

## LIMITS ON THE SEARCH FOR TRUTH IN CRIMINAL PROCEDURE: A COMPARATIVE VIEW

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### I. Introduction

Across diverse legal traditions, the search for truth is a basic function of the criminal process.<sup>2</sup> Uncovering the truth about the charged crime is regarded as an essential precondition to achieving justice, enforcing criminal law, and legitimating the verdict.<sup>3</sup> Yet while truthseeking is a broadly accepted goal in the criminal process, no system seeks the truth at all costs. The search for truth must on occasion yield to considerations related to efficiency, democratic participation, and protection of individual rights.

Different jurisdictions around the world show different preferences with respect to the tradeoffs between these values and the search for truth in criminal procedure. In

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<sup>2</sup> *E.g.*, *Rose v. Clark*, 478 U.S. 570, 577 (1986) (“The central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence.”); *Tehan v. United States*, 382 U.S. 406, 416 (1966) (“The basic purpose of a trial is the determination of the truth.”); *R. v. Levogiannis*, [1993] 4 S.C.R. 475; Judgment of the Federal Constitutional Court of March 19, 2013, BVerfG, 2 BvR 2628/10, BvR 2883/10, 2 BvR 2155/11.

<sup>3</sup> On the link between truth and legitimacy in criminal cases, see, for example, LARRY LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY* 2 (2006); FRAUKE STAMP, *DIE WAHRHEIT IM STRAFVERFAHREN* 22-23, 265 (1998) (observing that truthfulness is a necessary but not sufficient condition for a legitimate verdict); Thomas Weigend, *Is the Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL’Y 157, 157-58 (2003).

an effort to promote efficiency, enhance democratic participation, or protect individual rights, legal systems tolerate certain procedures that are known to heighten the risk of inaccurate outcomes.<sup>4</sup> Some of these procedural preferences can be explained with reference to the influence of the adversarial and inquisitorial traditions.<sup>5</sup> But the distinction between adversarial and inquisitorial systems on this point is not always clear. Great variation exists within these two traditions, and common approaches can be seen across the divide.

Some truth-limiting procedures, such as those related to the exclusionary rule and the protection of individual rights, have been adopted largely across the globe and have proven amenable to adjustments that accommodate the concern for truth. Other measures, such as lay participation in the criminal process, have retained their hold in some countries but have not spread to many others. Finally, one category of practices generally acknowledged to conflict with truthseeking—plea bargaining and other methods of negotiated justice—have become increasingly prevalent, but have proven the most difficult to regulate and to align with the search for truth.

## II. Promoting Individual Rights: Double Jeopardy and Exclusionary Rules

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<sup>4</sup> See, e.g., LAUDAN, *supra* note 3, at 213-33; STAMP, *supra* note 3, at 91-93; Mirjan Damaška, *Truth in Adjudication*, 49 HASTINGS L.J. 289, 301 (1997-1998); Wayne R. LaFave et al., *Implementing the Enforcement of the Substantive Law*, 1 CRIM. PROC. § 1.5(a) (2012); Weigend, *supra* note 3, at 167-68; see also Donald A. Dripps, *The Substance-Procedure Relationship in Criminal Law*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 409, 410-11 (R.A. Duff & Stuart Green eds. 2011).

<sup>5</sup> See LAUDAN, *supra* note 3, at 24-25; WILLIAM PIZZI, TRIALS WITHOUT TRUTH (2000); Elisabetta Grande, *Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth*, in CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT 145, 145-48 (John Jackson et al. eds., 2008); Gerson Trüg & Hans-Jürgen Kerner, *Formalisierung der Wahrheitsfindung im (reformiert-) inquisitorischen Strafverfahren? Betrachtungen unter rechtsvergleichender Perspektive*, in RECHT GESTALTEN – DEM RECHT DIENEN, FESTSCHRIFT FÜR REINHARD BÖTTCHER 191, 193-94 (Heinz Schöch et al. eds., 2007); Mirjan R. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 578-89 (1973); Weigend, *supra* note 3. But see Heike Jung, *Nothing But the Truth? Facts, Impressions, and Confessions about Truth in Criminal Procedure*, in TRIAL ON TRIAL 147, 152 (Anthony Duff et al. eds., 2004); Thomas Weigend, *Should We Search for the Truth, and Who Should Do It?*, 36 N.C. J. INT'L L. & COM. REG. 389, 401-02 (2011).

Perhaps the most universally accepted reason for limiting the search for truth concerns the protection of individual rights such as dignity, privacy, and liberty. The willingness to compromise the search for truth in the service of individual rights influences a host of criminal procedures in both adversarial and inquisitorial jurisdictions—from heightened burdens of proof to witness privileges to exclusionary rules.

Since World War II and the rise of international human rights law, the protection of individual liberties has become a more central goal of criminal justice systems around the world. Many of the procedural rights that developed in the process—the right to counsel, to an impartial adjudicator, to confront adverse witnesses, and to receive notice of charges—are generally consistent with an emphasis on accuracy in criminal cases. But certain individual protections, including the privilege against self-incrimination, the ban on double jeopardy, and rules for excluding unlawfully obtained evidence, may impair the search for truth.<sup>6</sup> Under the influence of human rights ideals, countries around the world have come closer together in their willingness to adopt these protections and limit the search for truth when necessary to ensure fairness.<sup>7</sup> Nonetheless, there remain some perceptible differences in the way adversarial and inquisitorial systems balance these values.

One of the most powerful influences on the shape of adversarial criminal procedures has been the maxim that “It is better that ten guilty persons escape than that one innocent suffer.”<sup>8</sup> Recognizing that errors are inevitable in any realm of human decision-making, this maxim suggests that we should opt for distributing errors away from wrongful convictions. Jurisdictions that take this “innocence-weighted” approach

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<sup>6</sup> E.g., LAUDAN, *supra* note 3, at 3, 91; Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1374-1381, 1407 (1991); Weigend, *supra* note 3, at 161-62.

<sup>7</sup> E.g., Jung, *supra* note 5, at 153; Weigend, *supra* note 5, at 405.

<sup>8</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, c. 27, margin p.358. For variations on this formula, both before and after Blackstone, see LAUDAN, *supra* note 3, at 63; Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173 (1997).

thus aim to avoid mistaken convictions even when this diminishes accuracy overall and results in a greater number of wrongful acquittals.<sup>9</sup>

Although the “innocence-weighted” procedural preference has historically been more prominent in adversarial systems, it can be seen across the adversarial-inquisitorial spectrum and is enshrined in key provisions of international human rights conventions.<sup>10</sup> The reasonable doubt standard, for example, which sacrifices some accuracy for the sake of reducing wrongful convictions, is shared by a number of adversarial and inquisitorial systems, and now by international criminal courts.<sup>11</sup> Likewise, the right to remain silent, which reduces the amount of information available to factfinders, is now accepted widely at least in part in order to ensure that innocent persons do not falsely incriminate themselves.<sup>12</sup>

#### A. *Double Jeopardy and the Ban on Appeals of Acquittals*

The “innocence-weighted” approach, however, remains somewhat more prominent in jurisdictions belonging to the adversarial tradition. One manifestation of

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<sup>9</sup> Stacy, *supra* note 6, at 1407.

<sup>10</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/, art. 14 (March 24, 1976); Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, June 1, 2010, Eur. Ct. H.R.

<sup>11</sup> Rome Statute of the International Criminal Court, art. 66(3), U.N. Doc. A/CONF. 183/9 (July 1, 2002); ICTY R. PROC. & EVID. R. 87(A); General Comment No. 32, HRC, UN Doc. CCPR/C/GC/32, Aug. 23, 2007, ¶ 30; Guido Acquaviva, *Written and Oral Evidence*, in *INTERNATIONAL CRIMINAL PROCEDURE* 99, 100 (Linda Carter & Fausto Pocar eds. 2013). Tom Stacy has explained how the beyond a reasonable doubt standard may be seen as truth-impairing:

As compared with a preponderance of the evidence standard, the requirement of proof beyond a reasonable doubt increases the overall incidence of erroneous verdicts. Unlike the preponderance of the evidence standard, it requires that the defendant prevail in cases where the weight of the evidence points decidedly but not overwhelmingly towards her guilt. Over the run of cases, fewer errors will occur if the verdict is rendered according to the weight of the evidence. . . . The reasonable doubt standard is truth-furthering only if one’s definition of accuracy distinguishes between erroneous convictions and erroneous acquittals, treats erroneous convictions as worse than erroneous acquittals, and seeks in part to minimize the occurrence of erroneous convictions. Stacy, *supra* note 6, at 1405-06.

<sup>12</sup> See, e.g., *Ohio v. Reiner*, 532 U.S. 17 (2001). While the right to remain silent protects against some false self-incriminations, it also produces more false acquittals. E.g., LAUDAN, *supra* note 3, at 150.

this approach is the ban on appeals of acquittals. Adversarial systems typically prohibit the prosecution from appealing acquittals, while inquisitorial systems grant the prosecution and the defense equal rights to appeal, regardless of the verdict. The asymmetrical appeals mechanism in adversarial systems means that legal or factual errors which favor defendants may remain uncorrected. The willingness to adopt a procedure that hinders the ability of the legal system to correct mistakes can be explained at least in part by a desire to minimize the risk of false convictions.

The ban on appeals of acquittals is often traced back to the general restriction on *all* appeals of criminal judgments under the common law.<sup>13</sup> While neither defendants nor prosecutors had the ability to obtain review of most criminal judgments in the early days of the common law, by the late nineteenth and early twentieth century, concerns about false convictions led many common-law jurisdictions to create a system of appeals.<sup>14</sup> Yet courts and lawmakers believed that appeals of acquittals would violate the doctrine of double jeopardy, so the new appellate remedies applied only to convictions.<sup>15</sup>

The asymmetrical system of appeals has been defended on several policy grounds. First, the procedure is championed as necessary to protect innocent defendants from being overwhelmed by the pressures of an appeal and potential

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<sup>13</sup> MIRJAN DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 60 (1991); The Law Reform Commission (Ireland), *Consultation Paper on Prosecution Appeals in Cases Brought on Indictment* ¶ 1.04 (2002), at [http://www.lawreform.ie/\\_fileupload/consultation%20papers/cpProsecutionAppeals.htm](http://www.lawreform.ie/_fileupload/consultation%20papers/cpProsecutionAppeals.htm) (citing JAMES FITZJAMES STEPHEN, 1 *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 308-10 (1st ed., 1883, *reprinted in* 1996)).

<sup>14</sup> LAUDAN, *supra* note 3, at 199; The Law Reform Commission (Ireland), *supra* note 13, ¶ 1.18.

<sup>15</sup> For the common law provenance, see The Law Reform Commission (Ireland), *supra* note 13, ¶ 1.02 (citing *R. v. Chairman and Justices of the County of Tyrone* for the proposition that it was an “elementary” and “a broad principle of common law” that “an acquittal made by a Court of competent jurisdiction and made within its jurisdiction, although erroneous in point of fact, cannot as a rule be questioned and brought before any other court.”). For the link to double jeopardy, see *Kepner v. United States* 195 U.S. 100 (1904); *see also* *Thompson v. Master-Touch TV Service Pty Ltd. (No.3)* (1978) 38 FLR 397, 403 (Fed. Ct. Austl.).

retrial.<sup>16</sup> Second, it is justified on the grounds that it reduces the risk that some acquittals might be erroneously reversed on appeal.<sup>17</sup> In cases decided by juries, it is also prized for protecting the jury's autonomy, and in particular, the jury's power to render a verdict against the evidence.<sup>18</sup>

From a truthseeking perspective, however, the ban on appeal of acquittals imposes significant costs as it precludes courts from correcting factual errors that favor defendants.<sup>19</sup> In a reflection of these concerns, inquisitorial countries and international criminal courts have rejected asymmetric appeals. The inquisitorial position—giving equal appellate rights to the defense and the prosecution—is formally rooted in a different understanding of double jeopardy.<sup>20</sup> While adversarial systems generally consider a trial verdict to be a final judgment for purposes of double jeopardy,<sup>21</sup> inquisitorial systems deem criminal judgments to be final only after all appellate remedies have been exhausted.<sup>22</sup> But this different interpretation of double jeopardy is ultimately grounded in a stronger preference for procedures that aid the search for truth.<sup>23</sup>

While the adversarial-inquisitorial split on appeals of acquittals remains clear, it has become narrower since the 1960s, as concerns about accuracy have grown more dominant in certain common-law jurisdictions. Several common-law countries have

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<sup>16</sup> See, e.g., *Green v. United States*, 355 U.S. 184, 187-88 (1957); see also Matteo Rizzolli, *Why Public Prosecutors Cannot Appeal Acquittals*, XV STUDI E NOTE DI ECONOMIA 81, 94 (2010); Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1007 (1980).

<sup>17</sup> Rizzolli, *supra* note 16, at 95; Westen, *supra* note 16, at 1010-11.

<sup>18</sup> Westen, *supra* note 16, at 1016-18.

<sup>19</sup> E.g., LAUDAN, *supra* note 3, at 194-212.

<sup>20</sup> See, e.g., John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83, 117-18 (2006/2007).

<sup>21</sup> See *id.*; David Rudstein, *Prosecution Appeals of Court-Ordered Midtrial Acquittals: Permissible Under the Double Jeopardy Clause?* 62 CATH. U. L. REV. 91, 95 n.22 (2012). For an elaboration on how this fits with the “horizontal” model of adjudication in common-law countries, see DAMAŠKA, *supra* note 13, at 59-60.

