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German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?†

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INTRODUCTION

Numerous American writers have pointed to foreign systems of criminal justice as a possible source of ideas for reforming the American system.¹ In previous articles, the authors have suggested that most of these earlier works were seriously flawed in a number of respects.² First, these earlier works failed to study each foreign

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system as a whole, and looked only at those isolated parts which were deemed most suitable for borrowing. Second, these works focused on formal rules and structures, disregarding data on how the latter actually functioned in foreign and American systems. Third, rather than seeking to discover smaller differences between foreign and domestic systems more likely to offer feasible reform transplants, these works suggested borrowing aspects of the foreign systems which were the most strikingly different from analogous procedures in the United States. Applying these principles to a study of the French criminal justice system, Professor Frase identified a number of French practices which suggest feasible and desirable American reforms.³

This Article seeks to apply the same system-wide, theory-and-practice approach to a reform-oriented assessment of the German system. Part I of this Article presents a nutshell summary of contemporary German criminal justice, with comparisons to the American system. Part II summarizes the major similarities and differences between the two systems, and evaluates the potential for basing American reforms on German practices.

This Article concludes that, despite major differences, many underlying similarities can be found in the two countries, and that the two systems of criminal justice appear to be converging toward a single model that incorporates both adversarial and "inquisitorial" elements. This convergence suggests that the two systems are sufficiently compatible to permit American reforms based on certain desirable features of the German system. Many of these features are remarkably similar to the French practices previously proposed as models for American reforms; however, borrowing from Germany may be easier than borrowing from the French because the German system is more similar to the American system. Finally, the present study shows the importance of examining all parts of each system, in practice as well as in theory, to discover the interactions between rules at different stages in the criminal justice system.

³ Frase, Comparative Criminal Justice, supra note 2, at 574–76. For a convenient summary of the French criminal justice system, see Richard S. Frase, Introduction to THE FRENCH CODE OF CRIMINAL PROCEDURE 1–40 (Gerald L. Kock & Richard S. Frase trans., 1988) [hereinafter Frase, FRENCH CODE].
I. A NUTSHELL SUMMARY OF THE GERMAN CRIMINAL JUSTICE SYSTEM (WITH COMPARISONS TO THE UNITED STATES)

German criminal justice is part of a federal system which shares some features with the American system. The German Penal Code and the Code of Criminal Procedure are federal enactments that apply in all German states. Attorneys are licensed on a nationwide basis. But the courts, except the Federal Court of Appeals and the Federal Constitutional Court, and most prosecutorial offices and police forces, are organized on a state level.


Most of the statistical data cited is for the former West Germany in the year 1989, the last full year before the unification with East Germany.

5 Strafgesetzbuch (Penal Code) [StGB], I Bundesgesetzblatt 945 (1987). The original version of the Penal Code dates from 1871. It has been amended many times but has more or less retained its original structure.

6 Strafprozeßordnung (Code of Criminal Procedure) [StPO], I Bundesgesetzblatt 1074 (1987). Like the Penal Code, the Code of Criminal Procedure has been amended several times but has retained the structure of its original version of 1877.

7 See Grundgesetz für die Bundesrepublik Deutschland (Basic Law) [GG], Bundesgesetzblatt 1, art. 95 (1949), which provides for Federal appeals courts in ordinary, administrative, tax, labor, and social security matters. Articles 93 and 94 Grundgesetz provide for a Federal Constitutional Court with exclusive jurisdiction in Federal constitutional matters. Id. arts. 93 & 94.
A. Judges and Courts

1. Selection and Education of Judges and Prosecutors

In contrast to most jurisdictions in the United States, German prosecutors and judges are not elected but are instead appointed by the Minister of Justice. These prosecutors and judges receive substantial training after graduating from law school. German law provides for a two-year internship period during which young lawyers rotate among various public and private legal posts; the internship requirement applies not only to future judges and prosecutors, but to all lawyers.8 Toward the end of their internship period, lawyers take the bar examination. Those who pass the bar have the right to practice law anywhere in Germany.9 State justice administrations choose newly practicing judges and prosecutors from the top quarter of examinees. During the first three years of state service, these prosecutors and judges work at various court levels before being given tenure as either judges or prosecutors.10 Later in their careers, civil service lawyers sometimes alternate between judicial and prosecutorial assignments.11 It is fairly unusual, however, for a private attorney later to become a judge or prosecutor, or vice versa.

2. Criminal Courts and Offense Classifications

German law provides for three degrees of infractions: felonies (Verbrechen) are criminal offenses punishable with at least one year of imprisonment; misdemeanors (Vergehen) are all other criminal offenses, punishable with either a fine or with imprisonment;12 petty infractions (Ordnungswidrigkeiten) are not deemed to be criminal (in the sense of carrying moral blame or stigma) and can only be punished with a fine and the temporary loss of driving privileges.13 Many of these petty infractions are the kinds of public order or "victimless" crimes (disorderly conduct, prostitution) that clog American criminal courts and aggravate problems of police and prosecu-

8 See Deutsches Richtergesetz (German Judges' Statute), I BUNDESGESETZBLATT 713, § 5b (1972) [hereinafter GJS].
9 Id. § 5; Bundesrechtsanwaltsordnung (Federal Statute on Attorneys), I BUNDESGESETZBLATT 565, §§ 4, 5 (1959).
10 Cf. GJS, supra note 8, §§ 11, 12.
11 This is more common in the Southern states than in the Northern states of Germany.
12 See StGB § 12.
torial discretion. The Germans handle most of the latter cases through either a streamlined administrative procedure without court trials, or by complete deregulation of the conduct.

The structure of German trial courts is vaguely related to the nature of the infractions. Both misdemeanors and petty infractions (the latter only if the defendant refuses to accept a fine decree issued by an administrative agency) are tried in county court (Amtsgericht), either by a single professional judge (Strafrichter), or, if the case concerns a more serious offense, by a mixed court (Schöffengericht) consisting of one professional and two lay judges. Felonies can also be tried in the Schöffengericht, but serious felony cases are tried in district court (Landgericht) before a different mixed panel composed of two or three professional and two lay judges (Große Strafkammer). Unlike the United States system, there is no close connection between the category of offense charged and the jurisdiction of the court. To some extent, jurisdiction depends on the prosecutor’s choice which, in turn, is informed by the penalty expected in the particular case.

The German system does not have juries, and instead uses lay judges sitting alongside professional judges. Because they are involved in the trial, judgment, and sentence of all but the most petty cases, lay judges nevertheless have a considerable impact in crimi-


15 See Weigend, Legal and Practical Problems, supra note 14, at 67–72 (adult homosexuality, prostitution in permitted areas, and vagrancy).

16 See PIA, supra note 13, §§ 67, 68.

17 Gerichtsverfassungsgesetz (Court Organization Act), I Bundesgesetzblatt 1077, § 25 (1975) [hereinafter COA]. A single judge can impose a maximum of two years imprisonment. Id.

18 See id. §§ 24, 28, 29. The Schöffengericht can impose a maximum of four years imprisonment. Id. § 24(2).

19 Id. §§ 74, 76. The COA also contains a list of 23 offenses (most of which involve the death of a person) of which Große Strafkammer has exclusive jurisdiction. COA, supra note 17, §74(2).

20 Schöffengericht does not have jurisdiction if the prosecutor files an information with the district court because of the special importance of the case. Id. § 24(1), no. 3; see also infra text accompanying notes 152–55.

