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Lessons From Inquisitorialism

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LESSONS FROM INQUISITORIALISM

CHRISTOPHER SLOBOGIN*

ABSTRACT

As implemented in the United States, the adversarial system is a significant cause of wrongful convictions, wrongful acquittals, and “wrongful” sentences. Empirical evidence suggests that a hybrid inquisitorial regime can reduce these erroneous results. This Article proposes that the American trial process incorporate three inquisitorial mechanisms—judicial control over the adjudication process, nonadversarial treatment of experts, and required unsworn testimony by the defendant—and defends the proposal against constitutional and practical challenges. While other scholars have suggested borrowing from overseas, these three proposals have yet to be presented as a package. Together they might measurably enhance the accuracy of the American criminal justice system.

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I. INTRODUCTION

The wrongful conviction movement has spawned a considerable amount of second-guessing about the integrity of the American criminal justice system. Numerous scholars, and some courts, are questioning the American way of investigating crime, adjudicating guilt, and assigning punishments. Reform proposals abound, including calls for new interrogation and identification protocols, the revamping of forensic lab procedures, the reorganization of prosecutor offices, changes in the discovery process, increased training of and pay for defense attorneys, and modification of various aspects of the jury, appellate and postconviction systems.¹

All of these proposals have some merit. But most tinker with the current system rather than seek to restructure it. In other words, they accept the premise of the adversarial system—that the parties should be in control of producing the evidence used to adjudicate guilt and punishment. That premise puts the prosecution and defense in charge of the trial and, through the institution of plea bargaining, largely in charge of sentencing as well.

If the goal is to improve the accuracy of the criminal justice system, reforms that accept the adversarial premise are not enough, especially if the accuracy goal encompasses a desire to do something about wrongful acquittals and punishments as well as wrongful convictions. This Article assumes that our criminal justice system has an accuracy problem and argues that, in an effort to alleviate that problem, consideration should be given to significantly modifying its adversarial thrust. Fundamental change, not just a tweaking of the existing framework, may be necessary.²

This Article's thesis consists of three prongs that, when combined, distinguishes it from most other works in this vein. First, the focus of this Article is on the postinvestigative, adjudicatory stage of criminal

1. For a recent compilation of such proposals, see Symposium, *Exonerating the Innocent: Pretrial Innocence Procedures*, 56 N.Y.L. SCH. L. REV. 825 (2011/12).

2. Cf. 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, 1222 (2005) (arguing that scholars should shift their focus from fine-tuning the investigative and proof process "to broader questions about the structure and administration of the justice system").

procedure, specifically plea bargaining, trial and sentencing, facets of the system that to this point have been relatively neglected by would-be reformers. Second, it looks not only at how the incidence of wrongful convictions might be reduced at these stages, but also at how these stages might better deal with wrongful acquittals and the phenomenon of “wrongful punishment”—the inevitable but reducible inconsistency of dispositions imposed on those who have committed a criminal act but whose sentence does not jive with their true culpability and other legitimate sentencing factors. Third, and most importantly, rather than try to tweak the current system by providing a better American-style process, this Article borrows its prescriptions from the inquisitorial model of criminal process favored in Europe and other civil law countries. While many other scholars have suggested that we look for help from overseas in fashioning our legal processes,³ the three inquisitorial-oriented proposals made in this paper—to wit, judicial control of evidence production, nonadversarial treatment of experts, and unsworn testimony by the defendant—have yet to be presented together and defended as a package.

Any attempt to import foreign practices into the American system is fraught with obstacles. An aspect of the inquisitorial system that works in other cultures may be disastrous in ours. Changing one part of our system could have unintended impacts on other parts. An isolated component of inquisitorial practice may not be able to function well, or at all, without bringing along other components (and, in recognition of this fact, this Article’s focus occasionally strays from the adjudicative process into the pretrial realm).⁴ This Article tries to address these concerns, but admittedly can only do so in a speculative fashion.⁵

It should be noted, however, that while the prescriptions outlined here are structural, the resulting system would retain many familiar aspects: lawyers would still function as advocates for their side, parties could still call witnesses the judge does not call, juries would still be the default decisionmaker, and a form of plea bargaining would still exist. This Article does not advocate abandoning the constitutionally required components of

3. One of the best known efforts in this regard is John Langbein’s. See generally John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: “Myth” and Reality*, 87 YALE L.J. 1549 (1978); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979).

4. See *infra* notes 91, 121, and text accompanying notes 147–48.

5. For a discussion of the pitfalls involved in borrowing from other countries, see Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325, 327 (1998) (examining the problems “associated with constitutional borrowing or lending”).

the American criminal justice system, but rather proposes a hybrid between pure adversarialism and pure inquisitorialism, one that moves closer to the procedural regime that exists in a number of civil law countries. Contrary to popular belief, the criminal justice systems in those countries have gone through their own fundamental changes since the nineteenth century. Largely as a result of the Anglo-American influence, they abandoned—long ago in Europe, more recently in Latin America—purely inquisitorial practices in favor of oral presentation of evidence, mixed professional and lay tribunals, and increased roles for the parties.⁶ In a sense, this Article is arguing for further convergence, this time from the American side.

Part II of this Article explains how the postinvestigation phase of the American criminal justice system, sometimes called the adversarial trial process, contributes to inaccuracy at both the verdict and punishment phases. Part III describes research suggesting that the inquisitorial model of criminal procedure—in particular, the idea that the court, not the parties, should control evidence production and presentation—is a superior method of ascertaining facts, and that, at least in its hybridized form, the model is no worse than the adversarial system in terms of promoting procedural justice. Leaning on this research, Part IV spins out some of its possible implications for American criminal procedure. I argue that the three inquisitorial components that are advanced in this part can, despite their foreignness to Americans, be adopted without running afoul of constitutional guarantees or upsetting the coherence of the system.

II. WRONGFUL VERDICTS, WRONGFUL PUNISHMENT, AND ADVERSARIALISM

By last count, over 140 people have been released from death row since 1973, exonerated by DNA or revelations of erroneous eyewitness identifications, coerced confessions, faulty lab work, prosecutorial misconduct, and other procedural malfunctions.⁷ Even the most conservative estimates of the wrongful conviction rate for serious offenses puts it at around 0.84 percent overall, with a 0.045 percent rate of error in cases in which the accused pleads guilty.⁸ As Michael Risinger points out, these “number[s] represent[] an absolute floor which the real number is

6. Mar Jimeno-Bulnes, *American Criminal Procedure in a European Context*, 21 CARDOZO J. INT'L & COMP. L. 409, 447–50 (2013) (describing the “Americanization” of European criminal procedure).

7. For a list of the cases and the reasons for exoneration, see *The Innocence List*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Jan. 31, 2014).

8. Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65, 71 (2008).

almost certain to be substantially above.”⁹ But even accepting a conservative 0.05 percent ratio, that means that, every year, roughly five thousand of the one million people convicted in state court should not have been.¹⁰

Data on wrongful acquittals are more inchoate, perhaps because such information seems less salient in a system that assumes a wrongful conviction to be a much worse outcome. But as David Sklansky has noted, “wrongful acquittals are a form of injustice” as well, because they slight the victim;¹¹ they also free a person who may be more likely to offend again. It is likely that the proportion of wrongful acquittals at trial exceeds the number of wrongful convictions.¹²

Finally, there is the “wrongful punishment” phenomenon, a phrase that is meant to describe inaccurate punishment of concededly guilty people. Punishment is inaccurate in two ways. First, it can be inaccurate if the sentence imposed is not for the specific crime the offender committed. Second, punishment is inaccurate if the defendant is convicted of the correct crime, but the sentence imposed is not calibrated to his precise degree of blameworthiness, risk, or other legitimate punishment criteria. As with verdicts, the wrongfulness of the punishment can improperly favor either the prosecution or the defense.

Wrongful punishment is probably much more common than either wrongful conviction or wrongful acquittals. To the extent it is the result of different punishment philosophies on the part of the sentencer, it might be reducible through a guidelines system.¹³ But sentencing disparities can also

9. D. Michael Risinger, *Tragic Consequences of Deadly Dilemmas: A Response to Allen and Laudan*, 40 SETON HALL L. REV. 991, 996 (2010).

10. MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, NCJ 206916, FELONY SENTENCES IN STATE COURTS, 2002, at 1 (2004), available at www.bjs.gov/content/pub/pdf/fssc02.pdf (reporting data on state court convictions). Note also that the percentage of wrongful guilty pleas undoubtedly is a gross underestimate once prosecutions for less serious crimes are added into the mix. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313 (2012) (“[I]nnocent misdemeanants routinely plead guilty to get out of jail because they cannot afford bail.”). See also Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 34–36 (2013) (detailing a laboratory study finding that over 50 percent of the “innocent” subjects pleaded guilty and accepted minimal punishment to avoid more aversive treatment).

11. David Alan Sklansky, *Hearsay’s Last Hurrah*, 2009 SUP. CT. REV. 1, 62.

12. David Hamer, *The Expectation of Incorrect Acquittals and the “New and Compelling Evidence” Exception to Double Jeopardy*, 2 CRIM. L. REV. 63, 67 (2009) (arguing that, considering the high burden of proof in criminal cases, the number of wrongful acquittals is likely substantially higher than the number of wrongful convictions).

