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Reinventing the Trial: The Innocence Revolution and Proposals to Modify the American Criminal Trial

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REINVENTING THE TRIAL: THE INNOCENCE REVOLUTION AND PROPOSALS TO MODIFY THE AMERICAN CRIMINAL TRIAL*

By: Marvin Zalman** and Ralph Grunewald***

ABSTRACT

Law review articles by D. Michael Risinger, Tim Bakken, Keith Findley, Samuel Gross, and Christopher Slobogin have proposed modifications to pre-trial and trial procedures designed to reduce wrongful convictions. Some fit within the adversary model and others have “inquisitorial” features. We compare and evaluate the recommendations from the perspectives of lawyer-scholars trained in the United States and Germany. We examine the proposals for their novelty, feasibility, complexity, likely impact, and possible negative or positive side effects. This Article describes, compares, and critically analyzes the articles; suggests additional truth-enhancing procedural reforms; and provides a platform for further analysis.

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I. INTRODUCTION

Five legal scholars—D. Michael Risinger, Tim Bakken, Samuel Gross, Keith Findley, and Christopher Slobogin—have recently (in 2004, 2008, and 2014) written speculative essays that modify or jettison traditional elements of the adversary trial process in an effort to improve verdict accuracy and avoid wrongful convictions.¹ These proposals came after two decades of innocence scholarship occasioned by growing awareness of DNA exonerations and the rise of “*innocence consciousness*”—the idea that innocent people are convicted in sufficiently large numbers as a result of systemic justice system problems to require efforts to exonerate them, and to advance structural reforms to reduce such errors in the first place.”² Innocence movement scholarship has minutely examined most possible causes of wrongful convictions from the specific (fabrications by “jailhouse snitches”)³ to the global (“tunnel vision”),⁴ with extensive research into eyewitness misidentification and false confessions by psychological scientists.⁵

1. Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547 (2008) [hereinafter Bakken]; Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911 (2011/2012) [hereinafter Findley]; Samuel R. Gross, *Pretial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y.L. SCH. L. REV. 1009 (2011/2012) [hereinafter Gross]; D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281 (2004) [hereinafter Risinger]; Christopher Slobogin, *Lessons From Inquisitorialism*, 87 S. CAL. L. REV. 699 (2014) [hereinafter Slobogin].

2. Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1468 (2010/2011) (emphasis added). Several landmark publications helped raise “innocence consciousness,” including EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996), <https://www.ncjrs.gov/pdffiles/dnaevid.pdf> [<http://perma.cc/NX2H-9QTZ>], and BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (Doubleday 2000).

3. Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107 (2006).

4. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291.

5. See, e.g., CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH (Brian L. Cutler ed., Am. Psychological Ass’n 2012); EXAMINING WRONGFUL

Writing on legal actors, especially ineffective assistance of counsel⁶ and prosecutorial misconduct,⁷ is extensive. By contrast, scholarship specifically about trial and pre-trial processes as wrongful conviction factors has been comparatively sparse,⁸ but it is growing.⁹ The adversary trial does not appear on any canonical list of wrongful conviction causes.¹⁰ We note that prior to the current pressing concerns with wrongful convictions, several distinguished scholars raised concerns regarding adversary trials, some of which resulted in wrongful acquittals.¹¹

The lack of attention to the trial process is rather curious because alongside psychological research on eyewitness misidentification, false confessions, and child witnesses,¹² the bulk of wrongful conviction scholarship appears in law review articles.¹³ The lack of focus on the

CONVICTIONS: STEPPING BACK, MOVING FORWARD (Allison D. Redlich et al. eds., Carolina Acad. Press 2014).

6. See, e.g., Robert P. Mosteller, “Potential Innocence”: Making the Most of a Bleak Environment for Public Support of Indigent Defense, 70 WASH. & LEE L. REV. 1345 (2013).

7. See, e.g., H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51 (2013).

8. See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317 (1997); F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189 (2002); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123 (2005).

9. See, e.g., BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 145-77 (Harvard Univ. Press 2011); DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 144-205 (Harvard Univ. Press 2012).

10. See, e.g., Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 186 (2008) (listing “eyewitness misidentification; false confession; misleading, false, or fraudulent forensic evidence; testimony by highly motivated police informants such as ‘jailhouse snitches’; perjury in general; prosecutorial misconduct; ineffective legal defense”).

11. To name a few, see WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT* (N.Y. Univ. Press 1999); MARVIN E. FRANKEL, *PARTISAN JUSTICE* (Hill & Wang 1978); MACKLIN FLEMING, *THE PRICE OF PERFECT JUSTICE: THE ADVERSE CONSEQUENCES OF CURRENT LEGAL DOCTRINE ON THE AMERICAN COURTROOM* (Basic Books 1974); FRANKLIN STRIER, *RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM* (Quorum Books 1994). For a critique of the American adversary process by a philosopher, see LARRY LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY* (Cambridge Univ. Press 2006). Jerome Frank remains the classical and in some ways unsurpassed source of this kind of critique. See JEROME FRANK, *LAW AND THE MODERN MIND* (Transaction Publishers 2009) (1930); JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (Princeton Univ. Press 1949).

12. See Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201 (2005).

13. From about 1990 to the mid-2000s, a plethora of articles were published on such wrongful conviction-related issues as the habeas corpus innocence gateway (reacting to *Herrera v. Collins*, 506 U.S. 390 (1993)); false confessions; videotaping interrogations; DNA evidence; post-conviction DNA statutes to test claims of innocence;

trial process might have resulted from its omission in Scheck and Neufeld's influential innocence agenda¹⁴ or from a clutch of legal issues that absorbed doctrinal analysis, such as habeas corpus. Likewise, lawyers' ideology may have blinded them from seeing the trial system itself as a source of error,¹⁵ or changing the adversary trial process may have seemed too theoretical and remote. Whatever the reason, the result is that tinkering with the trial has not been a part of the innocence reform agenda. The time for reassessing the heart of the adversary process may have come, as seen in the essays reviewed herein, which propose various accuracy-enhancing and inquisitorial-like modifications of the American adversary trial. Keith Findley best expressed the motivation for these proposals:

If one were asked to start from scratch and devise a system best suited to ascertaining the truth in criminal cases, and to ensuring that, to the extent any unavoidable errors in fact-finding occur, they do not fall on the shoulders of innocent suspects, what would that system look like? It is inconceivable that one would create a system bearing much resemblance to the criminal justice process we now have in the United States.¹⁶

The study of wrongful conviction narratives suggests that the standard list of wrongful conviction causes does not capture all the ways that justice can miscarry, and that trial processes may have generated or allowed wrongful convictions.¹⁷ Suggesting structural changes to trial procedures is no small matter. The trial process is complex, grounded

mistaken eyewitness identification; ineffective legal defense; prosecutorial misconduct; racism; death penalty; expert witnesses; child witness accuracy and suggestibility; repressed/recovered memory; and more. The relative lack of attention to judicial processes was noticed by Bakken, *supra* note 1, and Marvin Zalman, *The Adversary System and Wrongful Convictions*, in *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* 71, 79 (C. Ronald Huff & Martin Killias eds., Temple Univ. Press 2008) [hereinafter Zalman, *Adversary System*]. Advances in DNA profiling, of course, were laying the groundwork for the innocence revolution. See MICHAEL LYNCH ET AL., *TRUTH MACHINE: THE CONTENTIOUS HISTORY OF DNA FINGERPRINTING* (Univ. of Chi. Press 2008).

14. Barry Scheck not only constructed an inductive list of wrongful conviction causes but worked to instill a mission among criminal law scholars to establish additional innocence projects to expand the innocence movement agenda. SCHECK ET AL., *supra* note 2.

15. Zalman, *Adversary System*, *supra* note 13. "Lawyers and judges are inculcated with the notion that the system works well and there is nothing to worry about. And perhaps it's true. But there are far too many uncertainties for us to be complacent." Alex Kozinski, *Criminal Law 2.0*, 44 *GEO. L.J. ANN. REV. CRIM. PROC.* iii, xviii (2015). As this Article entered final editing, Judge Kozinski's stunning and detailed indictment of elements of the criminal justice and trial process appeared. Several of his observations are added herein that bolster the Authors' arguments and observations.

16. Findley, *supra* note 1, at 912.

17. See Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 *IOWA L. REV.* 471 (2014).

in a quasi-religious constitutional ideology, and is slow to change because it is guarded by an inherently conservative legal culture.

The Authors review and analyze the five proposals through the lenses of a German lawyer-scholar (Grunewald) and an American socio-legal scholar of wrongful convictions (Zalman), while exploring the adversarial or inquisitorial nature of the proposals. Part II begins by summarizing the proposals. It becomes quickly apparent that some of the proposals' elements bear a resemblance to the "inquisitorial" adjudicatory systems of continental Europe. In Part III, we describe aspects of contemporary European criminal procedure, concentrating on German law and practice as a backdrop for analyzing the proposals. This Part examines three attributes of contemporary continental inquisitorial process: the idea of the impartial investigation, the degree to which defendants' rights are protected, and judicial dominance of the trial. Part IV analyzes various components of the five reform proposals for their novelty, feasibility, complexity, likely impact, and possible negative or positive side effects. Part V concludes by briefly adding to the discussion our views advocating serious consideration of modest truth-enhancing procedural reforms. Given the complexity, embeddedness, and value-laden aspects of the trial process, advocating any modifications is a hard sell, and proposing changes that go to its core border on heresy. Yet we believe that the problems that stimulated the five proposals are sufficiently serious to call for reappraisal, further discussion, and carefully thought-out changes in trial procedures.

The Authors issue a disclaimer at the outset. Although this analysis evaluates the reform proposals in light of continental law and practice, it does not intend to criticize the proposals for not living up to some kind of idealized inquisitorial standard. For one thing, it is not entirely clear that European criminal justice systems are less prone to wrongful convictions than common law nations.¹⁸ More relevant, however, is that the proposals' authors did not set out to emulate the German, or French, or some idealized version of an inquisitorial system. Risinger,¹⁹ for example, does not mention continental procedure and draws

18. Rolf Eschelbach, a judge at the Federal Court of Justice, estimates (without statistical support) that probably more than 25% of all felony convictions in Germany are wrongful. Rolf Eschelbach, *StPO § 261 Rn. 63–63.2*, BECK'SCHER ONLINE-KOMMENTAR StPO (Feb. 1, 2012), https://beck-online.beck.de/default.aspx?vpath=bibdata/komm/BeckOK_StPO_13/StPO/cont/beckok.StPO.p261.glG.gIIII.gl2.htm [<http://perma.cc/9WQA-ZTSK>] (Ger.). However, Klaus Tolksdorf, former President of the Federal Court of Justice, criticizes a similar estimate of Eschelbach for being methodologically problematic. Stefan Geiger, *Interview zu Fehlurteilen: "Kein Mensch würde Richter,"* STUTTGARTER-ZEITUNG.DE (Nov. 4, 2012, 4:05 PM), <http://www.stuttgarterzeitung.de/inhalt.interview-zu-fehlorteilen-kein-mensch-wuerde-richter.16065407-e8a5-4097-bc7a-17c455f1f010.html> [<http://perma.cc/NJW5-3G84>] (Ger.).

19. A note on style: Throughout this Article the Authors use the names of the cited authors as metonyms for their articles. Thus, for example, Risinger, standing alone is, in context, a stand-in for Risinger's model or Risinger's proposal cited in

on English criminal procedure as a guide to appellate standards.²⁰ Findley, while discussing aspects of continental procedure, creates an entirely novel reform model.²¹ Although Bakken describes his model as inquisitorial, on inspection it is more a reengineering of the American trial process.²² Gross creates a judge-controlled process, thus introducing a continental attribute to his model. Yet while displaying an awareness of European procedure, Gross does not emulate it, and his proposal fastens on the realities of American criminal and civil procedure.²³ Slobogin draws more heavily on continental procedure than the other authors and relates each reform element to European practice; but throughout, his major concern is estimating the workability and constitutionality of his reforms.²⁴ It is fair to say that the proposals were not driven by comparativist goals but by considerations of the error-producing potential of the American trial process and by conceiving of ways to change pre-trial and trial procedures to reduce error. Nevertheless, because each proposal recommends trial-system changes that move toward inquisitorial modes (even if not directly borrowed from continental procedure), we believe that a comparison with continental procedure will help advance the broader discussion about “reinventing the trial.”²⁵

II. FIVE TRIAL-MODIFICATION PROPOSALS

Given the substantial attention that legal scholars pay to miscarriages of justice,²⁶ it is no surprise that scholars have begun to address the trial as a source of error and have begun to modify it to generate more accurate decisions.²⁷ The first accuracy-promoting trial innovation procedure we review, by D. Michael Risinger, sought to re-conceptualize criminal trial procedures depending on the nature of the issue and the evidence in the case.²⁸ Four years later, Tim Bakken

footnote 1. One benefit of this approach is to reduce excessive and unnecessary footnotes.

20. See *infra* Part II, Section A.

21. See *infra* Part II, Section D.

22. See *infra* Part II, Section B.

23. See *infra* Part II, Section C.

24. See *infra* Part II, Section E.

25. Borrowing from Germany’s inquisitorial system would be easier than borrowing from other inquisitorial systems, such as that of the French, because of the German system’s greater relative similarity to the American criminal justice system. Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT’L & COMP. L. REV. 317, 318 (1995).

26. At least thirty-nine law review symposia on wrongful conviction topics have been published since 2001. See Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1550 (2008) (counting twelve as of its publication in 2008). Since 2010/2011, the *Albany Law Review* has published an annual symposium on miscarriages of justice. A list of these symposia is available from the Authors.

27. See GARRETT, *supra* note 9, at 145–77.

28. Risinger, *supra* note 1.

proposed a modified adversary system trial that was more elaborate than, but conceptually similar to, Risinger's.²⁹ In 2010, Tim Bakken and Lewis Steele organized a symposium at New York Law School, producing a law review issue on innocence reform entitled *Exonerating the Innocent: Pretrial Innocence Procedures*.³⁰ We selected for analysis two articles proposing novel trial procedures by Keith Findley and Samuel Gross from that symposium. Slobogin's³¹ essay was previewed at a 2013 University of Southern California Law School conference and referenced the New York Law School Law Review symposium.

Our choice of the five proposals selected for analysis is somewhat arbitrary and dictated in part by their focus on trial and pre-trial processes. Other articles in the New York Law School Law Review symposium offer interesting ideas for additional structural innovations that, if adopted, might create a trial and justice system more fully committed to error reduction.³² Thus, Risinger and his multi-issue study proposed greater judicial supervision over police investigation; radical restructuring of the police by separating the patrol and detective functions; deposition procedures for evidence gathering; and reforms of interrogation, eyewitness identification, and mug shot procedures.³³ Other articles include: Griffin's encyclopedic proposal

29. Bakken, *supra* note 1. Bakken came upon Risinger's proposal after completing his own. *Id.* at 552 n.15. Simultaneous or multiple discovery in the sciences signal that scientific work has reached a rich stage, attracting the attention of many scholars and making new discoveries likely. The growing sense among legal scholars that the American trial needs rethinking may parallel what was viewed as a "coming crisis" in the forensic sciences in the 2000s, which led to the 2009 National Research Council's report and the creation of the National Commission on Forensic Science in 2013. See NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (Nat'l Academies Press 2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> [<http://perma.cc/5VBU-FJAN>]; Carmen Drahl & Andrea Widener, *Forcing Change in Forensic Science*, CHEM. & ENG'G NEWS, May 12, 2014, at 10, <http://cen.acs.org/content/dam/cen/92/19/09219-cover.pdf> [<http://perma.cc/KXD6-NMLP>]; Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCIENCE 892 (2005); see also Simon A. Cole, *The Innocence Crisis and Forensic Science Reform*, in WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 167 (Marvin Zalman & Julia Carrano eds., Routledge 2014); Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systematic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051 (2013).

30. Tim Bakken & Lewis M. Steel, *Exonerating the Innocent: Pretrial Innocence Procedures*, 56 N.Y.L. SCH. L. REV. 825 (2011/2012); see Tim Bakken, *Models of Justice to Protect Innocent Persons*, 56 N.Y.L. SCH. L. REV. 837 (2011/2012) [hereinafter Bakken, *Models of Justice*].

31. Slobogin, *supra* note 1.

32. Tim Bakken described these articles in some detail and critiqued them in Bakken, *Models of Justice*, *supra* note 30.

33. D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869 (2011/2012) (incorporating Risinger, *supra* note 1 (reviewed *infra* Part II, Section A)). In a private correspondence D. Michael Risinger noted that *Innocence Is Different* was intended to supersede *Unsafe Verdicts*. Email from Prof. D. Michael Risinger to

for prosecutorial disclosure of evidence;³⁴ proposals by Blume, Johnson, and Miller for special awareness and procedures to protect against wrongfully convicting mentally retarded defendants;³⁵ Ware's description of the prosecutor's conviction integrity unit;³⁶ and proposals by Cassell—somewhat of an innocence-skeptic—for truth-enhancing practices.³⁷ We do not analyze for comparison specific proposals in Kent Roach's sweeping study of “adversarial and inquisitorial themes,” in part because of its Canadian focus, but we do draw on his astute insights in our analysis.³⁸

Our summary of the five truth-oriented trial procedure proposals we selected imposes a structure on them that the authors may not have intended. Readers should be forewarned that we listed and arranged elements of the proposals for the sake of clarity but that, in so doing, we have stripped away some of the textual analysis and nuance that offers more complete explanations.

Dr. Marvin Zalman (July 24, 2015) (on file with Authors). Several topics in *Innocence Is Different* went beyond the focus on pre-trial and trial procedures, and retaining *Unsafe Verdicts* exemplifies its originality at an earlier point in the innocence movement.

34. Lissa Griffin, *Pretrial Procedures for Innocent People: Reforming Brady*, 56 N.Y.L. SCH. L. REV. 969 (2011/2012).

35. John H. Blume, Sheri Lynn Johnson & Susan E. Millor, *Convicting Lennie: Mental Retardation, Wrongful Convictions, and the Right to a Fair Trial*, 56 N.Y.L. SCH. L. REV. 943 (2011/2012).

36. Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y.L. SCH. L. REV. 1033 (2011/2012).

37. Paul G. Cassell, *Freeing the Guilty Without Protecting the Innocent: Some Skeptical Observations on Proposed New “Innocence” Procedures*, 56 N.Y.L. SCH. L. REV. 1063, 1080–95 (2011/2012) (proposing: (1) researching wrongful conviction causes; (2) experimenting with allowing a waiver of rights in return for raising post-conviction innocence claims (borrowing from Gross, *supra* note 1); (3) strictly implementing evidence disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963); (4) increasing defense and prosecutor resources; (5) abolishing the Fourth Amendment exclusionary rule; (6) replacing *Miranda* warnings with videotaped interrogations; (7) eliminating state habeas corpus in some circumstances; and (8) requiring defense attorneys to inquire into clients' claims of innocence).

38. Kent Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes*, 35 N.C. J. INT'L L. & COM. REG. 387 (2010). Roach also reviewed proposals cited here. *Id.* at 426 (reviewing Frase & Weigend, *supra* note 25, at 342; GEORGE C. THOMAS III, *THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS* 193–207 (Univ. of Mich. Press 2008)). A canvass of comparative legal scholarship would likely generate many other worthy works. *See, e.g.*, Findley, *supra* note 1, at 914 n.10, 931 n.108; Slobogin, *supra* note 1, at 712–13 n.60. *See generally* Slobogin, *supra* note 1, at 710–13 (writing a section entitled, “Empirically Comparing Adversarialism and Inquisitorialism”).

A. *Risinger—Factual Innocence Trial Rules & Unsafe Verdicts*
(2004)

Michael Risinger's model arose out of a concern with wrongful convictions,³⁹ his rethinking of earlier critiques of Robert Burns' enthusiasm for the adversary trial,⁴⁰ and the majority decision in *Old Chief v. United States*.⁴¹ *Old Chief*, in a radical departure from earlier standard rationalist evidence doctrine, expanded the meaning of an admissible, relevant "fact that is of consequence to the determination of" the case⁴² in the context of a judge limiting relevant evidence that is outweighed by its potential to prejudice the mind of the jury:

Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault.⁴³

To Risinger, the Court's allowance was a shocking departure from standard rationalist theory; but it also acknowledged that, in practice, prosecutors are allowed to introduce evidence that colors the case with a pro-prosecutor moral flavor and fervor even though such practice does "violence to the rationalist model" of evidence.⁴⁴ He labeled such emotion-generating evidence as "heartstrings and gore" evidence. In his rethinking, however, he came to appreciate the jury's value-laden, possibly emotional evaluations, but only in certain kinds of cases.

The key to Risinger's rethinking and to his proposal is an insight that divides criminal prosecutions into two classes. In the first class, external facts are known (the defendant without doubt performed the criminal act) and the jury must determine the defendant's state of mind. In the second class, the jury must decide whether a knowable external fact occurred or is true. The "main impact of . . . emotionally gripping horror-of-the-crime evidence . . . is to lower the jury's functional standard of what constitutes a reasonable doubt,"⁴⁵ shifting the inquiry from reasonable doubt of guilt to propensity. On reflection, Risinger thought that a cross-sectional jury's group decision-making might be better suited to state-of-mind decisions, which depend on the

39. Risinger, *supra* note 1, at 1282–83 (“[C]laims of actual innocence in fact (strictly defined) possess a moral purchase far superior to other moral claims that animate the legal process.”).

40. *Id.* at 1288–89 & n.34 (reconsidering ROBERT P. BURNS, A THEORY OF THE TRIAL (Princeton Univ. Press 1999); WILLIAM L. TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS (Nw. Univ. Press 1994).

41. *Old Chief v. United States*, 519 U.S. 172, 174–92 (1997).

42. *See* FED. R. EVID. 401.

43. *Old Chief*, 519 U.S. at 188.

44. Risinger, *supra* note 1, at 1301.

45. *Id.* at 1306.

jury's "empathetic projection" into the mind of a defendant.⁴⁶ In such case, the "range of potential subjective accounts is very great."⁴⁷ It is equally important that such decisions are made in contextually rich environments that involve thick descriptions of the social milieu in which the events transpired, all of which are beyond succinct description.⁴⁸ Risinger labels these "polyvalent and normatively charged" issues,⁴⁹ which are well suited to trials where lawyers employ storytelling techniques, resulting in the kind of normative decisions found in jury verdicts that reflect the common sense and ethics of the community.⁵⁰ Such verdicts are not inevitably correct, but judgment errors in cases like this do not rise to the same level of moral revulsion that greets "wrong person" or "no-crime" wrongful convictions.⁵¹

The second class of cases involves "binary-valued issues of actual fact" where the decision is whether a particular fact occurred.⁵² These "are the kinds of decisions where ordinary juries can most often be led to miscarry by adversary excess, especially in the context of high profile and highly dramatic cases."⁵³ Such cases require "special rules to rein in partisan excess and more tightly structure the trial."⁵⁴ To address these cases, Risinger suggested a "mechanism that matches procedures to cases," depending on whether the nature of issues in criminal cases involves polyvalent or binary-fact determinations.⁵⁵ A judge would determine whether to utilize normal trial procedures where polyvalent facts characterize the case or to employ special trial procedures for claims of factual innocence. We summarize Risinger's special factual innocence procedures:⁵⁶

(1) Gaining access to factual innocence procedures would require the defendant to "isolate the one (or perhaps two) binary exterior ultimate facts that underlie his claim of innocence."⁵⁷ The prosecution can argue against the motion, leaving the decision whether to conduct a "binary fact" trial in the hands of the judge.⁵⁸

46. *Id.* at 1306–07.