21 A common law type jury was provided for in the original Imperial Code of Criminal Procedure, but was abolished in 1924. Gerhard Casper & Hans Zeisel, Lay Judges in the German Criminal Courts, 1 J. Leg. Stud. 135, 135–36 (1972); see also Langbein, Mixed Court and Jury Court, supra note 1, at 195–98.
nal matters. In 1989, German prosecutors filed twenty-two percent (\textit{Schöffengericht} nineteen percent; \textit{Große Strafkammer} three percent) of all informations with a panel including lay judges, while the remaining seventy-eight percent were presented to a single professional judge.\textsuperscript{22} Because sole professional judges have exclusive jurisdiction of citizen's appeals against administrative fine decrees and penal orders, their overall share in criminal matters is larger (approximately ninety-one percent).\textsuperscript{23}

Mixed courts of lay and professional judges are almost completely unknown in the United States, where all non-petty offenses are triable to a lay jury. The common law jury determines only guilt, not sentence. Moreover, when guilty pleas and jury waivers are factored in, juries probably account for only about five percent of American criminal trial court dispositions.\textsuperscript{24} German law also provides for trial panels consisting of five professional judges. In the German state courts of appeal (\textit{Oberlandesgerichte}), such panels are responsible for trying serious offenses against the state, such as treason and the formation of terrorist gangs.\textsuperscript{25}

\section*{B. The Investigative Roles of Prosecutors and the Police}

Prosecutors in Germany are responsible for investigating and prosecuting criminal offenses.\textsuperscript{26} For that purpose, they have fairly broad investigatory authority; they can summon suspects, witnesses and expert witnesses.\textsuperscript{27} In urgent situations, prosecutors can order searches and seizures\textsuperscript{28} and conduct examinations of the body of a suspect or a witness.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{22} \textit{See} Statistisches Bundesamt, Staatsanwaltschaften 1989 14 (1991) [hereinafter Statistisches Bundesamt 1].
\item \textsuperscript{23} \textit{See} Statistisches Bundesamt, Rechtspflege, Reihe 2: Zivilgerichte und Strafgerichte 1989 124, 144, 156 (1991) [hereinafter Statistisches Bundesamt 2].
\item \textsuperscript{24} Yale Kamisar et al., \textit{Modern Criminal Procedure} 17–19 (7th ed. 1990). Seventy to 90\% of non-dismissed felony charges result in a guilty plea, while misdemeanor cases have even higher guilty plea rates. \emph{Id.} Sixty to 65\% of felony trials are by jury. \emph{Id.} Constitutional jury rights apply to all misdemeanors punishable with over six months imprisonment, and most state laws also provide jury trials for lesser offenses, but bench trials are still often in the majority. \emph{Id.; see also} Bureau of Justice Statistics, U.S. Dep't of Just., \textit{Bulletin: Case Filings in State Courts}, 1983 2 (Oct. 1984) (misdemeanor filings in 24 states generally comprised 85–95\% of total criminal trial court filings).
\item \textsuperscript{25} \textit{See} COA, supra note 17, § 120.
\item \textsuperscript{26} StPO § 160(1). The Code provides the State's Attorney's Office with a neutral role. The prosecutor shall investigate exonerating as well as incriminating circumstances. \emph{Id.} § 160(2).
\item \textsuperscript{27} \emph{Id.} § 161a.
\item \textsuperscript{28} \emph{Id.} §§ 98(1), 105(1).
\item \textsuperscript{29} \emph{Id.} §§ 81a(2), 81c(5).
\end{itemize}
The role of the police is theoretically restricted to doing what is immediately necessary at the scene of an offense, such as interrogating possible witnesses, arresting suspects, and seizing evidence on the spot. However, the great majority of police officers are also "auxiliary officers" of the prosecutor's office, and can be dispatched to conduct further investigations. Auxiliary officers have largely the same authority as prosecutors to order and perform immediately necessary measures in the interest of an efficient investigation.

In practice, most criminal investigations, except in homicide and economic matters, are conducted independently by the police. Only after the police have deemed the investigation complete do the auxiliary officers report the case to the public prosecutor, who then determines if additional information is necessary in order to decide whether to bring charges against the suspect.

C. Defense Counsel

In trials held in German district courts, counsel is mandatory and will be appointed (even against the defendant's will) if the defen-

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30 Section 163 of the Code of Criminal Procedure provides: "(1) The agencies and officers of the police service shall investigate criminal offenses and arrange for everything necessary to prevent the obfuscation of the matter. (2) The agencies and officers of the police service transmit their file to the State's Attorney's Office without delay . . . ." StPO § 163.

This provision shows that the legislature meant to limit the police to conducting a preliminary investigation and to securing relevant evidence. See Dr. Hans Achenbach, in Wassermann, supra note 4, § 163, no. 3. But see Franz-Ludwig Kneumeyer, Staatsanwaltschaft und Polizei, in SCHLUCHTER & LAUBENTHAL, RECHT UND KRIMINALITAT 471 (1990) (arguing that prosecutor and police both have authority to investigate crime).

31 Section 152(1) of the COA provides that "auxiliary officers" of the State's Attorney's Office are obliged to carry out orders of the State's Attorney's Office. COA, supra note 17, § 152(1). When this provision was enacted in 1879, the legislature had envisaged the creation of a special prosecutorial police force, as then existed in France. See Schoreit, in Pfeiffer, supra note 4, § 152. These plans were, however, never carried out. In the present system, auxiliary officers serve two masters. They are members of a State or Federal police force whose main function is to keep order and to prevent crime; and they are subject to the directives of State's Attorney's Offices engaged in the prosecution of crime. In practice, prosecutors request the services of (local) police departments rather than approaching individual officers. Not every member of the police is at the same time an auxiliary officer of the State's Attorney's Office. State legislation typically declares holders of certain ranks within the police force to be auxiliary officers, usually excluding the lowest and the highest ranks. See, e.g., North Rhine-Westphalian Verordnung über die Hilfsbeamten der Staatsanwaltschaft, 1982 Gesetz und Verordnungsblatt für das Land Nordrhein-Westfalen 592.

32 They can, under exigent circumstances, order, and immediately carry out, searches and seizures as well as bodily examinations. StPO §§ 81a(2), 81c(5), 98(1), 105(1).

33 See Erhard Blankenburg et al., Die Staatsanwaltschaft im Prozeß [Sozialer Kontrolle] in STRAFRECHT UND KRIMINOLOGIE 305 (1978); ROXIN, supra note 4, at 59.

34 German law does not recognize a defendant's right to defend himself. The rationale of the "right" to counsel in Germany is the public interest in conducting the criminal process
The defendant has not retained private counsel. There is no public defender system in Germany. The presiding judge of the trial court can appoint any member of the local bar, but the judge must, to the extent feasible, comply with the defendant's desire to have a particular attorney appointed.

If the trial is to be held in county court, which occurs in ninety-eight percent of all cases, the defendant has no general right to appointed counsel. Rather, counsel is appointed only if one or more of the following conditions apply: a) the defendant is charged with a felony; b) the prohibition to practice a profession may be ordered; c) the defendant has spent at least three months in pretrial detention; d) a psychiatric examination or treatment of the defendant may be necessary; e) the previous defense counsel was discharged by the court because he was suspected of being an accomplice in the offense to be tried; f) the facts or law of the case are extraordinarily complicated; or, g) the defendant is unable to conduct his own defense. In these cases, no trial can be held without the participation of defense counsel; the defendant cannot waive his "right" to counsel. One study found that about forty percent of defendants in county court were tried without a defense attorney.

When defense counsel is appointed, the attorney can claim his regular fee from the defendant only if the latter is able to pay; otherwise, counsel receives a small fee from the state (approximately two hundred dollars for a one-day trial).
In the United States, appointed counsel is constitutionally required only if the defendant has received a custody sentence. State laws, however, often confer broader rights.\footnote{See generally Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963). Cf. Minn. R. Crim. P. 5.02 (1994) (right to counsel in all cases punishable by incarceration, regardless of actual penalty imposed).} Comparison of total expenditures for indigent defense in the two countries (adjusted for differences in population and crime rates) indicates that the American budget is significantly higher than that of the Germans.\footnote{See Commission Justice Penale et Droits de l'Homme, La Mise en Etat des Affaires Penales Rapports 142 (1991) which reports that estimated expenses per inhabitant for indigent defense in the United States are 20 times higher than in France, and that German expenses are five times higher than in France. This would make U.S. expenses per inhabitant four times the German figure; after allowing for the higher U.S. criminal caseload per inhabitant, indigent defense expenditures per case would still be about 2.5 times higher in the United States. See infra note 215.} This may reflect the more active role of the parties in American pretrial and trial proceedings.