13. But see Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 250

be due to a failure to determine the relevant facts accurately, whether they have to do with the offense in question, other offenses, or the offender's character. This latter type of error is undoubtedly substantial.¹⁴

Most reformist energy has understandably been focused on reducing wrongful convictions, through improved interrogation techniques and identification procedures, defense involvement in the investigation process, and the like.¹⁵ Most of these reforms, however, could also increase wrongful acquittals or inaccurate punishment.¹⁶ Moreover, even if the investigative phase is cleaned up, those cases that go to a jury trial presumably are still contested, and thus can still result in error. Most importantly, in the vastly greater number of cases that are resolved through plea, wrongful punishment is very likely to occur regardless of improvements at the pretrial stage, because plea bargaining has the effect of producing sentences that are either too harsh or too lenient.¹⁷

In other words, focusing solely on reducing wrongful convictions is short-sighted. While the wrongful felony conviction rate is almost certainly above 1 percent, it probably is not above 5 percent.¹⁸ Because wrongful

(1999) (noting disparity even under the federal sentencing guidelines, and ascribing sentencing differences to differing judicial philosophies); Stephen J. Schulhofer, *Excessive Uniformity—and How to Fix It*, 5 FED. SENT'G REP. 169, 169 (1992) (“While [under the federal sentencing guidelines] we have fewer instances of unwarranted differences in sentences imposed in similar cases, we now have a serious problem of unwarranted similarity in the treatment of substantively distinguishable cases.”).

14. See *infra* note 17; Brandon L. Garrett, *Accuracy in Sentencing*, 87 S. CAL. L. REV. 499 (2014) (discussing sentencing errors and appellate review standards).

15. For the best summary of the problems and the respondent reforms, see Dan Simon, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS (2012).

16. See, e.g., Tim Bakken, *Models of Justice to Protect Innocent Persons*, 56 N.Y.L. SCH. L. REV. 837, 862–63 (2011/12) (asserting that defense attorney involvement in the investigation process will benefit guilty defendants at least as much as innocent ones); Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 484 (2005) (reporting a study finding that maximization and minimization interrogation techniques increased false positives from 6 percent to 18 percent but also increased true positives from 46 percent to 76 and 81 percent, respectively); Nancy K. Steblay, Jennifer E. Dysart & Gary L. Wells, *Seventy-Two Tests of the Sequential Lineup Superiority Effect: A Meta-Analysis and Policy Discussion*, 17 PSYCHOL. PUB. POL'Y & L. 99 (2011) (reporting a meta-analysis finding that sequential lineups, an oft-proposed reform in which the eyewitness views pictures or individuals one-by-one, are less likely to produce false positives but more likely to produce false negatives than simultaneous lineups).

17. See Oren Gazal-Ayal & Avshalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 383–84 (2012) (concluding, based on empirical research, that innocent individuals are often found guilty at trial and “receive higher average sentences than guilty defendants who face similar evidence and are charged with similar offenses . . . because guilty defendants more often plea bargain and thereby reduce their average sentence”); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 83, 155 (2005) (developing, and providing empirical evidence for, a theory that federal and state courts “produce too many dysfunctional guilty pleas . . . [that] distort the pattern of outcomes that would have resulted from trials”).

18. James R. Acker & Catherine L. Bonventre, *Protecting the Innocent in New York: Moving*

acquittals and wrongful punishments probably occur with more frequency, reforms aimed only at the first problem, while important, are insufficient.

It is highly likely that the adversarial process is a significant cause of the various sorts of error just described. Although often touted as one of the glories of the American system, several commentators have suggested that, in its Americanized form, the process of allowing the parties to control examination of witnesses is a highly flawed mechanism for promoting accuracy.¹⁹ Probably the most venerable source on this score is Jerome Frank's well-known chapter "The 'Fight' Theory Versus the 'Truth' Theory" in his book *Courts on Trial*.²⁰ The following quotation from that chapter, written during an era when adversarialism was probably nowhere near as honed as it is now,²¹ captures the attitude:

[A]n experienced lawyer uses all sorts of stratagems to minimize the effect on the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of that testimony. The lawyer considers it is his duty to create a false impression, if he can, of any witness who gives such testimony. If such a witness happens to be timid, frightened by the unfamiliarity of courtroom ways, the lawyer, in his cross-examination, plays on that weakness, in order to confuse the witness and make it appear that he is concealing significant facts.²²

Frank mentions an advocacy book that unabashedly describes "how 'a skillful advocate by a rapid cross-examination may ruin the testimony'" of a "'truthful, honest, over-cautious witness'"²³ and quotes from another which advises that "'You may . . . sometimes destroy the effect of an adverse witness by making him appear more hostile than he really is. You may make him exaggerate or unsay something and say it again.'"²⁴ Frank

Beyond Changing Only Their Names, 73 ALB. L. REV. 1245, 1246 n.5 (2010) (providing wrongful convictions estimates of between 2.2 percent and 5 percent, the latter figure tied to particularly error-prone murder-rape cases).

19. See, e.g., Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975) ("[O]ur adversary system rates truth too low among the values that institutions of justice are meant to serve."); Lloyd L. Weinreb, *The Adversary Process Is Not an End in Itself*, 2 J. INST. STUD. LEGAL ETHICS 59, 61 (1999) (criticizing the adversarial advocate's "tricks of persuasion" that throw "dust" in "the fact-finder's eyes," and concluding that "[a]dversariness harmfully distorts all the relevant relationships at a trial").

20. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 80–102 (1949).

21. See *infra* note 28.

22. FRANK, *supra* note 20, at 82.

23. *Id.*

24. *Id.* (quoting RICHARD HARRIS, *HINTS ON ADVOCACY: CONDUCT OF CASES CIVIL AND CRIMINAL* 223 (7th ed. 1884)).

also cites John Wigmore's statement that "[a]n intimidating manner in putting questions . . . may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject."²⁵ Frank concludes: "The purpose of these tactics—often effective—is to prevent the trial judge or jury from correctly evaluating the trustworthiness of witnesses and to shut out evidence the trial court ought to receive in order to approximate the truth."²⁶

Most important to notice is that, for this litany of truth-obscuring practices, Frank does not blame the lawyers. Instead, he states, "If there is to be criticism, it should be directed at the system that virtually compels their use, a system which treats a law-suit as a battle of wits and wiles."²⁷ For anyone who thinks Frank's diagnosis is outdated or applicable only to civil cases, there is plenty of evidence to the contrary.²⁸

In an adversarial system the parties control not only the questioning of witnesses, but their selection and preparation as well. This aspect of adversarialism can be a second cause of inaccuracy. Again Frank is worth quoting at length:

[T]he contentious method of trying cases augments the tendency of witnesses to mold their memories to assist one of the litigants, because the partisan nature of trials tends to make partisans of the witnesses. They come to regard themselves, not as aids in an investigation bent on discovering the truth, not as aids to the court, but as the "plaintiff's witnesses" or the "defendant's witnesses." They become soldiers in a war, cease to be neutrals.²⁹

When this pressure on witnesses to pick sides affects expert witnesses

25. *Id.*

26. *Id.* at 85.

27. *Id.*

28. For modern examples of prosecutorial adversarialism, see Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS, 309, 318–36 (2001) (describing cases in which prosecutors engaged in impermissible attacks on the defendant's character, introduced misleading or fabricated evidence, misrepresented or suppressed the truth, and engaged in inflammatory conduct); Christopher Slobogin, *The Death Penalty in Florida*, 1 ELON L. REV. 17, 32 (2009) (describing wrongful convictions in Florida death penalty cases involving prosecutors who withheld exculpatory information, knowingly used false testimony, and relied on perjured statements). For more modern accounts about defense attorney conduct that was intended to or had the effect of obfuscating the truth, from the criminal defense lawyers themselves, see generally F. LEE BAILEY & HARVEY ARONSON, *THE DEFENSE NEVER RESTS* (1971); ROBERT L. SHAPIRO & LARKIN WARREN, *THE SEARCH FOR JUSTICE: A DEFENSE ATTORNEY'S BRIEF ON THE O.J. SIMPSON CASE* (1996). See also William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1704–05 (1993) (providing examples of defense attorneys engaging in nonmeritorious delay, use of perjured testimony, and disclosure of tangential information simply to harm prosecution witnesses).

29. FRANK, *supra* note 20, at 86.

it becomes particularly worrisome, since juries are more likely to assume a scientist, technician, or specialist is neutral rather than attached to the prosecution or defense. Unfortunately, experts are not immune from the justice system's adversarial atmosphere. According to a 2000 survey of trial judges, the most common judicial complaint about experts is their tendency to "abandon objectivity and become advocates for the side that hired them."³⁰

A third way adversarialism can contribute to inaccuracy during trial is its tendency to prevent the factfinder from hearing from the defendant, despite the fact that the defendant is probably the single most important source of information about events relating to the offense. The invisibility of the defendant results, of course, from the routine assertion of the Fifth Amendment privilege against self-incrimination, which the Supreme Court has called the "essential mainstay" of our "accusatorial" system.³¹ Mainstay or not, the Fifth Amendment right enables the person who knows the most about the defendant's actions, motives, desires, and beliefs at the time of the crime to avoid testifying, which occurs in over half the cases that go to trial.³²

So far this discussion about the accuracy-deflating aspects of adversarialism has not mentioned the elephant in the room—plea bargaining, the process that resolves 90 to 95 percent of all criminal cases.³³ Here too the adversarial mindset can contribute to wrongful convictions, and even more so to wrongful punishment. As federal prosecutors have admitted,³⁴ in order to "win" at bargaining the government needs leverage, so it lobbies legislators for easier-to-prove crimes with stiffer sentences, and legislators, running on tough-on-crime

30. Carol Krafka et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL'Y & L. 309, 328 tbl.6 (2002).

31. *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

32. Data collected in the 2000s indicates that roughly 62 percent of defendants with no record testify, but only 45 percent of defendants with records testify, so that overall defendants testified in 49.4 percent of the three hundred cases studied. Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357, 1371 (2009).

33. See AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY, at xi–xii (3d ed. 1999) (stating that 93 percent of cases in federal system and 91 percent of cases in state systems are resolved through guilty pleas).

34. Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT'G REP. 326, 329 (2011) (stating that the Department of Justice "has sought more and harsher mandatory sentencing laws 'not because the enhancements are inherently just or required for adequate deterrence, but precisely because higher sentences provide increased plea bargaining leverage'").

platforms, are only too happy to oblige.³⁵ Because the guilty plea discount can easily be 100 percent or more even in states with sentencing guidelines,³⁶ defendants who are at all risk averse are tempted to plead guilty to crimes they did not commit.³⁷ And partly because, compared to the disposition that usually awaits a defendant convicted at trial, a discounted sentence is easy to view as a “win,” defense attorneys are often quite willing to go along with dubious plea offers.³⁸

The connections between adversarialism and plea bargaining go much deeper than this, however. Plea bargaining is the ultimate expression of the adversarial tenet that the parties control evidence production. When plea bargaining occurs, by the time the case gets to a judge the parties have already settled on all the relevant facts and have usually even come to terms on the sentence. Thus, guilty plea hearings consist primarily of a brief determination of whether a factual basis exists for the crime and an assessment of whether the defendant understands the rights he is waiving.³⁹ With respect to any sentencing recommendations that are part of the bargain, the court has even less legal obligation to engage in its own exploration of the relevant facts.⁴⁰

35. Cf. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001) (“[T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones. . . . Prosecutors are better off when criminal law is broad than when it is narrow. Legislators are better off when prosecutors are better off.”).

36. Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 992 (2005) (finding increases in sentences for those who go to trial ranging “from 13% to 461% in Washington, from 58% to 349% in Maryland, and from 23% to 95% in Pennsylvania”).

37. *An End to Plea Bargains*, INNOCENCE PROJECT (Jan. 13, 2009, 2:27 PM) <http://www.innocenceproject.org/Content/1784.php> (“Of the 227 wrongful convictions overturned in the United States by DNA testing, 12 defendants pled guilty to crimes they didn’t commit. Almost always, they pled guilty to avoid the threat of longer sentences—or in some cases the death penalty.”). See also Natapoff, *supra* note 10, at 1331–37 (discussing the incidence of wrongful convictions in misdemeanor cases).

38. Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1205–06 (1975) (“When a defense attorney takes a case to trial and loses, it can . . . be seen in retrospect that he probably made the wrong decision for his client. . . . The visibility of a ‘wrong’ decision to stand trial may, in this way, provide a further psychological impetus for lawyers to recommend pleas of guilty to their clients.”).

39. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 140 (2004) (“[G]uilty plea hearings are often dry recitations of rights and facts. Judges advise defendants of a laundry list of procedural rights they are waiving, and defendants answer ‘yes’ to indicate that they understand each one. After that, defendants provide very brief factual statements explaining what they did, which are often written by their lawyers.” (footnotes omitted)).

40. *Libretti v. United States*, 516 U.S. 29, 38–39, 43 (1995) (holding that since Rule 11’s factual basis requirement applies only to “plea[s] of guilty,” courts must only ascertain the facts underlying the

Party control over the evidence is so powerful that the Supreme Court has even permitted pleas by defendants who maintain their innocence. Although cautioning that judges must, as usual, ensure the factual basis of such a plea, the Court's decision in *North Carolina v. Alford*⁴¹ went on to hold that "an express admission of guilt . . . is not a constitutional requisite to the imposition of criminal penalty."⁴² So-called *Alford* pleas, which put a judicial imprimatur on guilty pleas by innocent defendants, are highly questionable as a matter of policy.⁴³ But they are a logical outgrowth of a system that lets the parties control the production of evidence.

The threat of all of this to accuracy should be apparent. As Stephanos Bibas has pointed out, the truncated proceeding that is a guilty plea hearing is "oddly silent about the substantive advisability of the sentences and consequences being offered, and it require[s] far less than proof of guilt beyond a reasonable doubt."⁴⁴ Although these words described the state of affairs before the recent spate of Supreme Court cases regulating plea bargaining,⁴⁵ they remain substantially true today with respect both to the overall fairness of bargained-for sentences and the facts underlying them.

Wrongful convictions, acquittals, and punishment are the result of a number of factors. In the United States, the adversarial adjudication system—most obviously its surrender of evidence production to parties that have winning as their main goal and, more speculatively, its immunization of the defendant from official inquiry—is one of the key culprits. The battle mentality adversarialism creates can sometimes result in conduct that even the most avid fan of the American system would reject. The point that this section has tried to establish, however, is that even run-of-the-mill adversarialism can create major accuracy problems.

criminal offense, not those related to punishment, and at most need only obtain "a stipulation of facts" supporting the recommendation).

41. *North Carolina v. Alford*, 400 U.S. 25 (1970).

42. *Id.* at 37. The Court's endorsement of the factual basis requirement was lukewarm at best, and was not described as constitutionally mandated. *See id.* at 38 n.10.

43. As Albert Alschuler dramatically put it: "There could hardly be a clearer violation of due process than sending someone to prison who has neither been found guilty nor admitted his guilt. If anything short of torture can shock your conscience, *Alford* pleas should." Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1412 (2003).

44. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1131 (2011).

45. *See, e.g.*, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (requiring that defendants be informed of some collateral consequences of a plea); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) (tightening ineffective assistance of counsel standards as they apply to plea bargaining).

III. THE GENERAL CASE FOR A HYBRID SYSTEM

If adversarialism causes accuracy problems, the question becomes whether any alternative procedure can reduce these errors. The inquisitorial model found in Europe—in which the court, usually consisting of one of more judges, controls the creation of the evidentiary record and the selection of witnesses and in which defendants routinely testify—appears to avoid much of the win-at-almost-all-costs mentality that dominates the American process. But can this less adversarial approach increase accuracy? And can it do so without infringing constitutional rights? The two sections in this part answer these questions in a preliminary fashion, before delving into the details of what an alternative system might look like.

A. EMPIRICALLY COMPARING ADVERSARIALISM AND INQUISITORIALISM

Researchers have compared the adversarial and inquisitorial models on a number of different dimensions. In the 1970s, Thibaut and Walker conceptualized the field by dividing procedural justice into “subjective” and “objective” components.⁴⁶ The subjective component measures the “capacity of each procedure to enhance the fairness judgments of those who encounter [the] procedures.”⁴⁷ The objective component is concerned with “the capacity of a procedure to conform to [the] normative standards of justice . . . by, for example, reducing some clearly unacceptable bias or prejudice.”⁴⁸ Thibaut and Walker’s initial research, relying primarily on reactions from student participants, compared relatively pristine versions of the adversarial and the inquisitorial models. A number of other empiricists have followed in their footsteps, using variations of their methodology. This research has been summarized elsewhere and will only briefly be described here.⁴⁹

With respect to subjective justice, Thibaut and Walker found that their participants believed the adversarial mode was better than the inquisitorial mode at providing “process control” (referring to the ability to control the

46. The phrases “subjective justice” and “objective justice” were actually coined by Allan Lind (who was a sometime co-author with Thibaut and Walker) and Tom Tyler. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 3–4 (1988). But the central concepts were developed by Thibaut and Walker. See JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 67 (1975) (discussing the “objective functioning” of the two models as well as the “subjective measure” of how procedural options are perceived).

47. LIND & TYLER, *supra* note 46, at 3–4.

48. *Id.* at 3.

49. Mark R. Fondacaro, Christopher Slobogin & Tricia Cross, *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955, 974–84 (2006).

development and selection of information) and that this belief led to a preference for verdicts obtained through adversarial rather than inquisitorial procedures.⁵⁰ However, Thibaut and Walker's modeling of the inquisitorial procedure involved, in their words, "an expert decisionmaker [who] actively investigates the claims of unrepresented litigants."⁵¹ In other words, disputants in this condition were not permitted to present their own view of the facts unencumbered by interference from the decisionmaker. More recent research that combines judicial questioning with the ability on the part of the disputant to present evidence and arguments—a process that comes closer to modern inquisitorial procedure—produced the opposite result, that is, a preference for the hybrid procedure rather than the adversarial one.⁵² As summarized by MacCoun "autocratic, inquisitorial-style procedures (with less process control than the adversarial mode) are rated more favorably when they provide opportunities for voice."⁵³

More relevant to the focus of this Article is the research on objective justice. Here Thibaut and Walker conceded that, based on their research, an "autocratic" procedure "is most likely to produce truth."⁵⁴ More specifically, consistent with the critique of adversarialism described in the previous section, they found that the adversarial format produced a more biased distribution of facts than an inquisitorial format in which a third party assembled the evidence.⁵⁵ More recent laboratory research confirms this result. Thibaut, Walker, and Lind reported that adversarial attorneys

50. THIBAUT & WALKER, *supra* note 46, at 81–96 (describing their research). See also John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 551 (1978) [hereinafter Thibaut & Walker, *A Theory of Procedure*] ("The freedom of the disputants to control the statement of their claims constitutes the best assurance that they will subsequently believe that justice has been done regardless of the verdict.")

51. John Thibaut, Laurens Walker & E. Allan Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 388 (1972).

52. See, e.g., LIND & TYLER, *supra* note 46, at 117 (finding that both adversarial and inquisitorial procedures can contribute to subjective procedural justice and that policymakers "should be able to design a variety of hybrid procedures that engender high levels of perceived fairness"); Norman G. Poythress, *Procedural Preferences, Perceptions of Fairness, and Compliance with Outcomes: A Study of Alternatives to the Standard Adversary Trial Procedure*, 18 LAW & HUM. BEHAV. 361, 375 (1994) ("[T]here are variations in the standard adversarial trial procedure that will permit us to optimize all criteria for a just system and escape the dilemma of a system that purchases fairness at the expense of (objective and subjective) accuracy."); Blair H. Sheppard, *Justice Is No Simple Matter: Case for Elaborating Our Model of Procedural Fairness*, 49 J. PERSONALITY & SOC. PSYCHOL. 953, 953–56 (1985) (study finding that a majority of the subjects preferred a hybrid procedure over an adversarial procedure).

53. Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. LAW & SOC. SCI. 171, 175 (2005).

