Introduction: mapping dialogue and change in comparative criminal procedure

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The study of comparative criminal procedure is not only a study of how national legal systems differ from each other but also a study of the dialogue between them, and between legal actors and interest groups across systems. Participants in this dialogue copy, criticize, or champion other systems. They seek to urge emulation of foreign models, or change their own. And they analyze processes and factors that bring legal systems closer or drive them apart or that create new hybrids out of elements of many different systems. Our volume seeks to track this dialogue and its evolution, mapping national changes over time in the influence of national models or of transplanted procedural devices, such as plea bargaining and the jury system, which have cross-pollinated multiple otherwise very different systems of criminal procedure. In particular, our volume tracks three shifts in the field of comparative criminal procedure.

These include, first, the way systems deal with error, and the recognition of their fallibility; a number of contributors to this volume track reform efforts that are meant to anticipate and correct errors. These reform efforts also seek to identify the vulnerabilities that contribute to mistakes and can lead to wrongful convictions, as well as acquittals against the evidence. Dialogue between systems often concerns the presumed promise or limitations of other systems’ procedural devices for detecting and avoiding miscarriages of justice.

The second shift includes the rapid pace of legal change and increased borrowing and transplantation of procedural devices from the adversarial criminal process, including the jury system and plea bargaining. A number of chapters query the extent to which this represents an Americanization of criminal procedure, or instead a development of new hybrid and pluralistic models of adjudication. To the extent change is promoted by supranational bodies like the European Court of Human Rights and supranational norms like the European Convention of Human Rights, the
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Contributors also debate the extent to which harmonization and convergence on minimalistic procedural safeguards tend to dilute the already strong protections in some countries as the price for raising the standards of others.

Third, our volume tracks a shift in the ways in which systems are compared. Though the contrast between adversarial and inquisitorial systems of criminal procedure retains considerable influence on the field of comparative criminal procedure – and perhaps too much, as Máximo Langer’s conclusion suggests – legal reforms, transplantation, and borrowing have also suggested new dimensions along which systems may be compared. These include holistic criteria, which compare ways in which different systems anticipate error and compensate for the vulnerabilities of one part of the criminal process through advanced procedural safeguards; through the injection of lay-factfinders at trial; or through corrective mechanisms at the back end. But comparisons can also focus on fragments or segments of the criminal process, and on individual procedural devices and the ways in which transplantation transforms them. We note that many comparisons now focus on the legitimacy of the criminal process, variously evaluating the extent to which different procedural devices tend to promote or undermine the legitimacy of evidentiary inputs (which we call input legitimacy); the extent to which they promote or cast doubt on the ways these inputs are evaluated (which we call process legitimacy); and the extent to which they produce fair and reliable results (which we call outcome legitimacy).

And, finally, we note that many comparisons of legal systems now adopt either a diachronic approach, which organizes a comparison of legal systems around particular stages of the criminal process (comparing, for example, the standards for pretrial detention, or the evidentiary thresholds for invasive investigative procedures), or a synchronic, multitrack approach, which compares the various bypass mechanisms by which legal systems make it possible to avoid trial (for example, through quasi-consensual resolutions such as plea bargaining) or to opt out of the criminal process altogether, in the name of crime prevention and the pursuit of intelligence, mooting the question of individual guilt or innocence in favor of concern with risk management and the most efficient processing of bulk data about people, most of whom are assumed to be innocent.
1. THE PRESUMPTION OF INNOCENCE, THE SEARCH FOR TRUTH, AND THE PROBLEM OF WRONGFUL CONVICTIONS

In recent years, the comparative study of criminal procedure has come to be shaped by a variety of parallel developments worldwide. One of these is the recurrence of scandals that have exposed wrongful convictions and have renewed interest in the dynamics that may propel a rush to premature judgment. In the United States, for example, the Innocence Project has highlighted the disturbing number of cases in which innocent defendants have been convicted and sentenced to death for murders they did not commit. Increasingly sophisticated methods for retrieving and analyzing DNA have made it easier to detect such errors, which helps explain the rapid proliferation of cases in which demonstrably innocent defendants were convicted. At the same time, the high stakes for defendants charged with capital crimes have made the risk of error sufficiently salient, politically and legally, to attract legal talent and institutional resources to the task of identifying erroneous convictions and figuring out what went wrong. This has led to increased awareness of problems with eye-witness testimony; of the distorting impact of deceptive questioning; of the dynamics that lead innocent defendants to plead guilty to crimes they did not commit; and of the ways in which accurate adjudication can be undermined by moral panics surrounding particular types of offenses and by the cognitive biases of investigators and fact-finders.

While death penalty litigation has highlighted these concerns in the United States, there are few legal systems that have not been affected by disclosures of unjust convictions. In many modern legal systems, increased procedural protections for criminal defendants, along with scientific advances in testing forensic evidence, have made it easier to identify such cases, and therefore more politically and legally pressing to identify systemic flaws and institutional blind-spots that were at fault, and to improve the criminal process in ways that reduce the risk of error.

Concerns about unjust convictions have prompted many scholars of criminal procedure to adopt a tragic view of criminal procedure as inherently flawed. Such scholars are less interested in juxtaposing ideal-typical versions of how systems are designed to work and instead compare legal systems according to their characteristic weaknesses and vulnerabilities, as well as the fail-safe systems that have been put in place in order to deal with a system’s inevitable failures. Chapters by Elisabetta Grande, David Johnson, and Stephen Thaman, for example, emphasize...
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the extent to which Spanish, Japanese, and Russian reforms designate laypeople to serve as a corrective for and a counter-weight to the other, professional actors in the legal system. Contributors like Stephen Thaman and Shawn Boyne identify the tragic flaws and blind-spots of legal systems, which lead them to compare legal systems as error-prone ensembles. This holistic approach suggests ways in which different procedural mechanisms interact to compound or, alternatively, to prevent or to expose and to correct mistakes when they occur. David Johnson likewise points out that reforms to one part of the legal system may spur collateral improvements to other features of the system. He contends, for example, that Japan’s introduction of lay judges into their trial process has prompted the inauguration of a new system of public defense for criminal defendants; a greater judicial willingness to release defendants on bail, so they can assist in their defense; the expansion of pretrial discovery rights for the defense; and the creation of a pretrial investigative stage designed to clarify the points of disagreement between the prosecution and the defendant, in order to allow compression of trials within the relatively brief time frame for which laypeople may reasonably be conscripted. In order for laypeople to evaluate the evidence, written dossiers were replaced, to a significant degree, by live testimony and more direct presentation of evidence at trial. And in order for juries to be able to evaluate confessions, interrogations needed to be made more transparent, which led the Japanese police to begin video-taping some confessions.

Thus, while the lay judge reform introduced a safeguard meant to correct or detect earlier errors by casting a critical external eye on the police and prosecutors’ work, the introduction of this new check at the tail end of the criminal process stimulated the creation of new error-prevention mechanisms during the early stages of criminal cases. But Johnson also sees more diffuse systemic effects that may not be the product of design. These include greater caution by prosecutors in charging cases and a greater willingness by judges to scrutinize the government’s evidence critically, as judges find themselves working closely with jurors, who are new to the criminal process and can look at criminal cases with fresh eyes.

