

## ARTICLES

# PROCEDURAL ECONOMY IN PRE-TRIAL PROCEDURE: DEVELOPMENTS IN GERMANY AND THE UNITED STATES

SHAWN MARIE BOYNE\*

*Almost from the adoption of the Constitution, it has been apparent that the provisions dealing with criminal procedure represented a set of ideals rather than a code of practice.*<sup>1</sup>

### I. INTRODUCTION

For decades, comparative law scholarship that focused on Western criminal justice systems regularly viewed national legal systems through what A. Esin Öricü calls a “[t]raditional black-letter law-oriented (rule-based)” framework that was “normative, structural, institutional, and positivistic.”<sup>2</sup> Seen through this lens, scholars categorized most of the world’s criminal justice systems as adversarial, inquisitorial, or mixed systems. According to conventional scholarship, these alternative models capture the essential structural differences that reflect competing visions of criminal law and procedure.<sup>3</sup> As the field of comparative law has continued to develop, theorists such as Mauro Cappelletti,<sup>4</sup> Mirjan Damaška,<sup>5</sup> and

---

\* Professor of Law, Indiana University Robert H. McKinney School of Law. I would like to thank the John S. Grimes Trust for their strong support of my research. I would like to thank the participants of the faculty workshops where I presented earlier drafts of this article at Indiana University Robert H. McKinney School of Law and the Illinois University College of Law.

1. Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1009 (1974).

2. A. Esin Öricü, *Methodology of Comparative Law*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 442, 449 (Jan M. Smits ed., 2006).

3. Peter J. van Koppen & Steven D. Penrod, *Adversarial or Inquisitorial: Comparing Systems*, in ADVERSARIAL VERSUS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS I (Peter J. van Koppen & Steven D. Penrod eds., 2003).

4. See MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* (Paul J. Kollmer & Joanne M. Olson eds., 1989).

5. See MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

John Merryman,<sup>6</sup> have proposed alternative frameworks employing concepts such as legal culture, legal families, and contrasting models of governmental authority to categorize legal systems. However, the utility of these models wanes when we shift the focus away from contrasting the normative theories that underlie the criminal justice systems and seek to understand how institutional actors operate within the framework of the law. Although the traditional dichotomy between adversarial and inquisitorial systems is based on an analysis of criminal procedure systems as viewed through statutory and case law, the law's impact is heavily mediated by institutional interactions. The implementation of law is thus a dynamic process that includes not only judicial or legislative interpretations of statutes, but also workplace routines and the relational interactions between legal actors.<sup>7</sup> Given the complexity, variability, and malleability, of the criminal process, when comparing pre-trial practices in Germany and the United States, the comparison can no longer be limited to a contrast between a system that features a battle between two parties versus a system with a unified objective investigation.<sup>8</sup> Doing so fails to capture the evolving changes in practice.

Although models never precisely mirror reality, social-legal scholars over the past three decades have argued that a myriad of exogenous forces beyond the law, as well as the law itself, influence the decisionmaking practices of legal actors. This development is particularly important in the field of criminal procedure, where a global financial crisis and shifting political priorities have imposed resource constraints on the truth-finding process in Germany and the United States. Indeed, as prosecutors, judges, and defense attorneys in both countries work to move case files through the system, concerns about efficiency and limited resources have skewed the shape and goals of the truth-finding process. Although there will always be a gap between actual practice and the law's normative aspirations, resource limitations have significantly widened that gap.

In this Article, using the U.S. system as a point of comparison, I examine the ongoing changes that have been occurring in German pre-trial

---

6. See JOHN H. MERRYMAN & ROGEL PEREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* (3d ed. 2007).

7. Sida Liu & Terence C. Halliday, *Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure*, 34 *LAW & SOC. INQUIRY* 911, 914 (2009).

8. See, e.g., Maximo Langer, *The Long Shadow of Adversarial and Inquisitorial Categories*, in *THE OXFORD HANDBOOK OF CRIMINAL LAW* (Markus D. Dubber & Tatjana Hörnle eds.) (forthcoming 2014).

practice. The daily practice of the key players in the criminal justice systems of both countries continue to shift in response to ever-increasing resource constraints and varied organizational incentives.

These shifts have created areas of both convergence and divergence. Faced with heavy caseloads, prosecutors in both countries have increasingly utilized settlement mechanisms that resolve cases short of a full-fledged public trial. As a result, the course of pre-trial practice has become more outcome-determinative. Yet, while plea bargaining in the United States came to play a dominant role several decades ago, its use in Germany is a more recent and controversial development. While German prosecutors have had the power to dismiss or defer prosecutions of minor cases for several decades, it is only recently that the judicial and legislative branches have sanctioned the practice. Unlike U.S. courts, German courts have imposed strict limits on deal making: most notably, demanding that the facts uncovered during the investigation substantiate the level of guilt referenced in the confession agreement.<sup>9</sup>

The shortened investigatory process in both countries raises questions about whether these abbreviated processes fulfill the objectives of criminal law. A key inquiry is the extent to which the shortened process may embolden or undermine prosecutorial power vis-a-vis the judiciary in both countries.

This shift towards efficient case processing practices poses a serious challenge to the traditional narratives of the path to truth in adversarial and inquisitorial systems. By highlighting this development, this Article examines how the (re)organization of the German prosecutorial function has reshaped its truth-finding process.

## II. COMPARING NORMATIVE ASSUMPTIONS

### A. INTRODUCTION

On paper, the structure of criminal justice in the United States and Germany reflect divergent assumptions about the path to truth—as well as the divergent levels of public confidence in the government’s role in the truth-finding process. Rather than placing the adjudication function in the hands of the judiciary, the U.S. Founding Fathers’ distrust of the King’s

---

9. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 3, 2005, 50 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 40, 47 (Ger.).

authority led the colonists to rely on citizen juries to weigh the facts and the law.<sup>10</sup> From the perspective of state authority, according to Damaška,<sup>11</sup> the purpose of the adversarial process is to legitimize the resolution of a single dispute between identifiable parties.<sup>12</sup> In contrast to inquisitorial systems, which vest their faith in the scientific nature of the law and judicial expertise, adversarial systems reflect the belief that, if the contest is structured fairly, the truth will emerge out of the battle between the parties.<sup>13</sup> A necessary precondition to a fair trial is that prosecutors must honor their duty to be more than simply a party to the proceeding. In principle, an American prosecutor is bound to an ethical duty of fair play, which is similar to that of German prosecutors. Rather than function solely as advocates, American prosecutors are bound by an ethical duty to seek justice and not merely to seek to convict.<sup>14</sup> On the German side, prosecutors possess a duty to conduct an objective investigation and to investigate the facts both for and against the defendant.<sup>15</sup> These congruent duties for prosecutors in both countries are often obscured when prosecution is viewed through the traditional lens of adversarial versus inquisitorial systems.

In theory, Americans have distrusted the government's ability to be objective since colonial times. For this reason, the U.S. system entrusts everyday citizens with the role of ascertaining the relevant facts in a case and with applying the law to reach a verdict. Ironically, the shift away from trials has not only usurped the jury's fact-finding role, but has also emboldened prosecutors to act in a manner that is prejudicial to defendants. This development is noteworthy because, for the past two decades, scholars have not only questioned whether the "contest" between the parties is a fair one, but also have also debated whether prosecutors possess a "conviction mentality" that undermines their duty to pursue justice.<sup>16</sup> One irony of the

---

10. Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He is Sworn to Protect*, 51 WASHBURN L.J. 513, 524–25 (2012).

11. See Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986).

12. William Twining, *What is the Law of Evidence?*, in *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 178, 181 (1990).

13. See Noah Weisbord & Matthew A. Smith, *The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure*, 36 N.C. J. INT'L L. & COM. REG. 255 (2011).

14. See, e.g., N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY EC 7–13 (2007).

15. See STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1074, as amended, § 160.

16. See, e.g., CAPPELLETTI, *supra* note 4; DAMAŠKA, *supra* note 5.

rise of plea bargaining in the U.S. is that, by moving away from trials, the system has disempowered citizen-jurors and empowered government prosecutors who have little incentive to view the facts objectively.

Prosecutorial behavior in the United States is often unconstrained for several reasons. First, because state and federal legislatures inadequately fund indigent defense services,<sup>17</sup> most defendants are represented by appointed counsel who are often underfunded, unprepared, and overburdened.<sup>18</sup> In 2004, the American Bar Association noted that this underfunding “places poor persons at constant risk for wrongful conviction.”<sup>19</sup> The instant that criminal proceedings commence, the scales of justice are tipped in prosecutors’ favor. Whatever “battle” occurs is often one-sided. Absent a well-funded opponent, prosecutors—often embedded in organizations that reward conviction rates and severe sentences—find few institutional incentives to protect defendants’ rights and achieve fairness. While prosecutors are in principle bound to play fair, they are seldom disciplined for violating their ethical duties.<sup>20</sup>

Even though the percentage of cases that are resolved through trial has dwindled, an adversarial outlook may shape the parties’ behavior during the pre-trial process. Indeed, neither a prosecutor’s refusal to disclose exculpatory evidence nor a defense counsel’s search for “dirt” to damage witnesses is likely to bring the investigation closer to the “truth.” In both cases, the rules that exist to curb the parties’ out-of-bounds behavior sometimes fail to guarantee that the process will serve the ends of justice. Despite the fact that defense counsel has a right to access whatever exculpatory evidence that the prosecution possesses, prosecutors’ failure to disclose exculpatory evidence has been a significant factor in many wrongful conviction cases.<sup>21</sup> As Peter Joy states,

---

17. Rodney Uphoff, *Broke and Broken: Can We Fix Our State Indigent Defense System?*, 75 MO. L. REV. 667, 669 (2010).

18. Robert P. Mosteller, *Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness*, 36 N.C. J. INT’L L. & COM. REG. 319, 325 (2009).

19. STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, AMERICAN BAR ASSOCIATION, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* (2004).

20. David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 205 (2011).

21. Peter A. Joy & Henry Hitchcock, *The Criminal Discovery Problem: Is Legislation a Solution?*, 52 WASHBURN L. J. 37, 44 (2013) (“In an early study of the first sixty-two DNA

Some of the other factors leading to wrongful convictions, such as mistaken identification, are more prevalent, but suppression of exculpatory evidence is especially troubling because it serves to derail the truth-seeking process of the criminal justice system. Rather than the adversarial process working as intended, the suppression of exculpatory evidence either leads some innocent defendants to plead guilty or denies the fact finders the ability to reach just verdicts in cases that go to trial.<sup>22</sup>

Another reason why the adversarial system falls short of its normative goal to find the truth is that most cases are resolved through a plea agreement. Although both parties are free to negotiate the outcome of a plea, the prosecutor typically has the upper hand in the negotiation because the specter of harsh penalties imposed by mandatory minimum sentences increases the risk of going to trial. Also, prosecutors may increase the number or seriousness of the charges filed against a defendant simply to strengthen their bargaining position.<sup>23</sup> Lacking deep pockets to fund their own investigations, overworked and underfunded public defenders find that their ability to challenge a prosecutor's case is extremely limited. Defense counsel, who find themselves armed only with a defendant's side of the facts and the possibility of cross-examining the state's witnesses, may strongly encourage their clients to accept a plea agreement in the pre-trial phase of the proceedings.

It is not only underfunding that puts defense counsel at a disadvantage in the pre-trial phase. Weak discovery rights, especially in federal courts, compromise the defendant's ability to uncover information which may undermine the state's case. Indeed, prosecutors in federal courts possess limited discovery obligations which may not come into play until just before or immediately after a witness testifies. Thus, a defendant who accepts a guilty plea prior to the prosecutor's discovery obligations may do so without full disclosure of the state's evidence.

The combination of inadequately funded representation, limited discovery, and over-charging practices, augment the prosecutor's pre-trial

---

exonerations, twenty-six (41.9%) cases involved prosecutorial misconduct. Of the DNA exonerations involving prosecutorial misconduct, the suppression of exculpatory evidence—Brady/Giglio violations—occurred forty-three percent of the time.”).

22. *Id.* at 44–45.

23. Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 868 (1995).

leverage. In a world of bargained justice, it is prosecutors, rather than judges, who most frequently engineer the system's results. One might argue that prosecutors, aided by the intimidation of long sentences, drive the terms of the plea bargain, while judges are content to accept the deal to keep their dockets moving. The portrait of pre-trial practice, at least for indigent defendants, in some respects looks more like the model of an inquisitorial system in which the "truth" reflects the government's theory of the case. At the same time, however, it is a flawed inquisitorial model as prosecutors lack the incentives to investigate and view the facts from a neutral standpoint, and American judges do not test the prosecutor's facts when the case enters the courtroom.

#### B. GERMANY'S INQUISITORIAL SYSTEM

The German model reflects the inquisitorial model's conviction that a neutral fact-finder can objectively discover the "truth." Charged with leading the search for truth during the investigation process, prosecutors are entrusted not with leading the effort to convict a suspect, but rather with uncovering all of the facts that are relevant for determining a suspect's guilt or innocence. One key difference between German and American prosecutors is that, while political pressures may drive American prosecutors to be tough on crime, German prosecutors are typically more insulated from public pressure. Moreover, German lawyers are trained not to view the trial as a contest.

In contrast to the American system, "truth" in the German system is discovered through the state's objective investigation of the facts. To find that "truth," the state directs career bureaucrats not to function as parties, but rather to serve in a quasi-judicial role investigating the facts for and against the defendant. This vision of the law is introduced and reinforced in law school where law faculties instruct students that an objective truth exists and most legal problems have only one "solution." Because the trial is not perceived as a contest, prosecutors are free to dismiss cases which are unsupported by evidence as well as ask the court to acquit a suspect.

Although the large majority of prosecution offices in the United States are headed by an elected public prosecutor, the political accountability of German prosecutors is less direct. Except for a small number of federal prosecutors, all prosecution offices are subsumed under the Ministries of Justice ("Ministry") on the "Land" or state level. Both the law and the prosecution service's sense of institutional identity block most efforts made

by the Ministry to influence case outcomes. However, the Ministries do influence prosecutorial practice as they determine staffing levels, create organizational incentives, and set overall priorities. Still, prosecution priorities are more reflective of the bureaucratic will than the politics of the local office leaders. In addition, because Germany lacks the retributivist bent popular in America, the prosecution of crime is much less politicized in Germany.

The structure of practice is determined not only by prosecutors' institutional role, but also by the state's larger vision of the purpose of the criminal justice system. Rather than branding criminals as dangerous offenders who must be separated from society, the judicial system views offenders as individuals who have fallen out of compliance with community norms. Instead of relying on incarceration and mandatory minimum sentences, the German system relies extensively on fines and conditional dismissals to nudge offenders back into the stream of law-abiding citizens. Even when an offender commits a serious crime, the justice system acts in a paternalistic manner, not to punish and isolate offenders, but rather to reintegrate offenders back into the society. This vision contrasts with that of the U.S. system of justice—only reinforced by heightened security concerns after the 9/11 attacks—that increasingly privileges the goal of crime control over the protection of due process rights.<sup>24</sup> Thus, while American prosecutors' thirst to convict may translate into a desire to seek harsh punishments, German prosecutors' fidelity to less politicized norms and a tradition of tailoring punishment to the individual defendant tend to encourage a more tempered approach to punishment.

Although German prosecutors possess a near-monopoly on the state's charging power, the discretion that they possess has historically been more circumscribed than their American counterparts.<sup>25</sup> The Code of Criminal Procedure aims to limit discretion through the Principle of Legality ("Legalitätsprinzip"), which requires prosecutors to initiate proceedings in all cases where there is sufficient factual basis to believe that a criminal offense has been committed.<sup>26</sup> It also dictates selection among overlapping

---

24. See Herbert L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968) (conceptualizing "two models of the criminal process").

25. *Id.*

26. STRAGPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBL] 1074, as amended, § 160 (Ger.).

offense definitions to reduce redundancy and accumulation of punishment.<sup>27</sup> However, in practice, prosecutors possess substantial discretion in low-level criminal cases which include many white-collar crimes.<sup>28</sup> In contrast to their American counterparts, German prosecutors often use this discretion to dismiss or defer cases where the state's interest in prosecution is low or the defendant's culpability is limited.<sup>29</sup> For more serious crimes, prosecutors are bound to the key pillars of the Rechtsstaat-fidelity to the Principle of Legality and adherence to rules for selecting among overlapping offense definitions. In theory, prosecutors and judges function as legal scientists eschewing discretionary and interpretive decisionmaking.

To ensure that prosecutors conduct an objective investigation, the Code of Criminal Procedure mandates that prosecutors investigate the facts "for" and "against" a suspect.<sup>30</sup> From a theoretical perspective, the inquisitorial truth-finding process demands that prosecutors view the "facts" through an objective lens. By eliminating prosecutors' ability to decline to press charges in serious cases and requiring prosecutors to function as neutral investigators, the Code aims to achieve an even-handed system of justice. Although prosecutors may decline cases for lack of evidence, with certain reservations, the Code even provides victims with the right to appeal a prosecutor's decision not to prosecute a case.<sup>31</sup>

While inequalities between the power of prosecutors and defense attorneys in the United States have undermined the system's ability to produce the truth, German practice also falls short of the system's normative goals. In particular, increasingly severe funding shortages have led to manpower shortages that undermine the system's ability to produce the "truth." Over the past three decades, budget constraints and personnel shortages have dramatically eroded the efficacy of the principle of mandatory prosecution. Frequently, German prosecutors now lack the time to thoroughly investigate every case with an objective eye. High caseloads

---

27. Hans-Heinrich Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. CRIM. L. 508, 509 (1970).

28. See SHAWN MARIE BOYNE, *THE GERMAN PROSECUTION SERVICE: GUARDIANS OF THE LAW?* 65–72 (2014).

29. STRAGPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1074, as amended, § 153 (Ger.).

30. *Id.* § 160 (Ger.).

31. *Id.* § 172 (Ger.).

may force prosecutors to dismiss or short cut investigations and move on to other cases.<sup>32</sup>

The cause of prosecutors' workload pressures is multi-dimensional. First, as "security" concerns have trumped the cause of "justice" in Land—and national level budget battles, the budgets, and manpower of police agencies have grown faster than the resource levels of courts and prosecution offices. In many prosecution districts, the growth in police departments has enabled police departments to assume more responsibility for case investigation. While that shift may have little effect in many cases, it does create a risk that investigations will be driven by the investigator's single-minded quest to establish the suspect's culpability.