47. *Id.* at 1294.

48. *Id.* at 1295.

49. *Id.* at 1311.

50. *Id.* at 1297–98, 1308–09; *see also* SAM SCHRAGER, *THE TRIAL LAWYER'S ART* (Temple Univ. Press 1999) (regarding lawyers' storytelling technique); D. GRAHAM BURNETT, *A TRIAL BY JURY* (Knopf 2001) (providing a juror's account of a trial).

51. Risinger, *supra* note 1, at 1298–1300.

52. *Id.* at 1295–1307.

53. *Id.* at 1309.

54. *Id.*

55. *Id.* at 1307.

56. Here, as in our summary of the other authors' proposals, the numbering of those authors' points are those of the Authors, designed to allow cross-referencing.

57. Risinger, *supra* note 1, at 1311.

58. *Id.* at 1311–12. The defense motion requirement gives the defendant a "specific pleading option" functioning "as a kind of special pleading" which requires judicial approval. *Id.* at 1312.

(2) The court tightly controls the evidence introduced at trial from both sides, limited to that which is *usably relevant* to the factual issues.⁵⁹ The “notion of usable relevance . . . takes account of the capacities of the jury as well as the content of the information.”⁶⁰ Although not all narrative context information is to be eliminated, the goal is to “squeeze out inflammatory proffers, especially of the ‘heartstrings and gore’ variety.”⁶¹ The evidence should be “relevant to the defined factual claims of actual innocence.”⁶²

(3) The court would closely screen expert witnesses for reliability.

(3a) “[A]ny defense-proffered expert evidence on the weaknesses of eyewitness identification, false confessions, the commonness of false testimony by jailhouse snitches, and the weaknesses of any expert evidence proffered by the prosecution” could not be excluded “on grounds that it ‘invades the province of the jury.’”⁶³ Excluding such expert witnesses “is misplaced whenever the testimony seeks to educate the jury about counterintuitive facts that are well supported by research and the jurors may not know from their general background experience.”⁶⁴

(3b) Prosecution-proffered expertise is screened according to “standards of reliability and applicable standards of proof”⁶⁵ that depend on the context. In an earlier article, Risinger worked out a rough guide of admissibility standards under *Kumho Tire*. His admittedly incomplete taxonomy included the following guidelines:

- All things being equal, the higher the standard of proof applicable to the issue upon which the expertise is offered, the higher the required threshold of dependability should be.
- High standards should apply to pure fact issues, and extremely high standards to prosecution expertise bearing on pure fact issues in criminal cases, such as identity or the existence of the *actus reus*.⁶⁶

(4) The defendant retains the right to silence.⁶⁷

59. *Id.* at 1311–13.

60. *Id.* at 1312.

61. *Id.* at 1313.

62. *Id.*

63. *Id.* at 1311–13.

64. *Id.* at 1313.

65. *Id.*

66. D. Michael Risinger, *Preliminary Thoughts on a Functional Taxonomy of Expertise for the Post-Kumho World*, 31 SETON HALL L. REV. 508, 536 (2000).

67. See Risinger, *supra* note 1, at 1312 n.157. Risinger considered requiring defendants who chose factual innocence procedures to testify before a magistrate and excluding prior convictions for impeachment. *Id.* (“Although these or other such proposals might actually increase the system’s ‘resolving power’ in regard to claims of actual innocence, I ultimately concluded that they would only get in the way of a fair consideration of the need for *some* provision of special procedures for factual innocence claims.”); see also *id.* at 1304 n.120 and accompanying text.

(5) “Closing arguments would be expected to stick closely to the factual issues raised in the application.”⁶⁸

(6) “The cross-sectional jury would be retained, together with the finality rule for acquittals.”⁶⁹

(7) “Convictions would be reviewable not merely on the basis of sufficiency, but also on the issue of whether they were ‘unsafe’”—the English standard of review.⁷⁰ “Adoption of the unsafe verdict ground would correct a number of defects in the current unsatisfactory role of courts in protecting the factually innocent,”⁷¹ upending the American tradition of extreme appellate deference to jury verdicts.⁷²

B. *Bakken—Innocence Procedures (2008)*

Tim Bakken’s intricately balanced proposal would change “the structure of the system so that defendants asserting innocence can compel the government and courts to search for truth” by introducing “innocence procedures” while leaving the traditional trial and plea bargaining process in place.⁷³ These are necessary because: (i) the reasonable doubt standard tolerates error; (ii) there is no method in the process to determine innocence or compel the government to “more thorough[ly] search for accuracy;”⁷⁴ (iii) fact-eliminating procedures populate the adversary system;⁷⁵ and (iv) post-conviction review is inadequate.⁷⁶

The main features of Bakken’s innocence procedures are as follows:

(1) A defendant may enter a plea of innocence rather than not guilty, under rules established to allow such a plea.⁷⁷

(2) “[D]efense attorneys would have to file an affidavit or affirmation indicating that upon information, belief, and investigation their clients’ claims of innocence are true” in order for defendants to invoke the innocence procedures.⁷⁸ An attorney could file an innocence affirmation for “incompetent” defendants who “might not know they are factually innocent” based on good faith investigation.⁷⁹

68. *Id.* at 1312.

69. *Id.*

70. *See id.* at 1313–33 (describing the standard of appellate review of criminal convictions established by the Criminal Appeal Act of 1966, which allows the Court of Appeals, Criminal Division to quash a conviction or order a retrial when in light of new or fresh evidence the verdict of guilt was unsafe and unsatisfactory).

71. *Id.* at 1315–16.

72. Risinger criticizes the way in which English courts narrowed the applicability of the unsafe verdict standard. *Id.* at 1316–21.

73. Bakken, *supra* note 1, at 549, 561.

74. *See id.* at 555.

75. *Id.* at 556.

76. *Id.* at 557–58.

77. *Id.* at 561.

78. *Id.* at 568 (modeling procedures after FED. R. CRIM. P. 11(a) (regarding guilty pleas)). *But see* Risinger & Risinger, *Innocence is Different*, *supra* note 33, at 893 n.71.

79. Bakken, *supra* note 1, at 570.

(3) The defendant is obliged “to submit to questioning and to reveal some communications with his attorney”⁸⁰ that would “reveal[] virtually his entire defense,”⁸¹ specifically waiving his or her:

(3a) “Fifth Amendment right to remain silent,”⁸² and

(3b) “Sixth Amendment right to some confidential communications with an attorney.”⁸³

(4) The innocence plea “would trigger pre-trial investigations that focus on determining the truth of the defendant’s innocence claim rather than on collecting evidence sufficient to prove guilt beyond a reasonable doubt.”⁸⁴ This converts the justice process “from an adversarial contest to an inquisitorial inquiry.”⁸⁵

How the state would marshal its investigatory resources to accomplish this end is not specified. We assume that a legislated system allowing the plea of innocence would be accompanied by rules and budget allocations to concentrate investigatory resources on factual innocence investigations that “do[] not implicate any question of law and [are] not dependent directly on the fact finder’s application of law to facts.”⁸⁶ This flows from Bakken’s assertion of “at least two types of factual innocence”⁸⁷ (similar to Risinger’s two types). The first type “involves a factual dispute to which the fact-finder must apply a legal rule,”⁸⁸ such as deciding a self-defense claim. Innocence procedures are less applicable to this type of factual innocence claim because when jurors err by “misapply[ing] the law to the facts presented and engage in faulty or inaccurate mental judgments, convicted defendants will find it virtually impossible to overturn the resulting guilty verdicts.”⁸⁹

Bakken’s second type of factual innocence which, following Risinger, we call *pure* factual disputes, comprises essentially wrong-person cases. This kind of case “does not implicate any question of law and is not dependent directly on the fact-finder’s application of law to facts. Every reasonable person viewing the universally objective facts in this type of case would always conclude that the defendant is innocent.”⁹⁰

80. *Id.* at 567.

81. *Id.* at 549.

82. *Id.*

83. *Id.*

84. *Id.* at 561. Earlier in the article, Bakken states that innocent pleas would require prosecutors, “absent a compelling justification, to faithfully investigate the truth of defendants’ innocence claims, as opposed to focusing on determining whether guilt can be proven beyond a reasonable doubt.” *Id.* at 549.

85. *Id.* at 561–62.

86. *Id.* at 554.

87. *Id.* at 553.

88. *Id.*

89. *See id.* at 554.

90. *Id.* The proposals made by Bakken and Risinger, focusing as they do on “pure” or “binary” factual disputes, may be difficult to apply to “no crime” wrongful convictions, such as erroneous “shaken baby syndrome” convictions where expert

For such pure factual disputes, the “main purpose of innocence procedures is to induce the government to conduct an enhanced pre-trial investigation” coupled with a general obligation not to “pursue cases that might normally proceed to trial without an enhanced investigation.”⁹¹

Bakken anticipated that after an enhanced investigation, prosecutors would dismiss some cases on grounds of innocence but would not be convinced in other cases and would proceed to trial. The main protection for innocent defendants who have waived certain rights but are nevertheless subject to trial after an *innocence investigation* consists of trial rights and presumptions. The trial rights are also designed to level the playing field if the prosecution does “not faithfully initiate or complete an investigation.”⁹²

(5) In order to protect these rights, the following *innocence procedures* would put pressure on prosecutors to play fair:

(5a) “The government would be required to prove guilt to a higher standard than beyond a reasonable doubt.”⁹³ The heightened burden of proof is designed to offset the government’s advantage in having obtained evidence in the defendant’s possession. The burden could be couched in terms of guilt “to a moral certainty” or “beyond all reasonable doubt.”⁹⁴

(5b) “Jurors could infer innocence from an innocent plea.”⁹⁵

(5c) “Jurors could draw inferences favorable to the defendant from the defendant’s prompt claim of innocence.”⁹⁶ Indeed, “[j]udges should instruct jurors that they may draw inferences favorable to defendants who claim innocence” and waive various rights.⁹⁷

(5d) “Jurors could presume that evidence and leads presented by the defendant but not pursued by the government would have been favorable to the defendant.”⁹⁸

opinions may be in conflict or faulty fire investigations that inflate accidental fires into arsons. See JOHN J. LENTINI, *SCIENTIFIC PROTOCOLS FOR FIRE INVESTIGATION* (2d ed., CRC Press 2013); DEBORAH TUERKHEIMER, *FLAWED CONVICTIONS: “SHAKEN BABY SYNDROME” AND THE INERTIA OF INJUSTICE* (Oxford Univ. Press 2014). Neither Risinger nor Bakken distinguished between “wrong person” and “no crime” wrongful convictions. The difficulty of applying their special trial processes to “no crime” cases seems not to apply to Gross, Findley, or Slobogin. For statistics distinguishing between “wrong person” and “no crime” case, see NAT’L REGISTRY OF EXONERATIONS, *EXONERATIONS IN 2014*, 3 (2015), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf [<http://perma.cc/R887-QCFD>].

91. Bakken, *supra* note 1, at 572.

92. *Id.* at 573.

93. *Id.* at 549.

94. *Id.* at 574.

95. *Id.* at 549.

96. *Id.* at 550.

97. *Id.* at 575.

98. *Id.* at 550.

(5e) “Jurors could acquit the defendant upon finding that the government acted in bad faith.”⁹⁹ An example is when “the government does not assist in investigating innocence” or does “not conduct a sufficient investigation” from evidence obtained from the defendant.¹⁰⁰

(5f) “[I]nnocence [trial] procedures should provide defendants with the right to block evidence the government obtains in violation of its innocence obligations. . . .”¹⁰¹

(5g) “Innocence [trial] procedures would mandate a jury instruction on the prosecution’s lack of investigation.”¹⁰²

In sum, the central premise of Bakken’s proposal is that “the government and courts search for truth as the primary means to free innocent persons.”¹⁰³

C. Gross—Investigative Trial (2011–2012)

Samuel Gross began by analyzing the innocent defendant’s dilemma of pleading guilty or facing a draconian sentence and a ponderous appellate process if found guilty at trial. Investigative trials, ideally “open-minded judge-led inquiries into the facts of contested prosecutions,”¹⁰⁴ involve tradeoffs. Curiously, a defendant found *guilty* following the investigative trial would benefit from procedural gains:

- (i) the right to reopen the question of his guilt if he presents substantial new evidence that casts doubt on his conviction and
- (ii) the right to a retrial if, at that review proceeding, a *de novo* assessment of all the evidence leads to the conclusion that there is a substantial doubt that he is guilty.¹⁰⁵

In return, the defendant gives up the Fifth Amendment privilege against self-incrimination and the Fourth Amendment exclusionary rule.¹⁰⁶

99. *Id.* Were this to occur, it would make determining whether such a defendant were factually innocent or exonerated on procedural grounds difficult.

100. *Id.* at 576.

101. *Id.*

102. *Id.* at 577.

103. *Id.* at 553.

104. Gross, *supra* note 1, at 1029.

105. *Id.* at 1023.

106. *Id.* The Fourth Amendment exclusionary rule, requiring that unconstitutionally seized evidence be excluded from consideration at trial, was established as a constitutional rule for federal prosecutions in *Weeks v. United States*, 232 U.S. 383 (1914), and as such extended to the states in *Mapp v. Ohio*, 387 U.S. 643 (1961). As one of the most controversial topics of constitutional criminal procedure, its status as a constitutional rule was “demoted” from a personal right to a device to protect Fourth Amendment rights by deterring police from conducting illegal searches and seizures. *See United States v. Leon*, 468 U.S. 897 (1984); *United States v. Calandra*, 414 U.S. 338 (1974). The constitutional status of the rule remains a closely contested issue. *See Herring v. United States*, 555 U.S. 135 (2009).

Gross proposed and analyzed several procedures and rules that would make an investigative trial feasible, which he judiciously labeled “open questions.”¹⁰⁷

(1) *Sentence*. For the scheme to work, the “trial penalty” paid by defendants who opted for the investigative trial and were found guilty would have to be “intermediate,” between the current plea bargain going rate and the trial penalty for opting for a trial absent the investigative trial.¹⁰⁸ Although we will not bog down this critical point with further speculation, a fully-fledged thought experiment would require more analysis of this issue.

(2) *Guilty pleas*. Gross would allow a defendant who opted for an investigative trial to change his mind and plead guilty, but the defendant would not get the benefit of the lower sentence had he initially pleaded guilty. Instead, the defendant would receive the intermediate investigative trial sentence but would not receive the appellate process benefits for entering a guilty plea after opting and dropping the investigative trial option.¹⁰⁹

(3) *Defendant waives the right to silence*. This does not require submission to police interrogation; but the defendant must “answer pre-trial questions from state officials in the presence of his attorney, possibly under oath, and will be required to testify at trial.”¹¹⁰

(4) *Defendant waives objection to evidence seized in violation of the Fourth Amendment*. Silence and the exclusion of illegally seized evidence “limit the accuracy of fact finding in favor of other interests.”¹¹¹

(5) *Other possible waivers*. Waivers of the Sixth Amendment right to counsel “should be off the table,” but Gross would consider some limited waivers of the double-jeopardy prohibition.¹¹²

(6) *Discovery*. Open—but not unlimited—discovery is a central feature of the investigative trial. “[S]ome confidential information has to be protected, and the burden of the process should be minimized.”¹¹³

(7) *Trial structure and process*. If the defendant waives trial by jury, the trial may be conducted by a judge without a jury, not in one sitting but “as a series of discreet hearings.”¹¹⁴ The first consequence is that exclusionary rules designed to avoid contaminating the decision of the lay jury are set aside.¹¹⁵ Controversial evidence may be allowed, and

107. Gross, *supra* note 1, at 1024–27.

108. *Id.* at 1024–25.

109. *Id.* at 1025. Gross leaves unanswered the question of whether actual trial sentences, the “going rate” sentences for pleading guilty, and some intermediate sentences are known with sufficient certainty to sustain an investigative trial system.

110. *Id.* at 1024; *see also* Risinger & Risinger, *Innocence is Different*, *supra* note 33, at 878–85 (proposing a system resembling historical judicial roles).

111. Gross, *supra* note 1, at 1023; *accord* Findley, *supra* note 1, at 917.

112. Gross, *supra* note 1, at 1025.

113. *Id.* at 1026.

114. *Id.*

115. *Id.*

the procedure then delayed to “give the opposing party time to do what it can to explain it or contradict it.”¹¹⁶ Second, such a continuing process “reduces the distinction between trial and discovery.”¹¹⁷ With time to address and respond to negative evidence, each party has less need to provide advance notice of the evidence in its possession. This model is not set in stone and “could take many forms.”¹¹⁸

(8) *Post-conviction review*. One trade-off benefitting “a defendant who is convicted at an investigative trial” is the “right to *reopen* the case if he presents *substantial new evidence* of innocence; and that, once reopened, he would have the right to a new trial if that new evidence casts *substantial doubt* on his guilt.”¹¹⁹

(9) *Legal culture and personnel; the role of the judge*. A major reason why the proposed model may not work is the professional conservatism of legal professionals, with prosecutors viewing the investigative trial as “an obstacle to convicting . . . the guilty” and defense attorneys viewing it as a “slow guilty plea without the benefit of a bargain.”¹²⁰ Nevertheless, their roles would not fundamentally change.¹²¹ The more radical change is to the role of judges, who would have to adopt the new function of “leading judicial investigations” effectively.¹²² “Our legal culture does not include the role of an investigative judge.”¹²³ As ex-litigators with no special judicial training and a belief in attorney-dominated trials, judges in investigative trials might not be up to taking more active roles in raising and defining issues, examining witnesses, or occasionally calling witnesses.¹²⁴

Gross’s concluding thoughts are: first, such trials “would not be a common choice” in part because defense attorneys might convince innocent clients to avoid them, fearing the consequence of waived rights; second, most investigative trials will be resolved without verdicts, leading to dismissals or guilty pleas; and third, the waiver of constitutional rights might raise defense attorney and civil libertarian opposition.¹²⁵ Were the investigative trial to become the norm, it could improve defendants’ civil liberties, “which are routinely com-

116. *Id.*

117. *Id.* at 1026–27.

118. *Id.* Again, Gross offers a sketch, not a completely fleshed out work. The trial process resembles some civil bench trials.

119. *Id.* at 1027.

120. *Id.*

121. *Id.* at 1028.

122. *Id.*

123. *Id.*

124. *Id.* If few investigative trials were held, it might be possible to find judges who have an inquisitorial bent to conduct them. The success of this proposal may hinge upon finding such judges, just as the success of problem-solving courts, such as drug courts, depends in part on locating judges with more “social work” orientations. See GREG BERMAN, REDUCING CRIME, REDUCING INCARCERATION: ESSAYS ON CRIMINAL JUSTICE INNOVATION 57, 63, 72–74 (Quid Pro Quo Books 2014).

125. Gross, *supra* note 1, at 1028–29.

promised or ignored in the mass of plea bargains.”¹²⁶ Although not perfect, investigative trials “will lead to better and more accurate . . . results, before trial and at trial.”¹²⁷ Finally, Gross opines that, although defendants may be attracted to investigative trials at first because of the trial-court process, the value of the post-conviction benefits will become apparent over time.¹²⁸

D. *Findley—Adversarial Inquisitions: Office of Public Advocacy (2011–2012)*

An adversary system “so compromised by imbalance between the parties” and rife with wrongful convictions has led some observers “to think about ways to redesign the search for the truth.”¹²⁹ In Keith Findley’s Office of Public Advocacy (“OPA”), “lawyers alternate between acting as prosecutors and as defense attorneys, and . . . both the adversarial prosecutor and defense attorney share in guiding the inquisitorial process of investigating the case and developing the evidence.”¹³⁰ Instead of “tweaking” the existing adversary system,¹³¹ Findley—after reviewing reasons why changes to the present system will not achieve the goal of better ascertaining the truth,¹³² and after considering the risks of importing a pure inquisitorial system into existing American institutions¹³³—opts instead for a hybrid system. “[T]he best procedure is one that attempts to harness the best aspects of both [adversarial and inquisitorial] procedures, while minimizing the weaknesses of each.”¹³⁴ The OPA is not simply an innocence option; any accused person “can choose whether to be prosecuted in the traditional adversarial system or under” the new hybrid system.¹³⁵

The process would work in the following way:

(1) The state would establish “an Office of Public Advocacy . . . that would house both prosecutors and defense attorneys who rotate between those roles.”¹³⁶ The rotation would result in the OPA attorneys sharing perspectives and thereby “becom[ing] committed to the search for the truth.”¹³⁷ The OPA would not replace the traditional adversary trial but would exist alongside it. The defendant would se-

126. *Id.* at 1028.

127. *Id.*

128. *Id.*

129. Findley, *supra* note 1, at 912. Findley also offers his own review and analysis of proposals by Risinger and Bakken. *Id.* at 920–27.

130. *Id.* at 913.

131. *Id.* at 922.

132. *Id.* at 922–27.

133. *Id.* at 930–35.

134. *Id.* at 935.

135. *Id.* It is not clear who—the OPA or a “traditional” defense attorney—would provide the accused with legal advice as to which system to choose. Lacking guidance, the accused’s choice might depend on which kind of lawyer gets to him first.

136. *Id.*

137. *Id.*

lect the system by which to be tried. This selection eliminates problems associated with a plea of “innocence,” which implies guilt for those who opt for the traditional “not guilty” plea.¹³⁸

(2) “The defense lawyer . . . would remain adversarial and duty-bound to zealously advocate for her client when assigned to that role”¹³⁹

(3) “In this new institution, the prosecutor and defense attorney would then be tasked to work together, as joint inquisitors—adversarial inquisitors, in a sense—to search for the truth and develop the evidence in the case.”¹⁴⁰ Thus, the defense attorney and the prosecutor, also acting in an adversary role, would “jointly supervis[e] the continuing investigation by police.”¹⁴¹ These procedures can bring about a culture change by eroding the cognitive distortions (or “tunnel vision”) that develop when agents become too closely associated with specific professional roles.¹⁴²

(3a) “Police and forensic analysts would answer to both and would be available to undertake investigations and analyses at the joint request of both.”¹⁴³ As a result, “[i]nequalities in resources and access to evidence would be muted, if not dissolved.”¹⁴⁴ This system would also create an atmosphere that makes it more likely that police will “internalize the search for innocence.”¹⁴⁵

(4) “Witnesses would be interviewed jointly to guard against coaching or manipulation by either side.”¹⁴⁶

(5) The jury trial is retained in trials conducted by OPA attorneys, and the jurors might not know whether the case was conducted under OPA or traditional criminal procedure.¹⁴⁷

(6) In OPA trials, the defendant waives conflict of interest claims.¹⁴⁸

(7) The defendant does *not* “waive confidentiality of communications with counsel or the right to remain silent.”¹⁴⁹

(8) The prosecutor’s file is fully disclosed to the defense.¹⁵⁰ “And all investigative reports, witness statements, laboratory reports—indeed, all evidence in the case—would be equally available to both sides (barring exceptional circumstances).”¹⁵¹

138. *Id.* at 936–37.

