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## **Bargained-for-Justice: Lessons from the Italians?**

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# Bargained-for-Justice: Lessons from the Italians?

Michael Vitiello\*

## I. INTRODUCTION

Since World War II, many European countries have reformed their criminal justice systems, often influenced by the United States.<sup>1</sup> Many protections found in the Bill of Rights have worked their way into Western Europe.<sup>2</sup> At times, that has been the result of the European Court of Human Rights' (ECHR) adoptions of protections that parallel protections in our Constitution.<sup>3</sup>

As discussed below, Italy has joined the movement away from an inquisitorial system toward an adversarial one.<sup>4</sup> It did so, in part, because of prodding from the ECHR when that court found the Italians denied defendants the right to speedy trials.<sup>5</sup> Part of that process was a move toward allowing guilty pleas.<sup>6</sup>

For many Americans familiar with bargained-for-justice in the United States, the idea that the Italians are finally adopting a form of guilty plea may seem ho-hum. What is the big deal? Indeed, some American scholars defend the United States' practice of accepting guilty pleas in exchange for reduced charges or

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1. William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT'L L. 429, 430 (2004).

2. Heinrich Klebes, *Membership in International Organizations and National Constitutional Law: A Case Study of the Law and Practice of the Council of Europe*, 1999 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 69, 71 (1999).

3. *Id.* at 437-38; European Convention on Human Rights, Art. 6, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (on file with *The University of the Pacific Law Review*) (section 1 states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.")

4. *Infra* Part III.

5. Pizzi & Montagna, *supra* note 1, at 437-38.

6. *Id.* at 444-45.

sentences as a social good.<sup>7</sup> Others simply recognize it as a reality of the modern American criminal justice system.<sup>8</sup>

But the transformation of Italy's legal culture is a big deal. This article focuses on whether that transformation towards a system that looks more like the United States system is a good thing.

Many Americans are far too quick to assume that our system has it right. Many are unfamiliar with non-American or at least non-Anglo-American criminal justice systems, often resulting in unwarranted criticisms of other judicial systems. The media frenzy surrounding the 2009 Amanda Knox trial in Italy is emblematic of our lack of understanding of the Italian system.<sup>9</sup> This essay looks back in time to focus on some of the criticisms leveled at the Italian system during the Knox case.<sup>10</sup> It also briefly explores whether that system looks so bad in retrospect.<sup>11</sup>

Thereafter, I turn to bargained-for-justice in the United States.<sup>12</sup> That section explores the history of plea-bargaining in the United States,<sup>13</sup> and then explores the philosophical questions surrounding the practice.<sup>14</sup> Is there a plausible justification, other than sheer pragmatics, supporting the practice? I then turn to serious concerns with the way in which bargained-for-justice works on the ground, raising concerns about the fairness of a system that may compel an innocent person to take a plea bargain.<sup>15</sup>

With that background, I then discuss the Italian system.<sup>16</sup> The Italians did not take naturally to guilty pleas.<sup>17</sup> Indeed, acceptance of guilty pleas is contrary to a number of principles followed by civil law countries.<sup>18</sup> After a bumpy start, the Italian system has begun to increasingly rely on bargained-for-justice.<sup>19</sup> After exploring the theoretical dilemma that bargained-for-justice poses for civil law judicial systems, that section describes what has happened in Italy over time.<sup>20</sup>

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7. See e.g., CASEY WELCH & JOHN RANDOLPH FULLER, *AMERICAN CRIMINAL COURTS: LEGAL PROCESS AND SOCIAL CONTEXT* 218 (Routledge 2013).

8. See e.g., RICHARD QUINNEY, *THE SOCIAL REALITY OF CRIME* 146 (Transaction Publishers 1970) (explaining how the criminal justice system relies on plea bargaining for judicial efficiency).

9. Danielle Lenth, *Life Liberty, and the Pursuit of Justice: A Comparative Legal Study of the Amanda Knox Case*, 45 *MCGEORGE L. REV.* 347, 349 (2013).

10. *Infra* Part II.

11. *Id.*

12. *Infra* Part III.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Infra* Part IV.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

Perhaps not surprisingly, an increasing number of cases are now resolved through bargained-for-justice.<sup>21</sup>

In part, this article is descriptive. But as with the Knox case, comparing the two systems offers a moment for Americans to reflect about what other systems can teach us and how those kinds of comparisons can remind us of some of the failings of our criminal justice system.<sup>22</sup> Here, I want to make an editorial comment: some members of the Court, including the late Justice Scalia, and other members of the rightwing in our country cry foul if, for example, Justice Kennedy cites European law as somehow relevant to issues before the Court. What a shame! Openness to competing systems can produce much greater insights into our system and can help us see profound flaws. Although the game may be over now that the Italians have started to rely on bargained-for-justice, I conclude by posing a hopelessly romantic question: would we be better off emulating the Italian's resistance to guilty pleas instead of the Italians emulating us?<sup>23</sup>

## II. LESSONS FROM AMANDA KNOX'S CASE

Think back to 2009 as the Italian government began its prosecution of Amanda Knox for the murder of her roommate Meredith Kercher.<sup>24</sup> The story had all the markings of a media field day.<sup>25</sup> The Italian police arrested a twenty-year-old American college student spending a year abroad in Perugia for the murdering her British roommate.<sup>26</sup> By the time the trial began, the local public prosecutor developed a theory that the murder occurred during a sordid sex game gone awry.<sup>27</sup>

How could the media resist such a story? Unsurprisingly, Italian, British, and American media covered the proceedings extensively.<sup>28</sup> Fairly early on, many American journalists put the Italian criminal justice system on trial.<sup>29</sup>

One might be willing to give journalists who are not legally trained a pass in their assessment of a foreign criminal justice system. But many American legal scholars, including some very prominent ones, fueled the media assault on the Italian system.<sup>30</sup> American media presented numerous legal experts who argued

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21. *Id.*

22. *Infra* Part V.