54. Thibaut & Walker, *A Theory of Procedure*, *supra* note 50, at 547.

55. *Id.* at 541–53.

were much more likely to proffer tilted evidence when the facts are unfavorable,⁵⁶ and Sheppard, Vidmar, and Laird found that witnesses situated in an adversarial setting were more likely to present slanted testimony than witnesses in the control condition.⁵⁷ O'Brien found that research participants placed in a "persuade" condition—the condition most closely analogous to the adversarial position—were much more likely to succumb to confirmation bias than those in an "outcome" condition—in which participants were told their goal was to discover what happened; in fact, the latter group was no more biased than the control group.⁵⁸ Similarly, a study conducted by Simon and his colleagues concluded that assignment to an adversarial role led participants to biased interpretations of the evidence in their favor, while those assigned to the inquisitorial role generally came up with judgments between the two adversarial positions.⁵⁹

Other, more theoretical research has looked at the accuracy issue through the prism of economics. These ruminations suggest that the inquisitorial model comes closer to the optimal use of resources, primarily because the typical defendant is poor and thus expenditures are likely to be unequal in the privately-run adversarial proceeding. Deffains and Demougin's analysis concludes, for instance, that "poor persons will underinvest in defense while wealthy ones will overinvest" and that "the feedback of the prosecution's optimal response to the defense behavior will magnify th[is] effect," leading to an increase in Type I error for poor defendants (think of the typical victim of a wrongful conviction) and Type II error for wealthy ones (think of O.J. Simpson).⁶⁰ In effect, an adversarial

56. THIBAUT & WALKER, *supra* note 46 at 28–40.

57. Blair H. Sheppard & Neil Vidmar, *Adversary Pretrial Procedures and Testimonial Evidence: Effects of Lawyer's Role and Machiavellianism*, 39 J. PERSONALITY & SOC. PSYCHOL. 320, 329 (1980). See also Neil Vidmar & Nancy MacDonald Laird, *Adversary Social Roles: Their Effects on Witnesses' Communication of Evidence and the Assessment of Adjudicators*, 44 J. PERSONALITY & SOC. PSYCHOL. 888, 895 (1983) (finding that bias may be introduced simply by labeling a witness the plaintiff's or the defendant's).

58. Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1029, 1031, 1049 n.201 (2009). O'Brien also discusses how the prosecutorial desire to avoid failure overrides the desire to avoid conviction of the innocent and how "cognitive dissonance" leads prosecutors to construe every new piece of evidence as supportive of guilt. *Id.* at 1013–15.

59. Dan Simon, Douglas M. Stenstrom & Stephen J. Read, *On the Objectivity of Investigations: An Experiment 2* (Aug. 20, 2008) (unpublished manuscript) (on file with author).

60. Bruno Deffains & Dominique Demougin, *The Inquisitorial and the Adversarial Procedure in a Criminal Court Setting*, 164 J. INSTITUTIONAL & THEORETICAL ECON. 31, 42 (2008). See also Francesco Parisi, *Rent-Seeking Through Litigation: Adversarial and Inquisitorial Systems Compared*, 22 INT'L REV. L. & ECON. 193, 208 (2002) (although concluding that the adversary system may produce more information, also asserting that it "conduces rent-seeking because the expenditures of each party are determined by the private rather than the social cost of winning," whereas judicial

system at its most efficient is error-prone in a world of unequal resources.⁶¹

The research briefly recounted above can be challenged on both internal and external validity grounds. Most of it was conducted under artificial conditions (although, if this had any effect, it should have understated the impact of adversarialism, since the stakes and pressures in the real world far exceed those typically created in the lab).⁶² The most useful information for purposes of comparing the accuracy of the adversarial and inquisitorial systems would, of course, provide data on wrongful conviction, acquittal, and punishment rates in civil law countries. Unfortunately those data are not available.

There are also a few studies that reach somewhat differing conclusions than those recounted above. In particular, some empirical literature suggests that a decisionmaker who becomes actively involved in the investigation can become prematurely biased in favor of a particular side, which in criminal cases will usually be the government.⁶³ Recall, however, that the focus of this Article is the adjudication stage, after the investigation is complete. By the trial stage, the pretrial process either has arrived at a consensus as to guilt or is at an impasse on the issue. Additionally, at the adjudication stage the judge must operate in open court in full view of the parties. Based on the available research, the remainder of this Article will assume 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.

B. FUNDAMENTAL RIGHTS IN A HYBRID CRIMINAL JUSTICE SYSTEM

The assumption that a hybrid inquisitorial process outperforms the adversarial process as a truth-finding mechanism does not mean, of course,

involvement in factfinding can improve “procedural economy”).

61. Other research has suggested that “expert advocacy is relatively more important to the operation of adversarial systems than expert judging is to inquisitorial systems,” a finding that could have significant implications in economically strapped jurisdictions. Michael K. Block et al., *An Experimental Comparison of Adversarial Versus Inquisitorial Procedural Regimes*, 2 AM. L. & ECON. REV. 170, 188 (2000).

62. See Fondacaro, Slobogin & Cross, *supra* note 49, at 979–80 (describing the limitations of studies “conducted in the ‘laboratory’”).

63. See Parisi, *supra* note 60, at 214 n.51 (citing studies suggesting that because “the adversary model requires the judge to listen passively to both sides of the case before making a decision, he would be less likely to become prematurely biased and draw a conclusion too early”). *But see* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1423–34 (2010) (noting that the “inquisitorial” process used to resolve social security claims heavily favored claimants).

that the American adversarial trial can or should be thrown over for a European inquisitorial proceeding. The Constitution ensures that certain components of the American criminal process are immutable. These components include the jury, the opportunity to confront one's accusers, the right to compulsory process under the Sixth Amendment, and the right to remain silent during trial under the Fifth Amendment,⁶⁴ all guarantees that stem as much from a desire to control state power and enhance the dignity of the process as from the goal of assuring verdict accuracy.⁶⁵ While the Supreme Court has indicated that only rights with "deep roots in our common law heritage" are "fundamental,"⁶⁶ the pedigrees behind the jury and confrontation rights and the compelled self-incrimination bar clearly meet that test.⁶⁷

Moreover, on several occasions the Supreme Court has expressed antipathy toward the inquisitorial model.⁶⁸ For instance, in *Blakely v. Washington*,⁶⁹ which held that a jury must find any fact that enhances a sentence above the presumptive maximum, the Court declared that the Constitution "do[es] not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."⁷⁰ In *Crawford v. Washington*,⁷¹ the Court held that the civil law tradition of permitting hearsay in criminal cases was "the principal evil at which the Confrontation Clause [in the Sixth Amendment] was directed,"⁷² and went on to hold that the defendant can demand that the state produce all of the witnesses who have provided the prosecution with testimonial evidence, regardless of how reliable those out-of-court statements might be, unless subjected to cross-examination by the defense at a previous

64. U.S. CONST. amend. V (self-incrimination bar); U.S. CONST. amend. VI (right to jury, confrontation, and compulsory process).

65. Malcolm Feeley, *The Adversary System*, in 2 ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM: STUDIES OF THE PRINCIPAL INSTITUTIONS AND PROCESSES OF LAW 753, 756-57, 761 (Robert J. Janosik ed., 1987).

66. See *Medina v. California*, 505 U.S. 437, 446 (1992).

67. See *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968) ("[T]he right to jury trial in serious criminal cases is a fundamental right . . ."); *Pointer v. Texas*, 380 U.S. 400, 405 (1965) ("[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."); *Malloy v. Hogan*, 378 U.S. 1, 10 (1964) ("[T]he accusatorial system has become a fundamental part of the fabric of our society.").

68. See David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1642-68 (2009) (describing cases where the Supreme Court has supported the confrontational model and rejected inquisitorialism).

69. *Blakely v. Washington*, 542 U.S. 296 (2004).

70. *Id.* at 313.

71. *Crawford v. Washington*, 541 U.S. 36 (2004).

72. *Id.* at 50.

proceeding.⁷³ In *Malloy v. Hogan*, the Court stated that “the American system of criminal prosecution is accusatorial, not inquisitorial” and went on to say, as noted earlier, that the Fifth Amendment privilege is the “essential mainstay” of that system.⁷⁴

The Supreme Court has also made the adversarial criminal trial the reference point for determining the constitutionality of procedures throughout the rest of the legal system. Even though trial in the juvenile justice system is not viewed as a “criminal prosecution” and thus is not governed by the Sixth Amendment or the literal language of the Fifth Amendment,⁷⁵ the Court has held that all of the adult criminal system’s attributes but the jury are required in that context (and even without juries, evidence production in juvenile courts remains the domain of the parties, not the judge).⁷⁶ The Court has also made the adversarial system the lodestar for determining what process is due in other disputes between the government and its citizens.⁷⁷

This mass of constitutional jurisprudence tilted toward adversarialism does not spell doom for all attempts to integrate inquisitorial components into the American criminal justice system, however. In particular, the type of hybrid system that empirical research suggests is best at achieving objective justice (and at least adequate at achieving subjective justice) would probably survive constitutional challenge. More specifically, so long as a “judicial inquisition” maintains trial by jury and the parties’ ability to select and cross-examine witnesses, it will avoid infringing the Sixth Amendment’s guarantees, and so long as it prevents self-incriminating “compulsion” it can survive a Fifth Amendment challenge.

IV. THREE PROPOSALS FOR A HYBRID REGIME

The hybrid system proposed here would modify the American system in three ways, corresponding to the three flaws in the adversarial system identified in Part II. First, the trial judge would be in charge of producing

73. *Id.* at 68.

74. *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

75. *In re Gault*, 387 U.S. 1, 59–60 (1967) (Black, J., concurring) (pointing out that the states labeled juvenile justice laws “civil” rather than “criminal” to avoid the constraints of the Sixth and Fifth Amendments).

76. *Id.* at 34–57 (holding that the rights to counsel, confrontation, cross-examination, and remain silent, *inter alia*, apply in juvenile delinquency proceedings); *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (refusing to apply the right to jury trial to juvenile delinquency proceedings).