<sup>22</sup> Jackson & Kovalev, *supra* note 20, at 117-18. Cf. *Maresti v. Croatia*, [2009] ECHR 981, ¶¶ 62-63.

<sup>23</sup> Grande, *supra* note 5, at 160.

allowed the prosecution to appeal questions of law even after acquittals.<sup>24</sup> In a few of these, the appeal is “with prejudice” — meaning that it may result in a reversal of the judgment.<sup>25</sup> In others, the appeal is “without prejudice,” meaning that the appellate decision is merely declaratory.<sup>26</sup> In the United States, the law has also expanded the availability of prosecutorial appeals. Statutes and case law in a majority of states permit prosecutors to challenge dismissals of charges and the exclusion of evidence through interlocutory appeals at the pretrial stage.<sup>27</sup> Even after trial, prosecutors may now appeal a verdict favorable to the defendant where the defendant obtains a dismissal of the case “on grounds unrelated to guilt or innocence”<sup>28</sup> or when a judge sets aside a jury conviction and acquits the defendant.<sup>29</sup>

Moving beyond appeals on legal issues, a few adversarial jurisdictions have introduced a more significant exception to double jeopardy principles, allowing re-prosecution on the grounds of newly discovered evidence. With the advent of DNA testing, England and several Australian provinces have provided for the reopening of proceedings in certain serious crimes cases where new and compelling evidence justifies it.<sup>30</sup> U.S. courts have also permitted successive prosecutions in certain limited

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<sup>24</sup> CRIM. CODE (Can.) § 676 (1985), *upheld as constitutional in R v. Morgentaler* [1988] 1 SCR 30, 156; CRIMES ACT (N.Z.) § 380 (1961); CRIM. PROC. ACT (S. Afr.) § 319 (1977).

<sup>25</sup> CRIM. CODE (Can.) § 676 (1985); CRIMES ACT (N.Z.) § 380 (1961); CRIM. PROC. ACT (S. Afr.) § 319 (1977).

<sup>26</sup> CRIM. JUST. ACT (Eng.) §§ 36(1)-(3), (7) (1972); CRIM. PROC. ACT (Scot.) § 123(1) (1995); CRIM. PROC. ACT (Ireland) § 11 (1993) (without prejudice appeals of acquittals for judge-directed acquittals only). Ireland is currently reviewing proposals to expand further its system of appeals of acquittals. The Law Reform Commission (Ireland), *supra* note 13.

<sup>27</sup> This is a departure from the common-law position prohibiting government appeals. MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION* 751 (3rd ed. 2007).

<sup>28</sup> *United States v. Scott*, 437 U.S. 82, 96 (1978). The Court in *Scott* clarified that appeal was permitted because the defendant had not in fact been acquitted: The proceedings had been terminated “on a basis unrelated to factual guilt or innocence.” *Id.* at 99.

<sup>29</sup> *Smith v. Massachusetts*, 543 U.S. 462, 467 (2005) (citing *United States v. Wilson*, 420 U.S. 332, 352-353 (1975)).

<sup>30</sup> CRIM. JUST. ACT § 78 (2003) (Eng.); Crown Prosecution Service, *Legal Guidance: Retrial of Serious Offences*, at [http://www.cps.gov.uk/legal/p\\_to\\_r/retrial\\_of\\_serious\\_offences](http://www.cps.gov.uk/legal/p_to_r/retrial_of_serious_offences); Vicki Wayne & Paul Marcus, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds, Part 2*, 18 TUL. J. INT'L & COMP. L. 335, 357-59 (2010); David Rudstein, *Retrying the Acquitted in England, Part I: The Exception*

cases of newly available evidence. Under the “due diligence” exception to double jeopardy, a successive prosecution is not barred for a second offense when “additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence.”<sup>31</sup> At least in the realm of appeals and retrials, therefore, we are seeing some rebalancing of priorities and a greater emphasis on the discovery of truth among several adversarial systems.

### *B. Excluding Unlawfully Obtained Evidence*

In an effort to ensure a fair process and protect individual rights, criminal justice systems may also adopt rules that exclude unlawfully obtained evidence. Such exclusionary rules tend to conflict with the search for truth, as they remove probative evidence from consideration by the judge or jury, and in some cases, entirely thwart the prosecution of guilty offenders.

Exclusionary rules are often associated with common-law jurisdictions, and the American rule in particular is frequently described as the strictest and broadest. Yet most contemporary civil-law jurisdictions also have rules that prohibit the use of unlawfully obtained evidence; in fact, some of these rules predate common-law exclusionary rules.<sup>32</sup> And while recent Supreme Court jurisprudence has continually narrowed the reach of the exclusionary rule in the United States, undermining the

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*to the Rule Against Double Jeopardy for “New and Compelling Evidence,”* 8 SAN DIEGO INT’L L.J. 387 (2007). In 2008, New Zealand had also introduced a provision allowing retrials after acquittals where “new and compelling evidence” has been discovered, but this provision was repealed in 2013. CRIMES ACT (N.Z.) § 378D, repealed by Section 6 of the Crimes Amendment Act (No 4) 2011 (2011 No 85).

<sup>31</sup> *Brown v. Ohio*, 432 U.S. 161, 169 n.7 (1977). For a discussion of the due diligence exception, see Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183 (2004).

<sup>32</sup> See, e.g., MIRJAN DAMAŠKA, EVIDENCE LAW ADRIFT 13-14 (1997); Stephen C. Thaman, *Constitutional Rights in the Balance: Modern Exclusionary Rules and the Toleration of Police Lawlessness in the Search for Truth*, 61 U. TORONTO L.J. 691, 696 (2011). According to the traditional common law rule, “the manner in which the evidence was obtained . . . was irrelevant to . . . its admissibility.” JOHN D. JACKSON & SARAH J. SUMMERS, THE INTERNATIONALISATION OF CRIMINAL EVIDENCE: BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS 153 (2012).



notion that the U.S. rule is mandatory,<sup>33</sup> courts in a number of modern inquisitorial systems have begun taking a firmer approach to exclusion.<sup>34</sup>

Categorization along adversarial and inquisitorial lines therefore does not appear useful with respect to the exclusionary rule—not only because of convergence among a number of adversarial and inquisitorial systems, but also because of significant divergence within each category.<sup>35</sup> Within the inquisitorial camp, countries such as Argentina, France, Italy, and Spain have maintained to some degree a tradition of procedural nullities. Under the nullity approach, when investigative action violates certain specified statutory rules, the action is declared void and its evidentiary results may not be used.<sup>36</sup> But with respect to evidence obtained as a result of other violations—to which nullities do not attach, but which affect fundamental rights—these countries take very different positions. Spain, Argentina and Italy provide near-automatic exclusion, while France continues with a presumption of admissibility.<sup>37</sup> Other countries, such as Greece, Turkey, and Russia, have recently adopted mandatory

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<sup>33</sup> *E.g.*, *Hudson v. Michigan*, 547 U.S. 586, 591 (2010); *Herring v. United States*, 555 U.S. 135 (2009); *United States v. Leon*, 468 U.S. 897 (1984). *See generally* TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE* 302-47 (2013).

<sup>34</sup> *See, e.g.*, AYA GRUBER ET AL., *PRACTICAL GLOBAL CRIMINAL PROCEDURE* 216-19 (2012) (discussing Argentina); Lorena Bachmaier Winter, *Spain: The Constitutional Court's Move from Categorical Exclusion to Limited Balancing*, in *EXCLUSIONARY RULES IN COMPARATIVE LAW* 209, 215 (Stephen C. Thaman ed. 2013); Adem Sözüer & Öznur Sevdiren, *Turkey: The Move to Categorical Exclusion of Illegally Gathered Evidence*, in *EXCLUSIONARY RULES IN COMPARATIVE LAW*, *supra*, at 287; Dimitrios Giannouloupoulos, *The Exclusion of Improperly Obtained Evidence in Greece: Putting Constitutional Rights First*, 11 *INT'L J. EVID. & PROOF* 181, 186 (2007).

<sup>35</sup> For an excellent analysis of exclusionary rules in different systems, see *EXCLUSIONARY RULES IN COMPARATIVE LAW* (Stephen C. Thaman ed. 2013). *Cf.* J.F. Nijboer, *Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective*, 41 *AM. J. COMP. L.* 299, 335 (1993) (“It is the lack of uniformity of the non-adversarial systems that causes the main difficulties in using the inquisitorial and the adversarial style or system or proceedings as basic models for comparison. . .”).

<sup>36</sup> *See, e.g.*, Giulio Illuminati, *Italy: Statutory Nullities and Non-usability*, in *EXCLUSIONARY RULES IN COMPARATIVE LAW*, *supra* note 35, at 235, 244-45; Jean Pradel, *France: Procedural Nullities and Exclusion*, in *EXCLUSIONARY RULES IN COMPARATIVE LAW*, *supra* note 35, at 145, 148-50.

<sup>37</sup> GRUBER ET AL., *supra* note 34, at 216-19; Alejandro D. Carrio & Alejandro M. Garro, *Argentina*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 3, 20-25, 32 (Craig Bradley ed. 2<sup>nd</sup> ed. 2007); Richard Frase, *France*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra*, at 212-14; Illuminati, *supra* note 36, at 235, 244-46, 258; Thaman, *supra* note 32, 698-700.

exclusionary rules under which unlawfully obtained evidence is generally inadmissible.<sup>38</sup> Finally, a number of jurisdictions, both adversarial and inquisitorial, use a balancing approach, as part of which they consider a host of factors related to the fairness of the process and the accuracy of the verdict.<sup>39</sup> Contributing to this diversity, at least in Europe, is the reluctance of the European Court of Human Rights to lay down common rules pertaining to the admissibility of tainted evidence, except in certain extreme cases.<sup>40</sup>

If the adversarial-inquisitorial dichotomy appears outdated, perhaps a more useful classification would be based on the values that the exclusionary rule aims to promote.<sup>41</sup> One can distinguish four main categories here: 1) the reliability approach; 2) the vindication of rights approach; 3) the judicial integrity approach; and 4) the deterrence approach. Classification along these lines is not seamless, as the rules of many jurisdictions frequently aim to maximize more than one value at a time. But it has the advantage of reflecting more accurately how courts and lawmakers within different jurisdictions reason about the scope and function of their exclusionary rules.

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<sup>38</sup> Giannouloupoulos, *supra* note 34, at 186; Georgios Triantafyllou, *Greece: From Statutory Nullities to a Categorical Statutory Exclusionary Rule*, in *EXCLUSIONARY RULES IN COMPARATIVE LAW*, *supra* note 35, at 261; Sözüer & Sevdiren, *supra* note 34, at 287.

<sup>39</sup> EVID. ACT (N.Z.) § 30 (3) (2006); EVID. ACT (CTH) § 138 (3) (1995); EVID. ACT (NSW) § 38(1995); *R v. Grant*, [2009] 2 S.C.R. 353 (Can.); *Yissacharov v. Chief Military Prosecutor*, [2006] (1) Isr. L.R. 320, ¶ 70; Marie-Aude Beernaert & Philip Traest, *Belgium: From Categorical Nullities to a Judicially Created Balancing Test*, in *EXCLUSIONARY RULES IN COMPARATIVE LAW*, *supra* note 35, at 161, 165-66.

<sup>40</sup> *Khan v. United Kingdom*, App. No. 35394/97, 31 Eur. Ct. H.R. 45, ¶ 34 (2000):

It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence - for example, unlawfully obtained evidence - may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the 'unlawfulness' in question and, where violation of another Convention right is concerned, the nature of the violation found.

The Court has enforced an exclusionary rule only in cases where the evidence was obtained through torture or inhumane and degrading treatment. *See infra* note 51.

<sup>41</sup> For a similar approach, see Christopher Slobogin, *A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases*, in *RESEARCH HANDBOOK ON COMPARATIVE CRIMINAL PROCEDURE* (Jacqueline Ross & Stephen Thaman eds., forthcoming 2014).

Furthermore, to the extent we are interested in understanding why different systems choose to depart from the search for truth, it is helpful to examine the policy reasons behind such departures.

Courts and commentators in both adversarial and inquisitorial systems occasionally justify exclusion on the grounds that it can help advance the search for truth. Under this approach, evidence is excluded when the methods used to obtain it have rendered it less reliable.<sup>42</sup> For example, courts may favor exclusion of testimonial evidence, which is more likely to be tainted by unlawful investigative tactics, but not of physical evidence.<sup>43</sup> The stricter treatment of testimonial evidence may be linked in part to the reprehensibility of the methods typically used to obtain it (e.g., torture, inhuman and degrading treatment, or deception). But a review of courts' decisions on these issues reveals that the differential treatment of tangible and testimonial evidence is due at least in part to a concern that tainted testimony is likely to be unreliable and to impair the search for truth.<sup>44</sup> While a focus on reliability can help explain certain features of exclusionary rules in some jurisdictions, it is not a satisfactory description of most modern exclusionary approaches, which sweep more broadly and often lead to the suppression of perfectly reliable evidence.<sup>45</sup>

In a number of jurisdictions, the exclusion of evidence is defended primarily on the grounds that it is necessary to vindicate fundamental rights. This theory is referred to alternatively as the "rights theory," the "remedial model," or the "protective principle,"<sup>46</sup> and it emphasizes the importance of providing an effective remedy to give

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<sup>42</sup> JACKSON & SUMMERS, *supra* note 32, at 154.