Second, the development of globalized markets and weak international oversight has led multi-national criminal enterprises to use sophisticated methods to move capital illegally across national borders. Many prosecutors' offices are ill-equipped to investigate many serious economic crimes.<sup>33</sup> As a result of resource constraints, prosecutors either fail to investigate complex crimes or are forced to settle serious cases with the German equivalent of plea bargaining, known as confession bargaining.<sup>34</sup>

Finally, the Land-level Ministries of Justice have shifted the focus of their oversight of case-handling practices from the use of quality-based assessments to quantitative metrics that emphasize efficiency. In the past, the Ministries of Justice would conduct site visits of prosecution offices and review case files. Those field visits now occur rarely. Instead, management uses metrics to track a prosecutor's open cases, investigation length, and case-closure rates. The shift in performance evaluation methods to metrics that privilege efficiency may undermine prosecutors' commitment to neutrality and objectivity. According to one prosecutor, "in determining who will be promoted, it is more important that the person has been productive, rather than that they do good work."<sup>35</sup>

As a result of growing resource pressures, a gap has emerged between the German system's faithfulness to the principle of legality and pre-trial practice. As this gap developed, the German legislature has repeatedly led

---

32. Interview with German Prosecutor (Nov. 12, 2005).

33. Deutscher Juristentag, Die Beschlüsse, *Neue Juristische Wochenschrift* 2991, 2992 (1990).

34. FLOYD FEENEY & JOACHIM HERMANN, ONE CASE: TWO SYSTEMS A COMPARATIVE VIEW OF AMERICAN AND GERMAN CRIMINAL JUSTICE SYSTEMS 380 (2005).

35. Interview with German Prosecutor (April 14, 2006).

from behind belatedly reforming the Code of Criminal Procedure in an attempt to codify bargaining practices already in use in German courtrooms. While these changes allow prosecutors and judges to process cases more efficiently, they also give prosecutors the power to short-circuit the truth-finding process. For example, in the mid-1970s, the legislature introduced statutory provisions that were intended to give prosecutors limited discretion to dismiss low-level crimes short of a full adjudicatory process.<sup>36</sup> Although the law permits prosecutors to depart from the norm of mandatory prosecution when handling low level crimes and juvenile offenses under Section 152 of the Criminal Procedure Code (“StPO”), prosecutors have nearly doubled the rate of discretionary non-prosecution during the past twenty years.<sup>37</sup> As a result, the principle of mandatory prosecution is now counterbalanced by the “opportunity principle,” which allows a prosecutor to consider the public’s interest in prosecuting a particular case. The economic pressures facing Germany today, and the resulting resource constraints on the judicial system, have brought concerns for efficiency to the fore.

By the mid-1980s, prosecutors had begun to short-circuit investigations and negotiate “confession agreements” with an increasing number of defendants.<sup>38</sup> Ironically, while the use of “confession agreements” blossomed in practice and was subsequently sanctioned by the courts, scholars and practitioners minimized the scope of these agreements for a long time and took care to differentiate “confession agreements” from U.S. plea bargains.

Although the German legislature only recently sanctioned a form of plea-bargaining, the legal restraints on prosecutorial decisionmaking long-heralded by legal scholars always existed more strongly on paper than in practice. In the mid-1980s, a distinct gap between the Code and actual practice developed as courts began to use settlement practices not contemplated by the Code. Increasing resource constraints fueled the use of these informal bargaining practices for over a decade. Finally, the Federal Court of Justice (“BGH”) acknowledged and attempted to regulate the

---

36. FEENEY & HERMANN, *supra* note 34, at 380.

37. See Dietrich Oberwittler & Sven Höfer, *Crime and Justice in Germany: An Analysis of Recent Trends and Research*, 2 EUR. J. CRIMINOLOGY 465, 472–73 (2005).

38. Joachim Herrmann, *Bargaining Justice: A Bargain For German Criminal Justice*, 53 U. PITT. L. REV. 755, 756 (1992).

practice in 1997.<sup>39</sup> While the BGH decision attempted to prevent “procedural deals,” bargaining practices continued to erode the enforcement of key principles of German criminal procedure.<sup>40</sup> Finally, in 2013, Germany’s Federal Constitutional Court (“BVerG”) handed down a landmark decision that placed strong restrictions on bargaining practices.<sup>41</sup> The decision appears to have impacted prosecutors’ willingness to engage in dealmaking prior to the opening of the main proceeding. Because the BVerG held that a sentence must conform to the individual’s level of guilt, some prosecution offices are now reluctant to agree to a deal in a case’s investigation stage.<sup>42</sup> Still, the rise of confession bargaining—coupled with the increase in discretion that German prosecutors enjoy—represents a sharp departure from the criminal justice system’s normative claims.<sup>43</sup>

### III. PRE-TRIAL INVESTIGATION PRACTICES

#### A. INTRODUCTION

In both Germany and the United States, tight resource constraints have fueled the use of procedures that short-circuit the production of evidence necessary to allow the fact finder to weigh the facts and the law.<sup>44</sup> The full factual and legal inquiry anticipated by the drafters of the codes of criminal procedure is on the decline in both countries. In the United States, these changes have expanded prosecutorial discretion and increased prosecutors’ power. In Germany, the pressure of resource constraints has forced prosecutors to look for ways to dismiss, rather than investigate, minor cases. In addition, it has forced judges to rely on confession agreements to terminate cases prior to a full adjudication. Developments in both countries operate to short-circuit case investigations.

---

39. Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 28, 1997, 43 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 195 (Ger.).

40. Alexander Schemmel, Christian Corell & Natalie Richter, *Plea Bargaining in Criminal Proceedings: Changes to Criminal Defense Counsel Practice as a Result of the German Constitutional Court Verdict of 19 March 2013?*, 15 GER. LAW JOURNAL 43 (2014), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1609>; Carl-Friedrich Stuckenberg, § 257(c) *Marginal Notes 1-19*, in DER LÖWE-ROSENBURG: DIE STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ, (Volker Erb et al. eds., 26th ed. 2013).

41. BUNDESVERFASSUNGSGERICHTS [BVERFGE] [Federal Constitutional Court] Mar. 19, 2013, 66 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1058, 2013 (Ger.).

42. Interview with German Prosecutor (Staatsanwalt) (July 8, 2014).

43. Thomas Weigend, *Abgesprochene Gerechtigkeit: Effizienz durch Kooperation im Strafverfahren?*, 45.2 JURISTENZEITUNG 774 (1990).

44. BUNDESVERFASSUNGSGERICHT [BVERFGE] 57, 250 (Ger.).

One way to compare pre-trial practices is to highlight the roles played by the various institutional players in the pre-trial process. Although resource constraints have short-circuited the pre-trial process in both systems, the nature of the impact of resource constraints differs, because of the contrasting roles of the players in two systems—and because organizational incentives affect prosecutorial decision-making in distinct ways.

A key point of comparison between both systems is the process that governs how criminal charges are filed against an individual, as well as the relative roles that the police and prosecutors play in the subsequent investigation. A prosecutor's initial decision to file charges against an individual is one of the most important and consequential decisions made by public officials.<sup>45</sup> To begin, it is important to acknowledge that prosecutors in both the U.S. and German systems lack the resources necessary to prosecute all cases where suspicion of a completed crime exists.<sup>46</sup> Thus, one of the most important functions of prosecutors is their gate-keeping role in deciding which cases will be dismissed, investigated, or tried. While prosecutors in both systems possess discretion, the law is not the only structure mediating how prosecutors exercise that discretion. Indeed, organizational controls help to shape prosecutors' investigation and charging decisions. The diversity of those controls within both countries makes it harder to compare the way in which the two systems actually function.

## B. UNITED STATES

Although the evidentiary rules that structure the presentation of evidence at trial are complex, relatively few rules govern prosecutorial behavior during the investigation process.<sup>47</sup> Ironically, the Supreme Court's reluctance to regulate the pre-trial process is premised on assumptions about the adversarial system that in many cases no longer apply. Most critically, the judiciary's hands-off approach assumes that the adversarial structure of the trial will encourage both parties to conduct a thorough

---

45. See Paul M. Secunda, Note, *Cleaning Up the Chicken Coup of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors Through the Use of the Model Rules of Professional Conduct*, 34 AM. CRIM. L. REV. 1267 (1997).

46. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING 2000 (2001), available at <http://www.bjs.gov/content/pub/pdf/fccp00.pdf>.

47. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1587 (2005).

investigation to obtain any evidence necessary to present their “side” of the facts in the courtroom.<sup>48</sup> Since the burden of proof lies with the State, in some cases, the defense investigation may aim to generate facts designed to undermine the credibility of the State’s witnesses. To this end, the system presumes that defense counsel will highlight any missteps made by the State at trial. However, if the defense lacks the resources to investigate the state’s case and the defendant feels pressured to accept a plea, a jury will never judge the comprehensiveness of the state’s investigation.

Without a doubt, prosecutorial power in the United States has grown dramatically. It is also true that public pressure and contested elections may fuel a “conviction mentality” that narrows prosecutors’ objectivity. Where prosecutors are beholden to a conviction mentality, they may suppress exculpatory evidence, over-charge a suspect, and use their leverage to make it too risky for defendants to proceed to trial. At the same time, prosecutors themselves are not immune from the impact caused by resource constraints. The presence of limited courtroom resources and high caseloads may make prosecutors more amenable to dismissing or undercharging a case. At both ends of the spectrum, imbalances in power or resources may impact the truth-finding process.

*i. An Unlevel Playing Field*

Another point of comparison between Germany and the United States is the role and stance that the police play during the investigation stage. Indigent defendants in the United States enjoy a right to counsel only after judicial proceedings commence. Therefore, in the pre-arraignment period, the police may function as adversaries against an undefended suspect.<sup>49</sup> As a result, even after police have probable cause to believe that an individual has committed a crime, police may employ a variety of tactics designed to continue to gather incriminating information. The absence of an attorney during the investigation stage tilts the scale in the state’s favor.

Although a suspect has a right to an attorney when the police commence a custodial interrogation, the state need not provide indigent suspects with an attorney until formal charges are filed.<sup>50</sup> While the Bill of

---

48. *Id.* at 1588.

49. *See* *Brewer v. Williams*, 430 U.S. 387 (1977).

