Should We Search for the Truth, and Who Should Do It

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The criminal process, my first thesis goes, is about truth. If one agrees with that premise, the question of how to determine the “true” facts in the criminal process becomes critical. I will try to show that there are different concepts of procedural truth, each traditionally associated with a different procedural system, but that the differences have become less pronounced, and the ways of procedural truth-finding seem to converge worldwide. Finally, I will focus on the issue of truth-finding without trial: How can we make sure that a procedural outcome not based on a full trial nevertheless is based on “true” facts?

I. The Importance of Truth

Many purposes have been ascribed to the criminal process. In Continental legal thinking, the criminal process is said to be geared, alternatively or cumulatively, to enforcing the criminal law, creating the basis for a just and fair judgment, restoring social peace, or simply “finding the truth” about a criminal incident.1

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1 For a recent overview of German theories, see Peter Rieß, Über die Aufgaben des Strafverfahrens, 2006 JURISTISCHE RUNDSCHAU 269, 270-71 (2006). For a French viewpoint, see BERNARD BOULOC, PROCEDURE PENALE (20th ed. 2006), marginal note 3 (discussing the use of criminal procedure to ascertain the quick discovery and repression of crime while at the same time upholding the rights of the individual).
Anglo-American writers, by contrast, tend to emphasize the conflict-resolving potential of the criminal process.\(^2\) None of the potential purposes of the criminal process can be reached unless the judgment has been based on a search for the truth. To reach any of its goals, the process must reflect an honest effort to determine what "really" happened.\(^3\) The truth evidently needs to be sought when "finding the truth" or achieving "truth and justice" are the declared goals of the criminal process.\(^4\) However, a successful restoration of "social peace" likewise presupposes that the relevant facts have plausibly been established; society cannot close the file on a disturbing incident unless convincing factual findings have been made by an agency with authority to do so. The importance of finding the "true" facts is demonstrated by the successful operation of Truth and Reconciliation Commissions\(^5\) and similar institutions. In order to achieve closure on traumatic events, it seems more important to determine and make public what actually happened than to impose criminal sanctions.

What about conflict resolution? If we conceive of the criminal process as a conflict between the prosecutor and the defendant, isn’t the factual basis upon which the parties reach an agreement irrelevant? At first glance, the answer should be yes. For example, if the prosecutor and the defendant in a robbery case both think that the defendant should receive five years in prison, it seems to make no difference whether the defendant actually committed the robbery, and whether he also caused the victim’s death.\(^6\)

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\(^4\) See Fairlie, supra note 2, at 258-59.


\(^6\) See Stephanos Bibas, \textit{Bringing Moral Values into a Flawed Plea-Bargaining
Nevertheless, even where the sentence rests on a perfectly voluntary agreement between the prosecution and the defense, the judgment may fail to resolve the underlying "conflict" if it appears to a (well-informed) public to be incongruous with the event that triggered the process. The reason for that residual fact-contingency of a fair judgment lies in the understanding that even where the law conceives of the criminal process as a contest between the prosecution and the defense, the criminal process differs from a civil suit in that the public is involved as an invisible third party. Crime constitutes a breach of the public peace because the offender's act violates a basic rule of social behavior. Therefore, the suspicion that a crime has been committed, as opposed to a mere breach of contract or civil tort, concerns people beyond the individuals directly affected. Thus, the conflict to be resolved by the criminal process is not just a dispute between two private parties; instead, the public is interested in the outcome, and the prosecutor is to represent that interest.

This specific situation implies that not just any agreement will do. No reliable empirical data exists on what exactly people regard as the minimum requirements for a criminal judgment to be "fair." However, it seems reasonable to assume that the public would be reluctant to accept a criminal judgment that is ostensibly based on a lie. One example of such a situation is the so-called Alford plea: If a defendant pleads guilty to murder charges and in

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7 See id. at 1429.
9 See Gibson, supra note 5, at 140.
10 See Jackson, supra note 2, at 139.
11 See generally Gibson, supra note 5, at 126 (explaining the importance of evenhandedness in "meeting expectations of fairness").
12 North Carolina v. Alford, 400 U.S. 25, 28 (1970). Terry Alford was charged with murder. Id. Due to State law applicable at the time, Alford could be sentenced to death only if he chose a jury trial. Id. On the advice of his lawyer, Alford pleaded guilty to murder but at the same time declared: "I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man . . . I just pleaded guilty because they said if I didn't they would gas me for it, and that is all." Id. A majority of the U.S. Supreme Court found Alford's guilty plea to be valid. Id. See Jenny McEwan, Ritual, Fairness and Truth: The Adversarial
the same breath declares in open court "I didn’t do it," the ensuing finding of guilt may or may not be technically valid. But the equivocality of the defendant’s declarations and the apparent lack of a reliable foundation for the court’s judgment makes us (and that means lawyers as well as the non-lawyer public) feel that the process has not provided a proper resolution to the conflict that triggered it. The procedural rules on guilty pleas may permit the court to ignore the defendant’s protest that he was induced to declare himself guilty only by the fear of the death penalty if he went to trial, but the judgment remains deficient when there is reason to believe that it is based on a fiction, or on an assumption that is equally likely to be true or false. In essence, the social acceptability of the judgment is at issue here. Society tolerates (because it has to) a margin of error as to the court’s findings of fact and law, but even in common law systems, a judgment that does not even claim to have a basis in “true facts” will not be accepted as a just resolution of conflict and instead will appear as an arbitrary judicial fiat.

Before taking a closer look at the exact meaning of “truth,” two caveats are in order with respect to the truth-orientation of the criminal process. First, even if the establishment of the “truth” about the relevant events is one of the goals of any criminal process conducted by the state, this does not mean that every

and Inquisitorial Models of Criminal Trial, in 1 THE TRIAL ON TRIAL, supra note 2, at 51, 58 (“Truth is here subservient to defendant autonomy, or the appearance of it.”). Compare Albert W. Alschuler, Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas, 88 CORNELL L. REV. 1412, 1412 (2003) (arguing that Alford pleas are a clear violation of due process), with Alschuler, supra note 8 passim (defending the position that Alford pleas, but not all guilty pleas, should be discontinued). For an analysis of Alford from a German perspective, see Andreas Ransiek, Zur Urteilsabsprache im Strafprozess: Ein amerikanischer Fall, 2008 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 116, passim (2008).

