whether or not reliable, is evidence of the accused's familiarity with and appreciation of the seriousness of criminal conduct.

The other two justifications Singer offers, however, suggest that reliability of the prior conviction is important. According to Singer, the third justification for recidivist statutes is that the accused, by committing repeat offenses, evinces an antisocial character trait. *Id.* at 70. Finally, Singer resorts to a gut-level justification: "we simply feel that" a second offender is more morally culpable. *Id.* at 72. Reliability affects the third justification since a person who was falsely convicted cannot be said to evince an antisocial character. A false conviction would also mean that the gut-level reaction of greater moral culpability is unfounded.

⁴¹ See note 19 *supra*.

alter the balance of governmental and individual interests there. The subsequent use of the foreign conviction also does not implicate citizen-state relations in the United States. Moreover, the primary policy underlying the exclusionary rule—deterrence of constitutional violations—would not be furthered through application of the rule to foreign convictions. The law-enforcement officials of the foreign country are unlikely to be deterred, even assuming such deterrence were proper, by an American court's exclusion of the foreign conviction since the foreign court retains full authority to try and punish violations of its laws. And the American authorities, who bear the effects of the exclusionary rule, are powerless to change foreign practices. The rule's application is therefore likely to be wholly symbolic.⁴²

When collateral use of foreign convictions is inconsistent with the political element of fairness, the holistic analysis provides an inadequate foundation on which to base the due process scrutiny of the collateral use. By adopting a foreign conviction as a formal part of its own procedure, the American court would be forced to exclude potentially reliable evidence without affecting the balance of citizen-state relations prescribed by the Constitution. On the other hand, the domestic court's use of the segmented approach, by separating the foreign and domestic proceedings, creates an opportunity for an intelligent evaluation of the legal process producing the prior conviction and the actual impact of that conviction on the later proceedings.

Further support for the use of a segmented approach in scrutinizing the collateral use of foreign convictions is found in the treatment by American civilian courts of prior convictions obtained in the military and Indian courts. Reliability of verdicts remains a goal

⁴² American courts routinely reject challenges to the introduction of evidence that was acquired through foreign police misconduct. See, e.g., *United States v. Mundt*, 508 F.2d 904 (10th Cir. 1974), cert. denied, 421 U.S. 949 (1975); *Kilday v. United States*, 481 F.2d 655 (5th Cir. 1973); *United States v. Welch*, 455 F.2d 211 (2d Cir. 1972) (per curiam); *United States v. Chavarria*, 443 F.2d 904 (9th Cir. 1971) (per curiam); *Birdsell v. United States*, 346 F.2d 775, 782-83 (5th Cir.), cert. denied, 382 U.S. 963 (1965); *People v. Helfend*, 1 Cal. App. 3d 873, 82 Cal. Rptr. 295 (1969), cert. denied, 398 U.S. 967 (1970); *Commonwealth v. Wallace*, 356 Mass. 92, 248 N.E.2d 246 (1969).

The application of the exclusionary rule by American courts to foreign police misconduct would be merely symbolic in the sense that the deterrence aim of the exclusionary rule would not be served. Such an application of the exclusionary rule, however, might still have legal significance. See Note, *Searches South of the Border: Admission of Evidence Seized by Foreign Officials*, 53 CORNELL L. REV. 886, 898 (1968) (arguing that a blanket exclusionary rule "will place all nations on notice of the high regard of our courts for individuals' rights, and will relieve the courts of the problem of applying different standards according to the place where the search occurred"); text and notes at notes 50-54 *infra*.

of each of these alternative criminal justice systems, yet neither employs all of the procedures that are demanded by the political element of fairness.⁴³ Military due process, for example, does not provide such fundamental civilian protections as trial by jury⁴⁴ and grand jury indictment.⁴⁵ Only in recent years have the Indian tribal courts been required by statute to provide most of the customary American procedural protections.⁴⁶ The delay in imposing the additional procedures is attributable to the peculiar constitutional status of the Indian nations as sovereignties but not states,⁴⁷ and to the

⁴³ Military due process is not coextensive with civilian due process since the former derives from the specific task of maintaining discipline and order in the Armed Services. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955); *Burns v. Wilson*, 346 U.S. 137, 140 (1953); *id.* at 149 (separate opinion of Frankfurter, J.). But see Comment, *Investigative Procedures in the Military: A Search for Absolutes*, 53 CALIF. L. REV. 878 (1965). The military procedures, while different, do contain protections for defendants that some maintain are greater than those afforded by civilian tribunals. See Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 ME. L. REV. 105 (1970). Yet, the holistic approach would measure military procedures against a civilian standard that they would almost certainly be unable to satisfy.

⁴⁴ See *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950).

⁴⁵ U.S. CONST. amend. V. In some military proceedings, such as the summary court-martial, defense counsel may be denied. See *Middendorf v. Henry*, 425 U.S. 25 (1976); Comment, *The Summary Court-Martial in Constitutional Perspective*, 14 Hous. L. REV. 449 (1977). The summary court-martial is a frequently employed proceeding. See 2 U.S. DEP'T OF DEFENSE, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 47 (1972) (of total courts-martial in fiscal year 1972, over 23,000, or 43.8%, were summary).

Even more striking than summary courts-martial are the nonjudicial disciplinary proceedings sanctioned under article 15 of the Uniform Code of Military Justice, 10 U.S.C. § 815 (1976). In article 15 actions, the commanding officer who brings the charge is also the sole adjudicator. Article 15 actions are numerous and sometimes involve serious crimes. 3 U.S. DEP'T OF DEFENSE, *supra*, at 91-113. Moreover, the adjudicative officer has the power to confine an enlisted man to "correctional custody" for up to 30 days. *Middendorf v. Henry*, 425 U.S. 25, 36 (1976).

⁴⁶ Known as the "Indian Bill of Rights," now 25 U.S.C. § 1302 (1976), the law was enacted as part of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 77, Titles II to VII deal generally with Indian civil rights, 25 U.S.C. §§ 1301-1341 (1976), while Title II, section 202, is the equivalent of the Bill of Rights, *id.* § 1302.

Not all rights are guaranteed. The most notable exception is indigents' right to counsel, for as 25 U.S.C. section 1302(6) states: "No Indian tribe . . . shall deny to any person in a criminal proceeding [in tribal court] the right . . . at his own expense to have the assistance of counsel for his defense." 25 U.S.C. § 1302(6) (1976) (emphasis added). Free counsel for indigents, required in federal and state courts since *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972), is not required in tribal courts. See *Tom v. Sutton*, 533 F.2d 1101, 1104 (9th Cir. 1976).

⁴⁷ See *United States v. Kagama*, 118 U.S. 375, 381-82 (1886); *Colliflower v. Garland*, 342 F.2d 369, 374-75 (9th Cir. 1965). But see Fretz, *The Bill of Rights and American Indian Tribal Governments*, 6 NAT. RESOURCES J. 581, 599 (1966) ("A method of resolution which the courts are barely beginning to explore is the concept of treating the tribe as a state or territory for purposes of applying the due process clause."). The fourteenth amendment does not apply to the Indian nations because they are not states.