D. Pretrial Procedure

1. The Role of Judges

As has been previously discussed, the investigation and preparation of the prosecution is the domain of the public prosecutor's office and, in practice, of the police. The office of the investigatory judge, who still dominates pretrial procedure in many other continental systems, was abolished in Germany in 1975.\footnote{See, e.g., Strafprozeßordnung [StPO] §§ 91-112 (Aus.); Code de procédure pénale [C. Pr. Pén.] arts. 79-190 (Fr.); Ley de Enjuiciamiento Criminal [L.E.C.] arts. 299-645 (Spain).} German magistrates play a similar pretrial role as judges in the United States. These magistrates examine the legality of intrusions of citizens' civil rights (for example, arrest, pretrial detention, search, seizure, and surveillance of telecommunications) which may become necessary in the course of the investigation.\footnote{The German expression is Ermittlungsrichter (judge of the investigation). Ermittlungsrichter is a judge of the county court which has jurisdiction of the area in which the act in question is to be carried out. See StPO § 162(1).}

The German Code of Criminal Procedure regards prior authorization of such intrusions by a magistrate as the rule.\footnote{See id. § 81a(2) (bodily examination), § 98(1) (seizure), § 100(1) (seizure of mail), § 105(1) (search), § 111(2) (roadblock). Pretrial detention can only be ordered by a magistrate. Id. § 114(1).} In practice, the requirements of urgency are often assumed to exist. This means...
that prosecutors, or police, initially act on their own and that the role of the magistrate is reduced to subsequently controlling the legality of the investigative act, either in order to give lasting effect to a provisional measure (for example, a wiretap),\(^{49}\) or upon appeal of the aggrieved citizen (as against a seizure).\(^{50}\) The prosecutor can request a magistrate to interrogate a witness or a suspect, or to perform other acts of investigation.\(^{51}\) Transcripts of such judicial interrogations, or the testimony of the magistrate, can be produced as evidence at the trial under certain conditions.\(^{52}\)

2. Arrest and Pretrial Detention

German law permits warrantless arrests in only two situations. First, any German citizen may arrest a person caught in a criminal act if the suspect's identity cannot be established or if there is a danger of flight.\(^{53}\) Second, a prosecutor or auxiliary police officer may arrest the suspect if the requirements for pretrial detention are met,\(^{54}\) and if there is not sufficient time to apply for a warrant (danger in delay).\(^{55}\) As discussed below, the requirements of pretrial detention include: a) urgent suspicion; b) a proper basis for detention (danger of flight, tampering with evidence, or further crime); and, c) proportionality of detention relative to the severity of the offense and the expected penalty.

\(^{49}\) A wiretap order can be made provisionally by a prosecutor, but it becomes invalid automatically after three days unless confirmed by a magistrate. \textit{Id.} § 100b(1). The same applies to the secret taping of private conversations. \textit{Id.} §§ 100c(1), 100d(1).

\(^{50}\) StPO § 98(2). The Code of Criminal Procedure does not provide for appeals against arrest, searches, bodily examinations and similar measures authorized by a prosecutor or an auxiliary officer. \textit{See generally id.} There is general agreement that such appeals must be available, but opinions differ with respect to jurisdiction and to requirements of standing. For an overview, see \textit{Kühne, supra} note 4, at 188–92.

\(^{51}\) StPO § 162.

\(^{52}\) \textit{See id.} §§ 251(1), 254(1). These provisions contain exceptions to the general rule that testimony of witnesses cannot be replaced by protocols. \textit{Id.} § 250. According to the jurisprudence of the Federal Court of Appeals, an \textit{Ermittlungsrichter} can testify as to the deposition of a spouse or relative of the defendant even if the relative claims a testimonial privilege at the trial. 2 Entscheidungen des Bundesgerichtshofes in Strafsachen (Decisions of the Federal Court of Appeals in Criminal Matters) [BGHSt] 99 (1952); \textit{cf.} StPO § 252.

\(^{53}\) StPO § 127(1).

\(^{54}\) \textit{Id.} § 127(2). The police can also arrest a suspect if the requirements for a citizen's arrest are met. \textit{Id.}

\(^{55}\) In contrast, the U.S. Constitution permits warrantless arrests for felonies even when a police officer would have sufficient time to obtain a judicial warrant. United States v. Watson, 423 U.S. 411, 411–14 (1976). According to the laws of many states, however, warrantless arrests for misdemeanors can be performed only if the offense was committed in the officer's presence. \textit{Kamisar et al., supra} note 24, at 214.
German rules on arrest appear to be somewhat more restrictive than American arrest rules in that Germany requires exigent circumstances for any warrantless arrest. However, in Germany any set of facts indicating a person’s possible involvement in a criminal offense may trigger the police officer’s “urgent suspicion” (dringender Tatverdacht); the officer’s subjective opinion that the requirements of the arrest are met is sufficient. In addition, evidence obtained as a consequence of an unlawful arrest is excluded only if the unlawful deprivation of liberty was intentionally employed to make the defendant talk.

Some of these differences are related to the differing functions of arrest in the German and American systems. Arrest in the United States marks the formal starting point of an individualized investigation, with a string of possible ramifications for the suspect, and is closely related, in time, to the initial formulation of criminal charges. In the German system, provisional arrest (vorläufige Festnahme) is but one of several steps in an investigation. A German prosecutor can, and often does, conduct an investigation and even file charges without ever arresting the defendant. Arrest is seen as necessary only if, and when, there is concern that the defendant may try to foil the process by absconding.

By the end of the day following the arrest, arrested defendants must be released or brought before the Ermittlungsrichter. American procedure codes likewise often contain “prompt appearance” rules requiring arraignment within twenty-four to forty-eight hours after arrest. The German magistrate, upon motion of the prosecutor, orders the defendant to be detained before trial if: a) there is

56 See KLEINKNECHT & MEYER, supra note 4, § 112, no. 5. There must be a “high probability” that the suspect has committed a criminal offense. Cf. Illinois v. Gates, 462 U.S. 213, 214–18 (1983) (holding that probable cause means a “fair probability” under the “totality of the circumstances”).

57 See Boujong, in Pfeiffer, supra note 4, § 127, no. 35; Günter Wendisch, in Löwe-Rosenberg, supra note 4, § 127, no. 35; Dr. Dietmar Krause, in Wassermann, supra note 4, § 127, no. 21. There is a split of opinion as to whether a citizen’s arrest is permissible upon mere suspicion of an offense or whether it is justified only if the arrestee has actually committed an offense. See KLEINKNECHT & MEYER supra note 4, § 127, no. 4.


59 There are no official statistics on vorläufige Festnahme, nor do we know of any quantitative empirical study on this subject.

60 StPO § 128(1); see also GG art. 104, sec. 3.

strong reason to believe that the defendant is actually guilty; and, b) certain facts give rise to the assumption that the defendant, if left at large, would flee or tamper with the evidence, or that he would commit further serious offenses of the same kind as those of which he is suspected. As a general rule, pretrial detention must be avoided if the loss of liberty involved would be out of proportion with the importance of the case and the anticipated penalty. In spite of this rule, an empirical study has shown that only fifty-five percent of defendants who were held in detention before trial eventually received a sentence of imprisonment. Pretrial detention is limited to six months but can be extended by a decree of the Court of Appeals. Defendants who have been acquitted or against whom charges have been dismissed can claim compensation in the amount of the German equivalent of approximately twelve American dollars for each day spent in pretrial detention.