139. *Id.* at 935.

140. *Id.* at 936.

141. *Id.* at 935.

142. *Id.*

143. *Id.* at 936.

144. *Id.*

145. *Id.* at 938.

146. *Id.* at 939.

147. *Id.* at 937.

148. *Id.*

149. *Id.*

150. *Id.* at 937–38.

151. *Id.* at 939.

(9) As noted above, alongside the OPA, “the traditional American system” continues to exist,¹⁵² obviating the need for a special “innocence plea.” The defendant initially pleads “not guilty,” as is done now, and chooses the system (traditional or OPA) under which he or she wishes to be tried.¹⁵³

Findley believes that this system is immune from defense manipulation because of its transparency; the shared-enterprise legal culture would impose prohibitive costs for lawyers who violate the norms of cooperation and “abuses could be taken to a judge for protective orders.”¹⁵⁴

E. *Slobogin—A Hybrid Regime (2014)*

Adverting to the possibility of wrongful acquittals as well as wrongful convictions, Christopher Slobogin saw the need for an adjudication system to better assess the truth. He laid the blame for a significant portion of miscarriages of justice at the feet of excessive adversarialism in the American trial process.¹⁵⁵ Slobogin sought to retain some features of the adversary system despite research (which could be challenged) tending to show that “an adversarial system at its most efficient is error-prone in a world of unequal resources.”¹⁵⁶ He defended his hybrid justice system proposal on the assumption that “in the trial context the hybrid inquisitorial mode in which the disputants can have their say is superior to the American-style adversarial model at avoiding both wrongful verdicts and wrongful punishment, without a significant sacrifice in subjective justice.”¹⁵⁷

Slobogin advanced three proposals for a hybrid regime with the aim of not only increasing verdict accuracy, but also ensuring that the proposals would be deemed constitutional and would not create disastrous “cascading effects” or place undue new burdens on judges and other trial participants.¹⁵⁸ They are: (i) put the judge in charge of conducting trial and plea-bargaining; (ii) limit expert witness adversarial-

152. *Id.* at 937.

153. *Id.*

154. *Id.* at 939. Findley’s alteration of the advocates’ roles should be read in tandem with a thought-provoking exploration of how being an “innocence lawyer” has modified professional expectations by Michael Risinger and Lesley Risinger. See D. Michael Risinger & Lesley C. Risinger, *The Emerging Role of Innocence Lawyer and the Need for Role-Differentiated Standards of Professional Conduct*, in *CONTROVERSIES IN INNOCENCE CASES IN AMERICA* 123 (Sarah Lucy Cooper ed., Ashgate 2014).

155. Slobogin, *supra* note 1, at 702–09.

156. *Id.* at 712–13.

157. *Id.* at 713. Unique among the proposals, Slobogin valorized the merits of procedural justice or subjective justice that has been supported in psychological research. *Id.* at 710 n.46 (citing E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 3–4 (1988)).

158. Slobogin, *supra* note 1, at 716.

ness by requiring court-appointed expert witnesses; and (iii) oblige the defendant to offer unsworn testimony.¹⁵⁹

(1) *A judicial inquisition: The judicial obligation to discover the truth.*¹⁶⁰

(1a) Rationale: “judicial questioning is likely to produce more facts.”¹⁶¹

(1b) Rationale: witnesses “called by the judge rather than the parties . . . will be less partisan.”¹⁶²

(1c) Rationale: “the greater role of the judge could help redress the imbalance that almost always exists between the state and defendants.”¹⁶³

(1d) Judge control does not violate the Sixth Amendment because the “judge is simply added as another questioner,” as long as the judicial examination is conducted “in a nonadversarial fashion,” and the prosecutor and defense attorney are allowed to question.¹⁶⁴

(1e) American judges are capable of leading trials but are not trained to do so and “a fair and efficient judicial bureaucracy” as exists in Europe does not exist here.¹⁶⁵ Nevertheless, “[m]oving in an inquisitional direction would not require drastic changes to the current American system” because European-like dossiers are “already prepared in many United States jurisdictions[,]” and judges, as prior litigators, can come up to speed with some training.¹⁶⁶

(1f) Judicial control will provide six noteworthy benefits. It will make plea bargaining more accurate by (i) requiring more intense judicial scrutiny of the facts;¹⁶⁷ (ii) eliminating *Alford* pleas; (iii) undermining the effect of coercive deals under threat of severe trial-penalties; (iv) weakening pressure to follow sentencing recommendations; and (v) limiting power of prosecutors to “condition pleas on waivers of rights” (e.g., waivers of *Brady* claims).¹⁶⁸ Finally, caseloads will not become impossibly high because, as a result of these inquisitorial reforms, “many trials will resemble (leaner) sentencing hearings” and shorter sentences will result in fewer appeals.¹⁶⁹

(2) *The expert’s obligation to remain neutral.*¹⁷⁰ The problem is that “the adversarial process can undermine the objectivity of even the

159. *Id.*

160. *Id.* at 716–23.

161. *Id.* at 717.

162. *Id.*

163. *Id.* at 716–17.

164. *Id.* at 718–19.

165. *Id.* at 719.

166. *Id.* at 719–20.

167. *Id.* at 720.

168. *Id.* at 721.

169. *Id.* at 722–23.

170. *Id.* at 723–27.

most cautious expert.”¹⁷¹ The response is to borrow the European system where experts “are almost always court-appointed rather than selected by the parties.”¹⁷²

(2a) Because “inserting a judge into the investigative stage” will not be adopted in America,¹⁷³ the alternative will be a judicially enforced rule “to prohibit coaching of experts.”¹⁷⁴

(2b) Constitutional objections to such a rule, based on the right to counsel and to have access to expert witnesses, can be defused by: (i) providing detailed jury instructions based on established, consensus scientific findings, or (ii) having experts with contrasting views sit together in court and allow cross-questioning.¹⁷⁵

(3) *The defendant’s obligation to testify at trial and at sentencing by making unsworn statements.*¹⁷⁶

(3a) There are benefits of a witness’s unsworn testimony. First, it provides the best evidence of the defendant’s actions and mindset, which is especially instrumental in preventing guilty defendants from being over-punished.¹⁷⁷ Second, it reduces the incentives for police to obtain confessions. And third, it contributes to subjective justice by allowing the defendant to play a role in his or her case.¹⁷⁸

(3b) Using defendants’ unsworn statements eliminates Fifth-Amendment privilege-against-self-incrimination objections because the statements “cannot be used to prosecute the defendant for perjury.”¹⁷⁹

(3c) The “defendant should not be impeachable with prior offenses.”¹⁸⁰

(3d) To avoid the Fifth Amendment objection that a defendant may be required to speak before hearing the prosecutor’s evidence, “the defendant could also be permitted to speak last, in contrast to the usual European practice.”¹⁸¹

171. *Id.* at 723.

172. *Id.* at 724.

173. *Id.* at 725. Gross, to a degree, along with Risinger & Risinger, *Innocence is Different*, appears to differ. See Gross, *supra* note 1, at 1024; Risinger & Risinger, *supra* note 33, at 878–85.

174. Slobogin, *supra* note 1, at 725.

175. *Id.* An unauthorized version of “hot tubbing” occurred in the early days of the DNA wars in the *Castro* case. See JAY D. ARONSON, *GENETIC WITNESS: SCIENCE, LAW, AND CONTROVERSY IN THE MAKING OF DNA PROFILING* 70–72 (Rutgers Univ. Press 2007).

176. Slobogin, *supra* note 1, at 727–30.

177. *Id.* at 727.

178. *Id.* at 728.

179. *Id.*

180. *Id.* at 730.

181. *Id.* at 728–29.

(3e) A defendant speaking under such a regime does not run afoul of *Griffin v. California*¹⁸² because the literal terms of its ruling simply prevent prosecutors or judges from commenting on silence.¹⁸³

(3f) The “defense should have full access to the prosecution’s dossier, in order to better structure the defendant’s testimony.”¹⁸⁴

F. *Differences and Similarities*

To assist in comparing the proposals, Table 1 provides a quick way to compare the large number of differing and partially overlapping proposals. The Table, of course, simplifies and “flattens” the authors’ models even more than our reduction of their proposals to numbered items, so it should be used only as a starting point.

182. *Griffin v. California*, 380 U.S. 609, 615 (1965).

183. “Nonetheless, *Griffin* would probably have to be overturned to remove all doubt on this point.” Slobogin, *supra* note 1, at 729.

184. *Id.* at 730.

TABLE 1
REINVENTING THE TRIAL: SIMILARITIES AND
DIFFERENCES AMONG THE PROPOSALS

		YES	NO
1	Parallels standard trial procedure (vs. replacing it in all cases)	Ris ¹ Bak Gro Fin	Slo
2	Keep the jury?	Ris Bak Fin Slo	Gro
3	Judge Control?	Gro Slo	Ris ² Bak Fin
4	Change lawyers' roles?	Fin Slo	Ris ³ Bak ⁴ Gro ⁵
5	Concern with police investigation?	Bak Fin	Ris Gro Slo
6	Innocence plea?	Bak	Ris Gro Fin Slo
7	Waiver of defendant's rights?	Bak Gro Slo	Ris Fin ⁶
8	Change evidence/trial practice rules?	Ris ³ Bak Gro ⁷ Slo	Fin
9	Expert witness control?	Ris Slo	Bak Gro Fin
10	Discovery?	Ris Bak Gro Fin Slo	
11	Plea bargaining and guilty pleas a concern?	Gro Slo	Ris Bak Fin
12	Sentence a concern?	Gro	Ris Bak Fin Slo ⁸
13	Appeal, post-conviction review a concern?	Ris ⁹ Gro	Bak Fin Slo
14	Proposal explicitly or distinctly inquisitorial or hybrid?	Bak ¹⁰ Gro Slo ¹¹	Ris Fin ¹¹

Notes

1. "Ris" = Risinger, "Bak" = Bakken, "Gro" = Gross, "Fin" = Findley, "Slo" = Slobogin.
2. Risinger does not deem his judge inquisitorial but as having tighter control of evidence.
3. Risinger's judge exercises tighter control over evidence and attorney's questioning, but other than this, the lawyers' adversary roles are not affected.
4. Bakken's defense attorney swears to client's innocence but otherwise does not change role.
5. Despite judge control, Gross retains party presentation of evidence.
6. Findley requires a waiver of conflict-of-interest issues.
7. Gross eliminates the continuous trial and exclusionary rules designed to avoid contaminating lay jury decisions.
8. Slobogin has the defendant's testimony present the mindset at plea-taking, which may reduce over-punishment.
9. Risinger adopts the English "safe verdict" standard.
10. Bakken claims that pre-trial investigations aimed at assessing the truth of innocence claims are inquisitorial.
11. Slobogin and Findley describe their proposals as adversarial and inquisitorial system hybrids; in our judgment, Slobogin has more of an inquisitorial nature than Findley.

Row 1 shows that four proposals are set up as procedures that stand alongside the current trial process, whereas Slobogin's proposal would replace existing rules in all trials and plea-taking processes.

Rows 2 through 5 examine institutional roles. Row 2 shows that only Gross eliminates the jury. Row 3 indicates that Gross and Slobogin establish strong judge control. Whereas the judge's ability to control evidence and expert witnesses is somewhat higher in Risinger's model, the change is not as strong as it is with Gross and Slobogin. Bakken's model also implies greater judicial control than is

now common, mostly by applying statutory presumptions. Findley does not alter the role of judge or jury.

Row 4 indicates changes in lawyers' roles. Findley's centerpiece suggests a major structural and cultural alteration by combining defense lawyers and prosecutors into one agency and reversing their jobs periodically. Slobogin creates a continental-style judge who leads off the questioning of witnesses, although this is in the context of a jury trial in which parties can ask questions and call witnesses. Although the lawyer's role is a bit fuzzy in Slobogin, on balance it should be counted as a change, especially as expert witnesses are called by the court. The same thinking might be applied to Gross, given his admonition that judges would lead judicial investigations. Yet party presentation of evidence, including lay and expert witnesses, is alive and well in Gross's model, putting his proposal on the "no change" side. Bakken creates a series of presumptions and Risinger clamps down on the ability of lawyers to try their cases in standard ways, but neither fundamentally changes the roles of prosecutors or defense attorneys. Row 5 indicates that only Bakken and Findley gave some thought to the role of police investigation.¹⁸⁵

Rows 6 through 10 address issues of evidence and trial procedure. Row 6 indicates that only Bakken requires the defendant to plead "innocent." This raises questions about the effect of innocence procedures on ordinary trials. Row 7 notes that Bakken, Gross, and Slobogin would have defendants waive constitutional rights, especially the self-incrimination privilege. Findley emphatically endorses the retention of defendants' rights while Risinger considered but rejected the waiver of rights in a manner similar to Slobogin.¹⁸⁶ Row 8 indicates that four proposals modify evidence rules and trial procedures, while Findley—despite radically restructuring the prosecutor's and defense lawyer's roles—appears to leave the trial process and rules of evidence as-is. The many ways in which the other proposals modify trial and evidence rules are not captured in Row 8. Row 9 indicates that control over expert witnesses was an issue deemed sufficiently important for Risinger and Slobogin to address specifically. The only point of unanimity, seen in Row 10, is agreement on open discovery.

Rows 11 through 13 ask whether the proposals address the other important—even critical—elements of the criminal procedure process, including plea bargaining; sentencing; and appeals and post-conviction review. As the Table shows, Gross is mainly concerned with the interaction of these institutions with a changed trial process.

185. For a detailed discussion of the control over police, see Risinger & Risinger, *Innocence is Different*, *supra* note 33, at 890–906.

186. Risinger clarifies that he rejected waivers of rights "mostly on [the] practical grounds" that to do so would detract from consideration of primary reforms. Email from Prof. D. Michael Risinger to Dr. Marvin Zalman (July 24, 2015) (on file with Authors).

Slobogin's judge control would probably have the greatest effect on plea bargaining, with Gross a close second, suggesting that their proposals would have the greatest potential impact on the justice system. As for appeals (Row 13), Risinger looks to the English "safe verdict" standard of review for appeals from his factual innocence trial procedures, while Gross creates easier post-conviction review for defendants who opted for the Investigative Trial.

Finally, although the proposals were not offered as comparative scholarship, we ask whether they drew on or closely resembled elements of continental (inquisitorial) procedure in any way.¹⁸⁷ Bakken, Gross, Findley, and Slobogin explicitly reference inquisitorial systems. In Row 14, we identify Slobogin and Gross as "inquisitorial" because they create judge-controlled proceedings and include Bakken because that proposal self-identifies as inquisitorial.¹⁸⁸

With these features in mind, we next explore European law and practice in order to compare the proposals to contemporary inquisitorial justice.

III. REFLECTIONS FROM A CONTINENTAL PERSPECTIVE

In recent years, numerous authors have introduced a comparative perspective into the wrongful conviction debate with a particular focus on "inquisitorial" systems.¹⁸⁹ Such systems have a stronger focus on factual truth and appear to produce fewer wrongful convictions than adversarial systems.¹⁹⁰ "[I]nquisitorially inspired reforms," suggested

187. Given the Table's simplification of categories, and because of the lack of a unified interpretation of the "inquisitorial," the Authors broadly categorize proposals that emphasize judge control or self-define as inquisitorial. Later, this Article will look at inquisitorialness more closely and consider the proposals again.

188. All the proposals are tinged with elements of inquisitorialness. Risinger's factual innocence procedures have inquisitorial elements of greater judge control over the evidence, but evidence is still party-developed and presented. The inquisitorial element in Bakken's innocence procedures is an attempt to nudge police into enhanced investigation, although it respects the organizational separation of police from the prosecution in state and local justice systems. Findley goes beyond Bakken in this regard by having the prosecutor and defense attorney jointly supervise the police investigation and by having OPA lawyers adopt an inquisitorial attitude. Slobogin and Gross establish judge-control.

189. See *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE*, *supra* note 13; *WRONGFUL CONVICTIONS & MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS* (C. Ronald Huff & Martin Killias eds., Routledge 2013); Roach, *supra* note 38; Frase & Weigend, *supra* note 25; Symposium, *An International Exploration of Wrongful Conviction*, 80 U. CIN. L. REV. 1067 (2012). The obverse literature inspects the adversary system, partially in light of the inquisitorial. For an interesting discussion and sources, see Mark P. Denbeaux & D. Michael Risinger, *Kumho Tire and Expert Reliability: How the Question You Ask Gives the Answer You Get*, 34 SETON HALL L. REV. 15, 19–24 (2003).

190. Although fewer cases of wrongful convictions are reported and discussed in the media in most inquisitorial countries, there is little to no data to back up a claim

Kent Roach, might be able to prevent future wrongful convictions.¹⁹¹ Roach suggests that continental systems' apparent willingness to reconsider factual findings reveals the high value they place on discovering truth above final dispute settlements and on "ensuring respect for legal rights which seem to be the major concerns of adversarial systems."¹⁹² While it is true that the American appellate process allows only for a narrow and limited review of facts, it "is possible to layer some features of a more neutral, inquisitorial system within the adversarial framework."¹⁹³ It can be argued that innocence organizations¹⁹⁴ have adopted what is the core of any inquisitorial system: a culture of an unbiased investigation into a case. However, beyond specific borrowings from European procedure, the idea behind the inquisitorial has come to guide many reform proposals, including the ones we look at.¹⁹⁵ In any event, we proceed to explore the proposals through three more-or-less inquisitorial concepts.

All the current reform models reflect inquisitorial ideas in one way or another, either by explicitly borrowing them or by changing American procedures to be more "inquisitorial," with the goal of improving accuracy. We are aware that "[b]oth the adversarial and the inquisitorial systems are integrated systems. Each piece is affected and supported by every other piece. Transfer a piece without its support system, and it will probably fail or distort some other features that you didn't intend to affect."¹⁹⁶ Criminal justice systems differ in much more than the way truth is determined. Institutional culture, culture in general, the historical and culturally accepted role of parties involved in criminal proceedings, the interactions of agencies and personnel within the criminal justice system, the standard of proof, sentencing policies, lower or higher minimum and maximum sentences, appellate procedures, and many other aspects can influence the likelihood of a wrongful conviction. Transferring the "best" and avoiding the "weakest" parts from a system¹⁹⁷ is difficult because of the challenge of de-

of lower wrongful conviction rates. A comparison would be difficult given the many differences between the systems. The Authors proceed with that caveat in mind.

191. Roach, *supra* note 38, at 424.

192. *Id.* at 435.

193. Findley & Scott, *supra* note 4, at 372.

194. The Authors adopt this usage instead of the more familiar "innocence project" because among Innocence Network member organizations, the original Innocence Project affiliated with Cardozo law school is recognized as a legal entity with rights to the name. Keith A. Findley & Larry Golden, *The Innocence Movement, the Innocence Network, and Policy Reform*, in *WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE* 93, 94, 108 n.1 (Marvin Zalman & Julia Carrano eds., Routledge 2014).

195. See Ralph Grunewald, *The Role of Innocence Projects in American Criminal Procedure* 132 (Aug. 3, 2005) (unpublished LL.M. thesis, University of Wisconsin-Madison) (on file with Authors).

196. Myron Moskowitz, *The O.J. Inquisition: An American Encounter with Continental Criminal Justice*, 28 *VAND. J. TRANSNAT'L L.* 1121, 1145 (1995).

197. Findley, *supra* note 1, at 935.

termining which parts are functionally better than other parts. And all parts of a system interact with each other and therefore limit isolated analysis. But that does not mean a comparative analysis is futile—quite the opposite. In acknowledging criminal justice systems as *systems*, we might be able to better understand what may work and what will not.

The reform proposals, at least implicitly, share the optimistic outlook that we can learn from inquisitorial systems, but they differ in how they understand *the inquisitorial*. That is not surprising because a common definition of what “the inquisitorial idea” means does not exist and the understanding of how any given system implements the idea of the inquisitorial varies widely.¹⁹⁸ Inquisitorial systems are often described as being non-accusatorial and the adversarial system as being typically accusatorial.¹⁹⁹ In fact, inquisitorial systems eliminated a *private* accuser to varying degrees, but even early on in the development of the inquisitorial process, a private and public accuser could initiate proceedings.²⁰⁰ Today, for example, the *German Staatsanwaltschaft* (public prosecutor) prepares a public accusation (*Anklage*) if a case should proceed to trial. But if the public prosecutor does not intend to move forward, a private individual can (for specific crimes) take the prosecutor’s role.²⁰¹ Because accusatorial elements exist in inquisitorial systems, we will not use the term “accusatorial” to distinguish between adversarial and inquisitorial systems.

198. See Chrisje Brants, *Wrongful Convictions and Inquisitorial Process: The Case of the Netherlands*, 80 U. CIN. L. REV. 1069, 1074 (2012). For example, the German system has been described as a neo-inquisitorial system because it equips the defense with many rights and encourages attorneys to play an active role (while at the same time, the whole process is still judge centered). See Frase & Weigend, *supra* note 25, at 342; Roach, *supra* note 38, at 388 (simplifying these distinctions by equating “inquisitorial” with “continental”).

199. See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 127 (3d ed. 2007).

200. *The Constitution Criminalis Carolina* (1532) codified both the private and official accusatory process. See Kai Ambos *Zum heutigen Verstaendnis von Akkusation-sprinzip und -verfahren aus historischer Sicht*, 30 JURA 586, 590 (2008); Mirjan Damaška, *The Quest for Due Process in the Age of Inquisition*, 60 AM. J. COMP. L. 919, 926 (2012) (providing a historical analysis).

201. STRAFPROZESSORDNUNG [StPO] [Code of Criminal Procedure], as amended, §§ 374–394, *translation at* http://www.gesetze-im-internet.de/englisch_stpo/german_code_of_criminal_procedure.pdf [<http://perma.cc/BJZ9-BAY6>] (Ger.). The so-called “private prosecution” is limited to specific crimes, among them trespass, defamation, bodily injury, or criminal damage to property. *Id.* § 374(1). Private prosecution does not play a significant role in the criminal justice system. EVA LÜTZ-BINDER, RECHTSWIRKLICHKEIT DER PRIVATKLAGE UND UMGESTALTUNG ZU EINEM AUSSÖHNUNG-SVERFAHREN: UNTERSUCHUNG UNTER AUSWERTUNG DER PRIVATKLAGEVERFAHREN DER JAHRE 1992–2002 AUS DEN AMTSGERICHTSBEZIRKEN LANDAU/PFALZ, NEUSTADT/WEINSTRASSE UND LUDWIGSHAFEN/RHEIN 63–64, 126 (Peter Lang 2010) (Ger.).