<sup>43</sup> See, e.g., *Yissacharov v. Chief Military Prosecutor*, [2006] (1) Isr. L.R. 320, ¶ 71 (distinguishing between tangible and verbal evidence); Findlay Stark & Fiona Leverick, *Scotland: A Plea for Consistency*, in EXCLUSIONARY RULES IN COMPARATIVE LAW, *supra* note, at 69, 87.

<sup>44</sup> See, e.g., *R. v. Grant*, [2009] 2 S.C.R. 353, ¶ 110 (Can.); *Chalmers v. H.M. Advocate* 1954 JC 66, 83 (Scot.); *Yissacharov*, [2006] (1) Isr. L.R. ¶ 71.

<sup>45</sup> JACKSON & SUMMERS, *supra* note 32, at 154.

<sup>46</sup> *Yissacharov*, [2006] (1) Isr. L.R. 320, ¶ 60; JACKSON & SUMMERS, *supra* note 32, at 155; Andrew Ashworth, *Excluding Evidence as Protecting Rights*, [1977] CRIM. L. REV. 723.

meaning to individual rights. Without exclusion, provisions that protect fundamental rights are said to be reduced to “a form of words”<sup>47</sup> such that they “might as well be stricken from the Constitution.”<sup>48</sup> The U.S. Supreme Court followed this approach in some of its earlier opinions on the exclusionary rule, though the Court has since abandoned it.<sup>49</sup> The “protective principle” nonetheless remains important in a number of other jurisdictions.<sup>50</sup> As might be expected, in countries that follow this principle, the nature of the right breached is a critical factor in the decision whether to exclude. Some jurisdictions reserve mandatory exclusion only for violations of certain fundamental or constitutional rights.<sup>51</sup> Others place great weight on the type of right violated as part of a balancing test that determines whether exclusion is warranted.<sup>52</sup>

Another justification for the exclusionary rule is that the rule helps preserve the integrity of the judicial system. Under this view, courts must exclude tainted evidence in order to avoid any perception that they are condoning illegal acts by government agents. As the U.S. Supreme Court put it in one of its early decisions on the exclusionary rule, courts must not become “accomplices in the willful disobedience of a Constitution they are sworn to uphold.”<sup>53</sup> Instead, they must disown any evidence

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<sup>47</sup> *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

<sup>48</sup> *Weeks v. United States*, 232 U.S. 383, 393 (1914).

<sup>49</sup> See MACLIN, *supra* note 33, chap. 1 (discussing *Boyd* and *Weeks*).

<sup>50</sup> See, e.g., D.P.P. v. Kenny, [1990] 2 I.R. 110, 134 (justifying exclusion with reference to the “unambiguously expressed constitutional obligation ‘as far as practicable to defend and vindicate the personal rights of the citizen’”). See generally Slobogin, *supra* note 41, at 12.

<sup>51</sup> See, e.g., Jalloh v. Germany, 2006-IX Eur. Ct. H.R. 281, ¶ 105; Harutyunyan v. Armenia, 49 Eur. Ct. H.R. 9, ¶¶ 65-66 (2009); Gäfgen v. Germany, 52 Eur. Ct. H.R. 1, 42 (2011). Consistent with the “rights theory,” there is growing consensus that evidence obtained through torture or inhumane and degrading treatment should be suppressed, regardless of its reliability. JACKSON & SUMMERS, *supra* note 32, at 162.

<sup>52</sup> See, e.g., *People (A.G.) v. O’Brien*, [1965] I.R. 142, 147, 170; Arnaud Cras & Yvonne Marie Daly, *Ireland: A Move to Categorical Exclusion?*, in EXCLUSIONARY RULES IN COMPARATIVE LAW, *supra* note 35, at 33, 34; Zinovia Dellidou, *The Investigative Stage of the Criminal Process in Greece*, in SUSPECTS IN EUROPE 101, 123 (Ed Cape et al. 2007). The German approach to exclusion might also be characterized this way. See, e.g., Weigend, *supra* note 3, at 401 (noting a “growing tendency [among German courts] toward rejecting evidence that was acquired in clear, conscious violation of a person’s constitutional rights”).

<sup>53</sup> *Elkins v. United States*, 364 U.S. 206, 223 (1960); *United States v. Leon*, 468 U.S. 897, 978 (1984) (Stevens, J., dissenting) (“If such evidence is admitted, then the courts become not merely the final and necessary

gathered through unlawful acts by government agents in order to ensure that the trial is fair and legitimate<sup>54</sup> and that the same standards of conduct apply to government actors and ordinary citizens.<sup>55</sup>

In American jurisprudence, the integrity rationale was prominent in earlier days of the exclusionary rule,<sup>56</sup> but has since been overtaken by a deterrence approach, at least at the federal level.<sup>57</sup> It remains salient in other national and international jurisdictions, however, as well as in the academic literature.<sup>58</sup> Under this approach, courts consider primarily the seriousness of the violation by law enforcement in deciding whether to exclude evidence.<sup>59</sup> Because courts focus on the damage to the integrity of the justice system as a whole, this approach often gives rise to multi-factor balancing tests.<sup>60</sup> Such tests may consider whether exclusion, to the extent it thwarts the adjudication of a serious crime, might itself threaten judicial integrity in some cases.

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link in an unconstitutional chain of events, but its actual motivating force.”); *A and Others v. Secretary of State for the Home Department* (No. 2) [2006] 2 AC 221, ¶ 87.

<sup>54</sup> See ANTONY DUFF ET AL., *TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL* 109 (2007).

<sup>55</sup> *Olmstead v. United States*, 277 U.S. 438, 485 (Brandeis, J., dissenting) (“Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”).

<sup>56</sup> See, e.g., *Weeks v. United States*, 232 U.S. 383, 392 (1914); *Elkins*, 364 U.S. at 223.

<sup>57</sup> See Robert M. Bloom & David H. Fentin, “A More Majestic Conception”: *The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 47-49 (2010) (noting the decline of the integrity rationale in Supreme Court jurisprudence, but its continued prominence in some state courts).

<sup>58</sup> See, e.g., CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 24(2) (1982) (“the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute”); *R. v. Grant*, [2009] 2 S.C.R. 353, ¶¶ 68-70 (Can.); *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Admission of Material from the “Bar Table” (June 24, 2009); DUFF ET AL., *supra* note 54, at 108-09; Bloom & Fentin, *supra* note 57, at 47-49; Slobogin, *supra* note 41.

<sup>59</sup> *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Decision on the Prosecutor’s Bar Table Motions ¶¶ 60, 62-63 (Dec. 17, 2010); *Lubanga*, Case No. ICC-01/04-01/06, Decision on the Admission of Material from the “Bar Table,” ¶¶ 42-46.

<sup>60</sup> See, e.g., *R v. Collins* [1987] 1 S.C.R. 265, 283 (Can.) (noting that administration of justice may be brought into disrepute if reliable evidence that is central to conviction is excluded because of a “trivial” breach by law enforcement); *Lubanga*, Case No. ICC-01/04-01/06, Decision on the Admission of Material from the “Bar Table,” ¶¶ 42-46 (considering the gravity of the violation, the impact on the rights of the accused, the

The preeminent justification for the exclusionary rule in contemporary U.S. Supreme Court jurisprudence is the deterrence of official misconduct. Under this view, the exclusionary rule should be used only when it would effectively dissuade law enforcement officials from violating the law in the future.<sup>61</sup> Even when exclusion does deter misconduct, courts may still decide not to impose it, if the social costs of exclusion outweigh the benefits of deterrence.<sup>62</sup> The cost-benefit analysis considers the availability of alternative sanctions, which may be able to discipline officers at a lesser cost to the administration of justice.<sup>63</sup> It also examines whether misconduct was an isolated occurrence or part of a pattern, under the theory that systemic abuses are in greater need of deterrence.<sup>64</sup> Finally, it considers officers' state of mind and reserves discipline only for reckless or deliberate violations of the law.<sup>65</sup> Although prominent in the United States, the deterrence approach has not been widely accepted elsewhere in the world.<sup>66</sup> Nonetheless, consistent with a focus on deterrence, a number of jurisdictions consider officers' state of mind, the systemic nature of the misconduct, and the availability of alternative remedies in deciding whether to exclude evidence.<sup>67</sup>

While the above discussion might suggest that jurisdictions choose one of four competing rationales for exclusion, in practice, many justify exclusion by reference to

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level of involvement by agents of the ICC prosecution, and whether the agents acted in good faith). See generally Slobogin, *supra* note 41.

<sup>61</sup> Hudson v. Michigan, 547 U.S. 586, 591 (2010); Herring v. United States, 555 U.S. 135, 141 (2009); United States v. Leon, 468 U.S. 897, 918 (1984).

<sup>62</sup> Hudson, 547 U.S. at 591, 599; Herring, 555 U.S. at 141; Leon, 468 U.S. at 908.

<sup>63</sup> Hudson, 547 U.S. at 591, 599.

<sup>64</sup> Herring, 555 U.S. at 144.

<sup>65</sup> *Id.*

<sup>66</sup> See, e.g., D.P.P. v. Kenny, [1990] 2 I.R. 110, 134 ("The detection of crime and the conviction of guilty persons, no matter how important they may be in relation to the ordering of society, cannot . . . outweigh the unambiguously expressed constitutional obligation 'as far as practicable to defend and vindicate the personal rights of the citizen.'"); R. v. Mason [1988] 1 WLR 139, 144; Yissacharov v. Chief Military Prosecutor, [2006] (1) Isr. L.R. 320, ¶ 60; Rinat Kitai Sangero & Yuval Merin, *Israel: The Supreme Court's New, Cautious Exclusionary Rule*, in EXCLUSIONARY RULES IN COMPARATIVE LAW, *supra* note 34, at 93, 97.

<sup>67</sup> See, e.g., EVID. ACT (N.Z.) § 30 (3) (2006); EVID. ACT (Cth) § 138 (3) (1995); R v. Grant, [2009] 2 S.C.R. 353 (Can.); Yissacharov, [2006] (1) Isr. L.R. ¶ 70. See generally Thaman, *supra* note 32, at 722-23.

multiple goals.<sup>68</sup> Countries frequently adopt a discretionary approach, which tries to “find the proper balance between the protection of the rights of the accused and safeguarding the fairness and integrity of the criminal process, on the one hand, and competing values and interests, including the value of discovering the truth, fighting increasing crime and protecting public safety and the rights of victims, on the other.”<sup>69</sup> Factors commonly considered in this balancing analysis include: 1) the importance of the right breached; 2) the seriousness of the violation (including whether the violation was deliberate or reckless; isolated or part of a pattern); 3) the probative value and importance of the improperly obtained evidence; 4) the seriousness of the offence with which the defendant is charged; and 5) whether alternative remedies could provide adequate redress to the defendant.<sup>70</sup>

The various factors in the balancing analysis aim to address different concerns. An emphasis on the type of right violated is consistent with the “protective principle.” Consideration of the gravity of the violation is linked to the systemic integrity rationale, while a few of the other factors reflect a concern for deterrence. Importantly, the third

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<sup>68</sup> See, e.g., *Yissacharov*, [2006] (1) Isr. L.R. ¶ 60; Winter, *supra* note 34, at 209 (citing STC 114/1984, Nov. 29, 1984).

<sup>69</sup> *Yissacharov*, [2006] (1) Isr. L.R. 320, ¶ 62; see also S. AFR. CONST. § 35(5) (1996) (evidence obtained in violation of the Bill of Rights “must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice”); POLICE & CRIM. EVID. ACT (ENG.) § 78 (1984) (evidence would be excluded where it “would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it”); *R. v. Grant*, [2009] 2 S.C.R. 353, ¶¶ 68-71 (Can.); *H.M. Advocate v. Higgins*, S.L.T. (2006), 946, 950, SC, 9.

<sup>70</sup> EVID. ACT (N.Z.) § 30 (3) (2006); EVID. ACT (CTH) § 138 (3) (1995); EVID. ACT (NSW) § 38 (1995); see also *Grant*, [2009] 2 S.C.R. 353; *Yissacharov*, [2006] (1) Isr. L.R. ¶ 70; *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Admission of Material from the “Bar Table,” ¶¶ 42-46 (June 24, 2009); *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Decision on the Defence “Objection to Intercept Evidence,” ¶ 63 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 3, 2003); Matthias J. Bogers & Lonneke Stevens, *The Netherlands: Statutory Balancing and a Choice of Remedies*, in EXCLUSIONARY RULES IN COMPARATIVE LAW, *supra* note 34, at 183, 204-06; Marc Groenhuijsen, *Illegally Obtained Evidence: An Analysis of New Trends in the Criminal Justice System of the Netherlands*, in THE XIII<sup>TH</sup> WORLD CONGRESS OF PROCEDURAL LAW: THE BELGIAN AND DUTCH REPORTS (2008), available at <http://arno.uvt.nl/show.cgi?fid=92639>; Sabine Gless, *Germany: Balancing Truth Against Protected Constitutional Interests*, in EXCLUSIONARY RULES IN COMPARATIVE LAW, *supra* note 34, at 113, 139.

inquiry—how probative the evidence is—attempts to minimize the conflict between truthseeking and the protection of individual rights. While the rest of the factors are not directly related to truth-seeking, they may nonetheless indirectly promote accuracy to the extent that they limit exclusion of reliable evidence.

