

COMPARING INJUSTICES: TRUTH, JUSTICE, AND THE SYSTEM

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INTRODUCTION

On the night of October 13, 2001, Rudolf Rupp, a farmer in the small town of Neuburg an der Donau (Bavaria, Germany) gets into his Mercedes and drives to the bar of the local sports club, where he sits at his table—alone. People avoid him. Often, he would not change clothes and come directly from the barn. But he is also considered a brawler and he drinks, a lot. At around one o'clock in the morning, after having eight pints of beer, he leaves with a blood alcohol level of around .25 percent. This is the last time he and his Mercedes are seen.¹ His wife gets concerned and reports him missing but nothing happens for two years—apart from the gossip that spreads through the village. Rumors circulate suggesting that the family might have killed the unsympathetic Rudi and buried him in the dung heap, or even chopped him up and fed him to the dogs and pigs. In January 2004, police, equipped with a warrant, searched the farm but could not find a trace of blood or any evidence in support of the allegations. The family of the missing Rupp is interrogated at the police station. During these interrogations, Hermine, wife of Rudi, their two daughters, and the fiancé of the eldest daughter confessed to having killed Rudi that night. None of them has an IQ higher than seventy. Their confessions are detailed. They describe how they waited for the victim to come home, how they first bludgeoned him, and later dismembered the body in the basement in order to feed the pieces to the dogs. Although physical evidence is missing, the prosecutor charges all

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¹ Julia Jüttner, *Justizskandal im Fall Rudi Rupp: Polizeivideos belegen Manipulation der Aussagen*, SPIEGEL ONLINE (Mar. 19, 2012, 6:07 PM), <http://www.spiegel.de/panorama/justiz/wie-die-polizei-im-fall-rudi-rupp-die-verdaechtigen-unter-druck-setzte-a-822276.html>.

four with manslaughter. All four, now represented by attorneys, recant their confessions and deny any involvement in the killing. The case is tried regardless and although evidence is circumstantial, both Rupp's wife and the fiancé of the eldest daughter are convicted of manslaughter and sent to prison for eight and a half years. The daughters are tried as juveniles and also convicted. The defendants protesting their innocence appeal the conviction but are unsuccessful.

Then, one day in March of 2009, fire fighters pull a black Mercedes E 230 out of the Danube River. Behind the wheel is the fully intact corpse of Rudi Rupp. "At that time," says the prosecutor, "we knew the story with the dogs was false."² Defense attorneys filed motions to reopen the case because of the newly found evidence but the motions were denied, mainly on the grounds that the confessions might have been false in regard to how the body was disposed of but still held with regard to the elements of the crime. On appeal, the State Supreme Court of Bavaria allowed the motions and ordered a new trial. This led to the acquittal of all defendants. During the retrial, the court explained that it was persuaded of the involvement of one or more of the defendants in the death of Rudolf Rupp, however, it simply could not be proven.

There is more to say about this case, about the junk dealer, for example, who was accused of aiding in disposing of the Mercedes (before it was found), who claimed that he was threatened by the police to make statements to that effect. While the original charges were unsupported, he was then accused of making false unsworn testimony when he explained that he was forced by law enforcement. This case of a wrongful conviction in Germany has received some of the highest media attention in past years. It has gained so much attention not only because of the absurdity of the circumstances, but also because it shattered the belief that the German legal system does not produce wrongful convictions.³ Whether or not this case is exemplary or an exception cannot be answered easily since the extent of wrongful convictions in

² *Id.*

³ Scholars and defense attorneys were always doubtful as to the efficiency of the German system in convicting the guilty and only the guilty. Karl Peters in his seminal work *Fehlerquellen im Strafprozeß* initiated a discussion of the pitfalls of German criminal justice, but even today with increasing criticism and many documented cases of wrongful convictions there is no "innocence revolution" and there are no innocence projects that call for reform. KARL PETERS, *FEHLERQUELLEN IM STRAFPROZESS* (1970).

Germany is unknown.⁴ Rolf Eschelbach, a judge at the Federal Court of Justice, estimates (without statistical support) that probably more than 25 percent of all felony convictions are wrongful.⁵ The number of wrongful convictions may not be that high,⁶ but innocent suspects are accused and convicted in Germany, and inquisitorial systems like Germany may be particularly prone to specific errors like tunnel vision—one of the leading causes of wrongful convictions in the United States.⁷

The following analysis confronts a paradox: Notwithstanding that striking example of a miscarriage of justice it will be argued that the connection between “justice” and “truth” is stronger in Europe or Germany than in the United States. Wrongful convictions happen despite that strong tie in Germany but they might not be an effect of the setup of the criminal justice system—at least not to the same degree as in the United States. While both systems agree that a verdict (tried or plea bargained) can only serve or represent justice if it is based on accurate facts, truth has much less of a systemic dimension in the United States than it has in Europe or in particular in Germany, where truth is protected beyond the trial and throughout the whole criminal process. In order to explore and support this thesis, a basic concept of truth and justice (procedural and material) will be developed.⁸ Here, concepts of substantive and procedural justice will be distinguished in order to create a framework that helps to separate the roles of substantive and procedural law. In Part II, the role of truth within the adversarial and inquisitorial models will be addressed and also how (and if at all) truth is protected in stages that follow the trial. Part III will address the “elephant in the room,” which is the fact that German courts produce wrongful convictions although the system itself is

⁴ That is true for most countries, even the United States, where a large(r) body of research on this topic exists than in Europe. Chrisje Brants, *Wrongful Convictions and Inquisitorial Process: The Case of the Netherlands*, 80 U. CIN. L. REV. 1069, 1070 (2012).

⁵ Beck Online Kommentar StPO § 261 Rn 63.2.

⁶ Klaus Tolksdorf, former President of the Federal Court of Justice, criticizes Eschelbach's numbers for being methodologically problematic. See Stefan Geiger, *Interview zu Fehlurteilen: “Kein Mensch würde Richter,”* STUTTGARTER-ZEITUNG.DE (Apr. 11, 2012, 4:05 PM), <http://www.stuttgarter-zeitung.de/inhalt.interview-zu-fehlurteilen-kein-mensch-wuerde-richter.16065407-e8a5-4097-bc7a-17c455f1f010.html>.

⁷ See Kent Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes*, 35 N.C. J. INT'L L. & COM. REG. 387, 401–02 (2010). Surprisingly, there is little overlap between leading causes of wrongful convictions in the United States and Germany. Eyewitness misidentification, for example, does not play much of a role in the known wrongful convictions in Germany, but wrongful accusations by victims do.

⁸ See *infra* Part I.

better equipped to filter out the innocent. In the end, the question of whether or not the known wrongful convictions in Germany are due (partly) to a failure of the system or other, less system-related reasons (like the police acting with tunnel vision) has to remain open for as long as we do not know more about these cases. However, a systematic analysis and discussion of how much truth and justice are tied will further the understanding of our criminal justice systems and their effectiveness to protect the innocent.

In Part I, this article develops and contextualizes basic concepts of truth and justice (procedural and material). Part II looks at how differently the pursuit of factual truth is implemented in the German and American systems. And Part III examines the gap between the German system in theory and how it works in reality, using the Rupp case as an example.

I. TRUTH AND JUSTICE IN A COMPARATIVE PERSPECTIVE?

A. *The Impossibility and the Value of a Comparison*

Avoiding wrongful convictions is the touchstone of every criminal justice system. Regardless of a system's design and its place in time or culture, "justice" is only served when the actual perpetrator is convicted and the innocent go free. This is at least what we would think. Different justice systems take different approaches as to how much a decision or *verdict* (despite its actual meaning to "speak the truth") reflects the factual truth of a case and how much it represents the results of fair proceedings; how much justice is a function of material or formal truth. The outcome of a criminal proceeding will usually be a mix of both—procedural and material considerations. Important facts, maybe the only facts that support a conviction, might be disregarded when they were found through illegal means. But a jury might at the same time convict an innocent man or woman if it believes a prosecutor's story. We all need to live with the understanding that criminal trials and proceedings are nothing but attempts to achieve justice. Truth is important but it is balanced with other goals, goals like due process, fairness, procedural tradition, democracy, and social ideas about the purpose of punishment.

In the last decades, journalists, innocence projects, and others

have shed light on the reasons and causes for wrongful convictions.⁹ On the legislative, as well as the technical/pragmatic level, changes to make decisions more factually reliable were initiated. Scholarship has triggered and reflected on these changes and laid out ideas about future reforms. While all these reflections have had a tremendous impact, the analyses of causes and potential changes often lack a broader system-oriented perspective. The following inquiry will take a comparative and systematic view of the relationship between truth and justice in the context of wrongful convictions and its interrelation within a criminal justice system. The German, civil-law based, “neo-inquisitorial”¹⁰ system will be contrasted with the American adversarial, common law-based, criminal justice system. Such a comparison might help to clarify and elucidate domestic concepts¹¹ and can shed light on how truth and justice are related in each system. However, a comparison is not an end in itself and any comparative approach has to be undertaken very carefully for at least two reasons: both (if not all) systems produce wrongful convictions and, although all systems stress the link between truth and justice in different ways, no system can claim superiority.¹² Just because, for instance, the German system offers a new trial (where new evidence can be introduced) for most convictions this does not make the system “safer.” And, generally excluding hearsay evidence does not make the American system more reliable either.

Wrongful convictions are a universal phenomenon because the causes for many are to a large extent rooted in the human condition and behavior.¹³ Second, any comparative endeavor has to be aware of the differences in the legal cultures and the difficulty that comes with the translation and interrelation not only of legal terms but also of the function and role of institutions and procedures within a system. Prosecutors, for instance, are elected in the United States

⁹ It is impossible to provide even a condensed list of articles and books that contributed to or “are” the innocence movement. A book that provides an in depth analysis and also a comprehensive overview of wrongful convictions is BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG passim* (2011).

¹⁰ “Neo-inquisitorial” is the term used to describe Germany’s system as including adversarial elements.

¹¹ See Christopher L. Blakesley, *Law, Language, Crime, and Culture: The Value and Risks of Comparative Law*, 49 CRIM. L. BULL. 438, 467–75 (2013).

¹² See Marvin Zalman, *The Adversary System and Wrongful Conviction*, in *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* 71, 79 (C. Ronald Huff & Martin Killias eds., 2008).

¹³ Roach, *supra* note 7, at 391.

but not in Europe, which can already demonstrate that although many functions might be equal, the roles and policies behind that office are different and can impact the workings of the criminal justice system in various ways. This and many other aspects¹⁴ affect any potential analysis as well as the extent to which parts of one system can be transferred to another: “Both the adversarial and the inquisitorial systems are integrated systems. Each piece is affected and supported by every other piece. Transfer a piece without its support system, and it will probably fail or distort some other features that you didn’t intend to affect.”¹⁵

A comparison of justice systems is even more difficult because comparable procedural rules (*Miranda*, the exclusionary rule, hearsay, etc.) are usually implemented differently within each specific criminal justice system and therefore cannot be easily translated. Thinking that truth and justice are linked in comparable ways in the United States, Germany, or other countries has led to some methodological confusion. In the comparative discussion paradigms like “truth-furthering” or “-impairing”¹⁶ rights were used without contextualization within a given system.¹⁷ A more precise understanding of a system will have to clearly

¹⁴ Further examples of fundamental differences that make any generalization about either system impossible: Some legal cultures trust judges as fact-finders and adjudicators; others believe that decisions as to guilt or innocence should be made by an impartial cross-section of society. One justice system might rest on a tough-on-crime philosophy with high conviction rates; another believes in rehabilitation and has low incarceration rates. One system allows a defendant to lie on the stand, another calls it perjury. The list could go on.

¹⁵ Myron Moskowitz, *The O.J. Inquisition: An American Encounter with Continental Criminal Justice*, 28 VAND. J. TRANSNAT’L L. 1121, 1145 (1995).

¹⁶ These terms are from Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1370–73 (1991). Later, it will be argued that constitutional protections and rights cannot be seen as primarily and purposefully “subordinating” accurate adjudication to other values. See *id.* at 1374; *infra* Part II.C. Both elements have to be considered separately.

¹⁷ For example, William Pizzi claims that “the United States is far more protective of a suspect” than other countries, where “the police are expected to talk to the suspect about the crime in an effort to get whatever information they can and . . . it is not considered the function of a lawyer to stop him from being questioned.” WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 52, 61–62 (1999). Many European criminal justice systems give a suspect the same rights any suspect in the United States has. In Germany, *Miranda* warnings have to be issued much earlier than in the United States (when law enforcement has thickened suspicion, even if the suspect is not in custody). See Richard S. Frase, *The Search for the Whole Truth About American and European Criminal Justice*, 3 BUFF. CRIM. L. REV. 785, 822 (2000) (reviewing PIZZI, *supra*). Even beyond *Miranda*, Frase shows that “there are many aspects of foreign criminal procedure which are more favorable to defendants than the corresponding American rule; Pizzi rarely mentions those foreign rules and practices.” *Id.* at 786. For more on how foreign systems apply limits on police questioning see, for example, *id.* at 801–02.

distinguish between substantive and procedural justice. There also might exist a potentially different understanding of what a miscarriage of justice is or what makes a decision “wrongful.”¹⁸ Moreover, why is it that there are no innocence projects in Germany despite known, highly and widely publicized wrongful convictions? The innocence revolution as we know it is mainly an American phenomenon.¹⁹ Is it because other systems provide internal safeguards, safeguards that (at least in theory) take into account the fallibility of the fact-finding process, to make it possible for an attorney to file for reopening of the case long after the verdict became final? Lastly, even on the linguistic level, what one would connote with the word “justice” in the English language might—as a matter of culture and usage—differ from what a speaker of German, French, or Spanish sees in comparable terms.²⁰ But even in the light of these limitations I share Richard Frase’s optimism that taking a comparative perspective (here, in wrongful conviction analysis) is a promising endeavor.²¹

B. A Simplified Theory of Justice

A universal understanding of justice does not exist for it differs from and is dependent on each individual justice system’s procedural and cultural setup. Any concept of justice will vary from discourse to discourse, context to context,²² and culture to culture.²³

¹⁸ See Jörg-Martin Jehle, *Was und wie häufig sind Fehlurteile? [What and How Frequent are Errors of Justice?]*, FORENSISCHE PSYCHIATRIE, PSYCHOLOGIE, KRIMINOLOGIE [FORENS. PSYCHIATR. PSYCHOL. KRIMINOL.], 220, 220–29 (2013) (Ger.).

¹⁹ In the past years, cases of wrongful convictions gained considerable media attention. But as of now there are no established “innocence projects” in Germany. See *Other Projects Around the World*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Other-Projects.php> (last visited Apr. 16, 2014).

²⁰ According to the Oxford English Dictionary, the noun “justice” refers to concepts of integrity, rectitude, or the quality of being morally just or righteous. 8 THE OXFORD ENGLISH DICTIONARY 325–26 (J. A. Simpson & E. S. C. Weiner eds., 2d ed. 1989). But the term also includes the idea of truth, fairness, legal vengeance (especially capital punishment), or rendering what is one’s due. *Id.* The term closest to justice in the German language would be *Gerechtigkeit*. LANGENSCHIEDTS HANDWÖRTERBUCH ENGLISCH ENGLISCH-DEUTSCH, DEUTSCH ENGLISCH 344 (2001). For the justice system, however, the term *Justizsystem* is common. *Gerechtigkeit* has similar connotations as justice—this includes the due and fair exchange of what is one’s due, which might be the strongest connotation. There are, however, differences.

²¹ Frase, *supra* note 17, at 788–89.

²² See MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? 28–30 (2010), for an insightful survey on ideas of public justice.

²³ See generally Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1293 *passim* (1986) (discussing the potential conflict between legal and cultural values).

Within the context of wrongful convictions it might not be necessary to comprehensively reflect on theories of material or procedural justice, on ideas of positive or natural law, or on how to assess feelings of justice.²⁴ Suffice it to say that, regardless of their background, “authors who deny a conceptually necessary relation between law and morality, as well as those who assert such a relation, maintain the thesis that law raises a claim to correctness or justice.”²⁵ Contrary to Thibaut and Walker, this article is based on the assumption that truth and justice are not dichotomous dispute resolution objectives and that determinations of fact are not subordinate to the justice objective.²⁶ Justice, as will be shown, requires truth. Since wrongful convictions are perceived as a matter of injustice, a simplified, basic framework of legal²⁷ justice needs to be established.

According to one of the oldest codes, the Corpus Juris Civilis, “[j]ustice is the set and constant purpose which gives to every man his due.”²⁸ While early on the “due” was determined through the simple formula of “[an] eye for [an] eye”²⁹ its understanding changed when the state assumed a monopoly on violence and determined what is “due” legally. Of course, other, extralegal, ways of ascertaining what is “due” exist³⁰ and shouldn’t be dismissed. In the context of this analysis, which is legal in principle, law will be used as a guiding standard. The law itself, however, can be in conflict with ideas of justice,³¹ and a factually wrongful but legally

²⁴ Cf. Raymond Boudon & Emmanuelle Betton, *Explaining the Feelings of Justice*, 2 ETHICAL THEORY & MORAL PRAC. 365, 365–97 (1999) (“[A]xiological feelings cannot always be derived from instrumental, in other words from consequential considerations. A promising path to eliminate these difficulties is to consider axiological feelings in general and justice feelings in particular as being generally the effects of systems of reasons perceived as strong by social actors.”).

²⁵ Robert Alexy, *Law and Correctness*, 51 C.L.P. 205, 205 (1998).

²⁶ See John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 545 (1978).

²⁷ Justice has to be understood in a positivist way; the measuring rod is worldly law and not the justice of philosophers. Ulfrid Neumann, *Materiale und prozedurale Gerechtigkeit im Strafverfahren* [Material and Procedural Justice in Criminal Proceedings], 101 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 52, 52–74 (1989).

²⁸ *Medieval Sourcebook: Corpus Iuris Civilis, 6th Century*, FORDHAM UNIV., <http://www.fordham.edu/halsall/source/corpus1.asp> (last visited Apr. 16, 2014). This idea, however, is older than the Corpus Juris Civilis; Plato mentions it in his Republic. PLATO, REPUBLIC, in PLATO: COMPLETE WORKS 971, 976 (John M. Cooper ed., G.M.A. Grube & C.D.C. Reeve trans., 1997) (stating “[t]hat it is just” to render to each his due).