62 StPO § 112(1), (2). According to § 112(3), neither danger of flight nor of tampering with evidence is required when the defendant is suspected of genocide, murder, manslaughter, belonging to a terrorist gang, or causing an explosion. Id. § 112(3). This section conflicts with the principle of proportionality (which permits restrictions of liberty only if they can be shown to promote a legitimate goal) or, alternatively, with the presumption of innocence. The Federal Constitutional Court therefore upheld the constitutionality of this section solely based on the understanding that danger of flight can easily be assumed when there is strong suspicion of the named offenses. § 112(3); 19 Entscheidungen des Bundesverfassungsgerichts (Decisions of the Federal Constitutional Court) [BVerfGE] 342, 350 (1965).

63 StPO § 112a. This provision, which lists several offenses (including aggravated battery and aggravated theft) for which preventive detention is permissible, is constitutionally suspect on various grounds; yet its constitutionality has been upheld. 35 BVerfGE 185 (1973). The practical relevance of preventive detention is insignificant. In 1989, 96% of all warrants for pretrial detention were based on flight or danger of flight, five percent on danger of tampering with evidence, and only two percent on danger of committing further offenses (these statistics include some cases of multiple grounds cited in detention warrants). Statistisches Bundesamt, Rechtspflege, Reihe 3: Strafverfolgung 1989 74–75 (1991) [hereinafter Statistisches Bundesamt 3].

64 StPO § 112(1).

65 MICHAEL GEBAUER, DIE RECHTSWIRKLICHKEIT DER UNTERSUCHUNGSHAFT IN DER BUNDESREPUBLIK DEUTSCHLAND 148 (1987). This figure should be seen in relation to the low rate of imprisonment as a sanction in Germany. See infra notes 207–15. It is possible that pretrial detention is used, in some cases, as an ersatz (substitute) sanction of imprisonment where the strict legal rules prevent the imposition of a prison sentence. See DR. ULRICH EISENBERG, KRIMINOLOGIE 325 (3d ed. 1990).

66 Courts of Appeals permit continuation of pretrial detention if the extraordinary extent of the investigation or “other important grounds” make a prompt trial impossible. StPO § 121. The necessity of further continuing pretrial detention is reviewed every three months by the Court of Appeals. There is no absolute time limit for pretrial detention except in cases of preventive detention. See id. §§ 112a, 122a (one year).

German law provides for several alternatives to pretrial detention, including: an order not to leave town and to report to the police at certain intervals, or an order to post bail. According to one study, money bail was required of defendants in only twelve percent of all cases in which pretrial detention was suspended.

In 1990, only 4.6 percent of defendants adjudicated for non-traffic offenses were previously held in pretrial detention, a percentage far lower than the percent detained in the United States. On December 31, 1989, the 12,222 pretrial detainees constituted twenty-eight percent of the population of (West) German prisons and jails. By comparison, the United States had about two and one-half times as many pretrial detainees (adjusting for the higher American population and crime rates).

3. Searches and Seizures

a. Identity Checks

Identity checks are formally authorized by German law, and bear some resemblance to detentions under the American "stop and frisk" rule. German police can stop anyone suspected of an offense, even a petty infraction, and hold him as long as necessary to reliably determine his identity, up to a maximum of twelve hours. Identity checks can also be made of non-suspects if these checks are necessary for investigating an offense. If there is suspicion that a terrorist

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68 StPO § 116.
69 Gerauer, supra note 65, at 254.
70 Statistisches Bundesamt, Rechtsakte, Reihe 3: Strafverfolgung 1990 70 (1992) [hereinafter Statistisches Bundesamt 4]. Compare the much higher rates in the United States, where 77% of defendants (excluding minor traffic violators) are held at least until first court appearance, and 11% are held until final disposition. Frase, Comparative Criminal Justice, supra note 2, at 600.
72 In 1989-90 there were approximately 205,825 unconvicted inmates in American jails. Bureau of Justice Statistics, U.S. Dep't of Just., Bulletin: Jail Inmates, 1990 2 (June 1991) (average of figures for June 1989 and June 1990). Dividing by four, to account for the four-fold greater U.S. population, and dividing again by 1.56, to account for higher U.S. crime rates per population, yields an adjusted figure of 32,985 inmates, or 2.7 times the German figure. See infra note 215. If violent crimes are weighted by a factor of 10, there are still 2.4 times as many inmates in the United States. See infra note 215 and accompanying text.
73 Terry v. Ohio, 392 U.S. 1 (1968); see Kamisar et al., supra note 24, at 269-95 (discussing Terry and its progeny).
74 StPO §§ 163b(1), 163c(3).
75 Id. § 163b(2).
gang has been active or that an aggravated robbery has been committed, the police can conduct roadblocks and can stop and search anyone regardless of individual suspicion.\textsuperscript{76}

An identity check does not formally accord the police authority to interrogate individuals with regard to any offense. In fact, individuals are not obliged to submit to police questioning on past crimes.\textsuperscript{77} Some state police statutes do, however, authorize police officers to stop and question citizens in order to \textit{prevent} future crime.\textsuperscript{78}

The power to stop and to provisionally arrest a person does not technically include an authority to search, or frisk, him for weapons.\textsuperscript{79} However, during the provisional arrest the police can search for items helping to establish the individual’s identity;\textsuperscript{80} assuming the requirements of exigency are met, the police also may search the individual and his belongings for evidence of the crime of which he is suspected.\textsuperscript{81} Moreover, police law may give the arresting officer the right to search a detainee for weapons in order to protect the detainee himself from harm.\textsuperscript{82}

b. \textit{Searches}

Searches of the person and the person's belongings, as well as searches of buildings, are possible under German law whenever: 1) there is minimal suspicion that an offense has been committed; and, 2) the officer in charge expects to find items usable as evidence or possible objects for confiscation or forfeiture.\textsuperscript{83} In theory, searches must be authorized by a magistrate.\textsuperscript{84} In the great majority of situ-

\textsuperscript{76} Id. § 111.
\textsuperscript{77} See H. Achenbach, \textit{in} Wassermann, \textit{supra} note 4, § 163a, no. 11; Müller, \textit{in} Pfeiffer, \textit{supra} note 4, § 163a, nos. 24, 31.
\textsuperscript{78} See, e.g., \textit{Polizeigesetz des Landes Nordrhein-Westfalen} (Northrhine-Westphalian Police Code) Gesetz und Verordnungsbllatt des Landes Nordrhein-Westfalen 70, §9(1) (1990) [hereinafter WPC] ("[t]he police can interrogate any person if certain facts give rise to the assumption that the person can give relevant information necessary for fulfilling an identifiable police task. The person can be detained for the duration of the interrogation.").
\textsuperscript{79} See H. Achenbach, \textit{in} Wassermann, \textit{supra} note 4, § 165b, no. 11; Kleinknecht & Meyer, \textit{supra} note 4, § 127 no. 12.
\textsuperscript{80} StPO § 165b(1).
\textsuperscript{81} Id. §§ 102, 104(1).
\textsuperscript{82} See, e.g., WPC, \textit{supra} note 78, § 39(1), no. 1.
\textsuperscript{83} When these conditions are met, suspects as well as non-suspects can be searched. Searches are also permissible for the purpose of arresting a suspect. StPO §§ 102, 103.
\textsuperscript{84} Id. § 105(1). Under the due process rule of art. 20, sec. 3 \textit{GRUNDEGESETZ}, search and seizure warrants must be specific as to the suspected offense, the place to be searched, and
ations in which exigent circumstances exist, however, the prosecutor or auxiliary police officer is permitted to search without a warrant.\textsuperscript{85} Such emergency searches can be reviewed by a magistrate if the person searched has a legitimate and special interest in having the search declared illegal.\textsuperscript{86}

German law grants the owner of the house or room searched, or a person representing him, the right to be present during the search.\textsuperscript{87} In addition, Germany requires the presence of neutral (non-police) witnesses when the search of a home, place of business, or enclosed premises is conducted in the absence of a judge or prosecutor.\textsuperscript{88} No such rights are recognized in the United States. However, Germany provides no exclusion of evidence if these rights are violated.\textsuperscript{89}

c. \textit{Seizure of Objects}

Items can be seized if they are relevant as evidence,\textsuperscript{90} or if they are subject to confiscation or forfeiture.\textsuperscript{91} If the items are relevant as evidence, the possessor can prevent seizure by voluntarily surrendering the object.\textsuperscript{92} Seizures can be ordered and carried out by prosecutors and their auxiliary officers if immediate action is necessary to avoid destruction or concealment of the item in question.\textsuperscript{93} The owner can then ask a magistrate for a determination of the lawfulness of the seizure.\textsuperscript{94}

\textsuperscript{85}Exigent circumstances ("danger in delay") exist whenever the delay involved in acquiring a judicial warrant would jeopardize the success of the search because the object in question may be destroyed or concealed. According to the majority opinion, the officer contemplating a search has discretion in determining whether there is danger in delay, and any factual or legal error on his part does not make the search illegal. See \textit{Kleinknecht & Meyer}, \textit{supra} note 4, § 98, nos. 6–7; Laufhütte, in \textit{Pfeiffer}, \textit{supra} note 4, § 98, no. 13.