Indian's cultural background.⁴⁸

American courts nevertheless have frequently allowed the collateral use of convictions from the military and Indian tribunals.⁴⁹ The ready use of these convictions by the courts demonstrates that criminal procedures failing to satisfy the requirements of the political element of fairness can still be tolerable as long as they provide trustworthy results. These different domestic judicial systems thus raise the prospect that convictions from foreign legal systems might be used in domestic courts without offending notions of fundamental fairness. This conclusion, however, can be pushed too far. Not only is the line between the political element of fairness and reliability often difficult to draw, but an American court should be uneasy about admitting a conviction obtained through procedures involving gross violations of basic American political standards. This unease suggests that a threshold exists beyond which violations of the political element of fairness are intolerable. Such unease apparently stems from a third aspect of due process analysis—the element of judicial integrity.

C. Shock of the Conscience

Prior to the extension of the exclusionary rule to the states in *Mapp v. Ohio*,⁵⁰ the Supreme Court encountered a number of cases in which defendants complained of egregious state misconduct. In response, it fashioned a subdoctrine within the political element of

⁴⁸ Statutory language applicable to tribal courts, see note 46 *supra*, contains the terms "due process" and "equal protection." They are not, however, the familiar concepts of Anglo-American law, but are subject to interpretation in light of Indian tradition. *Tom v. Sutton*, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976); *Groundhog v. Keeler*, 442 F.2d 674, 681-82 (10th Cir. 1971); *Janis v. Wilson*, 385 F. Supp. 1143, 1150-55 (D.S.D. 1974), *remanded on other grounds*, 521 F.2d 724 (8th Cir. 1975).

⁴⁹ Such convictions have been used for a variety of purposes, including impeachment, e.g., *United States v. Whiting*, 308 F.2d 537, 542 (2d Cir. 1962) (impeachment with court-martial conviction), *cert. denied*, 372 U.S. 909, 919 (1963); *United States v. Colletti*, 245 F.2d 781, 782 (2d Cir.) (same), *cert. denied*, 355 U.S. 874 (1957); *Perkins v. Baker*, 41 Okla. 288, 293, 137 P. 661, 663-64 (1913) (per curiam) (impeachment with conviction from Seminole Nation tribal court). They have also been used in the recidivist context. E.g., *People ex rel. Stewart v. Wilson*, 257 A.D. 555, 555, 13 N.Y.S.2d 749, 750 (1939) (court-martial sodomy conviction within statute allowing use of felony convictions secured "under the laws of any other state, government or country," since court-martial is federal tribunal). *But see State v. Paxton*, 201 Kan. 353, 364-65, 440 P.2d 650, 659-60 (court-martial convictions for robbery and felonious assault not within scope of legislative intent in providing for use of convictions obtained "in or out of this state"), *cert. denied*, 393 U.S. 849 (1968). One state specifically provides for the use of court-martial convictions in its habitual-offender statute. OR. REV. STAT. § 161.725 (1977).

⁵⁰ 367 U.S. 643 (1961).

fairness known as judicial integrity.⁵¹ The theory underlying this concept is that by allowing the use of evidence seized in a manner that "offend[s] the community's sense of fair play and decency," a court "afford[s] brutality the cloak of law,"⁵² and thereby diminishes the integrity of the legal system. Although this branch of the political element of fairness developed primarily as a means of ensuring minimum compliance by the states with established norms, a purpose that was rendered obsolete by the incorporation of most of the Bill of Rights into the fourteenth amendment, the idea of judicial integrity does retain some vitality. It reflects continuing concerns about the appearance, public standing, and legitimacy of the American court system.

Such concerns about judicial integrity have a legitimate role in the evaluation of foreign convictions. Even if the limits of constitutional application and the logic of due process theory preclude a court from deciding collateral-use questions according to the specific demands of American due process protection, they do not eliminate the need for a court to preserve its own legitimacy. A foreign conviction resulting from foreign police conduct that is abhorrent by American standards could, if used in a domestic court, affect the public's sense of the fairness of the proceedings against the defendant, even if it does not undermine the reliability of the factfinding process.

Setting workable standards for such a doctrine is a difficult task. Where reliability and the political relations between state and citizen are not at issue, considerations based on judicial integrity will conflict with other interests of the American legal system, particularly the interest in punishing the guilty. Moreover, if a court decides to exclude reliable evidence that is important to the prosecution's case, thereby increasing the likelihood of an acquittal, it runs the risk of undermining public confidence in its ability to do justice. These concerns suggest that judicial integrity should operate to exclude a conviction only when the policies underlying it outweigh the government's interest in using an otherwise valuable and proper piece of evidence.⁵³ Thus, for example, a reliable foreign

⁵¹ See, e.g., *United States v. Calandra*, 414 U.S. 338, 355-61 (1974) (Brennan, J., dissenting); *Rochin v. California*, 342 U.S. 165 (1952); *Weeks v. United States*, 232 U.S. 383, 391-92 (1914). See also Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974).

⁵² *Rochin v. California*, 342 U.S. 165, 173 (1952).

⁵³ Cf. *Stone v. Powell*, 428 U.S. 465, 485-86 (1976) ("While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence.").

conviction using evidence obtained by a search that would violate the fourth amendment might be more acceptable in impeaching an accused murderer or prosecuting a defendant under a recidivist statute than in impeaching the credibility of an unimportant defense witness in a petty theft trial. Finally, in weighing the value of the evidence against the integrity issues it raises, concerns over judicial integrity should not be accorded great weight since, by hypothesis, the conviction at issue is reliable and the threat to judicial integrity in this context involves a matter of appearance rather than the direct political relationship between the government and defendant.⁵⁴

In implementing this approach, however, two additional questions grounded in due process concerns are relevant. First, when is a conviction obtained through methods departing from customary due process procedures reliable? Second, what procedures may a court properly use in evaluating a challenge to the reliability of a conviction?

II. ELEMENTS OF RELIABILITY

Application of the segmented approach for evaluating the due process concerns arising out of the collateral use of foreign convictions requires an examination of the reliability of such convictions. The segmented approach should permit, in many instances, the collateral use of a foreign conviction although the procedures used in obtaining the conviction are not those used in the American trial model.⁵⁵ American courts confronted with the attempted collateral

⁵⁴ This balancing approach is easily reconciled with, and indeed seems implicitly to underlie, the *Ker-Frisbie* doctrine. Under the doctrine, "a court's power to bring a person to trial upon criminal charges is not impaired by the forcible abduction of the defendant into the jurisdiction." *United States v. Lira*, 515 F.2d 68, 70 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975). The government's interest in prosecuting a person who was abducted into its jurisdiction is substantial, especially in contrast to the state's interest in admitting a prior foreign conviction into evidence for purposes of impeachment or a recidivist statute. In the latter cases, at most the evidence might be excluded or a charge in a multi-count indictment dropped; in the former, the only alternative open to the state is release of the accused. Thus, the *Ker-Frisbie* doctrine provides that, as a general rule, a court need not concern itself with the manner by which the defendant entered the jurisdiction. But in a particularly egregious case, where the interests in judicial integrity might be injured, a court will dismiss the indictment. *See United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). *But see United States v. Lovato*, 520 F.2d 1270 (9th Cir.) (limiting *Toscanino*), *cert. denied*, 423 U.S. 985 (1975); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 65-66 (2d Cir.) (same), *cert. denied*, 421 U.S. 1001 (1975).