Stephen Thaman highlights the risk of wrongful convictions when he analyzes the procedural dynamics that instill a confirmation bias into many legal systems, allowing initial suspicions to harden into an almost reflexive presumption of guilt. Shawn Boyne echoes these concerns when she highlights the traditions of deference that weaken judicial controls of
prosecutorial charging decisions in Germany. Jenia Turner and Christopher Slobogin address different types of error in discussing the procedural devices (such as exclusionary rules) that derogate from truth more generally, for example by acquitting the guilty. In his normative evaluation of the exclusionary rule, Slobogin takes into account not only fairness to the defendant but how well that value is balanced against the ‘substantive integrity’ of the criminal law, in other words, how well the system does at producing outcomes that accurately reflect both guilt and innocence. Precisely because the exclusionary rule can lead to acquittals of the guilty – and because he thinks other remedies are more effective – he prefers liquidated damages as a remedy for many types of illegalities.

Nor do those concerned about error always focus on the outcomes of criminal cases; even when innocent defendants are likely to be acquitted, critics address the injustice of haling the innocent into court when a properly functioning screening process should have resulted in pretrial dismissal. Alarm at the difficulty of preventing unwarranted criminal prosecutions drives Tzu-te Wen’s and Andrew Leipold’s critique of pretrial screening in the United States and Taiwan. David Johnson likewise examines not only the extent to which Japan’s introduction of a lay judge system has protected defendants from the risk of unjust convictions, but also the way in which the prospect of trying a case to a jury has disciplined prosecutors in deciding when to press charges. And when unfounded cases are brought primarily to harass or extort, great harm can be done simply by forcing the innocent to spend a night in jail before posting bond – even if the eventual dismissal of charges is a foregone conclusion. Accordingly, Vikramaditya Khanna and Kartikey Mahajan examine a unique system of anticipatory bail that India first developed informally and eventually codified, in order to protect the innocent from extortion or harassment by their enemies.

Richard Vogler and Shahrzad Fouladvand point to a global decrease of judicial control over the arrest power, and this may be one of the risk factors for erroneous outcomes and hasty charging decisions. Khanna and Mahajan certainly suggest the dangers of uncontrolled police discretion in this area, while highlighting an ingenious corrective mechanism that allows potential victims of abusive arrests to reclaim a right to judicial screening and control over the arrest power, and to do so ex ante, by seeking anticipatory relief from an impending arrest. Though potential arrestees can initiate the review ex parte, judges eventually summon police and prosecutors for a contested hearing that allows a preview of the concerns of the prospective defendants with respect to the underlying merits of the case, functioning much like a temporary restraining order in the realm of criminal procedure. The procedure secures many of the
benefits of post-arrest bail hearings for the government, by allowing the court to insist on guarantees that the persons fearing arrest will appear in court when summoned and will cooperate with the police investigation – while protecting them from the dangers and indignities of an arrest. In a legal system in which the criminal process is notoriously slow, this anticipatory form of relief can play a crucial role in preventing or containing abuse of the criminal process.

Critical scrutiny of how well criminal procedure systems do at avoiding error motivates comparisons of how similar procedural safeguards, like the right to counsel, are implemented across different systems. Such research frequently draws on law and society scholarship that uses empirical methods to contrast the ‘law on the ground’ with ‘the law on the books’, as Jacqueline Hodgson does in her empirical examination of the ways in which England, France, and the Netherlands implement the right to counsel during custodial questioning of criminal defendants. By examining the role defense attorneys actually play during police questioning of the accused, Hodgson brings into focus the highly variable extent to which formal recognition of the right to counsel really protects criminal defendants from pressures to make admissions that often become the primary evidence against them. Though Hodgson’s methodology does not allow her to query the accuracy of such admissions, her work lays the groundwork for further research on the extent to which the right to counsel prevents false confessions or erroneous convictions, particularly since, as Jason Mazzone points out, confessions reduce investigators’ incentives to search out other evidence, or pursue leads that point to other suspects.

Examining criminal procedure for the risk of error it carries with it thus attracts comparative law scholars’ attention to how well different legal systems screen cases at intake; how well they guard against confirmation biases (by preserving the critical role of independent decision-makers); to what extent systems allow defense counsel as well as other system participants to challenge a dominant narrative or slow a rush to judgment; how heavily a criminal justice system relies on consensual resolutions that relieve the government of its burden of proof (allowing suspects to be punished based largely on suspicions coupled with negotiated admissions of guilt); and how well systems are designed to recognize and correct their mistakes.

To the list of procedural features that increase the risk of wrongful conviction one can add a system’s twin tendencies to over-rely on evidence that is shaped by the interaction of suspects and investigators (through police interrogation or undercover stings) and to undervalue evidence that exists independently of the investigative mechanisms by
which it is unearthed. As Christopher Slobogin makes clear in his comparative survey of how the exclusionary rule is used and justified across different jurisdictions worldwide, concern about the trustworthiness of evidence that the state has a hand in producing makes a number of legal systems more apt to exclude evidence shaped by police interaction with suspects (such as confessions) than ‘pre-existing’ physical evidence obtained through unlawful searches and seizures, even when the path used by investigative officials to discover such physical evidence was illegal. Because ‘evidence obtained during an illegal search or seizure … is almost always reliable proof of guilt’, Slobogin contends, many legal systems take the position that any ‘illegality connected with its seizure rarely rises to the level needed to mandate exclusion’, preferring ‘to reserve exclusion for cases where the police used the suspect as a means of obtaining evidence’ or ‘used coercive practices’ to obtain statements.

Turner, likewise, contends that ‘the differential treatment of tangible and testimonial evidence is due at least in part to a concern that tainted testimony is likely to be unreliable and to impair the search for truth’. Turner makes this point to demonstrate that the exclusionary rule is frequently applied in ways that limit its adverse impact on accuracy in fact-finding, so that the spread of safeguards for criminal defendants (for example, through the diffusion of exclusionary remedies) does not always come at the expense of the search for truth. Thus:

while exclusionary rules can be seen as a triumph of individual rights over truth-seeking, such rules typically contain numerous qualifications to allow courts to minimize the burden on the search for truth. Even where exclusionary rules appear quite strict on paper, in practice, they frequently give way to a concern for accuracy.

Attentiveness to the vulnerabilities of different investigative mechanisms – such as the risk of contaminating the evidence through conscious or unconscious manipulation – leads criminal procedure scholars to focus on procedural reforms by which legal systems can prevent, expose and correct for various types of error – whether by insisting on live testimony by a defendant’s accusers; requiring corroboration of confessions; or enhancing the role of defense counsel during questioning of the accused. Stephen Thaman, for example, favors a return to formal rules of evidence, like those which once constrained continental European judges, to protect defendants from conviction based on uncorroborated confessions, disputed eyewitness testimony, or the purchased testimony of informants or cooperating criminals. Because procedural safeguards often
carry with them a pressure on defendants to waive trial, he also borrows from European constraints on plea bargaining to argue that consensual dispositions should not be available for more serious offenses.

For many commentators, however, the problem of wrongful convictions is related to the unavoidable compromises trading off the search for truth against other system values which are common to all criminal procedure systems, including respect for fundamental rights (in the case of the exclusionary rule), or efficiency (in the case of plea bargaining), or democratic participation (in the case of the lay judge or jury system). Jenia Turner explores all three types of compromises in her chapter, comparing the ways in which different systems of criminal procedure restrict the search for truth in pursuit of competing goals. Just as insufficient protection for certain rights can result in erroneous convictions of the innocent, Slobogin and Turner both argue that vigorous application of the exclusionary rule, coupled with broad protections for fundamental rights or procedural justice can also compromise truth-finding (Turner) or ‘the substantive integrity of the criminal law’ (Slobogin) by permitting the acquittal of the guilty. For Slobogin and Turner, this is not a bug of a poorly designed system of criminal procedure, but a feature of all systems. What differs is not the need to balance the search for truth against other system values, but the way in which the trade-off is made, and the nature of the competing goals a system embraces.