77. See Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 574 n.252 (2006) (stating that *Mathews v. Eldridge*, the Supreme Court decision that governs due process analysis outside the criminal process, “accepted as given a baseline of adversarial process”).

the evidence used during the adjudication phase. The judge, not the lawyers, would make the initial selection of witnesses and would initiate questioning of any witnesses who are called; jurors too could be encouraged to ask questions. Second, to the greatest extent feasible, the judge would control the extraction of information from expert witnesses, through devices that ensure full revelation of the expert's factual findings and reasoning. These devices could include court-appointed experts, regulation of pretrial meetings, greater use of jury instructions, and the practice of "hot tubbing." Third, defendants would be cajoled into giving unsworn testimony describing their side of the story and would also be subject to questioning by the judge. To ensure fair treatment of the defendant consistent with constitutional doctrine, the European practice of having the defendant testify first would be modified, and American discovery and impeachment rules would be adjusted.

These proposals are proffered as thought experiments, with the recognition that their implementation poses significant challenges. The first challenge, of course, is that they need to be reconciled with constitutional guarantees. Second, as occurs with any attempt to insert a new procedure into a preexisting structure, these proposals have cascading effects on the rest of the process that need to be recognized. Third, the proposals impose burdens on various actors, particularly judges, which do not currently exist. These challenges are addressed in connection with each proposal. They are significant. But they are not insurmountable.

A. THE JUDICIAL OBLIGATION TO DISCOVER THE TRUTH

In most civil law countries, the trial tribunal is charged with taking active steps to discover the truth.⁷⁸ Aided by a dossier prepared by the police or the prosecution, the judge organizes the trial and the order in which witnesses testify. The judge initiates questioning, although, as noted above, the parties can also examine the witnesses and make arguments based on the evidence obtained.⁷⁹ Transposed to the American system, this format would have a significant impact, which would differ depending on

78. For a description of this requirement in France, Belgium, and Germany, see J.R. Spencer, *Evidence*, in *EUROPEAN CRIMINAL PROCEDURES* 594, 627–28 (Mireille Delmas-Marty & J.R. Spencer eds., 2002) (describing the European inquisitorial system of adjudication).

79. See Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 *BUFF. L. REV.* 361, 367 (1977). For a description of typical criminal trial procedure in two European countries, see Valérie Dervieux as revised by Mikaël Benillouche & Olivier Bachelet, *The French System*, in *EUROPEAN CRIMINAL PROCEDURES*, *supra* note 78, at 218, 245–47; Rodolphe Juy-Birmann as revised by Jörg Biermann, *The German System*, in *EUROPEAN CRIMINAL PROCEDURES*, *supra* note 78, at 292, 314–16.

whether the adjudication is in front of a jury or a result of plea bargaining.

1. Jury Trials

A judicial inquisition process could improve the accuracy of jury trials in several ways. First, as the laboratory research reported in Part II indicates, judicial questioning is likely to produce more facts, or at least more accurate facts. In contrast to the well-known aphorism about the types of questions a good adversarial cross-examiner asks, a judge is likely to ask questions to which he or she does *not* know the answer.⁸⁰ A judge would have no need to engage in the types of manipulation described by Jerome Frank.⁸¹ While lawyers might still want to grandstand or obfuscate when their turn comes, any efforts to do so will much more likely be perceived for what they are, given the facts the judge has already brought out.

Second, because they will be called by the judge rather than the parties, witnesses will be less partisan themselves. They will be less likely to see themselves as Frank's "soldiers in a war"⁸² and more likely to think of their role as providing information for the court. While the parties might still try to influence the witnesses prior to trial, whatever coaching takes place will be less effective, since the parties cannot know the types of questions the judge will ask on "direct" examination, nor how much like cross-examination it will be. Witnesses might also be less intimidated by a lawyer's cross-examination, if and when it occurs; since they are no longer testifying "for" the prosecution or the defense, witnesses should be less defensive about their account.⁸³

Third, the greater role of the judge could help redress the imbalance that almost always exists between the state and defendants, especially when the defendant is indigent.⁸⁴ Prosecutors will know that the judge is

80. See Roger C. Park, *Adversarial Influences on the Interrogation of Trial Witnesses*, in *ADVERSARIAL VERSUS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS* 131, 145–63, 166 (Peter J. van Koppen & Steve D. Penrod eds., 2003) (making this point and arguing that the factfinder ought to be allowed to ask questions).

81. FRANK, *supra* note 20, at 80–102.

82. *Id.* at 86.

83. Certainly expert witnesses feel more comfortable when they are designated as the court's witness. See Poythress, *supra* note 52, at 373 (describing a survey of experts); Sandra Evans Skovron & Joseph E. Scott, *Social Scientists as Expert Witnesses: Their Use, Misuse and Sometimes Abuse*, in *EXPERT WITNESSES: CRIMINOLOGISTS IN THE COURTROOM* 73, 85 (Patrick R. Anderson & L. Thomas Winfree, Jr. eds., 1987) ("Although a social scientist may be prompted to enter the legal setting by strong feelings about the matter being litigated, the social scientist is not there to argue or further his own opinions. He is there to offer his professional opinion on the legal controversy.").

84. See Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 912 (2011/12) (stating that the American criminal justice system "is marked

obligated to look over their shoulder at their investigative techniques, their participation in discovery, and their trial work in a much more direct way than occurs under the current system, which depends primarily on defense discovery of malfunctions.⁸⁵ As Stephanos Bibas has observed, in a world of underfunded public defenders, poor defendants “would prefer a quasi-inquisitorial system, with a neutral magistrate who is charged with digging up the truth.”⁸⁶

Despite the Supreme Court’s hostility toward “judicial inquisition,” the hybrid scheme proposed here is not unconstitutional. Because both parties can still ask questions and call witnesses whom the judge does not call, Sixth Amendment rights are not infringed. The judge is simply added as another questioner, albeit the predominant one; as such, this format can be seen as an accentuation of the current practice of occasional judicial (and in some states jury) questioning.⁸⁷ Some courts have rightly expressed dismay over uneven judicial intervention during questioning of witnesses because of its potential for leading the jury to believe that the judge favors one side or the other.⁸⁸ Courts have also been concerned about the effect a judge’s questioning demeanor might have on the jury.⁸⁹ However, if the judge’s questioning is confined to the beginning of each witness’s

by an adversary process so compromised by imbalance . . . that true adversary testing is virtually impossible”).

85. For a rare example of a judge rebuking the government’s tactics, see Dervan & Edkins, *supra* note 10, at 25–26.

86. Stephanos Bibas, Brady v. Maryland: *From Adversarial Gamesmanship Toward the Search for Innocence?*, in CRIMINAL PROCEDURE STORIES 129, 146 (Carol S. Steiker ed., 2006).

87. See FED. R. EVID. 614(b) (“The court may examine a witness regardless of who calls the witness.”). Even courts that disfavor judicial questioning generally permit it under fairly liberal circumstances. See, e.g., *United States v. Tilghman*, 134 F.3d 414, 416 (D.C. Cir. 1998) (reversing conviction in the instant case on ground that judicial questioning was impermissible but stating that “[j]udges may [question witnesses] repeatedly and aggressively to clear up confusion and manage trials or where ‘testimony is inarticulately or reluctantly given.’” (quoting *United States v. Norris*, 873 F.2d 1519, 1525–26 (D.C. Cir. 1989))). Jury questioning is permitted in Arizona. ARIZ. R. CIV. P. 39(b)(10); ARIZ. R. CRIM. P. 18.6(e). See also Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256, 259–61 (1996) (discussing studies that reported overall positive results from jury questioning procedure).

88. See, e.g., *United States v. Hickman*, 592 F.2d 931, 932–34 (6th Cir. 1979) (“[G]reat care must be taken by a judge to ‘always be calmly judicial, dispassionate and impartial. He should sedulously avoid all appearances of advocacy as to those questions which are ultimately to be submitted to the jury.’” (quoting *Frantz v. United States*, 62 F.2d 737, 739 (6th Cir. 1933))). See also *United States v. Bland*, 697 F.2d 262, 265–66 (8th Cir. 1983) (discussing situations where judicial questioning could prejudice a criminal defendant by indicating that the judge favors the government’s case).

89. *Tilghman*, 134 F.2d at 416 (“Because juries, not judges, decide whether witnesses are telling the truth, and because judges wield enormous influence over juries, judges may not ask questions that signal their belief or disbelief of witnesses.”). A related question is how judges would react to evidentiary objections to the judge’s questions, an issue that does not arise in Europe. See Schlesinger, *supra* note 79, at 367 (“[N]o technical rules of evidence impede the process of proof-taking.”).

testimony, the judge conducts the examination in a nonadversarial fashion, and the parties are permitted to carry out their questioning without significant judicial interference, neutrality and its appearance can be maintained.

The greater obstacle to this scheme is the selection and background of American judges and prosecutors. An inquisitional judge must be able to plan the trial, conduct much of the questioning, and ensure that witnesses are handled in as objective a fashion as possible. As Gordon Van Kessel has pointed out, “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.”⁹⁰ Similarly, prosecutors need to be able to prepare a balanced and complete file for the judge;⁹¹ otherwise, the judge’s questioning will at best be inefficient and at worst will completely miss the relevant points. While American judges and prosecutors are certainly capable of fulfilling these roles, currently they are not trained to do so. Additionally, in jurisdictions where judges are elected (which means in most states⁹²), the necessary neutrality may be harder to maintain.

Moving in an inquisitional direction would not require drastic changes to the current American system, however. Files resembling European dossiers are already prepared in many United States jurisdictions.⁹³ Most American judges were at one time litigators, and thus, with appropriate training, should be capable trial organizers and questioners; experience with managerial judging on the civil side and with magistrate investigations on the criminal side provide evidence that judges can be quite good at

90. Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 517–18 (1992).

91. *Id.* at 525 (describing the “Continental procedure[.]” of “providing the judge with the complete case file”). One suggestion for ensuring balance in the prosecutor’s file is to permit defense attorneys to cross-examine witnesses postcharge, with the result admissible at trial only at the behest of the defense attorney. Donald Dripps, *Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635, 673–74 (1999).

92. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266 (2008) (“[T]he majority of U.S. states have subjected at least some of their courts to popular elections; roughly ninety percent of state general jurisdiction judges are currently selected or retained this way.”).