²⁹ *Exodus* 21:24.

³⁰ Ralf Dreier, *Was ist Gerechtigkeit?* [What is Justice?], 37 JURISTISCHE SCHULUNG [JUS] 580, 580–84 (1996) (Ger.).

³¹ Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law*, 26 O.J.L.S., 1, 6–7

acceptable conviction might be an example for this.³² But even in a world of multiple ideas of justice, there are established concepts of justice that can be applied to legal contexts. An important and broadly accepted distinction is the one between justice of exchanges/compensations (*iustitia commutativa*) and distributive justice (*iustitia distributiva*).³³ This distinction makes clear that justice is a matter of the (equal) exchange and distribution of goods.³⁴ Criminal justice falls into the first category—justice of compensation where the element that has to be compensated for is guilt/wrongdoing and the element that compensates is a penalty.³⁵ Retribution means punishment for an injustice.³⁶ Although rehabilitation is still the dominant purpose of punishment in Europe,³⁷ it could not completely supersede the “anthropologically” rooted idea of retribution.³⁸ German Courts for example, acknowledge that punishment, in contrast to a pure preventive measure, is determined by the idea of the “just retribution” of a prohibited behavior.³⁹

Even if punishment has other purposes than retribution—the

(2006). Problems arise when the law is not in line with a common or “natural” understanding of right and wrong. *See id.* at 6. The debate of natural and positive law cannot be replicated here (nor is that necessary) but it needs to be acknowledged that wrongful convictions, as formally legitimate as they are, are seen as unjust because of principles that are beyond the letter but part of the “purposiveness” of the law. *See id.*

³² Radbruch expresses this idea (in the context of objectionable but duly enacted statutes and just law) where positive law goes against justice as “a conflict of justice with itself, a conflict between apparent and real justice.” *Id.*

³³ Dreier, *supra* note 30, at 580.

³⁴ *Id.*

³⁵ *Id.* at 581; D. D. RAPHAEL, CONCEPTS OF JUSTICE 56 (2001) (clarifying that Justinian—who consolidated a dictum by Ulpian—probably referred to civil law where the idea of restitution is common but that the formula of giving every man his due can also be interpreted as “what he deserves”).

³⁶ Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 859 (2002).

³⁷ Neumann argues that, in German criminal theory, the prospective orientation of the purpose of punishment is still dominant; punishment as a means for rehabilitation, but when questions of how just a judicial decision is arises, retribution is the measuring rod. *See* Neumann, *supra* note 27, at 52.

³⁸ *See* Dreier, *supra* note 30, at 581; Neumann, *supra* note 27, at 53.

³⁹ This does not imply that wrongful “convictions” are only thinkable in cases where an offender receives a sentence. Gustl Mollath, a German mechanic, who was found not guilty of a crime after a successful insanity defense was sent to a closed psychiatric institution. In 2013 it could be proven that the expert report on Mollath’s mental state was unreliable, and as a result of that, Mollath had to be released. *Free Man: Court Releases Whistleblower from Psychiatric Ward*, SPIEGEL ONLINE INT’L (Aug. 07, 2013, 1:46 PM), <http://www.spiegel.de/international/germany/court-releases-whistleblower-gustl-mollath-from-psychiatric-ward-a-915240.html>.

degree of guilt is a factor that limits any intervention in its scope.⁴⁰ A just sentence is one that is in balance with the amount of guilt the offender carries. Guilt and punishment have to be of equal value in order to be just,⁴¹ and the amount of guilt can only then be measured if the facts relevant for the establishment of guilt are clear: “[C]riminal sanctions are society’s most severe expression of moral blame. It is therefore imperative that criminal sanctions be imposed (only) upon those who are in fact guilty.”⁴² “Truth is the *sine qua non* of justice.”⁴³ A basic connection between facts and guilt exists in both the American and German/European systems because each system has at least some “residual fact-contingency.”⁴⁴ “If the truth cannot be discovered and acted on, the criminal justice system fails in its basic mission.”⁴⁵ While not explicitly establishing the connection between truth and justice, the Supreme Court underscores the leading role of finding the truth in criminal proceedings: “There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.”⁴⁶ Additionally, the Court states that deciding the factual question of the defendant’s guilt or innocence is the “central purpose of a criminal trial.”⁴⁷ In Germany, section 244 II of the Code of Criminal Procedure (StPO) states that: “In order to establish the truth, the court shall, *ex officio*, extend the

⁴⁰ See Jehle, *supra* note 18, at 222. In German criminal law the length or impact of any intervention is limited by a defendant’s “guilt.” *Id.* The idea of proportionate sentencing exists even in areas where treatment or education is the guiding idea; for example, in the juvenile justice system. *Id.*

⁴¹ Dreier, *supra* note 30, at 581.

⁴² Thomas Weigend, *Is the Criminal Process about Truth? A German Perspective*, 26 HARV. J.L. & PUB. POL’Y 157, 158 (2003) (footnote omitted).

⁴³ Eberhard Schmidhäuser, *Zur Frage Nach Dem Ziel Des Strafprozesses [On the Question of the Goal of the Criminal Process]*, in FESTSCHRIFT FÜR EBERHARD SCHMIDT: ZUM 70. GEBURTSTAG 511, 511–12 (Paul Bockelmann & Wilhelm Gallas eds., 1961).

⁴⁴ Thomas Weigend, *Should We Search for the Truth, and Who Should Do It?*, 36 N.C. J. INT’L L. & COM. REG. 389, 390–91 (2011).

⁴⁵ Edwin Meese III, *Promoting Truth in the Courtroom*, 40 VAND. L. REV. 271, 272 (1987).

⁴⁶ *United States v. Havens*, 446 U.S. 620, 626 (1980) (citing *Oregon v. Hass*, 420 U.S. 714, 722 (1975)).

⁴⁷ *Colorado v. Connelly*, 479 U.S. 157, 166 (1986) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)); see also *Crawford v. Washington*, 541 U.S. 36, 74 (2004) (Rehnquist, C.J., concurring) (noting that the aim of the Confrontation Clause is to promote the truth-seeking function of criminal trials); *United States v. Robinson*, 485 U.S. 25, 33 (1988) (“[The] central purpose of a criminal trial is to decide factual questions of the defendant’s guilt or innocence” (alteration in original) (quoting *Van Arsdall*, 475 U.S. at 681)); *United States v. Cronin*, 466 U.S. 648, 655 (1984) (observing that the Constitution’s guarantee of the effective assistance of counsel is of bedrock importance to the pursuit of truth); *United States v. Nobles*, 422 U.S. 225, 230 (1975) (commenting on the importance of the adversary system to the discovery of truth).

taking of evidence to all facts and means of proof relevant to the decision.”⁴⁸ The German Federal Constitutional Court underscores the pivotal role of fact-finding for reaching a just decision. It states that finding the truth is not only a fundamental principle in criminal procedure it is also one that is mandated by the German Constitution through the *Schuldprinzip* (“guilt principle,” the standard that individual guilt/blameworthiness is the basis for and limit of any sentence or intervention).⁴⁹ In order to establish the degree of guilt, judges need to know the facts of a case, because only through a factually true foundation can justice be achieved.⁵⁰ Criminal procedure is the tool, the “conveyor belt,”⁵¹ through which the true foundation of a case is formed and by that justice is achieved. This tool, however limited, can only produce “imperfect procedural justice” simply because following procedure does not guarantee a just outcome.⁵² While this is true for both the American and German systems, they differ in how strongly they make this search for the truth an element that is important across all stages of procedure—beyond the guilt finding phase. If truth is an element of justice, it will permeate all stages of the proceedings and will be reflected in more places than the pre-trial and trial stage. In this light, the American and German systems differ. The hesitance in the United States to “entertain . . . newly discovered evidence . . . years after” a trial does not, according to the Supreme Court, transgress principles of fundamental fairness.⁵³ Quite the opposite, entertaining claims of actual innocence would have a “very

⁴⁸ When I refer to the German Code of Criminal Procedure I will use the abbreviation common in Germany: StPO (Strafprozessordnung). An English version of the code is available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

⁴⁹ ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfG] [Federal Constitutional Court], Mar. 19, 2013, 2 BVR 2628/10, available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20130319_2bvr262810.html.

⁵⁰ *Id.* That is commonly accepted. See, e.g., Neumann, *supra* note 27, at 52. The same is true for the Japanese criminal justice system, where “material justice seeks the truth.” Hiroyuki Nose, *Fehlerquellen im japanischen Strafprozeß* [Sources of Error in the Japanese Criminal Process], in WAHRHEIT UND GERECHTIGKEIT IM STRAFVERFAHREN 399, 402 (Klaus Wasserburg & Wilhelm Haddenhorst eds., 1984).

⁵¹ Gerson Trüg & Hans-Jürgen Kerner, *Formalisierung der Wahrheitsfindung im (reformiert-) inquisitorischen Strafverfahren? Betrachtungen unter rechtsvergleichender Perspektive* [Formalization of Truth-Finding in the (Reformed) Inquisitorial Criminal Process? Considerations Under a Comparative Law Perspective], in RECHT GESTALTEN—DEM RECHT DIENEN. FESTSCHRIFT FÜR REINHARD BÖTTCHER ZUM 70 GEBURTSTAG. 191, 193 (2007) (Ger.).

⁵² AXEL TSCHENTSCHER, PROZEDURALE THEORIEN DER GERECHTIGKEIT 67 (2000).

⁵³ *Herrera v. Collins*, 506 U.S. 390, 411 (1993).

disruptive effect . . . on the need for finality.”⁵⁴ On the contrary, in Germany, factual truth matters before and after the trial.⁵⁵ Section 359 V StPO, for instance, allows (without imposing a deadline) for a new trial even after a decision has become final when, for instance, new evidence is found.⁵⁶ The understanding of this relationship between justice and truth can only be gained when the whole system is in focus.

C. Truth, Justice, and the System

Exploring a concept of “truth” is no less difficult than trying to get an understanding of what “justice” means. In order to go forward with such an exploration one has to agree that something like “reality” actually exists, that it plays a role in the legal discourse, and that observers are “generally able to determine and to describe it in some adequate form so that we can reasonably distinguish between truth and falsehood.”⁵⁷ Truth itself is hard to measure or describe—a multitude of approaches and counter-approaches exist that try to only categorize concepts of legally relevant truths.⁵⁸ The point where most theories concur is that the truth of historical events can only be reconstructed but never actually be found.⁵⁹ In that that regard, a judge, police officer, or a jury does not differ much from a historian. Once a criminal act is committed, it is already history and must, to be adjudicated, be reconstructed⁶⁰

⁵⁴ *Id.* at 417. Indeed, “[a]lthough common law [countries] differ in their receptiveness of fact-based appeals, appeals are generally oriented towards revealing mistakes of law.” Roach, *supra* note 7, at 435 (footnote omitted).

⁵⁵ See STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 359(5) (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

⁵⁶ *Id.*

⁵⁷ See Weigend, *supra* note 42, at 157.

⁵⁸ See Mirjan Damaška, *Truth in Adjudication*, 49 HASTINGS L.J. 289, 294 (1998). The South African Truth and Reconciliation Commission distinguishes in its report between four notions of truth—all of them relevant in most criminal proceedings: factual or forensic truth, personal or narrative truth, social or “dialogue” truth, and healing and restorative truth. 1 THE S. AFRICAN TRUTH AND RECONCILIATION COMM’N, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 110 (1998), available at <http://goo.gl/SkBR8n>.

⁵⁹ Damaška, *supra* note 58, at 294; Heike Jung, *Über die Wahrheit und ihre institutionellen Garantien [About the Truth and Its Institutional Guarantors]*, 64 JURISTENZEITUNG 1129, 1130 (2009). Courts in Germany stress the limitations of human insights. There is no absolute knowledge that could fully eliminate the possibility of the opposite, of an error. FRAUKE STAMP, DIE WAHRHEIT IM STRAFVERFAHREN 52–53 (1998).

⁶⁰ See Carlo Ginzburg, *Checking the Evidence: The Judge and the Historian*, 18 CRITICAL INQUIRY 79, 84–85 (1991). Ginzburg concludes “that the tasks of both the historian and the judge imply the ability to demonstrate, according to specific rules, that x did y, where x can

because facts and events do not disclose themselves. The process of establishing truth is as important as truth itself since “the line has become thin between a belief that is properly justified and a belief that is true.”⁶¹ That means that justice systems follow a certain kind of procedure that in one way or another leads to the re-creation of events and facts. This function of criminal procedure is tightly connected with substantive truth and justice: in its simplest form, criminal procedure has the purpose to establish the elements of a particular crime—the act, the state of mind, causation, harm, and so forth, which means that criminal procedure is “existentially dependent” on substantive law.⁶² Criminal procedure serves substantive criminal law.

Common law systems use an adversarial method to reconstruct reality in court; most civil law countries are convinced that an impartial investigation by a judge or panel of judges leads to true results. In both settings, criminal procedure has the objective of providing a framework for reconstructing reality, or, put differently, for establishing substantive truth and justice. But, as Neumann points out, criminal procedure has to be seen as emancipated from substantive criminal law and as occupying more than just a supporting role in the criminal process.⁶³ This is where legal fact-finding differs from historical fact-finding. Criminal procedure does more than just funnel facts into the courtroom. Through criminal procedure, due process (in whichever shade) or other important values are enforced and the rights of a defendant are protected. The discovery of truth is one thing, protecting rights another. Criminal procedure establishes limits to the search for substantive truth and by that curbs its own objective. The exclusionary rule, for instance, bars the use of evidence that was obtained illegally—regardless of its probative value. Defendants don’t have to incriminate themselves even if they are the sole witness to the crime, and once acquitted, a defendant cannot be tried again for the same crime even if new and compelling evidence is found.⁶⁴

In that sense, procedural rules inhibit substantive truth in order to serve procedural justice. Both ideas of justice are in conflict

designate the main actor . . . and y designates any sort of action.” *Id.*

⁶¹ Damaška, *supra* note 58, at 294.

⁶² See Neumann, *supra* note 27, at 53.

⁶³ *Id.* at 56.

⁶⁴ This is true for the United States. In Germany, a defendant can be tried again after an acquittal if specific requirements are met (new evidence not among them).

because they support different ends. The way a system tries to establish the factual basis of a case—through an adversarial or inquisitorial framework—is to a large extent independent of how the rights of a suspect are protected. It would be false to assume that continental systems “accord [primacy] to the discovery of the truth, over the final settlement of disputes and ensuring respect for legal rights which seem to be the major concern of adversarial systems.”⁶⁵ The American and German system both implement limits to a criminal investigation.⁶⁶ Just because a system follows an “inquisitorial” approach does not necessarily make the whole system more truthful in the sense that every piece of evidence is admissible in court. On the other hand, following an adversarial approach doesn’t automatically mean that due process is protected more cautiously. In some instances defendants’ rights are protected more strongly in systems that follow the inquisitorial ideal,⁶⁷ but not because these systems are inquisitorial—because they implement a differently nuanced idea of procedural justice, which, as was argued above, is independent of the way truth is established.

Another aspect that affects the relationship between truth and justice is the purpose and goal of punishment. For as long as punishment mainly serves retribution its direction is retroactive and the relevant facts—the truth—focus on the deviant act itself. By contrast, the more a system bases its purpose of punishment on rehabilitation, the more it will consider facts that help to make a decision for the future of the defendant. What is important is not only what happened but also what will happen.⁶⁸

II. THE IMPLEMENTATION OF TRUTH AND JUSTICE WITHIN TWO SYSTEMS

This part will look more closely at the relationship between truth and justice in the two paradigmatic systems. It argues that the adversarial system stresses conflict resolution over finding the truth. The way truth (and substantive justice) is established in each system has to be distinguished from questions of procedural justice. That means, although procedural issues (like questions of

⁶⁵ Roach, *supra* note 7, at 435.

⁶⁶ Including the exclusionary rule, which Pizzi claims does not exist in Germany. PIZZI, *supra* note 17, at 37.

⁶⁷ See Frase, *supra* note 17, at 815.

⁶⁸ STAMP, *supra* note 59, at 250, 285.

the admissibility of evidence) often directly influence what facts are available in court, these procedural issues serve—from a truth-and-justice-perspective—different goals.⁶⁹ While it is impossible to draw a line between procedural and substantive questions, the following analysis tries to maintain that, when looking at the procedural system as a whole, issues of evidence admissibility are to a lesser degree connected with substantive justice than, for example, plea bargaining and the appellate process.

A. *Justice and the Inquisitorial and Adversarial Paradigm*

The innocence movement resulted in a decline of confidence in the Anglo-American adversarial system.⁷⁰ Even beyond the United States, and because of the production of wrongful convictions “[a]ll around the common-law world,” serious doubts have been raised regarding the reliability and accuracy of adversarial criminal trials.⁷¹ While the adversarial system is rarely mentioned among the established causes for wrongful convictions, it forms “the context [and] the backdrop” of wrongful conviction cases.⁷² As could be seen at the beginning of this article, wrongful convictions also occur in inquisitorial systems. In the light of the known wrongful convictions in Germany, scholars and practitioners worry that the state of criminal procedure in Germany might be “worse than expected.”⁷³ An analysis of how much a system is oriented toward factual truth needs to distinguish between the lack of proper conduct (by the actors and institutions) within a system and the system itself—how it is supposed to function.⁷⁴ How can the inquisitorial and adversarial systems be categorized in regard to their truth orientation?

Two broad concepts of truth are dominant in contemporary

⁶⁹ Rules of evidence in the United States and, for instance, regulations in the German procedural code about what kind of evidence must or should be used in order to prove guilt effectively are guidelines that make sure only reliable evidence is considered. They have only little relation to procedural justice as it is discussed here. See Neumann, *supra* note 27, at 60.

⁷⁰ Roach, *supra* note 7, at 388.

⁷¹ *Id.* at 389.

⁷² Zalman, *supra* note 12, at 71–72, 75.

⁷³ Michael Bock et al., *Die erneute Wiederaufnahme des Strafverfahrens* [The Repeated Reopening of Criminal Proceedings], 6 GOLTDMAMMER'S ARCHIV FÜR STRAFRECHT 328, 328 (2013) (Ger.).