Boyne points out that many legal systems make these trade-offs in response to very similar pressures, such as increased resource constraints and caseloads for prosecutors, resulting in increased reliance on consensual dispositions like plea bargaining in the United States and confession bargaining in Germany. But the resulting trade-offs differ in ways that reflect the contrasting institutional roles, interactions, and professional identities of police, prosecutors, judges, and defense attorneys across disparate legal systems and procedural traditions. In the United States, caseload pressures coupled with prosecutors’ tendency to view the criminal process as a contest that they must ‘win’ translate into coercive plea bargaining strategies, such as the practice of deliberately over-charging criminal cases and exacting a ‘trial penalty’ from defendants who exercise their right to contest the charges against them, thus creating a risk that innocent defendants may be induced to plead guilty to crimes they did not commit. In Germany, Boyne argues, pressure to dispose of cases efficiently leads many prosecutors to look for ways of closing out cases through dismissals, using prosecutors’ increased discretionary powers to err on the side of not charging many cases that more probing investigations might otherwise have prompted them to charge.
Boyne’s close empirical observations of German prosecutors enables her to illuminate these dynamics, by showing how time spent on file documentation can replace close teamwork with investigators or interviewing witnesses, leading to summary dispositions that survive supervisory scrutiny but do not necessarily reflect the underlying merits of the criminal case. As a result, Boyne concludes, ‘[t]he traditional vision of the prosecutor as the chief of the investigation process who marshals the resources of the state to find the truth today applies to a narrower range of cases’.

At the same time, however, Boyne identifies those special features of prosecutors’ relationships both with judges and with their own administrative hierarchy that make these short-cuts possible – as well as those features that limit the extent to which prosecutors will be allowed to compromise accuracy of fact-finding for the sake of efficiency. Close collaboration between German judges and prosecutors, including regular *ex parte* contact to discuss cases and confession bargains, means that ‘German prosecutors may lack the incentive to contradict the court’ or to ‘serve as a counterweight or an additional set of eyes’ to weigh the evidence critically. On the other hand, internalized decision-making norms of the prosecution service itself – coupled with close hierarchical supervision – discourage the use of many investigative tactics that may derogate from the search for truth. Thus German prosecutors may not coach witnesses or ask leading questions, and they sometimes argue for acquittal at the close of a trial. And when German prosecutors do dispose of cases through confession bargains, ‘the level of evidence required to support such agreements is higher than in the US’, particularly since confessions do not relieve the court of the duty to hear other evidence.

For Thaman, as well as for Wen and Leipold, fairness to criminal defendants requires more than the avoidance of wrongful convictions or unwarranted prosecutions; it also commands respect for the presumption of innocence. In Thaman’s view, the presumption of innocence entails limitations on the consensual resolution of criminal cases (since these make it possible to adjudicate a finding of guilt based on little more than probable cause) and acceptance of the finality of acquittals against the weight of the evidence. For Wen and Leipold, the presumption of innocence instead requires reforms that would force Taiwanese judges who screen initial charging decisions to hold prosecutors to a meaningful standard of proof and to dismiss weak cases, rather than sending such cases back to prosecutors with instructions to look for additional incriminating evidence. Taiwanese judges do this under the guise of enforcing a mandatory prosecution principle that undermines the judge’s neutrality. Pursuant to this practice, judges highlight gaps in the prosecution’s case
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and then suggest ways of filling them with additional evidence, thus making them play ‘conflicting roles, as both an adviser to the prosecution as well as a neutral decision-maker’.

2. **LEGAL REFORM, TRANSPLANTS, AND PROLIFERATION OF PROCEDURAL MODELS: PLURALIST ALTERNATIVES TO THE DICHOTOMY BETWEEN ADVERSARIAL AND INQUISITORIAL CRIMINAL PROCEDURE**

A second set of influences on comparative scholarship about criminal procedure can be traced to the astonishing acceleration of innovation and legal reform both of national legal systems and of international criminal tribunals. In this volume alone, contributors highlight the adoption of lay juries by legal systems as diverse as Spain, Russia, and Japan; the newly expanded role of defense counsel in France and the Netherlands; new legal requirements that juries give reasons for their verdicts; new surveillance powers in the United States, Germany, and Russia; and new procedures for plea or confession bargaining in much of Europe. In his seminal work at the intersection of comparative and international criminal procedure, Máximo Langer has drawn attention both to the transformation of criminal procedure in Chile and Argentina in the wake of their transitions to democracy and to the development of new hybrid forms of criminal procedure by international criminal tribunals (Langer, 2004; Langer and Doherty, 2011). And a growing body of literature on legal transfers and transitional justice documents the ways in which outside experts sought to transform legal institutions in Eastern Europe, Latin America, and South Africa, in the post-Cold War and post-Apartheid era (Damaska, 1997; de Brito et al., 2001; Delmas-Marty, 2003; Koreman, 1999; Kritz, 1995; Levinson, 2000; Linz and Stepan, 1996; McAdams, 1997; O’Donnell et al., 1986; Offe, 1997; Pogany 1997; Posner and Vermeule, 2004; Teitel, 2000).

Multiplying legal reforms have prompted a variety of scholarly concerns. How can the literature on legal transplants make sense of the international diffusion of the jury system and plea bargaining, which are both so controversial among American scholars? (Alschuler, 1981, 1986; Easterbrook, 1983; Langbein, 1978; Schulhofer, 1988, 1992; Scott and Stuntz, 1992). Is the diffusion of the jury and practices similar to plea bargaining evidence of a rampant Americanization of European, Asian, and Russian criminal procedure? Or is it, as Elisabetta Grande suggests,
less an emulation of American institutions than the invention of a new, more pluralistic system populated by a more numerous and diverse ecology of legal actors? Should the transplant be thought of as the introduction of adversarial features into a hitherto inquisitorial criminal process? Or, following both Langer and Grande, should these reforms be understood to inaugurate new, hybrid, and eclectic forms, whose foreign features are transformed by the context and traditions of the systems into which they are transplanted?

Thus while the majority of criminal procedure scholars still use the adversarial-inquisitorial dichotomy as a heuristic tool for systemic comparison – as in the Tango-Rumba metaphor of Elisabetta Grande – it has become increasingly clear that it is difficult today to neatly classify systems as falling squarely in one camp or the other. For example, exclusionary rules, pioneered in the United States due to the influence of its Bill of Rights, cannot be seen as ‘adversarial’, as they have, until recently, been virtually non-existent in other common law countries without written constitutions. Moreover, inquisitorial countries very early on articulated the concept of ‘nullities’, which look very much like exclusionary rules – and did so at a time when English judges did not scrutinize the legality of the process by which evidence was collected, so long as the evidence proved relevant. As Slobogin makes clear, exclusionary rules now exist in some fashion in legal systems all across the spectrum, from fully adversarial to highly inquisitorial. What differs is not the willingness of legal systems to use the exclusionary rule but the types of violations for which legal systems are willing to implement this remedy; the scope of the underlying rights that the rule protects; as well as the rationales (such as protection for fundamental rights, deterrence, and concern for the reputation of the criminal justice system) which legal systems privilege.

Likewise, while plea bargaining has always been considered to be ‘adversarial’ and dependent on the unlimited discretion exercised by American prosecutors in (over)charging and dismissing criminal counts, plea- and confession-bargaining now thrive in inquisitorial legal systems in which, decades ago, such practices were considered anathema – and American-style plea bargaining has begun to look more and more like the primordial inquisitorial procedure of coercing admissions of guilt, as John Langbein has argued.