\textsuperscript{87}StPO § 106(1).

\textsuperscript{88}Id. § 105(2).

\textsuperscript{89}As a general rule, objects seized as a result of an illegal search can be used as evidence except when there was an egregious violation of the law or when the search could not have been authorized under any circumstances. See \textit{Bundesgerichtshof}, 42 \textit{Neue Juristische Wochenzeitung} 1741, 1744 (1989); \textit{Kammergericht}, 5 \textit{Strafverteidiger} 404 (1985); see also infra text accompanying notes 116–54.

\textsuperscript{90}See StPO § 94(1), (2).

\textsuperscript{91}Id. § 111b(1), (2).

\textsuperscript{92}Id. §§ 94(1), 95(1).

\textsuperscript{93}Id. § 98(1).

\textsuperscript{94}Id. § 98(2). The owner need not demonstrate a special interest in a determination of the
d. Surveillance of Mail and Telephone Calls

Special rules apply to the seizure of mail. If a judicial warrant is issued, letters and other mail addressed to, or presumably stemming from, a suspect can be obtained from the state mail service before delivery to the addressee.\textsuperscript{95} Even stricter regulations apply to electronic surveillance of private conversations and of telecommunication. This surveillance is permissible only in the investigation of a short list of serious offenses under limited circumstances.\textsuperscript{96}

Contrary to American law, consent of one of the parties to a conversation does not authorize German law enforcement agents to conduct wiretaps.\textsuperscript{97} Whether surveillance of “live” conversations (by hidden microphones) is permissible under German constitutional law has long been contested.\textsuperscript{98} Although a 1992 amendment of the German Code of Criminal Procedure (section 100c) has introduced the general possibility of surreptitiously listening to and recording such conversations, article 13, sections 1 & 3, of the Basic Law are deemed to provide special protection to conversations conducted in the privacy of the home.\textsuperscript{99} Because the legislature has thus far not proceeded to amend the Constitution, Procedure Code section 100c

\textsuperscript{95}StPO § 100(1), (2). Only a magistrate or a prosecutor designated by the magistrate is permitted to read confiscated mail. \textit{Id.} § 100(3).

\textsuperscript{96}Id. §§ 100a, 100c. Surveillance is permissible only if the investigation of the matter would otherwise be impossible or seriously impaired. \textit{See Thomas Weigend, Using the Results of Audio-Surveillance as Penal Evidence in the Federal Republic of Germany, 24 STAN. J. INT’L L. 21, 21-22 (1987).}

\textsuperscript{97}85 BVerfGE 386 (1992); \textit{cf.} United States v. White, 401 U.S. 745, 746-50 (1971) (use of “wired for sound” informant is not a “search” so does not require judicial approval); 18 U.S.C. § 2511(2) (c) (1988) (interception of an otherwise protected communication with the consent of a party is not unlawful, and thus is not regulated by the statute).

\textsuperscript{98}The courts have held that recording of private conversations violates the individual’s constitutional right to privacy as well as the protection of the privacy of the home. \textit{See GG art. 13; 34 BVerfGE 238 (1973); 31 BGHSt 296 (1983).}

\textsuperscript{99}Article 13 sec. § 1 of the Basic Law provides: “The home (Wohnung) is inviolable.” GG art. 13, sec. 1. Section 2 permits duly authorized searches, and section 3 specifically provides for intrusions other than searches for the purpose of averting danger to an individual’s life or to certain enumerated interests of the community. The interest of investigating and prosecuting crime is conspicuously absent from that list. The courts have interpreted the constitutional protection of the “home” extensively, to include places of business and garages. \textit{See GG art. 13; 32 BVerfGE 54 (1971); \textit{cf.} 18 U.S.C. §§ 2510(2), 2518 (permitting judicially-authorized bugging of any “oral communication”).
seems to permit only the recording of conversations conducted in open air or in public buildings.

4. Interrogations

Under German law, although witnesses and expert witnesses must submit to questioning by prosecutors and judges, these witnesses need not respond to questions from police or auxiliary officers. Witnesses have a general right to refuse to answer particular questions if by responding they would incriminate themselves or close relatives. Witnesses must be informed of this right if and when a danger of self-incrimination becomes apparent.

Suspects can be summoned and, if necessary, forcibly brought before prosecutors and magistrates for interrogation. Suspects 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 interrogation. The latter also applies to police interrogations. If an interrogator fails to inform the suspect of the right to remain silent, the suspect's statements can be used as evidence only if it can be shown that he was aware that he had this right. The protection of the suspect under German law thus goes further than Miranda because the German warnings must be given even if the suspect is not in custody.

Under the same provision of the German Code of Criminal Procedure, a suspect must be informed of his right to consult with an attorney before he answers any questions. The German Federal Court of Appeals recently excluded a defendant's statement from evidence because the police did not promptly honor the defendant's wish to speak with his attorney.

\[100\text{StPO §§ 70, 161a, 162.}\]
\[101\text{For a discussion on auxiliary officers, see supra notes 31–32 and accompanying text.}\]
\[102\text{StPO § 55(1).}\]
\[103\text{See id. § 55(2); see also Hans Dahs, in Löwe-Rosenberg, supra note 4, § 55, no. 19.}\]
\[104\text{StPO §§ 133, 134, 163a(3).}\]
\[105\text{Id. §§ 136(1), 163a(3).}\]
\[106\text{Id. § 163a(4).}\]
\[107\text{See 38 BGHSt 214 (1992).}\]
\[108\text{See case cited supra note 107 concerning the roadside interrogation of a drunken driver. The results of the roadside interrogation probably would have been admissible in the United States. See Berkemer v. McCarthy, 468 U.S. 420, 420–23 (1984).}\]
\[109\text{See StPO §§ 156(1), 163a(3), (4).}\]
\[110\text{See 38 BGHSt 372 (1992). It has not yet been decided whether a mere failure to inform the suspect of his right to consult with an attorney leads to the inadmissibility of subsequent statements.}\]
In some respects, however, the right to an attorney is more limited in Germany than under United States law. First, Germany does not provide cost-free legal counsel prior to the filing of formal charges (and often, free lawyers are not even provided at this point). Second, according to the majority view, defense counsel has no right to be present during interrogations of the client by the police. Counsel must, however, be informed of and be allowed to attend prosecutorial and judicial interrogations. Whether the defendant has a right to have counsel present at lineups conducted for identification is a contended issue; the courts tend to deny defendants this right.

5. Exclusion of Evidence

The concept of excluding otherwise relevant evidence from the consideration of the fact finder is not alien to German procedural law, although it works differently (and perhaps less effectively) than in the United States. German professional judges usually are familiar with the complete file of the investigation before a trial begins. The file usually contains information about any legally inadmissible evidence. In such a procedural context “exclusion” of evidence means: 1) that inadmissible evidence is not to be produced or discussed at the trial, and 2) that the court must not rely on it in finding the judgment. Professional judges thus are often required to “forget about” information they have seen in the file and to base the judgment on a hypothetical set of facts.