⁵⁵ American courts have, in a variety of contexts, accepted foreign process departing significantly from domestic standards. *See, e.g., United States v. Wilson*, 556 F.2d 1177, 1178 (4th Cir.) (German conviction admitted to impeach testimony since it was "not shown that

use of a foreign conviction should evaluate the foreign procedures in light of American notions of truthfulness and fairness of result rather than blindly require that foreign criminal procedure be identical to that provided in American trials.⁵⁶

This result-oriented approach to the collateral use of foreign convictions, however, should not countenance a total abandonment of all familiar procedures. Thus, although a foreign court may dispense with, or find substitutes for, some of the technicalities of the American criminal justice system without jeopardizing the reliability of its results, the absence of certain fundamentals would be almost certain to do so. For instance, a foreign conviction would certainly be lacking the requisite reliability when it was obtained without the defendant's having had his "day in court," including a timely statement of the charges against him, a trial or formal inquiry into those charges, an opportunity to present his defense, and an impartial determination of guilt beyond a reasonable doubt.⁵⁷ Although the foreign court need not provide for these fundamentals in the adversarial form familiar in domestic courts, foreign procedures should be examined for equivalent guarantees of reliable results.

A. Substantive Problems

The collateral use of foreign convictions is complicated by the divergence between what the United States and foreign jurisdictions deem criminal conduct. The range of possible differences is considerable, stretching from those foreign offenses in which the substantive elements vary only slightly from their American counterparts to those not recognized by, or even hostile to, domestic penal statutes. Before attempting to evaluate foreign procedures, therefore, the court must develop some means of handling the problems caused by these substantive departures.

In some instances, the substantive departures may not provide sufficient basis for barring the collateral use of a foreign conviction, as, for example, where a foreign conviction is used to impeach a

the German legal system lacks the procedural protections necessary for fundamental fairness"), *cert. denied*, 434 U.S. 986 (1977); *Cooley v. Weinberger*, 518 F.2d 1151, 1155 (10th Cir. 1975) (Iranian conviction for willful homicide held sufficient to bar claim for Social Security benefits as Iranian procedure not found to be "so shocking to the forum community that it cannot be countenanced'") (quoting *Brennan v. University of Kan.*, 451 F.2d 1287, 1289 (10th Cir. 1971)); *United States ex rel. Stone v. Robinson*, 431 F.2d 548 (3d Cir. 1970).

⁵⁶ Cf. *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966) (decision whether to apply retroactively a particular constitutional rule of criminal procedures rests in part upon "the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial").

⁵⁷ See L. TRIBE, *supra* note 33, § 10-8, at 512-13.

witness.⁵⁸ An exception to the ban on evidence of bad character,⁵⁹ admissibility of the prior conviction stems from the availability of some official document certifying that the individual was guilty of a particular crime. The existence of the document justifies the exclusion of evidence contesting its validity, thereby ensuring that the tribunal will not, as is likely in other cases in which bad-conduct evidence is at issue, be diverted from its investigation of the case actually before it.⁶⁰ In the case of a foreign conviction, such certification would be available irrespective of the nature of the underlying offense. Thus, even if it is not indicative of conduct that would be an offense under American criminal law, the foreign conviction, in most cases, would still provide evidence of bad character without causing the problems normally associated with such evidence.

Of course, a foreign conviction based on unusual substantive grounds might be excluded on relevancy grounds. A conviction for an exotic foreign offense would probably not be helpful in proving mental state, motive or knowledge. Further, many recidivist statutes have specific requirements as to what constitutes a prior conviction—requirements that foreign convictions cannot meet.⁶¹ Consider, for example, a conviction so alien to American law as one under Islamic law for blasphemy. Such a conviction might be relevant in impeaching the truthfulness of a witness if the foreign offense included the element of uttering a falsehood.⁶²

Collateral use of foreign convictions that depart greatly from American standards could also raise public-policy concerns about the integrity of the courts, as already noted.⁶³ Reliance on convictions for offenses that would be unconstitutional in American jurisdictions raises the same concerns over judicial integrity that would be raised by reliance on convictions obtained under procedures that

⁵⁸ See FED. R. EVID. 609.

⁵⁹ See *id.* 608(b).

⁶⁰ See 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 979-980 (rev. ed. J. Chadbourne ed. 1970).

⁶¹ Although it is a matter of statutory interpretation, see Annot., 19 A.L.R.2d 227, 233 (1951), the overwhelming majority of jurisdictions with recidivist statutes require that the prior conviction be based on facts that would constitute a felony under their laws. See, e.g., *People v. Dabney*, 250 Cal. App. 2d 933, 948, 59 Cal. Rptr. 243, 253 (1967), *cert. denied*, 390 U.S. 911 (1968); *People v. McIntire*, 7 Mich. App. 133, 140, 151 N.W.2d 187, 191 (1967); *People ex rel. Bell v. Martin*, 283 A.D. 1005, 1005, 131 N.Y.S.2d 1, 2 (1954) (mem.).

⁶² Cf. *State v. Prince*, 64 Idaho 343, 350, 132 P.2d 146, 149 (1942) (allowing use of Oregon conviction for purposes of an Idaho "persistent violator" statute without proof that underlying offense was an Idaho felony because "[g]ood citizenship requires obedience and observance to the laws of sister states as much as those of this state").

⁶³ See text and notes at notes 50-52 *supra*.

are repugnant by American standards. For example, a court might be asked to admit evidence of a Soviet conviction for the exercise of what, in the United States, would be a first amendment right. Since the use of such a conviction would raise the grave danger that our courts might be perceived as condoning Soviet repression of dissidents, any collateral use of such a conviction should be excluded.⁶⁴ For these reasons, courts should be extremely wary of admitting foreign convictions when the proscription of the underlying conduct is wholly alien to that ordinarily punished, or constitutionally punishable, under American law.

There remains, however, a considerable middle ground comprised of offenses that depart only slightly from domestic statutes and that are consonant with American sensibilities of right and wrong. A good example is a foreign statute that punishes a person for failing to come to the aid of a stranger in need.⁶⁵ Although ordinarily beyond the reach of domestic tort⁶⁶ or criminal law,⁶⁷ such an offense as "failure to rescue" would conform to our notions of decency, and, assuming the person had notice of the existence of the offense under foreign law, might be relevant to a domestic proceeding. When confronted by such a conviction, an American court should, of course, consider the relevancy of the conviction in light of the diverging standards of conduct. Yet foreign convictions for such "slightly different" offenses would not likely raise the same concerns regarding judicial integrity as would convictions secured under laws wholly alien to American jurisprudence.⁶⁸

B. Formal Inquiry

At a minimum, a foreign conviction can be considered reliable only if it is reached after a formal inquiry has been convened and pursued. In part, this requirement is necessary because an informal hearing may not provide an adequate basis for assessing the reliability of the foreign conviction. More importantly, a formal inquiry is

⁶⁴ It should be noted that the statement in the text applies only to the introduction of the prior conviction. The underlying facts might still be admissible, if relevant, under certain circumstances. Under the Federal Rules of Evidence, for example, the principle would preclude use of the conviction for impeachment purposes under Rules 608(b) and 609, but would not bar introduction of the underlying facts under Rule 404(b).