In addition, Article 6 of the ECHR – which in many respects resembles the Sixth Amendment of the US Constitution, albeit without the right to a jury trial – has expanded the traditionally more passive and restricted role of defense counsel and has gradually led to involvement of the defense and the prosecution in both the gathering and presentation of
Evidence in many continental European systems, so that trials in these
countries look more and more like trials in the US and England. Even
though the jury system has long been viewed as a key feature of the
adversarial criminal process and has often been invoked to explain other
characteristic features, such as the passive role of trial judges, the
prominent role of the parties in presenting evidence, and the division of
evidence into a ‘prosecution case’ and a ‘defense case’, lay juries have
now been introduced into some systems which still have strong inquisi-
torial features.

The scholarship in this volume takes as its starting point the increas-
ingly hybrid and diverse character of national systems of criminal
procedure and notes that the tendency of formerly inquisitorial legal
systems to borrow or emulate elements of adversarial procedure creates
commonalities, while opening the transplant up to some of the same
criticisms that are often leveled against adversarial legal systems. But
many chapters – like those by Jason Mazzone, Elisabetta Grande, Shawn
Boyne, David Johnson, Jacqueline Hodgson, and Jenia Turner – look
more closely at the ways in which the new, hybrid systems have
succeeded – or not – in importing some of the hoped-for benefits and in
containing some of the problems hitherto associated with the transplanted
feature in its home environment. If Grande sees the Spanish adoption of
the jury system as an instance in which the adoption of a foreign model
increases procedural safeguards by making decision-making more plural-
istic, Mazzone cites Britain’s dilution of protections during police
interrogation as an instance in which ‘dialogue among jurisdictions has
ended up weakening these rights by comparison with their strong
adversarial origins’.

Jason Mazzone’s chapter thus highlights some of the dangers and
limitations of efforts to increase protections for fundamental rights
through supranational norms diffused by courts (like the European Court
of Human Rights). The Court’s jurisprudence on the right against
compelled self-incrimination and the right to silence, he notes, risks
reducing procedural safeguards to their lowest common denominator, to
make them easier to implement across the procedural divide that con-
tinues to separate civil law countries from those with common law
traditions.

To be sure, Mazzone concedes, some legal systems, like Germany’s,
‘might fully understand that global rules are merely a floor, and so stick
to or pursue stronger rights domestically’. And in countries like France,
where these rights have enjoyed very weak protection, the ECtHR
jurisprudence has overcome domestic political resistance to reforms that
have significantly improved protections for criminal defendants. But in
places like the UK, where safeguards on police interrogations have traditionally been very substantial, Mazzone contends, universalist conceptions of rights ‘can provide cover to local reformers interested in cutting back on pre-existing protections’. This dynamic has already weakened the right to silence, as courts in England and Wales may now draw adverse inferences from defendants’ decisions to avail themselves of this right. As a result, ‘[r]eformers who speak the language of globalization can impose changes that actually leave localized rights worse off’, lending legitimacy to cut-backs on the right to silence and privilege against self-incrimination simply because these reforms accord with the relatively more modest conception of these rights that the European Court of Human Rights has embraced as a minimum level of protection.

Jacqueline Hodgson’s chapter suggests, however, that quasi-legislative mechanisms may be more effective at diffusing supranational procedural norms, ‘not as a minimum threshold below which states should not fall’, but as ‘positive standards to apply in uniform and consistent ways’. An EU directive on how member states should interpret and implement the right to counsel not only allows EU citizens to enforce these safeguards in their national courts but goes into much greater detail than the ECtHR jurisprudence generally does on what new measures member states must adopt and how these provisions should work in practice. The directive also requires member states to incorporate the new standards into their national codes of criminal procedure.

Hodgson’s empirical study concludes that constraints on defense rights come primarily from police resistance to the diffusion of pan-European norms in countries like France and the Netherlands, whose inquisitorial legal tradition assigns the protection of the criminal accused primarily to the judicial officers in charge of criminal investigations. Though France now permits defense counsel to sit in on their client’s interrogation by the police, they are nonetheless ‘not permitted to interrupt, to challenge police questions, or to ask questions or for clarification until the end of the interrogation’. And in the Netherlands, defense counsel are still not permitted to be present during police questioning, except when the defendants are juveniles, or when the police are investigating particularly serious crimes. In England and Wales, by contrast, where prosecutors do not supervise either the criminal investigation or the detention of suspects, defense counsel remains ‘an important guarantor of due process rights as well as being responsible for investigating the defense case’.

Though Mazzone points out that England and Wales have reduced protections for the right to silence and the privilege against self-incrimination, the well-established role of defense counsel thus exerts
counterbalancing pressures. This suggests that the adversarial procedural tradition and ‘practical arrangements’ in the provision of legal aid, which make the same defense counsel responsible for representing a criminal defendant throughout the criminal investigation, can counteract the tendency of less protective supranational norms to dilute other protections for criminal defendants.

Of course, national traditions can resist expansion as well as dilution of rights. Hodgson points out that there are relatively few French and Dutch lawyers who specialize in criminal defense. She argues that the protections called for by the EU directive are somewhat weakened, in the Netherlands and France, not only by the lack of a strong defense tradition in these two inquisitorial systems of criminal procedure, but also by the fact that custodial defendants must rely on different duty attorneys to represent them each time they appear in court after their initial arrest.

Although the dichotomy between civil law and common law retains its relevance for defense rights, rapid legal reforms do somewhat blur many of the systemic differences traditionally associated with the divide between inquisitorial and accusatorial models of criminal procedure. Thus Jenia Turner argues that inquisitorial legal systems, like the adversarial systems with which they are often contrasted, trade their truth-finding aims off against other system values by the use of exclusionary rules, plea bargaining, and lay juries, thereby making allowance for concerns with fairness, efficiency, and democratic decision-making as countervailing values. The focus of her comparison is on the ways in which these trade-offs differ across systems. What she rejects is the notion that the search for truth is a quest peculiar to the inquisitorial criminal process.

Shawn Boyne, too, notes that plea and confession bargaining has become increasingly common in Germany, and that in Germany, as in the United States, one can now observe a dynamic by which the increase in procedural safeguards for criminal trials heightens the incentives for prosecutors and judges to reduce at least some of the procedural complexities of criminal trials by negotiating for confessions that will allow them to shorten the duration of the trial. At the same time, however, Boyne notes that the context in which confession bargaining occurs is less coercive for criminal defendants than its American counterpart. Boyne explores the distinctive configuration of professional roles that can help to account for these differences. Though all legal systems sometimes trade the search for truth off against other system values, the respective roles of judges, defense counsel, and prosecutors help account for systemic differences between the ways these trade-offs are made and between the levels of effectiveness of procedural safeguards. National
differences between these professional roles also help explain the particular ways as well as the extent to which the search for truth may be compromised.

Rapid transformation of national legal systems has in fact lent itself to multiple conflicting narratives about the prevailing direction of legal influence, including disagreements about whether criminal procedure systems are gradually converging or moving further apart. The Americanization thesis concerning criminal procedure runs directly counter to claims of American exceptionalism in the substantive criminal law (see for example, Dubber, 2004), particularly with regard to the harshness of American punishment, American commitment to the death penalty, and controversial doctrines of vicarious criminal liability, such as American conspiracy law, vicarious liability for the crimes of co-conspirators, and the felony murder doctrine as it applies to homicides that occur during crimes committed by co-felons. Procedural borrowing and innovation has likewise led to increased interest in the viability of legal transplants; in the dynamics of the legal reform of societies transitioning from dictatorships; and in the reciprocal procedural influences of national and supranational courts, including international criminal tribunals.