50. *See* *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (A “custodial interrogation [refers to] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” (emphasis added)). *See also*

Rights grants suspects the right to remain silent, it is difficult for unrepresented suspects to maintain silence in the face of a strong pressure to confess. From the start, police officers do not enter interrogation rooms with a neutral attitude towards the suspect, as the police primarily use interrogations to confirm their initial suspicion of guilt.<sup>51</sup>

Even more troubling, in recent years the Supreme Court has drastically reduced the scope of constitutional protections that regulate pre-trial procedures. According to current case law, the police may lie to a suspect,<sup>52</sup> mislead a suspect about the strength of the state's case,<sup>53</sup> and even try to question a suspect prior to providing *Miranda* warnings, in order to increase the probability of obtaining a usable confession.<sup>54</sup> Although it is impossible to accurately document the percentage of suspects who confess to crimes that they did not commit, forced confessions lead to wrongful convictions in about 27 percent of cases.<sup>55</sup>

In theory, prosecutors' duty to fairness and justice should be a check on police officers' adversarial tendencies. Indeed, in many cases, fair-minded prosecutors have disclosed exculpatory evidence to the defense. However, recent scholarship has detailed patterns of widespread prosecutorial misconduct:

[These patterns are] largely the result of three institutional conditions: vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct, which create perverse incentives for

---

*Massiah v. United States*, 377 U.S. 201 (1964) (once adversary proceedings start the defendant is entitled to assistance of counsel and the government may not deliberately elicit incriminating statements, openly or surreptitiously).

51. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 *LAW & HUM. BEHAV.* 3 (2010), available at <http://ssrn.com/abstract=1483878>.

52. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969).

53. *Id.*

54. *But see Missouri v. Seibert*, 542 U.S. 600, 615–16 (2004) (striking down the police practice of first obtaining an inadmissible confession without giving *Miranda* warnings, issuing the warnings, and then obtaining a second confession).

55. INNOCENCE PROJECT, *Fact Sheet*, [http://www.innocenceproject.org/Content/DNA\\_Exonerations\\_Nationwide.php](http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php) (last visited Mar. 14, 2013). (according to the Innocence Project, “voluntary confessions” have played a role in causing about 27 percent of all wrongful convictions, while 25 percent of the wrongful convictions of innocent suspects have later been exonerated through DNA testing).

prosecutors to engage in, rather than refrain from, prosecutorial misconduct.<sup>56</sup>

The fact that a case is likely to end in a plea may compound the problems created during the investigation process. In order to gain the upper hand in the negotiation process, prosecutors may try and game the plea bargaining process by overcharging a case<sup>57</sup> to gain leverage in the negotiation process.<sup>58</sup> Although the Rules of Professional Conduct state that “the prosecutor in a criminal case [shall] . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause,” the probable cause standard is a relatively low evidentiary standard.<sup>59</sup> Not only is it easy to meet this evidentiary bar, but prosecutors possess no affirmative duty to ascertain the sufficiency of the police investigation.<sup>60</sup> In addition, the standard’s low threshold of factual sufficiency allows prosecutors to press cumulative charges to increase the sentence a defendant will face if she loses at trial.

The advent of high mandatory minimum sentences at the federal and state levels increases prosecutors’ ability to penalize defendants who choose to go to trial. Prosecutors can determine whether a mandatory minimum will be triggered by the way they frame the charges. For example, the availability of mandatory minimum penalties often depends on the quantities of narcotics for which the prosecutor seeks to hold a defendant accountable for, or on the prosecutor’s decision about whether to charge the defendant with using a weapon during the commission of another offense.<sup>61</sup>

The practice of encouraging defendants to plead guilty to crimes, rather than affording them the benefit of a full trial, has always carried its risks and downsides. Never before in our history, though, have such an extraordinary

---

56. Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 84 WISC. L. REV. 399, 400 (2006).

57. Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 539, 548 (1992).

58. Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977).

59. Mosteller, *supra* note 18, at 336.

60. *Id.*

61. Richard Opel, *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES Sept. 25, 2011, [http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html?pagewanted=all&_r=0).

number of people felt compelled to plead guilty, even if they are innocent, simply because the punishment for the minor, nonviolent offense with which they have been charged is so unbelievably severe. When prosecutors offer ‘only’ three years in prison when the penalties defendants could receive if they took their case to trial would be five, ten, or twenty years—or life imprisonment—only extremely courageous (or foolish) defendants turn the offer down.<sup>62</sup>

*ii. Unchecked Power*

In both inquisitorial and accusatorial legal systems, the pre-trial process is meant to redress any prosecutorial or police misconduct that may have occurred. The adversarial process in theory allows jurors to express their disdain for police tactics by acquitting a suspect and in essence nullifying the evidence presented at trial by the prosecution. In general, however, the constitutionality of police tactics is tested in pre-trial motions and hearings, not at trial. Because few cases now culminate in a jury trial, defense counsel must rely on pre-trial motions to counter unconstitutional tactics. In theory, defense counsel may also raise discovery issues during the pre-trial phase. However, absent egregious behavior from the prosecutor’s office, judges presume that prosecutors are competent and grant prosecutors wide discretion.<sup>63</sup>

A key area of recent contention is whether or not prosecutors comply with their duty to disclose exculpatory evidence. While the Model Rules<sup>64</sup> and Supreme Court decisions<sup>65</sup> require prosecutors to provide the defense with material evidence that weighs against a defendant’s guilt, the reluctance of both courts and disciplinary authorities to sanction prosecutorial misconduct undercuts the effectiveness of these mandates.<sup>66</sup> In a noted 1999 nationwide study, two investigative reporters unearthed close to 400 cases since 1963 in which courts had thrown out homicide charges because prosecutors had either suppressed or concealed evidence

---

62. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 87 (2d ed. 2012).

63. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *STAN. L. REV.* 989, 997 (2006).

64. MODEL RULES OF PROF’L CONDUCT R. 3.8 (2013).

65. See, e.g., *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

66. E.g., *United States v. Williams*, 504 U.S. 36, 36 (1992) (holding that a trial court need not dismiss an indictment even though the prosecutor failed to present exculpatory evidence to the grand jury).

suggesting that the defendant was innocent or had presented evidence that they knew to be false.<sup>67</sup>

A critical reason why prosecutorial power has grown relatively unchecked is that judges, concerned with respecting the separation between judicial and executive powers, have traditionally been reluctant to challenge prosecutors' exercise of discretion. In other cases, the judicial branch is powerless to force a prosecutor's hand. For example, a judge cannot force a prosecutor to file charges in a case that the judge believes is supported by sufficient probable cause.<sup>68</sup> In a system where trials are uncommon, a prosecutor's unparalleled discretion and power ensures that most indigent defendants never confront the state on even terms.<sup>69</sup> As a result, the "truth" that emerges bears the imprint of the state's boundless power to coerce a defendant to accept a plea.

Many scholars have argued that the system's truth-finding compass is currently skewed. As Robert Mosteller has written, "the prosecutor has effectively become not only an advocate but also the adjudicator in determining the resolution of the case through the omnipresent practice of plea bargaining as a substitute for trial."<sup>70</sup> However, the problem of resource constraints is not restricted to public defender offices. Where evidence of guilt is weak, prosecutors may not be able to convince the police to extend their investigation. While battles over serious felony cases occur, prosecutors and defenders often engage in compromise. Since only a small fraction of criminal cases go to trial and lawyers are often overburdened with cases, prosecutors' investigative zeal may be curtailed by lack of resources.

*iii. Resource Constraints & Case Screening Practices*

While the desire to keep cases moving may drive prosecutorial decisionmaking in American misdemeanor cases, where a "conviction mentality" shapes decision routines, that mentality may also color screening decisions:

Practically speaking, the prosecutor is the first line of defense against many of the common factors that lead to wrongful convictions. The prosecutor's

---

67. Ken Armstrong & Maurice Possley, *Trial & Error; How Prosecutors Sacrifice Justice to Win; The Verdict: Dishonor*, CHI TRIB., Jan. 10, 1999, § 1, at 1.

68. Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 647 (2002).

69. See *id.* at 648–49.

70. See Mosteller, *supra* note 18, at 323.

supervisory authority to evaluate the quality and quantity of evidence holds the potential for assuring the accused both procedural and, when the accused is actually innocent, substantive justice. When prosecutors do not critically examine the evidence against the accused to ensure its trustworthiness, or fail to comply with discovery and other obligations to the accused, rather than act as ministers of justice, they administer injustice.<sup>71</sup>

A prosecutor's initial case screening decisions play a critical role in determining a case's final outcome. Research shows that three factors shape a prosecutor's initial review of a case file: (1) office policies; (2) resource limitations; and (3) the prosecutor's relationships with law enforcement officers, judges, and defense attorneys.<sup>72</sup> The priorities of local law enforcement agencies play a strong role in the screening process, as prosecutors are not immune to pressure from officers to prosecute weak cases.<sup>73</sup> While portrayals of prosecutorial zeal may be commonplace, resource constraints at the courtroom level may actually lead prosecutors to undercharge cases, as a recent study by Bruce Frederick and Don Stemen found:

Shortages of courtrooms, judges, clerks, court reporters, and scheduled court hours—and especially unscheduled reductions in court hours—posed persistent difficulties for prosecutors. According to Southern County prosecutors, the lack of courtroom space and the consequent continuance of cases caused prosecutors to undercharge cases, continually reevaluate plea offers, and dismiss cases they otherwise “should prosecute.” They described a process of ranking cases, based on evidence, offense seriousness, victim cooperation, and time since initial filing. The effect was to change the threshold of what prosecutors were willing to accept or dismiss and often resulted in decisions the prosecutors considered less than ideal. Moreover, these decisions were often beyond the control of an individual prosecutor; when resource constraints required a re-evaluation of cases, some units determined case priorities and dispositions by group consensus.<sup>74</sup>

---

71. Joy, *supra* note 56, at 406.

72. See BRUCE FREDERICK & DON STEMEN, VERA INSTITUTE OF JUSTICE THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING – TECHNICAL REPORT 15 (2012).