In addition to the diversity of formal rules of exclusion, considerable variation exists with respect to the rules' practical implementation.<sup>71</sup> Several factors may explain why the practice of exclusion often deviates from written rules. First, where exclusionary rules have been recently reformed, longstanding habits and traditional legal culture are likely to “translate” new laws into a practice that is more consonant with preexisting value commitments of the legal system (particularly a commitment to the search for truth).<sup>72</sup> Second, where courts follow a balancing test that is drafted in broad terms and considers multiple factors, judges can easily place more weight on factors that maximize accuracy instead of factors that serve other stated purposes of exclusion.<sup>73</sup> Deviation from exclusionary rules is likely to be easier in inquisitorial systems where the same judge who rules on the admissibility of evidence then decides on the guilt or innocence of the defendant. In that situation, even under a mandatory rule, “the taint from the forbidden but persuasive information cannot be avoided: it

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<sup>71</sup> See, e.g., Catherine Newcombe, *Russia*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 397, 432 (Craig Bradley ed. 2<sup>nd</sup> ed. 2007); Margaret K. Lewis, *Controlling Abuse To Maintain Control: The Exclusionary Rule in China*, 43 *NYU J. INT'L L. & POL.* 629, 687-94 (2011).

<sup>72</sup> See JACKSON & SUMMERS, *supra* note 32, at 73-74. Cf. Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 *HARV. INT'L L.J.* 1 (2004) (describing the process of “translating” imported procedures to make them consistent with preexisting commitments of the host criminal justice system).

<sup>73</sup> See, e.g., Kuk Cho, *The Japanese “Prosecutorial Justice” and Its Limited Exclusionary Rule*, 12 *COLUM. J. ASIAN L.* 39, 66-67 (1998). *But cf.* Mike Madden, *Marshalling the Data: An Empirical Analysis of Canada's Section 24(2) Case Law in the Wake of R. v. Grant*, 15 *CAN. CRIM. L. REV.* 229, 237 (noting a roughly 70% rate of exclusion under the more concrete Canadian balancing test after *R. v. Grant*); Thierry Nadon, *Le paragraphe 24(2) de la Charte au Québec depuis Grant : si la tendance se maintient!*, (2011) 86 *C.R.* (6th) 33, 42 (finding a 64% post-*Grant* exclusion rate in Quebec).



always affects the decision maker's thinking."<sup>74</sup> Although reasoned opinions and appellate review diminish the odds that excluded evidence influences the court's decision, judges trained to see their role above all as the elucidation of the truth are likely to find ways to conform the verdict to the true facts.<sup>75</sup> Even categorical rules of exclusion may therefore prove frail in systems with a strong preexisting commitment to the search for truth.

Finally, even when courts scrupulously apply mandatory exclusionary rules, a commitment to accuracy may produce some unanticipated adverse side effects. Judges concerned with truthseeking may interpret the scope of individual rights more narrowly in order to minimize the risk that exclusion would be warranted.<sup>76</sup> Once the underlying rights are weakened, exclusionary rules become less meaningful, regardless of their strictness.

The brief overview of exclusionary rules shows that they are an increasingly common feature of criminal justice systems around the world, although their scope and purpose differ significantly from jurisdiction to jurisdiction.<sup>77</sup> While the adoption of exclusionary rules can be seen as a triumph of individual rights over truthseeking, such rules typically contain numerous qualifications to allow courts to minimize the burden on the search for truth. Even where exclusionary rules appear quite strict on paper, in practice, they frequently give way to a concern for accuracy.

### III. Promoting Efficiency: Plea Bargaining

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<sup>74</sup> DAMAŠKA, *supra* note 32, at 47. For a discussion of empirical studies supporting this notion, see JACKSON & SUMMERS, *supra* note 32, at 72-73.

<sup>75</sup> See JACKSON & SUMMERS, *supra* note 32, at 73-74.

<sup>76</sup> Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111 (2003); Sonja Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693 (2008).

<sup>77</sup> Cf. Cras & Daly, *supra* note 52, at 67 (reporting that the Irish exclusionary rule has "evolved over many years and is, in fact, still in a state of flux").

Around the world, efficiency fever has gripped criminal justice systems. Countries as varied as France, India, Nigeria, and Poland have increasingly sought to reform their procedures to expedite case flow.<sup>78</sup> An array of different mechanisms have been introduced to accomplish these ends, ranging from diversion to penal orders to summary trials, and increasingly commonly, plea bargaining.<sup>79</sup>

Plea bargaining has been at the forefront of the trend toward a more economical criminal process. In adversarial systems, plea bargaining has been practiced for decades and accepted by courts (at times begrudgingly) since at least the 1970s.<sup>80</sup> In inquisitorial systems, it has spread rapidly since the 1990s, overcoming longstanding resistance to “trading with justice.”<sup>81</sup> Despite its global ascendance, plea bargaining remains deeply controversial in both adversarial and inquisitorial systems. The objections to the practice are manifold, but a central criticism is that it conflicts with the search for truth.<sup>82</sup>

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<sup>78</sup> See, e.g., REGINA RAUXLOH, PLEA BARGAINING IN NATIONAL AND INTERNATIONAL LAW 1-2 (2012); JENIA IONTCHEVA TURNER, PLEA BARGAINING ACROSS BORDERS 1 (2009); Stephen C. Thaman, *A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial*, in WORLD PLEA BARGAINING 297, 345-46 (Stephen C. Thaman ed., 2010); Langer, *supra* note 72.

<sup>79</sup> See, e.g., Thaman, *supra* note 78, at 345-46; Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1441-53 (2011). The term plea bargaining is not entirely accurate when applied to inquisitorial systems, which still do not accept formal guilty pleas, but instead require confessions or admissions of guilt. But for the sake of readability, I use it to here to denote any “process of negotiation and explicit agreement between the defendant, on one hand, and the prosecution, the court, or both, on the other, whereby the defendant confesses, pleads guilty, or provides other assistance to the government in exchange for more lenient treatment.” TURNER, *supra* note 78, at 1.

<sup>80</sup> See *Brady v. United States*, 397 U.S. 742 (1970); see also *R. v. Winterflood* [1979] Crim. L.R. 263, cited in RAUXLOH, *supra* note 78, at 26 (accepting charge bargaining under the condition that it is practiced openly); Joseph Di Luca, *Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada*, 50 CRIM. L. Q. 14, 41-46 (2005) (discussing the mixed reactions to plea bargaining in Canadian case law from the 1970s and 1980s). But see RAUXLOH, *supra* note 78, at 29-31 (noting that in the 1970s, the English Court of Appeal attempted to discourage sentence bargaining, but after it was largely ignored by lower courts and practitioners, it eventually began accepting the practice in the mid-1980s).

<sup>81</sup> See, e.g., Thaman, *supra* note 78, at xvii.

<sup>82</sup> See, e.g., George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (“In place of a noble clash for truth, plea bargaining gives us a skulking truce.”).

That plea bargaining stands at odds with a quest for truth in criminal cases is commonly asserted, but less frequently explained.<sup>83</sup> The answer is not as simple as it is for the exclusionary rule. To begin, the right question is not simply how plea bargaining conflicts with truthseeking, but rather whether it is worse than trials at uncovering the truth. Trials are also not perfectly accurate, so we must measure plea bargaining outcomes not simply in absolute terms, but also by how they compare relative to trial outcomes.<sup>84</sup>

There are two principal ways in which plea bargaining—at least as practiced in the United States and a number of other adversarial jurisdictions—increases the risk of inaccurate verdicts. First, a sizeable plea discount can induce even some innocent defendants to waive their right to trial and plead guilty.<sup>85</sup> The even more common scenario is this: In exchange for sentencing or charge reductions, defendants who are guilty of some crime may agree to plead guilty to another crime. This obviously does not accurately represent their conduct and thus impairs the search for truth.<sup>86</sup>

The minimal judicial supervision of charging decisions and guilty pleas heightens the risk of inaccuracy. If prosecutors have exclusive authority over decisions

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<sup>83</sup> For a notable exception in the U.S. literature, see Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1610-12 (2005). The conflict between plea bargaining and truth-seeking is much more commonly discussed in the German academic literature. See, e.g., STAMP, *supra* note 3, at 149-51; Thomas Weigend, *The Decay of the Inquisitorial Ideal: Plea Bargaining Invades Criminal Procedure*, in CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT 39, 56-62 (John Jackson et al. eds., 2008).

<sup>84</sup> Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUDIES 289, 316 (1983). The high burden of proof, the uncertain reliability of testimonial evidence, and exclusionary rules are examples of hindrances to the search for truth at trial. See, e.g., LAUDAN, *supra* note 3, *passim*; Dan Simon, *Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143 (2011).

<sup>85</sup> See, e.g., KARSTEN ALTENHAIN ET AL., DIE PRAXIS DER ABSPRACHEN IN WIRTSCHAFTSSTRAFVERFAHREN 134 (2007); SAMUEL R. GROSS ET AL., EXONERATIONS IN THE UNITED STATES, 1989 THROUGH 2003, at 12 (2004), at [http://www.opensocietyfoundations.org/sites/default/files/exon\\_report.pdf](http://www.opensocietyfoundations.org/sites/default/files/exon_report.pdf); Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 309-10 (1975); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 85-86 (2005); Russell D. Covey, *Plea Bargaining After Lafler and Frye*, 51 DUQ. L. REV. 595, 597, 616 (2013) (citing data that 9% of exonerated inmates had pleaded guilty).

<sup>86</sup> See, e.g., Josh Bowers, *Punishing The Innocent*, 156 U. PA. L. REV. 1117, 1170-71 (2008).

to dismiss or reduce charges, with no meaningful oversight by the judiciary, they can negotiate charge bargains that significantly misrepresent the criminal conduct for which a defendant is responsible.<sup>87</sup> Particularly when judges' sentencing discretion is limited, prosecutors' charging choices also largely determine the punishment that a defendant is facing, which gives prosecutors enormous leverage during negotiations.<sup>88</sup>

In principle, judges can exercise some oversight over the product of plea negotiations when they examine whether a guilty plea is voluntary, knowing, and factually based.<sup>89</sup> Yet the pressure of heavy caseloads leads judges to conduct a cursory review, requiring little more than the defendant's confirmation that the allegations in the indictment are correct.<sup>90</sup> Whereas at trial, a neutral judge or jury evaluates the evidence carefully and weighs the credibility of witnesses after cross-examination, at a plea hearing, judges test the facts only superficially, based on meager documentary evidence and a brief questioning of the defendant, but no other witnesses.<sup>91</sup>

Once a plea agreement is negotiated, the parties themselves have no incentive to question its validity, so they commonly acquiesce to the *pro forma* review by the court.

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<sup>87</sup> In common-law jurisdictions, judges typically may not interfere with prosecutorial decisions to dismiss or reduce charges. *See, e.g.*, *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379-81 (2d Cir. 1973); *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992); *Vanscoy v. Ontario* [1999] O.J. No. 1661, 1999 CarswellOnt 1427, ¶ 38 (Ont. S.C.J.) (observing that the prosecution in Canada has "complete discretion" in charge bargaining); ANDREW ASHWORTH & MIKE REDMAYNE, *THE CRIMINAL PROCESS* 80 (4th ed. 2010) ("In recent years there have been some cases of successful judicial review of certain policies for and against prosecution, but the prevailing attitude remains one of reluctance."); Waye & Marcus, *supra* note 30, at 348-49 (noting that in Australia, judicial review of prosecutorial decisions is limited and charge bargaining is well-entrenched).

<sup>88</sup> *See, e.g.*, Wright, *supra* note, at 129. Mandatory minimum sentences and rigid sentencing guidelines are not used as broadly in other systems as they are in the United States. *See, e.g.*, Juliet Horne, *Plea Bargains, Guilty Pleas and the Consequences for Appeal in England and Wales* 4, at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2286681](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2286681); Waye & Marcus, *supra* note 30, at 377, 383.

<sup>89</sup> *See, e.g.*, FED. R. CRIM. PROC. 11; CAN. CRIM. CODE § 606; S. AFR. CRIM. PROC. ACT § 105A(6)(a).

<sup>90</sup> *See, e.g.*, PIZZI, *supra* note 5, at 73, 187; Brown, *supra* note 83, at 1611; Jacqueline Hodgson, *Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 116, 128 (Erik Luna & Marianne L. Wade eds. 2012); Kent Roach, *Canada's Experience with Constitutionalism and Criminal Justice*, 25 SINGAPORE ACADEMY L. J. 656, 672 (2013); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiation: A Comparative View*, 54 AM. J. COMP. L. 199, 212-23 (2006).

<sup>91</sup> *See* Brown, *supra* note 83, at 1610.

At the negotiation stage, when the prosecution and defense may benefit from greater access to information, such information may be unavailable or it may be too costly to obtain. In adversarial systems, the defense frequently lacks access to the prosecutor's evidence before negotiating a plea. At least in the United States, prosecutors need not disclose even certain evidence favorable to the defendant at that stage.<sup>92</sup> While other adversarial jurisdictions tend to provide for more extensive pre-plea disclosure, it is still not as broad as the disclosure provided just before trial;<sup>93</sup> moreover, at least in some adversarial jurisdictions, plea bargaining is increasingly occurring before charges are filed and therefore before disclosure obligations attach.<sup>94</sup> Adequate investigation by the defense is further constrained by the short time limits on plea offers, the heavy caseloads carried by most defense attorneys, and the limited funding for defense investigations.<sup>95</sup>

Accuracy in plea bargaining is also impaired because prosecutors tend to negotiate deals early in their investigation, in order to conserve valuable investigative and trial preparation resources. They frequently offer greater concessions for early guilty pleas and, in some cases, leave plea agreements open for only a limited time before trial.<sup>96</sup> The haste to conclude an agreement deprives prosecutors from useful information they could glean from a more thorough investigation, and it increases the risk of factual errors.