13 Alford, 400 U.S. at 37 (“An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.”).

14 See McEwan, supra note 12, at 58 (“Pragmatism apparently gave way to the need for catharsis.”).

15 Alford, 400 U.S. at 168.

participant is individually obliged to actively take part in the search for truth. One can postulate that state officials (judges and prosecutors) have an obligation to further, within the confines of their respective procedural roles, the determination of “true” facts, but the same obligation cannot be imposed on the defendant and his lawyer. The defendant’s right to remain silent as a corollary of his freedom to conduct the defense as he thinks best trumps the public interest in arriving at a truth-based judgment. It is a sign of authoritarian systems that they espouse the idea that “we all want to find the truth” and thereby deny the defendant’s right to stay aloof from the process or even to impede the truth-finding by holding back crucial evidence. Freedom-oriented procedural systems, by contrast, grant the defendant the option of withholding cooperation without adverse consequences.

Secondly, there is consensus—even among those that emphasize the truth-finding function of the criminal process—that truth shall not be sought at any cost. All procedural systems recognize overriding concerns that restrict or prevent the admission of certain pieces of evidence even if they would be necessary for presenting relevant facts to the court. Human dignity (guaranteeing a core sphere of privacy) and professional secrecy are typical sources of such restrictions. Systems differ with respect to the relative weight they afford the interest of protecting the regularity of the process. Some procedural systems

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17 See J.R. Spencer, Introduction to European Criminal Procedures 1, 23-24 (Mireille Delmas-Marty & J.R. Spencer eds., 2002). Systems differ with respect to their tolerance vis-à-vis a defendant’s attempts to actively distort the facts that come before the court. See Mirjan Damaška Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U. Pa. L. Rev. 506, 527-99 (1973). Although bribing or harassing witnesses, even if done by the defendant, will be universally sanctioned as an illegal interference with the process, Anglo-American legal systems punish the defendant for making false statements at the trial whereas other systems tolerate such efforts as an instance of self-defense. Id. The fact that the defendant can present his version of the facts without having to fear (additional) criminal punishment may, put greater pressure on the defendant to testify. Id.

18 See Weigend, supra note 16, at 162 (describing the right to remain silent and the privilege against self-incrimination in German law).

tend to exclude illegally obtained evidence in an effort to thereby deter illegal investigation methods, while others give preference to obtaining a complete factual basis for the judgment and exclude evidence only in egregious cases of unlawfulness and/or where the evidence has been rendered unreliable, e.g., through the use of force to obtain a statement from the accused or a witness. Balancing such external interests against the overall interest in establishing the truth is particularly sensitive when (possibly) exonerating evidence is concerned. Generally, the recognition of limits to truth-seeking should not work to the detriment of the suspect. If the exclusion of certain evidence removes a critical piece from the prosecution’s case, there is no sufficient basis for conviction. To the extent that procedural systems place a burden of proof with respect to certain issues (“defenses”) on the defense, inadmissibility rules should apply only in extraordinary situations.

II. Definitions of Truth and their Relation to Procedural Models

If we can agree that the search for truth is an indispensable element of the criminal process, it would be useful to know what “truth” is. That question has occupied theologians, philosophers, and lawyers for quite some time, and agreement has yet to emerge.


21 See Tinsley, supra note 20, at 68.

22 Examples of extraordinary situations could be: the defendant has obtained an exonerating document by robbery or extortion (simple larceny should be a borderline case); the defendant has used illegal threats to make a witness come forward and testify (truthfully) on his behalf. See generally Celia Goldwag, The Constitutionality of Affirmative Defenses:After Patterson v. New York, 78 COLUM. L. REV. 655, 670 (1978).

Generally, one can distinguish between two approaches. According to correspondence theory, a sentence is true if it corresponds with reality. Truth, according to that theory, is like a "hidden piece of gold" waiting to be discovered and brought to light. Correspondence theory comports with popular notions of truth, but it has to presuppose that we are able to determine and to express through language what in fact "is." The competing consensus theories of truth dispense with the notion that "true facts" exist a priori; truth, according to these theories, is what reasonable people agree upon after a complete and fair discourse.

The different approaches toward truth-finding connected with these competing theories have a direct impact on the function and structure of the criminal process. If truth-finding connotes the revelation (or discovery) of an objective reality, it is the result that legitimizes the process. The judicial process is only the means to

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26 Trüg & Kerner, *supra* note 24, at 194.


28 See Hodgson, *supra* note 24, at 225 ("Within the common law tradition, legal truth is seen as something which is contingent, existing not so much as an objective absolute but as the most plausible or likely account, established after the elimination of doubt."); Matthew T. King, *Security, Scale, Form and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Systems*, 12 Int’l Legal Persp. 185, 188-89 (2002).

discover the hidden, "objective" reality and should be organized to optimize the chances of finding the "piece of gold."\textsuperscript{30} If, on the other hand, consensus theory is correct in postulating that whatever emerges from a fair and rational discourse among the parties can be accepted as the "truth," the content of the rules that determine the process becomes more important than the outcome itself, and adherence to these rules acquires paramount importance for truth-finding.\textsuperscript{31}

Traditionally, correspondence theory has been regarded as congruent with inquisitorial procedural systems, whereas the adversarial process prevalent in common law countries has been said to reflect consensus theory.\textsuperscript{32} It is true that each of these procedural ideal types has features that fit well with one of the theories of truth.\textsuperscript{33} If we content ourselves with a very superficial sketch of the two models and disregard their complexities and variants, then the distinctive feature of the adversarial model is the assumption that an antagonistic presentation of competing versions of the "truth" by each party is the optimal device for bringing out the "real" truth. Hence, parties are given the power as well as the responsibility for presenting evidence to prove their respective versions of the truth, and each party is expected to rigorously test the opponent's version through cross-examination.\textsuperscript{34} Although this procedural arrangement is not

\textsuperscript{30} Id.

\textsuperscript{31} See Damaška \textit{supra} note 17, at 581 ("Almost imperceptibly, the emphasis shifts here from problems of cognition to the concern that parties abide by the rules regulating their 'battle.'"). For a subtle and profound analysis of this issue, see Antony Duff et al., \textit{3 The Trial on Trial} 62 (2007).