In this volume, Elisabetta Grande’s chapter occupies intermediate ground between the proponents and critics of the Americanization thesis – that is, between those who highlight American influence and those who view American practices as increasingly isolated and exceptional – by highlighting the ways in which systems that transplant a foreign, seemingly American, legal institution, like the jury, transform and adapt the model while allowing the ‘legal irritant’ to transform the host system and to turn the jury system into something altogether unique. Khanna’s and Mahajan’s chapter on Indian provisions for anticipatory bail emphasizes the ways in which legal systems can generate and experiment with their own distinctive legal mechanisms, without recourse to foreign models.

Yet another view of legal reforms and borrowing dismisses the notion either of undue American influence (that is, the Americanization thesis) or of a collective recoil against the harsh example of American criminal justice (the thesis of American exceptionalism as a negative example for others). Instead, scholars who study the jurisprudence and influence of the European Court of Human Rights emphasize its influence as a third magnetic pole and the related emergence of uniform norms and baselines for what constitutes fair procedure (see for example, Amman, 2000; Stone Sweet, 2000). These harmonizing principles derive not only from the jurisprudence of the European Court of Human Rights but also from the legal directives issued by the European Union. Areas in which
European institutions have been active – through directives and jurisprudence – include reforms such as the increased investigative role of defense counsel (as explored by Jacqueline Hodgson’s chapter), improved confrontation rights, an insistence that state surveillance be regulated by statute, and (as Mathilde Cohen and Elisabetta Grande point out) the ECtHR insistence, in Taxquet, that juries give reasons for their verdicts.

3. NEW WAYS OF COMPARING SYSTEMS

This diverse set of questions and theoretical preoccupations poses a daunting challenge of comparability. Along what axes should comparative scholars measure similarity and difference? What are the relevant yardsticks and normative frameworks within which systems may be compared with each other? Boyne and Hodgson both compare systems in institutional terms that emphasize the institutional and legal constraints on the roles of prosecutors, defense attorneys, and judges as explanatory variables. At the same time, supranational norms have thus turned protection for fundamental rights into the lingua franca of legal comparisons. For some scholars, like Jacqueline Hodgson, rights are themselves the subject of study, with empirical research making it possible to compare different ways in which these rights are understood and implemented. For others, like Jason Mazzone, differences between protection for fundamental rights like the right to silence and the right to counsel illuminate differences between investigative practices, and, specifically, between how far police across disparate legal systems can go in questioning custodial defendants, and how significantly the police find themselves constrained. Yet other contributors to this volume, like Jenia Turner, treat the protection of rights across different legal systems as one indicator among others of how systems strike a balance between competing values, such as the search for truth and efficiency (in the case of plea bargaining), democratic participation (in the case of the jury system), and the protection of fundamental rights (in the case of the exclusionary rule.)

Slobogin, too, studies trade-offs between accuracy and other system values. But his concern is specifically with the scope of the remedy for rights violations, not with the scope of the rights per se. Because the exclusionary rule now plays a role in both adversarial and inquisitorial systems of criminal procedure – and because there is considerable variation among the role of this remedy across countries within each of these traditions – the distinction between inquisitorial and accusatorial systems of criminal procedure is not very useful for explaining when and
how legal systems use the exclusionary rule, that is to say, when and how legal systems are willing to ‘depart from the search for truth’ to remedy unlawful police tactics. Accordingly, Slobogin focuses on the policy reasons that ground different national approaches. His reconstructions of the competing rationales explain national differences in scope of the exclusionary remedy. He seeks primarily to understand legal systems’ approaches on their own terms. Thaman’s concern with wrongful convictions instead takes an externalist perspective to compare criminal procedure systems with regard to the effectiveness of each system’s mechanisms for avoiding and correcting erroneous convictions or protecting the presumption of innocence.

Turner, too, measures legal systems against external benchmarks, examining empirical evidence about whether features like the jury trial, which serves policy reasons distinct from the search for truth, really compromise accuracy, as many critics have feared. Comparing plea bargaining, the exclusionary rule, and jury trials for their potential impact on accuracy in fact-finding, Turner points out that both the exclusionary rule and plea bargaining are sometimes used to promote rather than undermine the search for truth, as when the exclusionary rule is used to suppress unreliable confessions and when plea bargains are used to secure the cooperation of co-defendants in undercover operations. Turner compares different procedural devices for their tendency to undermine the search for truth and concludes that plea bargaining is perhaps the most problematic of the three procedures ‘because its detrimental impact on truth-seeking in individual cases has proven the most difficult to mitigate’. Comparing criminal procedures according to the extent to which they derogate from the search for truth allows Turner to identify corrective mechanisms like reason-giving requirements that mitigate the error rates of certain procedural devices, like the jury system, which are often criticized for reducing the accuracy of fact-finding. At the same time, her juxtaposition of multiple types of procedural devices, all of which burden the search for truth, make it possible to compare different procedural devices with their counterparts in different legal systems with regard to their characteristic vulnerabilities (like lack of transparency) and their relative impact on the accuracy of fact-finding.

The contributors’ comparative methodologies suggest yet another series of dimensions along which systems may be compared, namely, with respect to the input, process, and output legitimacy of procedural devices. Mathilde Cohen’s chapter, for example, suggests that reason-giving requirements for mixed panels of lay and professional jurors can be viewed as efforts to reconcile a more democratic, participatory model of adjudication that enjoys significant process legitimacy (due to the
involvement of lay fact-finders who function as community representa-
tives) with a commitment to accuracy in fact-finding and output legitim-
acy, as promoted by accountability through the giving of reasons. Cohen
argues that the reason-giving requirement serves as a device that makes
the professional judges who deliberate with lay assessors accountable for
jury verdicts by requiring them to draft a statement of reasons that can
serve both as a record on appeal and as a basis for scrutinizing the
verdicts rendered by mixed panels of lay and professional judges. The
French statute that followed on the heels of the ECtHR’s newly enunci-
ated reason-giving requirement created incentives for judges to draft
statements of reasons that anticipated and reconstructed the best justifi-
cation for jurors’ reasons, rather than simply tracking and recording the
process of decision-making that jurors actually followed. Though the
reason-giving required was hailed as a breakthrough for process legitim-
acy because it emphasized the moral project of making legal judgments
understandable to criminal defendants, Cohen suggests that the require-
ment may also promote the legitimacy of legal judgments by making
judges accountable for their role in guiding, reconstructing, and making
sense of jury deliberations.

Cohen links the reason-giving requirement to attempts to promote
judicial accountability by arguing that ‘the reform is aimed as much at
keeping presidents [of tribunals] in check as at making verdicts under-
standable to defendants’, particularly since ‘some of the cour d’assises’
reasons are now more widely available to the general public through the
press than they are to defendants’. The absence of a harmless error rule
for poorly drafted reasons also suggests that the reason-giving require-
ment ‘is meant as a check on judicial discretion’, by showing ‘the
relationship between the facts of the case and the verdict’. That the
reason-giving requirement is meant to discipline judges, Cohen argues, is
also reflected by the practice of remanding inadequate reasons directly to
them so as to ‘“punish” professional judges for unsatisfactory reason-
giving and force them to do their homework by sending the case back to
their court’. Judicial accountability thus promotes the legitimacy of jury
outputs – or verdicts – without compromising the process legitimacy that
inheres in lay participation.