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<sup>92</sup> *United States v. Ruiz*, 536 U.S. 622 (2002). Even when the defense has the right to access some of the prosecution's evidence, the waiver of that right is frequently an element of the negotiations. *See id.*; *Brown*, *supra* note 83, at 1612.

<sup>93</sup> *See* CRIM. JUST. ACT (ENG.), ch. 44 § 37 (2003); CRIM. DISCLOSURE ACT (N.Z.) §§ 12-13 (2008); *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (Can.); *R. v. Taillefer & R. v. Duguay*, [2003] 3 S.C.R. 307 (Can.); P.J.L. Rofe, *Disclosure by Both Sides*, Australian Institute of Criminology, at [http://www.aic.gov.au/media\\_library/conferences/prosecuting/rofe.pdf](http://www.aic.gov.au/media_library/conferences/prosecuting/rofe.pdf).

<sup>94</sup> ANDREW SANDERS ET AL., *CRIMINAL JUSTICE* 464 (4<sup>th</sup> ed. 2010).

<sup>95</sup> *Brown*, *supra* note 83, at 1612; *see also* MIKE MCCONVILLE ET AL., *STANDING ACCUSED: THE ORGANISATION AND PRACTICES OF CRIMINAL DEFENCE LAWYERS IN BRITAIN* 65-68 (1994); RAUXLOH, *supra* note 78, at 50.

<sup>96</sup> *E.g.*, *Turner*, *supra* note 90, at 211.

Finally, at least in adversarial systems, verdicts based on guilty pleas are typically not supported by a thorough reasoned judgment (or any reasoned judgment at all),<sup>97</sup> and appeals of negotiated verdicts are more circumscribed than appeals from contested cases.<sup>98</sup> This arrangement reduces the system's ability to correct inaccuracies.

While many plea bargains conflict with truthseeking for the reasons just discussed, some can also help uncover facts that would otherwise remain unknown to prosecutors. Cooperation agreements, under which the prosecution offers concessions to a defendant in exchange for his agreement to reveal information about other defendants or to participate in undercover investigations, can assist the search for truth, at least in some cases. But the precise extent to which cooperation agreements promote truthseeking is subject to debate.

Some scholars have argued that cooperation agreements are less likely to implicate innocent defendants because such defendants are less likely to be useful as links to a criminal enterprise and "are likely to redirect investigative efforts to the worthiest targets."<sup>99</sup> But others have raised serious concerns about the reliability of informants who receive concessions in exchange for cooperation.<sup>100</sup> They have pointed out the risk that defendants may falsely accuse other persons in order to obtain a good bargain.<sup>101</sup> Likewise, some have criticized the lenient treatment given to cooperating defendants who can provide valuable information only because of their deep

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<sup>97</sup> Thaman, *supra* note 78, at 367-69. One should note, however, that in some adversarial systems, juries (and sometimes judges) may not be required to provide reasoned judgments even after a contested case. *Id.* at 367.

<sup>98</sup> See, e.g., Jenia Iontcheva Turner & Thomas Weigend, *Negotiated Justice*, in INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 1403 (Göran Sluiter et al. eds. 2013); Horne, *supra* note 88. While review after a jury (guilty) verdict in adversarial systems is also limited, it is broader and much more rarely waived (in only about 20% of cases) than in cases following a guilty plea. In inquisitorial systems, where appeals after trial are typically more searching, this comparison is more meaningful.

<sup>99</sup> Jacqueline Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 730-31 (2006).

<sup>100</sup> E.g., ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 70-72 (2009).

<sup>101</sup> *Id.*

involvement in a criminal enterprise.<sup>102</sup> Such defendants may help the search for truth with respect to other investigations, but to the extent their cooperation is rewarded with lesser charges, it could undermine accuracy in their own case. For these reasons and others, inquisitorial countries have been slower than their adversarial counterparts to embrace cooperation agreements.<sup>103</sup>

In the final analysis, the principal defense of plea bargaining is that even if it deemphasizes the search for truth in particular cases, it yields a net benefit for truth-seeking across the board. By freeing up resources that prosecutors and courts can use to pursue more offenders, the argument goes, plea bargaining may help resolve more cases and thus achieve an overall gain in criminal law enforcement.<sup>104</sup> Negotiated justice may be rough and in some sense more superficial, but its reach is far broader. At least for those who accept utilitarian principles, the overall gain in the enforcement of criminal law may be worth the risk that we will uncover fewer facts in individual cases.

There are several potential problems with this view, however. First, it is practically impossible to assess objectively whether the disadvantages of reduced accuracy in individual cases outweigh the benefit from the resolution of more cases. Second, plea bargaining seriously limits what we learn about individual cases, and this has consequences beyond the mere decrease in accuracy. The shallower resolution of cases may provide less solace to victims, hinder the system's ability to diagnose the causes underlying different crimes, and in the end undermine various goals of punishment. Finally, overuse of coercive tactics in plea bargaining means that a certain

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<sup>102</sup> *E.g.*, *United States v. Griffin*, 17 F.3d 269, 274 (8<sup>th</sup> Cir. 1994) (J. Bright, dissenting).

<sup>103</sup> *E.g.*, TURNER, *supra* note 78, at 109-12, 153. Some of the concerns that inquisitorial systems have about cooperation agreements—having to do with reliability of the evidence or the principle of legality—are similar to concerns about using undercover informants. See Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 AM. J. COMP. L. 493, 501, 506-510 (2007).

<sup>104</sup> Damaška, *supra* note 4, at 307 n.46; Easterbrook, *supra* note 84, at 297. Cf. NANCY AMOURY COMBS, *GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW* 5-6 (2007) (making this argument in the context of international criminal cases, where prosecution is the exception rather than the norm).

number of innocent persons plead guilty, which is a result no one interested in just and accurate outcomes should desire.<sup>105</sup>

While it may be difficult to calculate the precise effect of plea bargaining on the search for truth in the criminal justice system, it is clear that certain features of plea bargaining—sizeable plea discounts, minimal judicial supervision, lack of transparency and disclosure—are particularly likely to undermine truthseeking in individual cases. Even if one is satisfied that plea bargaining is on the whole beneficial to the search for truth, it is still worth studying these procedures to see if their negative effects in individual cases can be minimized without significantly reducing efficiency. From a comparative perspective, it is notable that certain inquisitorial and international jurisdictions have made more serious attempts to limit these truth-impairing procedures.

To begin, inquisitorial countries have reduced the likelihood that plea bargaining would conflict with the search for truth by imposing restrictions on charging and sentencing reductions that can be offered in exchange for a guilty plea. As noted earlier, this helps minimize risk that innocent persons might plead guilty, as well as the risk that charges would misrepresent the defendant's conduct. In the United States, few jurisdictions regulate charge or sentence reductions or other concessions offered as part of a plea bargain. A few other adversarial jurisdictions have begun introducing presumptive plea discounts, although enforceable limits are still the exception rather than the norm in the common-law world.<sup>106</sup> More importantly, guidelines on plea

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<sup>105</sup> Although this is a question about the distribution of error and not simply about accuracy, it remains relevant as one considers whether mistakes in individual cases are worth a net gain in accuracy across the board.

<sup>106</sup> For England, see Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007) (setting out discounts between 1/10 and 1/3 depending on the timeliness of the plea). The most recent government had proposed increasing the discount to 50% for early pleas, but this proposal was abandoned. See *Ken Clarke Forced to Abandon 50% Sentence Cuts for Guilty Pleas*, THE GUARDIAN (June 20, 2011), at <http://www.theguardian.com/law/2011/jun/20/ken-clarke-abandon-sentence-cuts>; Sally Lipscombe & Jacqueline Beard, *Reduction in Sentence for a Guilty Plea*, SN/HA/5974 (Feb. 5, 2013). In New



discounts remain of little use, if, as is the case in most adversarial jurisdictions, charge bargaining remains common and largely unregulated.<sup>107</sup>

In inquisitorial systems, by contrast, prosecutors are more limited in their ability to negotiate about charges.<sup>108</sup> Many of these systems follow the principle of mandatory prosecutions, under which prosecutors are required (at least in more serious cases) to bring charges where sufficient evidence exists.<sup>109</sup> Even in systems that do not follow the mandatory prosecution principle, charge bargaining is regarded as impermissible because of its conflict with the search for truth, a central principle of inquisitorial (and international) criminal procedure.<sup>110</sup> Reflecting this preference for factual and legal accuracy, inquisitorial systems allow judges to modify the legal characterization of the facts alleged in the indictment. If judges believe the evidence warrants it, they may substitute more serious charges than those initially filed by the prosecution, as long as they give notice to the defendant and the opportunity to respond and adjust his defense.<sup>111</sup>

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South Wales, Australia, plea discounts were regulated for several years, but the relevant legislation was recently repealed. Criminal Case Conferencing Trial Act, 2008 (NSW), *repealed by* Criminal Case Conferencing Trial Repeal Bill, 2012 (NSW).

<sup>107</sup> See, e.g., RAUXLOH, *supra* note 78, at 25-26; SANDERS ET AL., *supra* note 94, at 463-68 (4<sup>th</sup> ed. 2010); Fiona Leverick, *Plea Bargaining in Scotland: The Rise of Managerialism and the Fall of Due Process*, in WORLD PLEA BARGAINING, *supra* note 78, at 129-33, 153; Waye & Marcus, *supra* note 30, at 349 (noting that in Australia, “charge bargaining is well entrenched . . . with studies reporting that defense counsel engage in charge bargaining in at least 50% of their cases”). *But cf.* SANDERS ET AL., *supra* note 94, at 468 (observing that in England and Wales, the Crown Prosecution Service Inspectorate is trying to reduce the incidence of charge bargaining).

<sup>108</sup> E.g., Turner & Weigend, *supra* note 98, at 1402 (discussing other jurisdictions in which the principle of legality hinders charge bargaining).

<sup>109</sup> See, e.g., StPO § 170(1).

<sup>110</sup> See, e.g., *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgment ¶ 65 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 2, 2003); see also GRUBER ET AL., *supra* note 34, at 42-43 (observing that charge bargaining does not occur in Argentina, although prosecutors are independent from the judiciary in their decisions to file or dismiss charges).

<sup>111</sup> StPO § 265. For a list of similar provisions in other national jurisdictions, see Carsten Stahn, *Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55*, 16 CRIM. L. F. 1, 5-6 (2005).

Plea bargaining in inquisitorial systems is therefore typically restricted to bargaining about the sentence.<sup>112</sup> Moreover, sentence discounts are often capped or presumptively set at around one-third.<sup>113</sup> The baseline sentences from which plea discounts are assessed are also significantly milder.<sup>114</sup> Finally, in a number of inquisitorial countries, plea bargaining is limited to only certain minor offenses which carry mild sanctions.<sup>115</sup> These three factors—particularly in combination—help reduce the pressure on defendants to plead guilty to crimes they did not commit.

Another way in which inquisitorial systems have reduced the truth-impairing nature of plea bargaining is by ensuring that bargains occur after a thorough inquiry into the facts by law enforcement and the prosecution. In adversarial systems guilty pleas are often sought early in the investigation, and early pleas are typically rewarded more generously.<sup>116</sup> By contrast, in inquisitorial systems, negotiations usually occur only after the completion of a thorough pretrial investigation.<sup>117</sup> The investigation is more thorough for various reasons, some of which are a function of professional culture and

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<sup>112</sup> See, e.g., StPO §257c.

<sup>113</sup> Thaman, *supra* note 78, at 350-52. Even in systems where plea discounts are limited to a certain percentage of the expected post-trial sentence, the limits do not take into account the value of reducing a sentence of imprisonment to probation. Moreover, in systems where judges have broad sentencing discretion, discount limits may not be perfectly effective in practice. Judges may be able to manipulate the anticipated post-trial sentence so as to provide a larger discount than formally allowed.

<sup>114</sup> Sentences in continental Europe are significantly milder than those in the US, while other adversarial systems, such as Canada and Australia, fall somewhere in the middle. See, e.g., JAMES WHITMAN, *HARSH JUSTICE* 71 (2005); Waye & Marcus, *supra* note 30, at 377-85; Cheryl Marie Webster & Anthony N. Doob, *Punitive Trends and Stable Imprisonment Rates in Canada*, 36 *CRIME & JUST.* 297 (2007).

<sup>115</sup> Thaman, *supra* note 78, at 348.

<sup>116</sup> *CRIM. JUST. ACT* (Eng.) § 144(1) (a) (2003); Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* ¶ 5.3 (2007); Turner, *supra* note 90, at 211 (discussing the United States). *But cf.* Joseph Di Luca, *Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada*, 50 *CRIM. L. Q.* 14, 54, 64-65 (2005) (observing that, despite efforts to move plea bargaining earlier in the process, guilty pleas in Canada too often occur on the day of trial because the prosecution had not had an opportunity to review the file in detail and the defense had not received the Crown briefs before then).