⁶⁵ See generally Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630 (1966).

⁶⁶ See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 56, at 340-43 (4th ed. 1971).

⁶⁷ See Feldbrugge, *supra* note 65, at 652-54.

⁶⁸ One could argue that if the foreign law imposes a standard of conduct with which the American abroad would be unfamiliar, use of such a conviction might raise notice and vagueness problems. There is no reason to think, however, that ignorance of the law should constitute grounds for exclusion of the foreign conviction in a collateral proceeding when such a reason is generally not a recognized excuse in an ordinary American proceeding.

the best guarantee that the conviction resulted from a careful and principled examination of the facts. Without such an inquiry, the accused might not have had an opportunity to present a defense and receive impartial consideration, elements essential to reliable results.⁶⁹

C. Right to Present a Defense

In domestic courts, the sixth amendment⁷⁰ ensures a defendant the right to confront the witnesses of the prosecution,⁷¹ the right to compulsory process of witnesses in his favor,⁷² the right to be present and assist in the preparation of a defense,⁷³ and the right to counsel.⁷⁴ Yet, because they derive from the adversarial model of the American trial, some of these rights may not be relevant in a foreign proceeding. The opportunity for cross-examination, for example, lies at the heart of the right to confront witnesses, but is less essential in civil-law countries where the trial judge is the chief forensic figure.⁷⁵ Likewise, the right to counsel may be far less important in a country where procedure is relatively simple or where the protection of the defendant's procedural rights is the responsibility of the court.⁷⁶

The specific guarantees provided by the American Constitution, whether relevant to a nonadversarial legal system or not, ultimately grant the defendant the right to present a defense: to respond effectively to the evidence against him and to introduce his

⁶⁹ While one might at first assume that a secret proceeding might be per se unreliable, the truth of the generalization depends on what one means by "secret." On one hand, a proceeding closed to the public but in which a trial record is preserved for appellate review would seem to be reliable. Cf. *Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979) (public may be excluded from pretrial suppression hearing). If, however, the trial is closed from public view, no transcript is kept, and appellate review is unavailable, admissibility on both reliability and judicial-integrity grounds is seriously in question.

⁷⁰ U.S. CONST. amend. VI.

⁷¹ *Pointer v. Texas*, 380 U.S. 400 (1965).

⁷² *Washington v. Texas*, 388 U.S. 14 (1967).

⁷³ See *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

⁷⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁷⁵ In a pure inquisitorial system, the presiding officer conducts all aspects of the trial and no counsel is present. See J. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE* 110 n.28 (1974); Langbein, *The Criminal Trial before the Lawyers*, 45 U. CHI. L. REV. 263, 282 (1978) (discussing the Old Bailey). This form of procedure lives on in American jurisprudence in the summary court-martial. See U.S. DEP'T OF DEFENSE, *MANUAL FOR COURTS-MARTIAL, UNITED STATES* 14-1, 14-2 (rev. ed. 1969).

The pure inquisitorial approach should be distinguished from the "mixed" system familiar in contemporary continental procedure, in which prosecution and defense have a role to play, but the judge is the chief forensic actor. See J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 62, 64-65 (1977); L. WEINREB, *DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES* 142-43 (1977).

⁷⁶ See text and notes at notes 97-100 *infra*.

own version of the facts. Underlying the rights of confrontation and compulsory process are the beliefs that the most interested party in the proceeding—the defendant—is most likely to develop the best evidence in his favor and that the defendant is often privy to the largest store of information concerning underlying events. Yet these same elements might be served by quite different procedures in a foreign forum: a pure inquisitorial system,⁷⁷ for example, in which responsibility for gathering the important information rests with the presiding judge, and not the parties, might replace our confrontation right with the opportunity to call to the attention of the inquiring court witnesses or other evidence.⁷⁸ To achieve trustworthy results, however, foreign tribunals must follow procedures providing equivalent guarantees that the defendant may bring what he knows before the tribunal.

One might similarly conclude that a foreign tribunal must allow the accused to be present at his hearing and that, therefore, foreign convictions that result from trials *in absentia* should be void.⁷⁹ Short of this extreme,⁸⁰ however, the question of presence is far more problematic. Even in American courts, the right to be present has never been absolute.⁸¹ Although courts have usually denied this right to defendants only when their conduct has tended to disrupt the proceedings,⁸² the prevailing standard focuses on

⁷⁷ See note 75 *supra*.

⁷⁸ See J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY*, *supra* note 75, at 90; Strafprozessordnung [StPO] §§ 160, 161a (1978) (W. Ger. Code of Crim. Pro.).

⁷⁹ *But see* Gallina v. Fraser, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960). The Second Circuit allowed extradition to Italy of a defendant convicted twice *in absentia* there, finding that the proceedings were not “antipathetic to a federal court’s sense of decency,” *id.* at 79. The court found that the defendant had been represented by counsel at one of his trials *in absentia*, and that his cohorts were present as his codefendants at the other. *Id.*

⁸⁰ In Austria, trial *in absentia* may take place for any crime punishable by up to five years. Strafprozessordnung [StPO] § 427 (1964) (Austrian Code of Crim. Pro.). This period is well beyond the common-law definition of a felony (one year) employed in some states, and the offense involved can be used in those habitual-offender statutes requiring imprisonment terms of several years. In most continental countries, however, the procedure is restricted. See, e.g., Riess, *Die Durchführung der Hauptverhandlung ohne Angeklagten*, 30 JURISTENZEITUNG 265 (1975) (commentary on West German practices). For a cursory review in English of the practices of conducting trials *in absentia* in Spain, West Germany, Italy, South Africa, and France, see Murray, *The Power to Expel a Criminal Defendant From His Own Trial: A Comparative View*, 36 U. COLO. L. REV. 171 (1964).

⁸¹ See Annot., 25 L. Ed. 2d 931 (1971).

⁸² E.g., *Illinois v. Allen*, 397 U.S. 337 (1970). Other reasons for exclusion have included a determination that the accused’s presence serves no purpose, e.g., *Hayton v. Egeler*, 405 F. Supp. 1133, 1150-51 (E.D. Mich. 1975), *aff’d*, 555 F.2d 599 (6th Cir.), *cert. denied*, 434 U.S. 973 (1977); *United States ex rel. Spinney v. Fay*, 228 F. Supp. 500, 501 (S.D.N.Y. 1964) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106-07 (1934)), or a finding that the accused has fled the jurisdiction, see *Taylor v. United States*, 414 U.S. 17 (1973) (*per curiam*) (accused who jumped bail during trial deemed to have forfeited his confrontation right, so continued

whether the presence of the defendant bears "a relation, reasonably substantial, to his opportunity to defend."⁸³ A procedure that regularly denies the accused access to the proceedings or denies the accused the right to have some representative, presumably counsel, present throughout should be highly suspect.