⁷⁴ See Roach, *supra* note 7, at 392. As an example, Roach mentions the willingness to accept a guilty plea from an innocent defendant as an intrinsic limitation of the adversarial system. *Id.*

procedural thinking: the correspondence and the consensus theory.⁷⁵ The correspondence theory of truth sees truth as being correspondent to a fact (*adaequatio rei et intellectus*).⁷⁶ Truth consists in relation to reality⁷⁷ and is a relational property “involving a characteristic relation . . . to some portion of reality.”⁷⁸ The consensus theory, in contrast, stresses “the process of justification of claims to knowledge.”⁷⁹ Truth is what would be agreed upon or established in a dialogue. “Truth is regarded as no more than the ideal end of a properly structured inquiry.”⁸⁰

The so-called adversarial system⁸¹ has traditionally been associated with the consensus theory, whereas inquisitorial models, with a stress on impartial fact-finding, resonate with the correspondence theory. While there is little doubt that each system has an interest in finding the true facts in any given case,⁸² a distinction needs to be made between the goal and the method of an inquiry because the method itself might incorporate specific cultural and procedural values that are as important for justice as the end of that procedure.⁸³

⁷⁵ See Weigend, *supra* note 44, at 395.

⁷⁶ See ANTHONY J. LISSKA, *AQUINAS'S THEORY OF NATURAL LAW: AN ANALYTICAL RECONSTRUCTION* 93 (1996).

⁷⁷ See Weigend, *supra* note 44, at 395.

⁷⁸ Marian David, *The Correspondence Theory of Truth*, STAN. ENCYCLOPEDIA PHILOSOPHY (July 2, 2009), <http://plato.stanford.edu/archives/fall2013/entries/truth-correspondence/>.

⁷⁹ Damaška, *supra* note 58, at 294.

⁸⁰ *Id.*

⁸¹ It would be a misconception to assume that there are no “adversaries” in inquisitorial systems. German criminal procedure considers the defense a vital organ of the justice system. See Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 342–44 (1995). Criminal defense attorneys are equipped with an array of rights and privileges that are comparable to the ones American attorneys enjoy. See *id.* at 342. What is different is the process of how facts and the factual basis of a case are established. See Thomas Weigend, *Germany*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 187, 206–07 (Craig M. Bradley ed., 1999).

⁸² See Frase, *supra* note 17, at 815. Jung (with further references) argues that the difference between adversarial and inquisitorial fact-finding is merely methodological. Jung, *supra* note 59, at 1130. Both systems, as a goal, want to find the factual elements that are important for a conviction, and, according to Weigend, “a judgment that does not even claim to [be rooted] . . . in ‘true facts’ will not be accepted as a just resolution of conflict and instead will appear as an arbitrary judicial *fiat*.” Weigend, *supra* note 44, at 392.

⁸³ See Weigend, *supra* note 42, at 168–69. The goal or purpose of the inquiry must not be confused with the goal or purpose of the criminal process itself. *Id.* at 168. Criminal justice is not only about establishing the true facts. *Id.* Factual truth is part of the goals of criminal justice but is not an end in itself. *Id.* It is a means to resolve a conflict. *Id.* Weigend argues that if truth-finding were the ultimate goal of the criminal process, it “would have to result in a statement of facts found to be true (and not in a judgment), and the process would have to be structured much more like a historian’s research into events of the past.” *Id.* at 169. But,

Both the inquisitorial and adversarial systems consist of intersecting and almost indistinguishable parts,⁸⁴ and they are—from a historical vantage point—converging to a roughly equivalent mixed system of criminal procedure.⁸⁵ They have to be seen as ideal-types that don't exist (and never existed) in pure form in reality.⁸⁶ The American criminal justice process is structured to rely on adversarial (i.e., opposing) parties for adjudicating guilt. This stands in sharp contrast to inquisitorial or “nonadversarial” systems existing in continental Europe, where an authoritative, neutral officer is entrusted with collecting relevant evidence that is later introduced in court to recreate the “truth” of a case.⁸⁷ This setup influences the whole process. While a systemic and in-depth comparison between the adversarial and inquisitorial approaches⁸⁸ is neither necessary nor within the scope of this article, some remarks will help to clarify some misconceptions.

Although “[t]he adversar[ial] system is a foundational feature” of the American legal system,⁸⁹ the term “adversarial” is nowhere defined. Adversary procedure works by the use of a number of interconnecting procedures that set up the process as a whole.⁹⁰ One often quoted and agreed upon definition says, “[t]he American

as a matter of fact, at least the inquisitorial model makes “collecting and processing information from all possible sources,” the main objective not only of the early stages of discovery but also the trial and, therefore, the inquisitorial model is a thorough inquiry into events of the past. *See id.* The desire to learn the truth is a necessary condition of the (German) inquisitorial system. *See* Trüg & Kerner, *supra* note 51, at 193.

⁸⁴ *See* Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 22 (1995); Lloyd L. Weinreb, *The Adversary Process Is Not an End in Itself*, 2 J. INST. FOR STUDY LEGAL ETHICS 59, 59 (1999).

⁸⁵ JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 127–29 (3d ed. 2007); Brants, *supra* note 4, at 1073.

⁸⁶ Brants, *supra* note 4, at 1073; *see* Frase, *supra* note 17, at 787.

⁸⁷ Sometimes, the two systems are referred to as “inquisitorial” and “accusatorial.” MERRYMAN & PÉREZ-PERDOMO, *supra* note 85, at 127. As inquisitorial systems also have accusatorial elements, this distinction seems less characteristic than the first. *See id.* at 127–29.

⁸⁸ *See* JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 1 (1977); Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 512–54 (1973); Frase & Weigend, *supra* note 81, at 318; Raneta Lawson Mack, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 7 IND. INT'L & COMP. L. REV. 63, 71–85 (1996); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 409–87 (1992).

⁸⁹ Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78. J. CRIM. L. & CRIMINOLOGY 118, 118 (1987).

⁹⁰ Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714 (1983).

adversarial criminal trial is a regulated storytelling contest between champions of competing, interpretive stories that are composed under significant restraints” in front of an impartial fact-finder.⁹¹ The adversarial system vests authority in a neutral decision maker (the judge or jury), who renders a verdict in light of the materials presented by the adversarial parties (i.e., the state and the defendant). This material is presented in a highly structured, forensic procedure.⁹² The parties have the responsibility of investigating the facts. The prosecutor seeks evidence supporting his or her view. The defense does not have to prove innocence but needs to show potential “other” stories. In the pre-trial stage, prosecution and defense are (ideally) equally active. However, the defense need not collect a single piece of exculpatory evidence, due to the burden of proof, which is on the state. During the trial, each party is supposed to determine the facts and the law in a way most favorable and persuasive to its side, and to challenge the arguments and the presentations made by the opponent.⁹³ The Supreme Court shares the view that facts are best proven dialectically through a complex process of persuasion and holds that truth “is best discovered by powerful statements on both sides of the question.”⁹⁴

By contrast, inquisitorial⁹⁵ systems regard the criminal process not so much as a contest between two participants. The figure of a private accuser is eliminated or attenuated and that role is appropriated to public officials⁹⁶ such as a prosecutor or magistrate. The process is designed as an official and impartial inquiry for

⁹¹ Goodpaster, *supra* note 89, at 120.

⁹² Landsman, *supra* note 90, at 716.

⁹³ *See id.* at 715.

⁹⁴ *United States v. Cronin*, 466 U.S. 648, 655 (1984) (internal quotation marks omitted). The belief in the truth finding capabilities of the adversarial trial is still widespread. *E.g.*, Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 *CHAP. L. REV.* 57, 78 (1998) (“Our constitutional adversary system is based . . . on the premise that the adversary system is more effective [than the inquisitorial] in the search for truth.”).

⁹⁵ The term “inquisitorial” has been connoted with medieval practices to find the truth by torturing a suspect until he or she confessed to a crime. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 905 (4th ed. 2000). Although torture has been condemned as a way of obtaining a confession in all civilized countries, many scholars consider the suspect a central element for finding facts in the inquisitorial system. *See, e.g.*, Mack, *supra* note 88, at 70–71. That is a misconception since in many European countries the suspect has even more or broader rights than the one to remain silent. In Germany, for example, the defendant won’t be sanctioned even if he lied on the stand. *See* Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 *U. CHI. L. REV.* 931, 987 n.270 (1983).

⁹⁶ MERRYMAN & PÉREZ-PERDOMO, *supra* note 85, at 135.

finding factual truth⁹⁷ and not so much as a contest of narratives.⁹⁸ State officials (the prosecutor, with the police) are charged to conduct an objective investigation to determine the factual basis of a crime.⁹⁹ Both the prosecutor and the police must avoid any kind of deception or coercion in their inquiry,¹⁰⁰ and must look at a case from all possible sides. The defense is comparably inactive in the (at least early) pre-trial stage. The prosecutor, which in most European countries is institutionally independent from the court, has the duty to find both exculpatory evidence as well as incriminating information.¹⁰¹ A major difference from the adversarial system lies in the inquisitorial prosecutor's duty to disclose any uncovered information to the defendant before the trial.¹⁰² When the prosecutor (in collaboration with the police) finishes the investigation, all the evidence and the crimes of which the defendant will be accused have to be filed in a comprehensive dossier. This dossier has to be disclosed to the defendant and becomes the only basis for the trial. Hence, the prosecuting attorney charges and also determines which evidence might be presented in support thereof. Once at trial, the roles of the participants change, as it is now the judge who plays the most active part.¹⁰³ Judges govern the course of the proceedings, and it is

⁹⁷ In Germany, according to section 160 StPO “[t]he public prosecution office shall ascertain not only incriminating but also exonerating circumstances.”

In France, the Examining Magistrate (*juge d'instruction*) has to carry out “any investigative step he deems useful for the discovery of the truth.” CODE OF PROCÉDURE PÉNALE [C. PR. PÉN.] art. 81 (Fr.); see also LUTZ MEYER-GOSSNER, STRAFPROZEBORDNUNG: GERICHTSVERFASSUNGSGESETZ, NEBENGESETZE, UND ERGÄNZENDE BESTIMMUNGEN 617 (2001) (Ger.) (“principle of substantial truth-seeking”).

⁹⁸ See Jung, *supra* note 59, at 1129–35 (acknowledging, however, that the adversarial process tries to find the historical truth as well and that correspondence can be achieved by developing coherent stories).

⁹⁹ Most inquisitorially oriented systems also include adversarial elements. See STAMP, *supra* note 59, at 19 (providing a more nuanced analysis, but concluding that it is characteristic of the German criminal process that the agencies (police, prosecutor, judge etc.) “instruct themselves” meaning that that they autonomously and independently look for a comprehensive picture of the facts).

¹⁰⁰ Section 136a of the German Code of Criminal Procedure states that, during an interrogation, for example, the suspect's freedom must “not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis.” STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 136a (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

¹⁰¹ Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 206 (1983).

¹⁰² *Id.*

¹⁰³ See Weinreb, *supra* note 84, at 63 (noting that “magisterial” is a more precise term than “inquisitorial”).

their objective to discover (better: reproduce¹⁰⁴) the truth by examining all sources of relevant information listed in the dossier, so as to leave no room for reasonable doubt.¹⁰⁵ There is variation among European countries as to how this reproduction is conducted.¹⁰⁶ Some, like Italy, move toward a more mixed system.¹⁰⁷ In Germany, although all facts are already summarized in the dossier, judges continue the investigation and are free to ask for more evidence if they see fit. That process is guided by what is called the principle of instruction (*Instruktionsmaxime*). It is a core element of inquisitorial proceedings and requires the trial judges to put themselves into the picture of the material facts and the objective truth and to clear up, reconstruct, and investigate the facts of a case in the most comprehensive way.¹⁰⁸ Parties also can offer evidence, and the court is generally obliged to follow up on these suggestions, but the parties can also “sit back and let the court do the work of fact-finding.”¹⁰⁹ Judges are bound by trial procedure, which further regulates how evidence is introduced.¹¹⁰ At the end of the trial, the judge evaluates the evidence presented, and prepares the verdict about guilt and the sentence. Though not all inquisitorial systems require judges to give their opinion in writing, many do: for example, Germany, or for certain cases,

¹⁰⁴ Klaus Volk, *The Principles of Criminal Procedure and Post-Modern Society: Contradictions and Perspectives*, INT'L SOCIETY FOR REFORM CRIM. L. 7–9 (2003), <http://www.isrcl.org/Papers/Volk.pdf>.

¹⁰⁵ See Frase & Weigend, *supra* note 81, at 344 (“This standard is . . . similar to the ‘beyond a reasonable doubt’ standard . . .”).

¹⁰⁶ See, e.g., Brants, *supra* note 4, at 1075–78. The role of the judge in the Netherlands appears to be much weaker than in Germany. See *id.* at 1081–90. A German court would never simply “review” evidence that is brought before it. Cf. Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 933 (2012) (“Simply assigning investigative responsibility to a neutral magistrate does not ensure a vigorous search for the truth.”).

¹⁰⁷ See Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227, 232 (2000). In Italy, the prosecutor supervises the investigative phase in an inquisitorial manner, *id.* at 232–33, but at the trial phase, the contending parties put evidence before the court—in serious cases consisting of two professional and six lay judges. See *id.* at 228, 243–47.

¹⁰⁸ This follows Sec. 155 II StPO “[T]he courts shall be authorized and obliged to act autonomously” in their pursuit of the truth.

¹⁰⁹ Weigend, *supra* note 42, at 162.

¹¹⁰ See Frase & Weigend, *supra* note 81, at 342–43. The principle of immediacy (*Unmittelbarkeitsprinzip*), for example, regulates the preference of oral over written proof if the “original” evidence was oral. *Id.* at 343. A witness’s statement cannot be introduced by reading a transcript, but hearsay testimony is generally admissible subject only to the judge’s duty to hear all witnesses in order to establish the truth (exceptions exist). See *id.*

France.¹¹¹ The inquisitorial judge in Germany must invariably and meticulously explain in writing how he or she arrived at his or her verdict, and how the evidence gathered in the trial relates to his or her verdict. This verdict then can be subject to revision by a superior court.¹¹²

As much as these two different methods to establish the truth are the result of a historical development, there are also many cultural aspects that support one or the other. Trüg and Kerner, for example, argue that the way a system approaches truth and justice is related to an idealtypical understanding of the state and its legal culture.¹¹³ They portray the United States as a “reactive state,” one that provides a frame and the context for conflict resolution but does not itself get involved. The state merely moderates, and would leave it to the parties to resolve a conflict outside of court (through, e.g., plea bargaining). A reactive state’s objective of criminal procedure is not the enforcement of a particular set of values rather than resolving a conflict. This conflict can be considered resolved even if doubt as to the truthfulness of a confession exists. Truthfulness would not be of great relevance.¹¹⁴ Procedure is important to regulate state influence, but in that procedure the adversaries face each other on the same level. The decision is made by citizens applying common sense, because adversarial proceedings are a legal and social system for conflict resolution. In contrast, a proactive or interventionist state is regulatory and involved.¹¹⁵ The state establishes specific values and objectives of procedure and all branches of power help to promote these values. Laws in that model are not only a means to regulate procedure, but they also protect and incorporate rights and values. The goal of criminal proceedings is not conflict resolution alone, rather than the execution and enforcement of substantive law. Criminal procedure is inquiry, not contest;¹¹⁶ even a confession does not render the inquiry into the facts obsolete because the courts impose legal guilt.

As limited as such a broad generalization is, it shows that beyond

¹¹¹ See generally Weigend, *supra* note 42, at 162 (describing the role of the inquisitorial judge in the German system); Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT’L L. 81, 100 (1994) (observing that French law is not as formal as its courts’ opinions might otherwise suggest).

¹¹² See Weigend, *supra* note 42, at 166–67.

¹¹³ Trüg & Kerner, *supra* note 51, at 192.

¹¹⁴ *Id.* at 200.

¹¹⁵ *Id.* at 202.

¹¹⁶ *Id.* at 203.

the actual procedural codes, tradition and cultural forces can and often do determine the development of any given system, and that also shows the difficulty of legal transplants.

When looking at the intricate relationship between truth and justice through a comparative lens, one has to be aware that the adversarial and inquisitorial approaches come with inherent flaws. A perfect method to find the truth does not exist. The assumption that adversarial proceedings are ideally suited to determine historical reality has been criticized by many participants of the legal discourse, who compare law to other fact-based disciplines:

Neither scientists, engineers, historians nor scholars from any other discipline use bi-polar adversary trials to determine facts. . . . In matters of importance, we want an active investigative body capable both of testing any credible hypothesis and of amassing evidence from any source relevant to them.¹¹⁷

On the other hand, partisan adjudication is also considered to serve an equally important aspect of a criminal trial itself: dispute resolution. Unlike inquisitorial proceedings, the adversarial structure of the American trial “maximizes the ability of individuals to participate in legal processes” and to resolve the dispute between them.¹¹⁸ “The procedural elements of party control, party commitment to winning, and jury fact determination are viewed as conducive to fairness because they lead to a potentially equal contest before an unbiased decision-maker.”¹¹⁹ Decisions based upon a fair battle between two equal contestants might be accepted more willingly and might give the participants and the public a greater sense of fairness and justice than decisions that are produced in an inquisitorial system even if it means that “truth-discovery” is an “incidental by-product” of a trial.¹²⁰ That statement

¹¹⁷ Goodpaster, *supra* note 89, at 122; *see also* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036 (1975) (“[W]e know that others searching after facts—in history, geography, medicine, whatever—do not emulate our adversary system.”).

¹¹⁸ Doran et al., *supra* note 84, at 22; *see also* Damaška, *supra* note 88, at 581–82 (observing that the primary goal of the adversarial system is to resolve disputes between parties, whereas, the inquisitorial system’s central goal is to seek truth); Freedman, *supra* note 94, at 57 (“[A]n adversary system resolves disputes by presenting conflicting views of fact and law to an impartial and relatively passive arbiter, who decides which side wins what.”).

¹¹⁹ Goodpaster, *supra* note 89, at 125 (describing this view as concordant with the “fair decision theory”).

¹²⁰ Arenella, *supra* note 101, at 206 (internal quotation marks omitted); *see also* Frankel, *supra* note 116, at 1037 (“Employed by interested parties, the process often achieves truth

is probably an exaggeration but it makes clear that the process of reconstructing truth follows and is part of a common and culturally rooted understanding of justice. “Americans have a strong distrust of concentrated authority, and have always sought to impose various ‘checks and balances’ on state power.”¹²¹ In that regard, the American idea of truth is not compatible with the (German) idea of material truth as reflected in the correspondence theory.¹²² Although other goals like due process, fair proceedings, and finality are also objectives of criminal procedure, none of them can be achieved without establishing the true facts of the case.¹²³ Truth in the American understanding is formalized and not so much an ontological fact as a social and discourse-oriented concept.¹²⁴ Here, the jury simply announces its verdict and leaves no written opinion that could be challenged later. For as long as the decision is “arrived at through a process which itself conforms to fundamental, dominant social beliefs and attitudes,”¹²⁵ it will (ideally) be accepted by the community as just.