23. *Id.*

24. Lenth, *supra* note 9, at 350.

25. *Id.* at 348.

26. *Id.* at 350–52.

27. *Id.* at 348.

28. *Id.*

29. *Id.*

30. *Id.* at 348–50, 353–54.

that the Italian system was unjust.<sup>31</sup> Prominent Columbia law school professor and scholar George P. Fletcher called the case “a scandal of the first order.”<sup>32</sup> Harvard Professor Alan Dershowitz observed the Italian system was “not among Europe’s most distinguished” and that the eventual guilty verdict was “totally predictable.”<sup>33</sup>

Widely circulated criticisms focused on several aspects of the Italian criminal justice system: the composition of Italian juries (where judges are in a position to dominate deliberations with jurors); the lack of jury sequestration; the joint trial of civil and criminal charges arising out of the same facts (whereby the jury would hear Knox’s confession despite the fact that she did not have counsel during the interrogation even though it was inadmissible for purposes of the criminal charges); and, the failure to recognize principles of double jeopardy.<sup>34</sup> The clear message was that the United States system has it right and that failing to adhere to the same rules is likely to produce unjust results.<sup>35</sup>

Critics increased their volume when Knox and her boyfriend, Rafael Sollecito, were convicted.<sup>36</sup> Some commentators argued the verdict was the result of anti-American sentiment; that the defense attorneys were too passive during the trial; and, that excessive pre-trial publicity influenced the verdict.<sup>37</sup>

An occasional American commentator defended the Italian system.<sup>38</sup> Some suggested that many of the charges leveled against the Italian system were true of the United States criminal justice system.<sup>39</sup> The University of the Pacific Law Review published a student comment in which Danielle Lenth argued that Amanda Knox may have been convicted in the United States and that similar legal issues routinely arise in United States courts.<sup>40</sup>

Much of the media attention faded after the Italian appellate court ordered Knox released in 2011.<sup>41</sup> She returned to the United States and awaited further rulings by the Italian courts.<sup>42</sup> She also wrote a book about her experience; but by the time Harpers published the book, the story no longer generated a great deal of

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31. *Id.*

32. *Id.* at 353–54; see e.g., Liz Robbins, *An American in the Italian Wheels of Justice*, N.Y. TIMES (Dec. 5, 2009, 7:24 PM), available at <http://thelede.blogs.nytimes.com/2009/12/05/an-american-in-the-italian-wheels-of-justice/> (on file with *The University of the Pacific Law Review*) (citing law Professor Fletcher referring to the Knox trial as a “scandal of the first order”).

33. Lenth, *supra* note 9, at 354; Robbins, *supra* note 32.

34. Lenth, *supra* note 9, at 376–77.

35. *Id.* at 377.

36. *Id.* at 350, 353–54.

37. *Id.* at 366; Robbins, *supra* note 32.

38. Lenth, *supra* note 9, at 374.

39. *Id.* at 374.

40. See generally *id.*

41. Lenth, *supra* note 9, at 373–74.

42. Elisabetta Povoledo, *Amanda Knox Freed After Appeal in Italian Court*, N.Y. TIMES (Oct. 3, 2011), [http://www.nytimes.com/2011/10/04/world/europe/amanda-knox-defends-herself-in-italian-court.html?\\_r=0](http://www.nytimes.com/2011/10/04/world/europe/amanda-knox-defends-herself-in-italian-court.html?_r=0) (on file with *The University of the Pacific Law Review*).

press.<sup>43</sup> That may explain why her final vindication in 2015 did not result in another media frenzy. The Italian Supreme Court wrote an opinion exonerating her and excoriating the prosecution for bringing the case despite “stunning flaws” in the evidence.<sup>44</sup> While media reported the decision in this country, few legal experts weighed in on the question.<sup>45</sup> An occasional commentator pointed out the earlier criticism and suggested that the criticisms were overstated.<sup>46</sup>

Here, I want to be clear that the Italian system no doubt has many flaws. But many of the criticisms were ill founded, based on a lack of appreciation of the overall system in place. Thus, under the rules, the jury heard police recount Knox’s confession to her involvement in Kercher’s death.<sup>47</sup> The confession was relevant to the civil aspect of the case, but because she lacked counsel when the police took the statement, the jury could not rely on the statement for purposes of the criminal conviction.<sup>48</sup> In an American court, such a rule would be inappropriate.

Critics failed to point out two aspects of Italian procedure. First, instead of a case-by-case *Miranda*-style rule, where the police can legally take a statement without counsel as long as the defendant waived his right to counsel (and 80% of all defendants waive counsel in the United States), the Italians have a bright line rule<sup>49</sup>—a statement from a suspect without counsel is inadmissible.<sup>50</sup> Many American criminal procedure scholars have given up faith in *Miranda* because police so easily circumvent it.<sup>51</sup> By comparison, the Italian rule starts to look good.

Second, and also largely ignored by American critics, is the fact that the jurors who heard the confession arrived at their verdict along with professional judges.<sup>52</sup> These judges are involved in the deliberations and are obligated to explain the proper use of evidence.<sup>53</sup> Unlike the American system—where one

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43. AMANDA KNOX, *WAITING TO BE HEARD: A MEMOIR* (HarperCollins 2013).

44. Stephanie Kirchgaessner, *Amanda Knox Acquitted Because of ‘Stunning Flaws’ in Investigation*, THE GUARDIAN (Sept. 7, 2015), <http://www.theguardian.com/us-news/2015/sep/07/amanda-knox-acquitted-because-of-stunning-flaws-in-investigation>.