\textsuperscript{32} See Gerson Trüg, \textit{Lösungskonvergenzen Trotz Systemdivergenzen im Deutschen und US-Amerikanischen Strafverfahren} 59-70 (2003). For an analysis of the philosophical background of the two systems, see King, \textit{supra} note 28, at 193-207. An affirmative state interest in determining the truth also comports with the ideal type of an "activist" state in the typology developed by Mirjan Damaška. Mirjan Damaška, \textit{The Faces of Justice and State Authority} 47-56 (1986). In a "reactive" state, the judge would typically wait for the parties to present their cases and would decide their dispute on the basis of what facts and legal propositions have been presented to him or her. However, in the criminal process even the "reactive" state is engaged as a party, so that Damaška's model does not quite fit.


\textsuperscript{34} See id.; Damaška, \textit{supra} note 17, at 525; Grande, \textit{supra} note 24, at 147.
necessarily linked to the notion that "truth" is whatever emerges from a fair process, both theories play well together. If no preconceived "objective" truth exists, but different people entertain different (interest-driven) notions of the relevant facts, then it makes sense to have these different notions presented in court and to base the decision on that version which, on balance, appears more plausible to the trier of fact.\(^{35}\)

The inquisitorial system, by contrast, assumes that an "objective" investigation by a neutral judge is the best guarantee for bringing out the truth.\(^{36}\) In procedural systems that adhere to the inquisitorial principle, it is thus typically the responsibility of a judge—before trial, at trial, or both—to determine the scope of the investigation as well as the witnesses, experts, documents and other evidence to be presented.\(^{37}\) Modern inquisitorial systems have tempered the judge's omnipotence by giving the parties, and especially the prosecutor, the power to co-determine the scope of the search for the truth.\(^{38}\) For example, in most Continental procedural systems, at trial the judge cannot extend the investigation beyond the factual framework that the prosecutor has defined in the charging document, and the defense can, in various ways, introduce or at least suggest additional evidence, thus broadening the factual basis of the court's eventual decision.\(^{39}\) Yet, these elements of party co-determination do not fundamentally abrogate the system's affinity toward the

\(^{35}\) I leave aside rules on the burden of proof, including the rule that the defendant can be convicted of a crime only if the prosecution has proved his guilt beyond a reasonable doubt.

\(^{36}\) See Grande, supra note 24, at 146-47.

\(^{37}\) See Damaška, supra note 33, at 120; see Hodgson, supra note 24, at 223-24; see also Stefan Kirsch, Verteidigung in Verfahren vor dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien (JStGH), 2003 Strafverteidiger 636, 638 (2003), regard this as the distinctive difference between the two types of process.

\(^{38}\) Damaška, supra note 33, at 120.

\(^{39}\) For example, in the Dutch system, the defense can request before trial that the investigating judge interrogate certain witnesses with a view toward saving their testimony for the trial phase. WETBOEK VAN STRAFVORDERING [SV] [CODE OF CRIMINAL PROCEDURE] art. 226a-226s (Neth.). In Germany, both the defense and prosecution can demand that the court hear certain witnesses in addition to those the presiding judge had subpoenaed on his own motion. Strafprozessordnung [StPO] [Code of Criminal Procedure] Apr. 7, 1987, Bundesgesetzblatt Teil I [BGBl. I] VI, as amended §§244 ¶ 3.
correspondence theory of truth. Neither in theory nor in practice does the inquisitorial process produce "truth" through an interaction between the prosecution and the defense, but it is the court, albeit assisted by the parties, that conducts a methodical search for the hidden piece of gold. Correspondence theory thus remains the basis of the inquisitorial process even where the recognition of defense rights has led to significant changes in the original model.

The traditional associations of consensus theory with the adversarial process, and of correspondence theory with the inquisitorial model, capture indisputable affinities but do not reflect the diversity and differentiation of attitudes toward "truth" in various present-day legal systems. Most importantly, existing procedural systems do not reflect the inquisitorial and the adversarial ideal types in their pure form. The heritage of one of the competing ideal types is still discernible in individual procedural systems, but they all contain differing amounts of alloy that may have entered the system because the purest doctrine of adversariness and inquisition turned out to be impractical or unfair. For example, the criminal process in the U.S. system, which is clearly adversarial in its general orientation, is not exclusively geared toward imposing and enforcing rules of fair procedure. It also aims at determining what "actually happened." In fact, some of the landmark procedural rules of adversarial systems can best be explained by the goal of truth-finding. The right to confront and cross-examine adverse witnesses, with its

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40 See King, supra note 28, at 193-207.
41 Id. at 201.
42 Mirjan Damaska, Evidence Law Adrift 74 et seq. (1997). Trüg and Kerner, supra note 32, at 196-98, maintain that the U.S. process follows a "formalized understanding" of the truth and aims to produce (herstellen), not discover (ermitteln) the truth. For the reasons outlined in the text, this view does not completely capture the essence of the U.S. criminal process. Judicial involvement in "finding the truth" may be even more pronounced in England, where judicial activism during trial is accepted more readily than in the U.S. Cf. John Sprack, A Practical Approach to Criminal Procedure 353-54 (10th ed. 2004). In common law systems, the reluctance of judges to meddle with the party presentation of evidence may have more to do with the presence of juries than with a desire to uphold adversariness in its pure form.
43 Cf. 3 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 1367, at 27 (2d ed. 1923) (Cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth.").
SHOULD WE SEARCH FOR THE TRUTH?

A corollary of excluding hearsay evidence, is to make certain that testimony is not accepted by the trier of fact without thoroughly testing its accuracy and reliability. One of the rationales of the privilege against self-incrimination is that allowing compulsion against the suspect is likely to produce false confessions. Another example is the rule that disallows the introduction of overly “inflammatory” evidence that might appeal too strongly to the emotions of the trier of fact and thus prevent him from rationally assessing its probative value. Given these instances of truth-orientation of evidence law, it would be at least an overstatement to claim that adversarial systems are not interested in “substantive” truth. The rules of these systems are, on the contrary, designed to get at the “true” facts of the case.