An externalist perspective could reflect a concern with output legitim-
acy, which Thaman adopts in addressing the ways in which different
legal systems risk outcomes that are illegitimate because they convict the
innocent. Thaman and Turner offer complementary externalist critiques
of the jury system, with heavy emphasis on the accuracy of jury
decision-making, and, hence, on output legitimacy. Turner argues that
‘[w]hile jurors do suffer from certain cognitive biases that affect all
humans, they are no less likely to produce accurate outcomes than professional judges. Thus Turner defends juries as not much worse than judges, while Thaman criticizes judges as not much better than juries. Put differently, Turner seeks to explain why juries tend to get things right, while Thaman asks why judges sometimes get things wrong. Both of them are concerned with the legitimacy of outputs, or verdicts. But if Turner worries about how systems rank the search for truth in relation to other values, Thaman is less concerned with the ability of the legal process to get things right in the first place than with its failsafe mechanisms for correcting erroneous charging decisions and trial verdicts as well as coerced guilty pleas.

But an externalist perspective can just as well focus on input legitimacy, as Wen and Leipold do in comparing the Taiwanese and American screening procedures with regard to their ability to identify and dismiss weak cases before they go to trial, or with regard to their reliance on confessions obtained without adequate safeguards for a defendant’s right to counsel.

An externalist perspective can also foreground process legitimacy, by evaluating legal systems according to external measures of fairness and respect for the dignity of the accused. Thus David Johnson argues that ‘[j]udging criminal trials solely in terms of their efficiency or effects on other parts of the criminal process makes no more sense than evaluating a wedding or funeral in terms of its accuracy (Kadri, 2005: 346)’. He contends that Japan’s lay judge reforms may not only counteract the country’s high conviction rate and the conviction mentality of a professional judiciary composed of repeat players who are highly deferential to prosecutors; the involvement of lay judges may prompt further reforms that improve safeguards for criminal defendants; and he hopes that these reforms can demonstrate the legal system’s ability to ‘treat[] its most despised enemies with respect, by presuming them innocent and by giving them a champion to argue their cause’, so as to ‘reinvigorate the ideals of democracy and reinforce the importance of dignity and other human values’.

4. DIACHRONIC COMPARISONS: COMPARING STAGES IN THE CRIMINAL PROCESS

Another way in which scholars can make systems comparable is by analyzing criminal procedure as a series of mini-trials which may be juxtaposed, across legal systems, according to the stage of the criminal process in which they intervene. Any criminal process organized around
the handling of cases – that is, the processing of individual criminal prosecutions – can be grouped chronologically around investigation, adjudication, sentencing, and appeal. The chapters in this volume deal with criminal procedure as a crescendo of institutional responses to expanding levels of suspicion and as a process by which suspicions are tested and raw data gradually shaped into usable evidence. Comparing legal systems according to the way they process cases reveals the ways in which each tests evidence against burdens of proof whose thresholds increase from relatively low levels in the early screening stages of the criminal process to requirements of proof beyond a reasonable doubt at the stage of final adjudication. And it is not only the process of hailing defendants into court that can be measured against an escalating series of evidentiary thresholds; governmental intrusions into protected interests, such as privacy and liberty, also require ever higher levels of factual predication to justify increasingly invasive investigative measures.

The contributors examine these parallel crescendos of invasive investigation and evidence-testing in an effort to compare the legal standards, across different systems, that justify this progression, from entering data into preliminary investigation case files, to processing evidence at trial, and, finally, to re-describing that evidence as factual findings that are transformed into judgment reasons by trial courts and appellate tribunals. These comparisons illuminate characteristic ways in which legal systems are vulnerable to error or protect against it. Thaman and Boyne, for example, closely examine the dynamics by which a failure to screen cases rigorously during the early investigative phase of the criminal process, coupled with traditions of collegial deference that link judges and prosecutors, can bias later proceedings against the defendant and reduce opportunities to detect and correct errors by weakening the presumption of innocence and subtly favoring a rush to premature judgment. Wen and Leipold closely examine some of the design flaws that exacerbate this risk in Taiwan, voicing their concern that Taiwanese courts are relatively less able than their American counterparts to screen out weak cases before they go to trial. In particular, they point out, screening is ineffective because the quantum of evidence needed for criminal charges to survive judicial screening once they are filed is actually lower than the amount of evidence needed to file such charges in the first place. And once charges are filed, the system makes it likely for errors or a rush to judgment in the pretrial phase to be locked in at trial, because the same three-judge panel that screens criminal charges in the pretrial stage of the criminal process will also preside over the trial. By contrast, David Johnson examines the ways in which the introduction of the lay jury into the Japanese criminal process may have improved
prosecutorial screening decisions, arguably increasing critical scrutiny by prosecutors themselves.

Jacqueline Hodgson emphasizes structural flaws in the pretrial investigation rather than the screening process itself as a source of error early in the criminal process that tends to infect and bias later proceedings. She brings into focus how little the right to counsel, as implemented in France and the Netherlands, can protect defendants from pressures to make statements, potentially contributing to an over-reliance on confessions as a short-cut to obtaining convictions without much in the way of independent investigation to corroborate guilt.

A number of contributors also focus on legal reform efforts designed to make it easier to detect errors at later stages of the criminal process. Mathilde Cohen, Elisabetta Grande, Stephen Thaman, and Jenia Turner all discuss the way the European Court of Human Rights is transforming both lay and mixed jury systems through its recent decision in Taxquet requiring juries to give reasons for their verdicts. And Grande considers the introduction of the jury system in Spain in the context of a number of other reforms that have given new legal actors, including victims, a voice in the criminal process, as part of a concerted reform effort to multiply checks and balances, while also turning the trial itself into the main locus for testing the strength of the evidence against the defendant.

Organizing systemic comparisons by focusing on the particular stages of the criminal process can reveal the contrasting ways in which initial suspicions set the stage for more intrusive government action. Richard Vogler and Shahrzad Fouladvand, for example, plot the difference between the English standard of ‘reasonable suspicion’ and the American notion of ‘probable cause’, which govern when the police may intervene to detain or arrest a suspect on suspicion of having committed a crime. At the same time, they contrast both of these with the French notion of ‘flagrant crime’, which not only supports an immediate arrest but also allows the police to bypass the preliminary investigation and its attendant restrictions on residential searches. Investigations of ‘flagrant crime’ permit the French police to escalate to more invasive investigative tactics that do not require a suspect’s consent or cooperation. Catching an offender in a flagrant violation also permits the police to set the case for immediate trial without supplemental investigation.

Vogler and Fouladvand’s juxtaposition of evidentiary thresholds across different legal systems suggests that many European legal systems have ‘a clear ladder of threshold tests’ to track the progression of a criminal case through the investigative process, ‘with “reasonable grounds to believe” for the issuing of arrest warrants, “substantial grounds to believe” for the confirmation of charges, and “beyond reasonable doubt”
for a finding of guilt’. By contrast, the United States uses the same ‘probable cause’ standard to justify the arrest, to screen the charges at the preliminary hearing, and to vote a ‘true bill’ on an indictment confirming criminal charges. Instead of tracking the progress of the criminal investigation, American criminal procedure uses its ladder of threshold evidentiary requirements to test the legal validity of an escalating set of liberty deprivations along ‘a continuum that begins with a hunch, then progresses to reasonable suspicion [justifying a “stop and frisk”], and then becomes probable cause’ justifying an arrest. (Vogler and Fouladvand quoting Moak and Carlson, 2014: 41). And while American criminal procedure hinges the validity of an arrest primarily on the strength of the evidence against the defendant, English and Continental European criminal procedure supplement their evidentiary thresholds for making arrests or keeping someone in investigative detention with notions of necessity or proportionality which limit the exercise of the arrest power even in cases where there are good reasons to suspect someone of a crime.