German law recognizes two sources of exclusionary rules. Some evidence is deemed so private that it cannot be used in court against the will of the individual concerned regardless of the means by which it was obtained. Other evidence is not admitted because it was obtained in an unlawful manner.

The first group of exclusionary rules is based on the constitutional protection of privacy. The concept of privacy, as interpreted by
German courts, covers: a person’s sexual orientation, bodily reactions which cannot be controlled by the will, the “right to one’s privately spoken word,” and, arguably, the contents of an intimate diary. The dignity of the person also lies at the basis of the privilege against self-incrimination, although the latter is nowhere explicitly guaranteed in the Basic Law or in the Code of Criminal Procedure. 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 “positive” conduct, including breathing into a breathalyzer or producing tangible evidence. As a general rule, courts must not only refrain from invading a person’s intimate sphere by taking evidence, but also must refrain from using such evidence when presented by others, including private parties. However, with respect to evidence stemming from an ill-defined “merely private sphere” (as opposed to the most “intimate sphere,” Kernbereich privater Lebensgestaltung), the courts weigh the individ-

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118 See 49 BVerfGE 286, 298 (1978) (concerning official recognition of a person’s transsexuality); 47 BVerfGE 46, 73 (1977) (concerning sexual education in public schools); 39 BVerfGE 1, 43 (1975) (concerning a woman’s right to choose motherhood).

119 See BVerfG, 1982 Neue Juristische Wochenschrift 375; 5 BGHSt 332 (1954). In both decisions, the courts held results of polygraph tests inadmissible because these tests invade the individual’s intimate sphere.

120 This right protects the individual from having his privately spoken words recorded against his will. See 34 BVerfGE 238 (1973); 31 BGHSt 296 (1988). It is questionable whether § 100c(1), no. 2 of the Code of Criminal Procedure, which permits the recording of private conversations with judicial authorization, comports with these decisions. See StPO § 100c(1), no. 2; see also supra text accompanying notes 94–95.

121 See 80 BVerfGE 367 (1989) (court splitting—four to four—on whether intimate diaries are absolutely protected from being used as evidence); 34 BGHSt 397 (1987); 19 BGHSt 325 (1964).

122 Section 55(1) of the Code of Criminal Procedure only provides that witnesses can refuse to answer questions when the answer might bring about criminal prosecution of the witness or a relative. StPO § 55(1). Section 136(1) provides that the defendant must be informed that he is free, “under the law” (nach dem Gesetz), to refuse to make statements. Id. § 136(1). However, there is no such positive law except in the International Covenant on Civil and Political Rights, art. 14, § 3, lit. g., which has been transformed into German law. See International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

123 See Dr. Klaus Rogall, in Rudolphi, supra note 4, Vor § 133, nos. 66, 73 (1987); KLEINKNECHT & MEYER, supra note 4, § 95, no. 5.

124 See, e.g., 54 BVerfGE 238 (1973) (private individual’s secret tape-recording of defendant’s words was given to police as evidence of fraud; tape held inadmissible); 19 BGHSt 325, 331 (1964) (wife of defendant’s paramour had given defendant’s diary to public prosecutor; diary held inadmissible).
ual's privacy interest against the community interest in detecting and punishing crime. If the community interest is deemed to prevail, the courts must use the evidence in question.

In other cases, the exclusion of evidence is a reaction to violations of the law committed in obtaining the evidence. Although German courts and legal writers are unclear as to the doctrinal basis and the extent of such exclusionary rules, deterrence of police misconduct is evidently a concern secondary to both the "purity" of the judicial process and the protection of the individual rights violated by illegal acts. Thus, in many cases, exclusion is not an inevitable consequence of prior breaches of the law. German courts tend to balance the interests involved, taking into account the seriousness of the offense, the importance of the evidence for finding a judgment, and the seriousness of the violation. Doctrines of standing, attenuation, and inevitable discovery likewise limit the impact of exclusionary rules, and—as in the United States—fruits of illegal searches and wiretaps are often admitted into evidence.

Only one provision of the Code of Criminal Procedure explicitly demands exclusion of a suspect's or a witness' statements. 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. Some of these proscriptions arguably restrict

127 For an overview, see Roxin, supra note 4, at 157–64.
129 See 27 BGHSt 355, 358–59 (1978) (discussing effects of illegal wiretap on admissibility of later confession); 22 BGHSt 129, 134 (1968) (warned confession admissible although defendant had previously made similar incriminating statements without required warning).
130 See Dr. Werner Beulke, Hypothetische Kausalverläufe im Strafverfahren bei rechtswidrigem Vorgehen von Ermittlungsorganen, 103 Zeitschrift für die gesamte Strafrechtswissenschaft 657 (1991); Dr. Klaus Rogall, Hypothetische Ermittlungsverläufe im Strafprozeß, 8 Neue Zeitschrift für Strafrecht 385 (1988); see also BGH, 9 Neue Zeitschrift für Strafrecht 375, 576 (1989) (fruits of illegal search admissible if judge could have issued search warrant).
131 See 34 BGHSt 362, 364 (1987) (testimony of witness found through illicit use of police informer held admissible); 32 BGHSt 68, 70–71 (1983) (incriminating statements made after arrest based on illegal wiretap held admissible). For a discussion of the analogous American doctrines of standing, attenuation, independent source, and inevitable discovery, see Kamisar et al., supra note 24, at 728–73.
police interrogation tactics to a greater extent than American law. The prohibition of using deceit has been interpreted broadly by German courts.\textsuperscript{132} The abuse of pretrial detention for interrogating the defendant through a police informer planted in his cell has been held to be an illegitimate use of force.\textsuperscript{133} However, only evidence gained directly through the use of impermissible methods has been deemed inadmissible; derivative evidence has not been excluded.\textsuperscript{134}

E. The Decision to Prosecute: Compulsory Prosecution and Discretion\textsuperscript{135}

1. Initial Decisions Not to Charge

Germany, unlike the United States, does not give the prosecutor complete discretion to decline to file charges. In Germany, felony (\textit{Verbrechen}) charges must be filed if there is an adequate evidentiary basis.\textsuperscript{136} Misdemeanor charges may be declined if the evidence is inadequate or if the defendant’s guilt is minor, and no public interest would be served by prosecution.\textsuperscript{137} A special provision allows such lack of public interest to be established if the accused either com-

\textsuperscript{132} See, e.g., 37 BGHSt 48 (1990) (police officer had told suspect that police were looking for a “missing person” when they had already found victim’s beheaded body and suspected defendant of killing; ensuing confession held inadmissible); 35 BGHSt 328 (1988) (police officer had told suspect that there was “overwhelming evidence” against him when police did not have much incriminating evidence; ensuing statement of defendant held inadmissible); \textit{cf.} Colorado v. Spring, 479 U.S. 564, 564–66 (1987) (upholding \textit{Miranda} waiver where suspect arrested for firearms violations was asked if he had ever shot anyone without being warned that he was a homicide suspect); Miller v. Fenton, 796 F.2d 598, 600 (3d Cir. 1986) (upholding voluntariness of confession despite deception and promises of leniency by police).


\textsuperscript{134} See 34 BGHSt: 362, 364–65 (1987); \textit{see also} cases cited supra note 129.


German police have no legal discretion to drop or to refrain from investigating arguably criminal cases. In practice, however, they sometimes define situations or conflicts as peacekeeping matters rather than criminal cases. See David K. Linnan, \textit{Police Discretion in a Continental European State: The Police of Baden-Wuerttemberg in the Federal Republic of Germany}, 47 L. & CONTEMP. PROBS. 185, 218 (1984).