45. Lenth, *supra* note 9, at 374; Andrew Gumbel, *Trial by Osmosis: Amanda Knox, Raffaele Sollecito and the Nightmare of Italian Justice*, Los Angeles Review of Books (Feb. 11, 2014).

46. *Id.* I could not find a mea culpa from any of the nationally recognized experts who were so sharp in their judgment of the Italian system.

47. Lenth, *supra* note 9, at 357; John Hooper, *Was There a Plot to Murder Meredith?*, THE GUARDIAN (Feb. 4, 2009), <http://www.guardian.co.uk/world/2009/feb/05/meredith-kercher-murder-trial>.

48. Lenth, *supra* note 9, at 357; Gumbel, *supra* note 45.

49. Lenth, *supra* note 9, at 362–63; Gumbel, *supra* note 45.

50. Lenth, *supra* note 9, at 357; Gumbel, *supra* note 45.

51. *See e.g.*, Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1521 (2008).

52. Lenth, *supra* note 9, at 254, 357.

53. Julia Grace Mirabella, *Scales of Justice: Assessing Italian Criminal Procedure Through the Amanda Knox Trial*, 30 B. U. INT’L L. J. 229, 236 (2012).

has to guess what went on jury deliberations—the Italian system requires the judges to produce a detailed opinion justifying the verdict.<sup>54</sup>

Finally and most importantly, why might an American who was critical about the Italian system before Knox’s release remain silent today? Knox got her freedom because appellate review of *facts* is *de novo* in Italy.<sup>55</sup> In the United States, an appellant has virtually no ability to challenge factual findings as long as they pass some minimal threshold of reliability.<sup>56</sup> Knox won both in her first appeal and eventually in the Italian Supreme Court because those courts reexamined the evidence and found it wanting.<sup>57</sup> Many lawyers in the United States who have worked on cases involving innocent defendants should envy such a system. As Ms. Lenth concluded, commentators should replace “hostile, biased comparison with reasoned research and understanding of the [other’s] judicial system *before* speaking to that system’s flaws.”<sup>58</sup>

I offer this discussion as a cautionary tale as I turn attention to bargained-for-justice in Italy and the United States.

### III. BARGAINED-FOR-JUSTICE IN THE UNITED STATES

Bargained-for-justice has supporters.<sup>59</sup> Proponents point to several reasons why a person pleading guilty should receive a lesser sentence than one who forces the state to trial.<sup>60</sup> For example, the person who pleads guilty has acknowledged his guilt and a willingness to accept responsibility for his conduct.<sup>61</sup> The plea agreement may have spared the victim the trauma of testifying in public—most notably, for example, in a case of sexual assault or rape.<sup>62</sup> The plea may help the prosecution pursue other offenders engaged in more serious crimes.<sup>63</sup> Even Judge David Bazelon, a leading liberal during his time on the D.C. Circuit, explained why a person who pleads guilty may rightly

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54. *Id.*

55. *Id.* at 253–55.

56. *Id.*

57. *Id.*; Matt Schiavenza, *Amanda Knox’s Ordeal is Finally Over*, THE ATLANTIC (Mar. 28, 2015), available at <http://www.theatlantic.com/international/archive/2015/03/amanda-knox-goes-free/388952/> (on file with *The University of the Pacific Law Review*).

58. Lenth, *supra* note 9, at 382 (emphasis added).

59. QUINNEY, *supra* note 8.

60. *Id.*

61. See e.g., *Brady v. United States*, 397 U.S. 742, 750 (1970) (“The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State’s law is alone sufficient reason for surrendering themselves and accepting punishment”).

62. See RONEL ET. AL, TRENDS AND ISSUES IN VICTIMOLOGY 167 (2008) (“Sometimes, it is actually desire to save the victim from the need to testifyCa consideration that frequently arises in sexual offense casesC that is a significant factor in the decision to sign a plea bargain.”)

63. See e.g. Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, WM. & MARY L. REV., (Forthcoming San Diego Legal Studies Paper No. 16-202), available at <http://ssrn.com/abstract=2674852> (on file with *The University of the Pacific Law Review*).

receive a lesser sentence than an offender who forces the state to take the case to trial: “[T]he critical distinction is that the price [a person who goes to trial] has paid is not one imposed by the state to discourage others from a similar exercise of their rights, but rather one encountered by those who gamble and lose.”<sup>64</sup>

Some supporters of bargained-for-justice have also argued that plea-bargaining is part of our history. As the Fifth Circuit stated in *Bryan v. United States*, “Plea bargains have accompanied the whole history of this nation’s criminal jurisprudence.”<sup>65</sup> One scholar suggested that plea-bargaining dates back to Cain and Abel, where Cain pled to a lesser charge than murder.<sup>66</sup> However, according to Professor Alschuler, that is simply not the case.<sup>67</sup>

Plea-bargaining entered American law only at the end of the 19th and beginning of the 20th century.<sup>68</sup> Bargaining grew dramatically in big cities and was often the product of corrupt lawyers and judges.<sup>69</sup> In the early part of the 20th century, a New York lawyer working with a magistrate would “stand out on the street in front of the Night Court and dicker away sentences. . . .”<sup>70</sup> In Cook County, Illinois, especially, “fixers,” minor political figures, arranged plea bargains.<sup>71</sup> Many prominent commentators at the time saw the practice as suspect and corrupt. The President of the Chicago Crime Commission called for the removal of judges from the bench because they reduced felony charges to misdemeanors in exchange for guilty pleas.<sup>72</sup> Both Dean Wigmore and Dean Pound criticized the practice.<sup>73</sup> The *Chicago Tribune* stated that the plea bargaining system was an “incompetent, inefficient, and lazy method of administering justice.”<sup>74</sup>

By the late 1960s, a report by a committee of the American Bar Association (ABA) Project on Minimum Standards for Criminal Justice and the President’s commission on Law Enforcement and the Administration of Justice found that guilty pleas were “of considerable value”<sup>75</sup> if properly administered. Less than a decade earlier, the Supreme Court seemed ready to outlaw the practice.<sup>76</sup> In *Shelton v. United States*, a divided panel of the Fifth Circuit held that plea-bargaining was unlawful stating, “[j]ustice and liberty are not the subjects of

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64. *Scott v. US*, 419 F.2d 264, 276 (D.C. Cir. 1969).