At the same time, however, Vogler and Fouladvand point out that England, like other European jurisdictions, makes liberal use of pretrial detention to prevent future crimes ‘in a way unconnected to the main proceedings’, while the US, at least in theory, continues to use pretrial detention primarily to secure defendants’ appearance at trial. This suggests that many of the necessity and proportionality considerations that act as brakes on European arrest powers, compared to their American counterparts, give way to an acceptance of preventive detention for serious offenses, ‘mov[ing] dramatically away from a focus on the integrity of the trial process towards control and policing priorities’.

Higher standards for escalating liberty deprivations mirror the progression of the evidentiary thresholds needed to move a criminal case from the initial investigation to trial. But the ease with which government officials can fast-track a case for adjudication not only depends on the quantum of evidence that the state can mobilize but on whether and how courts distinguish between the types of evidence that support an initial inquiry and the types of evidence required to prove guilt. In the United States, search warrants may be issued based on second-hand information from anonymous sources, if they can be shown to be sufficiently reliable and have been sufficiently corroborated; but evidence at trial is subject to hearsay constraints that do not apply to the consideration of warrants, or to earlier screening procedures like preliminary hearings and grand jury proceedings.

The more exacting the evidentiary standards at trial, however, the more likely it is that defendants will face pressure to concede their guilt and
thus avoid or at least shorten their trial, in exchange of lesser penalties. Boyne, Thaman, and Turner all explore the ways in which this pressure to waive a full trial, with its attendant safeguards, can lock in early factual errors (such as mistaken identifications), resulting in binding adjudication of guilt on little more than probable cause. These contributors worry that prosecutorial leverage can allow initial suspicions to harden into findings of guilt without independent verification.

Viewing criminal procedure through this sequential lens also makes it possible to compare systems according to how well they perform according to the chronologically more differentiated measures of legitimacy suggested above, namely, input legitimacy, process legitimacy, and outcome legitimacy. Roughly speaking, comparisons among jury systems and reason-giving requirements often examine the conditions that make legal systems’ outputs legitimate, while comparisons among screening mechanisms to determine whether a case merits being held over for trial, and comparisons among investigative procedures, such as custodial interrogation, exclusionary rules, and the post-arrest right to counsel, focus on the legitimacy of inputs into the criminal justice system, for example, through efforts to avoid contaminating the legal system with evidence tainted by illegality. Comparisons among trial procedures and the role of plea bargaining or confession bargaining as alternatives to contested forms of adjudication seem to focus primarily on process legitimacy, in other words, the fairness of the procedures by which guilt is assessed.

But any stage of the criminal process can be assessed in terms of input, process, or output legitimacy. David Johnson’s chapter on the Japanese jury system notes the extent to which introduction of the jury system has increased democratic participation in the criminal process – improving process legitimacy – and may have improved the care with which prosecutors screen cases, arguably making convictions a more reliable indicator of guilt and thereby improving output legitimacy as well. Turner and Cohen both discuss ways in which the Taxquet decision treats input and output legitimacy as acceptable alternatives for each other, noting that jury control through inputs such as jury instructions can substitute for reasoned opinions explaining jury verdicts, whose adequacy is otherwise necessary to lend jury outputs (or decisions) their legitimacy. And Thaman’s concern with the problem of erroneous convictions captures a quintessential problem of output legitimacy.

Comparing criminal procedure systems as a series of escalating mini-trials allows the contributors to take into account how later stages of the criminal process may lock in biases and errors from lax screening at earlier stages of the criminal process, or the ways in which a requirement
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that juries give reasons for their verdicts can expose and allow appellate courts to correct errors in judgment or compensate for earlier system failures, such as weak screening systems. At the same time, attention to the criminal process as a series of opportunities to make up for earlier failings reveals the danger inherent in allowing courts to resolve even serious cases through plea bargains, as plea bargaining eliminates opportunities to correct errors made during the investigative stage or the pretrial screening process.

Thaman’s, Johnson’s, Grande’s, Turner’s, and Cohen’s approaches to juries illustrate the ways in which different authors can approach the same issue from the vantage point of either input, process, or output legitimacy. Johnson’s chapter focuses on all three issues, since he discusses the effect of the jury system on charging decisions (that is, inputs into the trial process); on the gains in process legitimacy that come about through democratic popular participation; and on the impact on the conviction rate, which remains so high as to cast doubt on output legitimacy for anyone who questions whether an acquittal rate that approaches zero can be accurate. Grande is concerned more specifically with process legitimacy, which, from her perspective, hinges less on inviting the public to participate in adjudication than on the pluralism of decision-making in a jury system that, like other reforms to the Spanish criminal process, multiplies and diversifies the array of institutional actors who take part in the criminal process, and accords each of them an increasingly significant role in a decision-making ensemble.

Turner, in turn, focuses primarily on the inputs – such as jury instructions – that ground the legitimacy of verdicts that are otherwise unsupported by reasons. Cohen discusses ways in which reasoned jury verdicts create output legitimacy, arguing that the reason-giving requirement is not there primarily to tame the process of democratic, participatory deliberation, but to control the judges who deliberate jointly with lay jurors, to ensure that their outputs accord with legal requirements. For Thaman, by contrast, output legitimacy depends on juries avoiding at all costs erroneous convictions, regardless of how they reason their way to a decision. Of course, concern with judicial accountability could be either a concern with process legitimacy or outcome legitimacy, depending on whether one is concerned with judges getting a wrong outcome or with a judicial process that fails to follow the rules. At the same time, output legitimacy, for Thaman, does not require that an acquittal signify the actual innocence of the accused, but, in due respect to the presumption of innocence, only that the evidence is insufficient to support a finding of guilt beyond a reasonable doubt. This requires, in his view, respecting acquittals, despite the presence of incriminating evidence, and making
them final and not subject to appeal. From the externalist perspective of someone concerned more with accuracy of adjudication than with enforcing the presumption of innocence, by contrast, an acquittal against the weight of the evidence would lack output legitimacy.

5. SYNCHRONIC COMPARISONS: THE CRIMINAL PROCESS AND ITS ALTERNATIVES, IN A MULTI-TRACK SYSTEM OF THREAT REDUCTION AND RISK MANAGEMENT

Thinking about the ordinary criminal process in chronological terms, as the collection and testing of evidence against identified suspects, also makes it possible to distinguish it from alternatives that allow police, prosecutors, and intelligence agencies to bypass the criminal trial or indeed any form of criminal adjudication altogether, in the interest of efficiency, risk management, or national security. In many civil law systems, more elaborate trial safeguards and rights protection have increased case load pressures as well as resource constraints, resulting in new consensual mechanisms, akin to plea bargaining, for avoiding or shortening trials. Bypass mechanisms can include American-style plea bargaining, which avoids trial altogether, or German-style confession bargaining, which shortens and streamlines the criminal trial. Such mechanisms also include Italian-style ‘procedure bargaining’, which guarantees criminal defendants a lower sentence simply for agreeing to be tried on the basis of the evidentiary record compiled during the preliminary investigation, or for agreeing to forego the adversarial criminal trial, which features live testimony, in favor of adjudication based only on written evidence, including hearsay. The latter procedure essentially invites litigants to opt out of the adversarial process, in favor of the older, inquisitorial model that the 1988 Code of Criminal Procedure was intended to replace.