The problem of language adds a further dimension to these issues. Even if physically present at his trial, a defendant who does not understand the language of the host country would, in the absence of an interpreter, resemble in many respects an incompetent in an American court.⁸⁴ Unable to understand the proceedings, the accused would be unable to assist in his defense. Still, such a defendant, especially if represented by competent counsel, differs from the incompetent in that he will ordinarily learn of the particulars of the case at the end of each day's proceedings and can assist his counsel in preparing for trial. This factor has led American courts, when confronted with the problem of an accused who does not understand English, to conclude that simultaneous translation for his benefit is not necessary so long as counsel is in a position to exercise the accused's confrontation and evidentiary rights.⁸⁵ No more should be demanded of a foreign tribunal.

trial culminating in conviction in his absence permissible). *See also* *Diaz v. United States*, 223 U.S. 442, 455 (1912) ("the prevailing rule has been, that if, after the trial has begun in [the defendant's] presence, he voluntarily absents himself, this . . . operates as a waiver of his right to be present and leaves the court free to proceed").

⁸³ *Synder v. Massachusetts*, 291 U.S. 97, 106 (1934).

⁸⁴ *See United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970); *United States ex rel. Navarro v. Johnson*, 365 F. Supp. 676, 681 n.3 (E.D. Pa. 1973).

⁸⁵ *See* *Annot.*, 36 A.L.R.3d 276 (1971); *Annot.*, 140 A.L.R. 766 (1942). Counsel is guaranteed, but there is no constitutional right to the presence of an interpreter. The right of confrontation inherent in due process may at times necessitate the presence of an interpreter. *See, e.g., United States ex rel. Navarro v. Johnson*, 365 F. Supp. 676, 681 (E.D. Pa. 1973); *Markiewicz v. State*, 109 Neb. 514, 520-21, 191 N.W. 648, 650-51 (1922); *Garcia v. State*, 151 Tex. Crim. 593, 602, 210 S.W.2d 574, 580 (1948); *State v. Vasquez*, 101 Utah 444, 449-52, 121 P.2d 903, 905-06 (1942). But if the defendant has some grasp of English and comprehends the substance of the trial, no interpretation is necessary. *See, e.g., United States v. De Leon*, 498 F.2d 1327, 1333 (7th Cir. 1974); *Flores v. State*, 509 S.W.2d 580, 581 (Tex. Crim. App. 1974); *Diaz v. State*, 491 S.W.2d 166 (Tex. Crim. App. 1973); *State v. Karumai*, 101 Utah 592, 126 P.2d 1047 (1942). The government is not bound to provide simultaneous translation. *See, e.g., United States v. Desist*, 384 F.2d 889, 901-03 (2d Cir. 1967) (dictum, *aff'd*, 394 U.S. 244 (1969)); *Tapia-Corona v. United States*, 369 F.2d 366 (9th Cir. 1966) (per curiam); *United States v. Boria*, 371 F. Supp. 1068, 1069-70 (D.P.R. 1973). It may be sufficient that counsel for the accused understands the language of the witness against whom confrontation rights are demanded. *See, e.g., Escobar v. State*, 30 Ariz. 159, 167-71, 245 P. 356, 359-60 (1926) (holding that bilingual counsel suffices if defendant is not "hampered . . . in any manner . . . in presenting his case"); *The King v. Ah Har*, 7 Hawaii 319, 322 (1888). *But see State v. Rios*, 112 Ariz. 143, 539 P.2d 900 (1975) (en banc) (additional burden of translating to client hampers presentation of case).

These considerations suggest that the resolution of the presence issues is ultimately tied to the availability of local counsel. Even so, the absence of counsel at trial should not always be conclusive in determining the reliability of the conviction. For example, where a foreign jurisdiction allows the defendant to participate in his trial, the accused understands the local language, and the courtroom procedures are clear and easily learned,⁸⁶ the absence of counsel may not impair the reliability of a resulting conviction.

Also relevant to whether the absence of counsel should preclude the collateral use of the foreign conviction is the type of legal system in the foreign country. Although the Supreme Court has indicated that in an adversarial system the presence of counsel is essential for reliable results,⁸⁷ a similar conclusion would not hold for a pure inquisitorial system, in which no counsel, either defense or prosecution, is ever present, and the judge assumes the functions of judge, prosecutor, and defender.⁸⁸

As a practical matter, however, it is likely that either language difficulties or the technicalities of local procedure will be significant enough to render proceedings absent counsel unreliable. The pure inquisitorial system, moreover, is less common than the mixed system now followed in most continental countries.⁸⁹ In such a system, the judge ultimately controls the factual inquiry,⁹⁰ but the prosecutor and defense counsel play an important role in interpreting the information gleaned by the judge.⁹¹ Since the judge cannot undertake this task for the defendant without forfeiting his claim to impartiality,⁹² the presence of defense counsel in the more common, mixed system is essential if the accused is to receive the advantages already enjoyed by the state. These considerations suggest that in assessing the collateral use of foreign convictions in proceedings that

⁸⁶ See text and notes at notes 99-100 *infra*.

⁸⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁸⁸ See authorities cited note 75 *supra*.

⁸⁹ See generally Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 555-60 (1973).

⁹⁰ *Id.* at 558-59.

⁹¹ The prosecutor and defense counsel may also provide a safeguard in the form of a check on the judge. The right to examination conducted by counsel is available under the law in some countries, although not used in practice. The German Code of Criminal Procedure provides, for example, that if prosecution and defense so agree, they may examine witnesses in place of the judge. STPO § 239(I) (1978) (W. Ger. Code of Crim. Pro.). This provision is rarely invoked, however, and is viewed by some commentators as an intrusion of Anglo-American law, see, e.g., 2 E. SCHMIDT, *LEHRKOMMENTAR ZUR STRAFFPROZESSORDNUNG* 643-44 (1957).

⁹² *Powell v. Alabama*, 287 U.S. 45, 61 (1932) (judge cannot be advocate).

may result in incarceration,⁹³ the absence of defense counsel in the underlying proceedings, although not conclusive of unreliability, should weigh heavily against treating the result as trustworthy.

D. Impartial Tribunal

The guarantees of reliability offered by the right to formal hearing and to present a defense will ultimately prove hollow if the deliberations of the foreign court are not impartial. To be sure, proof of impartiality in any particular trial leading to a foreign conviction is likely to be elusive, particularly since the domestic court is in no position to inquire into the state of mind of the foreign trier. Yet some external indications of impartiality will ordinarily be available to a domestic court confronted with this problem. Of primary importance will be the seriousness and regularity of judicial procedures in the country responsible for the conviction. Evidence that the country surrounds its courts with some dignity and proceeds in a deliberate manner is the best initial test of whether the proceedings are truly dedicated to the factfinding process.