But what makes a system inquisitorial and what are its defining features? Findley, for instance, understands an inquisitorial system as one in which

a neutral magistrate, rather than the parties themselves, undertakes the task of managing the investigation and developing and presenting the evidence, motivated solely by an interest in finding the truth. The parties play a less direct role in the process, although often the prosecutor is cast in the role of a neutral inquisitor, whose task is defined just as much by the duty to acquit the innocent as to convict the guilty.²⁰²

Slobogin notes that “the Continental system relies heavily upon the skill, motivation, discipline, and integrity of its professional judges. It depends on a fair and efficient judicial bureaucracy buttressed by high standards of selection, training, and performance, and protected from political and public pressures by a form of judicial tenure.”²⁰³ But inquisitorial attorneys can be and often are likewise active in the later pre-trial stages and the trial itself. They often take an adversarial stance (with many variations in different inquisitorial systems) and are much less passive than believed. Even when the police are still investigating, attorneys are free to look for evidence and often do so. During a trial, defense attorneys can file motions to have specific evidence considered. Furthermore, inquisitorial systems have been characterized as having much weaker exclusionary rules than those of the United States,²⁰⁴ such that they are more truth-oriented. What we will show in this Part is that, in sum, there are various safeguards against wrongful convictions implemented on all levels of the German procedural system. But at the same time, defendants’ rights are protected strongly. We acknowledge that the German system is just one of many inquisitorially structured systems and differs from systems such as in France, where fewer adversarial elements exist.²⁰⁵ We will concentrate on and address three critical aspects of the inquisitorial from which to

202. Findley, *supra* note 1, at 913 n.5 (citing Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1088–90 (1975)). His reference to Damaška does not support his definition. In that particular section, Damaška briefly explains the nonadversary mode of adjudication and notes that after an interrogation from the bench: “the two parties are permitted to address questions to the witness, in an attempt to bring out omitted aspects favorable to them, or to add emphasis to certain points on which testimony has already been obtained.” Damaška, *supra*, at 1089. At the same time, German prosecutors have in fact the duty to “ascertain not only incriminating but also exonerating circumstances.” STPO § 160(2).

203. Slobogin, *supra* note 1, at 791 (quoting Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 517–18 (1992)).

204. PIZZI, *supra* note 11, at 37–42. Pizzi also argues that a criminal justice system has a “skewed sense of priorities” when it suppresses reliable evidence at the expense of an accurate determination of guilt. *Id.* at 45.

205. See Richard Vogler, *Criminal Procedure in France*, in *CRIMINAL PROCEDURE IN EUROPE* 171, 188 (Richard Vogler & Barbara Huber eds., Duncker & Humblot 2008).

evaluate the reform proposals: impartial investigation; the exclusionary rule and defendants' rights; and judicial control of fact-finding.

A. *The Impartial Investigation*

Findley's definition aligns with the common understanding of the inquisitorial system's basic features.²⁰⁶ Some European systems, like the French,²⁰⁷ can be described that way, but others, including the German, differ. More critically, a neutral and transparent investigation and search for the truth in the *pre-trial phase* is an integral part of any inquisitorial system. From a historical and comparative point of view, though, the image is more complex. Not all continental European systems are the same; they all have different inquisitorial frameworks. Some, like France, rely on an examining magistrate who, after a decision from the prosecutor,²⁰⁸ carries out the *instruction* to establish the truth (*manifestation de la vérité*).²⁰⁹ That examining magistrate has broad discretion in how to conduct the investigation. Other European countries like Spain, the Netherlands, and Belgium have retained the feature of an examining magistrate, but Germany abolished it in 1974 and Italy followed suit in 1988.²¹⁰ In Germany, the prosecutor and the police—acting as the investigative arm of the prosecutor—dominate the investigative stage.²¹¹ The prosecutor and police have less discretion and might be less driven by “winning.”²¹² The only time a judge gets involved is when a search or an arrest is necessary. In this case, an impartial judge (*Ermittlungsrichter*, “investigative judge”) has to issue the warrant. The Netherlands also employs a prosecutor who leads the investigation. Should that lead to sufficient evidence, an examining judge can be asked to initiate a preliminary judicial inquiry.²¹³ Whereas in the past only the examining judge could apply “means of coercion” (search and seizure, wiretapping, etc.), now these measures are “autonomous,” and the examining judge mainly examines witnesses.²¹⁴

Another aspect characteristic of the German prosecutor is his or her comparably small amount of discretion. The German prosecutor is largely bound by the principle of legality—the idea that a prosecutor

206. See also Roach, *supra* note 38, at 413.

207. Vogler, *supra* note 205, at 179 (explaining that the French system is a mixed system and lacks crucial procedural safeguards (like the exclusionary rule) that the German system offers).

208. *Id.* at 202.

209. *Id.* at 205.

210. *Id.*

211. Frase & Weigend, *supra* note 25, at 322–23.

212. See Findley, *supra* note 1, at 931.

213. Marc Groenhuijsen & Joep Simmelink, *Criminal Procedure in the Netherlands*, in *CRIMINAL PROCEDURE IN EUROPE* 385 (Richard Vogler & Barbara Huber eds., Duncker & Humblot 2008).

214. *Id.* at 386.

must commence investigations if there is evidence that an offence has been committed.²¹⁵ Cases are supposed to be disposed of (in whatever way) by a judge. Dutch investigation and prosecution, however, are “not matters of duty but of authority,” meaning that, for instance, “prosecution may be abandoned ‘for reasons of public interest’”²¹⁶—i.e., the principle of opportunity. That shows that European systems are diverse in this regard, and there is no noticeable trend to strengthen either the principle of legality or the principle of opportunity.²¹⁷ What European systems do have in common is that prosecutors are not elected officials and therefore do not have to view public accountability as interfering with the way they pursue cases; that is different from their American counterparts.²¹⁸ In France, for example, candidates for both positions in the judiciary or the prosecutorial service are recruited in the same way, have to take similar exams, and are not elected.²¹⁹ They do not have to answer to constituents, and they see that as important for an independent judiciary.²²⁰

For the purpose of investigating and prosecuting criminal offenses, German prosecutors have fairly broad investigatory authority: they can summon witnesses and suspects, they can guide the police in their investigation, and under exigent circumstances they can order searches and seizures.²²¹ In most criminal matters (except homicides and economic or white-collar crimes) the police conduct their investigation without much oversight from the prosecutor.²²² And even in more serious cases, prosecutors often trust the expertise and experience of law enforcement. In general, the German system is seen as “marked by a high degree of cooperation and of mutual trust and confidence between police and prosecutors.”²²³ Observers described the

215. Vogler, *supra* note 205, at 24–25.

216. Groenhuijsen & Simmelink, *supra* note 213, at 392 (quoting statutory language).

217. Germany, Spain, and Italy trust the principle of legality, whereas England, Belgium, the Netherlands, and France operate systems of prosecutorial discretion. *See* Vogler *supra* note 205, at 24–25.

218. *See* Slobogin, *supra* note 1, at 719 (noting that, because American judges are mostly elected, their neutrality may be harder to maintain).

219. *See* Vogler, *supra* note 205, at 229.

220. Whitman describes a strong state as one that is “relatively *powerful*” in its ability “to intervene in civil society without losing political legitimacy” and “*autonomous*,” in that its bureaucracies “are relatively immune to the vagaries of public opinion.” JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 13–14 (Oxford Univ. Press 2003). In this respect, France and Germany are strong states while, in contrast, governments in the United States are weak states.

221. Frase & Weigend, *supra* note 25, at 323 & n.33.

222. *Id.* at 323. “The great majority of police officers are [called] ‘auxiliary officers’ of the prosecutor and can be dispatched to conduct further investigations” without direct oversight from the prosecutor. *Id.*

223. LEONARD H. LEIGH & LUCIA ZEDNER, *THE ROYAL COMMISSION ON CRIMINAL JUSTICE: A REPORT ON THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE PRE-TRIAL PHASE IN FRANCE AND GERMANY* 26 (1992).

relationship between both agencies as strikingly harmonious.²²⁴ The prosecutor is expected to investigate in an impartial manner, looking into both elements of innocence and guilt. This is why the prosecutor is sometimes described as the most objective officer or department in the world (“objektivste Behörde der Welt”).²²⁵ But, without having exact data, we can assume that not all prosecutors in Germany are equally successful in acting entirely neutrally.²²⁶ However, the low acquittal rates in Germany and France and the apparent absence of unjust convictions, according to Leigh and Zedner, are seen as products of the care taken in the initial stages in the criminal process.²²⁷

Only when police consider their investigation complete does the file reach the desk of the prosecutor who then decides about further steps. If the prosecutor considers preferment of public charges, he or she will make a note of the conclusion of the investigation in the files.²²⁸ From that point on, the defense has a right to review the dossier.²²⁹ Use of a dossier varies across Europe.²³⁰ During the investigative stage, defense attorneys can be involved but are not usually as active (and do not need to be as active) as the prosecutor. Although disclosure of evidence is different in the United States, it has been argued that “in practice . . . German pre-trial procedure closely resembles the

224. *Id.* at 71.

225. It makes sense to view this statement in light of tunnel-vision, on the one hand, and prosecutorial culture on the other. The Authors assume, *arguendo*, that all honest prosecutors operate (as do all human actors) with cognitive biases that tend to shape their decisions toward guilt. The quoted slogan appears to express pride in a culture of objectivity, though the search for the truth is a different matter. This is a genuine cultural marker for German prosecutors even assuming, again *arguendo*, that human ideals are never fully realized. To test these assumptions, prosecutorial cultures should be the subject of comparative social science research. *Cf.* FLOYD FEENEY & JOACHIM HERRMANN, ONE CASE—TWO SYSTEMS: A COMPARATIVE VIEW OF AMERICAN AND GERMAN CRIMINAL JUSTICE (2005) (comparing prosecutorial cultures in Germany and the United States); Chrisje Brants, *Tunnel Vision, Belief Perseverance and Bias Confirmation: Only Human?*, in *WRONGFUL CONVICTIONS & MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS* 161 (C. Ronald Huff & Martin Killias eds., Routledge 2013).

226. Leigh & Zedner note that it is more likely for prosecutors to look into exculpatory facts when the suspect is unrepresented or a juvenile. LEIGH & ZEDNER, *supra* note 223, at 36. As soon as a suspect has counsel, the prosecutor relies on the defense to establish indicia of innocence. *Id.*

227. *Id.* at 71–72. That statement needs further scrutiny because acquittal rates are affected by many factors and not only the quality of the investigation.

228. STRAFPROZESSORDNUNG [StPO] [Code of Criminal Procedure], as amended, § 169a, *translation at* http://www.gesetze-im-internet.de/englisch_stpo/german_code_of_criminal_procedure.pdf [<http://perma.cc/BJZ9-BAY6>] (Ger.).

229. *Id.* § 147(1). In general, most documents included in the dossier are sent to the attorney’s place of practice where he or she is free to make copies, scans, etc. Section 147(2) of the StPO gives the prosecutor the discretion to let the defense review the files even earlier if such a review does not interfere with the investigation. *Id.* § 147(2).

230. Amboss, *supra* note 200, at 593, mentions Germany, France, Netherlands, Portugal, and Austria as countries that use dossiers.

American model”²³¹ German prosecutors are charged with finding the truth just like the American prosecutor, whose aim is twofold: “that guilt shall not escape or innocence suffer.”²³² In that regard, and on a purely structural level, “the German system . . . has more in common with American criminal justice than does the French system.”²³³ More significant differences emerge in the following stages of a case.

In historical perspective, the idea of *the inquisitorial* transcends the pre-trial and trial stages and includes more than an unbiased, neutral investigation. Kai Ambos in his analysis of the current understanding of what he calls the German “accusatory” system summarizes three aspects as the core of the inquisitorial process: First, the official and *ex officio* pursuit of an investigation (*Offizialmaxime, indagatio criminis*); second, the (secret) investigation (*Inquisitionesmaxime, inquisitio*); and third, the principle of substantive truth (*veritas delicti*).²³⁴ The principle of substantive truth binds the prosecutor, who is charged with the investigation of the facts. But it also binds the judge and the court.²³⁵ According to Eberhard Schmidt, the nature of the inquisitorial process is “that the investigation is based on an official initiative, that official acts keep the process from the first suspicion . . . to the verdict going and that . . . proof is based on rational methods.”²³⁶ The second element Schmidt mentions as being crucial is the principle of instruction—“the duty of the official institutions to put themselves into the picture of the material facts and the objective truth.”²³⁷ Where the principle of an official investigation and the principle of instruction meet, “the inquisitorial process stands before us.”²³⁸ This principle of instruction requires the (trial) judge to clear up, reconstruct, and investigate the facts of a case²³⁹ in the most comprehensive way. The

231. Frase & Weigend, *supra* note 25, at 352.

232. *Berger v. United States*, 295 U.S. 78, 88 (1935).

233. Frase & Weigend, *supra* note 25, at 353 (footnote omitted). This needs a little more context, but it shows that procedure in itself might be less important than “soft” features when it comes to accurate fact finding.

234. Ambos *supra* note 200, at 593. In continental trial systems “personal belief [is] the controlling criterion” for the decision of a trial judge or lay assessor; in contrast, the American jury verdict is a group—not an individual—decision and is the product of democratic deliberation in which a juror’s inner voice may legitimately “be trumped by [the] intersubjectively valid decisional criteria” of the majority. MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* 38, 39 (Yale Univ. Press 1997).

235. STRAFPROZESSORDNUNG [StPO] [Code of Criminal Procedure], as amended, § 244(2), *translation at* http://www.gesetze-im-internet.de/englisch_stpo/german_code_of_criminal_procedure.pdf [<http://perma.cc/BJZ9-BAY6>] (Ger.) (“In order to establish the truth, the court shall [*ex officio*] extend the taking of evidence to all facts and means of proof relevant to the decision.”).

236. EBERHARD SCHMIDT, *EINFÜHRUNG IN DIE GESCHICHTE DER DEUTSCHEN STRAFRECHTSPFLEGE* 86 (3d ed. 1965) (translations are Grunewald’s).

237. *Id.* at 86–87.

238. *Id.* at 87.

239. See StPO § 155(2) (mandating that “the courts shall be authorized and obliged to act independently” and/or autonomously in their pursuit of the truth); *Id.* § 244(2); see also *supra* note 202.

principle of instruction stands in contrast to the principle of negotiation (*Verhandlungsmaxime* or *Dispositionsmaxime*),²⁴⁰ a concept more prevalent in European civil trials.²⁴¹

We next review a central feature of the impartial investigation—the role of the judge.

B. *Judicial Dominance of the Trial*

The presiding judge conducts German criminal trials.²⁴² The whole criminal justice system in Germany is judge-centered. Lay-elements in decision-making exist but are not as dominant as in the United States. The German system trusts in an independent and professionally trained decision-maker.²⁴³ The judge then uses the dossier as a basis for his or her own reconstruction of the case. The principle of instruction allows the court to expand its view beyond the facts that are included in the dossier or the story presented by the prosecutor or the defense.²⁴⁴ The attorneys in a German trial have a right to question witnesses (after the judge finished his or her questioning), and they can make specific requests of further proof (*Beweisantrag*). Courts usually comply with these requests²⁴⁵ and can refuse a request of proof only for fairly limited reasons.²⁴⁶ But since it is the court's objective to determine the truth,²⁴⁷ the role of the attorneys is not fully comparable to attorneys in the United States, where their action and involvement is essential. With regard to evidence law, a comparison

240. GWLADYS GILLIÉRON, PUBLIC PROSECUTORS IN THE UNITED STATES AND EUROPE: A COMPARATIVE ANALYSIS WITH SPECIAL FOCUS ON SWITZERLAND, FRANCE, AND GERMANY 26 (Springer 2014).

241. In civil trials the court bases its decision on the evidence supported by the parties and has only little investigative authority. Although there are differences in the function of judges in civil proceedings in the United States and Germany, “lawyers for the parties play major and broadly comparable roles in both the German and American systems. Both are adversary systems of civil procedure.” John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 (1985).

242. StPO § 238(1) (“The presiding judge presides over the trial, interrogates the defendant and takes the evidence.”).

243. Curiously, as the Authors will address later, within legal scholarship in the United States, there is only a little criticism of the jury as a fact finder and contributor to wrongful convictions. Kent Roach, for instance, acknowledges that bench trials in the United States reflect values of reasoned decision making that are found in judge-dominated inquisitorial systems: “Decreased use of juries might increase the ability of the justice system to reach accurate results, especially in cases involving complex scientific evidence.” Roach, *supra* note 38, at 418.

244. This is accomplished by requesting the police or prosecutor to collect more evidence. See Barbara Huber, *Criminal Procedure in Germany*, in CRIMINAL PROCEDURE IN EUROPE 269, 332 (Richard Vogler & Barbara Huber eds., Duncker & Humblot 2008).

245. Frase & Weigend, *supra* note 25, at 342. As is the case in many areas of criminal procedure, the circumstances under which such a request for further proof can be denied is the subject of a heated debate.

246. *Id.*

247. StPO § 244(2) (“In order to establish the truth, the court shall [*ex officio*], extend the taking of evidence to all facts and means relevant to the decision.”).

would need more space than we have here. In some respect, and because of the judge-driven proceedings, rules of (trial) evidence are less strict than in the United States.²⁴⁸ Hearsay evidence, for example, is not excluded per se in Germany because it is subject to the court's duty to hear all evidence that pertains to finding the truth.²⁴⁹ But there are limitations on the use of hearsay evidence, and judges have to carefully justify its use in their decisions. In other regards, German criminal procedure recognizes many testimonial privileges.

The involvement and dominance of judges is still seen as one of the major truth-promoting elements in the German system. Judges are charged with establishing the truth, and truth itself is of constitutional significance.²⁵⁰ In 2013, the German Federal Constitutional Court mandated that this charge also should permeate the plea bargaining process.²⁵¹ The judicial decision-making process has a high degree of transparency and allows for review of fact and law. Judges have to write out their verdicts and have to explain which fact they used for which element of the crime. They have to answer why they saw a specific witness as credible and why they trusted an expert. For most cases, an appeal regarding fact and law is possible. Whether or not the judge followed the truth-finding objective can be reviewed on appeal as a question of law. Cases can be reopened if new evidence is found, regardless of the time that has passed after the verdict. German trial records, however, only show formally relevant aspects of the proceedings (motions, summoning witnesses, putting witnesses under oath, etc.) but do not include verbatim statements from witnesses and defendants.

248. See Frase & Weigend, *supra* note 25, at 342.

249. "Continental fact-finders are continuously awash in hearsay." DAMAŠKA, *supra* note 234, at 49. Damaška explains that the American exclusion of hearsay at trial has more to do with the bifurcated nature of American trial courts than the usual story that hearsay will be given undue credence by amateur jurors. *Id.* at 48–52.

250. According to the German Federal Constitutional Court, finding the truth is mandated by the German Constitution through the *Schuldprinzip* ("guilt principle"), the standard that individual guilt/blameworthiness is the basis for and limit of any sentence or intervention. See Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court], Mar. 19, 2013, 2 BVR 2628/10, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/03/rs20130319_2bvr262810en.html [<http://perma.cc/UZ8K-JL2Y>].

251. *Id.* Plea bargaining is still not the default way to dispose of cases, and if a plea bargain (the German variation of it) happens, it is regulated and conducted with judicial oversight. See STPO § 257b; see also Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. (forthcoming 2015) (manuscript at 20–21), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2583898 [<http://perma.cc/TWC2-E267>]. Slobogin argues that an inquisitorial-style type of plea bargaining is "more likely than American practice to produce well-honed punishments, and to expose whether improper agendas—for instance, excessively harsh bargains based on misinformation from the prosecution or inappropriate leniency based on substantial assistance from serious offenders—are driving any bargains that are reached." *Id.* at 21 (footnote omitted).

As we stressed earlier, even inquisitorial systems implement adversarial elements (to a smaller or greater extent); what sets them apart from the American system is not so much the truth-bound prosecutor, but that the judge is the head of trial proceedings. In Germany, judges have a duty to investigate and establish the material truth.²⁵² They are not influenced by the activity or inactivity of the parties, nor are they bound by the narrative or the evidence contained in the dossier. During trial, they can investigate independently by, for example, calling and questioning witnesses and experts, examining the evidence with their own eyes, and reading all of the documents. Judges establish a defendant's guilt solely on the evidence introduced in trial and develop the *forensic truth*.²⁵³ By law, the judiciary is impartial and objective.

Apart from the rules that establish and protect the standards of the judiciary, there is also a culture that trusts in career judges to be impartial. In contrast to the United States, German judges are not former litigators and German legal education pivots around the judge as the ideal type lawyer. Especially during their first years at the university, law students are trained to see both or many sides of a legal question. Until the first state examination (usually after four years), law students only write "expert opinions" (*Gutachten*) on legal questions that address all potential aspects of a case—facts are usually undisputed. Afterwards, in the second part of their education, students learn to argue within an adversarial setting, taking the side of a plaintiff, defendant, or the state, but the default angle is still from the judge's perspective. As difficult as it might be to connect wrongful convictions (or the lack thereof) to a legal culture, the background of the main decision-makers is important. It has been argued that tunnel vision can be a particularly negative side effect of concentrating the decision-making power in judges²⁵⁴ and that it might be a cause for specific types of wrongful convictions in Germany. At the same time, however, there are very few German cases in which a mistaken identification has led to a wrongful conviction.²⁵⁵

The judge in Gross's model resembles American judges in civil bench trials who do not need to adhere to the tight timeframes of criminal jury trials where the witnesses assemble to testify.²⁵⁶ Euro-

252. See STPO § 244(2).

253. Section 261 of STPO requires that "[t]he court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole." STPO § 261; see also Thomas Weigend & Jenia Iontcheva Turner, *The Constitutionality of Negotiated Criminal Judgments in Germany*, 15 GERMAN L.J. 81, 85 (2014).

254. Findley, *supra* note 1, at 928; see also Findley & Scott, *supra* note 4, at 307–31; *supra* note 225 (regarding prosecutorial tunnel vision).