B. Plea Bargaining

From a truth-and-justice perspective, plea bargaining is particularly significant because the process of establishing legal guilt is abbreviated and less supervised than in a trial.¹²⁶ In systems with adversarial features plea bargaining is acceptable, but it is less so in Europe where it interferes with the traditionally

only as a convenience, a byproduct, or an accidental approximation.”); Weinreb, *supra* note 84, at 61 (noting that the same attributes that make the adversarial system great—for example the single-minded, zealous representation of each party—also hamper the pursuit of truth because of tactics or “tricks of persuasion” used by advocates to achieve favorable results for those they represent).

¹²¹ Frase, *supra* note 17, at 809.

¹²² Trüg & Kerner, *supra* note 51, at 193, 197.

¹²³ PETER HÄBERLE, WAHRHEITSPROBLEME IM VERFASSUNGSSTAAT 23 (1995) (Ger.); THOMAS WEIGEND, *Rechtsvergleichende Bemerkungen zur Wahrheitssuche im Strafverfahren*, in FESTSCHRIFT FÜR RUTH RISSING-VAN SAAN, 749, 751 (Thomas Fischer, et al. eds, 2011) (Ger.).

¹²⁴ Trüg & Kerner, *supra* note 51, at 197. This description is imprecise in that it does not differentiate between truth as the ultimate goal of an inquiry and the process that is used to achieve it. However, the statement holds true for what at the end of a trial and the criminal process in general is an acceptable truth.

¹²⁵ Goodpaster, *supra* note 89, at 152.

¹²⁶ See Damaška, *supra* note 58, at 305 & n.41. There is “an unruly mix of objectives” in the American process—a mix that “is reflected in dramatic differences between the court’s concern with factfinding precision in accepting a guilty plea and in the course of trial.” *Id.* Fact-finding precision has a different weight in plea bargaining than it does at trial. *See id.* at 302.

established dynamics of truth finding. Guilty pleas do not exist in European systems and the idea of, for example an *Alford* plea, where a defendant assumes criminal responsibility while at the same time protests his innocence is inconceivable. Although on the rise in Europe, plea bargaining is still more prevalent in the American (adversarial) criminal justice system. It provides a good example for how differently issues of truth and justice are handled in different systems.

First, it is a fact that innocent suspects confess and plead guilty to crimes they didn't commit, especially when they face the death penalty. "[I]nnocent defendants will almost always risk additional years of their lives in order to seek vindication [in a trial] rather than accept disgrace coupled with a long term of imprisonment [through a plea agreement]," but only few would risk the death penalty.¹²⁷ And yet, it is not always the threat of the death penalty that motivates suspects to plead guilty or make incriminating statements. Duress, coercion, mental impairment, a misunderstanding of the situation, or diminished capacity are among the reasons why "[i]n about 30 [percent] of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty."¹²⁸ A new study could demonstrate that "when study participants are placed in real, rather than hypothetical, bargaining situations and are presented with accurate information regarding their statistical probability of success, just as they might be so informed by their attorneys or the government during criminal plea negotiations, innocent individuals are highly risk averse."¹²⁹

Second, for historical reasons and because of its long standing practice in the United States, "[p]lea bargaining has pushed the jury trial into a small corner of the criminal process."¹³⁰ However, its practice is actually in line with core features of the American criminal justice system and not a recent phenomenon after all. It

¹²⁷ Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 BUFF. L. REV. 469, 488 (1996).

¹²⁸ *Understanding the Causes: False Confessions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Sept. 27, 2014).

¹²⁹ Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 37 (2013).

¹³⁰ LAWRENCE M. FRIEDMAN, *AMERICAN LAW: AN INTRODUCTION* 194 (W.W. Norton & Co. rev. ed. 1998).

can be seen as a “logical consequence” of the adversarial trial and a formalized concept of truth and justice.¹³¹ Plea bargaining goes back many decades—so far that even in the middle of the nineteenth century half of all cases were already plea bargained.¹³² Since then, through the professionalization of criminal justice, a system that was formerly controlled by lay people is now in the hands of professionally trained lawyers. The consequence is that plea bargaining is considered the “modern, professional version of routine processing.”¹³³ In the United States, plea bargaining rests on a unique feature of criminal proceedings: the guilty plea. This guilty plea has both factual and legal implications. It includes a confession as to specific facts and the admission of guilt as an admission of legal responsibility in one. But the factual and the legal components of a plea can be decoupled. A defendant can plead *nolo contendere* (no contest) and neither admit nor dispute a charge while accepting criminal responsibility. The *Alford*¹³⁴ plea goes even further, where defendants plead guilty while simultaneously protesting their innocence.¹³⁵ Through either plea, a defendant also waives the right to a trial and can be sentenced immediately. However, plea bargaining is not without oversight. Courts have to safeguard the legitimacy of the plea bargain. Different states and jurisdictions employ different rules. On the federal level, Rule 11 of the Federal Rules of Criminal Procedure outlines requirements for a legitimate plea bargain. These requirements include, among others, that the court informs the defendant about the right to plead not guilty, the right to a jury trial, the right to confront and cross-examine witnesses, the nature of the charges, and the maximum possible penalty.¹³⁶ The judge then “must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).”¹³⁷ Before a guilty plea is entered, “the court must determine that there is a factual basis for the

¹³¹ Trüg & Kerner, *supra* note 51, at 205.

¹³² See FRIEDMAN, *supra* note 130, at 196.

¹³³ *Id.* at 197.

¹³⁴ North Carolina v. Alford, 400 U.S. 25 (1970).

¹³⁵ Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1371–72 (2003).

¹³⁶ FED. R. CRIM. P. 11(b)(1)(B), (C), (E), (G), (H).

¹³⁷ FED. R. CRIM. P. 11(b)(2).

plea.”¹³⁸ Depending on the type of plea agreement, the court may accept or reject the plea.¹³⁹ This fairly broad supervisory power is unexpected in light of the control and autonomy the adversaries usually have in the American system. The degree to which the courts’ supervisory role is practiced, however, has been questioned.¹⁴⁰ Unlike the German Federal Constitutional Court, the U.S. Supreme Court has not installed measures to promote the search for truth during the plea bargaining process.¹⁴¹ Moreover, there is evidence that judges abuse their role in the plea bargaining process, triggered by the need to efficiently process cases:

Over the years, a pattern has emerged where judges routinely engage in practices that violate the constitutional rights of the defendants who come before them, and which run counter to the ethical conduct that we have a right to expect and demand from those empowered to engage in critical decisions concerning the liberty of our citizens.¹⁴²

While the extent of this potential abuse is not clear and can hardly be seen as a general tendency, scholars agree that there is lack of guidance in the plea bargaining process and that “the resulting diversity of practice have negative ethical, constitutional and utilitarian consequences.”¹⁴³

In sum, plea bargaining is used to resolve cases efficiently and quickly. Establishing elements of factual truth are necessary but they are more of a byproduct of this process than its goal. If truth were paramount in criminal proceedings, pleas like no contest or *Alford*—which are largely initiated and controlled by law enforcement and the prosecutor—wouldn’t exist. Plea bargaining is a tool in the reactive state to resolve conflicts but not to promote truth—or at least honor it—as a necessary element in decision making.

The more factual truth plays a role within a system, the more

¹³⁸ FED. R. CRIM. P. 11(b)(3).

¹³⁹ See FED. R. CRIM. P. 11(c)(3).

¹⁴⁰ Trüg & Kerner, *supra* note 51, at 207.

¹⁴¹ Thomas Weigend & Jenia Iontcheva Turner, *The Constitutionality of Negotiated Criminal Judgments in Germany*, 15 GER. L.J. 81, 102–03 (2014).

¹⁴² Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1351–52 (2004). Klein reports cases in which judges told defendants that an offer is “for today only,” or that he would “up the sentence if you take it to trial.” *Id.* at 1350 (internal quotation marks omitted).

¹⁴³ Ursula Odiaga, Note, *The Ethics of Judicial Discretion in Plea Bargaining*, 2 GEO. J. LEGAL ETHICS 695, 695 (1989).

plea bargaining will be handled and regulated differently. Just as in the United States, most western criminal justice systems are faced with steadily increasing numbers of cases that are also becoming more and more complex.¹⁴⁴ The earlier a dispute can be resolved, the fewer (of the scarce) resources that need to be devoted to it. If a defendant and his attorney can make a deal with the prosecutor—can trade, for example, a confession and information on co-defendants for lightened charges, dropped counts, and reduced sentences—then, in theory, both the justice system and the defendant benefit.

In continental European systems, guilty pleas do not exist.¹⁴⁵ There, “a defendant can confess his crimes, and a confession is powerful evidence of guilt. But, at least in theory, the state must still prove its case.”¹⁴⁶ A “plea bargain,” that is, an agreement between prosecution and defense, runs counter to the idea of impartial and official fact (and guilt) finding. But it also contradicts other procedural and institutional aspects. First, contrary to the American criminal justice system, prosecutors in Germany are not equipped with the same discretion as their American colleagues. In non-serious misdemeanor cases,¹⁴⁷ where the defendant caused only “minor damage,” a prosecutor has the discretion to drop charges in exchange for a non-criminal fine the suspect has to pay.¹⁴⁸ In all

¹⁴⁴ See Joachim Herrmann, *Bargaining Justice—A Bargain for German Criminal Justice?*, 53 U. PITT. L. REV. 755, 763 (1992).

¹⁴⁵ See *id.* at 755; see also C.H. Brants-Langeraar, *Consensual Criminal Procedures: Plea and Confession Bargaining and Abbreviated Procedures to Simplify Criminal Procedure*, ELECTRONIC J. COMP. L., May 2007, at 12, <http://www.ejcl.org/111/art111-6.pdf> (comparing plea bargaining practices in the United States and the Netherlands).

¹⁴⁶ FRIEDMAN, *supra* note 130, at 195. In the Netherlands a confession is a simple “statement by the defendant.” Brants-Langeraar, *supra* note 144, at 12 (internal quotation marks omitted). Brants-Langeraar correctly calls the idea that a confession should have an influence on the trial an “anathema in the light of inquisitorial ideology.” *Id.*

¹⁴⁷ German misdemeanors include crimes that would be considered felonies in the United States, such as theft, embezzlement, fraud, some drug offenses, and most environmental crimes. Even a large-scale white-collar crime might fall under fraud and by that be a misdemeanor. One of the most notorious cases showing the unexpected effects of § 153a STPO is the Party Finance Scandal from 2001 in which former Chancellor Helmut Kohl agreed to make a payment 300,000 DM (equivalent to roughly \$200,000 today) after a 14-month criminal investigation into his acceptance of and failure to declare anonymous campaign donations. *Germany’s Party Finance Scandal “Ends” With Kohl’s Plea Bargain and Too Many Unanswered Questions*, GERMAN L.J., <http://www.germanlawjournal.com/article.php?id=60> (last visited May 15, 2014). (The preceding article incorrectly uses the term “plea bargain” for Kohl’s agreement to make that payment.)

¹⁴⁸ STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 153a(1)–(2) (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html; Herrmann, *supra* note 144, at 757.

other misdemeanor cases, the prosecutor needs the consent of the court that would assume jurisdiction if the case went to trial. In felony cases, no such discretion exists. Those cases must be tried in court.¹⁴⁹ Germany, like most other European systems allows—within limits—an agreement (plea bargain) between the involved parties. Plea bargaining is regulated heterogeneously across Europe. It might not be allowed at all¹⁵⁰ or it might only be permitted within specific limits.¹⁵¹ In cases where plea bargain is technically an option, judges are usually involved in the process since a case usually has to be on the trial level before a plea bargain is an option. That means, a court must have allowed the case to proceed to trial and established that “in the light of the results of the preparatory proceedings there appears to be sufficient suspicion of the indicted accused having committed a criminal offense.”¹⁵² If a plea bargain is initiated by any of the parties, the trial is paused and the involved parties meet with the judge in order to look at the evidence and a potential sentence. When an agreement is reached the parties go back into the courtroom where the defendant confesses and the judges announce the (agreed upon) verdict.¹⁵³

This practice is in line with the general understanding that truth and justice cannot be separated from each other. Only recently has the German Federal Constitutional Court decided on questions of

¹⁴⁹ Shawn Marie Boyne, *Translating Civil Law ‘Objectivity’ with an Adversarial Brain: An Ethnographic Perspective* 7 (Ind. Univ. Robert H. McKinney School of Law Legal Studies research Paper No. 02, 2013). Boyne convincingly argues that German prosecutors exercise more discretion than scholars were aware of. *Id.* at 8–9. However, her general claim that limited discretion of German prosecutors is a myth must be repudiated. A prosecutor who dismisses a felony case would not only face disciplinary action but also criminal sanctions.

¹⁵⁰ For example, it is not allowed in Slovenia. Katja Šugman Stubbs, *Criminal Procedure in Slovenia*, in *CRIMINAL PROCEDURE IN EUROPE* 483, 531 (Richard Vogler & Barbara Huber eds., 2008).

¹⁵¹ In France, a defendant must face a charge carrying less than five years in prison, the offered penalty must be less than half the maximum prison sentence or a fine, and there is no negotiation. Richard Vogler, *Criminal Procedure in France*, in *CRIMINAL PROCEDURE IN EUROPE*, *supra* note 150, at 171, 254. If the defendant accepts, a judge must “verify the reality of the facts” or “vérifié la réalité des faits.” *CODE DE PROCÉDURE PÉNALE* [C. PR. PÉN.] art. 459-9 (Fr.). In Spain, a plea bargain is impermissible if the most serious charge exceeds a potential sentence of six years imprisonment. Fernando Gascón Inchausti & María Luisa Villamarín López, *Criminal Procedure in Spain*, in *CRIMINAL PROCEDURE IN EUROPE*, *supra* note 150, at 541, 635.

¹⁵² STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 203 (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

¹⁵³ While the process itself does not look all that different than American plea bargaining, judges in the United States are not involved to the same degree in reviewing the facts as their German colleagues. Weigend & Turner, *supra* note 141, at 103.

the constitutionality of the law that regulates plea bargaining in German Criminal Procedure.¹⁵⁴ The central argument of the Court directly addresses the relationship between justice and truth in Criminal Justice. The Court made clear that although the legislature intended to strengthen the ability of trial courts to lead an open trial that fosters communication between the parties, it had not planned to introduce a new “consensual” model of criminal procedure. The goal was to maintain a model of criminal procedure that is rooted in finding factual truth and the just punishment that reflects the guilt of the defendant.¹⁵⁵ In contrast to merely preventive measures, punishment, though not alone, focuses on just retribution. Without determining individual blameworthiness any reaction from the criminal justice system would contradict constitutionally protected guaranties of human dignity and due process (*Rechtsstaatsprinzip*).¹⁵⁶ A sentence has to be in a just relationship with the severity of the crime and the blameworthiness (*Verschulden*) of the offender.¹⁵⁷ As an essential requirement for the realization of the principle of guilt, the duty to discover the substantive truth cannot be touched by a legislator. This duty is the decisive goal of criminal procedure. Because of the constitutionally anchored principle of guilt, which is linked to the duty to discover the truth, and because of the principles of fairness, due process, the presumption of innocence and the role of courts as impartial fact finders, the discovery of the truth must not be at the disposal and discretion of the adversaries and the court.¹⁵⁸ Nontransparent, uncontrollable “deals” are unconstitutional because of the danger they pose to the principle of guilt and, as a part of that, the duty to investigate the truth.¹⁵⁹ Prosecutors must be prohibited from “dealings with justice.”¹⁶⁰ These limitations become clear in light of the distinction made above: the court and judges as central elements of the proactive state are in control of procedure and the decision. They follow up on truth as a protected

¹⁵⁴ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 19, 2013, 2 BvR 2628/10 (Ger.). A brief summary in English is available on the Internet. *German Court Upholds Plea Bargains*, DW (last visited May 19, 2013), <http://www.dw.de/german-court-upholds-plea-bargains/a-16683893>.

¹⁵⁵ See Deutscher Bundestag: Gesetzentwurf der Bundesregierung [BT] 16/12310 (Ger.); 2 BvR 2628/10 (para. 67) (Ger.).

¹⁵⁶ 2 BvR 2628/10 (para. 54) (Ger.).

¹⁵⁷ *Id.* (para. 55).

¹⁵⁸ *Id.* (para. 105).

¹⁵⁹ *Id.* (para. 115).

¹⁶⁰ *Id.* (para. 4).

value.¹⁶¹ No other value or objective is like or could replace truth. Plea bargaining, in contrast, is in line with ideas of the reactive state and its formalized procedure for finding the truth because plea bargaining eliminates the conflict between the adversaries and by that the need for an official intervention.¹⁶² Although plea bargaining is a necessity in proactive states, it creates frictions with procedural core principles.¹⁶³ This is not to say that inquisitorial systems would allow an unlimited search for the truth. They establish many safeguards to protect the innocent and the guilty from an overbearing and overzealous executive. Those safeguards limit the pursuit of factual truth and establish a second main element necessary to understand the concept of truth and justice.

C. Limits of the Pursuit for Truth: Procedural Justice

This section clarifies and outlines the extent to which the German and American systems support procedural justice even if it means that “the truth” doesn’t make it into court. Both systems regulate what kind of evidence can be collected and what bars it from being admissible. The systems do it for different purposes: deterrence of law enforcement being a main reason in the United States, while the protection of “objective values” is seen as a guiding concept in Germany. These differences will be explained first before a few procedural rules from each system are contrasted. Using examples from both criminal procedures the second part will (continue to) argue that procedural justice is often unrelated to the inquisitorial or adversarial backdrop it exists in. In some instances an inquisitorial system like Germany’s can be more protective of a suspect’s right against self-incrimination than the American adversarial system.

1. Differences and Similarities of General Ideas of Criminal Procedure

Regulations that control how evidence is collected and what kind of evidence is admissible in court is an area that can exemplify a

¹⁶¹ Trüg & Kerner, *supra* note 51, at 203.