\textsuperscript{136} StPO §§ 152(2), 170(1). Exceptions exist for certain political offenses. \textit{Id.} §§ 153d, 153e.

\textsuperscript{137} \textit{Id.} § 153(1). In addition, certain offenses require the victim’s explicit request for prosecution, without which charges must be declined. \textit{See infra} text accompanying notes 243–44.
pensates the victim, pays money to a charity or to the state, performs other charitable works, or undertakes specific support obligations. These declinations are similar to what is called “pretrial diversion” in the United States.

These limitations are enforced by several means. First, anyone who objects to a prosecutor’s action may file a departmental complaint. In addition, the victim of an offense that was declined for evidentiary reasons may, following an unsuccessful departmental complaint, file a mandamus action compelling prosecution. Dismissals of misdemeanors for lack of public interest in the prosecution sometimes require court approval, but they are not subject to mandamus. In some cases, the victim may institute private prosecution. In contrast, American victims and courts have almost no means to compel prosecution.

Despite these legal differences, however, the majority of criminal matters in both countries are dismissed at the outset. In Germany, this is true even among cases with identified suspects. One reason why German dismissal rates are so high is because the strictest “mandatory” prosecution rule only applies to Verbrechen; this limited offense category excludes a large number of crimes (including non-violent thefts) that would be felonies in the United States. Al-

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138 StPO § 153a(1). In 1989, German prosecutors used this provision to dismiss 11% of cases with sufficient evidence for conviction. See Statistisches Bundesamt 1, supra note 22, at 14.
140 StPO §§ 172–77.
141 Id. §§ 153(1), 153a(1). Prior court approval is not required for dismissal in cases of non-serious offenses. Id.
142 Id., § 172(2). For a critique of this rule, see Dr. Heinz Schöch, in Wassermann, supra note 4, § 153 no. 65.
143 StPO § 374; see infra text accompanying notes 245–48.
145 American prosecutors dismiss about 40% of state felony arrests, and about 80% of federal matters. See Barbara Boland et al., The Prosecution of Felony Arrests 3 (1992). The proportion of state felony matters declined by police or prosecutors is undoubtedly considerably higher than 40%. Id.; see also Richard S. Frase, The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion, 47 U. Chi. L. Rev. 246, 252 (1980) [hereinafter Frase, Prosecutorial Discretion] (federal prosecutors declined a much higher proportion of matters involving failures to arrest any suspect).
146 In 1989, German prosecutors brought to court only 31.5% of known defendants. See Statistisches Bundesamt 1, supra note 22, at 34. About 60% of dismissals were due to legal and evidentiary problems. Id. at 14.
147 See supra text accompanying note 12. In 1992, only 1.4% of offenses reported to the
though legally free to do so, American prosecutors decline prosecution of relatively few serious felonies for which the evidence is sufficient to convict.\textsuperscript{148}

In addition to the exceptions noted above, German prosecutors have two other means by which to reduce the seriousness of charges. Multiple charges or counts can be dropped if the defendant has been or will be convicted on other charges, and the punishment to which the dropped charge(s) or count(s) would lead is deemed negligible in comparison with the punishment imposed or expected from the remaining charges.\textsuperscript{149} In addition, charges can be dropped if conviction based on the charge(s) in question could not be obtained in due course, and the punishment imposed for the remaining charges is sufficient for protection of the legal order and prevention of further crime by the defendant.\textsuperscript{150} This discretionary authority of the prosecutor is important because convictions of multiple charges do not merge for sentencing; the Penal Code merely provides that combined sentences may not exceed fifteen years and must total somewhat less than the sum of the individual sentences for all charges.\textsuperscript{151}

As has been previously mentioned,\textsuperscript{152} the prosecutor also has leeway in deciding which court to file charges in. Offenses of medium seriousness can be brought either before the county court panel (\emph{Schöffengericht}) or before the district court (\emph{Große Strafkammer}).\textsuperscript{153} Less serious cases can be tried before the single professional judge or before \emph{Schöffengericht}.\textsuperscript{154} This choice need not actually influence the outcome of the case (although county courts are precluded from imposing sentences of more than four years of imprisonment),\textsuperscript{155} but the prosecutor’s choice can influence the “tone” of the trial as well as the court’s initial perception as to the seriousness of the case.

\footnotesize

\begin{itemize}
\item police were felonies (computed from figures of reported offenses given in Bundeskriminalamt, Polizeiliche Kriminalstatistik 1992, 1993, Tabellenanhang).
\item See, e.g., Frase, Prosecutorial Discretion, supra note 145, at 310–15 (violent and other high priority offenses tended to be declined due to evidence insufficiency, and were rarely declined for reasons of policy alone).
\item StPO §§ 154(1), no. 1, 154a(1).
\item Id. §§ 154(1), no. 2, 154a(1).
\item StGB § 54(2).
\item See supra note 20 and accompanying text.
\item COA, supra note 17, § 24(1), no. 3.
\item Jurisdiction depends on the expected sentence; if the prosecutor expects a penalty of more than two years of imprisonment, he should charge the case before the \emph{Schöffengericht}. See id. § 25, no. 2.
\item See id. § 24(2).
\end{itemize}
In misdemeanor cases, the prosecutor can also choose between filing an information or applying for a penal order (a brief written judgment which issues without a trial and becomes final unless the defendant appeals). This choice can be of great interest to the defendant both because a penal order spares him the particular onus of a public trial, and because the maximum penalty is a fine or a suspended sentence of imprisonment of up to one year.

2. Dismissal of Filed Charges

Only in the penal order proceeding can a German prosecutor unilaterally withdraw charges once they have been filed with the court. In other cases, the prosecutor is by law precluded from reducing charge severity or dismissing charges without the consent of the trial court. By contrast, American prosecutors routinely reduce and/or dismiss charges, usually in return for a guilty plea (which, as noted below, does not exist under German law).

3. Review of Decisions to Bring Charges

In the United States, the defendant has a right to have a felony information reviewed in a preliminary hearing, or to have a grand jury pass upon a felony indictment. Under German law, every information is summarily reviewed (on the basis of the prosecutor’s file) by the trial court for sufficiency prior to the opening of the trial. A standard of “adequate” suspicion is applied, and charges are rarely rejected at this stage. Nevertheless, German procedure provides for prior judicial review of every charge, with a very

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158 StPO § 411(3).

159 Id. § 156. The court is not bound by the legal definition of the offenses as charged by the prosecution. It can, after proper warning, convict the defendant of another offense but only for the conduct defined in the prosecutor’s formal accusation. Cf. id. § 265.

160 See Kamisar et al., supra note 24, at 14–17.

161 StPO §§ 199, 203.

162 “The court orders the opening of the main proceeding if, based on the results of the preliminary proceeding, the accused appears to be sufficiently suspect.” Id. at § 203.

163 In 1989, courts refused to set the case for trial in only 3,416 instances (0.8% of all cases in which the prosecutor had filed an indictment). Statistisches Bundesamt 2, supra note 23, at 126, 128.