65. *Bryan v. United States*, 492 F.2d 775, 780 (5th Cir. 1974).

66. Newman, *Reshape the Deal*, TRIAL, May–June 1973, at 11.

67. See generally Albert Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5–6 (1979).

68. *Id.*

69. *Id.* at 24–26.

70. *Id.* at 24.

71. *Id.* at 25.

72. *Id.* at 29.

73. *Id.* at 30.

74. *Id.* at 31.

75. *Id.* at 35.

76. *Id.*



bargaining and barter.”<sup>77</sup> An en banc panel of the Fifth Circuit reversed.<sup>78</sup> The Supreme Court granted review, but then dismissed when the Solicitor General took the unusual step of confessing error.<sup>79</sup> Professor Alschuler argued that the Solicitor General’s unusual action demonstrated a desire to avoid the legal issue.<sup>80</sup> Today, the idea that the Court would find plea-bargaining unconstitutional is inconceivable,<sup>81</sup> as it is so deeply ingrained in our system.

Ironically, the increasing acceptance of plea bargaining occurred as the Warren Court expanded procedural rights at a time when the Court seemed intent on leveling the playing field for criminal defendants.<sup>82</sup> Viewed theoretically, however, plea bargaining fits into the concept of an adversarial system because a represented defendant who engages in a plea bargain is making an informed decision to waive his constitutional rights.<sup>83</sup>

In the decades after *Shelton*, the Court imposed some restrictions on guilty pleas.<sup>84</sup> State courts and bar associations also weighed in and pushed for reforms to make plea-bargaining less suspect.<sup>85</sup> But plea bargaining still has many critics.<sup>86</sup>

Prosecutors have virtually unreviewable discretion in charging defendants,<sup>87</sup> and thus, they have incentive to overcharge.<sup>88</sup> They can bargain by agreeing to reduce the charge from a felony to a misdemeanor.<sup>89</sup> Alternatively, prosecutors may agree to recommend a particular sentence.<sup>90</sup> In the latter instance, if the

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77. *Id.* at 35–37.

78. *Id.*; *Shelton v. United States*, 246 F.2d 571 (5th Cir. 1957), *rev’d per curiam on confession of error*, 356 U.S. 26 (1958).

79. Alschuler, *supra* note 67, at 35–37.

80. *Id.*

81. *Id.* at 40.

82. Yale Kamisar, *A Rejoinder to Professor Schauer’s Commentary*, 88 WASH. L. REV. 172, 183 (2013).

83. Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338, 338–40 (1982), available at <http://scholarship.law.berkeley.edu/facpubs/1559> (on file with *The University of the Pacific Law Review*) (“[T]he opportunity for adversariness has expanded in direct proportion to, and perhaps as a result of, the growth of plea bargaining.”); cf. Fred C. Zacharias, *Justice in Plea Bargaining* [in italics], 39 Wm. & Mary L. Rev. [small caps] 1121, 1124 (1997-1998).

84. See generally, Kevin O’Brien, *Plea Bargaining and the Supreme Court: The Limits of Due Process and Substantive Justice*, 9 HASTINGS CONST. L.Q. 109 (1981).

85. Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 658 (1981).

86. See, e.g., Tina Wan, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least Restrictive Alternative*, 17 REV. L. SOC. JUSTICE 33 (2007); Tim Lynch, *The Devil’s Bargain: How Plea Agreements, Never Contemplated by the Framers, Undermine Justice*, CATO (July 2011), available at <http://www.cato.org/publications/commentary/devils-bargain-how-plea-agreements-never-contemplated-framers-undermine-justice> (on file with *The University of the Pacific Law Review*).

87. Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L. J. 1259, 1260 (2011).

88. Kyle Graham, *Overcharging*, 11 OHIO ST. L. J. 701, 701 (2014).

89. *Id.* at 704.

90. JOAN E. JACOBY AND EDWARD C. RATLEDGE, *THE POWER OF THE PROSECUTOR: GATEKEEPERS OF THE CRIMINAL JUSTICE SYSTEM* 108 (Praeger 2016).

court does not honor the agreement, the defendant may withdraw the plea.<sup>91</sup> Because charging decisions are largely beyond judicial review, prosecutors may favor that form of bargaining since it creates greater certainty. Not surprisingly, over 90% of all criminal cases result in guilty pleas.<sup>92</sup>

Professor Donald Dripps analogizes plea-bargaining to coercive threats akin to torture.<sup>93</sup> Thus, the prosecutor may make an offer that is such a serious threat that the offer is “worse than torture.”<sup>94</sup> For example, prosecutors typically offer reduced sentences in exchange for guilty pleas, requiring defendants to quickly decide between admitting guilt or facing the possibility of 40 years in prison.<sup>95</sup> Like Professor Dripps, many believe prosecutors have too much power in the administration of criminal justice. Increased sentences and mandatory minimum sentences have given prosecutors so much power that “[c]harge selection, in a great many cases, is not the beginning of an adversarial process, but the *outcome* of the case, practically speaking.”<sup>96</sup>

One might expect judges to limit that exercise of prosecutorial discretion. But case law imposes few limitations. Most decisions made within a prosecutor’s office lack any transparency.<sup>97</sup> As long as prosecutors demonstrate that some facts support the charges, courts exercise virtually no supervision over charging decisions.<sup>98</sup> And those charging decisions may wildly differ depending on the exercise of the prosecutor’s discretion: consider the options that the prosecutor had in *Lockyer v. Andrade*, a case involving California’s three-strikes law.<sup>99</sup> Police twice arrested Andrade for shoplifting videotapes.<sup>100</sup> Under California law, a prosecutor may charge petty theft with a prior as a misdemeanor or a felony.<sup>101</sup> Had the prosecutor charged Andrade with one count petty theft, the sentence might have been six months in jail.<sup>102</sup> And the prosecutor could have charged Andrade with two counts of petty theft, leaving open the possibility of a sentence up to a year.<sup>103</sup> Or he could have charged Andrade with felony theft, with a possible sentence of one to three years in prison.<sup>104</sup> Because Andrade had

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91. *Id.* at 104.