¹⁶² See FRIEDMAN, *supra* note 130, at 194.

¹⁶³ Trüg & Kerner, *supra* note 51, at 207; Jehle, *supra* note 18, at 225. The statutorily embedded principle of legality, for example, demands that every act that could fulfill a criminal statute has to be pursued by the police, prosecutor, courts, and so forth. It limits the discretion of the actors to a minimum because of the distrust in adversarial decision-making.

system's approach to truth and justice. Procedural rules including, for instance, *Miranda* warnings, attorney-client privilege, or the exclusionary rule make establishing the factual basis of a case harder. But, as was established earlier, procedural law and justice follow different imperatives than substantive law and justice. In most criminal justice systems, the promise of a fair trial and the protection of due process rights can be seen as the consequence of the monopoly of the state to investigate and punish crimes. Neither any European nor the American system tries to find the truth "at all costs."¹⁶⁴ It is therefore not in line with the law when it is argued that the "Anglo-American law has an 'adversarial' tradition that favors the values of 'due process' and exclusion, while continental law has an 'inquisitorial' tradition that favors 'crime control' and inclusion."¹⁶⁵ Furthermore, the American system of exclusionary rules has been criticized as being too restrictive, technical, and truth defeating¹⁶⁶ and that "the objective of reaching a true and just result in any particular case" is subordinated by those "truth-defeating changes" in criminal procedure.¹⁶⁷

Procedural rules have their own purposes; they need to strike a balance between the goal of finding the facts of a case and protecting a suspect's rights. Foreign systems actually apply a number of limits to pretrial investigation and also employ broad exclusionary rules—that is, they also have concepts of procedural justice. In contemporary comparative discussions there exists the broadly established myth that the continental criminal system lacks "evidentiary barriers that restrict the information the judge can consider in determining guilt."¹⁶⁸ Former Chief Justice Burger claimed that the exclusionary rule is "unique to American jurisprudence."¹⁶⁹ It is maintained that inquisitorial systems "have

¹⁶⁴ Bundesgerichtshof [BGH] [Federal Court of Justice] June 14, 1960, 14 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 358, 365 (Ger.).

¹⁶⁵ Kuk Cho, "Procedural Weakness" of German Criminal Justice and its Unique Exclusionary Rules Based on the Right of Personality, 15 TEMP. INT'L & COMP. L.J. 1, 1 (2001) (footnote omitted).

¹⁶⁶ See PIZZI, *supra* note 17, at 71. *But see* Frase, *supra* note 17, at 794 (criticizing Pizzi's claims).

¹⁶⁷ Meese, *supra* note 45, at 273.

¹⁶⁸ William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 7 (1992).

¹⁶⁹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting); *see also* LANGBEIN, *supra* note 88, at 69 ("The constitutional exclusionary rules are for the most part an American peculiarity. Illegally obtained evidence is generally admitted not only in Germany and other Continental legal systems, but also in

no equivalent of the Federal Rules of Evidence, since fixed evidentiary rules might lead to the exclusion of important probative evidence.¹⁷⁰ It is also believed that “the paradigmatic inquisitorial system reflects a singular focus on the ascertainment of truth that effectively subordinates the protection of individual rights.”¹⁷¹ The German criminal system in particular has been cited as one in which exclusionary rules do not exist.¹⁷² Even German authors assert that although “[e]xclusionary rules can be found in every legal system, . . . they are more prevalent in systems adhering to the adversarial approach.”¹⁷³ All of these claims are difficult to support. Since the beginning of the twentieth century it has been established that a defendant in Germany is not the “object” of an investigation rather than a subject whose dignity (and other rights)

England and the Commonwealth systems.”)

¹⁷⁰ Pizzi & Marafioti, *supra* note 168, at 7; *see also* Craig M. Bradley & Joseph L. Hoffmann, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: Public Perception, Justice, and the “Search for Truth” in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1285 (1996) (“The constitutional privilege against self-incrimination . . . [is] a bastion against an inquisitorial system of criminal justice.”); Doran et al., *supra* note 84, at 20 (“In the inquest model, however, such [evidentiary] rules only impede the inquirer in the quest for truth.”).

¹⁷¹ Mack, *supra* note 88, at 71; *see also* Damaška, *supra* note 88, at 583–84 (noting that “many procedural safeguards and technical rules” found acceptable in adversary proceedings are unacceptable in inquisitorial systems). Pizzi disregards the existence of laws comparable to *Miranda* warnings when he states that in continental systems “the police are expected to talk to the suspect about the crime in an effort to get whatever information they can and . . . it is not considered the function of a lawyer to stop him from being questioned.” PIZZI, *supra* note 17, at 62.

¹⁷² *See, e.g.*, Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three “Inquisitorial” Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 261 (1977); Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 217 (1978).

¹⁷³ Weigend, *supra* note 42, at 168. Weigend argues that in adversarial systems, truth is a procedural concept that “comports well with . . . [the] Anglo-American skepticism about man’s ability to discover the ‘substantive’ truth.” *Id.* If “truth is . . . elusive,” so his argument goes, then “the fairness of proceedings becomes the main foundation of [a decision] . . .” *Id.* In inquisitorial systems, “the criminal process is . . . a search for substantive truth,” and any exclusionary rule “run[s] counter to the goals and the spirit of the inquisitorial model; they are therefore used only as a last resort to safeguard indispensable procedural values . . .” *Id.* In *Hudson v. Michigan*, the Supreme Court made the same argument and stated that, “[s]uppression of evidence . . . has always been our last resort, not our first impulse.” *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). The Court has “repeatedly emphasized that the [exclusionary] rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” *Id.* (second alteration in original) (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364–65 (1998)) (internal quotation mark omitted). Weigend acknowledges that the criminal process is not about factual truth alone, but this comparison shows again that distinguishing between substantive and procedural justice helps to create clearer picture of the different goals of any given justice system. Weigend, *supra* note 42, at 168.

need to be protected.¹⁷⁴ Criminal procedure in Europe and Germany in particular establishes a broad array of exclusionary rules that often surpasses in scope their American equivalents.¹⁷⁵ They have even existed “[l]ong before the innovations of the Warren Court.”¹⁷⁶ The rule of law and principles of proportionality are part of the core of any civilized system of criminal justice. In all systems, exclusionary rules reflect the fundamental standard that relevant evidence be excluded if constitutional rights are violated.¹⁷⁷

In Germany, any criminal inquiry is limited by the constitution, especially Article 20 III GG: “The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.”¹⁷⁸ As was explained earlier, discovering the factual truth of a case is also mandated by the constitution, which requires the guilt of a defendant to be based on facts. Therefore both the objective to find the truth and the limits of the search for it are of constitutional importance.¹⁷⁹ Like the executive branch in general, actors in the criminal justice system are bound by statutory law and law in general. Constitutional rights of a suspect or any person can only be limited if an official act is proportionate and shows a balance between the purpose of the act and rights of the person. Human dignity is one fundamental right but there are many more such as the right of privacy, the protection of one’s home, or the presumption of innocence.¹⁸⁰ Substantive justice demands the search for the whole truth but procedural justice then limits it.¹⁸¹ The purpose of the exclusionary rule, at least the way it is discussed, is the protection of individual, fundamental,

¹⁷⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 19, 2013, 2 BVR 2628/10 (Ger.), available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20130319_2bvr262810.html; see STAMP, *supra* note 59, at 90.

¹⁷⁵ See Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1064 (1983).

¹⁷⁶ Stephen C. Thaman, *Chapter 17 Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules*, 20 IUS GENTIUM 403, 407 (2013).

¹⁷⁷ Bradley, *supra* note 175, at 1064.

¹⁷⁸ GRUNDEGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. XX (Ger.), available at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0107. The original reads “Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden.” A more literal translation of “Gesetz” would be “statutory law” and of “Recht” would be “law.”

¹⁷⁹ STAMP, *supra* note 59, at 91.

¹⁸⁰ *Id.* The principle of proportionality explains that, for example, an arrest for a petty crime might not be justifiable.

¹⁸¹ *Id.* at 92.

constitutionally protected rights. The German Constitution establishes an objective system of values (*Objektive Wertordnung*) that limits official power.¹⁸² These values are indisputable and cannot be infringed upon even if a suspect agrees.¹⁸³ Every procedural step, every warrant, arrest, search, interrogation, has to be justified in the light of the constitutional value system. For most of these standard situations the legislature established rules under which individual rights can be curbed. In other instances the courts have to decide whether or not an investigative procedure violated constitutional values. As will be shown below, there are sections of the procedural code that specifically address police conduct but, interestingly from a comparative point of view, “deterrence” is not a pronounced objective of the exclusionary rule. The constitutional discourse is much less pragmatic and more value-oriented than in the United States.

In the United States, the exclusionary rule has its focal point on the Fourth and Fifth Amendments, which “throw great light on each other.”¹⁸⁴ The Supreme Court was initially hesitant to exclude evidence even if it was illegally obtained. In *Adams v. New York*, the Court observed that:

The question was not made in the attempt to resist an unlawful seizure of the private papers of the plaintiff in error, but arose upon objection to the introduction of testimony clearly competent as tending to establish the guilt of the accused of the offense charged. In such cases the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained.¹⁸⁵

Later, the Supreme Court acknowledged the exclusionary rule and explained (in *Weeks v. United States*¹⁸⁶) that the Fourth Amendment addresses courts and law enforcement alike:

¹⁸² See generally Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Jan. 16, 1957, 1 BVR 253/56 (Elfes); available at <http://www.iuscomp.org/gla/judgments/tgcm/velfes.htm>.

¹⁸³ Siegfried Broß, *Der Einfluss des Verfassungsrechts auf strafprozessuale Eingriffsmaßnahmen* [The Impact of Constitutional Law on Criminal Procedure Intervention Measures], HUMBOLDT FORUM RECHT (Jan. 1, 2009), <http://www.humboldt-forum-recht.de/english/1-2009/beitrag.html>.

¹⁸⁴ *Boyd v. United States*, 116 U.S. 616, 633 (1886).

¹⁸⁵ *Adams v. New York*, 192 U.S. 585, 594 (1904).

¹⁸⁶ *Weeks v. United States*, 232 U.S. 383 (1914).

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.¹⁸⁷

Excluding evidence was seen as an “effective way of deterring unreasonable searches”¹⁸⁸ and “an essential part of the right to privacy” protected by the Fourth Amendment.¹⁸⁹ Exclusion was viewed as essential to safeguarding “the privacy and security of individuals against arbitrary invasions by government officials”¹⁹⁰ and by that, the protection of rights is considered an integral part of the exclusionary rule. In later decisions, however, deterrence of law enforcement was considered the “prime purpose” of the exclusionary rule, “if not the sole one,” while at the same time its actual deterrent effect was questioned.¹⁹¹ “[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates”¹⁹² because “removing the incentive to disregard [the Constitution]” is “the only effectively available way” to compel respect for it.¹⁹³ That means that the values and individual rights established in the Constitution are enforced through the exclusionary rule. However, by stressing the deterrence rationale (as opposed to values and individual rights) the Court curbed the exclusionary rule.¹⁹⁴ The exclusionary rule should “be applicable only where its deterrence benefits outweigh its

¹⁸⁷ *Id.* at 392.

¹⁸⁸ *Wolf v. Colorado*, 338 U.S. 25, 31 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁸⁹ *Mapp*, 367 U.S. at 656.

¹⁹⁰ *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967)

¹⁹¹ *United States v. Janis*, 428 U.S. 433, 446 (1976) (quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974) (citing *United States v. Peltier*, 422 U.S. 531, 536–539 (1975)); *see Janis*, 428 U.S. at 448–54.

¹⁹² *United States v. Leon*, 468 U.S. 897, 916 (1984); *see also Calandra*, 414 U.S. at 347 (“[T]he rule’s prime purpose is to deter future unlawful police conduct . . .”); *United States v. Peltier*, 422 U.S. 531, 538 (1975) (same).

¹⁹³ *Elkins v. United States*, 364 U.S. 206, 217 (1960).

¹⁹⁴ *Narrowing Application of the Exclusionary Rule*, ONECLE, <http://law.onecle.com/constitution/amendment-04/33-narrowing-application-of-the-exclusionary-rule.html> (last updated Oct. 24, 2012).

‘substantial social costs.’¹⁹⁵ This argument opened the door to exceptions to the exclusionary rule, because if deterrence of law enforcement is the main goal, then, for example, evidence need not be excluded if a police officer acted in “good faith” while relying on a warrant that was later found to be invalid,¹⁹⁶ if the evidence is sufficiently attenuated from police misconduct,¹⁹⁷ or if an officer seizes evidence relying on a statute that was later considered violative of the Fourth Amendment.¹⁹⁸

2. Lying on the Stand: Differences in the Treatment of the Suspect and Evidence

The following section will exemplify some of the similarities and differences in the treatment of the suspect and evidence that can be found in American and German procedural law. The purpose of this part is not so much to prove that one system has stronger or better protections—it is to show the degree to which the search for truth is limited in systems that have a different layout.

The suspect has traditionally been seen as the most important witness of a crime, and therefore an important source of information. But the days of the Spanish Inquisition are long gone, and, contrary to the belief that inquisitorial systems leave the suspects and witnesses unprotected for the sake of establishing the truth, they actually enjoy broad protections when it comes to interrogations and the criminal investigation in general.

According to sections 136 I, 163a III StPO, “[s]uspects have an unqualified right to remain silent, and must be informed of this right, as well as of the charges against them at the very beginning of each [prosecutorial or police] interrogation.”¹⁹⁹ If an interrogator fails to inform the suspect of his or her right, the testimony will be excluded from trial unless the suspect was aware of the right.²⁰⁰ This is comparable to the situation in the United States. A difference exists as to when the suspect has to be informed or warned. In the United States, *Miranda* warnings are triggered

¹⁹⁵ Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) (quoting *Leon*, 468 U.S. at 907). “Social Costs” include the “exclusion of relevant incriminating evidence” or “the risk of releasing dangerous criminals into society.” Hudson v. Michigan, 547 U.S. 586, 595 (2006).

¹⁹⁶ *Leon*, 468 U.S. at 920–21.

¹⁹⁷ Wong Sun v. United States, 371 U.S. 471, 487–88 (1963).

¹⁹⁸ Illinois v. Krull, 480 U.S. 340, 342 (1987).

¹⁹⁹ Frase & Weigend, *supra* note 81, at 333.

²⁰⁰ *Id.*

once a suspect is in custody and interrogated.²⁰¹ In Germany, a suspect has to be read his rights as soon as law enforcement has a “sufficient factual indication” for a “triable crime.”²⁰² The suspect does not have to be in custody.²⁰³ For example, in a stop and frisk scenario or a situation where a person is informally questioned, this person becomes a suspect as soon as law enforcement believes that this person might be involved in a crime.

During an interrogation, law enforcement is limited with regards to their interrogation techniques. According to section 136a StPO, suspects must not be physically and psychologically mistreated and interrogations have to stop when suspects are fatigued.²⁰⁴ Trick questions are allowed but deceit is not.²⁰⁵ For example, the standard “your buddy incriminated you, and you can only make it better by collaborating” (when the buddy actually didn’t) is prohibited, and any confession or testimony made thereafter would be inadmissible.²⁰⁶ Offering a reward (plea bargain), however, is allowed.²⁰⁷ These rights extend to questioning by undercover agents

²⁰¹ See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

²⁰² See STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 152(2) (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (describing the principle of mandatory prosecution for triable crimes); see also Sabine Gless, *Germany: Balancing Truth Against Protected Constitutional Interests*, in EXCLUSIONARY RULES IN COMPARATIVE LAW 113, 136 (Stephen C. Thaman ed., 2013) (quoting BUNDESGERICHTSHOF [BGH] May 31, 1990, 37 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 48 (Ger.)) (“The admonitions required by [STPO § 136(1)] must be given ‘when the suspicion already present at the beginning of the interrogation has so thickened that the suspect can seriously be considered a perpetrator of the investigated crime.’”). A crime is not “triable,” for example, if a minor (person younger than fourteen years old) is the suspect. This person would not be adjudicated in the criminal justice system. See DON CIPRIANI, CHILDREN’S RIGHTS AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY: A GLOBAL PERSPECTIVE 100 tbl.5.1 (2009).

²⁰³ Frase & Weigend, *supra* note 81, at 333; Frase, *supra* note 17, at 801.

²⁰⁴ See STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 136a (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html; Bundesgerichtshof [BGH] [Federal Court of Justice], May 15, 1992, 38 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 291 (Ger.).

²⁰⁵ Gerhard Dannecker & Julian Roberts, *The Law of German Criminal Procedure*, in INTRODUCTION TO GERMAN LAW 419, 438 (Mathias Reimann & Joachim Zekoll eds., 2d ed. 2005).

²⁰⁶ See Christopher Slobogin, *Comparative Empiricism and Police Investigative Practices*, 37 N.C. J. INT’L L. & COM. REG. 321, 327 (2012) (noting that German law prohibits the police from affirmatively misrepresenting the evidence to a suspect).

²⁰⁷ See STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 257c (2013) (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (outlining the circumstances under which a defendant may enter into a negotiated plea agreement with the court).

as well.²⁰⁸

While it is often claimed that in inquisitorial systems defendants are expected to participate in the investigation or to testify during trial, they are under fewer obligations than in the United States.²⁰⁹ While “[s]uspects can be summoned and, if necessary, forcibly brought before prosecutors and magistrates for interrogation,”²¹⁰ they only have to provide their personal information (name, date of birth, employment, address, etc.) and need to allow fingerprinting and photographs.²¹¹ They are not, however, compelled to testify in court.²¹² Because under the law suspects cannot commit perjury, they can even lie if this supports their defense—as long as the lie does not qualify as a crime like insult or false incrimination.²¹³ If a suspect chooses to remain silent this silence cannot be held against him.²¹⁴ Witnesses are held to a slightly higher standard of compliance. They must answer questions from prosecutors and judges, but they can refuse to answer questions that would incriminate themselves or close relatives²¹⁵ such as siblings, parents, spouses, fiancés, or domestic partners even if the marriage or domestic partnership has ended.²¹⁶ “Witnesses must be informed of this right . . . [as soon as the] danger of self-incrimination becomes apparent.”²¹⁷ Spousal privileges in the United States are usually smaller in scope.²¹⁸ Defendants in the United States have a

²⁰⁸ See Frase, *supra* note 17, at 801.