93. See WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 972–73 (5th ed. 2009) (stating that police reports “[m]ost often” contain statements of defendants, codefendants, and witnesses that are subject to disclosure under discovery rules, as well as “considerable additional information” from persons whose statements are not subject to disclosure).

orchestrating the factfinding role.⁹⁴ While the democratic process can take its toll on judicial independence, especially when the right result looks “soft” on crime,⁹⁵ judges sitting in jury trials can blame acquittal rates on someone else. More importantly, even elected judges presumably would not be as obsessed with win-loss records as prosecutors currently are; with sufficient education about their new role, their institutional position would ensure a more neutral inquisition.

2. Plea Bargained Cases

Putting the judge at the controls would have even greater impact in the huge number of cases that do not go to trial because they are resolved via plea bargain. As noted earlier, while judges are supposed to ensure such pleas have a factual basis, they generally rely on the parties’ stipulation that such a basis exists, with very little independent attempt to verify the stipulation.⁹⁶ In many civil law countries, in contrast, the guilty plea does not exist.⁹⁷ While plea bargaining does occur, it does not eliminate the requirement of a trial.⁹⁸ Similarly, while a defendant’s confession will ordinarily carry considerable weight, the judge must still conduct a formal proceeding designed to make sure the confession is accurate.⁹⁹ Thus, in an inquisitorial regime both the government’s investigative process and its evidence can be subject to a much more intense scrutiny than that which occurs at the typical American guilty plea hearing.

94. Cf. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 825 (1985) (asserting that the trend toward managerial judging is “telling evidence for the proposition that judicial fact-gathering could work well in a system that preserved much of the rest of what we now have in civil procedure”); Felix Recio, Tanner Neidhardt & Briana Bassler, *Who Is the Magistrate Judge? Litigating Before U.S. Magistrate Judges in District Courts*, 41 ADVOCATE 40, 42–43 (2007) (noting that in 2006 magistrate judges disposed of 111,543 criminal pretrial matters, including ex parte probable cause hearings and search warrant proceedings).

95. See, e.g., Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 779, 793–96 (1995) (finding a statistically significant correlation between judicial overrides of life sentence recommendations and the occurrence of judicial elections).

96. See *supra* note 40 and accompanying text.

97. Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L.J. 1, 11 (2004) (“The inquisitorial procedural structure . . . does not include the concept of the ‘guilty plea’; it only includes the concept of ‘confession.’”).

98. See Joachim Herrmann, *Bargaining Justice—A Bargain for German Criminal Justice?*, 53 U. PITT. L. REV. 755, 763 (1992) (noting that, in Germany, “a confession does not replace a trial but rather causes a shorter trial”).

99. Jimeno-Bulnes, *supra* note 6, at 453 (stating that “a common aspect” of the plea bargaining process that occurs in France, Germany, Italy, and Spain “is that judicial control of the plea bargain . . . usually takes place at the appropriate hearing”).

The potential of this procedure to minimize wrongful convictions and wrongful punishment should be evident. *Alford* pleas would be out of the question. Confessions that result from particularly coercive prosecutorial offers (and that are therefore the most likely to be false) would also likely be ignored, if only because heavily discounted charges or sentencing recommendations most commonly occur in weak cases that the judge in an inquisitorial system will dismiss on lack of evidence grounds.¹⁰⁰ Perhaps most importantly, judges would be less likely to follow the parties' sentencing recommendation, a practice which is standard today¹⁰¹ even though the recommendations often depart from established guidelines.¹⁰² In an inquisitorial regime, the judge would have an obligation to conduct an independent investigation of facts relevant to sentencing, whether that investigation takes place during a plea hearing or at a separate sentencing proceeding.¹⁰³ In short, in an inquisitorial regime, the government needs an actual and strong factual basis for the verdict and sentence, not one simply agreed upon by the parties.

An inquisitorial procedure would place one other serious accuracy-enhancing constraint on plea bargaining. Because the parties no longer control the outcome, the prosecution would not be able to condition pleas on waivers of rights that relate to substantive liability. While this limitation would not prevent waivers of claims that are irrelevant to or detract from the merits,¹⁰⁴ it would prohibit waivers of *Brady* claims, due process-based contentions associated with eyewitness procedures, and other claims that attack the validity of the guilt and punishment determinations.¹⁰⁵

100. See Gazal-Ayal & Tor, *supra* note 17, at 363, 395 (discussing reasons why “prosecutors are expected to make more—rather than less—attractive plea offers in weaker cases that they still decide to prosecute in an effort to avoid the risk of failure to convict at trial,” and reporting a study finding that “the innocent are less willing to plead guilty and hence only accept plea offers with large sentence discounts”).

101. See Stuntz, *supra* note 35, at 596 (“Even when sentencing was everywhere discretionary, judges tended to defer to bargained-for sentencing recommendations.”).

102. Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1285 (1997) (estimating that plea bargaining results in circumvention of federal sentencing guidelines in 20–35 percent of cases).

103. Judicial determinations of sentencing facts do not violate the Sixth Amendment “*Apprendi*” right unless they add to the statutory or guidelines minimum or maximum. See *Rita v. United States*, 551 U.S. 338, 352 (2007) (“This Court’s Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence.”).

104. See *United States v. Mezzanatto*, 513 U.S. 196, 197 (1995) (permitting a plea agreement conditioned on waiver of protection against impeachment use of statements made during negotiations).

105. Cf. *United States v. Ruiz*, 536 U.S. 622, 628–33 (2002) (permitting a plea agreement conditioned on waiver of the right to access impeachment material and information about affirmative

Thus, while bargaining would not disappear, it would be less common. From both a wrongful conviction and a wrongful punishment perspective, that would be a good thing. From a constitutional perspective as well, this manifestation of the inquisitorial process can only be viewed positively. Rather, the main complaint about such a system, an obvious one, is that it could increase trials beyond the system's capacity, a likelihood brought home by the fact that in recent years even civil law countries have introduced what is in effect a guilty plea process, at least in cases involving minor crimes.¹⁰⁶

If the proposed system took root in the United States, however, the latter practice would probably, at most, be confined to cases in which little or no prison time is involved. That is because, given the expense of the American jury trial compared to its European analogue, American prosecutors have more incentive to bargain than their European counterparts; prosecutors will still offer breaks to defendants, simply in exchange for foregoing a jury trial.¹⁰⁷ And as long as there is a factual basis for any charge reduction prosecutors offer in exchange for a jury waiver, the judge could not upset the deal, because the charging decision is a prosecutorial prerogative.¹⁰⁸ Thus, many trials will resemble (leaner) sentencing hearings. Furthermore, the cost of the increased number of trials that would result from the proposal may be offset to some extent by a reduction in challenges to verdicts (because of the enhanced factual basis requirement) and a decrease in long sentences (which would be imposed less frequently once prosecutors lose control over disposition and judges are truly in charge of calibrating punishment¹⁰⁹). To the extent they occur

defenses); *United States v. Scallon*, 683 F.3d 680, 683–84 (5th Cir. 2012) (upholding plea waiver of the right to challenge a supervised release); Julian A. Cook, III, *Plea Bargaining, Sentence Modifications, and the Real World*, 48 WAKE FOREST L. REV. 65, 69 (2013) (arguing, consistent with the text, that “plea agreements should properly be construed as bilateral contracts involving three parties—the prosecution, the defendant, and the court”).

106. See Dervieux as revised by Benillouche & Bachelet, *supra* note 79, at 245 (describing the French *ordonnance pénale*, or penal order); Herrmann, *supra* note 98, at 757–63 (describing German treatment of petty crimes and penal orders).

107. Indeed, plea bargaining developed largely as a tool to avoid time-consuming and unpredictable jury trials. See GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 12–44, 111–24 (2003). While laypeople often serve on European courts, they are much cheaper to select and accommodate. See John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83, 101–11 (2006) (describing the factfinder selection process and evidentiary rules in Europe).

108. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

109. See Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1665 (2012)

separately from these trials, sentencing proceedings should also be shorter, because judges will already have a good picture of the defendant from the dossier-driven trial process. From an efficiency perspective, an inquisitorial regime is less attractive than the current American system, but on balance, may well be worth it.

Reconceiving the role of the judge as truth-finder should go a long way toward avoiding the potential for distortion associated with the current party-controlled system. Judges will not be beholden to the parties' version of the facts. Judicial questioning should provide more information at the margin and judicial activism at plea bargaining should also have a truth-enhancing impact. Two other inquisitorial features should move the system even further in that direction.

B. THE EXPERT'S OBLIGATION TO REMAIN NEUTRAL

In hotly contested adversarial criminal trials, experts can proliferate. The prosecution relies on experts primarily to prove the *actus reus*—for instance, expert evidence about DNA analysis, ballistics, and causes of death—and the defense often seeks countering experts. Increasingly, the defense also uses experts to try to counter testimony by *lay* witnesses, such as eyewitnesses or police officers testifying about the interrogation process. Finally, the defense relies on experts to support defenses for which it bears the burden of production, such as the insanity defense.¹¹⁰

Unfortunately, as the research reported earlier indicates, the adversarial process can undermine the objectivity of even the most cautious expert. In 2009, the National Research Council (“NRC”) scathingly criticized virtually every forensic discipline for relying on deficient scientific theories and procedures, taking inadequate steps to avoid error and bias, and fielding experts who overstated their capabilities.¹¹¹ More importantly for present purposes, the NRC blamed these problems on the legal system, stating that the process had been “utterly ineffective” in dealing with them.¹¹² To improve the situation, the NRC recommended the

(discussing how the “transfer of . . . more plea-bargaining power from judges to prosecutors . . . result[ed] in higher sentences” (quoting Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 308 (2004)) (internal quotation marks omitted)).

110. To get a sense of the range of experts consulted by the courts, see generally DAVID L. FAIGMAN ET AL., *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY* (2005).