92. Pizzi & Montagna, *supra* note 1, at 445.

93. Dripps, *supra* note 63.

94. *Id.* at 2.

95. *See e.g., id.* at 2.

96. *Id.* at 7 (emphasis in original).

97. *Cf. id.* at 2.

98. Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L & POL’Y REV. 61 (2015).

99. *Lockyer v. Andrade*, 538 U.S. 63, 68 (2003).

100. *Andrade v. Att’y Gen. of Cal.*, 270 F.3d 743, 746 (9th Cir. 2001).

101. *Id.* at 749 (“Prosecutors have discretion to charge petty theft with a prior as either a misdemeanor or a felony, and the trial court has reviewable discretion to reduce this charge to a misdemeanor at the time of sentencing.”).

102. CAL. PENAL CODE § 484-502.9 (2016).

103. *Id.*

104. CAL. PENAL CODE §§ 18, 666 (2016).

two prior strikes, the prosecutor could have charged Andrade with a count under the three-strikes law, requiring a sentence of 25 years to life (without reduction of the mandatory minimum of 25 years in prison), based on one count of felony theft.<sup>105</sup> Or the prosecutor could have charged—as the prosecutor did—two counts under the three-strikes law.<sup>106</sup> As a result, upon conviction, Andrade was subject to a sentence of 50 years to life.<sup>107</sup>

While I have written about three-strikes and the *Andrade* case,<sup>108</sup> I do not know whether the prosecutor offered a plea deal or not. My guess is, because the case arose in 1995, in the early days of the law, the prosecutor did not offer a plea. During that period, prosecutors charged third-strikes in cases that ended up shocking the public.<sup>109</sup> I use the example here to demonstrate the enormous power that prosecutors have. While the Supreme Court of California has found that judges have the power to “strike” a “strike” under the law,<sup>110</sup> judges exercise that authority sparingly.<sup>111</sup>

Similar examples are readily available. Professor Dripps cites a case that went to the United States Supreme Court, dealing with life-without-parole sentences for juvenile offenders.<sup>112</sup> The juvenile offender in that case pled guilty to an earlier charge than the one that earned him a true life sentence.<sup>113</sup> As Professor Dripps points out, when the juvenile accepted the original “so-called bargain,” “[t]he gap between the prosecutor’s plea offer and trial threat was the difference between little more than time served and a life sentence . . . .”<sup>114</sup>

One of the primary concerns about plea-bargaining is the risk that innocent defendants have no real choice but to accept the plea offer. That is magnified by the practice of some prosecutors to make a plea offer with a very short fuse—in effect, accept it now or lose it.<sup>115</sup> Imagine an innocent defendant’s dilemma in a case in which the prosecutor has charged the defendant with crimes that may result in many years in prison. A *New Yorker* article offered a chilling

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105. *Andrade*, 270 F.3d at 749.

106. CAL. PENAL CODE §§ 667(c)(6), 1170.12 (a)(6) (2016).

107. *Andrade*, 270 F.3d at 749–50.

108. See, e.g., Michael Vitiello, *California’s Three Strikes and We’re Out: Was Judicial Activism California’s Best Hope?*, 37 U.C. DAVIS L. REV. 1025 (2004); Michael Vitiello, *Three Strikes: Can We Return to Rationality*, 87 J. CRIM. L. & CRIMINOLOGY 395 (1997).

109. Eric Slater, *Pizza Thief Receives Sentence of 25 Years to Life in Prison: Crime: Judge Cites Five Prior Felony Convictions in Sentencing Jerry Dewayne Williams Under ‘Three Strikes’ Law*, L.A. TIMES, Mar. 3, 1995, at 9B.

110. *People v. Superior Court (Romero)*, 917 P.2d 628, 647 (Cal. 1996).

111. See, e.g., *People v. Williams*, 948 P.2d 429 (Cal. 1998).

112. *Graham v. Florida*, 560 U.S. 48 (2010).

113. *Id.* at 52–54.

114. Dripps, *supra* note 63, at 8.

115. Mike Work, *Creating Constitutional Procedure: Frye, Lafler, and Plea Bargaining Reform*, 104 J. CRIM. L. & CRIMINOLOGY 457, 481 (2014).

description of the realities that jailed offenders face in big-city courts.<sup>116</sup> Innocent offenders who cannot make bail have few options other than pleading guilty. Conditions in jail are oppressive and the consequences of staying in jail are devastating.<sup>117</sup> Any hopes of retaining employment are lost.<sup>118</sup> Meanwhile, pleading guilty leaves an offender open to numerous collateral consequences, often leading to disastrous results.<sup>119</sup> Determining how often innocent offenders are convicted is tricky. But some scholars estimate the rate is somewhere between 2.3–5% of offenders.<sup>120</sup> With that in mind, imagine how you would advise your client faced with continued incarceration and a trial down the road somewhere in a clogged system or taking a plea and being released for time-served. Assume that you are the public defender with far too many cases to handle other than through bargains. Do you have time to assess your client's claim of innocence? At the end of the day, more than nine times out of ten, you will advise the client to take the plea.