73. *Id.* at 16.

74. *Id.*

According to the district attorney in Northern County, constraints on court resources freed up prosecutors to do more work on cases at the front end. As a result, the prosecutor's office worked harder to evaluate cases for declination and deferral, effectively restructuring the process to remove people from the system early.<sup>75</sup>

### C. GERMANY

For decades, the primary difference between the scope of a prosecutor's power in Germany and the United States was that American prosecutors had more authority to decline prosecution than German prosecutors. In the wake of certain changes, the discretion of German prosecutors has increased dramatically. Despite recent changes in German law, American prosecutors still possess greater authority to decline cases on paper than German prosecutors; German prosecutors' discretion is limited by law to minor criminal cases.<sup>76</sup> Still, at least one empirical study calls these changes in the scope of discretion into question. A 1998 study found that the percentage of cases actually charged by German and American prosecutors was strikingly similar for most offenses examined in the report.<sup>77</sup> While empirical research on this question is lacking, this study suggests that German prosecutors may fail to prosecute cases where evidence is insufficient.

#### *i. The Quest for Objectivity*

Despite this statistical congruence between the two systems' charging practices, the German and U.S. pre-trial practice structures reflect each system's differing assumptions about the path to truth. While the U.S. adversarial model treats the discovery and investigation processes as stages in a competitive process, German prosecutors function as "second judges" rather than as parties. German prosecutors are mandated to maintain "absolute objectivity" from the start to the finish of the criminal process.<sup>78</sup> Underpinning the German faith in this objective outlook is the system's

---

75. *Id.* at 15.

76. STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1074, as amended, § 152(2) (Ger.).

77. FLOYD FEENEY, GERMAN AND AMERICAN PROSECUTIONS: AN APPROACH TO STATISTICAL COMPARISON (1998), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=942>.

78. EBERHARD SIEGISMUND, THE PUBLIC PROSECUTION OFFICE IN GERMANY: LEGAL STATUS, FUNCTIONS, AND ORGANIZATION (2001), available at [http://www.unafei.or.jp/english/pdf/RS\\_No60/No60\\_10VE\\_Siegismund2.pdf](http://www.unafei.or.jp/english/pdf/RS_No60/No60_10VE_Siegismund2.pdf).

faith that prosecutors function as legal scientists who classify facts within the correct legal categories. Both the charging decision and the final verdict function as the bookends of a logical “decision involving correct subsumption under legal categories.”<sup>79</sup> Given that the law seldom functions as smoothly as a formula, prosecutorial decisionmaking is subject to the influence of external factors. For example, in the subset of cases in which prosecutors must rely on the police to conduct the investigation, their view of a case may be a narrow one. Personal observation indicates that German prosecution offices have more of a conviction mentality in the drug crimes departments where prosecutors work closely with the police to initiate investigations using extraordinary measures such as wiretaps. Due to the potential bias among the police, both systems can rarely be said to be fully neutral.

*ii. Prosecutors & Police*

The investigation process commences when the police or a prosecution office receives a report of suspected criminal activity.<sup>80</sup> Consistent with the German view that fact-gathering is part of a larger scientific process, German criminal procedure law has traditionally entrusted prosecutors, rather than police, with the supervision of the investigation and the decision to charge a suspect.<sup>81</sup> However, consistent with the increasing professionalization of the police function and the changing nature of crime, the nature of the relationship between police and prosecutors continues to evolve. Although the statutory responsibility for case investigation remains vested in the prosecution service, the distribution of investigative work between prosecutors and police varies by office, department, and individual prosecutor. These variations run the gamut from issuing written instructions to police officers to working hand-in-hand with the police to plan an investigation.

Although the law aims to prevent police officers from dismissing cases without approval from a prosecutor, law enforcement officers may circumvent this policy goal by not disclosing all investigative activities to prosecutors. In practice, because police department budgets have outgrown the resources of prosecutors’ offices, it is often the police themselves who

---

79. Mirjan Damaška, *The Reality of Prosecutorial Discretion: Comments on a German Monograph*, 29 AM. J. COMP. L. 119, 125 (1981).

80. STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1074, as amended, § 160 (Ger.).

81. *Id.* § 161 (Ger.).

make crucial decisions in the investigation stage in cases of minor criminality.<sup>82</sup> Indeed, in most minor crime cases, police officers conduct the bulk of the investigation before turning the case over to the prosecution office. While 80 percent of the initial reports of crime originate within the police department,<sup>83</sup> during the course of my research in Germany, I observed many prosecutors in major crime departments play an active investigative role.

*iii. Prosecutors as Investigators*

The degree of prosecutorial involvement in the investigation stage depends upon local routines of practice, expediency, and type of crime. In cases such as rape or economic crimes, which require investigative follow-up and expert testimony, the police officer leading the investigation would likely coordinate the follow up investigation with the prosecutor. In these cases, the prosecutor will decide whether the police should interview additional witnesses and, if necessary, whether to seek a search warrant.<sup>84</sup> In cases where search warrants are required, by law the judge—and in “exigent circumstances” the prosecutor—must approve the legal paperwork.<sup>85</sup> Where a delay in obtaining a warrant may compromise evidence collection, German procedure law permits prosecutors to approve a warrant without judicial oversight. In contrast to U.S. criminal procedure, the level of suspicion required to obtain a warrant in Germany falls below the United States’ probable cause requirement. The police may search a home, apartment, or business, for the purpose of arresting a suspect or if “it may be presumed that such search will lead to the discovery of evidence.”<sup>86</sup>

In complex cases, the nature of the investigation and the complexity of the law mandate prosecutorial involvement. For example, because drug cases typically require the use of informants and search warrants, prosecutors routinely work hand in hand with the police on those cases, as prosecutors must approve such tactics in advance. Complex economic crime investigations require a similar partnership between police and prosecutors throughout the investigation, especially if the suspects have transferred capital across national boundaries. The nature of the police-

---

82. Interview with German Appellate Judge (July 22, 2004).

83. SIEGISMUND, *supra* note 78, at 61.

84. Interview with German Senior Prosecutor (June 10, 2004).

85. STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1074, as amended, § 105, para. 1 (Ger.).

86. Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1038 (1983).

prosecutor interaction in complex cases varies. In one prosecution office, an inter-agency economic crime investigative team worked with the lead prosecutor to map out a criminal syndicate's complex organizational structure to plan the investigation's future stages using software that facilitated a team-oriented investigation. In another office, prosecutors complained that economic crime investigations were time-consuming and that the police department lacked the expertise to investigate account violations.<sup>87</sup> As a result, prosecutors in that office often investigated their own cases.

In more well-staffed offices with an anti-bureaucratic outlook, prosecutors working in the economic crimes department often choose to work such cases in order to be able to work closely with the police. As one prosecutor reported, “[w]e do not sit behind our desks all day as we go out and execute search warrants and play an active role in the investigation.”<sup>88</sup> While some prosecutors are content to issue written directions and wait for a response from the police, more proactive prosecutors meet personally with the police on a regular basis, formulate a joint investigation plan, and frequently communicate directly with members of the investigative team.

*iv. Cutting Short the Search for Truth*

Because of caseload pressures, the first step that a prosecutor generally will seek to take with a case is not to order additional investigation, but rather to determine whether or not he or she can find a way to dismiss the case with a fine or a diversion.<sup>89</sup> As the German legislature has continued to widen the range of prosecutors' discretion in minor crime cases, prosecutors began to search for ways to close a case in the early stages. Even in cases of more serious criminality, German prosecutors also possess the authority to dismiss cases with the court's consent by using penal orders, which mandate a minimum sanction such as a fine and a suspended sentence.<sup>90</sup>

In contrast to some U.S. prosecutors' tendency to overcharge cases to gain leverage in the negotiation process, the initial instinct of German prosecutors in all but the most serious cases is to close the file using pre-

---

87. Interview with German Lead Office Prosecutor (May 14, 2008).

88. Interview with German Prosecutor (Jan. 19, 2006).

89. Interview with Justice Ministry (May 4, 2006).

90. STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1074, as amended, §§ 407–409 (Ger.).

trial procedures. Rather than stretch the facts to support more charges, many German prosecutors favor dismissal and imposing minimal sanctions. As a result of this case-closing mindset, decision-making routines become a search for options to transfer cases out of the in-box. As one appellate court judge commented, “[i]n the majority of low-level crime cases, prosecutors do the work of administration and not of justice—they get their papers signed and that is that.”<sup>91</sup>

Despite the fact that prosecutors across Germany are charged with implementing the same law, case screening and disposition practices vary widely. Local attitudes towards crime, resource levels, office norms, and practice routines shape the extent and degree of leniency offered by prosecutors. Liberal Schleswig-Holstein led the way with case dismissal and diversion rates close to 63 percent.<sup>92</sup> Consistent with their long-standing strict attitudes towards crime, prosecutors in Bavaria dismiss or defer the lowest percentage of cases, with close to 63 percent of cases proceeding to a main hearing.<sup>93</sup>

v. *Organizational Controls*

Organizational controls also play a role in shaping pre-trial practice. Although the political independence of prosecution offices in the United States, taken in conjunction with differences between state penal codes, makes it difficult to isolate the impact of organizational controls on American offices, it is easier to draw comparisons across offices in Germany. The existence of a common code and the fact that German prosecutors are part of a hierarchically ordered civil service makes it easier to isolate differences at the Land and office levels. Although key differences in personnel policies and charging practices exist throughout Germany, in recent decades, all prosecution offices now use similar organizational metrics to evaluate case handling practices. Most notably, as resource constraints have intensified, the Land-level Ministries of Justice have increasingly employed statistical indices to monitor productivity and staffing rates. These standards attempt to establish performance baselines for practices such as the average investigation length in a department.