Domestic courts should also be sensitive to evidence of general prejudice in the host country. The accused American abroad may well be the target of local hostility on ethnic, religious, racial, or even political grounds. American courts have had some experience with this kind of problem in domestic cases in which race is a factor and may thus be able to recognize such hostility when it arises in foreign courts. It should be noted, however, that in domestic courts scrutiny of juror prejudice is greatly restricted by the general notion that juror prejudice will not vitiate a conviction if the jurors swear to judge the defendant on the basis of facts presented,⁹⁴ the presumption being that the jurors put prejudice aside in reaching their verdict.⁹⁵ Although unfamiliarity among American courts with foreign legal process distinguishes the foreign case from the domestic one, a similar presumption may be applied in considering the admissibility of a prior foreign conviction. The presumption applied in the foreign-conviction context should be weakened slightly so as to encourage the court to review the foreign process carefully before rendering a decision on its trustworthiness. Of course, any judicial bias in the form of a financial interest in the outcome of the trial

⁹³ If imprisonment is not threatened, the potential damage to the defendant through collateral use of the foreign conviction is less, although the reliability of the conviction is still suspect. Consequently, the hesitancy to exclude should not be as great. *Cf. Scott v. Illinois*, 440 U.S. 367 (1979) (counsel not constitutionally required if defendant not imprisoned).

⁹⁴ See cases collected in Annot., 91 A.L.R.2d 1120 (1963).

⁹⁵ *E.g., State v. Wright*, 12 Wash. App. 585, 591-92, 530 P.2d 704, 709 (1975).

should also lead to the exclusion of resulting convictions as unreliable.⁹⁶

It has at times been suggested that the role the judge plays in the pure inquisitorial system⁹⁷—exercising the threshold decision to prosecute and bring the defendant before the court—undermines impartiality of the foreign proceeding.⁹⁸ The Supreme Court, however, in *Middendorf v. Henry*,⁹⁹ rejected a similar argument in a military context. The Court held that in a summary court-martial the court has a duty to inquire “thoroughly and impartially . . . into both sides of the matter and [to] assure that the interests of both the Government and the accused are safeguarded.”¹⁰⁰ This obligation was considered sufficient to protect the accused from bias even when counsel is denied.¹⁰¹ A similar analysis should apply when evaluating other inquisitorial systems, provided that the judge is under a similar obligation and regularly demonstrates his evenhandedness in cases under his control. Indeed, the case for reliability may even be stronger in the case of foreign convictions, given the legal education and training advantages that foreign judges will often have over the military officers in a court-martial.¹⁰²

III. TESTING FOREIGN CONVICTIONS

A. Practical and Political Difficulties

As the foregoing discussion indicates, establishing that foreign procedures provide sufficient guarantees of reliability is primarily a theoretical exercise based on informed examination of the dynamics of the foreign criminal process and the role of specific procedures within it. To a very great extent, therefore, a proper evaluation of a foreign conviction can take place at home in the domestic court with the help of expert witnesses and intelligent investigation of scholarly materials.¹⁰³ Occasionally, however, the evidence available to an

⁹⁶ See *Tumey v. Ohio*, 273 U.S. 510 (1927); cases collected in Annot., 72 A.L.R.3d 375 (1976).

⁹⁷ See note 75 *supra*.

⁹⁸ See Schmidt, *Introduction to THE GERMAN CODE OF CRIMINAL PROCEDURE* at 2 (H. Niebler & M. Pfeiffer trans. 1965); G. WILLIAMS, *THE PROOF OF GUILT* 30 (2d ed. 1958).

⁹⁹ 425 U.S. 25 (1976). See note 81 *supra*.

¹⁰⁰ 425 U.S. at 41 (quoting U.S. DEP'T OF DEFENSE, *supra* note 75, at 14-1).

¹⁰¹ Counsel is denied in summary court-martial proceedings. *Middendorf v. Henry*, 425 U.S. at 31-33; U.S. DEP'T OF DEFENSE, *supra* note 75, at 14-1, 14-2.

¹⁰² With respect to the German system of judicial appointments, see, for example, R. SCHLESINGER, *COMPARATIVE LAW* 118-20 (3d ed. 1970).

¹⁰³ The literature in comparative law on protection of the accused's rights under foreign criminal justice systems is extensive. See, e.g., *THE ACCUSED: A COMPARATIVE STUDY* (J. Coutts ed. 1966); G. MUELLER & F. LE POOLE-GRIFFITHS, *COMPARATIVE CRIMINAL PROCEDURE* (1969);

American court will be insufficient to determine the reliability of a conviction obtained through the foreign procedures. The attempted collateral use may thus engender validation issues that require additional time, expense, and inconvenience for their resolution.

Such logistical problems may be even greater when the reliability of a particular trial, in contrast to the foreign procedure generally, is at issue.¹⁰⁴ When confronted with damaging prior convictions, American defendants can be expected to argue almost routinely that foreign authorities acted improperly in obtaining the convictions by flaunting the procedures of the perhaps otherwise trustworthy foreign criminal law. Ordinarily, such contentions cannot be verified or refuted without evidence available only in the original host country. To inhibit defendants from making such objections, American courts may become reluctant to acknowledge such claims, short of overwhelming (or undeniable) evidence of their veracity.

Perfunctory rejection of challenges to the particular criminal proceeding would tend to trivialize the due process analysis suggested earlier, however, by increasing the risk that an unreliable conviction may be admitted into evidence. Placing too great a burden on a defendant to prove that the particular prior conviction is untrustworthy seemingly robs him of the very protections granted by *Burgett* and the Constitution.

In addition to the practical problems encountered in reviewing reliability, political difficulties are likely to arise. Although a foreign country can be expected to be largely indifferent to the use made in America of any particular conviction obtained in its courts, repeated insults to its criminal justice system, the conduct of its judges, or the wholesale rejection of its procedures, may well create considerable resentment among foreign officials.¹⁰⁵ Furthermore,

37 REVUE INTERNATIONALE DE DROIT PÉNAL 5-318 (1966) (series of articles dealing with rights of the accused in various countries).

For the particular techniques used to prove foreign law, see, for example, O. SOMMEREIGH & B. BUSCH, *FOREIGN LAW: A GUIDE TO PLEADING AND PROOF* (1959); McKenzie & Sarabia, *The Pleading and Proof of Alien Law*, 30 TUL. L. REV. 353 (1956); Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018 (1941).

¹⁰⁴ For example, apart from considerations of distance and expense, the stenographic trial transcript that an American appeals court would regard as essential for review, see *Holmes v. Laird*, 459 F.2d 1211, 1214 (D.C. Cir.) (dictum), cert. denied, 409 U.S. 869 (1972), is not ordinarily available in German criminal proceedings, J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY*, *supra* note 75, at 64.