255. And then again, it is hard to say if that is an effect of a balanced pre-trial investigation or the judiciary.

256. Although German law requires that trial be continuous, delays up to a month occur so that witnesses can be secured. See FEENEY & HERRMANN, *supra* note 225, at

pean judges rely heavily on case dossiers that result from the impartial investigations made by civil service professionals whose agencies do not have the political baggage of most American prosecutor's offices. And while the harmonious police-prosecution relationship—a hallmark of German criminal justice—may occur in America, it is not always the case.²⁵⁷

On further reflection, Gross's proposal about the actual role of the judge vis-à-vis the trial attorneys is elusive, although he places the judge at the center of the investigative trial:

Judges would have to take on an entirely new task—leading judicial investigations—and do it well. Unless the judges who conduct investigative trials are seen as effective and open-minded, defendants won't choose this option and prosecutors won't cooperate. It will wither on the vine. On the other hand, if both sides learn to trust the judges, this procedure could take root. But that's a big if.²⁵⁸

Does this imply that, as in continental trials, the judge takes the lead in questioning witnesses and only allows the prosecution and defense attorney to ask follow-up questions when the judge is finished? If so, the process might fail, not because of any personal attributes of the judge but because the adversary system does not produce a dossier on which the judge bases truth-probing questions. The parties control the adversary process, in which “each side . . . present[s] evidence that has already been assembled, in an attempt to persuade a passive tribunal.”²⁵⁹ Slobogin's assertion that “[m]oving in an inquisitional direction would not require drastic changes to the current American system . . . [because] [f]iles resembling European dossiers are already prepared in many United States jurisdictions”²⁶⁰ seems far too optimistic. It ignores the powerful argument made by Damaška that continental and American justice systems are deeply embedded in governmental systems rooted in centuries of development that reflect profoundly different approaches to democratic and constitutional polities. Under this view, the (American) reactive state reflects the coordinate ideal, and the (European) active state reflects the hierarchical ideal.²⁶¹ To become active, the judge would not only require the instincts of a continental judge but would need to be supported by a system that supplies the right kind of evidence on which intelligent and probing inquiries can proceed.²⁶²

394. “In German procedure truth-finding obviously takes precedent over the idea that the trial should be a short, continuous process.” *Id.*

257. George F. Cole, *The Decision to Prosecute*, 4 L. & SOC'Y REV. 331 (1970).

258. Gross, *supra* note 1, at 1028.

259. *Id.* at 1027.

260. Slobogin, *supra* note 1, at 719.

261. MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (Yale Univ. Press 1986).

262. If anything, the trend in adversarial systems is to push the judge more toward the role of the referee and less an active prober or even commenter on evidence. *See*

C. *Defendants' Rights within Inquisitorial Systems*

So far, we have stressed Germany's focus on factual truth and argued that comparative scholarship must look at the idea of the inquisitorial in a way that encompasses the whole system and not just the pre-trial or trial phase. But in addition to its emphasis on elements that advance truth-finding, German criminal procedure also protects defendants' rights—often much more broadly than in the United States. That stands in contrast to Roach's assumption that continental systems are willing to sacrifice defendants' rights in favor of pursuing the truth,²⁶³ a view that might have also influenced Bakken's, Gross's, and Slobogin's models.

American lawyers and scholars may think that inquisitorial systems, with their focus on truth and bias toward the admissibility of evidence, reduce “truth obstructing” rights (Findley's term)²⁶⁴ like the privilege against self-incrimination as well as evidentiary barriers like the hearsay rule. These views are problematic because European legal culture provides many protections for the defendant that are comparable to those practiced in the United States, and the dominant role of professional judges discounts the biasing effects of evidence that would be thought to render American jury verdicts unfair and inaccurate. Nevertheless, Bakken, Gross, and Slobogin would limit defendants' rights to comport with their understanding of the inquisitorial system and broad allowance of evidence.

At both the pre-trial and trial stage, suspects and defendants enjoy considerable rights regarding their degree of participation and what kind of evidence can be used against them. In the pre-trial phase, the prosecutor is the “primary guarantor of the integrity of the investigative” stage and, as Leigh and Zedner observe, “he has distinct responsibilities for safeguarding the rights of the suspect.”²⁶⁵ Defendants, their doctors, and even their family members enjoy substantial privileges under German criminal law. For example, every suspect has the right against self-incrimination, including the right to remain silent. Suspects also receive “Miranda warnings” (which are worded very similarly to the American warnings). In contrast to the United States, these warnings are triggered as soon as a person becomes a crime suspect, regardless of whether this person is in custody or formally interrogated. That means that if police have or, during a conversation with a person, develop the suspicion that he might be involved in a crime,

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, 5, 38–39 (2013).

263. Roach, *supra* note 38, at 435.

264. See Findley, *supra* note 1, at 917.

265. LEIGH & ZEDNER, *supra* note 223, at 35.

police must inform that person about his privileges.²⁶⁶ Any police or prosecutorial interrogation must be free of actions that influence decision-making or the memory of the suspect.²⁶⁷ This includes induced fatigue, any kind of physical interference, coercion, or deception.²⁶⁸ Any suspected ill-treatment of a suspect who is in (preliminary) detention will lead to an immediate investigation.²⁶⁹ Defendants are not considered witnesses and cannot perjure themselves, meaning that they can lie without penalty or consequences at any stage of the proceedings, even when on the stand.²⁷⁰ Further, spouses, fiancés, or civil partners can refuse to testify even if their relationship with the defendant no longer exists. Relatives can also refuse to testify against the defendant and so can specific groups of professionals like doctors, attorneys, and members of the clergy.²⁷¹ Public officials (like civil servants) might need permission to testify in court if testimony potentially endangers the proper fulfilling of an official task.²⁷² As this shows, Germany broadly protects a suspect's right against self-incrimination. And it probably would not be far-fetched to assume that many of the interrogation techniques used in the United States would be problematic under German law.²⁷³

When it comes to the question of excluding relevant evidence from the trial, the German system shows similarities to the United States, but because of its structure it has to implement the exclusionary rule differently. The deterrence rationale, which is so strong in the United States, does not play much of a role in German legal thinking.²⁷⁴ Because the dossier includes both inadmissible and admissible evidence, German judges are usually aware of all of the evidence on which they can base their decisions. In general, evidence is excluded for two reasons: (1) It was obtained in an unlawful manner, or (2) obtaining or

266. Huber, *supra* note 244, at 301–02. United States constitutional law is to the contrary. *Stansbury v. California*, 511 U.S. 318, 319 (1994) (per curiam) (holding that an officer's subjective and undisclosed view concerning whether interrogatee is a suspect is irrelevant to an assessment of whether that person is in custody).

267. STRAFPROZESSORDNUNG [StPO] [Code of Criminal Procedure], as amended, § 136a(2), *translation at* http://www.gesetze-im-internet.de/englisch_stpo/german_code_of_criminal_procedure.pdf [<http://perma.cc/BJZ9-BAY6>] (Ger.).

268. It would be prohibited, for example, to tell a suspect he or she was incriminated by another suspect/person if that is not the case. United States constitutional law is to the contrary. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (allowing police deception).

269. LEIGH & ZEDNER, *supra* note 223, at 37.

270. Frase & Weigend, *supra* note 25, at 343.

271. StPO § 52–53.

272. Frase & Weigend, *supra* note 25, at 342.

273. See Dorothy Heyl, *The Limits of Deception: An End to the Use of Lies and Trickery in Custodial Interrogations to Elicit the "Truth"?*, 77 ALB. L. REV. 931 (2013/2014) (describing how the New York Court of Appeals has placed some limits on police deception).

274. Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1035 (1983).

using a specific kind of evidence violates the constitution, particularly the defendant's privacy rights.

German law excludes evidence obtained in violation of section 136a of the German Code of Criminal Procedure (prohibiting acts like threats and deception during the suspect's examination). This is the only provision in the procedural code that explicitly regulates the exclusion of evidence. But it serves as an expression of the idea that there "does not exist a principle in criminal procedure which requires that the truth be won at any price."²⁷⁵ That means that in other cases, a violation of a procedural rule or other law can lead to the exclusion of evidence. But German courts usually balance the seriousness of the offence and the seriousness of the violation in order to decide whether they must throw evidence out.²⁷⁶

Unique to German criminal procedure is the general protection of a person's privacy. That privacy, as interpreted by courts, includes a person's dignity, his or her sexual orientation, and privately spoken and written words in an intimate diary.²⁷⁷ German courts distinguish between spheres of privacy.²⁷⁸ Evidence deriving from an expression of the innermost intimate sphere is considered untouchable and can never be used (for instance, entries in a diary do not touch "the sphere of others").²⁷⁹ By contrast, evidence that stems from the merely private but not-yet-intimate (core) sphere can be used, but only if community interests in crime control or prevention prevail over its exclusion. Courts have to balance the kind and type of crime (felony or misdemeanor) in question and can consider how probative the information is. For example, the more a diary entry elaborates on planned or completed crimes the less likely it is that it will be excluded.²⁸⁰ This mechanism looks at evidence on an individual case level. The German exclusionary law appears to be tighter in some instances, such as intimate content and police deception, but allows for broader inclusion of evidence in others.

As argued earlier, the German system does not see procedural rights as either inhibiting or supporting factual truth—they are a different category and follow a different purpose. Any suspect, factually

275. Kuk Cho, "Procedural Weakness" of German Criminal Justice and Its Unique Exclusionary Rules Based on the Right of Personality, 15 TEMP. INT'L & COMP. L.J. 1, 18 (2001) (quoting the German Federal Court of Justice for criminal matters).

276. *Herring v. United States*, 555 U.S. 135, 143 (2009), in effect makes the Fourth Amendment exclusionary rule discretionary and dependent on the judge's perception of the egregiousness of the police action. Textualists accept this shaky foundation for a constitutional right because they do not view the exclusionary rule as a core component of Fourth Amendment rights.

277. See Frase & Weigend, *supra* note 25, at 334–35.

278. See Cho, *supra* note 275, at 26–27.

279. See Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court], BVerfGE 80, 367, 373–74, <http://sorminiserv.unibe.ch:8080/tools/ainfo.exe?Command=ShowPrintVersion&Name=BV080367> [<http://perma.cc/SEA9-R42E>] (Ger.).

280. *Id.* at 374–76.

guilty or innocent, has a lot to lose by waiving constitutional rights. An innocent remark may lead to further investigation and incrimination, as attested by false confessions. It is problematic to assume that inquisitorial systems per se (or “inquisitorialness”) come with limited procedural rights, as most have protections for suspects and defendants.²⁸¹ German criminal procedure curbs the search for truth quite extensively, as does the American.²⁸² The German process, however, accepts these limitations and reduces its search for truth to evidence that is constitutionally acceptable.

In view of German law’s strong rights-protection, the apparent logic that motivated Bakken, Gross, and Slobogin to weaken American trial rights can be seen as embedded in adversary structure. As they tinker with the machinery of justice to get to the truth, they are concerned that a guilty party may hide behind innocence procedures and therefore propose that defendants lower—if not drop—their shields. However, that would lead to all defendants losing their rights and protections. When European defendants offer information, they do so for different purposes²⁸³ and in systems with their own safeguards,²⁸⁴ including the extra-procedural but overwhelmingly important factor of

281. Bakken, for example, describes the inquisitorial process as being less protective than criminal procedures. Bakken, *supra* note 1, at 567–68 (“[T]o invoke innocence procedures, defendants would have to relinquish the more protective procedures . . . in favor of procedures more common in . . . inquisitorial processes.” (footnote omitted)). See Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 507, 507–08 n.1 (1973) (questioning the claim from Justice Douglas’s dissent in *Johnson v. Louisiana*, 406 U.S. 356, 391–94 (1972) (Douglas, J., dissenting), “that the ‘higher evidentiary barricades’ to conviction somehow emanate from the very nature of adversary proceedings and that their lowering smacks of the ‘inquisitorial’ continental procedure”).

282. “Privacy rights protected by the Fourth Amendment, for example, can lead to the exclusion of undeniably relevant and reliable evidence.” Findley, *supra* note 1, at 917.

283. German criminal procedure is not bifurcated into a distinct guilt and sentencing stage. That means, for example, that if in the light of incriminating evidence the defense wants to introduce mitigating aspects relevant for the sentence, this has to happen during the trial. See Detleff Burhoff, *Einlassungsverhalten des Beschuldigten* [Concession Behavior of the Defendant], 2002 PRAXIS STEUERSTRAFRECHT 176, https://www.burhoff.de/insert/?/veroeff/aufsatz/pstr_2002_176.htm [http://perma.cc/6VWK-HJ6R].

284. European systems vary in how much they expect the defendant to offer information. The French system has long been seen as more inquisitorial than, for instance, the German. But today, defendants are provided with the means to intervene actively in their own defense. That includes the right to know the details of the accusation, right to silence, and right to counsel. In France, these rights are strongest in the *instruction* period, but are not that well protected in the earlier stages in the proceedings. Vogler, *supra* note 205, at 192. A detailed description of a French murder trial portrays the defendant participating in an extensive forensic reexamination being conducted by the prosecution, thus providing a sound basis for the verdict. Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527, 537–41 (1997).

lower maximum and actual sentences.²⁸⁵ A defendant, who presumably knows where he or she was at the time of an alleged crime, could add much light about relevant circumstances by providing information. Yet, an innocent defendant will likely have a vague recollection of the date and time of the crime if nothing memorable occurred, resulting in weak or initially erroneous alibis that become incriminating evidence.²⁸⁶ There is, nevertheless, the temptation to interpret silence as masking guilt, and distrust of the privilege against self-incrimination has a long legal heritage.²⁸⁷ Seasoned scholars may agree with Daniel Givelber's observation, borrowed from comparative scholar John Merryman, that an innocent defendant would prefer to be tried in an inquisitorial court, but a guilty one would take his chances in a common law trial.²⁸⁸ This experience-based assertion speaks to the sense that adversary gamesmanship, along with trial-based exclusionary rules like hearsay, may generate wrongful acquittals.²⁸⁹ But without careful analysis of the systems today, given the continental commitment to rights, this view could be mistaken. A broader view of continental justice may see greater justice not only in trial procedures like a defendant's ability to successfully obtain specific and repeated forensic tests²⁹⁰ but also in the truth-irrelevant but profoundly important context of civilized and less-degrading penal systems.²⁹¹

D. *Evaluating the Reform Models in Light of Continental Procedure*

Having sketched three inquisitorial themes and commented on how the five proposals fit those themes, we now review each proposal for more nuanced analysis. If pre-trial stage police errors generate most

285. McKillop, *supra* note 284, at 560; Frase & Weigend, *supra* note 25, at 346; *see also* Dana Goldstein, *Too Old to Commit a Crime?*, N.Y. TIMES: SUNDAY REVIEW (Mar. 20, 2015), http://www.nytimes.com/2015/03/22/sunday-review/too-old-to-commit-crime.html?_r=0 [<http://perma.cc/D3E5-8DRS>] (advocating "a 20-year cap on federal prison terms with an option for parole boards or judges to add more time if necessary to protect the public").

286. JENNIFER THOMPSON-CANNINO ET AL., *PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION* 86 (St. Martin's Press 2009); *Serial: The Alibi*, IRA GLASS (Oct. 2014), <http://serialpodcast.org/> [<http://perma.cc/BDX3-VLDP>].

287. Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 672–74 (1968); *Griffin v. California*, 380 U.S. 609, 622 (1965) (Stewart, J., dissenting) ("The California rule allowing comment by counsel and instruction by the judge on the defendant's failure to take the stand is hardly an idiosyncratic aberration.") (reflecting a widespread view). Under German law, however, no negative inferences must be drawn from a defendant who makes full use of his right not to testify. *See* Burhoff, *supra* note 283.

288. Givelber, *supra* note 8, at 1317.

289. *But see* DANIEL GIVELBER & AMY FARRELL, *NOT GUILTY: ARE THE ACQUITTED INNOCENT?* (N.Y. Univ. Press 2012).

290. *See* McKillop, *supra* note 284.

291. WHITMAN, *supra* note 220; CRAIG HANEY, *REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT* (Am. Psychological Ass'n 2006).

wrongful convictions, excessive adversarialness and tunnel vision limits the ability of courts to sort out erroneous prosecutions. Integrating inquisitorial elements into the adversary system is an obvious move to improve trial accuracy. To that end, Gross and Slobogin contemplate continental-style judge control of the trial, with Gross going beyond the adversarial setup of the American trial system to construct a model resembling the German system.²⁹²

Risinger's "factual innocence trial" rules expand the judge's role to a more inquisitorial one but do so by shaping the scope of evidence presented to the cross-sectional jury, as the trier of fact in innocence proceedings. From a comparative perspective, the evidence presented to the jury is somehow regimented and tightly controlled—"manualled," so to speak. Given that the jury is instructed in a very comprehensive way, the question remains: Why not then have a judge decide "binary fact" cases?²⁹³ From a comparative perspective, the bifurcation of two kinds of prosecution (polyvalent or binary) appears conceptually plausible but slightly artificial. While "establishing" a defendant's state of mind is a subjective decision that a jury may be able to make as well as, if not better than a judge, there is no guarantee that Risinger's factual innocence trial rules will in fact produce verdicts that are more accurate than current-day trials. From the American perspective, however, the elected judge in a bench trial does not have the same level of training, control, or reliance on as carefully constructed a dossier as the continental judge.²⁹⁴ In that light, a state-of-mind issue might indeed be better decided by a jury, especially if the defendant can decide whether to opt for a bench or jury trial. The unsafe verdict review also allows for a more effective case review because, like appeals in Germany, it incorporates questions of how the factual basis of a case was established. Again from a comparative perspective, it is not clear how to maintain the integrity of the jury and trust in its ability to decide questions of fact accurately, especially given that it remains a "black box" whereas a continental judge must explain a verdict's factual basis.

Bakken also focuses mostly on the pre-trial and trial stages. The main purpose of his "innocence procedure" is to ensure that prosecutors search for the truth by inducing enhanced pre-trial police investigations.²⁹⁵ If the prosecutor does not comply and, for example, fails to assist in investigating innocence, jurors could acquit the defendant. By forcing the government to look at all sides of a case and conduct a

292. See Strafprozessordnung [StPO] [Code of Criminal Procedure], as amended, § 359, translation at http://www.gesetze-im-internet.de/englisch_stpo/german_code_of_criminal_procedure.pdf [<http://perma.cc/BJZ9-BAY6>] (Ger.).

293. This raises the possibility that Risinger's approach could stimulate judges to become more active in motions to dismiss after the prosecution's case or in post-trial motions in arrest of judgment.

294. See *supra* Part III, Section B.

295. Bakken, *supra* note 1, at 572.

thorough investigation, Bakken tries to foster an “inquisitorial inquiry.”²⁹⁶ Government investigators would “look at evidence differently, trying to determine whether it pointed toward innocence instead of evaluating whether it would be sufficient to convince a jury of the defendant’s guilt.”²⁹⁷ That is fairly comparable to the job description of a German (but also American) prosecutor. What differs, however, are the consequences when an investigator does not look at a case comprehensively. In Germany, almost no direct consequences exist if the police or prosecutors do not search for evidence that supports a notion of innocence.²⁹⁸ One reason might simply be the culture that exists within the German police and prosecutorial offices. Although tunnel vision can affect German prosecutors and the police (and, to be very clear, we are aware that even the best education and most professional socialization will not be able to prevent cognitive biases), the prosecutor is still seen as a fundamentally objective institution.²⁹⁹ Most reform models, including Bakken’s, seem to substitute procedure for what is lacking in the existing police culture and the institutional separation of police from prosecutors in American state systems.

A second reason for the lack of direct consequences from a one-sided investigation can be seen in the dominant role judges play in the German criminal justice system. A judge, who is charged with finding the truth, would ideally recognize a one-sided or biased investigation. That also explains why there are not different standards of proof for defendants who claim innocence or who confess. Even when a defendant admits to a crime, because there are no “pleas” in the technical sense in Germany, the confession is just one piece of evidence that needs to be evaluated based on its probative value. Again ideally, judges cannot draw any inferences from a defendant’s claim of innocence, nor can they more easily acquit the defendant when they see that the prosecutor conducted a biased investigation. Like some other authors, Bakken suggests that defendants who claim innocence give up essential procedural rights; that again blurs the line between concepts of procedural justice and substantive truth. Although Bakken points out the limitations and lack of truth-orientation of post-conviction procedures, he does not address how the appellate system can be changed to make it more truthful. Here he diverts from how truth is protected in Germany. At the same time, Bakken leaves the jury un-

296. *Id.* at 561–62.

297. *Id.* at 562.

298. A prosecutor might face potential disciplinary consequences should he or she investigate in an unbalanced manner.

299. The German scholar Franz von Liszt did not agree with the notion that the prosecutor is the “most objective office in the world” because prosecutors are subject to directives, but he stressed the importance of the truth-finding objective as being a key characteristic of that office. Franz von Liszt, *Vortrag im Berliner Anwaltsverein, in DEUTSCHE JURISTEN-ZEITUNG [DJZ]* 179, 180 (1901) (Ger.).

touched in the sense that it still is the fact-finder and its verdict on the factual basis of a case is essentially unreviewable.

Gross includes many features that exist in European systems and proposes to change the judge's role by "leading judicial investigations." This resembles the function and role of German judges. And just like in Germany, Gross's investigative trials are "open-minded, judge-led inquiries into the facts of contested prosecutions."³⁰⁰ Juries are not involved in the fact-finding process, and the trial is seen as a continuing process that narrows the gap between trial and discovery.³⁰¹ Finality is also more limited since a defendant who was convicted at an investigative trial has the "right to reopen the case if he presents substantial new evidence of innocence."³⁰² That resembles section 359 of the German Code of Criminal Procedure.³⁰³

Gross argues that the advantages of the new proceedings should only be available when a defendant waives "major procedural rights,"³⁰⁴ assuming that innocent defendants are likely to benefit from full disclosure and open consideration of evidence. Defendants, in Gross's understanding, have comparatively little to lose. To avoid abusive interrogation tactics, Gross puts an attorney in the interrogation room. This is where the model departs from the German idea of procedural justice. Gross seems to assume that "many guilty defendants . . . hope that essential evidence against them will be suppressed"³⁰⁵ in court and that innocent defendants have nothing to hide and can only benefit from any disclosure. Procedural rights, so it sounds, are for the guilty, not the innocent. At least in Germany, procedural rights and protection serve different purposes than furthering or limiting the truth.³⁰⁶ These protections are in place to prevent a suspect—whether "innocent" or "guilty"—from becoming "the mere objects of criminal proceedings"³⁰⁷ and to ensure that basic ideas of

300. Gross, *supra* note 1, at 1029.

301. *Id.* at 1026.

302. *Id.* at 1027.

303. Section 359 of the German Code of Criminal Procedure allows for a reopening of the proceedings concluded by a final judgment for a variety of reasons. Strafprozessordnung [StPO] [Code of Criminal Procedure], as amended § 359, *translation at* http://www.gesetze-im-internet.de/englisch_stpo/german_code_of_criminal_procedure.pdf [<http://perma.cc/BJZ9-BAY6>] (Ger.). The most important in our context is "new facts or evidence" that tend to support the defendant's acquittal or, upon application of a less severe penal norm, a lesser sentence. *Id.*

304. Gross, *supra* note 1, at 1023.

305. *Id.* at 1024.