---

91. Interview with Appellate Judge (April 10, 2004).

92. Wolfgang Heinz, *Entwicklung und Stand der freiheitsentziehenden Maßregeln der Besserung und Sicherung. Werkstattbericht auf der Grundlage der Strafrechtspflegestatistiken*, KONSTANZER INVENTAR SANKTIONSFORSCHUNG 1, 85, [http://www.uni-onstanz.de/rtf/kis/Heinz2014\\_Freiheitsentziehende\\_Massregeln.pdf](http://www.uni-onstanz.de/rtf/kis/Heinz2014_Freiheitsentziehende_Massregeln.pdf) (2014).

93. *Id.*

Within individual prosecution offices, the office leadership may use the data to identify prosecutors who “process” their cases less efficiently than their peers. While the metrics attempt to gauge differences in the investigation requirements between different types of crimes, there is little doubt that the use of the metrics as a management tool privileges efficiency. For example, to meet productivity guidelines, one general crimes department calculated that prosecutors in the department had to screen and close each low-level crime case in under three minutes.<sup>94</sup> Still, it is important to note that the introduction of computers has not only made it possible to track efficiency-related metrics, but it has also sped up the work process. One senior prosecutor related that:

Through the use of technology, we have the possibility [of working] faster and more rationally. When I started in the general crimes department, we closed about seventy five cases per month. Now they close 130 cases per month. But on the other side, we must do more work. We do more work on the computer now and less through writing.<sup>95</sup>

vi. *The Logic of Documentation*

Though technology has increased prosecutors’ productivity, other traditional aspects of a German prosecutor’s pre-trial routine are more archaic and idiosyncratic. The time that German prosecutors devote to documenting their decisions and “issuing instructions” stands out when juxtaposed against American practice. Indeed, a significant part of a German prosecutor’s initial training involves one-on-one training in the art of documenting actions taken on a case file. Not only does this one-on-one training ensure that prosecutors accurately and consistently document the history of a case in the case file, the training systematically conveys the routines of organizational practice to newcomers entering the organization. This unique aspect of German prosecutorial practice stems from the role that case files play in both systems. While U.S. judges never review the prosecutor’s file, German judges use the file not only to determine whether charges should proceed, but also to determine how to present the evidence at trial. The use of common nomenclature encourages prosecutors to handle cases in a consistent manner. In theory, any prosecutor could pick up another prosecutor’s file and immediately understand the case. In contrast

---

94. Interview with Leading Office Prosecutor (May 11, 2006).

95. Interview with Senior Prosecutor (April 16, 2008).

to American case files, the German case file is a near-complete record of the investigation as well as the prosecutor's notes.

Prosecutors' use of a common nomenclature increases the transparency of the pre-trial process.<sup>96</sup> Key criminal procedure obligations are based on the state of the evidence at any given point in a criminal inquiry. This makes it important for the case file to be transparent in disclosing what was done, and for prosecutors to be consistent in how they record the progress of an investigation. In some ways, the attempt to standardize practices reinforces an individual prosecutor's lack of identity and agency.

During my observational studies of German prosecution offices, many prosecutors used this time-consuming written bureaucratic practice of issuing instructions. In more tradition-bound offices, after a prosecutor reviews a new file that requires more investigative work, he or she will actually write an order directing the police to interview a particular witness or to take another action on the case. For example, the prosecutor may also send the file to an administrative agency to determine whether the suspect's actions violated an environmental law. The file is then physically transported to the police department or another office. The prosecutor will also instruct the department's administrative secretary to return the file to them within a specified amount of time for follow-up. While this method ensures that each step of the investigation is documented, it also takes time.

The German system's allegiance to the principle of legality is reflected not only in the transparency of case files, but also in the organization of responsibilities within individual offices. While a District or U.S. Attorney might steer certain cases to particular prosecutors to ensure that a case is handled in a particular way, German prosecution offices use annual organizational plans in an attempt to minimize political influence over case-handling practices. Each plan specifically designates prosecutors to specific case files based on the type of crime(s) involved and on the defendant's last name. For example, a prosecutor might be assigned to handle general crime cases where the suspect's last name begins with "A" through "K" for the year. Absent an order from his or her superior, that prosecutor will not handle other cases. The case assignment plan, coupled

---

96. The documentation would include the date that a prosecutor received the file, the prosecutor's initial instructions to her secretary, orders to the police instructing them to interview certain witnesses, a request for information from a government agency such as the driver's driving history in the case of a traffic-related offense. Interview with Prosecutor (Nov. 8, 2005).

with file documentation practices allow supervisors to monitor whether or not prosecutors are following the correct procedures,<sup>97</sup> but it does have its faults:

A key downside to this heavily routinized system of practice is that it requires prosecutors to devote significant time conforming to procedures, which, on their own, do not ensure that the prosecutor has conducted a neutral investigation designed to find the truth. Furthermore, office culture influences the prosecutor's investigation.<sup>98</sup> In less interactive offices, a prosecutor may indeed spend the day at his or her desk issuing written instructions rather than meet with witnesses, police officers, and other agency officials. In some cases, a supervisor may simply look at the file's documentation procedures and conclude that the prosecutor is doing his or her job. Indeed, the system's dedication to bureaucratic documentation practices may privilege prosecutors who dot their "i's" but who fail to establish personal relationships with law enforcement officers, witnesses, and other interlocutors. On the other hand, prosecutors who establish personal connections and treat the police and other agencies as team members may benefit from more buy-in from other team members. While compliance with documentation procedures guarantees a certain level of conformity and transparency, it does not by itself guarantee that a prosecutor has conducted a thorough and objective investigation. Many department leaders are too are too bureaucratic. It is safer [for some] just to issue written orders. In order to resolve cases quickly, everything [in an investigation] must come together—the defense attorney, the judge, [and] the police. This does not always happen. We have changed a lot in this department. It is now less bureaucratic than most departments. [When I took over] the police were doing all the investigating and I changed the system so that the prosecutors started doing more investigative work . . . .<sup>99</sup>

---

97. Interview with Senior Office Prosecutor (March 15, 2006).

98. As I spent time conducting interviews in over a dozen prosecution offices, I noticed a distinct difference in the "life" of each office. In some offices, doors were closed and halls were quiet. In others, doors were open as a constant stream of police officers and witnesses flowed through the offices. One must be careful to not assign too much significance to subjective appraisals of the "life" of each office. At key points in the criminal justice process, however, a prosecutor's reluctance to interact personally with witnesses, police officers, and other players in the process may narrow a prosecutor's understanding of the case.

99. Interview with Leading Office Prosecutor (July 16, 2004).

This delegation of responsibility to the police may be problematic when the crime is a complex one, and investigators lack sufficient training in the area. However, in rural places, the lack of specialized law enforcement expertise may force prosecutors to investigate cases themselves or settle cases short of a full investigation.<sup>100</sup> In well-staffed regions, the prosecutor screening the investigation file may order the police to continue the investigation if the quantum of proof fails to satisfy the prosecutor's evaluation of the court's screening standards.<sup>101</sup> In all regions, complex cases such as organized crime investigations require the prosecutor to do more than simply function as a public bureaucrat. According to one department supervisor, a model prosecutor should not be content with simply moving paper:

One must be able to intuitively determine what investigation measures are possible. In the investigation, one must have knowledge of special measures in organized crime, for example, that come with experience . . . . One must know how to work with people. I believe that the ideal prosecutor knows how to work with the police. [She must decide whether] the police [should] interview the suspect or a witness. [She must contemplate] how one should compile the file [by completing the investigation]. [She must decide] what technical investigation tools are available to [gather evidence on] the suspect.<sup>102</sup>

vi. *Efficiency and the Truth*

A critical question regarding German pre-trial procedures is whether prosecutors have the time, dedication, and independence to fulfill their duty to look at cases objectively. While the question of whether or not the suspect committed a crime may be easy to answer in most cases, one key test of the fairness of a criminal justice system is how it handles cases where a suspect's guilt is unclear. While it is apparent that most German prosecutors are not consumed with a desire to "win" cases by securing convictions, the system's emphasis on efficiency and the use of archaic procedures also do not guarantee that prosecutors are sufficiently motivated to pursue every facet of a case that may enrich the court's understanding of the "truth." While I observed a large number of dedicated and hard-working prosecutors, I also observed a number of prosecutors who seemed

---

100. Interview with Leading Office Prosecutor (May 14, 2008).

101. Senior Prosecutor Interview (June 10, 2004).

102. Interview with German Prosecutor (Nov. 18, 2005).

content to “work the file” and empty their inbox each day. When working the file merely means that the prosecutor has issued a few “instructions” to other authorities, a “closed case” may simply mean that the prosecutor has supervised a minimum level of investigation.

However, there are a number of statutory and bureaucratic controls that limit prosecutors’ ability to dismiss or lightly investigate cases.<sup>103</sup> Where a victim is involved in a case, German law gives the victim the right to appeal a prosecutor’s decision to dismiss to the General Prosecutor’s Office in that jurisdiction. If that office refuses to take action, a victim may file an appeal with the regional appellate court. In addition, depending on the internal protocols of a particular prosecution office, prosecutors who are assigned to handle important or other high profile cases must pen regular reports for their superiors describing the progress made on the case. While the purpose of the reporting process is to keep the authorities up-to-date on the status of a case that may appear in the media, the reports also impose subtle pressure on the prosecutor to handle the case according to the formal and informal guidelines of the office.