²⁰⁹ See Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1136–37 (1982). “A representative difference between the two models is the existence in the . . . adversary system of the privilege against self-incrimination. . . . [S]uch a privilege would be inconceivable in a criminal process modeled on a scientific investigation.” *Id.* at 1137. This privilege (*nemo tenetur se ipsum accusare*) is protected by the German Constitution and case law of the German Supreme Court. See Dannecker & Roberts, *supra* note 205, at 427.

²¹⁰ Frase & Weigend, *supra* note 81, at 333.

²¹¹ See STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], April 7, 1987, BGBl. I at 1074, §§ 68(1), 81b (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

²¹² Weigend, *supra* note 81, at 210.

²¹³ See Frase & Weigend, *supra* note 81, at 343.

²¹⁴ See *id.*; Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 3, 1965, 20 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 298 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 26, 1965, 20 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 281 (Ger.).

²¹⁵ Frase & Weigend, *supra* note 81, at 333.

²¹⁶ See STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], April 7, 1987, BGBl. I at 1074, § 52(1) (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

²¹⁷ Frase & Weigend, *supra* note 81, at 333.

²¹⁸ See Frase, *supra* note 17, at 822–23.

right to not incriminate themselves but if they speak, they have to do so truthfully and would commit perjury if they lied.²¹⁹

When it comes to the exclusion of evidence, the German approach is in some aspects comparable, in others different, from the situation in the United States. In general, German law prohibits the use of evidence for two reasons: first, evidence that is acquired in an unlawful way has to be excluded, and, second, some evidence is deemed so private that without the consent of the individual, courts cannot use it.²²⁰

The exclusion of evidence can be a reaction to a violation of procedural and constitutional law. While in the United States the exclusionary rule is mainly discussed as a deterrent for law enforcement, German jurisprudence, though not always clear, stresses “the ‘purity’ of the judicial process and the protection of the individual [constitutional] rights violated” as the main reasons.²²¹ Except for one case, the procedural code itself does not mandate the exclusion of evidence. “Section 136a(3) of the Code of Criminal Procedure declares that statements are inadmissible, even with the declarant’s consent, when they were obtained through the use of coercion, force, deceit, undue threats or promises, or after the declarant was administered narcotic or mind-altering drugs.”²²² In any other case, a violation of the law that regulates discovery can lead to the exclusion of evidence. Yet, just like in the United States, not every violation automatically makes evidence inadmissible. Courts balance the seriousness of the offense, the seriousness of the violation, and the importance of the evidence for the case in order to decide whether evidence should be excluded.²²³ In this regard, ideas of “standing,” “attenuation,” or “inevitable discovery” play a role just

²¹⁹ *See id.* at 822.

²²⁰ Frase & Weigend, *supra* note 81, at 334.

²²¹ *Id.* at 336. Deterrence of police misconduct is never cited as a reason for the exclusion of evidence. *See* Gless, *supra* note 202, at 129. American law enforcement has greater discretion than German or European officers, and a German officer could also have to face administrative sanctions in a case of misconduct. *See* John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: “Myth” and Reality*, 87 *YALE L.J.* 1549, 1560 (1978); Gregory Howard Williams, *Police Discretion: A Comparative Perspective*, 64 *IND. L.J.* 873, 875 & n.8 (1989). It might appear as if the German system follows an approach that emphasizes individual rights whereas in the United States the exclusionary rule is regarded as a pragmatic device to control law enforcement. Yet, through the exclusionary rule courts in the United States enforce constitutional values and rights as much as German courts do.

²²² Frase & Weigend, *supra* note 81, at 336; *see* STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 136a(3) (Ger.), *available at* http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

²²³ Frase & Weigend, *supra* note 81, at 336.

as much as they do in other systems.²²⁴ Particular differences between systems are more noticeable when it comes to the protection of rights that don't fall into the area of controlling police conduct. In Germany, this second set of exclusionary rules has its basis in the constitutional protection of privacy.²²⁵ Privacy, as interpreted by courts, is a broad and constantly changing concept. A privately spoken word (including soliloquy), for example, is considered privileged information.²²⁶ The basis of the privilege against self-incrimination can be seen as stemming from the constitutionally protected dignity of the person, although neither the German Constitution nor the Code of Criminal Procedure actually stipulates that right explicitly.²²⁷ Even if evidence was obtained legally (in accordance with, for example, wire-tapping laws) it might still be inadmissible under the privacy doctrine. Because of the broad spectrum of what can be private, German courts distinguish three spheres of privacy, and only the core, nucleus, or inner sphere of privacy must remain untouched. In that core sphere, the right to privacy is absolute:

The dignity of the person is inviolable and prevails against all the respect and protection of governmental power Even the predominating interests of the general public cannot justify an intrusion in the absolutely protected nucleus . . . of private life.²²⁸

Protections in the other spheres of privacy are less inflexible. For example, in a murder case where the suspect reflects on his crime and his motivation in his diary, these entries would be considered within the core sphere and could not be used in court even if the diary was seized legally. However, if there were entries that would address the sequence of events in a descriptive manner, the diary would at least be partly admissible because the information would be considered part of the mere "private sphere," an area that is

²²⁴ *See id.*

²²⁵ *Id.* at 334.

²²⁶ *Id.* at 334–35. This is why, for instance, a private individual's secret tape-recording of the defendant's words was held inadmissible in a fraud case. *See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 31, 1973, 34 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 238 (Ger.).*

²²⁷ *See Frase & Weigend, supra* note 81, at 335. "It would violate a person's dignity if he were forced to actively participate in his prosecution. This prohibition covers not only verbal statements but all other . . . conduct, including breathing into a breathalyzer, [participating in a polygraph exam,] or producing tangible evidence." *Id.*

²²⁸ Cho, *supra* note 165, at 25 (quoting Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 31, 1973, 34 BVERFGE 245 (Ger.)).

removed from the core and can be intruded upon as long as there is an overriding public interest in the evidence.²²⁹ In the United States, that diary would probably be admissible regardless of its content. The third tier is the so-called “social or business sphere”—what is said publicly and within the context of public transaction can be used in a court of law. Especially today, where many people share information online with various degrees of visibility and accessibility, it is difficult to establish which sphere is touched and if information can be used. Section 100c StPO, the law that regulates wiretapping, provides guidelines as to when an intrusion into the private sphere of an individual is legitimate, but it also states that any intrusion (e.g., recording) has to stop immediately if it becomes clear that the core of the right to privacy is touched.²³⁰ “Fruits” from such evidence must not be used.²³¹ Although a “fruit of the poisonous tree” doctrine is not generally applied in German criminal law.

In conclusion, neither one of the two criminal justice systems seeks the truth at all costs. Both procedural traditions distinguish between the importance of reconstructing historical events and the investigative practices necessary to reveal those events and facts. The latter aspect has almost the same relevance in both systems. Defendants enjoy rights that protect them from becoming mere objects of an investigation. Contrary to a common belief, German suspects are not expected to contribute to an investigation. They have the right to remain silent throughout the investigatory phase and can even lie in court. This again shows that even within an inquisitorial system, the rights afforded to a suspect can be stronger than the inquisitorial objective to find the truth. They might even go beyond what is afforded to suspects in an adversarial system. The same is true for the way evidence is collected and the question of whether or not it can be introduced in court. While in the United States, deterrence appears to be the main reason for excluding evidence, the German system is more centered on a value and individual rights approach. Both have, of course, a lot in common. Behind the deterrence rationale in the U.S. are the rights protected under the Constitution. And, a German police officer might be

²²⁹ *Id.* at 25.

²³⁰ STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 100c(5) (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

²³¹ *Id.*

thinking less about “values” in an investigation than about the likelihood that evidence will be thrown out.

D. Appellate and Postconviction Review

The systematic function of the protections discussed in the previous section is to make sure that only legitimate evidence is heard by a jury or used by a judge. But what happens after the trial? How, if at all, is truth protected after the verdict? This is what the following part will address—in a simplified way. The following analysis takes a holistic view, assuming that appeal proceedings are an integral part of a criminal justice system as a whole and that “what happens at one stage of procedure . . . is shaped by what has already occurred . . . , and also by expectations of what will occur later.”²³² It will be argued that the appellate process in Germany protects truth much more strongly than the American process, where questions of factual truth are hardly reviewable by themselves. Truth in Germany and many other European countries is a component of the whole system and reaches beyond the trial.

For most criminal justice systems, appellate or post-conviction review generally safeguards against erroneous conviction and, therefore, safeguards against individual and systematic injustice. Courts, scholars, and practitioners alike agree that “[a]ppellate review has now become an integral part of the . . . system for . . . adjudicating the guilt or innocence of a defendant.”²³³ To which degree, however, “guilt or innocence” refers to legal or factual guilt needs further clarification. It would be too optimistic to say that the American “appellate process is an essential part of the justice system’s apparatus for finding the truth.”²³⁴ In common law systems “appeals are generally oriented toward revealing mistakes of law”²³⁵ and have little or no interest in remedying factual innocence.²³⁶ It is not the appellate courts’ role to scrutinize the factual determinations of juries or trial judges.²³⁷ This appears to

²³² Frase, *supra* note 17, at 789.

²³³ *E.g.*, Griffin v. Illinois, 351 U.S. 12, 18 (1956).

²³⁴ Keith A. Findley, *Wrongful Conviction Issues: Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 592 (2009).

²³⁵ Roach, *supra* note 7, at 435; see Frase, *supra* note 17, at 839–40.

²³⁶ Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 348–49.

²³⁷ See PIZZI, *supra* note 17, at 222 (“[The American] appellate system does not review the

be in line with the adversarial (trial) setup of the American system that once the forum for resolving the dispute (the trial) closes, once the adversaries had their say, no further investigation, no further argument as to the actual truth or innocence of a defendant must be made. In his dissent in *In re Davis*,²³⁸ Justice Scalia explained:

This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is “actually” innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged “actual innocence” is constitutionally cognizable.²³⁹

Compared with the United States, the appeal’s process in Germany is more open to factual question and by that strengthens the tie between truth and justice. In most cases (cases that result in a sentence of up to four years), an appeal as to questions of fact and law exists.²⁴⁰

In the United States, appellate review is a fairly recent development.²⁴¹ Not until the beginning of the twentieth century did Congress and states establish the right to appeal a criminal conviction.²⁴² But even then, appeals were limited to specific crimes (mainly capital ones) and did not allow for a review of factual issues.²⁴³ This is noteworthy because the United States appeared to have been influenced by other common law countries like the United Kingdom and Canada who had passed appeal laws as a reaction to factually wrongful convictions.²⁴⁴ For example, the

most important issue of all, namely, the accuracy of the jury’s verdict.”); Frase, *supra* note 17, at 839–40; Giovanna Shay, *What We Can Learn About Appeals from Mr. Tillman’s Case: More Lessons From Another DNA Exoneration*, 77 U. CIN. L. REV. 1499, 1536 (2009).

²³⁸ *In re Davis*, 557 U.S. 952 (2009).

²³⁹ *Id.* at 955 (Scalia J., dissenting). In *McQuiggin v. Perkins*, the Supreme Court held, however, “that a plea of actual innocence can overcome AEDPA’s one-year statute of limitations” under which a state prisoner has only one year to file a federal habeas petition, starting from “the date on which the judgment became final.” *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013); 28 U.S.C. § 2244(d)(1)(A) (2012). The *McQuiggin* ruling has not resolved the issue of whether a prisoner may be entitled to habeas relief based on a freestanding actual-innocence claim.

²⁴⁰ Weigend, *supra* note 81, at 211.

²⁴¹ See Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 521–23 (1992).

²⁴² *Id.*

²⁴³ See Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1233–34 (2013).

²⁴⁴ See Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 DUKE J. COMP. & INT’L L. 1, 9 (2011).

Criminal Appeal Act (1907) in the United Kingdom established broad appellate review: “appeals were available to all persons convicted on indictment, information or inquisition; review of one’s conviction was permitted as of right on questions of law and with leave on questions of fact and mixed questions of law and fact.”²⁴⁵ In Canada a comparable legal situation existed.²⁴⁶ In the United States, “in 1889 and 1891, Congress granted defendants convicted in a range of cases a right of direct appeal to the United States Supreme Court.”²⁴⁷ But there is no constitutional right to appeal factual or legal errors.²⁴⁸ Nor did the idea of a factual review out of equity reasons (as was the case in the United Kingdom²⁴⁹) transpire into the American system. As tangled as the history of appeals in the United States is, Rossman notes that courts in the late nineteenth century could not think of a factually wrongful conviction that is not accompanied by errors of law, meaning that errors of fact would result in errors of law so that a review of errors of law would reveal those errors of fact:

Nor is there any danger that innocence will suffer for want of a writ of error. Criminal proceedings have thrown around the innocent so many guards, that the writ of error is almost useless. . . . If there be the least irregularity in the proceedings, the court must either grant a new trial, or recommend the party to a pardon. It may be said, with truth, that probably an instance cannot be found on record, of an innocent man suffering, for want of a writ of error in a criminal case.²⁵⁰

Today every state and the federal government provide some means of appellate review for defendants in criminal cases, though a right to appeal is not constitutionally protected.²⁵¹ In general, appellate review consists of three stages: “direct appeal, state

²⁴⁵ *Id.* at 9.

²⁴⁶ *Id.*

²⁴⁷ *Id.* This jurisdiction was later transferred to the federal circuit courts. *Id.*

²⁴⁸ *McKane v. Durston*, 153 U.S. 684, 687 (1894). In *Whitmore v. Arkansas*, Justice Marshall conceded “that the Constitution does not require States to provide appellate review of noncapital criminal cases.” *Whitmore v. Arkansas*, 495 U.S. 149, 167 (1990) (Marshall, J., dissenting) (citing *Ross v. Moffitt*, 417 U.S. 600, 611 (1974)).

²⁴⁹ Robertson, *supra* note 243, at 1237–38.

²⁵⁰ David Rossman, “*Were There No Appeal?*”: *The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 546–47 (1990) (quoting *Lavett v. People*, 7 Cow. 339, 339 n.a (N.Y. 1827)). Frase finds that view still current arguing that “in many appeals, the issue of law or fact are fairly close.” Frase, *supra* note 17, at 841.

²⁵¹ See Robertson, *supra* note 243, at 1221–22.

postconviction proceedings, and federal habeas corpus.”²⁵² A case originating in a state court will first go through the state’s judicial system.²⁵³ The defendant can raise many claims including the evidence admitted at trial and state law and federal constitutional claims.²⁵⁴ Once the last appeal is denied (potentially by the United States Supreme Court), a case becomes “final” and can only be challenged with, first, state postconviction proceedings and, second, federal habeas corpus.²⁵⁵ State postconviction proceedings are handled again by the state courts (the trial court up to the state supreme court).²⁵⁶ If unsuccessful, a petitioner can turn to federal courts and file a federal habeas corpus petition, which again can run through the whole court system including the Supreme Court.²⁵⁷

The guilt or innocence determination in state criminal trials is considered “a decisive and portentous event”²⁵⁸ which is why it is generally not possible for litigants to introduce new evidence of innocence during the direct appeal process.²⁵⁹ Appellate courts “limit their review to the evidence” that was introduced in the original trial and represented in the record.²⁶⁰ Trial courts establish “legal guilt” because “[t]he purpose of the trial stage from the State’s point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt.”²⁶¹ What is true for federal habeas courts is true for appellate courts in general: they “sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.”²⁶² The Supreme Court has been hesitant to allow a claim of actual (i.e., factual) innocence to play any role after a

²⁵² GARRETT, *supra* note 9, at 194.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 194–95.

²⁵⁶ *Id.* at 195.

²⁵⁷ *Id.* at 195–96.

²⁵⁸ *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

²⁵⁹ Wisconsin is the only state that

provides a mechanism for introducing new evidence of innocence, and new facts underlying claims of innocence-related error, into the direct appeal process. Appellate counsel for an innocent defendant can undertake new or additional investigation to determine if exculpatory witnesses or other evidence was overlooked at trial, and can then seek a new trial based on such newly discovered evidence.

Findley, *supra* note 234, at 611.

²⁶⁰ *Id.* at 605.

²⁶¹ *Ross v. Moffitt*, 417 U.S. 600, 610 (1974).

²⁶² *Herrera v. Collins*, 506 U.S. 390, 400 (1993).

conviction. As in the case of *Herrera v. Collins*, where a new trial—ten years after the defendant’s conviction—could be justified only if a constitutional violation existed, but not because of new facts alone.²⁶³ “Truth” itself is not a substantive value, at least not one that is equal to other procedural protections.²⁶⁴ That explains why the Supreme Court can take a pragmatic approach on innocence and argue that new trials would not produce a more reliable determination of guilt or innocence, since “the passage of time only diminishes the reliability of criminal adjudications” and “[t]o conclude otherwise would all but paralyze our system for enforcement of the criminal law.”²⁶⁵ Moreover, the adversarial structure of the justice process requires defense counsel to create an evidentiary record in the trial. With no official interest in the truth,

[i]t is common for state appeals courts to dispose of claims for lack of preservation or failure to make an adequate record. There are a number of different issues at stake—failure to object or make a legal argument, failure to ensure sufficient memorialization of what transpired at trial, and failure to make an adequate “offer of proof” or request an evidentiary hearing.²⁶⁶

This shows that the adversarial layout of the American trial reaches beyond the trial verdict in the sense that it limits the scope of what can be looked at on appeal. Only under exceptional circumstances can errors of fact reach the magnitude of a violation of the Constitution. In *Thompson vs. City of Louisville*,²⁶⁷ the Supreme Court held “that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm.”²⁶⁸ That means that (only) a completely arbitrary deprivation of liberty amounts to a violation of the Due Process Clause. When it comes to scrutinizing the decision

²⁶³ *Id.* at 393, 400–05.

²⁶⁴ Marshall argues that “there has been considerable convergence in how criminal appeals are conceptualized in common law and European civil law jurisdictions.” Marshall, *supra* note 244, at 2. He mentions human rights laws as one of the reasons for that convergence. *Id.* When it comes to the factual correctness of a verdict, the convergence might be less obvious because a review of the factual basis (that most European systems offer) is still missing in the United States. *Id.* at 44–45.

²⁶⁵ *Herrera*, 506 U.S. at 403 (citing *McClesky v. Zant*, 499 U.S. 467, 491 (1991); *United States v. Smith*, 331 U.S. 469, 476 (1947)); *id.* at 399.