<sup>117</sup> See Langer, *supra* note 72, at 54-55; Thaman, *supra* note 78, at 357-59; Turner, *supra* note 90, at 229-30.

resource allocation, while others reflect formal legal requirements.<sup>118</sup> Although there is great variation across inquisitorial systems, in general, prosecutors tend to be more closely involved in the investigation than they are in adversarial systems.<sup>119</sup>

Prosecutors also have a duty to uncover both exculpatory and inculpatory evidence in inquisitorial systems and at international criminal courts.<sup>120</sup> While this requirement is not always sufficient to ensure a more thorough and objective investigation,<sup>121</sup> education, training, and professional culture help to reinforce the self-identification of prosecutors as neutral “organs of justice.”<sup>122</sup> Because many inquisitorial systems have traditionally measured prosecutors’ performance along qualitative rather than quantitative lines, prosecutors tend to take the task of seeking evidence for both sides seriously.<sup>123</sup>

Even when prosecutors do not take the initiative to pursue exculpatory leads, at least in some inquisitorial jurisdictions, the defense has the right to request that they undertake specific investigative measures.<sup>124</sup> Defendants in inquisitorial jurisdictions

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<sup>118</sup> See, e.g., JACKSON & SUMMERS, *supra* note 32, at 72; Gwladys Gilliéron, *The Risks of Summary Proceedings, Plea Bargains, and Penal Orders in Producing Wrongful Convictions in the U.S. and Europe*, in WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE 237, 250 (C. Ronald Huff & Martin Killias eds. 2013). Cf. Abraham Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1971) (“The operation of any model and of the procedure reflecting it will depend upon the interaction of many factors: the normative content of the standards to be applied in making decisions, how the participants are perceived and trained, the controls introduced at strategic points, and the resources assigned to implement policies and controls.”).

<sup>119</sup> See, e.g., Hodgson, *supra* note 90, at 121-22.

<sup>120</sup> E.g., StPO § 160; Rome Statute of the International Criminal Court, *supra* note 11, art. 54(1).

<sup>121</sup> See, e.g., Heribert Ostendorf, *Strafvereitelung durch Strafverteidigung*, 28 NEUE JURISTISCHE WOCHENSCHRIFT 1345, 1348 (1978); Jacqueline Hodgson, *The Role of the Criminal Defence Lawyer in an Inquisitorial Procedure: Legal and Ethical Constraints*, 9 LEGAL ETHICS 125, 135-36, 136 n.48 (2006).

<sup>122</sup> E.g., SHAWN MARIE BOYNE, *THE GERMAN PROSECUTION SERVICE: GUARDIANS OF THE LAW?* 233-35 (214); James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. LEGAL ANALYSIS 119, 139 (2009).

<sup>123</sup> Cf. BOYNE, *supra* note 122, *passim* (observing the continued influence of the norm of objectivity on German prosecutors, but noting how certain competing influences, including an increased focus on efficiency, at times interfere with prosecutors’ commitment to objectivity).

<sup>124</sup> See, e.g., Piotr Kruszynski, *The Investigative Stage of the Criminal Process in Poland*, in SUSPECTS IN EUROPE, *supra* note 52, at 196; Volker Krey & Oliver Windgätter, *The Untenable Situation of German Criminal Law:*

typically cannot waive their right to an attorney in a plea bargained case, unlike their American counterparts.<sup>125</sup>

Another accuracy-enhancing feature of inquisitorial systems is that judges and defense attorneys have access to the investigative file before plea negotiations.<sup>126</sup> The prosecution can prevent the defense from seeing certain portions of the file while the investigation is still ongoing, but plea bargaining rarely occurs at that stage.<sup>127</sup> Unlike their American counterparts, prosecutors in inquisitorial systems and at the international criminal courts do not seek waivers of this right to review the investigative file; in any event, such waivers would likely be held unlawful in at least some inquisitorial jurisdictions.<sup>128</sup>

Rules concerning judicial supervision of admissions of guilt also tend to be stricter in inquisitorial systems. Judges have an independent duty to establish the objective truth, and this duty implies a searching review of the facts supporting an admission of guilt.<sup>129</sup> In some inquisitorial countries, courts are constitutionally

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*Against Quantitative Overloading, Qualitative Overcharging, and the Overexpansion of Criminal Justice*, 13 GERMAN L.J. 579, 586-92 (2012); see also Giulio Illuminati & Michele Caianiello, *The Investigative Stage of the Criminal Process in Italy*, in SUSPECTS IN EUROPE, *supra* note 52, at 142 (noting that Italian defense attorneys can conduct their own investigations and request the assistance of the prosecution with some of the investigations); *But cf.* Jan Fermon et al., *The Investigative Stage of the Criminal Process in Belgium*, in SUSPECTS IN EUROPE, *supra* note 52, at 55-56 (noting that defense attorneys have increasing ability to influence the pre-trial investigation, at least in more serious cases, but that overall, they are still seen as obstacles, rather than contributors, to the search for truth in criminal cases); Hodgson, *supra* note 90, at 129 (noting the difficulties experienced by French attorneys “who sought to assert the rights of their clients to participate in the investigation, and to propose a line of inquiry that pointed away from the guilt of the suspect”).

<sup>125</sup> *E.g.*, Hodgson, *supra* note 90, at 127; Thomas Weigend & Jenia Turner, *The Constitutionality of Negotiated Criminal Judgments in Germany*, 15 GERMAN L.J. 81, 103 (2014).

<sup>126</sup> StPO § 147 (1); Gilliéron, *supra* note 118, at 250; Hodgson, *supra* note 90, at 127.

<sup>127</sup> StPO § 147 (2) (providing that during the investigative stage, the prosecution may limit disclosure to protect the integrity of the investigation); see also *id.* § 68 (4) (providing that a witness’s name and address may be removed from the file as long as there exists a risk of harm to the witness from the disclosure of this information); Kruszynski, *supra* note 124, at 196 (noting similar limits to disclosure in Poland).

<sup>128</sup> See Judgment of the Federal Constitutional Court of March 19, 2013, BVerfG, 2 BvR 2628/10, BvR 2883/10, 2 BvR 2155/11.

<sup>129</sup> See, *e.g.*, Hodgson, *supra* note 90, at 128; Weigend & Turner, *supra* note 125, at 85, 97.

prohibited from relying solely on the defendant's confession as the basis for a verdict.<sup>130</sup> Both legislation and court decisions across inquisitorial systems emphasize judges' duty to go beyond the defendant's admissions of guilt to verify its accuracy. At a minimum, judges must examine the investigative file to determine if it contains independent evidence corroborating the admissions.<sup>131</sup> In many jurisdictions outside the United States, judges are also not allowed to accept so-called *Alford* pleas or equivocal pleas, in which the defendant protests his innocence while entering a formal guilty plea.<sup>132</sup>

Finally, inquisitorial judges have the requisite tools to pursue the truth independently of the parties. In most systems, they can and do consult the investigative file before reviewing an admission of guilt.<sup>133</sup> In some, they also participate in the plea negotiations, and this gives them a fuller picture of the facts of the case.<sup>134</sup> Finally, judges can call and examine their own witnesses and order further investigative measures to determine the true facts before deciding whether to accept a plea agreement.<sup>135</sup>

When plea negotiations do produce factual errors, these errors are more likely to be caught and corrected in those systems that require a reasoned judgment and provide for appellate review in negotiated cases. In inquisitorial systems and at international criminal courts, unlike in adversarial systems, reasons for the verdict tend to be

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<sup>130</sup> TURNER, *supra* note 78, at 273.

<sup>131</sup> Judgment of the Federal Constitutional Court of March 19, 2013, BVerfG, 2 BvR 2628/10, BvR 2883/10, 2 BvR 2155/11; *see also* Hodgson, *supra* note 90, at 128.

<sup>132</sup> *See* North Carolina v. Alford, 400 U.S. 25, 28 (1970) (permitting such pleas); Thaman, *supra* note 78, at 356 (listing inquisitorial jurisdictions that require an admission of guilt before accepting a plea agreement); Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah ¶ 29 (Int'l Crim. Trib. for the former Yugoslavia, Oct. 7, 1997) (requiring that guilty pleas be unequivocal and listing national jurisdictions that follow the same rule). Some inquisitorial jurisdictions, such as Spain, Italy, and Russia, do not require an admission of guilt by the defendant. But even there, judges would likely not accept a plea agreement if the defendant actually asserts his innocence; this would be inconsistent with the requirement that the defendant accept the charges against him. *See* Thaman, *supra* note 78, at 355-56.

<sup>133</sup> *See supra* note 126.

<sup>134</sup> Thaman, *supra* note 78, at 360-61; Turner & Weigend, *supra* note 98, at 1403-04.

<sup>135</sup> *E.g.*, StPO § 244; Rome Statute of the International Criminal Court, *supra* note 11, art. 65.

required in plea bargained cases.<sup>136</sup> The reasoning is typically shorter, however, as it relies significantly on the defendant's admission of guilt. While a few inquisitorial countries limit appeals of negotiated judgments, others make appeal available as broadly as in contested cases; moreover, at least in some jurisdictions, a plea agreement may not include an appeals waiver.<sup>137</sup>

The above overview may leave the impression that plea bargaining is significantly less likely to deviate from the search for truth in inquisitorial and international criminal jurisdictions than in adversarial ones. This would be a fair conclusion if one were to focus solely on the formal rules that regulate plea bargaining. But a glance at the practice of plea bargaining reveals a somewhat different picture.

Empirical studies of plea bargaining in Germany, for example, reveal a wide gap between the law on the books and bargaining in practice.<sup>138</sup> The most recent survey, conducted in 2011, found the divergence persisting even after the adoption of legislation to formalize and regulate the practice.<sup>139</sup> A majority of judges surveyed admitted that they concluded more than half of their negotiations "informally," i.e., without complying with the requirements of the legislation.<sup>140</sup> In a significant percentage of cases, judges accepted a formal agreement of the prosecutor's factual allegations by the defendant as the sole basis for finding the defendant guilty, contrary to the law's demand of independently establishing the truth.<sup>141</sup> The study also found that the subject matter of bargains extended beyond that authorized in the Code. For

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<sup>136</sup> TURNER, *supra* note 78, at 272; Thaman, *supra* note 78, at 368-69.

<sup>137</sup> *E.g.*, StPO § 302(1); Thaman, *supra* note 78, at 37-71.

<sup>138</sup> *See, e.g.*, ALTENHAIN ET AL., *supra* note 85; Raimund Hassemer & Gabriele Hippler, *Informelle Absprachen in der Praxis des deutschen Strafverfahrens*, 8 STRAFVERTEIDIGER 360 (1986); Turner, *supra* note 90, at 217-22.

<sup>139</sup> The study was conducted in 2012 and surveyed 190 criminal court judges from the German state Nordrhein-Westfalen. The study also surveyed 68 prosecutors and 76 criminal defense attorneys. ALTENHAIN ET AL., *supra* note 85, at 18-24. The description of the study is adapted from Weigend & Turner, *supra* note 125 at 92-94.

<sup>140</sup> ALTENHAIN ET AL., *supra* note 85, at 36-37, 146-147. More than a quarter of the respondents said that they always concluded deals informally.

<sup>141</sup> *Id.* at 93.

example, many judges listed the contents of the charges as a frequent subject of bargaining.<sup>142</sup>

Likewise, a study of plea bargaining at the ICTY and ICTR has shown that bargaining often involved charge and even fact bargaining, despite the tribunals' repeated pronouncements that such practices would conflict with the search for truth.<sup>143</sup> When the Tribunals' judges attempted to counter such practices by ignoring charge reductions and departing from the prosecutors' recommended sentences, they effectively extinguished the interest of international defendants in guilty pleas.<sup>144</sup>

In Russia, judges were found to depart frequently from the formal rules concerning plea bargaining. In some cases, they deviated from the rules in order to advance the search for truth.<sup>145</sup> But more frequently, they ignored provisions of the law designed to protect the accuracy of plea bargains. In 16 out of 33 cases studied, judges relied only on the investigative file or on the agreement between the parties and did not inquire further whether the plea was voluntary or knowing.<sup>146</sup>

In short, even in systems that have attempted to regulate plea bargaining and to align it more closely with the search for truth, informal practices may push in the opposite direction, in favor of a convenient and quick resolution of cases. Such practices are difficult to contain, as lawyers and judges have powerful economic and other

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<sup>142</sup> *Id.* at 77-78.

<sup>143</sup> COMBS, *supra* note 104, at 63-71, 97-108.

<sup>144</sup> Nancy Amoury Combs, *Obtaining Guilty Pleas for International Crimes: Prosecutorial Difficulties*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 331, 340-41 (Erik Luna & Marianne Wade eds. 2012).

<sup>145</sup> Olga B. Semukhina & K. Michael Reynolds, *Plea Bargaining Implementation and Acceptance in Modern Russia: A Disconnect Between the Legal Institutions and the Citizens*, 19 INT'L CRIM. JUST. REV. 400, 412-14 (2009). For example, some judges refused to accept an agreement between the parties on the ground that "the truth of the case cannot be discovered without full trial" even though such a ground for refusal is not available under the law. *Id.* And some courts have mistakenly allowed appeals of plea-bargained cases based on a factual error, even though such appeals are not allowed under the law. Apparently, the appeals were seen by judges as necessary to find the true facts of the case. *Id.* at 414.