The structure of the German proceedings undercuts a defense attorney’s ability to challenge the state’s case. The nature of the defense attorney’s role in Germany is different from its American counterparts because a judicial panel rather than a jury ultimately decides the suspect’s guilt. Thus German judges are less likely to be swayed by defense strategies that hinge on sowing doubt in jurors’ minds. In the pre-trial stages, the law permits counsel to petition the state to investigate leads that point away from the defendant’s guilt.<sup>104</sup> However, a prosecutor may decline to do so if he or she believes that the evidence is unimportant or that the lead is unpromising. In one case that a defense counsel recounted to me, the prosecutor refused to interview additional witnesses suggested by the defense.<sup>105</sup> When I questioned a former defense attorney and current professor about a prosecutor’s commitment to finding the truth, the attorney related the prosecutor’s lack of commitment:

[T]he problem is, they normally don’t have any interest in only looking [beyond the] charges. The problem is that they often have a hypothesis

---

103. See, e.g., STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1074, as amended, §§ 171–75 (Ger.).

104. See STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1074, as amended, § 163(a).

105. Interview with Defense Counsel (Feb. 6, 2006).

about what has happened and then they don't question [that hypothesis]. And I often experienced [situations in which] I [would] say: "Just go and look I have proof which discharges my client's guilt." Then the judges and the prosecutors would both suspect that you are sabotaging the procedure. So they are not willing to look at it.<sup>106</sup>

If a defendant hires counsel when a case file is still sitting on the prosecutor's desk, a defense counsel may also seek to convince the prosecutor handling the case to defer prosecution or to dismiss the case altogether. In larger cases, defense counsel may initiate a conversation regarding the terms of a confession agreement. When office guidelines permit, prosecutors who are facing a particularly heavy caseload may respond to these overtures positively—especially given the fact that most German prosecutors are not motivated to "win" cases.

vii. *Prosecutors and Judges*

The final arbiter of the sufficiency of the evidence is not the defense, but the court. The case files in all but the most minor prosecutions end up on a judge's desk. Initially, the decision to send the case file to the court lies solely with the prosecutor, not with the police. Once the file arrives on a judge's desk, the court is obligated to review the facts in the file and determine whether there is sufficient evidence to open the "main proceedings."<sup>107</sup> The necessary level of suspicion is "Angfangsverdacht," which means that there are sufficient grounds to believe that the suspect has committed a criminal offense.<sup>108</sup> Although some judges interpret that requirement strictly, one senior prosecutor stated that, in his experience, judges fail to open the preliminary proceedings only an appallingly low 1 percent of the time.<sup>109</sup> One reason for the rare instance in which a judge will refuse to issue an order to open a main proceeding is that the nature of the judge-prosecutor relationship is strikingly different than the equivalent relationship in the United States. Because the prosecutor functions not as a party, but rather as part of the administration of justice, a German judge may directly discuss the case with the prosecutor and tell the prosecutor to

---

106. Interview with Defense Counsel (Feb. 6, 2006).

107. STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1074, as amended, § 199.

108. STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1074, as amended, § 203.

109. Interview with Senior Prosecutor (Jan. 16, 2006).

gather more evidence.<sup>110</sup> Similarly, a judge may directly initiate a plea discussion with the defense without the prosecutor's participation.<sup>111</sup> The judge may also decide to order further investigation on a case before making a decision to open the main proceeding.<sup>112</sup>

Another intriguing aspect of German pre-trial practice is that, even before a prosecutor deposits a case file with the court, the prosecutor and the presiding judge may talk about the case. This communication may continue throughout the trial as the judge and the prosecutor engage in a joint decision-making dance as the evidence unfolds. Such communication is not unethical, as it is an integral element of a criminal justice process that relies on close cooperation between prosecutors and judges. This institutional cooperation between the prosecutor's office and the judicial branch results in a pre-trial process that, on paper, is fundamentally different from the adversarial pre-trial process. At the same time, these discussions do not mean that prosecutors will fall in line with a judge's view of the case. According to one female prosecutor, when a judge's suggestions conflict with office policy, prosecutors are not bound to agree with the bench.<sup>113</sup> The most effective source of control of a prosecutor's decisionmaking is not the court, but the prosecution service itself.

*viii. Legal Controls*

There are two other notable pre-trial practice differences between Germany and the United States. United States police are free to use a variety of psychological tools and deceptive practices to secure a confession including lying to a suspect.<sup>114</sup> In Germany, statutory provisions and interrogation norms prohibit the police from using misleading interrogation tactics which may produce a false confession.<sup>115</sup> Moreover, the German Code of Criminal Procedure curbs the ability of police officers and informants to lie or mislead suspects during the questioning process.

---

110. Interview with Leading Office Prosecutor (July 16, 2014).

111. STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1074, as amended, § 202(a).

112. STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1074, as amended, § 173(3).

113. Interview with German Prosecutor (Dec. 8 2005).

114. See *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (affirming the legality of deceptive interrogation practices).

115. Jacqueline Ross, *Do Rules of Evidence Apply (Only) in the Courtroom? Deceptive Interrogation in the United States and Germany*, 28 OXFORD J. LEGAL STUD. 443, 446 (2008).

A critical difference with U.S. law is that this prohibition extends even in cases where the police have not arrested the suspect or the suspect is not otherwise in custody. Another striking difference is that the German conception of “voluntariness” is much stronger than its U.S. counterpart, as Germany’s exclusionary rules require that a presiding judge exclude from consideration any statement obtained through a prohibited interrogation technique.<sup>116</sup> In fact, even leading questions can lead to suppression of an answer.

A second divergence from U.S. practice is that German prosecutors cannot meet with witnesses to “prep” them for trial. The need for such preparation is diminished because cross-examination of witnesses considerably more restrained. Since it is the judge or the judging panel that conducts most of the questioning during the main proceeding, the prosecutors play only a secondary role in eliciting evidence. The prosecutor is not expected to use leading questions to advance their own theory of the case. Finally, the act of preparing witnesses for trial contradicts the German conception of a prosecutor as a neutral fact-finder. If new or slightly different facts are disclosed during the trial, it is expected that a prosecutor will adjust their recommendation to reflect those changes. Consistent with a German prosecutor’s duty to weigh facts for and against an accused, a prosecutor may even recommend that the court acquit the defendant or dismiss some of the charges at the conclusion of the main proceeding.

One significant and pervasive control on discretion in the German system is the continuing role played by legal science. While one may challenge the extent to which day-to-day decisionmaking conforms to rigid models of scientific thinking, at key points in the process, decisionmakers must explain how the facts of a case and the legal reasoning support their decisionmaking. Although the file documentation processes do not guarantee that prosecutors will conduct an objective investigation, they require prosecutors to leave a documentation trail that makes their decisionmaking process transparent to their supervisors. The bill of indictment must detail the evidence and witnesses against the accused.<sup>117</sup> Similarly, when judges refuse to open a main proceeding, they must specify

---

116. *Id.* at 447.

117. STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1074, as amended, § 200.

whether their decision is based on factual or legal grounds.<sup>118</sup> Finally, court judgments must explain how the court weighed the evidence presented in court and reconciled that evidence with the law. Critically, the absence of an adversarial structure and the institutional ethos of the prosecution service cut against a prosecutor's potential desire to stretch the facts to fit a particular version of the truth. The legal training that all lawyers receive in law school teaches attorneys to believe that there is one legally correct answer to any legal problem. The desire to twist the facts of a case to "win" a conviction is largely absent from prosecution offices. Finally, in the system as a whole, the players respect and, in many cases, privilege systematic legal thinking over the simple application of statutory provisions.<sup>119</sup>

At the same time, workload pressures may challenge a prosecutor's ability to ensure that the case investigation is thorough and comprehensive enough to satisfy the requirements of the law. The simple fact that a prosecutor documents the trajectory of their decisionmaking in a case file does not guarantee that he or she has fulfilled their duty of objectivity. Facing pressures to "move" files, a prosecutor may look first for ways to dismiss or defer a prosecution rather than to take the initiative to build a case. Although the formal requirements of the law ultimately require the court to reconcile the facts and law of a case, the mindset of many prosecutors who handle low-level crime cases is simply to move folders from the inbox to the outbox. In the mass of low-level criminal cases, a prosecutor performs their job by simply by reading the file, checking off forms, and finding grounds to dismiss the case. That function appears to fall far short of the ideal of ensuring that a suspect's level of guilt is correctly identified and adjudicated. The danger exists that prosecutors who have adopted the mindset of low-level crimes practice and its privileging of efficient case-handling practices will not jettison that mindset when they turn their attention to major crimes cases. Indeed, several department supervisors complained that too many of their colleagues prefer to sit at their desks rather than take the initiative to speak with the police and witnesses to build a case.<sup>120</sup>

---

118. STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBL.] 1074, as amended, § 204.

119. Thomas Weigend, *Criminal Law and Criminal Procedure*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 214, 221 (Jan M. Smitz ed., 2006).

120. See, e.g., Interview with German Prosecutor (Jan.16, 2006).

#### IV. CONCLUSION: DISCRETIONARY DECISION-MAKING IN PRE-TRIAL PRACTICE

Traditionally, the goal of pre-trial practice in rule of law states has been to determine whether there is sufficient evidence to believe that a suspect has violated the law in order to justify convening a public proceeding. The legal goal in both systems can be stated simply. In the United States, an investigation travels a course from reasonable suspicion to probable cause. In Germany, prosecutors will investigate a complaint when “simple” suspicion (“*Anfangsverdacht*”) exists. Though mere suppositions of guilt are insufficient and some factual proof is required, the legal requirements necessary to open an investigation are ill-defined.<sup>121</sup> At the end of the investigation, a prosecutor will only send a file to the court if sufficient facts exist to warrant a finding of sufficient or aggravated suspicion.<sup>122</sup> This standard is satisfied when the investigation confirms the original suspicion of the accused.