²⁶⁶ Shay, *supra* note 237, at 1539.

²⁶⁷ *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

²⁶⁸ *Jackson v. Virginia*, 443 U.S. 307, 314 (1979).

of the fact finder, the Supreme Court is deferential:²⁶⁹ according to *Jackson*, an appellate court can only acquit on the basis of insufficient evidence if “after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”²⁷⁰ This standard is hard to meet, and in practice courts generally “uphold convictions unless there is essentially no evidence supporting an element of the crime.”²⁷¹

With habeas corpus petitions the situation is comparably difficult. Take for example the case of Jeffrey Deskovic, who was wrongfully convicted for the rape and murder of a high-school classmate.²⁷² DNA found in the victim exonerated him but his coerced confession created a narrative momentum that would keep Deskovic in prison for 16 years.²⁷³ Deskovic and his lawyer filed an appeal, which was denied because it reached the court four days late.²⁷⁴ Deskovic appealed this decision but the “judge[s] on the panel, ruled that the lawyer’s mistake did not ‘rise to the level of an extraordinary circumstance’ that would compel them to forgive the delay.”²⁷⁵ Procedure, for Deskovic, was elevated over innocence—which he tried to prove through his appeal. In 1996, the Antiterrorism and Effective Death Penalty Act allowed habeas corpus petitions only within one year after a conviction became final.²⁷⁶ The likelihood of being successful with a habeas corpus claim is slim: according to a report by Vanderbilt University Law School and the National Center for State Courts from 2007, only 7 out of 2384 habeas corpus petitions by state prisoners in noncapital cases were granted from 2003 to 2004; only 33 out of 267 habeas corpus petitions in capital cases were granted from 2000 to 2001.²⁷⁷

²⁶⁹ Findley, *supra* note 234, at 602.

²⁷⁰ *Jackson*, 443 U.S. at 319 (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972)).

²⁷¹ Findley, *supra* note 234, at 602.

²⁷² Fernanda Santos, *A Supreme Court Nomination Stirs Up Bad Memories*, N.Y. TIMES, June 10, 2009, at A19.

²⁷³ *Id.* For a description of the role of story-telling in wrongful conviction cases, see Ralph Grunewald, *The Narrative of Innocence, or, Lost Stories*, 25 LAW & LITERATURE 366, 367–68 (2013), which describes how the adversarial system of justice in the United States encourages the simplification of cases to easily recognizable narratives that can mislead juries and lead to wrongful convictions.

²⁷⁴ Santos, *supra* note 272, at A19.

²⁷⁵ *Id.*

²⁷⁶ NANCY J. KING ET AL., NAT’L CTR. FOR STATE COURTS, EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS 1 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf>.

²⁷⁷ *Id.* at 9–10. “In none of the 33 cases receiving relief did the federal court grant the writ

In continental Europe, appeals emerged much earlier than in England and can be considered “a persistent feature of continental criminal procedure.”²⁷⁸ They are now a fundamental right across Europe.²⁷⁹ Early on, appeals encompassed not only a legal but also a factual review of the case in question.²⁸⁰ Marshall argues that appellate review was a method associated with the growth of royal power and a way for European governments to exert power over lower courts.²⁸¹ This alone, however, cannot explain why a factual review has become a common feature among European appeals systems. The adoption of Roman-canon procedure that included ideas of the impartial inquisition might also have been an element that influenced the development of an appellate system inclusive of facts.²⁸² By allowing factual review, procedural justice was shaped differently than in the United States. Through this, they were instrumental in achieving procedural justice.

Germany has had appellate review since the fifteenth century. The modern appellate system is unified across the country. There is only one (federal) Code of Criminal Law (*Strafgesetzbuch*, StGB) and one (federal) Code of Criminal Procedure (*Strafprozessordnung*, StPO). Both have to be followed by all courts in all states. Criminal cases enter the criminal justice system either on the municipal/local level (*Amtsgericht*) or the circuit level (*Landgericht*). If a prosecutor determines that, if found guilty, a defendant would face a sentence of up to four years, the municipal court (consisting of one judge or a panel of one judge and two lay judges) has jurisdiction. If the prosecutor expects the sentence to be beyond four years, charges have to be filed at the circuit level (so called *Große Strafkammer*, generally consisting of three professional judges and two lay judges). In Germany, the majority of all cases will enter at the municipal level. Only 20 percent see a *Strafkammer*. A defendant who loses his case on the municipal level has two options to appeal the decision: first, he or she could appeal to a higher court and demand a new trial²⁸³ (called *Berufung*, conducted by that higher

based on a claim of factual innocence itself. Instead, the presence of an innocence claim made a grant of relief on a *different* claim more likely.” *Id.* at 10.

²⁷⁸ Marshall, *supra* note 244, at 11.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 40.

²⁸¹ *Id.* at 14–15.

²⁸² *See id.* at 13.

²⁸³ STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 312 (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/

court) or, if the defendant does not want to contest the factual basis but rather, the application of law (procedural or substantive), he could appeal to the state supreme court. A decision of this court is final. An appeal as to facts takes the form of a new trial that follows the same lines as the initial trial. The appellate court reviews the former judgment as correct or incorrect, but also hears old evidence again and also can hear newly found evidence. If this appeal is unsuccessful, a defendant who appealed as to facts (and law) in the municipal court can (in a second appeal) question the application of the law and ask the state supreme court for review. That means that for most (but not the most serious) criminal cases, two appeals are available. A case that enters the system on the circuit level can only be appealed once and only for legal mistakes (this is called *Revision*²⁸⁴) to the next higher (and highest) level, which is Germany's Federal Court of Justice.²⁸⁵ This court consists of five professional judges. At this point it might suffice to remark that "legal" review includes questions of how the judges conducted their investigation into the facts of the case but also the application of substantive criminal law. If the appeal is successful, the appellate court will basically reverse the judgment and order a new trial;²⁸⁶ if not, the decision becomes final. What errors are appealable? A *Revision* can only be "based upon" a violation of the law.²⁸⁷ Such a violation exists when a law was not or not properly applied. "Law" in this sense can be any law, including customary law, international law, or even foreign law as long as the proper application of that law would have had an influence on the decision. There is an overwhelming amount of literature on the question under which circumstances a decision is "based upon" an error. For some cases section 338 StPO enumerates a list of errors that automatically lead to a new trial. Among them are errors that relate to the jurisdiction of the court and other formal (but important) administrative aspects of the process.

Where truth and, in the German understanding, justice are protected the most in appellate proceedings is through the claim by

englisch_stpo.html (available to both prosecutor and defense).

²⁸⁴ *Id.* §§ 333, 337–38.

²⁸⁵ The reasoning behind the limited review of the more serious crimes is that a panel of at least three professional judges will conduct the factual reconstruction of the case.

²⁸⁶ Frase & Weigend, *supra* note 81, at 348.

²⁸⁷ STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 337 (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

one of the parties that the trial court did not determine the material truth properly.²⁸⁸ A violation of this principal duty (section 244 II StPO) is a valid reason for an appeal. The so called *Aufklärungsrüge* is one of the most commonly used appeals and is seen as an indicator for the importance of the true determination of the facts of a case.²⁸⁹ In practice, however, such an appeal is more often than not unsuccessful.²⁹⁰ That is because the formal requirements for such an appeal are difficult to meet. Furthermore, according to the appellate court, the trial court simply did not investigate the case sufficiently enough. But the *Aufklärungsrüge* has to be seen in relation to the whole process and especially the attorney's rights during the trial to make oral requests of proof, meaning that an attorney can ask the court to hear a specific witness or consider a specific piece of evidence. Within the inquisitorial setup, this is a powerful right: "The right to request the taking of additional evidence (which need not be presented but only identified by the requesting party) has become one of the most efficient tools of an active defense."²⁹¹ The court can refuse such a request but only for fairly limited reasons.²⁹² This is why it has been argued that with more possibilities for attorneys and prosecutors to influence the fact-finding process during the trial, the importance of the *Aufklärungsrüge* has been diminished.²⁹³ Yet, the right to appeal a violation of a trial court's duty to establish the truth is still considered a powerful way to admonish judges to explore the facts of a case thoroughly and truthfully.²⁹⁴

If the appeal fails, defendants still have two possible avenues left: a constitutional complaint and reopening of the proceedings if, for instance, new evidence is found. There is no deadline for the latter motion. Even after a decision by the highest appellate instance has become final, defendants can file a "constitutional complaint (*Verfassungsbeschwerde*)" and claim that this decision violates their constitutional rights—for example due process, equality before the

²⁸⁸ As stated earlier, section 244 StPO reflects the "inquisitorial principle characteristic" that the court is obligated to determine the facts of the case. Frase & Weigend, *supra* note 81, at 342 & n.176.

²⁸⁹ Johannes Wessels, *Die Aufklärungsrüge im Strafprozeß*, JURISTISCHE SCHULUNG, Jan. 1969, at 1, 1.

²⁹⁰ See Jehle, *supra* note 18.

²⁹¹ Frase & Weigend, *supra* note 81, at 342 n.175.

²⁹² *Id.* at 342.

²⁹³ Wessels, *supra* note 289, at 1.

²⁹⁴ *Id.* at 2.

law (Art. 3 GG), personal freedom (Art. 2 II GG), freedom of expression (Art. 5 I GG), the right to assembly (Art. 8 GG), and a general right to “unfold one’s personality” (Art. 2 I GG).²⁹⁵ These complaints are maybe the closest to habeas corpus but they are rarely used and rarely successful. If, even after years of incarceration, new evidence is discovered, the case can be reopened through an “extraordinary appeal”²⁹⁶ to the defendant’s benefit.²⁹⁷ In Germany, this appeal is thought to mediate the conflict between “legal certainty and justice.”²⁹⁸ But, it is not unique to Germany since comparable procedural instruments exist in many European countries²⁹⁹ in order to set aside final verdicts, which are inconsistent with “basic concepts of truth, justice, and legal proof.”³⁰⁰ New facts can include actual, newly found evidence but also, for example, expert testimony if it contains new facts or if it is of a higher quality than what was introduced in trial. Even an expert’s conclusion can be “new” if it was misunderstood or not contextualized properly. The same is true for a witness’s statement.³⁰¹ Like all justice systems, German criminal procedure has to balance aspects of finality and truth.³⁰² Although it is commonly acknowledged that the conviction of an innocent would be an “unbearable violation of justice,”³⁰³ the bar for reopening a case is rather high: in their motions for a new trial based on new facts, petitioners have to establish that the new facts must alone or in

²⁹⁵ Frase & Weigend, *supra* note 81, at 349.

²⁹⁶ Sascha Ziemann, *Aktuelle Entwicklungen auf dem Gebiet der Wiederaufnahme in Strafsachen*, in HRRS ONLINEZEITSCHRIFT FÜR HÖCHSTRICHTERLICHE RECHTSPRECHUNG IM STRAFRECHT 401, 401 (2006) (Ger.).

²⁹⁷ STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 359 (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html. Reopening of the proceedings concluded by a final judgment shall be admissible for the convicted person’s benefit “if new facts or evidence were produced, which, independently or in connection with the evidence previously taken, tend to support the defendant’s acquittal, or, upon application of a less severe penal norm, a lower penalty or an essentially different decision on a measure of reform and prevention.” *Id.*

²⁹⁸ MEYER-GOSSNER, *supra* note 97, at 1132.

²⁹⁹ Among them: Bulgaria, Denmark, the United Kingdom, Estonia, Finland, Greece, Norway, Austria, Poland, Romania, Russia, Sweden, Slovakia, Hungary, and Germany. See Sabine Swoboda, *Das Recht der Wiederaufnahme in Europa*, in HRRS ONLINEZEITSCHRIFT FÜR HÖCHSTRICHTERLICHE RECHTSPRECHUNG IM STRAFRECHT 188, 191 (Karsten Gaede eds., 2009).

³⁰⁰ Barbara Huber, *Criminal Procedure in Germany*, in CRIMINAL PROCEDURE IN EUROPE, *supra* note 150, at 322.

³⁰¹ MEYER-GOSSNER, *supra* note 97, at 1132.

³⁰² Neumann, *supra* note 27, at 64 (stating that the underlying reason for finality is the acceptance of the limitations of the human possibility to “know”).

³⁰³ *Id.* at 57.

connection with evidence previously adduced lead to an acquittal or a less severe penalty because a different law should have been applied. The court then has to establish that “the contentions set out in the motion are established,”³⁰⁴ and that a re-trial will materially improve the position of the convicted person. In practice, however, courts are often reluctant to recognize new facts as grounds for a new trial, and show some of the same deference to trial courts as we can see in the United States in appeal proceedings.³⁰⁵ Attorneys and scholars alike think of the reopening procedure as being an important yet very complex instrument³⁰⁶ and call for a practice of that instrument that is in line with its intended purpose.

Under specific and narrowly defined circumstances, a case can be reopened even if the defendant was acquitted (reopening *in malam partem*). In Germany, for instance, section 362 StPO allows for a reopening (and a bypass of the otherwise strong prohibition against double jeopardy) if an acquittal was based on a forged document or perjured witness.³⁰⁷ A few countries go even further and make a reopening possible if new evidence is found, which by itself or in combination with existing evidence suggests that the defendant has actually committed the crime he was charged with or an even more serious crime.³⁰⁸ In Germany, a proposed law that would allow a reopening in *malam partem* in serious cases if new “scientific” evidence was discovered could not reach a majority, although the proposal argued that, for instance, DNA evidence would put a different accent on the tension between finality and material justice (i.e., factual truth).³⁰⁹ The *Bundesrat*, initiator of that law, stressed the principle of factual truth when it supported its draft with the notion that it would be unbearable to maintain the finality of an acquitting verdict in the light of material truth and justice.³¹⁰ In

³⁰⁴ STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 370 (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

³⁰⁵ Findley & Scott, *supra* note 236, at 348–49.

³⁰⁶ Ziemann, *supra* note 296, at 402.

³⁰⁷ MEYER-GOSSNER, *supra* note 97.

³⁰⁸ Swoboda, *supra* note 299, at 191–92 (mentioning Bulgaria, Denmark, England, Estonia, Finland, Greece, Norway, Austria, Poland, Romania, Russia, Sweden, Slovakia, and Hungary as countries that allow the reopening of proceedings for and against the defendant).

³⁰⁹ BUNDESRAT DRUCKSACHEN [BR] 655/07 (Ger.); see Klaus Marxen & Frank Tiemann, *Aus Wissenschaft und Praxis: Die geplante Reform der Wiederaufnahme zuungunsten des Angeklagten*, ZIS 188, 189 (2008) (Ger.).

³¹⁰ BUNDESRAT DRUCKSACHEN [BR] 655/07 (Ger.).

the end, the proposed law could not prevail, and the constitutionally rooted principle of *ne bis in idem* (basically the double jeopardy clause, Art. 103 III GG) was considered to be stronger. Whether or not such a debate is thinkable in the United States is speculative. However, for Germany, it might underline the strong trust in the value of material truth.

In summary, the German criminal justice system provides many avenues for judicial review of questions of fact. Less serious cases can be appealed twice: the first appeal being basically a new trial and the second more comparable to appeals in the United States. More serious crimes can be appealed only once—for questions of law to the Federal Court of Justice. All cases can be reopened at any time if (among other possibilities) new facts are found. The function of that law is to be able to set aside final verdicts that are inconsistent with basic concepts of truth, justice, and legal proof.

III. SYSTEMATIC INEFFECTIVENESS?

What may be true in theory, sometimes doesn't apply in practice. In recent years, the German criminal justice system has faced significant criticism with regard to its claimed effectiveness in filtering out the innocent and only convicting the guilty.³¹¹ Besides the case of Rudolf Rupp mentioned at the beginning, there was, for instance, Horst Arnold, a teacher who was accused of and convicted for a rape he never committed.³¹² The alleged victim claimed that Arnold raped her, and this accusation alone was the basis for his conviction.³¹³ Arnold served his full sentence of five years in prison before he was able to prove his innocence.³¹⁴ False accusations in sexual assault cases that lack physical evidence appear to be a typical issue of the German justice system.³¹⁵ Other cases show

³¹¹ See, e.g., THOMAS DARNSTÄDT, *DER RICHTER UND SEIN OPFER: WENN DIE JUSTIZ SICH IRRT* (2013); SABINE RÜCKERT, *UNRECHT IM NAMEN DES VOLKES: EIN JUSTIZIRRTUM UND SEINE FOLGEN* (2008); Johann Schwenn, *Fehlurteile und ihre Ursachen—die Wiederaufnahme im Verfahren wegen sexuellen Missbrauchs*, 2010 STRAFVERTEIDIGER 705–711 (Ger.); Johann Schwenn, *Merkmale eines Fehlurteils*, 7 FORENSISCHE PSYCHIATRIE, PSYCHOLOGIE, KRIMINOLOGIE [FORENS. PSYCHIATR. PSYCHOL. KRIMINOL.] 258, 260 (2013) (Ger.).

³¹² *Five Years Jail for German Woman on Fake Rape Allegations*, NEW AGE (Sept. 13, 2013, 5:27 PM), http://www.thenewage.co.za/107102-1020-53-Five_years_jail_for_German_woman_on_fake_rape_allegations.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ See Schwenn, *Merkmale eines Fehlurteils*, *supra* note 311, at 260 (noting a “dramatic accumulation” of these kinds of cases and discussing similarities in all of the cases the author has defended).

familiar causes of wrongful convictions, such as the use of unreliable scientific evidence,³¹⁶ unprofessional and sloppy police work,³¹⁷ and false confessions.³¹⁸ One common cause of wrongful convictions in the United States—mistaken eyewitness identification—do not appear to be a major contributor to wrongful convictions in Germany.³¹⁹ Also, so far, not a single exoneration has been based on DNA evidence. There is too little data from which to draw conclusions, and even the known cases deserve more scrutiny than is possible here. What appears to stand out, however, is that in many cases personal or institutional tunnel vision played a role. The Rupp case is an example.