The same ambivalence appears when we look at inquisitorial systems such as France or Germany. American readers may be surprised to note that the very first article of the French Code of Criminal Procedure provides that the criminal process must be fair and adversarial and must safeguard the equilibrium between the parties’ rights. Even though the French understanding of adversariness (“contradictoire”) may be more limited and formalized than in the Anglo-American world, denoting the parties’ right to be heard on equal terms, the French Code’s clear acceptance of the parties’ active role is a far cry from the cliché of inquisitorial procedure. In fact, limitations and conditions hedging the search for “truth” are far from infrequent in inquisitorial


45 In some common law systems, the test for excluding confessions characteristically is the reliability of the statement, not the method by which it has been obtained. See, e.g., Police and Criminal Evidence Act, Current Law Statutes [C.L.S.] art. 76(2)(b) (Eng. & Wales); Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf. 183/10, art. 69(7)(a).


47 DAMAŠKA, supra note 33, at 121-23.


49 CODE DE PROCEDURE PENALE [C. PR. PEN.] art. premier (Fr.).

50 See BOULOC, supra note 1, at 96.
systems. They all respect the defendant’s right to silence, which clearly limits the court’s ability to obtain a full picture of the relevant facts.\(^5^1\) Germany, moreover, recognizes professional and personal testimonial privileges to a much larger extent than most common law jurisdictions.\(^5^2\) Nor is the concept of excluding illegally obtained evidence unknown in civil law systems.\(^5^3\) French law, for example, regards certain procedural acts as “null” when formal requirements have not been observed, and accordingly refrains from admitting evidence acquired through such acts.\(^5^4\) German law explicitly provides for the inadmissibility of suspects’ and witnesses’ statements whenever certain illegal means (force, threats, fraud, illicit promises) were used during the person’s interrogation.\(^5^5\) Beyond this and a few other instances of

\(^5^1\) Interestingly, the English system allows impeachment of the credibility of an exonerating statement made by a defendant by raising the point that it was made “too late.” See Criminal Justice and Public Order Act, 1994, c. 33, § 34 (Eng.). Under German law, however, the timing of the defendant’s statement cannot be used to question its credibility. See 20 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 281 (282-84) [FEDERAL COURT OF APPEALS] Oct. 26, 1965 (Ger.); 38 BGHST 302 (305) (Ger.). For a discussion of the rationale of the right to remain silent, see John Jackson, Re-Conceptualizing the Right of Silence as an Effective Fair Trial Standard, 58 INT’L & COMP. L.Q. 835, 841-54 (2009). For a discussion of whether the procedural rules of the inquisitorial system put greater pressure on the defendant to testify in court, see Damaśka, supra note 17, at 527-29; Spencer, supra note 17, at 23-24.

\(^5^2\) See STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE] Apr. 7, 1987, Bundesgesetzblatt [BGt] 6, as amended, §§ 52 (Right to Refuse Testimony on Personal Grounds), 53 (Right to Refuse Testimony on Professional Grounds), and 55 (Privilege against Self-Incrimination) (Ger.).

\(^5^3\) See Craig M. Bradley, Mapp Goes Abroad, 52 CASE W. RES. L. REV. 375, 375-76 (2001) (explaining that the exclusionary rule is not limited to use in the United States, but is also found in other countries such as France or Germany).

\(^5^4\) See CODE DE PROCEDURE PENALE [C. PR. PEN.] art. 171 (Fr.). For an overview of various forms of nullités, see BOULOC, supra note 1, at 776-77.


(1) The accused’s freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. Coercion may be used only as far as this is permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited.
exclusion of evidence based on statute, German courts still regard evidence as admissible, on principle, even if a procedural fault occurred when the piece of evidence was obtained. However, there is a growing tendency toward rejecting evidence that was acquired in clear, conscious violation of a person’s constitutional rights. In that case, sanctioning the violation of basic rights is seen as more important than the presentation of the “whole truth” at the trial.

III. Convergence of the Opposing Models?

A. Hybrid Systems

The landscape of international procedural systems has shifted from a stark division between codified and common law, to what looks more like a checkerboard of individual approaches and solutions. Each country’s rules of criminal procedure do not depend so much on its “legal culture,” its national heritage, or its adherence to one great scheme (“inquisitorial” or “adversarial”). Rather, they have been shaped by political and pragmatic preferences that can change over time and are subject to transfers

(2) Measures which impair the accused’s memory or his ability to understand shall not be permitted.

(3) The prohibition under subsections (1) and (2) shall apply irrespective of the accused’s consent. Statements which were obtained in breach of this prohibition shall not be used, even if the accused agrees to their use.

Id. By contrast the Police and Criminal Evidence Act, leaves it to the judge’s discretion to accept or reject illegally obtained evidence. Police and Criminal Evidence Act, 1984, c. 60, § 78 (U.K.).

56 German courts hold illegally obtained evidence to be inadmissible only if a statute demands this result or if higher-ranking reasons exist to exclude the evidence. See Federal Constitutional Court, Judgment of Oct. 15, 2009, 2010 NEUE JURISTISCHE WOCHENSCHRIFT 287; 44 BGHSt 243 (249) (Ger.); 51 BGHSt 285 (290) (Ger.).

57 See Federal Constitutional Court, Judgment of March 16, 2006, 2006 NEUE JURISTISCHE WOCHENSCHRIFT 2684 (holding that evidence obtained through an arbitrary warrantless search was inadmissible); Judgment of 18 April 2007, 2007 NEUE JURISTISCHE WOCHENSCHRIFT 2269. See also Judgment of the State Court of Appeals of Oldenburg of 12 Oct. 2009 NEUE JURISTISCHE WOCHENSCHRIFT 3591 (holding that a blood sample taken without judicial warrant was inadmissible).