Imagine other cases. Assume a client and victim engaged in a bar fight, resulting in the death of the victim. If offered a plea of a short term of years, should your client accept it or go to trial to interpose a plausible self-defense claim? Or consider a conversation I had with a woman who called me seeking someone to represent her son in a rape trial. The case would turn on conflicting testimony about consent. And if the woman's son went to trial, in addition to a term of imprisonment, he would face a lifetime as a registered sex offender.

The choices faced by defendants have the look and feel of coercion; but no court today is likely to so rule.<sup>121</sup> Occasionally, writers suggest reforms to the system.<sup>122</sup> But few suggestions have much hope of succeeding because our criminal justice system is addicted to guilty pleas.<sup>123</sup> Even a reduction in pleas from 90% to 80% would mean that twice as many cases that go to trial today

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116. Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), available at <http://www.newyorker.com/magazine/2014/10/06/before-the-law> (on file at *The University of the Pacific Law Review*).

117. *Id.*

118. *Id.*

119. *Id.*

120. INNOCENCE PROJECT, *How Many Innocent People Are There in Prison?*, <http://www.Innocenceproject.org/faqs/how-many-innocent-people-are-there-in-prison> (last visited Apr. 6, 2016) (on file with *The University of the Pacific Law Review*).

121. See, e.g., H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011).

122. See, e.g., Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971).

123. Pizzi & Montagna, *supra* note 1, at 444–45 (explaining that over 90% of cases in the United States result in plea agreements).

would go to trial.<sup>124</sup> Many court systems, like California, faced budget cuts during the recession—funds that the state has not fully restored.<sup>125</sup>

Criminal trials are a staple of TV shows.<sup>126</sup> Often, offenders have resources to hire top-notch lawyers who secure acquittals in close cases.<sup>127</sup> But, in effect, those cases are a show about what our system can provide. Despite high hopes during the Warren Court era, when the Court found that the states have an obligation to provide indigent offenders with competent counsel, that promise is still largely unfulfilled. The result is bargained-for-justice where one side has few chips to play.<sup>128</sup>

#### IV. BARGAINED-FOR-JUSTICE IN ITALY

In 1988, the Italian Parliament revised its Code of Criminal Procedure to move Italy from an inquisitorial to an adversarial system.<sup>129</sup> As indicated above, during the post-World War II era, European systems adopted some of the basic rights guaranteed in the United States Constitution.<sup>130</sup> At times, the motivation has come from the European Court of Human Rights (ECHR).<sup>131</sup> The Italian Parliament's adoption of its form of adversarial justice resulted in part from the ECHR's finding that Italy failed to provide defendants with speedy trials.<sup>132</sup> As occurred elsewhere, the Italians increased criminalization, leading to systemic inefficiency.<sup>133</sup>

In addition, Italy was going through a significant change, as were many European countries. Inquisitorial justice reflects a societal belief that the state is legitimate and acts in the interest of its citizens.<sup>134</sup> By comparison, the rights model in the United States is grounded in the belief that government needs to be restrained.<sup>135</sup> A quick look at protections in the Bill of Rights establishes that point. Many of those protections have little or nothing to do with improving the

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124. *See id.*

125. *See* Brian Melley, *California Courts Innovate Small Changes Despite Budget Cuts*, WASHINGTON TIMES (Jan. 31, 2015), available at <http://www.washingtontimes.com/news/2015/jan/31/california-courts-innovate-small-changes-despite-b/?page=all> (on file with *The University of the Pacific Law Review*).

126. *See, e.g., Making a Murderer* (Netflix 2015); *48 Hours Hard Evidence* (CBS 2005).

127. *Cf.* Jon Blistein, 'Making a Murderer' Lawyers Plot North American Speaking Tour, ROLLING STONE, Mar. 1, 2016.

128. Derwyn Bunton, *When the Public Defender Says, 'I Can't Help,'* N.Y. TIMES (Feb. 19, 2016), available at <http://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html> (on file with *The University of the Pacific Law Review*).

129. Pizzi & Montagna, *supra* note 1, at 430.

130. *See, e.g., id.* at 437–38.

131. *Id.*

132. *Id.*

133. Stefano Maffei, *Negotiations 'on Evidence' and Negotiations 'on Sentence': Adversarial Experiments in Italian Criminal Procedure*, 2 J. INT'L CRIM. JUST. 1050, 1051 (2004).

134. *See* Mirabella, *supra* note 53.

135. Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 692 (1999).

fact-finding function of a trial.<sup>136</sup> The Fourth Amendment frustrates the finding of truth when the court suppresses what is likely the most probative evidence of guilt.<sup>137</sup> The Fifth Amendment—to be free from compelled testimony—often results in disqualifying the person with the most relevant information from testifying in court.<sup>138</sup> Our system aims for a sense of procedural fairness; that is, our system gives a defendant a fighting chance against the powerful state.<sup>139</sup>

One of the lessons of World War II was that Europeans, especially citizens of Germany and Italy, could not rely on a beneficent state.<sup>140</sup> Authoritarianism was illegitimate.<sup>141</sup> One of the reforms was to include a form of bargained-for-justice.<sup>142</sup> Not surprisingly, many participants in the Italian system were slow to adapt to the changes in the law. Part of the problem was fundamental: lawyers trained in the civil law inquisitorial justice system reject plea-bargaining.<sup>143</sup> Among the civil law values in conflict with plea bargaining, are some important principles: a prosecutor has a mandate to pursue all crimes where the prosecutor has sufficient evidence that a crime has taken place<sup>144</sup>; the justice system presumes the defendant innocent and has the responsibility to prove the defendant's guilt<sup>145</sup>; and, consistent with the principle of legality, the state cannot impose punishment on a defendant absent a trial on the merits.<sup>146</sup> In addition, the principle of just and proportional punishment suggests that a court must determine a sentence based on a defendant's conduct. The effect of a plea agreement is to lessen the punishment; that is, when a judge sentences an offender consistent with a plea bargain, the judge is not sentencing consistent with the law only.<sup>147</sup>

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136. *Id.* at 678.