111. William C. Thompson, *The National Research Council's Plan to Strengthen Forensic Science: Does the Path Forward Run Through the Courts?*, 50 JURIMETRICS J. 35, 35 (2009).

112. COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY., NAT'L RESEARCH

establishment of a new federal regulatory agency—the National Institute of Forensic Science—to devise best practice standards, and also recommended the removal of forensic laboratories from the control of the prosecution and the police.¹¹³

In essence, the NRC proposed a nonadversarial approach to science. In Europe, an analogue to the NRC's proposed Institute, known as the European Network of Forensic Science Institutes, already exists.¹¹⁴ Even in controversial areas not governed by the institutes, experts in most European countries are almost always court-appointed rather than selected by the parties.¹¹⁵ A number of commentators in this country have proposed, along similar lines, that trial judges rely more frequently on their authority to select experts under provisions like Federal Rule of Evidence 706.¹¹⁶

As practiced in Europe, this approach to expertise has much to recommend it. In Germany, for instance, the parties can respond to the report of the court's expert in writing, obtain another court-appointed expert if the first expert's work is deficient, and retain their own experts if they are not satisfied with the court's.¹¹⁷ If this procedure could be implemented in the United States, it would likely reduce erroneous verdicts based on flawed science, which the DNA exoneration cases have shown has played a role in numerous wrongful convictions.¹¹⁸

Why hasn't such implementation occurred? First, of course, the adversarial tradition is strong. Inertia is a powerful force against change.¹¹⁹

COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 53 (2009).

113. *Id.* at 18–20.

114. Ton Broeders, *The Role of the Forensic Expert in an Inquisitorial System*, in ADVERSARIAL VERSUS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS, *supra* note 80, at 245, 248 (noting that the Institute was established in 1994).

115. *See, e.g., id.* at 246.

116. *See, e.g.,* JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 116 (1995) (arguing that the court should sometimes “go beyond the experts proffered by the parties” and “utilize its powers to appoint independent experts under Rule 706”).

117. *See* Langbein, *supra* note 94, at 837–41 (1985) (describing the German expert selection process in civil and criminal cases). It should also be noted, however, that European courts still exhibit a strong tendency to rely on written reports rather than on oral testimony. *See, e.g.,* Broeders, *supra* note 114, at 246 (noting that, in the Netherlands, experts usually submit written reports). That practice would often be a violation of the Confrontation Clause in the United States. *See, e.g.,* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 329 (2009) (holding, in a case involving hearsay from an expert technician, that “[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits”).

118. *See* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 9 (2009) (noting that in 60 percent of a sample of exoneration cases, “forensic analysts called by the prosecution provided invalid testimony”).

119. *See* JOE S. CECIL & THOMAS E. WILLGING, *FED. JUDICIAL CTR., COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706*, at

Furthermore judges are probably concerned about fairness to the parties. The fear is that the court's expert will be perceived as more objective or more qualified than the parties' experts.¹²⁰ Finally, and most persuasively, there can be structural impediments. The European approach works best when the judge is involved at an early stage of the process and thus can pick an expert far enough ahead of trial to be useful.¹²¹ Although this Article has not shied away from proposing significant structural changes, routinely inserting a judge into the investigative phase of the criminal process is probably too much to swallow.¹²²

An alternative method of injecting an inquisitorial element into the use of experts in American courts would be to prohibit coaching of experts. In Europe, this prohibition applies to all witnesses, not just experts, and is enforced judicially.¹²³ As strange as this rule may seem to American attorneys, denial of pretrial witness contact is a natural outgrowth of the inquisitorial premise that judges, not attorneys, control evidence production. If the research reported in Part III can be trusted, it is a practice that would significantly reduce the amount of slanted information experts provide to the courts.

This scheme might run afoul of constitutional guarantees, however, specifically the rights to effective assistance of counsel and due process.¹²⁴

20–21 (1993), available at [www.fjc.gov/public/pdf.nsf/lookup/experts.pdf/\\$file/experts.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/experts.pdf/$file/experts.pdf) (discussing a survey of judges identifying respect for the adversary system as one of the main reasons courts did not appoint their own expert, despite a deep distrust of party-selected witnesses).

120. *Id.* at 52–56 (finding that judges favored their own experts over the parties' experts).

121. Compare Langbein, *supra* note 94, at 841 (“Effective use of court-appointed experts as exemplified in German practice presupposes early and extensive judicial involvement in shaping the whole of the proofs.”), with CECIL & WILLGING, *supra* note 119, at 22–23 (noting that nonappointments under Rule 706 often stemmed from the court not discovering until too late in the process that the parties' experts were not going to provide credible guidance). Cost is another factor inhibiting court appointments. *Id.* at 5, 22.

122. Although the proposal has been made. See 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, 890–93 (2011/12).

123. Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1088–89 (1975) (stating that in a nonadversarial proceeding, “[t]he parties are not supposed to try to affect, let alone to prepare, the witnesses' testimony at trial. ‘Coaching’ witnesses comes dangerously close to various criminal offenses of interfering with the administration of justice”); Langbein, *supra* note 94, at 834 (“German judges are given to marked and explicit doubts about the reliability of the testimony of witnesses who previously have discussed the case with counsel or who have consorted unduly with a party.” (quoting Benjamin Kaplan, Arthur T. von Mehren & Rudolf Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193, 1201 (1958))) (internal quotation marks omitted).

124. See *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (holding that due process guarantees the defendant “access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense”).

If so, at least two other methods of defusing adversarial excess are available. The first is illustrated by the New Jersey Supreme Court's decision in *State v. Henderson*,¹²⁵ dealing with expert testimony about the accuracy of eyewitness identifications. *Henderson* held that instead of having opposing experts quibble over how the relatively robust scientific findings in this area apply to the facts of the case, the trial court should provide the jury with a detailed instruction describing the relevant findings about both the psychological factors (for example, weapons focus and cross-racial identification) and the police practices (for example, failure to use a double-blind identification process) that can affect eyewitness accuracy.¹²⁶ This approach is one way of avoiding the so-called 99:1 problem, where the consensus view is called into question by one (possibly well-meaning) maverick.¹²⁷ While the adversarial system exacerbates this problem by treating the outlier as equal in stature to the representatives of the consensus view, the more inquisitorial approach taken in *Henderson* provides the factfinder with a balanced treatment of the relevant science.

In scientific areas where the science is more heavily contested, *Henderson*-type instructions might not be possible. A final mechanism for reducing the distorting impact of adversarialism has come to be known as "hot tubbing." Developed in Australia, hot tubbing involves experts, selected by the parties, sitting side-by-side in the courtroom. It begins with one expert giving his or her views, which are then subject to questioning by the other expert or experts, the court and the attorneys; the same procedure is then followed with the next expert.¹²⁸ The advantage of this approach is that it reduces attorneys' control over the experts, while allowing the witnesses to provide their opinions in a less adversarial atmosphere.¹²⁹

125. *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

126. *Id.* at 925–26.

127. Rebecca Haw makes this point well:

The adversarial presentation of expert evidence can exaggerate the importance of a minority view on a scientific question. As long as there is some scientifically legitimate difference of opinion, one side can exploit that difference by calling an expert from the minority side. If, out of one hundred experts, ninety-nine agree on a proposition, one side may call the outlier, and the other may call one of the heartland experts. This will make a real-world ratio of 99:1 appear, in the courtroom, closer to 1:1. So the legal system can create an illusion of insoluble disagreement even if all experts are presumed to be honest, qualified, and unbiased. All scientific communities have good-faith holdouts and mavericks.

Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW. U. L. REV. 1261, 1262–63 (2012) (footnotes omitted).

128. See Elizabeth Reifert, Comment, *Getting into the Hot Tub: How the United States Could Benefit from Australia's Concept of "Hot Tubbing" Expert Witnesses*, 89 U. DET. MERCY L. REV. 103, 113–14 (2011) (describing the process of "hot tubbing" and explaining why it is not inconsistent with the Federal Rules of Evidence).

129. An alternative or supplement to hot tubbing is ensuring that the experts meet before trial and exchange information. Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1212.

While hot tubbing's effect on accuracy has not been studied,¹³⁰ the research reported in Part III suggests that its more inquisitorial nature would tend to reduce bias and distortion in the presentation of expert evidence.

C. THE DEFENDANT'S OBLIGATION TO TESTIFY

One of the most stunning aspects of European trial procedure to American viewers is that the defendant is often the first to speak. Usually the defendant testifies in narrative form, and then is asked questions by the judge and the parties.¹³¹ While defendants are told they have the right to remain silent, they are still required to take the stand and officially refuse to answer questions, and thus almost all end up testifying.¹³²

As the Supreme Court made clear in *Griffin v. California* when it prohibited adverse comment about a defendant's decision to forego taking the stand¹³³ and subsequently applied that holding to sentencing as well,¹³⁴ requiring the defendant to testify is an infringement of the Fifth Amendment's prohibition against compelling a person to provide self-incriminating testimony. From both a wrongful conviction and a wrongful punishment perspective, however, this prohibition is unfortunate. Regardless of how it is instructed, a jury tends to believe that a defendant who does not testify is hiding something.¹³⁵ Furthermore, the best source of information about the defendant's actions and mindset at the time of the offense is usually the defendant, and if he is willing to admit the crime, his description of his motives and intentions can be essential to calibrating his culpability and avoiding wrongful punishment.¹³⁶

130. Several authors have speculated favorably on this score, however. See, e.g., Reifert, *supra* note 128, at 113–15; Steven Feola & Richard A. Alcorn, *Expert Witness Advocacy: Changing Its Culture*, ARIZ. ATT'Y, Mar. 2009, at 24, 30.

131. See, e.g., Dervieux as revised by Benillouche & Bachelet, *supra* note 79, at 247–48; Juy-Birmann as revised by Biermann, *supra* note 79, at 316.

132. See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 951, 990–91 (1983).

133. *Griffin v. California*, 380 U.S. 609, 614 (1965) (“[C]omment on the refusal to testify is a remnant of the ‘inquisitorial system of criminal justice,’ which the Fifth Amendment outlaws.” (citation omitted)).