58 See Tatjana Hörnle, Unterschiede zwischen Strafverfahrensordnungen und ihre kulturellen Hintergründe, 117 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 801, passim (2005) (discussing cultural backgrounds of various criminal procedure systems).
and transplants.\textsuperscript{59}

It is indeed becoming more and more difficult to place some of today's legal systems in the inquisitorial or adversarial box. During the last few decades, a number of "mixed" legal systems have developed which are faithful to their inquisitorial origins in some respects, but also display distinct adversarial features.\textsuperscript{60} Italy,\textsuperscript{61} Japan,\textsuperscript{62} and Spain\textsuperscript{63}—although differing from each other in many respects—are examples of this type of procedural arrangement. Typically, in these hybrid systems there exists a unilateral pretrial process, often conducted by the police under the guidance of the public prosecutor.\textsuperscript{64} The parties present evidence at the trial, but the court retains a residual right (and obligation) to ensure the relevant issues are covered at the trial.\textsuperscript{65} Hybrid

\textsuperscript{59} Máxim Langer, \textit{From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Processes}, 45 \textit{Harv. Int’l L.J.} 1, 4-7 (2004). \textit{See also} John D. Jackson, \textit{The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence, or Realignment?}, 68 \textit{Mod. L. Rev.} 737, 738-40 (2005) (legal transplants sometimes do not have the intended effects, citing Italy as an example); Mirjan Damaška, \textit{The Uncertain Fate of Evidentiary Transplants: Anglo American and Continental Experiments}, 45 \textit{Am. J. Comp. L.} 839, 849 (1997) ("The music of the law changes, so to speak, when the musical instruments and the players are no longer the same.").

\textsuperscript{60} \textit{See} Christine Schuon, \textit{International Criminal Procedure: A Clash of Legal Cultures} 271-308 (2010).


\textsuperscript{62} \textit{See Keiji SosoHō [Keishō][C. Crim. Pro.]} 1948, art. 131 (Japan) containing strong adversarial elements but allowing the presiding judge, at his discretion, to interrogate witnesses first. \textit{See also id.} art. 298 §2.

\textsuperscript{63} \textit{See} L.E. Crim. (Spain) arts. 728, 729 §2 (requiring parties to present evidence; subsequently, judges can ask additional questions and also call witnesses \textit{proprio motu}); Vincente Gimeno Sendra, \textit{Derecho Procesal Penal} 671 et seq. (2d ed. 2007).

\textsuperscript{64} \textit{See} C.C.P. (It.) arts. 496, 498, 507.

\textsuperscript{65} \textit{See} L.E. Crim. (Spain), arts. 728, 729 §2.
systems combine an active "truth-finding" role of state representatives who initiate the process and determine its scope, with an adversarial mode of presenting evidence.

This new breed of hybrid processes also exists in international criminal courts, which seek to integrate party activity and judicial responsibility. The formulation of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY), which started operations in 1993, was largely influenced by the U.S. Federal Rules of Evidence, and thus largely reflects Anglo-American adversarial procedure. Yet various provisions exist that do not comport with adversarial orthodoxy. For example, Rule 90(F) of ICTY Rules of Procedure and Evidence authorizes the trial chamber to "exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time." Although control of the trial process is an essential feature of judicial authority in all procedural systems, it is interesting to see that Rule 90(F) specifically emphasizes the "ascertainment of the truth" to be the goal of the trial process. The thorny issue of excluding illegally obtained evidence is handled with delicacy in the ICTY Rules of Procedure and Evidence; the weighing process required under Rule 95 hardly resembles the straightforward approach prevalent in the United States. Most significantly, Rule 98 permits the trial chamber to order either party to produce additional evidence and to proprio motu summon witnesses and order their attendance—an opportunity for judicial activism that one would not expect to find in rules mainly designed by Anglo-American lawyers. The influence of Continental legal thinking is even more pronounced.


69 Id.

70 ICTY, U.N. Doc. R. 95 (2009) ("No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.").
in the procedural rules of the International Criminal Court (ICC),\(^71\) which are the result of deliberations of a large number of national representatives from all parts of the world. The ICC Statute contains elements of both the adversarial and the inquisitorial mode.\(^72\) It is generally the parties' prerogative to present evidence in their favor, but according to Article 64(6)(d) of the Court's Statute the Trial Chamber may, as necessary, "order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties." Further, Rule 140(2)(c) of the Court's Rules of Procedure and Evidence affords the Trial Chamber the right to question a witness before or after a witness is questioned by a participant.\(^73\)

The provisions to be found in the ICTY and ICC Statutes are typical of the new breed of "softly" adversarial systems: the judge generally remains aloof from the presentation of evidence, but he has a subsidiary right to ask questions and even to call evidence \textit{sua sponte}. The procedural concept behind such rules seems to allocate a share of the responsibility for the trial outcome to the judge as an active participant in the search for truth.\(^74\)

\textbf{B. Inquisitorial Process on the Retreat?}

When we take a closer look at the movement of the tectonic plates that has produced subtle and sometimes dramatic changes in the universal distribution of procedural models, we can detect a pattern. Leaving international tribunals with their necessary compromise solutions apart, there exists a clear trend toward an expansion of adversarial elements at the expense of "pure" inquisitorial systems. Several countries of the Continental tradition have opened up to adversariness and have embraced active party involvement at the trial stage, whereas no similar inroads of inquisitorial ideas in the common law world have been

\(^{71}\) See International Criminal Court R. P. and Evid. (2002).

\(^{72}\) See SCHUON, \textit{supra} note 60, at 271-308. \textit{See also} CHRISTOPH SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 219-20 (2001).


\(^{74}\) See Damaška, \textit{supra} note 17, at 527-29.
documented. One might be led to assume that this switchover movement finally proves the inherent superiority of the adversarial system, but there may well be alternative explanations available.

One important factor in the advance of adversarial elements is the influence of international human rights instruments, most importantly the International Covenant on Civil and Political Rights (ICCPR) and, in Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). These instruments contain specific provisions on the rights of criminal suspects and defendants, and they have been shaped by Anglo-American legal thinking. Although the human rights instruments do not prescribe a certain trial mode, they emphasize the right to conduct an active defense and provide for the defendant’s right to confront adverse witnesses. In Europe, the jurisprudence of the European Court of Human Rights in Strasbourg has encouraged (or even pushed) the states’ parties to

75 See supra text accompanying notes 66-73.


79 See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/art. 14(3) (March 24, 1976) (“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . [t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”).

80 Anyone who feels aggrieved in his or her rights under the ECHR by an act of one of the Member States can, after exhausting the appropriate domestic remedies, apply
the ECHR toward adapting their procedural arrangements to the demands of the Convention. The Court's emphasis on (among others) the defendant's confrontation right\(^8\) may well have had an influence on the overall thinking about the structure of the trial in Europe.