<sup>146</sup> *Id.* at 414.

incentives to resolve cases “amicably.”<sup>147</sup> As long as certain structural features of the criminal justice system persist (expanding criminal codes; increasing numbers and complexity of cases, without a corresponding adjustment of human resources; outdated trial procedures; and evaluation of criminal justice professionals based on efficiency rather than based on quality), formal constraints on plea bargaining will have a more limited effect than expected.

#### **IV. Promoting Democratic Participation: Unreasoned and Unreviewable Jury Verdicts**

Another hindrance to the search for truth in criminal cases may arise from certain evidentiary and procedural rules associated with jury trials. This Part focuses on one such procedure—jury verdicts that contain no reasoning and are subject to limited appellate review. I discuss how unreasoned and unreviewable verdicts conflict with truth-seeking and why they nevertheless continue to be used in a number of jurisdictions around the world.

Trial by jury has often been introduced into criminal justice systems as an element of broader democratic reforms.<sup>148</sup> The French Revolution ushered in jury trials

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<sup>147</sup> See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470-86 (2004); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 49-60 (1988); Weigend, *supra* note 83, at 52.

<sup>148</sup> Jury trials have not always represented self-government. In some European countries, the jury was introduced as a result of Napoleonic conquest. Across a number of jurisdictions in Africa, Asia, and South America, it was installed as part of colonial rule and was used as a means of protecting the rights of colonists rather than as a guarantor of democracy. See, e.g., Neil Vidmar, *The Jury Elsewhere in the World*, in WORLD JURY SYSTEMS 421, 422-31 (Neil Vidmar ed. 2000). Not surprisingly, a number of post-colonial governments abolished juries because of their affiliation with oppressive regimes. *Id.* Countries that follow the adversarial model but do not have jury trials include India, Pakistan, Nigeria, Tanzania, Kenya, Zimbabwe, and South Africa. *Id.* at 422-28; see also RICHARD VOGLER, A WORLD VIEW OF CRIMINAL JUSTICE 230 (2005); Daniel Ehigialua, *Trial by Jury: Is It About Time for Nigeria?* (Feb. 17, 2012), at <http://wrongfulconvictionsblog.org/2012/02/17/trial-by-jury-is-it-about-time-for-nigeria>. While in most of these countries, juries were abolished as a sign of rejection of the colonial legal system, in some cases, the



as a means of increasing popular participation in the criminal process.<sup>149</sup> Liberal thinkers in other European countries, influenced by the same democratic ideals, were likewise successful in introducing juries in the nineteenth century.<sup>150</sup> As authoritarian governments took power in several European countries in the early twentieth century, however, they limited or entirely abolished lay participation.<sup>151</sup> The subsequent return of democracy did not always restore juries, although many jurisdictions reintroduced lay participation through mixed courts in which professional judges deliberate and decide alongside their lay counterparts.<sup>152</sup>

The association of juries with democracy can be found in a number of non-European countries as well. Most recently, South Korea and Japan launched mixed courts of judges and jurors in an effort to bolster the democratic legitimacy of their criminal justice systems.<sup>153</sup> Around the world today, laypersons participate in criminal trials in over fifty countries, all of which can be described as roughly democratic.<sup>154</sup> While most of these countries rely on mixed courts of professional judges and jurors, more than a dozen (typically common-law) countries employ all-lay juries.<sup>155</sup>

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abolition of juries was also an effort by authoritarian governments to maintain control over the judiciary. Vidmar, *supra*, at 424.

<sup>149</sup> VOGLER, *supra* note 148, at 233-36.

<sup>150</sup> See, e.g., Arnd Koch, C.J.A. Mittermaier and the 19<sup>th</sup> Century Debate About Juries and Mixed Courts, 72 REVUE INTERNATIONALE DE DROIT PENAL 347 (2001); see also VOGLER, *supra* note 148, at 240-43; Vidmar, *supra* note 148, at 430.

<sup>151</sup> Stephen C. Thaman, *Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium*, 86 CHI.-KENT L. REV. 613, 619 (2011).

<sup>152</sup> Several jurisdictions, including Spain, Russia, and Georgia, introduced all-lay jury trials as part of their transition to democracy. See, e.g., Thaman, *supra* note 151, at 619-20.

<sup>153</sup> Ryan Park, *The Globalizing Jury Trial: Lessons and Insights From Korea*, 58 AM. J. COMP. L. 525 (2010); Ingram Weber, *The New Japanese Jury System: Empowering the Public, Preserving Continental Justice*, 4 E. ASIA L. REV. 125 (2009).

<sup>154</sup> Ethan J. Leib, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 OHIO ST. J. CRIM. L. 629, 635-41 (2008); Park, *supra* note 153, at 527 & n.8.

<sup>155</sup> Taxquet v. Belgium [2010] Eur. Ct. H.R. 1806, ¶ 47 (listing European countries with all-lay jury systems); Vidmar, *supra* note 148.

In the academic literature and judicial opinions, juries have been defended on several different grounds. One justification is fully consistent with an emphasis on truthseeking: It maintains that jurors, with their diverse perspectives and deliberative decision-making process, are more likely to reach accurate outcomes.<sup>156</sup> Other rationales for jury trials are not linked to the jury's factfinding abilities but instead emphasize the jury's democratic virtues. Jury trials are praised for giving ordinary citizens a say in the criminal process and for producing verdicts that are more consistent with community standards of justice.<sup>157</sup> These features are said to increase "public confidence in the fairness of the criminal justice system."<sup>158</sup>

Juries are also prized as a symbol of rejecting authoritarian government and a means of controlling biased or corrupt judges.<sup>159</sup> As Patrick Devlin colorfully remarked, the jury is "the lamp that shows that freedom lives."<sup>160</sup> This association with democratic government and the protection of individual liberties is one of the main reasons why juries retain such a strong symbolic significance today, even as their practical influence has sharply decreased.<sup>161</sup>

One of the main reasons why juries are "uncongenial to authoritarian rule" is that, in many systems, they can "reach a verdict based on conscience, against the letter of the law, and occasionally in defiance of government."<sup>162</sup> The ability to render verdicts

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<sup>156</sup> See Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 L. & CONTEMP. PROBS. 205, 217-18, 223 (1989); Toby S. Goldbach & Valerie P. Hans, *Juries, Lay Judges, and Trials*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE \*5 (Gerben Bruinsma & David Weisburd eds., forthcoming 2014); see also *AK v Western Australia*, [2008] HCA 8, 232 CLR 438, 492.

<sup>157</sup> See, e.g., *AK*, [2008] 232 CLR 438; *R. v. G. (R.M.)*, [1996] 3 S.C.R. 362, ¶ 13 (S.C.C.).

<sup>158</sup> *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

<sup>159</sup> *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). Juries are said to "support democratic forms of government, because they are uncongenial to authoritarian rule." Richard O. Lempert, *The Internationalization of Lay Decision-Making: Jury Resurgence and Jury Research*, 40 CORNELL INT'L L.J. 477, 481 (2007).

<sup>160</sup> PATRICK DEVLIN, TRIAL BY JURY 164 (1966), cited in *AK*, [2008] 232 CLR at 489.

<sup>161</sup> Sally Lloyd-Bostock & C. Thomas, *Decline of the 'Little Parliament': Juries and Jury Reform in England and Wales*, 62 L. & CONTEMP. PROBS. 7, 40 (1999); see also MARIJKE MALSCH, DEMOCRACY IN THE COURTS 2 (2009).

<sup>162</sup> Bostock & Thomas, *supra* note 161, at 40.

against the law rests on the unique procedural arrangement that is the subject of discussion in this chapter—the unreasoned, and in the case of acquittals, unreviewable jury verdict. While often extolled as a principal virtue of juries, it is also the subject of intense criticism.<sup>163</sup>

Critics of the jury target a variety of perceived flaws of the institution. For purposes of this chapter, I address the critiques that concern the jury's ability to render truthful verdicts. These critiques take three main forms. Some commentators challenge the jury's capacity to discern facts accurately, particularly in more complex cases that involve scientific or statistical evidence.<sup>164</sup> Others focus on the jury's perceived weakness in understanding and following the law.<sup>165</sup> Finally, a number of critics focus not on the cognitive capacities of jurors, but rather on the truth-thwarting features of certain procedural and evidentiary rules associated with jury trials.<sup>166</sup>

Empirical evidence does not bear out the first critique. While jurors do suffer from certain cognitive biases that affect all humans, they are not less likely to produce accurate outcomes than professional judges. On the whole, jurors do not appear to be worse at discerning facts than judges are, even in cases where the evidence is technical

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<sup>163</sup> For a review of some of the debates, see Darryl Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700-03 (1995); Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 L. & CONTEMP. PROBS. 51, 85-111 (1980).

<sup>164</sup> Jurors are frequently “thought to more easily believe lies, to evaluate expert testimony uncritically, and to insufficiently attend to relevant information.” Thomas Bliesener, *Lay Judges in the German Criminal Court: Social-Psychological Aspects of the German Criminal Justice System*, in UNDERSTANDING WORLD JURY SYSTEMS THROUGH SOCIAL PSYCHOLOGICAL RESEARCH 179, 186 (Martin F. Kaplan & Ana M. Martín eds. 2006) [hereinafter UNDERSTANDING WORLD JURY SYSTEMS]; Daniel Shuman & Anthony Champagne, *Removing the People from the Legal Process—The Rhetoric and Research on Judicial Selection and Juries*, 3 PSYCHOL. PUB. POL’Y & L. 242, 249-56 (1997).

<sup>165</sup> More specifically, jurors are blamed for failing to understand and follow jury instructions and for deciding cases based on innate notions of justice rather than the written law. *E.g.*, NEIL VIDMAR & VALERIE HANS, AMERICAN JURIES: THE VERDICT 158-63 (2007); see also DAMAŠKA, *supra* note 32, at 29 n.6 (“On the Continent, where the machinery of justice is dominated by professional civil servants, Hegel’s lament—“the masses are miserable hands at judging”—has a very long history.”).

<sup>166</sup> LAUDAN, *supra* note 3, at 7, 117-24, 214-17; Weigend, *supra* note 3, at 165-67.

and complex.<sup>167</sup> A number of the studies that find difficulties in the comprehension or retention of certain facts trace the problem not to the cognitive capacities of jurors, but rather to rules that prohibit jurors from taking notes, asking questions of the witnesses or lawyers, and seeing certain relevant evidence.<sup>168</sup>

A number of studies have also found that jurors have difficulty understanding certain aspects of the law and that they struggle to follow legal instructions.<sup>169</sup> Yet these difficulties diminish when clearer wording is used, when attorneys clarify the instructions, or when other preventive measures are taken.<sup>170</sup> Moreover, with respect to understanding certain limiting instructions (to disregard particular evidence or to consider it only for a limited purpose), judges appear to suffer from similar cognitive weaknesses.<sup>171</sup> Whatever difficulties juries may have in understanding the law, in the vast majority of criminal cases, they render the same verdicts that judges would have imposed.<sup>172</sup> In the few cases where judges and jurors disagree about the outcome of a

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<sup>167</sup> Shuman & Champagne, *supra* note 164, at 253-56; *see also* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 826-27 (2001). *Cf.* VIDMAR & HANS, *supra* note 165, at 188 (reporting studies where jurors appear to have some difficulty interpreting statistical evidence, but observing that judges experienced similar difficulties).

<sup>168</sup> *See, e.g.*, VIDMAR & HANS, *supra* note 165, at 153-54, 157; Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788, 795-806 (2000).

<sup>169</sup> Lorraine Hope & Amina Memon, *Cross-Border Diversity: Trial by Jury in England and Scotland*, in UNDERSTANDING WORLD JURY SYSTEMS, *supra* note 164, at 31, 38 (citing W. YOUNG ET AL., JURIES IN CRIMINAL TRIALS: A SUMMARY OF RESEARCH FINDINGS) (“[T]hese basic misunderstandings persisted through, and significantly influenced, jury deliberations despite clarifications provided during the course of the judges’ summary.”); *see also* Jane Goodman-Delahunty & David Tait, *Lay Participation in Legal Decision-Making in Australia and New Zealand: Jury Trials and Administrative Tribunals*, in UNDERSTANDING WORLD JURY SYSTEMS, *supra*, at 61 (“In 1998, a study of 48 jury trials in New Zealand revealed that . . . in 35 of the 48 trials studied, some of the jurors misunderstood the law, especially the offense charged.”).

<sup>170</sup> VIDMAR & HANS, *supra* note 165, at 159; Ellsworth & Reifman, *supra* note 168, at 806-09; Shari Seidman Diamond et al., *The “Kettleful of Law” in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1603-04 (2012).

<sup>171</sup> VIDMAR & HANS, *supra* note 165, at 164.

<sup>172</sup> HARRY KALVEN, JR., & HANS ZEISEL, *THE AMERICAN JURY* 56-58 (1966) (after excluding hung-jury cases, finding agreement between judges and juries in 75.4% of cases); Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel’s The American Jury*, 2 J. EMPIR. LEG. STUDIES 171, 182 (2005) (after excluding hung-jury cases, finding agreement in 70.5% of cases); Sangjoon

case, this is typically the result of a reasonable difference in the interpretation of the law, not of misunderstanding by jurors.<sup>173</sup>

While jurors do not appear to be less capable than judges in discovering the truth, certain procedural and evidentiary rules accompanying jury trials may interfere with truthseeking. Part II.B discussed certain exclusionary rules that fall in that category. This Part focuses on two other features, unreasoned jury verdicts and limited appellate review of such verdicts.