¹⁰⁵ See *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918) ("To permit the validity of the . . . [seizures of property by] one sovereign State to be reexamined and perhaps condemned by the court of another would very certainly 'imperil the amicable relations

proof of reliability in any particular case may require inquiry in the foreign jurisdiction regarding the operation of its courts, raising the specter of American officials interrogating foreign citizens, reinvestigating particular events, and tracking down physical evidence.¹⁰⁶ A foreign court would not likely treat such interference with equanimity.¹⁰⁷

These political concerns may well rise to the level of constitutional problems. Since repeated inquiry by state and federal courts into the criminal procedures of a foreign country may affect relations between the United States and that country, a strong presumption in favor of the reliability of a foreign conviction might be appropriate under the act-of-state doctrine, arguably barring review of foreign convictions.¹⁰⁸ This conclusion gains some support from *Zschernig v. Miller*,¹⁰⁹ in which the Supreme Court struck down an Oregon statute that prohibited alien heirs not living in the United States from receiving inheritances from Oregon decedents unless they could prove, *inter alia*, that their own country would not confiscate the property. The Court observed that the statute "affect[ed] international relations in a persistent and subtle way," because it made "unavoidable judicial criticism of nations established on a

between governments and vex the peace of nations.'"). *But see Zschernig v. Miller*, 389 U.S. 429, 460-61 (1968) (Harlan, J., concurring in the result).

¹⁰⁶ Judicial humility also counsels against an American court considering itself an appeals court for foreign legal process. *See Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159-60 (1825).

¹⁰⁷ The foreign governments may also try to thwart inquiry by American courts. Such has been the case in the antitrust area, where foreign governments have enacted antidiscovery laws aimed at rendering ineffective the application of the United States antitrust laws. *See, e.g.,* Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INT'L L. 747, 748 (1974).

¹⁰⁸ The doctrine requires courts to "refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1965). As a rule of law, the doctrine would not prohibit collateral examination of foreign convictions since the "reliability" of the judgment, rather than its "validity," is being examined: a court's disapproval would have no effect on the policies of the foreign country. Furthermore, the doctrine principally relates to choice of law and "is applied only in cases in which . . . the settlement of a claim or interest involv[es] the same transaction as that involved in . . . the [foreign] exercise of jurisdiction," *id.* § 41, Comment j.

As a statement of policy or principle, however, the doctrine does have some significance. "The policy underlying the doctrine is that the courts should abstain from any action that might hinder the executive branch in the conduct of foreign relations." *Id.* § 41, Comment c. The necessity of courts to pry into and pass judgment on foreign adjudications may lead to political repercussions that would hinder development of foreign relations.

¹⁰⁹ 389 U.S. 429 (1968).

more authoritarian basis than our own."¹¹⁰ The Court consequently held that the statute intruded upon the powers allocated by the Constitution to the federal government.¹¹¹

The extension of *Zschernig* to the prior-conviction arena, however, is unwarranted. First, if examination of a foreign conviction were entirely precluded, the accused's due process rights would be denied. In contrast, no due process problems were involved in *Zschernig*. But even if such problems had been present, the preclusion of review of foreign law in *Zschernig* allowed foreign heirs to receive their rightful inheritances and thus would have alleviated any such problems. Second, review of foreign convictions has less potential for creating international tensions than does the denial of inheritances to foreign citizens. The former only involves an insult to the foreign judicial system, whereas the latter effects a "real or imagined wrong" to the citizens of the foreign country.¹¹² Indeed, Justice Harlan noted in his concurrence that many procedures under state and federal law engender incidental interference in foreign relations similar to the inheritance statute, but without transgressing the boundaries of permissible state activity.¹¹³

As an alternative to conclusive acceptance of foreign convictions, American courts might choose, as *Zschernig* suggests by analogy, to exclude all foreign convictions as a matter of course or to bar admission whenever the defendant objects to their reliability.¹¹⁴

¹¹⁰ *Id.* at 440.

¹¹¹ *Id.* at 441.

¹¹² The *Zschernig* Court noted that "[e]xperience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941)).

¹¹³ 389 U.S. at 461-62 (Harlan, J., concurring).

¹¹⁴ In addition to the act-of-state doctrine, see note 108 *supra*, a second doctrine, expressed in the familiar nostrum that "[t]he courts of no country execute the penal laws of another," *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825) (Marshall, C.J.), provides support for consistent exclusion of foreign convictions. American courts have traditionally refused to enforce judgments against persons for crimes committed and adjudicated abroad. See generally Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193 (1932); Stoel, *The Enforcement of Foreign Non-Criminal Penal and Revenue Judgments in England and the United States*, 16 INT'L COMP. L.Q. 663 (1967). This doctrine originated in notions of conflicting sovereignty, see *State ex rel. Okla. Tax Comm'n v. Rodgers*, 238 Mo. App. 1115, 1127-28, 193 S.W.2d 919, 926 (1946); *Folliott v. Ogden*, 1 Black., H. 123, 135, 126 Eng. Rep. 75, 82 (C.P. 1789), *aff'd*, 3 T.R. 726, 100 Eng. Rep. 825 (K.B. 1790), 4 Bro. P.C. 111, 2 Eng. Rep. 75 (H.L. 1792); F. STAUBACH, *DIE ANWENDUNG AUSLÄNDISCHEN STRAFRECHTS DURCH DEN INLÄNDISCHEN RICHTER* 160-63 (1964), and the common law's bias toward territorial jurisdiction, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38, Comment b (1965). Today it derives its force from the notion that an attempt by one jurisdiction to enforce the laws of another will usually lead to a tumultuous,

This option would eliminate both the due process and the foreign-relations problems. Thus, in recent years some jurisdictions have excluded the use of foreign convictions under habitual-offender statutes.¹¹⁵ Such a result is unsatisfactory, however, since it will regularly subordinate the interests that the criminal justice system has in acquiring probative evidence to the often diaphanous concerns over foreign relations in cases in which, by hypothesis, no due process problems exist. By elevating form over substance, this solution threatens to allow a guilty defendant to mitigate his punishment or to escape conviction altogether upon exclusion of reliable evidence.

Ultimately, some middle course is necessary between the extremes of a strong presumption in favor of the reliability of a foreign conviction, with all of the due process problems it creates, and that of total exclusion of foreign convictions, with the unnecessary harm

often fruitless investigation into the operations of a judicial system alien to the court hearing the case. *Cf. Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (L. Hand, J., concurring) (enforcing revenue laws of another state requires passing "upon the provisions for the public order of" that state), *aff'd*, 281 U.S. 18 (1930).