Other considerations may have further contributed to the attractiveness of the adversary model. There is, first, the persistent rumor that the suspect in the inquisitorial process is regarded as a mere object of the inquisition and subject to oppressive methods in search of confessions, rather than a party with rights of its own. Although this notion has little to do with modern procedures of the inquisitorial system it evokes the image of hooded minions of the Spanish Inquisition.\(^8\) By contrast, the adversarial system is associated with individual autonomy and equality of arms between the prosecution and the defense. The premise of the adversarial system, that the defendant enters the courtroom on equal footing with the prosecutor, evokes democratic and egalitarian ideals.\(^8\)

This image persists even though, in reality, defendants lacking adequate means for mounting a full defense often feel constrained for relief to the European Court of Human Rights; Convention for the Protection of Human Rights and Fundamental Freedoms art. 34-35, June 1, 2010, Eur. Ct. H.R. The Court can declare that the petitioner's rights under the ECHR have been violated and can oblige the state in question to pay the petitioner financial damages. \textit{Id.} art. 41.


\(^8\) See, e.g., McEwan \textit{supra} note 12, at 59 ("Defendants in continental trials are at the mercy of the presiding judge, lacking the protective shield of the Anglo-American exclusionary rules about bad character."); Gerald Walpin, \textit{America's Adversarial and Jury Systems: More Likely To Do Justice}, 26 \textit{HARV. J.L. & PUB. POL'Y} 175, 177 (2003) ("In the adversarial system, the lawyer for a party has the duty to act zealously and faithfully for his client . . . . That is simply not the obligation of an inquisitorial judge."). \textit{See also} CRAIG M. BRADLEY, \textit{CRIMINAL PROCEDURE: A WORLDWIDE STUDY} xxii-xxiii (Carolina Academic Press 2d ed. 2007).

\(^8\) In some countries, the fact alone that the adversarial system is practiced in the United States may make it more attractive than one's own procedural arrangements associated with authoritarian political regimes of the past. \textit{See} Grande, \textit{supra} note 61, at 231 ("Being associated with Lockean liberal values, distrust of the state, restraint of state power, and freedom from the state's intrusion in private lives, adversary criminal procedure symbolizes the procedural model that would appear to best safeguard the individual against state abuses."). \textit{See also} Ellen E. Sward, \textit{Values, Ideology and the Evolution of the Adversary System}, 64 \textit{IND. L.J.} 301, 302 (1989).
to accept a deal involving a guilty plea.

Proponents of the adversarial system further argue that this system is more likely than its inquisitorial competitor to bring out the "truth." They claim that the self-interests of the prosecutor, as well as the defendant, will move each party to do everything in its power to collect and present evidence in its favor, whereas the inquisitorial system must rely on the judges' self-motivation to bring their professional expertise to each case. However, that image of a competitive hunt for "truth" is rebutted, to some extent, by the reality of the courtroom. For one, the defendant's ability to effectively present his version of the truth critically depends on his financial ability to hire a knowledgeable and astute lawyer interested in his case, a condition likely to be absent in practice. By contrast, the quality of legal representation, though not inconsequential, is not as crucial to the inquisitorial process because the judge is professionally trained to examine both sides of the case. Secondly, the parties' self-interest in the adversarial mode is likely to present the trier of fact with a carefully selected, biased set of facts. Two half-truths don't necessarily add up to one truth, especially when the parties do not have equal access to the means necessary for effectively presenting evidence in court. The adversarial system's reliance on the power of cross-examination may likewise be overstated. It cannot be doubted that the confrontation of witnesses with thorough questioning by a party critical of these witnesses' accounts can reveal inaccuracies and lies, but a professionally conducted cross-examination may also confuse or disturb truthful witnesses and shatter their credibility in the eyes of the trier of fact. On balance, the

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84 See Damaška, supra note 17, at 563; Trüg & Kerner, supra note 32, at 192.
85 See Walpin, supra note 82, at 180.
86 See Bradley, supra note 82, at xviii-xix; Grande, supra note 61, at 161-62; Hörnle, supra note 58, at 833.
90 See Roberts & Zuckerman, supra note 44, at 215-217; Spencer, supra note 44, at 629. One further drawback of the adversarial mode is that it tends to consume
adversarial system appears not \textit{a priori} to be in a better position than its competitor to bring out the "truth," unless one adheres strictly to a consensus theory of truth.

What emerges is a \textit{non liquet} situation. Neither the adversarial nor the inquisitorial mode can guarantee a fair trial outcome based upon the "truth." On the other hand, it is possible, under favorable conditions, to arrive at a reliable factual basis through adversarial as well as inquisitorial proceedings. In such a situation, the trend toward hybrid procedural systems may reflect the work of an invisible hand guiding the criminal process toward optimal conditions. The convergence of the extremes toward a cooperative model, where the parties and the court work together in an effort to determine the "true" facts, may follow an inner logic.\textsuperscript{91} Yet, a system built on cooperation needs to function even when one of the parties refuses to cooperate. The defense must retain the option of abstaining or withdrawing from the cooperative effort, and the system must not turn the defendant's refusal to play along against him by inferring guilt from his lack of cooperation in the common search for the truth.\textsuperscript{92}

\textbf{C. Contours of a "Compromise" Model}

This is not the occasion to draw a comprehensive picture of a cooperative procedural model that might be conducive to finding the "truth" as the basis for the judgment. I limit myself to suggesting a few general considerations that might be helpful to an effort to construe such a model.

The first principle I propose concerns the question of who should be responsible for finding the truth. Regardless of the mode of trial, the burden of providing the basis for the criminal judgment should be carried by those who wish to convict the defendant.\textsuperscript{93} In modern systems of criminal procedure, it is almost

\begin{footnotesize}
\footnote{91}{See Hörnle, \textit{supra} note 58, at 829; Francoise Tulkens, \textit{Negotiated Justice, in European Criminal Proceedings}, \textit{supra} note 17, at 677.}

\footnote{92}{See Tulkens, \textit{supra} note 17, at 675-76.}

\footnote{93}{Roberts & Zuckerman, \textit{supra} note 44, at 348.}
\end{footnotesize}
invariably the state that brings suit against a private party. It is therefore the agents of the state that carry the burden of proof. They must present to the trier of fact a sufficient basis for convicting the defendant.