134. *Mitchell v. United States*, 526 U.S. 314, 328 (1999) (“We decline to adopt an exception [to *Griffin*] for the sentencing phase of a criminal case . . .”).

135. See Clyde Hendrick & David R. Shaffer, *Effect of Pleading the Fifth Amendment on Perceptions of Guilt and Morality*, 6 BULL. PSYCHONOMIC SOC'Y 449, 451 (1975) (describing a study finding that mock jurors who read a trial transcript in which the defendant invoked his Fifth Amendment right were more likely to think the defendant committed the crime and more likely to rate the defendant as significantly less moral than a defendant who testified and denied his involvement in the crime).

136. Celine Chan, Note, *The Right to Allocation: A Defendant's Word on Its Face or Under Oath?*, 75 BROOK. L. REV. 579, 588 (2009) (“Without allocation, much of the information necessary to

Routine trial testimony by defendants might bring two further benefits. First, requiring testimony at trial could reduce the incentive for the police to produce a confession prior to trial. Years ago Edwin Borchard speculated that the ability to assert the privilege at trial “is probably responsible for many abuses . . . [T]he accused’s known privilege of refusing to testify influences the police to exact ‘confessions’ which, whether true or not, stigmatize the system of obtaining them as a public disgrace.”¹³⁷ Second, putting the defendant on the stand may also contribute to subjective justice. Research indicates that defendants often resent proceedings that do not allow them to tell their story.¹³⁸

Thus, importing this aspect of inquisitorialism into the American process could help reduce both wrongful convictions and wrongful acquittals and perhaps also improve perceptions of its fairness. But how can a testimony requirement be implemented, given the Fifth Amendment? When the defendant has confessed and the adjudication is in essence a sentencing hearing, this question may not be a pressing one. But in other situations, it needs a good answer.

One response is to ensure that the defendant’s testimony is “unsworn,” a practice that several countries permit,¹³⁹ and in fact was routine in this country until the mid-nineteenth century.¹⁴⁰ If testimony is not under oath, it cannot be used to prosecute the defendant for perjury, and thus avoids the confession-or-perjury dilemma that is often seen to be the primary rationale for the Fifth Amendment.¹⁴¹ Additionally, to assure compliance with the Supreme Court’s holding that the Fifth Amendment prevents the state from forcing the defendant to testify before he or she has heard all the

achieve the goals of mitigation and individualization—and ultimately, sentencing accuracy—would never be realized. Indeed, a defendant’s allocution is arguably the most important factor in securing an accurately mitigated and individualized sentence.”).

137. EDWIN M. BORCHARD WITH E. RUSSELL LUTZ, *CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE* 371 (1932).

138. See Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 887–89 (1997) (reporting research finding that personal participation enhances perceptions of fairness in plea bargaining, sentencing hearings, and mediation, and that litigants prefer mediation to adjudication and ex parte settlements reached by lawyers and judges in part because of the greater opportunity to participate).

139. Van Kessel, *supra* note 90, at 423.

140. See *Portuondo v. Agard*, 529 U.S. 61, 66–67 (2000) (recounting the colonial practice of obtaining testimony from defendants, who were “disqualified from testifying under oath”).

141. See William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 766 (1989) (explaining why the Fifth Amendment “privilege can be seen . . . as guarding against a relatively narrow evil—the practice of forcing individuals to choose between confession and false statement—either because imposing such a choice is morally problematic, or because suspects who face such a choice will rarely confess absent unacceptable physical or emotional pressure from the police”).

evidence,¹⁴² the defendant could also be permitted to speak last, in contrast to the usual European practice.¹⁴³

While these two moves would go a long way toward reducing the tension between the Fifth Amendment and inquisitorialism, it does not eliminate it, because in the end inquisitorialism demands that the defendant testify or suffer the consequences. More specifically, if the defendant remains silent, civil law judges can consider the silence as (negative) evidence.¹⁴⁴ Most American courts would probably hold that practice to be in violation of *Griffin*. However, the precise holding in that case was that “the Fifth Amendment . . . forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt.”¹⁴⁵ The literal terms of this language would not be violated by an inquisitorial proceeding that avoided both prosecutorial comment on the accused’s silence and instructions about the meaning of silence, and instead allowed the relevance of the court’s request for testimony and the defendant’s refusal to provide it to be determined by the jury. Nonetheless, *Griffin* would probably have to be overturned to remove all doubt on this point.¹⁴⁶

142. See *Brooks v. Tennessee*, 406 U.S. 605, 611 (1972) (“Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty.”).

143. In many European jurisdictions, the defendant not only testifies first but is also permitted to make a final statement. Van Kessel, *supra* note 90, at 424. However, the fact that the defendant must talk before hearing the accusers probably violates *Brooks*. Of course, as suggested in the text, if *Griffin* were overturned, *Brooks* could be as well. See *Brooks*, 406 U.S. at 610–11 (indicating that the holding depended on *Griffin*).

144. Although in most European countries today the factfinder is technically not permitted to draw adverse inferences from silence, “Continental prohibitions on adverse inferences from defendant’s failure to speak are rather anemic” and Continental procedure “strongly encourages the defendant to respond to questions by exacting a heavy price for remaining silent.” Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 W. VA. L. REV. 799, 823, 833 (1998). Furthermore, at least in Germany, if the defendant answers some questions and refuses to answer others, even the technical prohibition on adverse use disappears. Schlesinger, *supra* note 79, at 379–80.

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

146. In practice, *Griffin* is on its last legs. A number of Supreme Court cases have undermined its import. See *White v. Woodall*, ___ S. Ct. ___ (2014) (holding that state court’s decision to uphold trial judge’s refusal to give jury instruction against drawing adverse inferences about offender’s failure to take the stand during capital sentencing phase not an unreasonable interpretation of Supreme Court precedent); *Portuondo v. Agard*, 529 U.S. 61, 73 (2000) (concluding that a prosecutor’s statement during closing argument that defendant had the opportunity to listen to the state’s witnesses and tailor his testimony accordingly did not violate *Griffin*); *United States v. Robinson*, 485 U.S. 25, 32 (1988) (holding that a prosecutor’s comment about defendant’s failure to take the stand is a “fair response” to defense attorney’s claim that defendant could not tell his story and does not violate *Griffin*); *United States v. Hasting*, 461 U.S. 499, 507–09 (1983) (finding that repeated violations of *Griffin* can be harmless error). At least two justices would clearly vote to overturn it. See *Salinas v. Texas*, 133 S. Ct.

Whether that overruling occurs explicitly or implicitly, two other steps can be taken to allay defense attorney concerns. First, as occurs in many European countries and is recommended by several American scholars,¹⁴⁷ the defense should have full access to the prosecution's dossier, in order to better structure the defendant's testimony.¹⁴⁸ Second, to remove the most powerful subconstitutional objection to putting the defendant on the stand, the defendant should not be impeachable with prior offenses.¹⁴⁹ The relationship of previous criminal behavior—even fraudulent behavior—to a witness' current credibility is extremely tenuous at best.¹⁵⁰ But even if the impeachment rule is maintained for other witnesses, it could be relaxed for defendants giving unsworn testimony, since the factfinder will undoubtedly already assume this testimony is self-serving and will need no (tangentially relevant) reminder of that fact.

V. CONCLUSION

Integrating inquisitorial features into an adversarial system is risky business. This Article's proposals—judicial control of guilt and punishment adjudication, inquisitorial treatment of experts, and a requirement that the defendant give unsworn testimony—are alien to American trial procedures. Most importantly, these proposals transfer a significant amount of power from lawyers to judges.

2174, 2184 (2013) (Thomas, J., concurring) (“*Griffin* is impossible to square with the text of the Fifth Amendment.”). Reversal of *Griffin* would of course also nullify *Carter v. Kentucky*, 450 U.S. 288 (1981), which requires an instruction to the jury that adverse inferences may not be drawn from the defendant's failure to testify.

147. See, e.g., Findley, *supra* note 84, at 937–39 (describing various proposals and stating that “[f]ull disclosure of the prosecutor's file is not unworkable”).

148. See Jimeno-Bulnes, *supra* note 6, at 433 (“The investigative dossier . . . may be consulted by both parties at the beginning of the preliminary (and judicial) investigation.”).

149. See FED. R. EVID. 609(a)(1)(b) (permitting introduction of a prior offense for which the penalty is a year or more to impeach a defendant “if the probative value of the evidence outweighs its prejudicial effect to that defendant”); Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 47 (1999) (noting that “many criminal defendants” choose not to testify to avoid the prejudicial impact of prior conviction impeachment).

150. Cf. Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235, 247 (1975) (discussing a study concluding that the groups with knowledge of the defendant's prior conviction rarely used it in weighing his credibility); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide Guilt*, 9 L. & HUM. BEHAV. 37, 43 (1985) (discussing a study finding that “[t]he defendant's credibility is already so much lower than that of the other witnesses (because it obviously is in the defendant's self-interest to give testimony which favors his or her position) that the admission of prior convictions does not reduce the credibility of the defendant further”).

But that, of course, is the goal. Adoption of these proposals would tone down the adversarial tenor of the process and therefore, if empirical research is any guide, enhance adjudicative accuracy. The proposals would also provide the factfinder with more information, particularly from experts, who increasingly appear in criminal courts, and from defendants, whose testimony can be especially crucial in avoiding wrongful acquittals, but may also help avoid wrongful punishment and wrongful convictions. Even when the parties plea bargain, trials would still occur, and the enhanced judicial inquiry requirement would provide more protection against erroneous convictions, particularly of poorer defendants, who are less likely to benefit from aggressive investigation and negotiation by their attorneys. Furthermore, all three proposals can be implemented without infringing fundamental constitutional rights. In short, instituting these proposals could reduce wrongful convictions, wrongful acquittals, and wrongful punishment at a cost that is legally and fiscally acceptable.