All-lay juries typically do not have to provide a reasoned judgment in support of their decisions. By contrast, most jurisdictions today require judges and mixed tribunals to submit written reasons for their judgments in criminal cases.<sup>174</sup> The lack of reasons for jury verdicts in common-law countries is justified on the grounds that it protects the confidentiality of jury deliberations and preserves the jury's ability to render a verdict of conscience.

Common-law systems attempt to make up for the lack of reasons for the jury verdict by requiring judges to give jurors elaborate instructions on the law and, in some countries, to summarize the evidence.<sup>175</sup> In recent years, some jurisdictions have also

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Kim et al., *Judge-Jury Agreement in Criminal Cases: The First Three Years of the Korean Jury System*, 10 J. EMPIR. LEG. STUDIES 35, 42 (2013) (reporting a 91.4% agreement rate).

<sup>173</sup> KALVEN & ZEISEL, *supra* note 172, at 106-11; VIDMAR & HANS, *supra* note 165, at 233-34.

<sup>174</sup> The United States is unfortunately an exception to this rule. At the federal level, findings of fact are available, but only at the request of the party. FED. R. CRIM. P. 23(c). More troubling is the fact that many states do not require findings of fact in bench trials even upon request. Sean Doran et al., *Rethinking Adversariness in Nonjury Trials*, 23 AM. J. CRIM. L. 1, 45-46 (1995).

<sup>175</sup> In a number of common-law countries (but not the United States):

[A]t the conclusion of the evidence, the judge sums up the case to the jurors. He reminds them of the evidence they have heard. In doing so, the judge may give directions about the proper approach to take in respect of certain evidence. He also provides the jurors with information and explanations about the applicable legal rules. In that context, the judge clarifies the elements of the offence and sets out the chain of reasoning that should be followed in order to reach a verdict based on the jury's findings of fact.

Taxquet v. Belgium, [2010] Eur. Ct. H.R. 1806, ¶ 50; *see also* Yager v. The Queen, [1977] W.A.R. 17, 11 A.L.R. 646 (Austl.); R. v. Krieger, 2 R.C.S. 501 (2006) (Can.); R. v. Osolin, [1993] 4 S.C.R. 595, 683 (S.C.C.). *See generally* Paul Marcus, *Judges Talking to Jurors in Criminal Cases: Why U.S. Judges Do It So Differently from Just About Everyone Else*, 30 ARIZ. J. INT'L & COMP. L. 1 (2013).

experimented with giving jurors decision “flowcharts” and “decision trees,” in addition to judicial instructions, to help guide their deliberations.<sup>176</sup> A few countries—mostly in the civil-law tradition—also present jurors with specific questions that they must answer in support of their verdict.<sup>177</sup> These are all valuable efforts to reduce inaccurate verdicts, but it is not clear whether they go far enough “to shore up ... the legitimacy of inscrutable jury verdicts.”<sup>178</sup> The lack of a reasoned decision is a major reason why many continental European countries disfavor the common-law jury trial. It is seen as inconsistent with statutory and in some cases constitutional requirements that a criminal verdict be based on factual evidence.<sup>179</sup>

From a truthseeking perspective, the problem of inscrutable jury verdicts is compounded by the limited possibility of appeal. As discussed earlier, appeals of acquittals are generally prohibited in adversarial countries, where most all-lay juries are found. Although appeals from acquittals from bench trials are also often banned, “protection afforded by the double jeopardy principle has been at its strongest where the accused has been acquitted by the jury, rather than where the acquittal is delivered as a result of a judicial direction.”<sup>180</sup>

The restrictions on appeals of jury verdicts of acquittal are often justified on the grounds that they safeguard the beyond a reasonable doubt standard, double jeopardy protections, and more broadly, the innocence-weighted approach.<sup>181</sup> But these rationales do not explain the disparate treatment of jury verdicts and court judgments in many jurisdictions. Likewise, they do not explain why *convictions* by juries, which do not

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<sup>176</sup> Marcus, *supra* note 175, at 56-58.

<sup>177</sup> This is similar to the “special verdict” questions common in civil-law trials in the United States. Within Europe, Austria, Belgium, Ireland, Norway, Russia, and Spain require jurors to answer such questions. *Taxquet*, [2010] Eur. Ct. H.R. 1806, ¶ 49.

<sup>178</sup> DAMAŠKA, *supra* note 32, at 46.

<sup>179</sup> *Cf. id.* at 45-46.

<sup>180</sup> The Law Reform Commission (Ireland), *supra* note 13, ¶ 3.093;

<sup>181</sup> *Id.* ¶ 2.06.

implicate the double jeopardy and standard of proof concerns, are also given great deference by reviewing courts. Appellate review is typically more deferential to convictions by juries than by judges.<sup>182</sup> In some countries, appeals of jury verdicts are limited to questions of law, while appeals from bench trials are *de novo*.<sup>183</sup>

Limited appellate review has been explained in part on practical grounds: If the jury offers no justification for its decision, appellate courts have no way of discerning how the jury evaluated the evidence and applied the law.<sup>184</sup> But this reasoning is somewhat circular, as it presumes that juries should provide no reasoning. Moreover, while the lack of reasoning makes appellate review more challenging, it does not entirely preclude such review. The court could examine the evidence in the case *de novo*, or it could assess whether the verdict was one that a reasonable jury could have reached.<sup>185</sup> It appears that a principal motivation for restricting appeals of jury verdicts, particularly of acquittals, is to preserve the autonomy of the jury to apply the “sense of the community” and to protect individuals against official abuse of power.<sup>186</sup>

Even if one were to accept the value of a mechanism that permits jury nullification, however, the lack of reasoning for jury verdicts means that we cannot be certain whether an acquittal in a particular case reflects disagreement with the law or simply a legal or factual mistake by the jury. Studies of judge-jury disagreements suggest that nullification is rarely the motivation for jury acquittals.<sup>187</sup> Furthermore, because the lack of reasoning extends to convictions and acquittals alike, it makes appellate review difficult even when the jury returns a conviction (i.e., when nullification is not implicated). Some commentators have therefore questioned whether

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<sup>182</sup> PIZZI, *supra* note 5, at 145.

<sup>183</sup> CODE DE PROCEDURE PENALE § 572 (Fr.); *Taxquet*, [2010] Eur. Ct. H.R. 1806, ¶ 99.

<sup>184</sup> *Cf.* R. v. Binias, [2000] 1 S.C.R. 381, ¶¶ 36-40.

<sup>185</sup> *Id.* ¶ 40; The Law Reform Commission (Ireland), *supra* note 13, ¶¶ 3.102-3.103.

<sup>186</sup> *People (Director of Public Prosecutions) v. O’Shea* [1982] IR 384, 438.

<sup>187</sup> KALVEN & ZEISEL, *supra* note 172, at 115; VIDMAR & HANS, *supra* note 165, at 234.

the benefits of nullification are worth the costs of inscrutable and unreviewable verdicts.<sup>188</sup>

Reflecting this concern about unreviewable jury verdicts, countries that have adopted jury trials more recently have generally opted for more accountable juries.<sup>189</sup> In Spain and Russia, for example, all-lay juries must respond to specific questions concerning the verdict. Spanish juries must also provide reasons for their judgments by answering a detailed questionnaire to explain factual findings.<sup>190</sup> In both Spain and Russia, acquittals can also be reviewed on appeal, and review of both convictions and acquittals is said to be rather searching.<sup>191</sup> Japan and South Korea adopted juries that fall closer to the mixed-court model than full-blown juries, in which professional judges (even when they do not participate fully in the deliberations) help produce reasoned judgments that can be reviewed on appeal.<sup>192</sup> Kazakhstan adopted the traditional mixed-court model, in which judges and jurors deliberate and reach a verdict together,

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<sup>188</sup> *E.g.*, John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477 (2002).

<sup>189</sup> Only Georgia has adopted an essentially American-style jury whose acquittals cannot be reviewed. *See* CRIM. PROC. CODE § 231(4) (Georgia), *cited in* Thaman, *supra* note 151, at 619 & n.40. Georgia introduced the criminal jury as part of a broader reform to introduce adversarial elements in its criminal procedure, and it was very heavily influenced by the U.S. model, which may explain the ban on appeal of acquittals. *See* CRIMINAL JUSTICE REFORM STRATEGY, at <http://www.cpt.coe.int/documents/geo/2011-19-appendix-I.pdf>. It also appears that Georgia may have been trying to avoid some of the problems encountered in Russia, where appellate courts frequently reversed jury acquittals. *See* Giorgi Lomsadze, *Georgia: Jury Trials Aim to Bolster Public Confidence in Courts*, Oct. 1, 2010, at <http://www.eurasianet.org/node/62059>.

<sup>190</sup> Ana M. Martín & Martin F. Kaplan, *Psychological Perspectives on Spanish and Russian Juries*, in UNDERSTANDING WORLD JURY SYSTEMS, *supra* note 164, at 71, 73 (noting that jurors must specifically note the evidence that led them to believe that a particular proposition was proved or not proved). As the European Court of Human Rights succinctly described the Spanish jury verdict:

[It] is made up of five distinct parts. The first lists the facts held to be established, the second lists the facts held to be not established, the third contains the jury's declaration as to whether the accused is guilty or not guilty, and the fourth provides a succinct statement of reasons for the verdict, indicating the evidence on which it is based and the reasons why particular facts have been held to be established or not. A fifth part contains a record of all the events that took place during the discussions, avoiding any identification that might infringe the secrecy of the deliberations.

Taxquet v. Belgium [2010] Eur. Ct. H.R. 1806, ¶ 57.

<sup>191</sup> Martín & Kaplan, *supra* note 190.

<sup>192</sup> Park, *supra* note 153, at 523–33; Weber, *supra* note 153, at 160–64.



and judges produce a reasoned judgment that is subject to review.<sup>193</sup> Belgium, which has long had trial by jury, has amended its criminal procedure to require juries to provide the “main reasons” for their verdicts.<sup>194</sup>

More significantly, the European Court of Human Rights recently rendered a judgment that may require European countries to devote greater attention to the problem of inscrutable and unreviewable jury verdicts. In *Taxquet v. Belgium*, the Court held that jury verdicts may comply with fair trial principles even if they do not provide reasons, but it emphasized that states must implement other measures to compensate for the brevity of jury verdicts.<sup>195</sup> The Court suggested that several procedures (seemingly when used in combination) can make up for the lack of a reasoned judgment: “directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced,” “precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury’s answers,” and the availability of appeal to the accused.<sup>196</sup> National courts will therefore have to examine jury procedures against these benchmarks to determine whether they guard sufficiently against arbitrary verdicts.

The *Taxquet* judgment suggests that juries are increasingly expected to be accountable for their judgments. Countries that have recently expanded lay participation in criminal cases have taken measures to ensure that jury decisions are more transparent and reviewable. This emphasis on accountability—together with the limited diffusion of criminal jury trials around the world—shows that the democratic

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<sup>193</sup> Nikolai Kovalev & Gulnar Suleymenova, *New Kazakhstani Quasi-Jury System: Challenges, Trends and Reforms*, 38 INT’L J. L. CRIME & JUST. 261 (2010).

<sup>194</sup> *Taxquet*, [2010] Eur. Ct. H.R. 1806, ¶ 60.

<sup>195</sup> *Id.* ¶ 90.

<sup>196</sup> *Id.* ¶ 92.

virtue of juries is less accepted today as a reason to depart from fair trial principles or an emphasis on truthseeking.

## V. Conclusion

Criminal justice systems around the globe profess a strong commitment to the discovery of truth in criminal cases. At the same time, courts and legislatures across the adversarial-inquisitorial spectrum increasingly concur that the truth should not be sought at any price. Competing values, such as individual rights, efficiency, and democratic participation have motivated the introduction of procedures that often depart from the singular quest for truth. As a result of a stronger commitment to individual rights, many systems today follow rules that exclude unlawfully obtained evidence and deprive factfinders of probative evidence. Some also rely on juries to provide a democratic check on the criminal process, and by making jury verdicts difficult to review and revise, privilege jury autonomy over truthseeking. Finally, a growing number of jurisdictions have introduced abbreviated procedures such as plea bargaining, which help resolve criminal cases quickly and conveniently, but often less accurately. While the trend has not been exclusively in the direction of truth-impairing procedures (as reform of double jeopardy laws and requirements of reasoned decisions by juries indicate), on the whole, legal systems around the world continue to confirm that the search for truth does not trump all other concerns.

As these various reforms have occurred, the adversarial-inquisitorial dichotomy has become less relevant in determining the commitment of a criminal justice system to the discovery of truth. There is broad agreement across systems of both traditions that truthseeking should be limited to some degree by the concern for individual rights and liberties. While the details differ on how the balance between these competing goals is struck, there is as much divergence within inquisitorial systems as across the adversarial-inquisitorial divide.

Among the procedures that rest in tension with truth-seeking, plea bargaining appears at once the most attractive and the most problematic. It is attractive due to its undeniable contribution to efficiency in crowded and overworked criminal justice systems. It is problematic because its detrimental impact on truthseeking in individual cases has proven the most difficult to mitigate. Rules introduced to regulate plea bargaining often appear overly inconvenient to prosecutors, defense lawyers, and even judges. To a great degree, this is because shrinking resources and broad emphases on efficiency dominate criminal justice systems around the world today. As long as this is so, effective regulation of plea bargaining is likely to be challenging. The goal of greater alignment between plea bargaining and the search for truth, if it is to be reached, will demand tough and deep structural reform.