The state agent in charge of collecting, preserving, and presenting the incriminating facts can be a prosecutor or a judge, and these individuals can also share these tasks. The person(s) in charge of collecting and presenting evidence should, to the extent possible, be free from political influence. No member of the executive should have the authority to overrule, on political, financial or personal considerations, the prosecutor’s professional decision on the filing or withholding of charges. In order to provide double control, the person(s) responsible for collecting and presenting evidence and the judge(s) who hear(s) the case and ultimately render judgment should be independent of each other. Thus, the defendant would be convicted only if each state agent independently concludes that he or she is guilty. If this double finding of guilt has been made, there is a high probability that the defendant is “truly” guilty and that the state has met its responsibility to present sufficient incriminating evidence. If the criminal process is organized in the manner described above, the question of who is responsible for presenting the evidence at the trial is of secondary importance. One strong argument against

94 Remaining instances of criminal prosecution by the private victim can be neglected here.

95 A “sufficient” basis is in the common law world defined as proof of guilt beyond a reasonable doubt. In terms of the correspondence theory of truth, a sufficient basis is a plausible version of reality that can be accepted as “true.”

96 Some Continental systems, such as France, Spain and the Netherlands, have retained the investigating magistrate. See C. PR. PÉN. 49-52.1, 79-230 (2010) (Fr.); SV 181-241c (2010) (Neth.); L.E. CRIM. 299-325 (2010) (Spain). Judicial pre-trial investigations have become subject to controversy and are on the brink of abolition in France. See BOULOC, supra note 1, at 459. The usefulness of a judicial investigation is limited without sufficient staff and means to conduct an independent investigation; however an investigative magistrate could be of use as a neutral agent accepting evidence by request of the defense. Cf. C. PR. PÉN. 82-1 (2010) (Fr.).

97 Many Continental legal systems cast the public prosecutor in a neutral role. See, e.g., StPO §160 (2) (2010) (F.R.G.). This statutory exhortation to act like a judge is not effective unless supported by rules that make the prosecutor independent from political influence.

98 See Eser, supra note 88, at 1470.
placing the responsibility for presenting evidence and interrogating witnesses on the trial judge—as the inquisitorial system typically does—is the fact that a judge who is to conduct the presentation of evidence needs to have sufficient prior information on the facts of the case, which can subsequently compromise his objectivity and impartiality.99

What, then, is the role of the defense, in the effort of finding the “truth”? The defense has no obligation to participate in the truth-finding process, and its passivity must not lead to any repercussions against the defendant, either in the evaluation of the evidence or in sentencing.100 The defense must, on the other hand, have the option of taking an active part in the collection and presentation of evidence.

This applies not only to the trial, but it also is of crucial importance that the defense is involved in the effort to find the “truth” from the early stages of the criminal investigation.101 The reason for this proposal is simple: Regardless of the choice of an adversarial or an inquisitorial trial structure, most criminal cases are no longer decided on the basis of a traditional “full” trial.102 In common law as well as in civil law systems, the great majority of cases are resolved without trial, either through a prosecutorial decision not to bring charges, which can be coupled with an informal sanction imposed on the suspect, or through a plea of guilty or its equivalent.103 Whenever the state imposes sanctions,

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100 See supra text accompanying note 121.


102 See id. at 155.

103 See Thomas Weigend, The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure, in CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMASKA 39, 41 (John Jackson et al. eds., 2008). Since 2009, Section 257(c) of the German Code of Criminal Procedure provides for a case resolution by way of an “understanding,” consisting of the court’s indication of a (lenient) sentence in exchange for the defendant’s confession or a similar procedural move. Similar procedures are available in France and Italy. See CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] arts. 495-7
even informal ones, on the suspect as a reaction to an offense he has allegedly committed, the fact that no trial has taken place does not save the state the need to legitimize the sanction by a finding of "true" facts.\textsuperscript{104} When the sanction is negotiated between the prosecutor (or judge) and the defense it is especially important that there is a factual basis on which both sides can rely in the bargaining process.\textsuperscript{105} Otherwise, the outcome of the bargaining process depends not on considerations of fairness and justice, but solely on the (perceived) distribution of power between the parties, or on their relative skills at gambling.\textsuperscript{106}

Although truth-finding before or in the absence of a trial is of great importance, procedural systems often do not provide for appropriate fact-finding mechanisms at the investigation stage.\textsuperscript{107} Especially in common law systems, there exist no rules guiding the collection of evidence or the interaction between parties before trial. This problem is exacerbated by the fact that the defense, in the early stages of the criminal process, is often non-existent or not yet sufficiently organized to counter the vastly superior manpower and means of the prosecution.\textsuperscript{108} Procedural systems must, therefore, be adapted to the need for early defense involvement.\textsuperscript{109} Defense lawyers must be given the legal as well as the material means to conduct their own investigation, and they must receive sufficient information about the case and the evidence well ahead

\begin{footnotes}
\item[104] See Weigend, supra note 103, at 60 (arguing that "practical compromise" is insufficient to legitimize a criminal conviction; rather, legitimacy can be obtained only through an honest attempt "to bring out the truth").
\item[105] See Mary Prosser, Reforming Criminal Discovery, 2006 WIS. L. REV. 541, 560 (2006) (describing the disparate power between the prosecutor and the defense throughout the plea process).
\item[106] Cf. Weigend, supra note 103, at 59 (asserting that the "bargained-for sentence" often fails to adequately reflect defendant's guilt or culpability, and thus the outcome rarely fulfills the "requirements of criminal "justice").
\item[107] See, e.g., Prosser, supra note 105 passim (explaining the wide variations in discovery statutes or rules of criminal procedure, which often limit the breadth of evidence to which the defense has access).
\item[108] Id. at 602.
\item[109] Cf. id. at 595 ("[W]e should devise rules that reflect the presumption of innocence. . . . To this end, we should start with the presumption that all relevant evidence known to the police and prosecution should be discoverable [by the defense] and therefore subject to scrutiny and potential challenge.").
\end{footnotes}
of the trial date. One can think of various models to make an active and well-informed defense practically feasible. The common law, in the name of “equality of arms,” leaves the defense to their own devices and in some systems still provides only minimal discovery. This is not necessarily the best and fairest option. The defense is hardly in a position to conduct an effective investigation, given its lack of power to compel cooperation from witnesses and experts as well as its typical lack of financial means. Full disclosure of the prosecution file before trial, as practiced in Germany, creates occasional problems, such as concern over the protection of sensitive witnesses and documents. However, protective rules can be established to provide a viable compromise between the interests of the police and prosecutor to keep the investigation secret and the interest of the defense lawyer to obtain enough information for preparing an

110 See id. at 598-600 (proposing that discovery rules should allow for early defense access, and also that discovery should be completed before a trial date is even set).