It is evident, however, that the trajectory of the pre-trial process cannot be defined solely in terms of the evidence collected and whether that evidence satisfies the legal standards to continue the process. Looking at each system’s pre-trial process through the lens of its normative goals provides a narrow and, in some cases, inaccurate map of the process.

Indeed, this Article calls into question whether the driving impetus of this sequential process is a desire to uncover the “truth.” In particular, faced with the burden of high case loads, prosecutors in both systems seek to find an equilibrium point in the investigation in which there are enough facts to dispose of the case through a plea bargain or confession agreement. In the United States, and to a growing extent in Germany, one goal of the pre-trial process is to find a “consensual” solution that will shorten the truth-finding process.

Given that pre-trial practice in both countries today often ends in a consensual “solution,” a critical question to be asked is whether these short-circuited truth-finding processes serve the ends of justice. Here is another way of asking the question: What is the nature of the “truth” that is found? One way to compare both systems is to imagine that in an era of

---

121. STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1074, as amended, § 152(2) (Ger.).

122. STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1074, as amended, § 170.

high caseloads, prosecutors in both systems search for an “equilibrium point.” The point represents the point in the investigation where a prosecutor decides that he or she has sufficient evidence to settle a case via a plea agreement or a confession agreement. How might we compare the amount of evidence required in each system that prosecutors require to reach this point? Approximately how much “truth” has the prosecutor collected at the time a case reaches the equilibrium point? To some extent, the nature of organizational controls at the local level help shape the equilibrium point. However, it may be possible to draw some system-wide conclusions as well.

In the U.S. system, the prosecutor is not prepared to go to trial at the pre-trial equilibrium point. In fact, if the case proceeds to trial the prosecutor will gather more evidence as well as prepare key witnesses to testify. In the German system, prosecutors must now wait until the court has opened the main proceeding before engaging in settlement negotiations. At this point in the German process, the court has already decided that there is sufficient evidence in the case file to justify proceeding to trial. Given that at this point in the process there has been some form of judicial review of the entire case file, one might hypothesize that the German equilibrium point represents a higher quantum of evidence than in the United States. In contrast, to proceed to trial in the U.S., a felony case must only survive a probable cause review based on a subset of the evidence that is conducted by a grand jury or a magistrate judge.

When cases do proceed beyond the pre-trial process, how does the structure of each system’s pre-trial process shape a case’s final outcome? While the trajectory and resolution of each criminal case reflects its own unique facts, this Article has identified four structural factors that influence the case investigation and disposition processes at the pre-trial stage in both systems. The interaction of those factors sets the stage on a structural level for how cases proceed through the pre-trial process. By examining how these factors interact, one can begin to understand the differences between both systems’ pre-trial processes. Given that practice on the ground in both systems no longer fulfills each system’s normative aspirations, these macro-level factors are a useful starting point for comparison and include: (1) the defined role of the prosecutor and judge; (2) institutional norms and constraints; (3) legal checks on prosecutorial power; and (4) the role of the defense at the pre-trial stage.

In addition, three factors that have a more case-specific impact on outcomes include resource constraints, the mindset of the particular prosecutor handling the case, and the evidentiary strength of the case. It is possible to fine tune the analysis even further by evaluating the nature of police-prosecutor relationships, courtroom dynamics, and so forth. At some point, however, adding further variables to a comparative model undercuts the model's strength.

One might compare the macro-level variables in table form.

	<b>Germany</b>	<b>United States</b>
<b>Defined Role of Prosecutor &amp; Judge</b>	Informal limits on power.	Few formal or informal limits.
<b>Institutional Norms</b>	Efficiency/objectivity.	Adversarial in major cases. Dispute resolution model in low-level cases.
<b>Legal Checks on Prosecutorial Discretion</b>	Weakening.	Few.
<b>Defense Role at Pre-trial Stage</b>	Minimal. May petition to supplement investigation.	Weak in indigent cases.

How do these structural variables help us to understand the differences between both systems in the pre-trial stage? To begin with, these factors capture not only the degree of discretion that prosecutors possess but also the institutional mindset of the prosecution service. The potential sources of constraint in both systems stem from the nature of the judicial power in the pre-trial stage, binding legal limits on prosecutorial decision-making, and the constraining impact of defense counsel. When we consider these factors together, a more interesting picture emerges.

In Germany, the nominal source of constraint is the role played by the judiciary. Behind the scenes, judges may steer prosecutors acting outside the norm through phone calls and informal conversations. By law, the prosecutor and judge function as members of the same team to find the truth. While the law permits a judge to refuse to open a case filed by a prosecutor and to conduct his own investigation, open disagreement between prosecutors and judges is rare. Because the law presumes that a prosecutor will not act as a party, but will instead conduct an objective investigation, judges lack overt control to deter misconduct such as through excluding evidence.

The more robust source of control stems from the fact that prosecutors are members of a hierarchically organized bureaucratic organization that

privileges conformity. German prosecutors disavow the role of gunslingers. Critically, they do not view convictions as notches in their belt. In an era of tight resources; however, the organization's use of performance metrics may be steering prosecutors away from their role as "guardians of the law" who dispassionately seek to uncover the facts for and against a defendant. On the other hand, the hierarchical structure of the prosecution office, combined with comprehensive file documentation procedures, permit managers to review a prosecutor's decision-making.

While the combination of institutional and judicial controls paints a portrait of limited decision-making discretion in Germany, the German legislature has elected to gradually grant prosecutors more decision-making room during the past three decades. Although the principle of mandatory prosecution requires that prosecutors file charges in all cases where sufficient suspicion of criminal behavior exists, in many instances, caseload pressures force prosecutors to turn to the plethora of disposition options to resolve cases. The 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. No modern inquisitorial system is structured to produce "truth" at any price.<sup>123</sup> In Germany, the search for truth is tempered by procedural rules that guarantee a defendant's right to remain silent, protect the sanctity of privileged relationships, and encourage courts to resolve cases in a manner that is "speedy, efficient, and within the limits of reasonable expenditure."<sup>124</sup> Although it once was true that prosecutorial decisions were guided by their fidelity to the law, pragmatic concerns about costs and limited resources often shorten the full search for truth today.

With the explosion of plea bargaining in the United States, a key constraint on prosecutorial decisionmaking—namely the jury's verdict—has been lost. The weakening of due process constraints in an age of heightened security, coupled with judges' historical deference towards prosecutorial decisions in the pre-trial stage, offer prosecutors an open playing field. Although the institutional structure and operating procedures of German prosecution offices are remarkably similar across Germany, those institutional similarities do not apply to the United States. As a result, one must be careful in making grand claims that prosecutors possess a

---

123. Thomas Weigend, *Is the Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 167 (2003).

124. *Id.* at 163.

conviction mentality that is unrestrained by their superiors. What can be said is that in many prosecution offices prosecutors are rewarded not for pursuing justice, but for “earning” high conviction rates and stiff sentences. This predilection stems not only from the model of trials as contests between parties, but is also fueled by the fact that district attorneys on the state level are elected representatives. While a district attorney’s reelection campaign does not often capture spirited public interest, a district attorney’s failure to earn convictions in high profile cases may end their public career.

The defense’s role during the pre-trial stage in both systems often varies with the defendant’s financial status. In the United States, however, indigent defendants are at the mercy of police investigation practices and a prosecutor’s adversarial mindset. Defendants who lack counsel during the pre-trial investigation process often find themselves at the mercy of the prosecutor, and their counsel may enter the scene only after the defendant has confessed and is facing a lengthy list of charges designed to drive him to a plea.

In the German system, prosecutors who are seeking ways to dismiss or defer prosecution often work with defense counsel to resolve cases as soon as possible. In cases where counsel has not yet been appointed, a prosecutor’s desire to close files quickly may work in the defendant’s favor. In any case, because the consequences of violating German law are less severe than in the United States, the stakes are lower in German courts.

Turning from the level of structural factors to case-level factors, differences in the resource levels that prosecutors face in both systems when a particular case is ripe for adjudication may affect case dispositions. In addition, the particular personality of the prosecutor handling a case shapes the pre-trial process. Even in Germany, more punitively-minded prosecutors often find themselves working on certain types of cases—most notably drug cases—where a hard-nosed attitude towards crime weighs against high dismissal rates. In the United States, prosecutors who see trial outcomes as victories may be more likely to pursue a case to trial rather than engage in pre-trial bargaining.

The trajectory of pre-trial practice in both systems is contingent on both structural and case-specific variables. As a result, it is apparent that simplistic comparisons of the criminal justice systems that depend on normative truisms hold less weight than ever before. In particular, past scholarship that has compared both systems and praised the German system

for its success in containing prosecutorial discretion oversimplifies case investigation practices.<sup>125</sup> In addition, the picture of the U.S. system painted by scholars who have categorized the system as plagued by prosecutorial discretion, bargained justice, and widely varying sentencing outcomes is also inaccurate in an age of tight resource constraints.<sup>126</sup>

The reality is that prosecutorial practice in both systems has diverged from each system's normative design. Pre-trial practice is not necessarily a truth-seeking exercise in either nation. Both structural reforms and decision-making constraints on the local level must be implemented to ensure that even if the law cannot structure the process to find the "truth," the criminal justice systems at a minimum avoid injustice.

---

125. See, e.g., John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 204–25 (1979).

126. WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT, 119 (NYU Press 1999).