306. Ralph Grunewald, *Comparing Injustices: Truth, Justice, and the System*, 77 ALB. L. REV. 1139 (2013/2014).

307. The German Federal Constitutional Court has repeatedly stressed what has become a foundational idea of the German criminal justice system, that the state in its pursuit of justice and the protection of its citizens must not make the suspect the object of the criminal process. The suspect must be given the opportunity to influence the course of the proceedings in order to exercise his rights. While most of these rights could be listed (and many are comparable to the rights a defendant in the United

due process and of the constitution are maintained. From a comparative perspective, at least in the scholarly debate in Germany, there is very little criticism regarding procedural protections that allow too many guilty defendants to leave the court unpunished.

Findley is skeptical of America's career judges and prosecutors because they are drawn from its "sharply adversarial system and culture."³⁰⁸ German (and European) prosecutors, according to Findley, are not comparable to American counterparts in that they do not appear to have the "thirst for winning" that characterizes American prosecutors. The best procedure, Findley argues, is one in which adversarial zeal is combined in one office where a prosecutor and defense attorney work together as "joint inquisitors"³⁰⁹ searching for the truth and developing the evidence. While that will tend to address tunnel vision and other causes of wrongful convictions, it also goes beyond how inquisitorial systems are structured. Findley stresses the importance of zealous advocacy for seeing multiple sides of a case but at the same time promotes an Office of Public Advocacy ("OPA"), where prosecutor and defense rotate and try to share perspectives. Nothing like Findley's OPA exists in continental procedure, and lateral movement between defense and the office of the prosecutor is very rare. But that does not mean it is a bad idea, and if exported it might even improve the German court system. It is not easy to imagine how that can work, but the ability to see both sides of a case and not to become too drawn into a specific office culture helps to promote a truth-oriented investigation. When it comes to procedural rights, Findley distinguishes between procedural rights and the search for truth. Like most European systems, his model affords the defendant almost all constitutional protections, apart from conflict of interest protections.³¹⁰ Findley is also optimistic that a "new culture of objectivity and neutrality in police investigations"³¹¹ could develop when all the evidence is shared and disclosed.³¹² That also is in line with German procedure, where all evidence is collected in one file that is openly shared among defense, prosecutor, and judge. Findley's model, however, does not offer controls for the actual decision-making process, still relying on the jury, which remains the black box. How the objective to find the truth is protected on appeal also is not fully developed in Findley's proposal.

States has), the idea of not becoming an object resonates with fundamental principles of the German Constitution (especially the protection of human dignity). See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 19, 2013, 2 BVR 2628/10, http://www.bundesverfassungsgericht.de/entscheidungen/rs20130319_2bvr262810.html [<http://perma.cc/UZ8K-JL2Y>] (Ger.).

308. Findley, *supra* note 1, at 930.

309. *Id.* at 936.

310. *See id.* at 937.

311. *Id.* at 939.

312. *Id.* at 940.

Slobogin's hybrid model rests on a dual conclusion. First, ordinary (as well as excessive) adversarialism is a "significant cause of various sorts of error"³¹³ and can generate inaccurate verdicts as a result of lawyers' truth-defeating strategies, expert witness bias, and the defendant not testifying in "over half the cases that go to trial."³¹⁴ Second, elements of the adversary system should be kept because, by placing some control in the defendant, adversarialism enhances procedural justice; and the adversary process is constitutionally grounded and deeply embedded in legal attitudes.³¹⁵

Slobogin's model has the strongest inquisitorial features among the proposals, putting the judicial tribunal in charge of actively discovering the truth. Judicial control affects many other elements of the process, more than he can address in his article. Slobogin does address two important truth-related issues: expert witnesses and the defendant's unsworn testimony. Experts must remain neutral and are not agents for either party. If parties disagree with an expert, they can either obtain another court-appointed expert or retain their own.³¹⁶ In addition, because truth matters, Slobogin eliminates the danger of perjury and allows (even encourages) the defendant to give unsworn testimony.³¹⁷ This would also affect the plea bargaining culture as it exists in the United States. Judges would be much more involved in assuring the truthfulness of the facts that underlie the plea.³¹⁸ Slobogin's suggested changes would demand an overhaul of not only the existing criminal procedure but also the culture and training of the judiciary. However, Slobogin's overhaul does not affect the jury as the fact-finder or the reviewability of its decision for factual errors. The jury would hear evidence narratives in a less partisan way and would be allowed to ask questions,³¹⁹ but the "black box" decision-making process itself would still be out of sight because the jury would not be obligated to explain its decision in writing or in a special verdict. Slobogin does not address how an appellate system would respond to his suggested changes. But appellate proceedings must be different in order to make the new model reviewable and enforceable. German criminal procedure requires both a written verdict and ways to review a verdict for factual accuracy, including asking whether the judge fol-

313. Slobogin, *supra* note 1, at 705 (including not just wrongful convictions but also wrongful acquittals and punishment).

314. *Id.* at 705–07.

315. *Id.* at 710–15; see also David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634 (2009).

316. Slobogin, *supra* note 1, at 724.

317. *Id.* at 728.

318. *Id.* at 723.

319. *Id.* at 716–17.

lowed the truth-finding objective. The scope of that review is not uniform and mainly depends on the severity of the case.³²⁰

IV. THEMATIC SUMMARY AND EVALUATION

The five proposals are exhilarating intellectual forays that force readers to think hard about the nature and actual practices in American criminal courts and raise a host of questions. Although reconceiving the trial is not a new exercise in American legal thought, the essays we review are driven by the sure knowledge that the actually innocent are routinely convicted. But empirically grounding innocence consciousness is a new thing. It gained a foothold in the 1990s and early 2000s, and the legal community is only now acknowledging it as a reality. While knowledge of wrongful convictions gives the proposals urgency, it does not mean they are feasible or wise. Any reform program will need to closely scrutinize the elements of the proposals and take a closer look at the wrongful conviction problem itself. The obvious fact that the proposals are not ripe for quick adoption is not an excuse to jettison the reform project. Feasibility of adoption, in full or in part, requires more thought. A second wave of analysis should examine whether the proposals are overly complex or perhaps not sufficiently worked out. Whether reform should occur piecemeal or *in toto* is another question. More thinking is required about possible side effects, positive as well as negative. We now review several issues.

A. *What is the Problem?*

The proposals acknowledge wrongful conviction as a significant problem requiring reform. We agree, but not all American jurists and lawyers may think that the numbers of known official exonerees—more than 1,650 as of this writing³²¹—justify radical action.³²² Therefore, reform campaigns at the state legislative or legal community level will need to convince skeptics that the problem is significant. Although the true number of actual innocence convictions cannot be known, the most plausible lowest estimate, assuming about one million felony convictions a year (with a .5% error rate) puts the number of wrongful convictions at about 5,000 a year, with 40% (or 2,000) receiving prison terms. A still-plausible 2% error estimate runs to 20,000 wrongfully convicted and 8,000 wrongfully imprisoned annu-

320. See Grunewald, *Comparing Injustices*, *supra* note 306, at 1186–87. It might sound counter-intuitive but the more serious a case is, the less factual review is possible in Germany. See *id.*

321. THE NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> [<http://perma.cc/RB9K-WYRD>].

322. Judge Alex Kozinski, by adding his trenchant voice, will likely cause thoughtful jurists and lawyers to consider the possibility that from 22,000 to 110,000 American prisoners may be innocent. See Kozinski, *Criminal Law 2.0*, *supra* note 15, at xiv–xv.

ally.³²³ These estimates are based on a few empirical studies and a qualitative analysis of the systemic weaknesses of the American criminal justice system.³²⁴ The latest and most statistically sophisticated estimate of death penalty miscarriages of justice established a conservative estimate that the rate of exoneration among those sentenced to death between 1973 and 2004 “who remained under threat of execution for 21.4 y[ears] was 4.1% (with a 95% confidence interval of 2.8–5.2%).”³²⁵ If every defendant in America sentenced to death in

323. Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 225 tbl.1 (2012).

324. See Marvin Zalman, *Measuring Wrongful Convictions*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 3047 (Gerben Bruinsma & David Weisburd eds., Springer 2014). Only one empirical study did not involve death penalty cases, analyzing an unbiased cohort of 634 Virginia post-conviction sexual assault and/or homicide evidence files that resulted in 715 convictions dating from 1973 to 1987. Biological evidence retained in the files was subjected to DNA testing. In 5.3% of the cases, the offender was eliminated as a source of DNA, and the DNA exclusion was accompanied with probative evidence that appeared to support exoneration. In another 2.5% of the cases, the offender was eliminated as a source of DNA, but the exclusion was not accompanied with probative exoneration evidence. This is the strongest empirical evidence to date that establishes the existence of a substantial proportion of wrongful convictions in a sample of *general* cases, rather than in groups of cases that were targeted because they appeared to be miscarriages of justice. And, the likely percentage of innocent defendants is more than double the high “plausible” qualitative estimate.

325. Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. 7230, 7233 (2014), <http://www.pnas.org/content/111/20/7230.full.pdf> [<http://perma.cc/D8AG-ZEJM>] (applying statistical survival analysis to death-sentenced defendants). The study by Gross, O'Brien, Hu, and Kennedy is the latest of only three studies of precise cohorts of murder to death penalty cases. A complex analysis of 1992 murder commitments to prison in New York estimated an error rate of 1.4%. Tony Poveda, *Research Note: Estimating Wrongful Convictions*, 18 JUST. Q. 689, 697 (2001). An earlier study by Gross and O'Brien examined 2,394 death sentences pronounced in US courts from 1973 to 1984 and calculated an exoneration rate of 2.3%. Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 945 (2008). They pointed out that the rate was likely higher because some innocent prisoners may have been executed, forewent appeals, died from other causes, or had their sentences commuted to life terms. *Id.* at 946–47. Risinger compared two sets of defendants sentenced to death for rape and murder against 11 DNA exonerations for those crimes during comparable time periods. D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007). The numerator was discounted to 10.5 exonerations to produce a conservative estimate of 3.3%. *Id.* at 768–80. Although the latest Gross et al. study was based on many non-DNA exonerations and only a few DNA cases and did not apply a discount, as did Risinger, the authors acknowledged that “[s]ome exonerated defendants are guilty of the crimes for which they were sentenced to death.” Gross et al. *supra*, at 7234. But they also pointed out that “some innocent defendants who remained on death row for more than 21.4 y[ears] but were not exonerated are misclassified as guilty.” *Id.* The advance of this study is that it demonstrates that an estimated death-row exoneration rate must account for the greater efforts to exonerate those still under threat of death and estimates a likely exoneration rate for those executed, resentenced to life, or who died by other causes (a censored population, to apply the statistical term) by applying sophisticated statistical techniques (survival analysis and

those years was executed, *at least* four innocent prisoners of every hundred would have been killed.³²⁶ Perhaps more disturbing than that conclusion was the finding that, once prisoners were removed from death row, their exoneration rates fell sharply, because the urgency of continuing the expensive and arduous legal exoneration process decreased.³²⁷ While keeping in mind that exonerations are proxies for wrongful convictions, that the relationship of the two are subject to further analysis, and that the plausible upper level of wrongful convictions for the general run of felonies is subject to speculation,³²⁸ it is safe to say that a prosecutor-generated extremely low rate of 0.027% was bogus.³²⁹ This quick review makes it clear that exonerations are few because the barriers to exoneration are great,³³⁰ the efforts to exonerate the wrongfully convicted are enormous, and most wrongfully convicted defendants will never be exonerated. In short, the problem is large, affecting thousands or tens of thousands of wrongfully convicted defendants every year.

This issue will need to be argued in every reform venue because most lawyers are ignorant of this knowledge. For all the wishful thinking about DNA exonerations, the justice system will never be able to adequately deal with wrongful convictions through post-conviction exonerations. Structural reform is imperative. But whether the five proposals are the most appropriate remains in question.

B. *Feasibility*

Each author is aware of his proposal's distance from current-day criminal procedure. Risinger wrote that his suggestions "may appear radical, and . . . [are] unlikely to be explicitly adopted by statute or rule anytime soon."³³¹ Gross, Findley, and Slobogin call their proposals thought experiments.³³² Among the five proposals, Findley's Of-

the Kaplan-Meier estimator; sensitivity analysis) to generate an estimate that goes beyond the raw proportion of death row exonerations of 1.6%. *Id.* at 7233–34.

326. See Gross et al., *supra* note 325, at 7231–34.

327. See *id.*

328. This includes the issues of false positives (exonerees who are factually guilty) and false negatives (non-exonerated who are factually innocent).

329. See Samuel R. Gross, *Souter Passant, Scalia Rampant: Combat in the Marsh*, 105 MICH. L. REV. FIRST IMPRESSIONS 67, 69 (2006) [hereinafter Gross, *Souter Passant*]. Justice Scalia, concurring, incautiously repeated this figure in *Kansas v. Marsh*, 548 U.S. 163, 197–98 (2006) (Scalia, J., concurring). His argumentative concurrence can stand for the adversary lawyer's penchant for both turning an examination of a complex issue into a detailed forensic analysis of specific cases as well as the casual use of data. There are forests and trees and times to look at the former.

330. "Convicted prisoners wishing to gain release on grounds of innocence face formidable hurdles." Kozinski, *Criminal Law 2.0*, *supra* note 15, at xv.

331. Risinger, *supra* note 1, at 1335; see also Bakken, *supra* note 1, at 547 ("This Article proposes a fundamental change to the adversarial system and the American criminal justice process.").

332. Findley, *supra* note 1, at 914; Gross, *supra* note 1, at 1030; Slobogin, *supra* note 1, at 716.

office of Public Advocacy seems the least likely to be adopted, given its radical restructuring of lawyers' roles.³³³ Gross's Investigative Trial is also an unlikely candidate for adoption *in toto*, given its need to recalibrate the trial penalty to work. Yet, to the degree that it is modeled on civil trials, it may be more feasible than Findley's. Bakken's pro-innocence presumptions, proposed as a "fundamental change to the adversarial system,"³³⁴ would generate fierce opposition from prosecutors and raise questions about guilty defendants gaming the system.

Attitudes about the likelihood of adoption run from the view that adoption is impossible and that innocence advocates should work on more feasible reform projects³³⁵ to the view that imminent implementation is less important than discussing these issues. Inherent in the latter view is the hope that further discussion will lead to some trial process reforms, perhaps less comprehensive, that improve accuracy. We agree with Risinger that imminent adoption is unlikely.³³⁶ But because current trial processes do not adequately screen out erroneous indictments, we believe the proposals are valuable starting points and should be conversation starters in law schools, bar associations, think tanks, professional legal organizations, and wherever else critical thinking about the justice system takes place.³³⁷

Two potential roadblocks to adoption are the complexity of the American adversary process and the vagaries of policy making in our democracy. We note these concerns and set them to the side. Our comparison of the proposals shows that just getting a handle on the issues involved in trial process reform is no easy matter. Beyond the items listed in Table 1,³³⁸ a practitioner could easily think of additional factors that influence how a real legal system operates and can also

333. One might ask how lawyers would be trained for such radical departures from advocacy, how such an experiment would be funded, and more.

334. Bakken, *supra* note 1, at 547.

335. That is, the list of canonical causes and reforms associated with them. *See supra* note 10.

336. Yet, the remarkable example of the North Carolina Innocence Inquiry Commission ("NCIIC"), a state fact-finding post-conviction agency, offers hope that even radical reform is possible under the right political conditions. *See* Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 *DRAKE L. REV.* 647 (2004) (describing the agency that conceived the NCIIC); Christine C. Mumma, *The North Carolina Innocence Inquiry Commission: Catching Cases that Fall Through the Cracks*, in *WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE* 249 (Marvin Zalman & Julia Carrano eds., Routledge 2014) (describing the organizational dynamics and politics leading to the creation of the NCIIC) [hereinafter Mumma, *Catching Cases*].

337. The Authors acknowledge that this point needs additional research and discussion and cannot simply be assumed; skeptics can raise serious questions about the origin of wrongful conviction that ought to sharpen the insights of reform proponents.

338. *See supra* tbl.1.

result in error.³³⁹ Even the most feasible reform³⁴⁰ would require years of discussion and support from, for example, a state bar committee, and then a state bar association, before vetting by state defense, prosecution, and judges' associations. Finding a sponsor in a judicial committee of a state House of Representatives or Senate is crucial to success. After sponsorship and three or four years of legislative hearings, revisions, and inside review by the state's attorney general, a bill *may* get to the floors³⁴¹ of the state's legislative chambers, and *might* have a chance of passage and signing by the Governor. We appreciate that the concern of political scientists and policy analysts regarding the policy implementation process is beyond the usual concern of legal writing, but political and policy implementation will be essential; and it is clear that the proposals, even implicitly, gave some thought to feasibility.³⁴² We set these concerns aside with the reminder that they will have to be addressed when ideas move from proposal to policy.

To clarify this point slightly further: the vantage point we take is systemic. We acknowledge that reforms could also happen on a local or ad-hoc level, and we consider this as a possibility. Tim Bakken suggests that a demonstration project could display the feasibility of novel procedures.³⁴³ It would take just one district attorney with a good working relationship with the police, a willing judge, and defend-

339. Findley and Scott, for example, review the impact on tunnel vision of evidence law's direct connection doctrine and hearsay exception for statements against penal interest and argue for easing restrictions on such types of evidence proffered to bolster the defendant's innocence. Findley & Scott, *supra* note 4, at 342–46, 355–65. They note that “our system typically does not prescreen evidence for reliability, but relies on juries and cross-examination to test the veracity of evidence.” *Id.* at 358. These are just two examples of the kind of system detail and complexity that will have to be engineered into the proposals' larger structural changes.

340. Possibly Risinger, which makes the fewest changes to the trial process and focuses on one type of jury trial procedure. However, adding Risinger's appellate “safe verdict” standard complicates adoption, perhaps exponentially, because adopting the English standard opens the radical idea of appellate courts reviewing factual issues. Yet, SIMON, *supra* note 9, at 202, suggests that appellate court review of facts has “the potential to increase the diagnosticity of the adjudicative process.”

341. Floor in Nebraska.

342. Many law professors have experience in the legislative arena, but as academicians their job, so to speak, is to propose policies and not to be directly concerned with the details of implementation. For discussions about innocence policy implementation, see Nancy Marion & Marvin Zalman, *Towards a Theory of Innocence Policy Reform*, in *CONTROVERSIES IN INNOCENCE CASES IN AMERICA* 175 (Sarah Lucy Cooper ed., Ashgate 2014); Marvin Zalman & Nancy E. Marion, *The Public Policy Process and Innocence Reform*, in *WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE* 24 (Marvin Zalman & Julia Carrano eds., Routledge 2014). For more extended coverage of policy development and implementation regarding innocence policies, see Marvin Zalman & Julia Carrano, *Sustainability of Innocence Reform*, 77 *ALB. L. REV.* 955 (2013/2014). For a description of innocence reform politics and implementation, see Mumma, *Catching Cases*, *supra* note 336; Rebecca Brown & Stephen Saloom, *The Imperative of Eyewitness Identification Reform and the Role of Police Leadership*, 42 *U. BALT. L. REV.* 535 (2013).

343. Email from Prof. Tim Bakken to Dr. Marvin Zalman and Dr. Ralph Grunewald (June 14, 2015) (on file with the Authors).

ants willing to waive the jury trial right to create a quasi-inquisitorial court and trial experiment that might be well worth trying. It is somewhat surprising that in the two decades since the American innocence movement was born, very little trial-procedure innovation has happened even at the county level. This is much in contrast to movements like the Problem Solving Court, which demonstrates how a grassroots initiative without much legislative support could develop a strong momentum and change existing court structures and practices.³⁴⁴

One aspect of feasibility that goes to the core of the proposals requires further discussion: the concern with adversarial ideology.

C. Adversarial Ideology

All authors of the proposals were aware of gaps between adversarial and inquisitorial models and understood inquisitorial proposals to be a hard sell. That difficulty is illustrated in David Alan Sklansky's review of four constitutional law doctrines in which the Supreme Court has seemingly entrenched "anti-inquisitorialism."³⁴⁵ By this, he means that a mental image of the continental justice system has played a "broad and enduring" role in American criminal jurisprudence as an ideal "contrast model" to our adversary system. "There is a broad consensus that the inquisitorial system can and should serve as a kind of negative polestar for American criminal procedure."³⁴⁶ Sklansky admits that scholars occasionally suggest borrowing from European criminal procedure, "[b]ut these are voices in the wilderness."³⁴⁷ If the attitude he describes is limited to Supreme Court justices, it may not impede state-level procedural reforms, but Sklansky makes a sociological assertion:

If they think about it at all, the vast majority of American scholars, like the vast majority of American judges, are apt to agree with the Supreme Court that "the civil-law mode of criminal procedure," far from meriting emulation, should be studiously avoided—indeed,

344. Problem Solving Courts do "not only resolve disputed issues of fact, but also to attempt to solve a variety of human problems that are responsible for bringing the case to court These newer courts, however, attempt to understand and address the underlying problem that is responsible for the immediate dispute, and to help the individuals before the court to effectively deal with the problem in ways that will prevent recurring court involvement." Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 *FORDHAM URB. L.J.* 1055, 1055 (2003); see also BERMAN, *supra* note 124.

345. Sklansky, *supra* note 315. The four areas Sklansky reviewed as seedbeds of anti-inquisitorialism are (1) confrontation and the changes wrought by *Crawford v. Washington*, 541 U.S. 36 (2004); (2) the Court's confrontation cases regarding sentencing and juries; (3) procedural default (including the debate about citing foreign law); (4) and confessions law. *Id.*

346. Sklansky, *supra* note 315, at 1635–36.

347. *Id.* at 1638.

that avoiding inquisitorial justice is what our own system is all about.³⁴⁸

Although the point is not empirically supported and may be exaggerated for emphasis, it seems generally correct. American lawyers take mandatory courses on civil procedure and evidence law in law school and train to be adversary-style advocates; criminal procedure is a popular elective.³⁴⁹ Relatively few law students take comparative criminal procedure seminars, which do not develop the kinds of skills honed in clinical courses. Litigators—meaning virtually all criminal attorneys—develop hard-won skills that make them adept in the arcane world of American trial practice. When these lawyers become members of prestigious bar committees or other venues in which law reforms can advance, most are likely to be ignorant of continental criminal procedure, even if not hostile to the idea.

One would expect that when the Supreme Court raises anti-inquisitorial rhetoric (“ours is an accusatorial and not an inquisitorial system”³⁵⁰) it would define what that “inquisitorial system” is. But the Court does not. It uses “civil law system” and “inquisitorial system” interchangeably without noting differences or explaining either.³⁵¹ It remains unclear what the Supreme Court thought was wrong with the continental system “or how it threatened values that warranted constitutional protection.”³⁵² But even if the foundation of the contrast model is thin, it can still lead to harmful stereotypes that are factually wrong.³⁵³ Images are created that can stop lawyers from thinking beyond the scope of what they have learned in law school.³⁵⁴

Is change possible? On close inspection, Sklansky addresses an attitude, not a constitutionally grounded rule—and attitudes can change.