111 For a discussion of the importance of full discovery, see id. at 557 (“[I]n 95% of criminal cases, evidence is not evaluated by a jury, witnesses are not subjected to cross-examination, and the prosecution is not put to its proof. Because the evidence available at the time of many pleas is the evidence that the prosecution has chosen to disclose, prosecutors end up being the fact-finders, rather than juries.”).

112 See id. at 578 (acknowledging that in many states, the defense cannot compel the prosecution to disclose its witnesses and their statements prior to trial).

113 The German Code of Criminal Procedure provides a general right for defense counsel “to inspect the file that has been presented to the court or would have to be presented to the court in case charges are filed.” STRAFFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], April 7, 1987, BUNDESGESETZBLATT 1 [BGBl] 1074, as amended, § 147, ¶ 1 (Ger.) [hereinafter StPO]. This refers to the case file of the prosecutor, who is obliged to turn the file of the investigation over to the trial court when he has filed charges. The defense inspection right applies, in principle, at all times during the investigation. Id. ¶ 3. However, the prosecutor can (and often does) deny defense inspection as long as the investigation continues (i.e., as long as charges have not been filed) if inspection might “jeopardize the purpose of the investigation.” Id. ¶ 2. Since the defense lawyer can pass on to his client any information gleaned from the file, denial can be based on the fear that the defendant might abuse such information, for example to intimidate or otherwise improperly influence witnesses.

114 According to Section 68, paragraph 4 of the German Code of Criminal Procedure, information concerning the name and address of a witness can be removed from the file if there exists a risk that the witness could be intimidated or harmed. The government can also deny access to documents if their disclosure could jeopardize the well-being of the state. See StPO § 96 (1987) (Ger.).
Defensive access to crucial information on the case can be combined with a right of the defense lawyer to be present at, or even participate in, certain important instances of evidence-gathering before trial, for example, interrogations conducted by a magistrate. A defense lawyer’s right to demand such interrogations—a whose results could be used as trial evidence—would further promote a true “equality of arms” during the pre-trial phase.

The question of the involvement of jurors or other lay judges, however relevant as an element of democratic openness of the criminal process, is of little consequence in the search for the truth. Juries, though more common in the Anglo-American world, also exist in several legal systems that still adhere to their inquisitorial heritage, such as Austria and Belgium. On the other hand, U.S. judges can try cases without a jury, which may make the process a little less formal, but does not change the structure of the presentation of evidence. From the perspective of truth-finding, jurors deciding alone may be a less desirable feature of the process because it is important that the rationality of the determination of guilt is supported by written reasons and can be subject to meaningful review.

Since jurors cannot be expected to submit elaborate reasons for their findings, it may be preferable to integrate the lay element with professional judges to form a

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115 Cf. Prosser, supra note 105, at 611-12 (discussing provisions for protective orders and limitations during depositions, which embody this compromise).

116 In Italy, defense lawyers can even conduct searches themselves; they only need the owner’s consent if the search involves a home. See C.C.P. art. 38 (lt.).

117 Cf. John D. Jackson, Making Juries Accountable, 50 AM. J. Comp. L. 477, 477-82 (2002) (describing the possibility for mistake with juries, coupled with the jury’s lack of accountability to the legal system); see also Prosser, supra note 105, at 547 (noting the “scores of exoneration[s]” based on actual innocence, which has “taught us that juries sometimes convict [the] innocent . . . ”).

118 See Austrian Code of Criminal Procedure (Strafprozessordnung, StPPO), at §§ 31 (2), 32.

119 See 1994 CONST. art. 150 (Belg.).

120 See, e.g., FED. R. CRIM. P. 23(a).

mixed bench.\textsuperscript{122}

In summary, a "compromise" model that combines the features that may be best suited for a determination of the truth could consist of:

- a thorough pretrial investigation guided by a state agent (judge or prosecutor) but with an option for the defense to participate and to obtain access to the results of the investigation; and
- a trial before a court that consists at least partly of professional judges, where the evidence is initially presented by the prosecution and the defense, but where the judges can question witnesses and introduce additional evidence on their own motion.\textsuperscript{123}

\textbf{IV. Conclusion}

Inquisitorial and adversarial models of trying criminal cases do not differ so much in their aim—the finding of the "truth"—but in the allocation of responsibility for reaching it.\textsuperscript{124} While it remains an open question as to which mode is, in general, better suited to reach the goal of truth-finding, there are strong indications for a convergence of the two models toward shared responsibility, with judges becoming more active in adversarial systems and parties obtaining greater participation rights in inquisitorial systems.\textsuperscript{125} The trend of the future may be the recognition of responsibility for truth-finding as a task to be shared by the prosecution and the court, with the defense free to join or to remain passive, relying on the presumption of innocence.\textsuperscript{126} If that holds true, the question of "adversarial" or "inquisitorial" presentation of evidence loses much of its theoretical significance and becomes an issue of mere trial technique.

\textsuperscript{122} See Spencer, supra note 44, at 622 (stating that requiring judges to provide a reasoned decision acts as a reasonable safeguard against negligence and arbitrariness). For a discussion of the difficulties of holding juries accountable, see Jackson, supra note 117, at 517-24.

\textsuperscript{123} See supra Part III(C).

\textsuperscript{124} See supra Part II.

\textsuperscript{125} See supra Part III(A).

\textsuperscript{126} See supra Part III(B).
Meanwhile, there exists a risk that truth-finding at trial, irrespective of the mode of presenting evidence, becomes marginalized by a universal advance of case resolutions without trial, including the imposition of severe criminal sanctions in summary proceedings.\textsuperscript{127} This development raises the important issue as to what safeguards can be devised to make sure that sanctions without trial are based on an honest search for the truth, and not on the power differential between the state and the accused.\textsuperscript{128} It is in this arena that the procedural battles of the twenty-first century will have to be fought.

\textsuperscript{127} See supra notes 102-106 and accompanying text.

\textsuperscript{128} See supra notes 107-120 and accompanying text.