How was it possible that with confessions from intellectually-challenged suspects as the only evidence, a panel of judges would convict? The idea of a neutral investigation by the “most objective institution in the world”³²⁰ into the facts alone seems remote and weak when courts and prosecutors cling to their stories and decisions even in the light of compelling new evidence. This case, which has stirred an intensive debate and is procedurally multifaceted, deserves much more scrutiny than this article can devote, but two aspects that might have a bearing on the whole

³¹⁶ Donald Stellwag spent eight years in prison for a robbery he didn't commit. D. Schanzenbach, *Donald Stellwag kämpft bei "Maischberger" gegen einen Gutachter*, BERLINER KURIER (May 17, 2005), <http://www.berliner-kurier.de/archiv/justizirrtum-donald-stellwag-kaempft-bei-maischberger-gegen-einen-gutachter-8-jahre-unschuldig-im-knast,8259702,4097692.html>. A surveillance video in a bank took a picture of the back of the head of the robber. *Id.* Stellwag's conviction was based on an expert analysis that claimed that the ear of Stellwag matched the one of the person in the photo. *Id.* Stellwag was convicted despite eight witnesses that testified that the defendant was 350 kilometers away from the crime scene in Nuremberg. *Id.* Fingerprints from the crime scene did not match the defendant either. *Id.* Two weeks after Stellwag's release, the real robber was arrested for other robberies—he confessed to the crime Stellwag allegedly committed. *Id.*

³¹⁷ Harry Wörtz, who was wrongfully convicted of killing his ex-wife, was a “natural” suspect for the police. The victim was a police officer, and the investigation was led by the suspect's father in law, also a police officer. See Beate Lakotta, *Ich will mein Leben zurück*, 20 DER SPIEGEL 58, 58 (2012) (Ger.).

³¹⁸ Accused of having sexually assaulted his daughter, the defendant confessed for “tactical” reasons and was convicted to a three-year sentence. Years after his release, his daughter recanted her testimony. See *Sexueller Missbrauch an Tochter: Nur ein großer Justizirrtum?* SÜDKURIER (May 5, 2009), <http://www.suedkurier.de/region/hochrhein/waldshut-tiengen/Sexueller-Missbrauch-an-Tochter-Nur-ein-grosser-Justizirrtum;art372623,3755410>.

³¹⁹ Eyewitnesses suffer the same weaknesses everywhere but it would be (at least at this point) speculative to try to explain why only a few cases of eyewitness misidentifications are known. Maybe such cases haven't been exposed yet, maybe the German system has a different (more effective) method of evaluating eyewitness evidence.

³²⁰ This is how Franz von Liszt describes the German prosecutor. Franz von Liszt, *Vortrag im Berliner Anwaltsverein*, in DEUTSCHE JURISTEN-ZEITUNG [DJZ] 179, 180 (1901) (Ger.).

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system shall be addressed: First, tunnel vision was possibly the main contributing factor in the wrongful convictions of the defendants. Second, inquisitorialness and reviewability strongly promote factual truth but intrinsic mechanisms (often a lack of resources) suffocate their ability to prevent wrongful convictions.

As in many wrongful conviction cases in the United States, things started to go wrong early on in the investigation. The actual investigation didn't start until two years after Rudi Rupp had gone missing. During that time Rupp's daughters (then fourteen and fifteen years of age) wrote journal entries in which they stated how much they missed their father and that they were waiting for him to come back, and their mother even hired a psychic to help them find her husband.³²¹ But there was little to no official interest in finding Rudolf Rupp. Then rumors began to spread. A neighbor speculated that the whole family might have fed Rudolf to the dogs.³²² A different neighbor guessed Rupp might have been buried in a dung heap.³²³ Those new rumors made the police think again, so they continued their investigation into the case. They got a warrant to search the house and in due course the family was brought in for "informal" questioning.

The police had prepared thirty pages of highly suggestive questions: "didn't R.R. come home that night after all? Was there a fight? Did he maybe fall? Did you maybe get scared and didn't know what to do?" One of the daughters stated that her father hadn't come home that night and the officer—knowing that his statement would be false—replied, "your father came home," whereupon the daughter answered, "and what happened then?" All suspects had IQs between fifty and seventy and had no prior experience with law enforcement.³²⁴ Throughout the interrogation, all suspects made incriminating but contradictory statements regarding the sequence of the alleged events. There were no recordings of the interrogations—as they are not mandatory according to German law.

³²¹ Most facts of the case were covered in the media and are publicly available. I also interviewed Regina Rick, the defense attorney, who represented one of the defendants in the reopening proceedings. She also shared the manuscript of a conference talk she gave on that case with me ("An die Hunde verfüttert", Prozessbericht zu einem Justizirrtum, held on November 12, 2011, 28. Herbstkolloquium der Arbeitsgemeinschaft Strafrecht in Hamburg). That manuscript includes further details of the case.

³²² Jüttner, *supra* note 1.

³²³ *Id.*

³²⁴ *Id.*

In order to clarify what happened, police reenacted the crime at the home of the suspects and brought the suspects to help explain. Original footage of that reenactment was used in a documentary directed by Der Spiegel.³²⁵ In that video, it can be seen that one officer in particular interrupts the suspects often when he or she doesn't seem to "get it right." The officer also appears to comfort one of the suspects by hugging her. At one crucial point in the reenactment, the video is paused, and after the pause the officer continues by stating, "short addition: after a short conversation with Manuela (one of the daughters) in which it was explained to her that the events couldn't have happened the way she had explained, she agrees to, again, show what happened." She also states that her "mother hit the victim once" (something she had denied earlier). Another example of the suggestive interrogation style is the point at which the officer asked the fiancé of one of the daughters why he "cooked" the head of the victim.³²⁶ The officer volunteers, "because it makes smashing it easier."³²⁷ The suspect nods, and the officer continues by asking, "you thought of that before?" The suspect nods again.³²⁸

In the end, all four suspects confessed to a brutal crime of which the only proof of its existence are the confessions, since no trace of blood, bones, DNA, and so forth, could be found in the house or anywhere else. These confessions were recanted a week later, mainly on the grounds that the suspects were coerced. More interrogations followed but the suspects then kept silent. At many points in the video, the officers appear to be well meaning, and the atmosphere of the reenactment does not show signs of threat or force. Later, the presiding trial judge described the atmosphere as being "joyful." This, to him, was a "strong indication that the confessions [were] reliable and voluntary."

As in many cases of false confessions, confessions, even if recanted, develop a momentum of their own. In the Rupp case they are a result of police and prosecutorial tunnel vision as it has been described often in the literature. As much as justice systems mandate an impartial investigation, tunnel vision is hard to

³²⁵ Spiegel.TV, *Rekonstruktion eines Justizskandals: Vier Mörder und ein Todesfall?*, SPIEGEL ONLINE (Sept. 12, 2012), <http://www.spiegel.tv/filme/wissen-4-moerder-und-ein-todesfall>.

³²⁶ Jüttner, *supra* note 1.

³²⁷ *Id.*

³²⁸ *Id.*

regulate because it “is a natural human tendency that has particularly pernicious effects in the criminal justice system.”³²⁹ Moreover, “[p]roperly understood, tunnel vision is more often the product of the human condition as well as institutional and cultural pressures, than of maliciousness or indifference.”³³⁰ Once investigators think they have their suspect, the direction of their inquiry changes “from a fact-gathering ‘interview’ to a confession-seeking ‘interrogation.’”³³¹ The Rupp case is a prime example of tunnel vision.

“Rumors” that start spreading years after somebody disappears are not a strong indicator for a crime. They fall into the same category of soft triggers that in so many miscarriages of justice caught the attention of law enforcement.³³² Police started looking into a family that had little to no education, slightly outside of the community, and with low socio-economic status. They fit a specific type.³³³ Just as in other cases, no evidence linked the suspects to the crime—which is striking in light of the gruesomeness of the alleged crime. Police and the prosecution had focused on the suspects without looking (as would have been mandated by law) in other possible directions. Once the suspects—under pressure, as they later claim—confessed to the events, even in a very contradictory way, legal reality was created. As was explained earlier, since European systems do not recognize a “plea”, a confession is just one piece of evidence that needs to be contextualized by the prosecutor and the court. However, the prosecutor and the court in their respective discretion can use a confession as a basis for an indictment or conviction even if a confession was recanted. Tunnel vision as a psychological phenomenon can easily be perpetuated in a written verdict and on other levels of the justice system where belief perseverance or belief persistence play a strong role (see below). According to Regina Rick, the court in its verdict simply omitted the journal entries from the daughters, and in an interview, the prosecutor assumed they could

³²⁹ For an in depth analysis of the phenomenon of tunnel vision, see Findley & Scott, *supra* note 236, at 292.

³³⁰ *Id.*

³³¹ *Id.* at 293 n.11.

³³² In Chris Ochoa’s case, for example, employees of a Pizza Hut restaurant found it suspicious when he and his friend “toasted” in memory of the victim, so they notified a security guard who contacted law enforcement. Grunewald, *supra* note 272, at 378–379. For a discussion of the dramatization of everyday events, see *id.* at 380.

³³³ *See id.* at 380.

have been fabricated by the suspects (at a time when they were not suspects). It is within the discretion of a prosecutor or court to assume that much foresight in suspects that lack fundamental reasoning skills. Not mentioning these elements in the decision makes it at least possible that the court looked at the case with a narrow focus.

The case could only be appealed to the Federal Court of Justice (*Bundesgerichtshof*), the highest federal court. That court does not review questions of fact and denied the appeal on legal grounds.³³⁴ Among other aspects, the appellant claimed that the court did not fully investigate the facts (section 244 II StPO) of the case but supported that claim solely by referring to the arguments made by an attorney of one of the codefendants. The Federal Court did not find the claim sufficiently supported by simply referring to arguments a different attorney made—a formal argument.

Years later, when Rudolf Rupp's body was found, forensic evidence from the body of the victim clearly conflicted with the version of the events that were part of the confessions. According to the confessions, the defendants smashed the head of the victim first with a club then with a hammer. There was no indication of any physical abuse whatsoever—the head being fully intact.³³⁵ Prosecutors, however, only admitted that the story about the dogs was untrue, disregarding contradictions to the now available evidence and maintained their belief that a homicide was the cause of the death. The motion to reopen the case filed by the defendants was denied basically on these grounds. This does not seem to be in line with the state's charge to look at a case from an impartial perspective. Reopening proceedings safeguards factual truth especially in cases where a *Berufung* (appeal as to facts) is not possible because the case is tried before a Regional Court. This again is an example of systematic tunnel vision: "While biases thus affect the acquisition and interpretation of information, and thereby impede rational or logical adjustment of hypotheses or conclusions to reflect new information, natural tendencies also make people resistant to change even in the face of new evidence that wholly undermines their initial hypotheses."³³⁶ The defendants appealed the decision, and it was the Oberlandesgericht Munich (highest

³³⁴ Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 2006, 1 StR, 527/05 (Ger.), available at <http://www.hrr-strafrecht.de/hrr/1/05/1-527-05.php>.

³³⁵ Jüttner, *supra* note 1.

³³⁶ Findley & Scott, *supra* note 236, at 314.

state court) that made clear that the statements as to how the victim died are “essential facts that build the foundation of the conviction. They are, contrary to the findings of the Regional Court, not irrelevant.”³³⁷ The case had to be retried, and in that retrial all defendants were (although all of them were out of prison at that time) acquitted. Prosecutors and judges maintained their conviction that the defendants are guilty but stated they weren’t able to prove it. In the aftermath of the case, some of the involved judges and prosecutors defended their decisions. Others, like the presiding judge of the court that convicted the wife of Rupp and the fiancé of one daughter, Georg Sitka, admitted that humans with all their weaknesses are at work and that humans can err. Especially in cases with circumstantial evidence, tunnel vision can be a leading cause of wrongful convictions.³³⁸

One case alone is not sufficient to draw conclusions on the inquisitorial system as a whole. It has been argued that they are more vulnerable to systematic tunnel vision³³⁹ but a general assessment is difficult since inquisitorial systems differ in how they distribute power between the judiciary, defense and prosecution. For Germany, four problematic areas are usually addressed in the literature: despite all of its benefits, the dossier can trigger cognitive biases because it presents to the judge a specific representation of the events, which he or she will seek to confirm during the trial. “Dissonant” facts will be ignored and the version represented in the dossier “perseveres.”³⁴⁰ The indictment³⁴¹ can have a likewise prejudicial effect because judges consider

³³⁷ Oberlandesgericht [OLG] Mar. 9, 2010, MÜNCHEN, BESCHL. 8 (Ger.).

³³⁸ Given the lack of official data, general statements are difficult to make. A look at which cases are covered by the media shows that there are only a few cases of mistaken ID but many in which alleged victims claim a sexual assault. Courts have convicted suspects of multiple rapes of one victim even when forensic evidence showed that the victim was still a virgin.

³³⁹ Roach, *supra* note 7, at 401–02 (“[I]nquisitorial systems, which rely on the building of dossiers, may be particularly vulnerable to tunnel vision or confirmation bias because evidence that does not correspond with the investigator’s judgments can be discounted and excluded in the process of constructing the dossier.”). Even beyond the dossier, tunnel vision can influence how a verdict is written up so that it becomes practically hard to review. *Id.*

³⁴⁰ Bernd Schönemann, *Der Richter im Strafverfahren als manipulierter Dritter? Zur empirischen Bestätigung von Perseveranz- und Schulterchlussseffekt*, StV 2000, at 159, 161 (Ger.).

³⁴¹ A document that, among other information, includes the charges, relevant facts, and the evidence. See STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 200 (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

prosecutors their peers and (subconsciously) show solidarity with their assessment of a case.³⁴² Also problematic is the *Zwischenverfahren* (interlocutory proceeding), the procedural step that follows the indictment: the same judges who decide whether there is probable cause (*hinreichender Tatverdacht*) to open a trial, then actually conduct the trial.³⁴³ Criticism also focuses on the possibility of covering up mistakes that were made in the investigative stage.³⁴⁴ At the same time, however, as has been argued, the German inquisitorial system efficiently protects the truth in many other ways.

Lastly, all criminal justice systems have to deal with the human limits of the criminal process. Klaus Tolksdorf, former President of the Federal Court of Justice, phrases it this way:

Suppose the witness for the prosecution made a credible incriminating statement. There was no indication in the files nor the course of the trial that raised doubt as to her telling the truth. The verdict is materially wrong if it doesn't correspond with the truth. At the same time the judge is blameless. The defendant had to be convicted. It's a different situation when the court disregarded cognizable discrepancies in the testimony of the witness or if it didn't hear a witness for the defense or an expert on the credibility of a witness.³⁴⁵

Especially in cases with circumstantial evidence or where it is one person's word against another's the burden is on the court. And courts might give more weight to the statement of a victim³⁴⁶ but maybe not out of malice, maybe out of mere honest conviction. Findley argues that "[o]nly an advocate charged with responsibility for zealously pursuing the defendant's perspective . . . can overcome . . . [cognitive biases] and push for alternative understandings of the facts that might reveal the truth."³⁴⁷ In the light of the actual power structures within the adversarial system this trust into the adversarial idea might in the end be a cultural phenomenon, one that is more deeply rooted in what a society believes makes for an

³⁴² Schünemann, *supra* note 340, at 162.

³⁴³ STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 203 (Ger.), available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

³⁴⁴ See Bock et. al., *supra* note 73, at 338.

³⁴⁵ Geiger, *supra* note 6.

³⁴⁶ Schwenn, *Merkmale eines Fehlurteils*, *supra* note 310.

³⁴⁷ Findley, *supra* note 106, at 934.

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acceptable procedure than in what lawyers and scientists think is an effective way to establish truth. Yet, the same can be said about the trust inquisitorial systems put into the integrity of their institutions:

While there are differences in different inquisitorial jurisdictions, they all share the need to trust the integrity of the representatives of state institutions and, logically, a great and almost unquestioning faith that the legal guarantees of the system at each stage in the process will prevent the state, in whatever guise, from going off the rails. Without such faith, the very basis of the system would be called into question. Paradoxically, this is precisely one of the strengths of inquisitorial justice: one can feel secure in the hands of a prosecutor, expert, or judge, from a legal culture where integrity and non-partisanship are expected and continually reinforced by training and experience. That may be preferable to being forced to place one's fate in the hands of a lawyer who may or may not do a good job, depending, among other things, on how much he is paid.³⁴⁸

The comparative debate needs to acknowledge systematic differences but also has to see procedure within the particular cultural context.

IV. CONCLUSION

This article started out with the thesis that justice and truth are inseparable and that a (or any) goal of a criminal justice system (like finding and valuing truth) can only be as strong as it is supported by the system as a whole and that the German system at least on the system level employs more procedural safeguards than the American to make sure that these goals are met. Both systems see factual truth as an important feature and the trial as "the paramount event for determining the guilt or innocence of the defendant."³⁴⁹ While each system installs regulations that address what kinds of and how evidence passes into the trial, they differ significantly in how questions of factual truth or actual innocence are handled after the trial. The German system promotes truth throughout the whole system, including appellate and post-

³⁴⁸ Brants, *supra* note 4, at 1080–81 (footnote omitted).

³⁴⁹ *Herrera v. Collins*, 506 U.S. 390, 416 (1993).

conviction proceedings. The American criminal justice system does less so. The true story of a case has to be developed in court and whether or not this story is actually true is more or less unreviewable. Appellate or “federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.”³⁵⁰ German criminal procedure provides remedies beyond the trial phase in order to guarantee a conviction rests (and remains) on factually true grounds. Looking at a criminal justice system as a whole the German (and other European) system allows challenges for fact that go beyond the American system. Each system has a strong interest in establishing a factually correct basis for a conviction but this interest changes after the trial and with it the idea of justice that is intrinsic to each system. This is not to say that the German or any other European system is better at avoiding wrongful convictions. There is no empirical data to support that notion (or the opposite). The German system also fails in practice. But whether or not these failures are endemic of the system itself is questionable and needs further investigation. What could be shown, however, is that factual truth is to a much greater extent a feature of justice as it is understood in Germany or Europe. Truth, so it appears, is a matter of law and justice and makes it easier for claims of actual innocence to actually be heard. Kent Roach convincingly argued that the “end result of any reform will inevitably be shaped by the particular legal and political cultures of each jurisdiction.”³⁵¹ The influence of legal cultures could only be addressed peripherally. But culture matters. It might be a question of legal culture who determines who “owns” truth and who determines when the search for it ends—the jury or the highest court in the country. Each has benefits and disadvantages but to flesh them out would go beyond the scope of this paper. What this article hopes to have shown is that the more justice is understood as a matter of truth, the more successful any future reform will be that wants to protect the innocent.

³⁵⁰ *Id.* at 400.

³⁵¹ Roach, *supra* note 7, at 424–25.