348. *Id.*

349. Law students taking co-author Zalman’s graduate-school wrongful conviction seminar have expressed astonishment at the grimy reality of criminal law from sources like GARRETT, *supra* note 9, claiming that their law school criminal procedure courses present an idealized version of legal practice.

350. *Rogers v. Richmond*, 365 U.S. 534, 541 (1961).

351. *See* Sklansky, *supra* note 315, at 1639. Comparative scholarship usually describes “civil law” as a *legal tradition* that is based on codification and “inquisitorial” as a type of a *procedural system* within a given tradition. *See, e.g.*, PHILIP REICHEL, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS* 80 (6th ed., Pearson 2013).

352. Sklansky, *supra* note 315, at 1639. Sklansky further argues that this usage reflects the Court’s understanding that continental European legal systems “are still identifiably the outgrowths of the inquisitorial systems of medieval Europe.” *Id.*

353. For example, in *Crawford v. Washington*, 541 U.S. 36, 50, 67 (2004), the Court sees cross-examination as the greatest legal engine ever invented to “tease out the truth.” It went unnoticed that inquisitorial systems have comparable instruments to question the credibility of a witness. When the Supreme Court decided *Miranda v. Arizona*, 384 U.S. 436 (1966), and stated “our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system,” *id.* at 477, inquisitorial systems like the German already had established protections against self-incrimination for almost ninety years.

354. *See* Sklansky, *supra* note 315, at 1641.

Even though the Supreme Court's criminal procedure interpretations appear adamantly anti-inquisitorial, proposals that do not fit into some adversary ideal may someday have a chance of acceptance.³⁵⁵ The imperfect discovery rule of *Brady v. Maryland*,³⁵⁶ for example, has long been viewed as an adversary system modification,³⁵⁷ driven by a concern about convicting the innocent. Thus, *Brady*'s "purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur."³⁵⁸ To guard against such miscarriages, the Court in *Brady* modified party presentation of evidence—a central tenet of the adversarial system. In the long view, the Supreme Court is a singular political-legal institution that follows public opinion in its own way.³⁵⁹ As such, it might eventually uphold "inquisitorial" modifications to the adversary trial, depending on a constellation of factors including public opinion, justices' views of the seriousness of the wrongful conviction problem, and shifts in the Court's attachment to established procedures.³⁶⁰

D. Ideological Attacks

Virtually every legal issue, no matter how abstract the subject, occurs in a world of contest; criminal law is inherently conflictual. Even a unifying issue like wrongful conviction (nobody is for it) has generated its share of questioning, from conservative doubts about the reality of the problem to liberal fears that raising innocence issues for some defendants will subvert the presumption of innocence for many

355. Despite anti-inquisitorialism displayed by the Court in its Confrontation Revolution, *id.* at 1642–56, or the Supreme Court's refusal to find a due process violation in a state's denial of post-appeal DNA testing, *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 55–56 (2009), the passage of post-conviction DNA testing statutes without much criticism shows that accuracy can trump ideological attachment to the forms of adversarialism. For a contrary view of *Osborne*, see Brandon L. Garrett, *DNA and Due Process*, 78 *FORDHAM L. REV.* 2919 (2010). As Keith Findley put it, "Convicting the guilty and exonerating the innocent truly cuts across political and ideological lines." Keith A. Findley, *New Laws Reflect the Power and Potential of DNA*, *WIS. LAW.*, May 2002, at 20 <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=75&Issue=5&ArticleID=353> [<http://perma.cc/9SWA-6BGB>]. And across systemic lines, one might add.

356. *Brady v. Maryland*, 373 U.S. 83 (1963).

357. "By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985).

358. *Id.* at 675.

359. RICHARD A. POSNER, *HOW JUDGES THINK* 269–323 (Harvard Univ. Press 2008) (presenting a chapter entitled, "The Supreme Court is a Political Court").

360. The clash in *Kansas v. Marsh*, 548 U.S. 163 (2006), between Justice Scalia's concurrence and Justice Souter's dissent regarding the degree to which wrongful convictions constitute a critical issue is emblematic of the underlying concern. See Gross, *Souter Passant*, *supra* note 329.

others.³⁶¹ Aside from the practical barriers created by inertia and a psychological bias toward the value-laden adversary system, anti-inquisitorialism can take the form of conservative rear-guard sniping or progressive pro-defendant protectionism. The proposals thus can expect to face double-barreled opposition from progressives and conservatives. Robert Mosteller's cogent description of how difficult it is for practicing defense attorneys to know with certainty whether most clients are factually innocent³⁶² explains his opposition to Bakken's and similar proposals. Mosteller rejects them on the ground that innocence will "become a wedge issue" that fractures progressives into blocs: those who support innocence reforms and others who support only reforms (especially enhanced defense resources) that benefit all defendants.³⁶³

Mosteller's skepticism of proposals to create innocence trial procedures follows other critiques by progressive defense lawyer-scholars that centered on the fear that adopting innocence procedures would cast a shadow on the vast majority of cases in which defendants are in fact guilty of some offense. The concern is that as the public comes to know of parallel innocence procedures, jurors in standard trials will not be able to overcome their suspicions of the defendant's guilt—in effect destroying the always-fragile presumption of innocence.³⁶⁴ To give this concern some credence, the innocence movement has positioned itself to move away from its natural base in the defense community to develop an "accuracy model" ideology,³⁶⁵ especially as it advocates reforms that strengthen the defense while helping make police investigation and prosecution more accurate. Beyond fulfilling the professional ethic that the guilty deserve skillful advocacy, defense lawyers are essential to the larger society, in part because they blunt

361. See Morris B. Hoffman, *The Myth of Factual Innocence*, 82 CHL-KENT L. REV. 663 (2007); Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449 (2001). Daniel Medwed, however, argues that innocence concerns will not undermine due process values. Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549.

362. Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1 (2010).

363. *Id.* at 2, 38–40 (footnote omitted); see also Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931, 935 (2010).

364. See Raymond, *supra* note 361; Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219 (2005); Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315 (2010); David Feige, *The Dark Side of Innocence*, N.Y. TIMES MAG., June 15, 2003, at 15, <http://www.nytimes.com/2003/06/15/magazine/15ESSAY.html> [<http://perma.cc/S3WX-PYBR>].

365. See Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133 (2008). As Risinger and Risinger demonstrate, the innocence lawyer role diverges from that of a "cab rank" defense lawyer in several ways. Risinger & Risinger, *Emerging Role*, *supra* note 154.

the worst excesses of our present justice system's exceptionally harsh penalties³⁶⁶ and bring balance to a power structure where prosecutors often get away with egregious violations.³⁶⁷ Moreover, defense lawyers highlight cruel and excessive "supermax" prisons and the huge damage that the mass incarceration system, fueled by the war on drugs, has inflicted on state education and social services by hobbling budgets for two generations.³⁶⁸

As if on cue, Paul Cassell, a noted conservative jurist—and one of the first to tilt his lance against innocence arguments, even before the modern innocence movement was born³⁶⁹—echoed Mosteller's point about the difficulties of picking innocence needles out of the guilty haystack.³⁷⁰ Cassell asserted that fiscal limitations pressure defense attorneys to attack procedural defects in the evidence instead of its substantive qualities.³⁷¹ Two of the proposals reviewed in this article raised concerns that innocence procedures would allow guilty defendants to "play the system,"³⁷² and worse, increase the possibility of wrongful acquittals. Slobogin avoids the problem by applying his judge-run system across the board and eliminating party-control of the evidence at trial. Gross is also alert to the difficulty of sorting the innocent from the guilty;³⁷³ in recognition, he would create a disincentive in the form of an increased sentence for innocence-procedure defendants who dropped out and pleaded guilty. It is hard to know whether this device would lessen false claims of innocence. There may be something of a conservative red-herring aspect to the specter of false acquittals.³⁷⁴ One false lead is to conflate the very large number of non-reported and non-arrested crimes (which are social and police system concerns and not flaws in the adjudication process) with the

366. See Goldstein, *supra* note 285.

367. See Alex Kozinski, *Foreword of SIDNEY POWELL, LICENSED TO LIE: EXPOSING CORRUPTION IN THE DEPARTMENT OF JUSTICE*, at XI–XVII (Brown Books 2014) (describing prosecutorial misconduct in prosecutions of Arthur Anderson executives and Senator Ted Stevens); Kozinski, *Criminal Law 2.0*, *supra* note 15, at xxiii–xxiv.

368. See NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 184–89 (Jeremy Travis et al. eds., Nat'l Research Council 2014); see also *infra* note 414 and accompanying text. As the Authors note, adversary system lawyers should better understand the rights protections that exist in continental criminal procedure. See *supra* Part III, Section C.

369. Stephen J. Markman & Paul G. Cassell, *Comment: Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988).

370. See Mosteller, *supra* note 362, at 13–30.

371. Cassell, *supra* note 37, at 1067–68, 1086–92.

372. As prisoners now do by asking innocence organizations to review their cases. See Gwendolyn Carroll, *Proven Guilty: An Examination of the Penalty-Free World of Post-Conviction DNA Testing*, 97 J. CRIM. L. & CRIMINOLOGY 665 (2007).

373. Gross, *supra* note 1, at 1014–21.

374. The case that innocence activism may increase crime was made in a convoluted way, with scientific window dressing, by leading scholars. See Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65 (2008). For a response, see D. Michael Risinger, *Tragic Consequences of Deadly Dilemmas: A Response to Allen and Laudan*, 40 SETON HALL L. REV. 991 (2010).

much smaller number of false acquittals in the 5% of cases that go to trial.³⁷⁵ Although unable to provide definitive figures about false acquittals or false convictions in jury verdicts, Givelber and Farrell's careful study of verdicts provides a basis "to suggest that when juries acquit those who refuse to plead because they insist they are innocent, those defendants are likely to be individuals who did not commit the crimes with which they were charged."³⁷⁶

E. *Police Investigation and the Judicial Process*

The impartial investigation is a central feature of the inquisitorial.³⁷⁷ Two of the proposals considered police investigation. Findley's OPA prosecutor and defense lawyer would jointly supervise police investigation and could jointly request additional investigation.³⁷⁸ Bakken's innocence plea would trigger innocence-oriented police investigation.³⁷⁹ We cannot fault the other authors for not attending to police investigation, as their chief focus was on the judicial process. Yet the sharp separation of police from adjudication speaks volumes about the structure of the American adversary system and the way American criminal law scholars view "criminal justice" (i.e., law enforcement) as an allied but remote field akin to forensic science.³⁸⁰ Unless defendants (or prosecutors) have their own criminal investigators, the "facts" determined by fact-finders can go no further than the facts that police investigators present.³⁸¹ Local or county agencies in-

375. Cassell, *supra* note 37, at 1079 tbl.1, presents a table of the national crime funnel that creates an especially scary picture of a tiny fraction of 6 million "violent" crimes in 2006 that resulted in prison sentences. A closer view of the National Crime Victimization Survey shows that 3.75 million of those "violent" (actually, "person") crimes were simple assaults in which 76% of the victims suffered no injury and the other 24% slight injury, 173,000 were purse snatching/pickpocketing, and 230,000 were attempted robberies (of which 19% included injury). BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 223436, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2006 STATISTICAL TABLES tbl.1 (2008), <http://www.bjs.gov/content/pub/pdf/cvus06.pdf> [<http://perma.cc/XF9M-U5SH>]. Person crimes are genuine concerns that persist and need to be reduced—even after the great crime drops of the 1990s—but the "law and order" or "arrest and imprison" impulse is only a part of the solution.

376. GIVELBER & FARRELL, *supra* note 289, at 142.

377. See *supra* Part III, Section A; see also Risinger & Risinger, *Innocence is Different*, *supra* note 33.

378. See *supra* Part II, Section D.

379. See *supra* Part II, Section B.

380. To a significant degree, European law students study criminology. Michael Tonry, *Criminology and Criminal Justice in Europe*, in PUNISHMENT, PLACES AND PERPETRATORS: DEVELOPMENTS IN CRIMINOLOGY AND CRIMINAL JUSTICE RESEARCH 21, 23 (Gerben Bruinsma et al. eds., Wilan Publishing 2004).

381. "The police, and then the prosecution in cooperation with the police, have a monopoly on information gathering and assembly (*vel non*) in secret until a charging decision is made. By the time any effective adversary involvement comes about, the most important part of the case is often (or even usually) over." Risinger & Risinger, *Innocence is Different*, *supra* note 33, at 884–85. Slobogin cited Jerome Frank's *Courts on Trial* for the way in which trial advocacy can distort facts. Slobogin, *supra* note 1,

investigate and prosecute the bulk of crimes; police are executive-branch agencies answerable to municipal or county government. Prosecutors are mostly elected, executive-branch county officials. Although prosecutors and law enforcement must interact and cooperate to adjudicate cases, their relationship is essentially based on comity. It may run smoothly, or it may be fraught with operational and political obstacles.³⁸²

With regard to law, European police and courts are more closely bound. In France, only two police agencies investigate crimes: the National Police and the Gendarmerie. This suggests more uniform investigation standards throughout the country than may be the case with America's thousands of local law enforcement agencies.³⁸³ A significant aspect of French law is the defendant's limited right to request that the examining magistrate conduct a specific investigation.³⁸⁴

at 705–06 (citing FRANK, *supra* note 11, at 82, 85–86). However, Frank also wrote about the uncertainty of “facts” in law cases. FRANK, *supra* note 11, at 14–33 (writing a chapter entitled, “Facts Are Guesses”).

382. See Cole, *supra* note 257.

383. See CHRISTINE HORTON, POLICING POLICY IN FRANCE 3 (PSI Research Report No. 782, 1995). The National Police come under the Ministry of the Interior and the Gendarmerie under the Ministry of Defense. Local police departments do not have major crime investigation responsibilities. *Id.* at 26. Two major police forces are designed to maintain a separation of powers and not allow all police power to fall under one political agency. *Id.* Prosecutors, magistrates and judges are organized under a central Ministry of Justice. Police officers cannot exercise full powers to investigate cases until they take a two-year part time study course and pass an examination and are designated Officers of Judicial Police. *Id.* at 27. French police investigators work under a double hierarchy, the police and the judiciary. *Id.* at 31. Police investigators rarely appear in court and a substantial part of the crime investigation is carried out by the instructing magistrate (*le juge d'instruction*) who interviews suspects and witnesses. *Id.* at 35. Judicial oversight of French investigations, at least in serious cases, may lengthen the pre-trial investigative stage far beyond what is the norm in the United States but will result in a detailed dossier. McKillop, *supra* note 284.

384. See Vogler, *supra* note 205, at 233–34.

[T]he examining magistrate must look with equal diligence for exculpatory as well as for inculpatory factors, [but] the *instruction* does not operate on the basis of equality between the parties. Whereas the prosecutor can “require” the examining magistrate to carry out certain investigations and may appeal against any refusal to do so, the defendant and the civil party remain in a somewhat less advantaged position. It is true that since 1993 they have been able to file a “request” (*demande d'acte*) and a refusal by the examining magistrate to respond must be given in writing and is subject to appeal. However, their rights of appeal are still inferior to those of the prosecutor since all their appeals are subject to a “filtering process” by the president of the instruction court. Also, the prosecutor has permanent access to the dossier and his office is situated in the same building as that of his professional colleague, the examining magistrate.

Id. at 205 (footnote omitted); see also McKillop, *supra* note 284, at 539–40 (describing where the defendant in a murder case, after being asked by investigating judge if he wished for additional investigations to be carried out, declined the opportunity); *id.* at 543–44 (describing a prosecutor who files a supplementary requisition to the investigative judge, requesting a specific investigation related to revolver shots be conducted).

Germany has a decentralized, coordinated police structure where each state controls its own police force. Despite the potential for great divergence, there is considerable similarity between various state police agencies, due to tradition and comparable police laws. Under German law, prosecutors are responsible for the investigation and are vested with broad powers. The prosecutor is the “master of the investigation” (*Herrin des Ermittlungsverfahrens*) and has the authority to give orders to the police. In many cases those directives are necessary for legitimate investigative action because the prosecutor is not a political arm of the state but rather an impartial officer of the court and a representative of constitutional values.³⁸⁵ In practice, police control the investigations without being subject to a lot of oversight. “[T]he great majority of police officers are also ‘auxiliary officers’ of the prosecutor’s office, and can be dispatched to conduct further investigations.”³⁸⁶ Under specific (exigent) circumstances, those investigatory officers have the right to conduct searches and seizures and to make arrests. What we see in a description of the German system is a structurally closer police-prosecution-court relationship. In cases of “minor or medium seriousness, the police take responsibility for the investigation”³⁸⁷:

The extent of interaction between the police and prosecutor depends very much on the demands of the case, its seriousness and whether special measures are needed in the course of the investigation. Thus informants, for example, are not generally used until the prosecutor has agreed. In cases of serious crime, organised crime, as well as some other high profile cases, there is close contact between prosecutor and police throughout the case.³⁸⁸

German defense lawyers may conduct independent investigations but do not have subpoena rights.³⁸⁹ Although the parties (prosecutor and defense) “have neither control over the presentation of evidence nor any power to seek a discontinuance of the proceedings,” the defendant “has a right to participate actively in the process of establish-

385. LEIGH & ZEDNER, *supra* note 223, at 27. “When the office of public prosecutor was created in 1848, it was considered as a judicial control over executive action and that ideal [still] informs the German system.” *Id.*

386. Frase & Weigend, *supra* note 25, at 323. In 2004, the term “auxiliary officer” (*Hilfsbeamte*) was changed to *Ermittlungsperson*, which translates to “investigatory officer/person,” in order to account for the changed relationship between prosecutor and police. Police are not in a mere supporting (helping) role anymore; they conduct investigations independently and with little direct supervision by the prosecutor.

387. LEIGH & ZEDNER, *supra* note 223, at 28.

388. *Id.*

389. Frase & Weigend, *supra* note 25, at 341. The right of compulsory process is guaranteed by the United States Constitution, U.S. CONST., amend. VI, and was incorporated through the Fourteenth Amendment’s Due Process Clause to apply to state and local cases. *Washington v. Texas*, 388 U.S. 14, 18 (1967).

ing the truth by putting questions, making suggestions . . . or bringing motions to take further evidence.”³⁹⁰

F. *The Jury*

All the models, save Gross’s,³⁹¹ keep the jury as the main fact-finder in light of its constitutional status and its deep roots in American culture.³⁹² Keeping the jury raises questions of verdict accuracy when considered against the many wrongful jury verdicts among known exonerations.³⁹³ Some indirect empirical research has suggested significant jury error rates. Baldwin and McConville drew on opinions of participants in English jury trials to estimate questionable results in 36% of acquittals and 5% of convictions.³⁹⁴ Bruce Spencer assumed that juries found guilty 25% of defendants who, in the eyes of a judge, should have been acquitted; this resulted in a 10% jury error rate.³⁹⁵ Against this, Givelber and Farrell offer some support for jury accuracy and Risinger suggests that juries perform at least as well as judges in state-of-mind cases.³⁹⁶ The mixed data raise questions requiring more careful exploration before adopting a reform proposal, particularly regarding whether judges are more accurate or likely to acquit an innocent defendant.³⁹⁷

Even the most inquisitorially oriented pre-trial and trial procedure will not achieve greater accuracy if it is ultimately the unreformed jury

390. Huber, *supra* note 244, at 291 (citations omitted).

391. Gross, *supra* note 1, at 1026, 1028.

392. *Singer v. United States*, 380 U.S. 24, 27–36 (1965) (stating that defendants cannot waive federal jury trial without consent of court and prosecution and tracing the rule through common law and colonial history).

393. *See Update: 2012 THE NAT’L REGISTRY OF EXONERATIONS*, https://www.law.umich.edu/special/exoneration/Documents/NRE2012UPDATE4_1_13_FINAL.pdf [<http://perma.cc/4ZWF-Z2K3>]. As is well known, almost all of the early DNA exonerations have resulted from jury verdicts. In 2012, the National Registry of Exonerations reported that among the first 1,050 exonerations, 82.2% were convicted in jury trials 7.0% were convicted in bench trials, 9.4% pleaded guilty, and data for type of adjudication was unknown in 1.2% of the exonerations. *Id.* at 5. As the National Registry of Exonerations reports more non-DNA cases and more exonerations from crimes less serious than murder and rape, the proportion of exonerations resulting from jury trials can be expected to drop. In 2014, 38% of reported exonerations resulted from guilty pleas, the highest rate and part of a trend. NAT’L REGISTRY OF EXONERATIONS, *EXONERATION IN 2014* 3, http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf [<http://perma.cc/Z7KA-PK26>].

394. JOHN BALDWIN & MICHAEL MCCONVILLE, *JURY TRIALS* 54, 86 (Clarendon Press 1979).

395. Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305, 317–18 (2007).

396. GIVELBER & FARRELL, *supra* note 289; Risinger, *supra* note 1, at 1308–10.

397. Kozinski, *Criminal Law 2.0*, *supra* note 15. Judge Kozinski has weighed in heavily on the score of jury accuracy: “I’ve heard judges say that they seldom or never think juries reach the wrong outcome. I am skeptical of such claims.” *Id.* at xviii. He pointed out that observation of juries is rare and drew on his experience both as a juror in two state trials and as a judge who debriefs juries in cases he presides over to address the vagaries of jury decision-making. *Id.* at xviii–xx.

that decides. A good deal of empirical research aimed at improving jury accuracy exists but adoption of reforms has been spotty. An earlier comprehensive review suggested that

future research should examine the effects of the following: (a) using court-appointed experts, (b) pre-instructing jurors, (c) providing jurors with written copies of judicial instructions, (d) revising/simplifying judicial instructions, (e) allowing jurors to take notes and/or ask questions during the trial, (f) having judges and/or attorneys provide summary comments on the evidence, and (g) using verdict forms that include interrogatories. It is clear from this review, as well as considerable research conducted with mock jurors, that jurors are often uncertain or confused about their task, a condition only slightly lessened by discussing the judge's instructions with other jurors during deliberation. Most of these areas have received some initial attention, but the results so far have been modestly encouraging, certainly not overwhelming. Much more work is needed.³⁹⁸

These suggestions assume that with sufficient guidance the jury can be transformed into an accurate fact-finder. Courts see jurors' "inexperience [as] an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye."³⁹⁹ It is beyond the scope of this Article to summarize the research that questions the jury's ability as a fact-finder⁴⁰⁰ or to be able to understand the instructions.⁴⁰¹ In the end, it might be the lack of legal experience (and not the lack of instructions) that make a juror's task difficult.⁴⁰² Lacking

398. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 *PSYCHOL., PUB. POL'Y, & L.* 622, 712 (2001). Judge Kozinski offered six suggested jury reforms, including telling juries what the sentencing ranges are. Kozinski, *Criminal Law 2.0*, *supra* note 15, at xx-xxi.

399. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 355 (1979) (Rehnquist, J., dissenting) (citation omitted).

400. See Franklin Strier, *Making Jury Trials More Truthful*, 30 *U.C. DAVIS L. REV.* 95, 130 (1996).

401. Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 *LAND & WATER L. REV.* 59, 120-21 (1998) ("The study suggested that Wyoming juries are working hard to apply the instructions they receive; our juries routinely spend significant amounts of their deliberation time reading and discussing the instructions. Wyoming's jurors also generally seem to *feel* that the jury instructions are helpful and not unduly hard to understand. Unfortunately, the study also revealed that many jurors thought that they had understood the instructions better than they really had. A significant number of jurors who participated in the study had misunderstood key aspects of the instructions, even if they were not aware that they had done so. And at least some of the ways in which some jurors are misunderstanding instructions could be affecting the outcomes of both criminal and civil trials.").

402. Despite the fundamental role of the trial judge, German criminal procedure employs lay assessors, who are part of the bench and who have the same rights as judges. Depending on the case, lay assessors might even outnumber professional judges. Lay assessors are not (and in general cannot be) legally trained; however, they all have to undergo some training. In contrast to the United States, lay assessors are appointed for a term of five years and not just for a single case.

professional knowledge and experience, jurors can only use familiar mental constructs to form truth and justice from the evidence.⁴⁰³

The proposals probably retain the jury because it is constitutionally guaranteed. This weakens claims that the proposals are inquisitorial but supports viewing them as hybrid models. As noted above,⁴⁰⁴ impartial fact-finding and judicial oversight form the essence of the inquisitorial. This means that the fact-finder has to seek all the material facts to try and determine the objective truth. The inquisitorial judge has to inform himself about the relevant facts. But in the adversarial process, the jury (or judge when acting as a fact-finder) cannot avail itself of evidence beyond what is presented. There is no right or opportunity to request more proof or even clarification, as is the case in Germany and other inquisitorial countries. In other words, the impartial investigation is one thing; contextualizing and processing facts, making sense of them, and maybe asking more questions is another. That whole process is in the hands of an inquisitorial judge but is divided up into two parts in the adversarial: adversaries present facts and juries process them. For as long as the divide between impartial investigation (police, prosecutor) and fact-finding (jury) exists, an idea of instruction, that allows the fact-finder to be involved in the construction of the facts, will be difficult to achieve.⁴⁰⁵ None of the authors except Gross, whose model does not keep the jury, addresses this issue.

The proposals did not discuss the jury in detail, perhaps because the authors sought to advance novel ideas about the trial process and reforming the jury is an established area of research for psychologists of law.⁴⁰⁶ A full-fledged reform proposal, however, should make jury accuracy reform more of a priority. From an inquisitorial perspective, the adversarial element of the passive fact-finder is fundamentally inconsistent.

G. Defendants' Rights

An area where most of the reform models differ from European trial systems is the degree to which they abridge defendants' rights—especially the privilege against self-incrimination, but also Fourth Amendment rights and, in Gross's model, the jury trial.⁴⁰⁷ Slobogin

403. See Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 54–55 (1994).

404. See *supra* Part III, Section A.

405. The concept of instruction is explained in Part III, Section A, *supra*. The Authors are aware that the value of “instruction” is relative, in the sense that it might lead to tunnel vision. Therefore, as will be pointed out later, the Authors trust in proceedings that allow the introduction of the other possible story through adversarial lawyering. See *infra* Part V.

406. See e.g., NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* (Prometheus Books 2007).

407. Gross, *supra* note 1, at 1023.

and Bakken agree. Furthermore, Gross maintains that “innocent defendants have comparatively little to lose by giving up the privilege against self-incrimination: if they tell the truth and are believed, they will be released. Many innocent defendants are anxious to tell the authorities whatever they know.”⁴⁰⁸

According to Slobogin, the defendant is “probably the single most important source of information about events relating to the offense.”⁴⁰⁹ Slobogin gets around Fifth Amendment protections by suggesting that defendants “be cajoled into giving unsworn testimony describing their side of the story.”⁴¹⁰ The meaning and scope of “cajoling” does not become quite clear, but depending on the degree of zealous advocacy that remains in the system, the defendant might put himself into jeopardy by testifying, especially if innocent. Although Slobogin does not go as far as the other authors in limiting Fifth Amendment rights, he still seems to assume that the defendant should make (in our eyes) potentially harmful statements.

As a matter of logic, eliminating the Fourth Amendment exclusionary rule cannot lead to wrongful convictions, because possession of contraband signals guilt and the exclusionary rule itself allows the guilt to escape justice. Is this so in practice? Some legal scholarship has linked defendants’ rights to inaccurate verdicts⁴¹¹ and to that end the Burger Court created a hierarchy of constitutional rights related to factual truth, “with those rights that are trial related at the top, the [F]ifth [A]mendment privilege in the middle and the [F]ourth [A]mendment right with its unpopular remedy of exclusion at the bottom.”⁴¹² One consequence of the exclusionary rule is widespread police perjury covering illegal searches,⁴¹³ but even then one may argue that the police are using the evidence against “bad guys”—or so it seems from applying the abstract logic of single cases to mass action. Extravagant fears of crime and drugs have led to a four-decade massive increase in prisoners generated by harsh sentencing laws, police incentives, bipartisan political support, a runaway prison-building program,⁴¹⁴ and an enabling role by a conservative Supreme Court that

408. *Id.*

409. Slobogin, *supra* note 1, at 707.

410. *Id.* at 716. Under the German system, defendants are only obligated to make statements regarding their personal background (job, date of birth, etc.) but are never put under oath and cannot perjure themselves. *See id.* at 728.

411. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Stephen J. Markman, *Six Observations on the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 425, 429–30 (noting “enormous” human suffering of an estimated 55,000 criminals turned loose).

412. Charles H. Whitebread, *The Burger Court’s Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471, 478–84 (1985).

413. Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994).

414. TRAVIS C. PRATT, *ADDICTED TO INCARCERATION: CORRECTIONS POLICY AND THE POLITICS OF MISINFORMATION IN THE UNITED STATES* (Sage 2009); MICHELLE

shredded Fourth Amendment protections.⁴¹⁵ It is no longer possible to fall back on brittle logic to support believing that every convicted drug possessor was factually guilty.⁴¹⁶ In too many cases, the war on drugs has corrupted or overwhelmed American police departments, leading to a rise of police corruption and wrongful convictions both in pleaded-to drug convictions and tried homicide convictions.⁴¹⁷

From a comparative viewpoint, it is striking how great a pragmatic and political function fundamental rights like the Fourth or Fifth Amendments have to serve in the United States. Indeed, to a large degree, the decades-long pseudo-rational debate about the exclusionary rule was driven by the Burger Court's (and later the Rehnquist and Roberts Courts') ideological support for the politicized and futile "war on drugs." Nobody in Germany would argue that if the defendant claims his innocence, he has to relinquish his procedural rights, nor would they accept that even illegally obtained evidence is admissible. In Germany, the discourses involving truth and rights are distinct from one another. That should be a model for the United States, but our more politicized justice system, from elected county prosecutors to a polarized Supreme Court, makes achieving such an ideal remote. A debate about adopting trial reforms should consider not only the pure logic of rights denial but also the unintended consequences.

H. Judge Control

Vesting significant decision-making power in a single judge, an important inquisitorial feature of German criminal justice, comes with the potential risks of wrongful conviction based on tunnel vision. Data

ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS*, REVISED EDITION (2d. ed., The New Press 2012).

415. A plethora of law review articles have analyzed the "drug exception" to Fourth Amendment rights. See, e.g., Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 908–10 (1987).

416. Again, Judge Kozinski frontally challenged the comfortable myth that "guilty pleas are conclusive proof of guilt." Kozinski, *Criminal Law 2.0*, *supra* note 15, at xi–xii.

417. Hannah Laqueur et al., *Wrongful Conviction, Policing, and the "War on Crime and Drugs"*, in *EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD* 93 (Allison D. Redlich et al. eds., Carolina Academic Press 2014); see also Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/> [<http://perma.cc/3F5X-HVY7>]; NATE BLAKESLEE, *TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN* (Public Affairs 2005); Dylan Purcell, *Judge Reverses 58 Drug Squad Convictions*, PHILA. INQUIRER (June 21, 2015), http://articles.philly.com/2015-06-21/news/63649844_1_perry-betts-narcotics-officers-convictions [<http://perma.cc/UE2T-AXJR>] (describing reversals laid to work of six Philadelphia Police Department Narcotics Field Unit officers who, although acquitted of federal criminal corruption charges, are still believed to have been responsible for as many as 1,370 false drug convictions because of planted evidence, doctored paperwork, and beating and robbing suspects). The link between mass incarceration and wrongful convictions was more tentatively advanced by C. RONALD HUFF ET AL., *CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY* 146–50 (1996).

on wrongful convictions in Germany is scarce, but highly publicized cases show that tunnel vision was a dominant factor.⁴¹⁸ In a system based on the impartial judiciary ideal, “adversarial checks (such as when the defense introduces an alternate perpetrator story) are limited, at least in the earlier stages of the proceedings. Judges rely only on prosecutors’ indictments to decide whether to allow cases to proceed to trial; and according to critics, they bias themselves by presiding over cases to which they earlier admitted having enough evidence (*hinreichender Tatverdacht*) for a conviction. Strong ties with prosecutors on this and other levels have raised doubts as to how one-sided a trial can (but not necessarily must) become.⁴¹⁹ Most of the known wrongful conviction cases in Germany show symptoms of tunnel vision, leading German scholars to rely on American ideas and ideals in calling for more adversarial checks throughout the trial.⁴²⁰

Objections to judicial questioning, in Slobogin’s view, present a relatively minor hurdle to judge control.⁴²¹ He notes that judge questioning is constitutional as long as the parties can question and cross-examine witnesses and that some courts have raised concerns about judge questioning biasing the jury. Even assuming that judges are prepared with information from a dossier-like file about the case, it seems likely that many elected trial judges who practiced in the adversary system will be hesitant to take the lead in questioning. As Slobogin creates a system for all cases, some judges will defer to the lawyers to conduct trials while others may become more inquisitorial, producing the uneven trial practice application. Most elected judges will not exhibit the same level of procedural uniformity as judges in continental Europe, where an intricate system of statutory laws and precedent tries to achieve consistency within the judiciary. Gross avoids this problem by finding judges who would relish an inquisitorial role and assigning them to investigative trials while leaving standard trials for judges who preferred the old way.⁴²²

418. This is especially true in sexual assault cases that lack physical evidence. See Grunewald, *Comparing Injustices*, *supra* note 306, at 1191.

419. The German term for the feared relationship between prosecutor and judge is *Schulterschluss* (literally, “touching/locking of shoulders”), meaning that both entities stand very close together.

420. Slobogin argues for a neutral, court-appointed expert to increase the overall objectivity of the fact-finding process. Slobogin, *supra* note 1, at 723. This is very much in line with how the German system employs and uses experts. However, there has been an increasing debate in German scholarship about the problem of cognitive biases that judges develop by being too close to the experts they pick. It has long been argued that, especially in cases of false accusations of sexual assaults, judges tend to trust experts to a high degree and are rarely able to consider “dissonant” aspects. Grunewald, *Comparing Injustices*, *supra* note 306, at 1191.

421. Slobogin, *supra* note 1, at 718–19.

422. Gross, *supra* note 1, at 1027–28.

A recent study by Prof. Paul Marcus,⁴²³ not discussed by the proposals, provides a more comprehensive and empirical-legal view of just how entrenched party control is in American courts and the degree of hostility to judges asking questions. Marcus examined the law and questioned more than eighty experienced lawyers and judges in five adversary systems about judges addressing the jury: “The law on judges summarizing evidence for jurors is settled and reasonably clear. In Australia, Canada, New Zealand, and England and Wales, the practice is permitted, and may be required. In the United States, with but a few exceptions, the practice is expressly forbidden.”⁴²⁴ American case law that supports judicial commentary to jurors is mostly dated, and a number of state statutes and constitutions forbid judges from charging juries on matters of fact.⁴²⁵ Federal law allows judges to comment on the evidence, and while at least one judge spoke out in favor of the practice, the “prevailing view in the United States was forcefully set out by federal appeals judge Pierre Leval[:] . . . ‘It appears that the giving of a flight instruction is a vestige of the late nineteenth and early twentieth centuries For good reason, that practice has fallen into widespread disfavor, absent special circumstances.’”⁴²⁶

Not only are judges allowed to address the juries on questions of fact in the other common law systems, but the evidence obtained by Marcus shows that the practice is widespread and strongly supported as a sensible way to help the jury perform its function properly. Marcus spoke to dozens of American lawyers and judges throughout the United States and drew on his own experience to find that “there was nary a dissent to the view that judges simply never summarize the evidence for jurors.”⁴²⁷ Several reasons were given for the American practice. The most important was that “it is the job of the lawyers to explain the theories of their cases, and it is the job of the jurors to sort through the evidence.”⁴²⁸ Other reasons included the value of careful jury instructions, the concern that the judge will bias the jury, and the notion that it is simply not the role of the judge.⁴²⁹ On a deeper level, we find ideological and cultural explanations: the jury is “seen as a bulwark against overly aggressive government behavior,”⁴³⁰ and several quotations expressed a deep faith in the ability of juries to come up with the correct verdict.⁴³¹ Time and efficiency may also play a role. Marcus gathered data to show that the time it took judges in Australia to address the jury on law, evidence, and summarizing the

423. Marcus, *supra* note 262.

424. *Id.* at 5.

425. *Id.* at 12 & n.53.

426. *Id.* at 14 (citing *United States v. Mundy*, 539 F.3d 154, 158 (2d Cir. 2008)).

427. *Id.* at 25.

428. *Id.* at 37.

429. *Id.* at 37–39.

430. *Id.* at 40.

431. *Id.* at 41–43.

case could range from as little as one and one-half hours in five-day trials, to as long as six hours in twenty-day trials; anecdotal evidence indicated that jury charges could take many hours or even days.⁴³² In contrast, the delivery of American pattern instructions normally takes no more than an hour to ninety minutes, even in complicated cases.⁴³³

Aside from Marcus's findings that suggest far greater roadblocks to Slobogin's judge-control model, what is apparent is that the jury—enshrined in the Constitution⁴³⁴ and revered, or at least given lip service, by American lawyers—is the institution that leads the American legal community to view judge control with suspicion.

V. CONCLUSION

This Article has reviewed five error-reducing trial reform proposals with inquisitorial elements in light of German and continental procedure to set the stage for continuing discussion. Our review of continental practice emphasized that contrary to common stereotype, modern German and continental criminal procedure strictly enforces defendants' rights, including the exclusion of illegally seized evidence. We showed that judicial dominance of European trials involves a complex institutional and practice-culture framework based on impartial investigation. As four proposals retain an unreformed jury and at least four maintain party presentation of evidence, it appears they do not fundamentally change the existing adversary system. Most introduce elements of a more balanced investigative process that allows defendants to raise innocence claims and affords defendants varying kinds of innocence procedures. Four proposals introduce procedures for those claiming innocence rather than for all defendants who are presumed innocent under the law. No inquisitorial system has anything comparable to that.

Although we do not propose an elaborate reform model, we offer a few caveats and suggestions. First, we are not sure whether institutional support exists for trial process reform among innocence organizations. Law school clinics must train their students to be excellent adversary-system lawyers.⁴³⁵ Innocence organizations located in public defenders' agencies, or prosecutor's integrity units for that matter, operate in the adversary system and are unlikely to have any energy or desire to rethink their operating environment. Even if innocence

432. *Id.* at 33–34.

433. *Id.* at 49.

434. U.S. CONST., art. III; *id.* amend. VI.

435. Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 *CLINICAL L. REV.* 231 (2006); Jan Stiglitz et al., *The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education*, 38 *CAL. W. L. REV.* 413 (2002).

clinics operate inquisitorially when investigating cases,⁴³⁶ that investigation is in preparation for adversary engagement. Without the institutional support that innocence organizations have given to canonical reform issues,⁴³⁷ trial reform proposals may remain an academic exercise.

Second, keeping criminal justice system reforms separate from actual innocence issues may reduce wrongful convictions, although it will be impossible to detect effects with social scientific research. Post-1973 exonerations listed in the National Registry of Exonerations occurred as American criminal justice was driven to wretched excess by a politicized war on crime that has only recently been subjected to serious question. *If* the number of annual convictions will drop from about one million to, say, 750,000 in a few years, *if* drugs are largely decriminalized and police give up the asset forfeiture “tax” of individuals caught in their nets, *if* police and prosecutorial agencies are “right-sized” but adequately funded (by tax appropriations) to focus on community crime prevention and the apprehension of serious felons, and *if* criminal defense is reasonably funded—then in theory, the number of wrongful convictions would decline without any efforts to modify the adversary system. If this makes sense, innocence organizations should vigorously support “smart-on-crime” initiatives.

Third, if we had to support one trial procedure reform for policy action, we would cautiously support the most feasible proposal with the lowest risk of unintended consequences. That might be Risinger’s relatively modest changes to trial procedures, without adding his appellate standard that would require American appellate courts to undertake fact review. States that wish to re-think post-conviction review are well advised to observe the North Carolina Innocence Inquiry Commission.⁴³⁸

Finally, examining the proposals as a springboard for our own modest (or piecemeal) reform suggestions, what kind of change do we propose?⁴³⁹ We would focus on two reform areas that might have more “bang for the buck.” First, as the vast majority of convictions result from plea bargaining and there is no assurance that guilty pleas are more accurate than trials, Gross and Slobogin were right to be con-

436. See Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097 (2003).

437. See, e.g., *Model Legislation*, INNOCENCE PROJECT, <http://www.innocenceproject.org/free-innocent/improve-the-law/model-legislation> [<http://perma.cc/V8N3-G84V>].

438. See Mumma, *Catching Cases*, *supra* note 336.

439. A counter-argument is that piecemeal reform may make matters worse. This suggests that no changes should be made unless a legislature were willing to fundamentally change its state’s adversary system. Given the impossibility of eliminating the jury or creating a European-style system, with non-elected prosecutors and judges, and a deep culture of inquisitorial justice, the Authors very much doubt that such fundamental changes are feasible or even wise.

cerned with it. Rather than being seen as a distortion of the “elegant” adversary trial, plea bargaining should be recognized as its own system, as Gerard Lynch made clear.⁴⁴⁰ Rules created by legislation or court rule should consider proposals that: require open discovery; modify the prosecutor’s role vis-à-vis the defense lawyer (looking to Findley); give judges more authority to probe the facts of the case (*à la* Gross and Slobogin); require judges to produce a fact summary (borrowing from continental practice); and reverse rules that bar judges from discussing cases with the attorneys (and perhaps with probation officers). With a view to Bakken, developing statutory presumptions could give the process some teeth. We do not underestimate the difficulty in fashioning such a proposal and do not work out the details here. Given the challenge of plea bargaining modifications, states may consider developing a trial system on an experimental basis, perhaps among volunteers in large multi-judge courts with a research component built in to track the process and results of a modified approach. Indeed, Professor Slobogin extended his analysis in a forthcoming article,⁴⁴¹ asserting that the current plea bargaining regime is incompatible with (1) retributivism (the current reigning sentencing theory), because in the course of bargaining the prosecutor offers two possible sentences, and only one can be in sync with the goal of retribution; and (2) the constitutional framework of an “open, confrontational procedure.” Arguing it is impossible to change plea bargaining, Slobogin proposes that American jurisprudence shift to a theory of preventive sentencing, along the lines of the Model Penal Code, and that it abandon the adversarial element of party control, adopting a form of inquisitorialism that draws on his analysis in the article reviewed herein. Without further analysis, Slobogin’s separate extension of his inquisitorial approach simply acknowledges the obvious fact that any major change to improve adjudicatory accuracy must encompass plea bargaining.

The second reform area that may have a real effect on potential innocence cases, without modifying the trial process, would look to the ability of French and German defendants to request further criminal investigation where reinvestigation may divulge evidence of factual innocence.⁴⁴² The proposal would require legislation creating a

440. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2120 (1998).

441. Slobogin, *Plea Bargaining*, *supra* note 251.

442. *See supra* note 383. Zalman made a similar proposal. Zalman, *Adversary System*, *supra* note 13. Under German law, defendants can apply to the trial judge to take further evidence. STRAFPROZESSORDNUNG [StPO] [Code of Criminal Procedure], as amended, § 244(3), *translation at* http://www.gesetze-im-internet.de/englisch_stpo/german_code_of_criminal_procedure.pdf [<http://perma.cc/BJZ9-BAY6>] (Ger.). That motion may be rejected for reasons that pertain to the evidentiary value of the evidence requested, but it can also be rejected if the sole purpose of the motion is to protract the proceedings. *Id.*

limited right to reinvestigation. With the legislation should come additional funding for such investigations, which could be directed to a state bureau of investigation or specified investigative units in large municipal or county detective bureaus. The order for additional investigation would be made by the trial judge, after a motion and contested hearing in which the defense would (*à la* Risinger) point to a specific fact issue that could be dispositive. Such a procedure might include a request for expert witnesses on the point. The procedure would not require the defense attorney to affirm a belief in innocence, as proposed by Bakken, but would be in the traditional role of adversary lawyering. Possible sanctions, however, could be part of the process if an attorney is shown to abuse the process (perhaps more likely in organized crime or some white-collar prosecutions). A factor in ordering reinvestigation might be the wealth or ability of the defense to conduct its own investigation. Constitutional support for such a proposal can be found in *Ake v. Oklahoma*.⁴⁴³ Again, although we view this sketch of a proposal as relatively feasible, we do not underestimate the amount of detail and effort that would be required to make it a reality.

This Article explores five error-reduction trial and pre-trial procedural reform proposals with the hope of stimulating further consideration, debate, and action. The five proposals are not the only ones suggesting ways to reimagine criminal adjudication,⁴⁴⁴ and further reflection will need to sort out a broad array of ideas to determine the most effective and feasible. Rethinking the American adversarial process is a dynamic enterprise, as demonstrated by the fact that at least two of the authors reviewed herein have already built on the articles reviewed herein.⁴⁴⁵ It is certainly audacious to tackle the very heart of the adjudicatory process of a mature legal system with a deeply embedded legal culture. But this new generation of trial reform thinking diverges from past efforts because of new awareness that convicting the innocent is an everyday reality in our courts. In the tradition of American appellate judging, the five proposals can be thought of as seriatim opinions, dissenting in their own ways from the standard American adversary trial process. Like all great dissents, they are written for an alternate, and a better, future.

443. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

444. See *supra* notes 32–37 and accompanying text.

445. See Risinger & Risinger, *Innocence is Different*, *supra* note 33, at 893 & n.71 (citing Bakken, *supra* note 1); Slobogin, *Plea Bargaining*, *supra* note 251, at 13 & n.50 (citing Slobogin, *supra* note 1).