¹¹⁵ One commentator, writing in 1964, found sixteen states with habitual-offender statutes explicitly providing for the use of prior foreign convictions. Pye, *The Effect of Foreign Criminal Judgments Within the United States*, 32 U. MO. KANSAS CITY L. REV. 114, 128 n.73 (1964), reprinted in *INTERNATIONAL CRIMINAL LAW* 479 (G. Mueller & E. Wise eds. 1965). He omitted mention of two statutes then in force, 1953 Ark. Acts No. 228, § 2 (current version at ARK. STAT. ANN. § 43-2329 (1977)); 1937 S.D. Sess. Laws ch. 98 (current version at S.D. CODIFIED LAWS ANN. §§ 22-7-7 to -8 (1979)). Since that time, there has been a marked trend away from giving recidivist effect to foreign convictions. Significantly fewer states now explicitly consider foreign convictions for this purpose. *E.g.*, ARK. STAT. ANN. § 43-2329 (1977); CAL. PENAL CODE § 668 (West Supp. 1979); LA. REV. STAT. ANN. § 529.1 (West Supp. 1979); N.J. STAT. ANN. § 2C: 44-4 (West 1979); OKLA. STAT. ANN. tit. 21, § 54 (West 1954); R.I. GEN. LAWS § 12-19-21 (1956); TENN. CODE ANN. § 40.2801 (1975); VT. STAT. ANN. tit. 13, § 11 (1974). Several states have amended the clear language of former statutes, inserting a more ambiguous phrase, *e.g.*, KY. REV. STAT. § 532.080 (Supp. 1978) ("any other jurisdiction"); MO. ANN. STAT. § 558.016 (Vernon 1979) ("previously convicted of two felonies"); MONT. CODE ANN. § 46-18-501 (1979) ("any other jurisdiction"); N.M. STAT. ANN. § 31-18-17 (Supp. 1979) ("any prior felony"); N.Y. PENAL LAW § 70.10 (McKinney 1975) ("any other jurisdiction"), while others have changed their law specifically to exclude such convictions, *e.g.*, COLO. REV. STAT. § 16-13-101 (1973); FLA. STAT. ANN. § 775.084 (West 1976 & Supp. 1979); MINN. STAT. ANN. § 609.155 (West 1964); N.D. CENT. CODE § 12.1-32-09 (1976).

Many states directly preclude the use of foreign convictions for recidivist purposes. *E.g.*, COLO. REV. STAT. § 16-13-101 (1973); CONN. GEN. STAT. ANN. § 53a-40 (West Supp. 1979); DEL. CODE ANN. tit. 11, § 4214 (1979); FLA. STAT. ANN. § 775.084 (West 1975 & Supp. 1979); GA. CODE ANN. § 27-2511 (1978); IOWA CODE ANN. § 902.8 (West 1979); MASS. ANN. LAWS ch. 279, § 25 (Michie/Law. Co-op 1968); MISS. CODE ANN. § 41-29-147 (Supp. 1979) (drug offenders only); NEB. REV. STAT. § 29-2221 (1975); N.C. GEN. STAT. § 14-7.1 (Cum. Supp. 1979); N.D. CENT. CODE § 12.1-32-09 (1976); OR. REV. STAT. § 161.725 (1977); S.C. CODE § 17-25-40 (1976); VA. CODE § 19.2-297 (Supp. 1979) (petit larceny only); W. VA. CODE § 61-11-18 (1977).

Many common-law jurisdictions exclude the use of foreign convictions in their recidivist statutes. *See, e.g.*, Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58, § 80(2) (England & Wales); Crimes Act, 1914-1973, § 17(1) ACTS AUSTRAL. P. (1974).

it might do to the criminal justice system generally. This middle ground can be found only in a more detailed and balanced structure of presumptions and the burden of proof governing collateral use of prior foreign convictions.

B. A Proposal for Examining Foreign Convictions

A careful structuring of the burdens in cases involving the collateral use of foreign convictions can accommodate the various interests implicated. Initially, the state should notify the defendant of its intention to use the foreign conviction. Since a foreign conviction may involve remote sources of information the investigation of which might lead to protracted deliberations, an *in camera* hearing on the admissibility of the conviction should take place well in advance of trial. At that hearing, the proponent of the prior-conviction evidence should have the burden of production and persuasion in proving the existence of a foreign conviction.¹¹⁶ The first substantive discussions should address the general reliability of the procedures of the foreign country. Here the party opposing introduction should have the burden of production in challenging the foreign legal system and the proponent should have the burden of persuasion in establishing its general reliability, probably with experts or treatises.¹¹⁷ A finding that the foreign legal system lacks sufficient guarantees of reliable verdicts should end the matter, precluding introduction of the conviction.

If, on the other hand, the foreign system meets the test of general procedural guarantees of reliability, investigation of the specifics of the particular conviction at issue becomes appropriate. At this point, the opponent has the burden of production in specifying the defects in the criminal procedures leading to his conviction abroad.¹¹⁸ These allegations, which may focus either on the ways in which the foreign conviction was insufficient under the foreign juris-

¹¹⁶ The Court in *Burgett v. Texas*, 389 U.S. 109 (1967), did not assign the ultimate burden of proof for cases involving the use of allegedly insufficient prior convictions. At least one court has noted the continuing silence of the Supreme Court, the Federal Rules of Evidence, and the Uniform Rules of Evidence on the burden of proof in disputes over the collateral use of prior in-state convictions. *Reinsch v. Quines*, 274 Ore. 97, 104 n.5, 546 P.2d 135, 139 n.5 (1976).

¹¹⁷ See note 103 *supra*.

¹¹⁸ This burden should be set rather high, demanding either a detailed sworn statement or extrinsic evidence so that those issues for which the prosecution must gather evidence will be limited. This requirement is not unreasonable, since the accused is in control of the facts surrounding his prior conviction. The temptation to act as a *de facto* foreign appeals court should, however, be resisted. See note 106 *supra*.

diction's own standards or those aspects of the foreign procedure that can be said to shock the conscience,¹¹⁹ will narrow considerably the range of issues to be investigated. Once these allegations are properly before the court, the proponent will have the burden of rebutting them by proving that the foreign jurisdiction provided the safeguards necessary for reliable results by following its normal procedure. At this point, and usually only at this point, an intrusion into foreign territory may become necessary for deciding the issue.

This structured procedure should vindicate both the defendant's right to exclude an unreliable conviction and the state's interest in introducing probative evidence, while minimizing the friction created by overseas investigations. In practical terms, it may permit in many cases an early resolution of the reliability issue. And, where the conviction is suspect, the state will ordinarily have to commit time and resources to support the conviction only after the defendant has made the information held by him or his witness available to all parties. The requirements built into the process at each juncture ensure that the number of foreign investigations will be restricted to only the most important cases.

CONCLUSION

The collateral use of foreign convictions may often advance the same interests of the criminal justice system as the collateral use of domestic convictions. Yet the use of foreign convictions in American criminal proceedings gives rise to a host of peculiar problems, which have to date escaped careful analysis by the courts.

The constitutional standards established by *Burgett v. Texas* are the starting point for the analysis of these problems. Once it is acknowledged that, as this comment argues, the holding of *Burgett* turns on the Court's concern over the use of reliable convictions, the analysis of constitutional problems raised by the collateral use of foreign convictions becomes a simple one. A court must then establish criteria for evaluating the ability of foreign criminal process to provide reliable judgments. And, by properly dividing the burdens of production and persuasion between the proponent and opponent, most disputes concerning the collateral use of foreign convictions will be promptly and efficiently resolved. The courts, by adopting a flexible approach to the collateral use of foreign convictions, modifying the procedures as situations demand, will be able both to ensure that the accused's constitutional rights are not impaired and

¹¹⁹ See text and notes at notes 50-54 *supra*.

to permit, in a variety of instances, the introduction of probative evidence.

David K. Linnan