137. THOMAS N. MCINNIS, *THE CHRISTIAN BURIAL CASE: AN INTRODUCTION TO CRIMINAL AND JUDICIAL PROCEDURE* 219 (Greenwood 2001).

138. See generally Roderick R. Ingram, *A Clash of Fundamental Rights: Conflicts Between the Fifth and Sixth Amendments in Criminal Trials*, 5 WM. & MARY BILL RTS. J. 299 (1996).

139. RONALD J. BACIGAL & MARY KELLY TATE, *CRIMINAL LAW AND PROCEDURE: AN OVERVIEW* xxxvi (Cengage Learning 4th ed. 2015).

140. See Maffei, *supra* note 133.

141. *Id.*

142. *Id.* at 1050.

143. Pizzi & Montagna, *supra* note 1, at 439. Interestingly, Chile also adopted the adversarial system. James P. Carey, *Reflection on Criminal Justice Reforms in Chile*, 2 LOY. U. CHI. L. J. 271 (2005). But by comparison to Italians, Chileans have been enthusiastic in their adoption of the adversarial system. *Id.* The explanation may be that the ECHR prodded the Italians into reforming their system. *Id.* By comparison, the Chileans say the change is a repudiation of Augusto Pinochet's dictatorial rule. *Id.*

144. Cf. Frederica Iovene, *Plea Bargaining and Abbreviated Trial in Italy* 3 (Warwick Sch. of Law Res. Paper No. 2013-11, 2013), <http://dx.doi.org/10.2139/ssrn.2286705> (Italian Constitution ART. 112: the public prosecutor has the obligation to institute criminal proceedings).

145. JOHN D. JACKSON & SARAH J. SUMMERS, *THE INTERNATIONALISATION OF CRIMINAL EVIDENCE: BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS* 199 (2012).

146. Maffei, *supra* note 133, at 1054.

147. Cf. Pizzi & Montagna, *supra* note 1, at 442–43 (explaining the judge has discretion over the plea).

Italian courts issued a number of decisions that undercut the procedural reforms.<sup>148</sup> In 1999 and then again in 2001, the Italian Parliament returned to the subject of procedural reforms, eventually amending the Italian Constitution.<sup>149</sup> It now states that a defendant may renounce various rights the defendant loses when she pleads guilty.<sup>150</sup>

Current law in Italy permits a form of bargaining called *patteggiamento*, which means “the application of punishment upon the request of the parties.”<sup>151</sup> Updated in 2005, the law limited the offenses that are within the law. Bargaining is available for offenses that carry a sentence of up to seven and a half years in prison.<sup>152</sup> The law excludes certain crimes, including organized crime offenses and sexual crimes, from the list of offenses subject to bargaining.<sup>153</sup> The Italian Parliament also excluded certain habitual offenders from plea-bargaining.<sup>154</sup>

Bargaining takes a different form than bargaining in the United States. In the United States, prosecutors and defendants can enter a bargain without regard to the offense. The parties may enter a bargain, even in a first-degree murder case, where a defendant may avoid the death penalty by pleading guilty to the crime with a promise that the prosecutor will support a sentence other than the death sentence.<sup>155</sup> Alternatively, the parties may agree that the prosecutor will reduce the crime charged from first-degree to second-degree murder or to voluntary manslaughter, as a way to assure a lesser sentence.<sup>156</sup> One of the unhealthy effects of the ability of a prosecutor to reduce charges is the tendency to

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148. *Id.* at 431–32.

149. Maffei, *supra* note 133, at 1055–57.

150. Pizzi & Montagna, *supra* note 1, at 437–38. Text of Art. 6 § I: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.” European Convention on Human Rights art. 6, Nov. 4, 1950, 213 U.N.T.S. 221, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (on file with *The University of the Pacific Law Review*).

151. Pizzi & Montagna, *supra* note 1, at 438.

152. *Id.* at 439.

153. *Id.* at 439 n.34.

154. *Id.*

155. See, e.g., Ashley Fantz, *Ariel Castro Agrees to Plea Deal to Avoid Death Penalty*, CNN (July 28, 2013, 1:55 PM), <http://www.cnn.com/2013/07/26/justice/ohio-castro/>; John Ingold, *James Holmes May Plead Guilty to Avoid Death Penalty, Court Documents Show*, DENVER POST (Mar. 27, 2013, 7:50 AM), <http://www.denverpost.com/2013/03/27/james-holmes-may-plead-guilty-to-avoid-death-penalty-court-documents-show/> (last updated April 30, 2016, 4:26 AM) (on file with *The University of the Pacific Law Review*).

156. See, e.g., Jessica Miller, *Utah Man Originally Charged with Murder in Ogden Shooting Pleads Guilty to Manslaughter*, SALT LAKE TRIB. (Mar. 22, 2016, 12:36 PM), <http://www.sltrib.com/news/3693199-155/utah-man-originally-charged-with-murder> (last updated Mar. 24, 2016, 10:04 PM) (on file with *The University of the Pacific Law Review*).

overcharge offenders.<sup>157</sup> Italy has, in effect, legislated in a way that reduces prosecutorial discretion.