However, more radical bypass mechanisms can function as true alternatives to criminal prosecution. The chapter by Jacqueline Ross discusses American FISA investigations – which facilitate collection of bulk data without the individual showing of suspicion ordinarily required for criminal investigations – as alternatives to the criminal process, in contrast with German efforts to allow for limited use of data mining as part of the criminal process and to limit the collection of bulk data outside the criminal process. While German criminal procedure treats ‘preventive’ police operations as mere precursors to the criminal process,
largely confining intelligence operations to intelligence agencies, foreign intelligence investigations function as true alternatives in the United States, even when conducted by law enforcement agencies. Nikolai Kovalev and Stephen Thaman, likewise, highlight what is at stake in the decisions many post-Soviet states have been facing about whether to codify special surveillance powers outside of the criminal process, as true alternatives, or to subject them to the procedural strictures of regular investigative powers that are governed by national Codes of Criminal Procedure.

Unlike the use of surveillance to pave the way for criminal prosecution, the use of surveillance as an alternative to the criminal process pursues intelligence rather than evidence. It does not ordinarily culminate in the bringing of criminal charges. It is not case-driven but focused on the analysis of data, which may never crystalize into a case. It is concerned with risks, not with crimes. And it often (but not always) centers on the identification of risk profiles and unusual behavior patterns rather than the investigation of particular suspects. It is not a chronological endeavor, as personal data are not organized around hypothesized wrongdoing by the people to whom they pertain. Indeed, almost all data collected together as bulk data are assumed to be about people who are wholly innocent of any wrongdoing and are simply assumed to provide the haystack within which an aspiring terrorist or spy may be hidden.

One might contrast these two distinct bureaucratic repertoires for processing information about crime by describing the traditional criminal process as engaged, primarily, in the processing of cases, while intelligence operations that rely on data mining of vast databases focus primarily on narrowing the field of suspicion. The former tends to treat guilt as a foregone conclusion, while the latter is arguably indifferent to guilt, in that those who are innocent do not disappear from the databases on account of their innocence. The risk in the case of the former is a rush to judgment; in the case of the latter, the risk is that of bypassing the need to pass judgment altogether and potentially assigning risk status to individuals whose guilt or innocence is never tested but who can find themselves in legal limbo simply by virtue of turning up on a list.

When data mining serves purely as a prelude to identifying particular persons of interest – as it may under Germany’s police laws – the chronological logic of the criminal process dictates that the data set assembled for that purpose be destroyed once a suspect has been identified and his guilt tested in court. But when data is assembled purely for intelligence purposes, investigators are not limited to using it to generate and test hypotheses about possible wrongdoing by particular suspects – which means that the intelligence has no obvious time horizon
beyond which it loses its relevance. The collection and analysis of intelligence is therefore ongoing; unlike the regular criminal process, it is not time-limited, linear and uni-directional.

As Kovalev and Thaman point out in their analysis of what it means for post-Soviet states to have legalized surveillance outside of their regular criminal process, the regulation of government surveillance can become a way of mapping the demarcation not only between the search for evidence and the pursuit of intelligence but also between a process that is designed to test a hypothesis of guilt and alternative procedures that are designed to maximize the collection of data about the innocent and guilty alike, in order to facilitate the search for patterns and to generate hypotheses, which investigators can later choose to test either through the intelligence system or through the regular criminal process. If the criminal process contemplates an escalating intrusion into the lives of a relatively limited number of people whom there is good reason to suspect of criminal wrongdoing, intelligence investigations contemplate relatively minor intrusions into the lives of massive numbers of people, almost all of whom are assumed to be innocent. If the criminal process is intended to culminate in a transparent judicial process, the alternative intelligence track is meant to remain secret, perhaps permanently, and to be subject to judicial review, if at all, only at the outset, when data is collected, and not later, when the data is combined, analyzed, disseminated, and used for intelligence operations.

More than the regular criminal process, intelligence operations are preventive and, especially, predictive, rather than reactive. People who attract the interest of intelligence analysts can remain in limbo – and in government records – indefinitely, without their guilt or innocence of any particular offenses ever being ascertained or even tested. Intelligence operations pose almost exactly the opposite epistemological and policy problem from that posed by criminal investigations. Of criminal investigations one might ask: how well do systems used to process the guilty do in detecting those who are actually innocent? And how well do such systems do in enforcing the presumption of innocence? By contrast, one might ask the opposite about intelligence investigations. How well do systems that process huge volumes of data about innocent or harmless people do at detecting the tiny number of guilty or at least dangerous people among them?

As the US and many European legal systems are creating legal regimes of exception for covert investigations of terrorism and organized crime, some of the post-Soviet republics, and reformers in many of the others, are trying to do the opposite, as Kovalev and Thaman document: at the urging of the European Court of Human Rights, which frequently
criticizes the legal frameworks that govern post-Soviet covert practices, reformers wrestle with the legacy of the Soviet police state through efforts to fold formerly secret investigative tactics into criminal procedure; to require judicial oversight; to establish legal standards and evidentiary thresholds that must be met before the use of covert investigative tactics may be authorized; and to inaugurate a distinction between evidence and intelligence along with rules about when and how intelligence can be turned into evidence. The underlying principle is to separate the rules that govern true intelligence operations, whose aim is unconnected to the criminal process, from those that govern covert practices that were designed to create evidence that feeds back into the criminal process. The latter are increasingly subjected to rights-protective controls, such as: restricting particularly invasive covert tactics to the investigation of particularly serious offenses; imposing time limits on the duration of such tactics; and placing an outright ban on some tactics (such as secret searches) that can shelter corrupt practices like the planting of evidence. These reforms represent an effort to extend the rule of law to areas of covert investigation that have been inherited from the Soviet era and that reformers are attempting to tame.

Post-Soviet reforms thus represent an effort to limit the ability of the police to opt out of the strictures of the criminal process selectively, using the relatively unregulated powers of intelligence services to collect information that will ultimately feed back into the criminal process and be used to convict. These reforms represent an effort to draw a cleaner line between the powers of criminal investigators and the powers that these same investigators may possess when they conduct similar surveillance in their capacity as intelligence services. More generally, immigration investigations, in rem proceedings against the fruits or instrumentalities of crime, as well as administrative investigations by Customs and Revenue authorities, resemble intelligence investigations in their capacity to subject targets to state surveillance and sometimes to sanctions, without resort to the criminal process.

6. LOCATING THE CRIMINAL PROCESS IN A LARGER CONTEXT

If diachronic comparisons make it possible to juxtapose and compare the way in which the criminal process unfolds over time, synchronic comparisons of ‘multi-track’ systems make it possible to link concerns about plea bargaining as a mechanism for bypassing trial to criticism of the lingering post-Soviet tendency to permit investigative short-cuts around
the safeguards of the criminal process. Bypassing the criminal process altogether is merely a more extreme variant of such end-runs, as Ross contends in comparing American willingness to use intelligence operations as true alternatives to the criminal process with the German preference for using early-stage exploratory operations merely to generate testable hypotheses about criminal activity, for the criminal process to adjudicate. It remains a challenge for future scholarship to investigate the dynamics by which legal systems channel data inputs about suspects into the criminal track or into one of its alternatives, and to identify the institutional pressures, legal frameworks, and political power struggles that drive the competition between them.

NOTE

1. For a discussion of the epistemological and moral difficulties of processing criminal cases in a system which presumes innocence although most defendants are guilty, see Whitman, ‘Presumption of Innocence or Presumption of Mercy? Weighing Two Western Modes of Justice’, 94 Texas L. Rev. (forthcoming 2016).

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