Unlike in the American system, an Italian prosecutor is unable to drop a charge because of the principle of mandatory prosecution, which is in the Italian constitution.<sup>158</sup> A prosecutor cannot drop charges against the defendant; a judge must determine if dropping the charge is warranted.<sup>159</sup> The bargaining system that does exist allows a defendant to ask for a particular reduced sentence and does not require the defendant to enter a plea of guilty.<sup>160</sup> The Italian system gives the defendant greater protection than what is available in the United States. If a prosecutor refuses a defendant's request for a particular sentence, the prosecutor must explain the decision to the defendant.<sup>161</sup> If the defendant disagrees with the prosecutor's reasons, the defendant may ask the judge for review of the prosecutor's explanation.<sup>162</sup> Further, even if the parties have agreed to a particular sentence, the judge must verify whether the defendant's request was voluntary.<sup>163</sup> The judge must also review the facts, including mitigating and aggravating circumstances, to determine if the bargain corresponds to the facts.<sup>164</sup>

The Italian system includes other advantages for a defendant who bargains for a reduced sentence. Some of those are not unique. For example, a defendant's plea is not given issue preclusive effect in related civil proceedings.<sup>165</sup> While that is not the case in the United States when a defendant pleads guilty, many states allow a plea of *nolo contendere*, which has the same procedural effect as the plea in the Italian system.<sup>166</sup> The Italian system makes offenders eligible to have their records expunged after a period of years.<sup>167</sup> Some states in the United States allow expungement, but they do so under more restrictive conditions than in Italy.<sup>168</sup> In the United States, an offender must commence a new proceeding to move for expungement; the process is far more burdensome than in Italy, where the right to expungement is in the law authorizing bargaining.<sup>169</sup>

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157. Graham, *supra* note 88.

158. Iovene, *supra* note 144.

159. Maffei, *supra* note 133, at 1054.

160. Iovene, *supra* note 144, at 4–8.

161. Pizzi & Montagna, *supra* note 1, at 442.

162. *Id.* at 442–43.

163. Iovene, *supra* note 144, at 8.

164. *Id.* at 5–6.

165. Maffei, *supra* note 133, at 1065.

166. See generally Norman S. Oberstein, *Nolo Contendere – Its Use and Effect*, 52 CAL. L. REV. 408 (1964).

167. Maffei, *supra* note 133, at 1065.

168. Megan Dunn, *You're Fired! The Role of State Courts in the Expungement of Criminal Records for the Federal Security Clearance Purposes*, 71 MO. L. REV. 495, 497–98 (2006).

169. *Id.* at 498.



Another way to think about the bargained-for-justice system in Italy is to see the abiding influence of “the Continental mentality.”<sup>170</sup> As a University of Trento graduate student wrote, “irrespective of any attempt to transplant an adversarial model, [the Italian system] is at pains to accept that judges play no role in the search for truth and that [the] parties shape the criminal outcome.”<sup>171</sup>

Initially, plea-bargaining did not seem to take hold in Italy. For example, in 2004, 85% of all criminal cases still went to trial.<sup>172</sup> But by 2012, bargaining seemed to have taken root: in that year, 34% of all criminal cases involved bargained-for-justice.<sup>173</sup>

## V. LESSONS LEARNED

No doubt, the ECHR had ample evidence that the Italian system crawled too slowly, thereby depriving defendants of their right to speedy trials. After a sluggish start, Italian lawyers and judges are learning to accept bargained-for-justice. But is that something to celebrate?

That depends. Insofar as the Italian system provides defendants with speedy trials, the reforms to the Italian system are a success. But rapidly increasing rates of cases that the parties resolve through bargaining raises questions. I have not observed the Italian system in action and have not found scholarly accounts of how bargaining works on the ground in Italy. At least as drafted, Italian law continues important guarantees that prevent abusive prosecutorial overreaching. Prosecutors must explain their reasons for refusing bargains—decisions that judges must review. In theory, that is an important check on abuse. Jurisdictions in the United States provide far fewer checks on plea-bargaining.

That takes me to my final point: too often, Americans are ignorant about the basics of alternative judicial systems. Often, when Americans and even some scholars discuss foreign systems, they demonstrate a singular lack of understanding of how those systems work. Sadly, when some members of the Supreme Court talk about foreign law, they enflame American prejudice. In response to Justice Kennedy’s citation to European law, the late-Justice Scalia railed that such a citation was “meaningless dicta” and “dangerous.”<sup>174</sup> During a discussion at the American University Washington College of Law, Justice Scalia said, “. . . we don’t have the same moral and legal framework as the rest of the world, and never have.”<sup>175</sup> At a minimum, Justice Scalia demonstrated a

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170. Iovene, *supra* note 144, at 5.

171. *Id.*

172. Pizzi & Montagna, *supra* note 1, at 444–45.

173. Iovene, *supra* note 144, at 13.

174. *Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, J., dissenting).

175. Antonin Scalia & Stephen Breyer, Associate Justices, U.S. Supreme Court, Participants at the American University Washington College of Law Discussion: Constitutional Relevance of Foreign Court Decisions 5 (Jan. 13, 2005).

remarkable lack of curiosity about the larger world; worse, his remarks seem to demonstrate an arrogance about the American system. Other members of the Court's rightwing have expressed similar indifference to international law.<sup>176</sup>

And yet, we have a lot to learn from foreign systems. Bargained-for-justice in the United States has degraded our system with an intolerable risk of coercing innocent defendants into accepting plea bargains. Further, our system allows little light into the bases for the exercise of prosecutorial discretion; and at least, viewed in gross terms, the system seems rigged against indigent minority defendants. Before the Italians go further down the path of bargained-for-justice, would this be a good time for us to emulate some of Italy's restraints on bargained-for-justice?

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176. Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335, 1343 (2007) (citing Justice Clarence Thomas's concurrence in *Foster v. Florida*, criticizing consideration of "foreign moods, fads, or fashions"); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 269 (2006) (statement of Samuel A. Alito, Jr.) ("I don't think that it's appropriate or useful to look at foreign law in interpreting the provisions of our Constitution."); Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 651 (2007) (providing Chief Justice John Roberts statements, "Foreign law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia, or wherever.")