164 Penal orders must be signed by a judge. StPO § 408(3).
limited exception in cases of so-called expedited trials for petty offenses.165

F. Rights of the Defense before Trial

Defense counsel in Germany has a right to conduct an independent investigation before trial, but is not granted any means of compulsion. Counsel can also request the prosecutor to take certain evidence, but the prosecutor need not honor such request unless he or she deems it relevant for the investigation.166 The most important right of the defense in the pretrial phase is the right to inspect the entire prosecution file, including both favorable and unfavorable evidence.167 Only defense counsel, not the defendant himself, is permitted to inspect the prosecution file.168 There is no corresponding right of the prosecution to discover defense evidence. The inspection right is unconditional with respect to transcripts of interrogations of the defendant, statements of expert witnesses, and protocols of judicial acts of investigation.169 With respect to all other parts of the file, the prosecutor can deny inspection until the investigation is closed if earlier inspection would endanger the purpose of the investigation.170 According to the German courts, the prosecutor’s denial of inspection is not subject to judicial review.171 Thus, the defense has a right to discovery of a witness’ statements only at the end of the investigation (at the time when charges are being filed by the prosecution). In the United States the defense traditionally has received far less information before trial, although the trend is to grant broad, even total “open files” discovery rights.172

165 Id. § 212a(1). The maximum punishment in an expedited trial is one year of imprisonment. Id. § 212b(1). In 1989, only 25,296 cases were tried in an expedited fashion (four percent of all cases adjudicated by county courts). See Statistisches Bundesamt 2, supra note 23, at 124, 126, 128.
166 StPO § 163a(2).
167 Id. § 147.
168 StPO § 147(3).
169 Id. § 147(2).
170 The rationale of this rule is the fear that the defendant might lose, damage or destroy the file. For a critique of the exclusion of the defendant, see Klaus Lüderssen, in Löwe-Rosenberg, supra note 4, § 147, nos. 6–9. Defense counsel is not precluded from informing the defendant of the contents of the file and from giving him a copy.
171 See, e.g., Oberlandesgericht Hamburg, 6 Strafverteidiger 422 (1986); Oberlandesgericht Koblenz, 38 Neue Juristische Wochenschrift 2038 (1985). Most commentators oppose this view. See, e.g., K. Lüderssen, in Löwe-Rosenberg, supra note 4, § 147, no. 157; Dr. Steffen Stern, in Wassermann, supra note 4, § 147, no. 64.
172 See Frase, Comparative Criminal Justice, supra note 2, at 672.
G. Trial and Judgment

German trials are conducted by the presiding judge, but parties may play a fairly active role. The attorneys have a right to question witnesses and expert witnesses after they have been interrogated by the presiding judge. Attorneys also can make oral requests of proof which generally oblige the court to hear additional evidence as suggested by the party. The court can refuse a request of proof only for one of several fairly limited reasons listed in the Code of Criminal Procedure. Regardless of the activity or inactivity of parties, the court is responsible for gathering all the evidence necessary to "determine the truth" (defined as that which is needed to form a rational basis for the verdict).

Because of the court's overriding responsibility for determining the truth, rules of trial evidence are less strict in Germany than in the United States. Proof can be taken by means of witnesses, expert witnesses, documents, and inspection of tangible evidence. With respect to witnesses, German law recognizes a broad range of testimonial privileges: the spouse and relatives of the defendant can refuse to testify, and various professionals (e.g. doctors, attorneys, clergymen, midwives, public accountants, journalists) and their auxiliary staff can refuse to testify as to facts learned in their professional capacity. A general privilege applies to self-incriminatory statements. Moreover, there is a broad cloak of secrecy covering the sphere of state administration: civil servants can testify only with special permission of their superiors, and permission may be withheld whenever the civil servant's testimony might endanger the proper fulfilling of official tasks.

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173 "The presiding judge presides over the trial, interrogates the defendant and takes the evidence." StPO § 238(1).
174 Id. § 240(2). The prosecutor, defense counsel, and the defendant himself have the right to ask questions of witnesses and experts.
175 See id. § 244(3)–(6). 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. An attorney who makes extensive use of this right can thereby significantly protract the trial.
176 Section 244(2) of the Code of Criminal Procedure reflects the inquisitorial principle characteristic of the continental criminal process, where it states: "The court shall, in order to determine the truth, extend the taking of proof ex officio to all facts and evidence relevant to the decision." Id. § 244(2).
177 Id. §§ 52–53.
178 StPO § 55.
179 Id. § 54 (in connection with the various States' statutes on civil servants, for example
The defendant can make unsworn statements but is not regarded as a witness, and is not criminally liable for giving false testimony. Although the court is precluded by law from drawing negative inferences from the defendant's silence, or a witness' reliance on a privilege, most German defendants waive their right to remain silent.\(^{180}\) Even when he refuses to make a statement, the defendant's prior criminal record is routinely introduced at the trial.\(^{181}\)

The most important rule of trial evidence is the so-called principle of immediacy (\textit{Unmittelbarkeitsprinzip}), which is a preference of oral over written proof. While oral hearsay testimony is generally admissible, subject to the court's duty to hear all witnesses necessary to "find the truth", a witness' statement cannot be introduced by reading his written declaration, or the transcript of his prior interrogation.\(^{182}\) This rule is relaxed with respect to transcripts of \textit{judicial} interrogations,\(^{183}\) and police transcripts can be introduced when the witness is no longer available.\(^{184}\)

As in the United States, defendants in Germany are presumed innocent until proven guilty,\(^{185}\) and must be given the benefit of the doubt (\textit{in dubio pro reo}).\(^{186}\) This presumption applies even to what American law regards as affirmative defenses (for example, insanity). A finding of guilt presupposes that the court is convinced of the facts establishing the defendant's guilt. Criminal Procedure Code section 261 requires the court to adjudicate each case on the basis of its "free conviction derived from the totality of the trial."\(^{187}\)

\(^{180}\) See, e.g., 32 BGHSt 140, 144 (1983); 22 BGHSt 113 (1968); 20 BGHSt 281 (1965).

\(^{181}\) See StPO § 243(4).

\(^{182}\) Id. § 250.

\(^{183}\) See id. §§ 251(1), 254(1).

\(^{184}\) Id. § 251(2); see also 33 BGHSt 70, 72–75 (1984) (Ministry of the Interior’s refusal for reasons of security to permit an undercover agent to be heard in open court makes the agent unavailable within the meaning of § 251(2) of the Code of Criminal Procedure, thus allowing admission of the transcript of the agent’s statement to other officers).

\(^{185}\) The presumption of innocence is not in the Code of Criminal Procedure but is contained in Article 6(2) of the European Convention for the Protection of Human Rights and Basic Liberties of 1950, which has the force of law in Germany. See II BUNDESGESETZBLATT 685 (1952). Moreover, the presumption of innocence has been held to be part of the constitutional principle of due process (\textit{Rechtstaatlichkeit}). 74 BVerfGE 358, 370 (1987).

\(^{186}\) See Hürxthal, in Pfeiffer, \textit{supra} note 4, § 261, nos. 56–63; Roxin, \textit{supra} note 4, at 93–96. The rule \textit{in dubio pro reo} has not been transformed into German positive law but is applied as customary law. Roxin, \textit{supra} note 4, at 93–96.

\(^{187}\) The German words are \textit{nach seiner freien, aus dem Inbegriff der Verhandlung geschäfien Überzeugung}. They reflect the traditional French concepts of \textit{libre appréciation} of proofs and \textit{intime conviction} of guilt.
The court’s “conviction” of the defendant’s guilt must be subjective and must be based on persuasive factors which leave no room for reasonable doubt.\footnote[188]{See 29 BGHSt 18, 19–20 (1979); Bundesgerichtshof, 8 NEUE ZEITSCHRIFT FÜR STRAFRECHT 236 (1988); see also Gerhard Herdegen, \textit{Die Überprüfung der tatsächlichen Feststellungen durch das Revisionsgericht aufgrund der Sachrüge}, 12 STRAFVERTEIDIGER 527 (1992); Gerhard Herdegen, \textit{Die Überprüfung der tatsächlichen Feststellungen durch das Revisionsgericht aufgrund einer Verfahrensrüge}, 12 STRAFVERTEIDIGER 590 (1992).} This standard is, in effect, very similar to the “beyond a reasonable doubt” standard utilized in the United States. German law requires an exhaustive written judgment in which the court must describe in detail how it evaluates the evidence and which facts it finds to be true.\footnote[189]{StPO § 267.} This requirement serves as an additional control mechanism against irrational convictions or acquittals.\footnote[190]{Any misapplication of the law appearing from the written judgment can lead to reversal on appeal. \textit{See id.} § 337.}

Furthermore, German law demands a majority of two-thirds of the judges for any decision adverse to the defendant.\footnote[191]{Id. § 263.} (By contrast, most states in the United States still require unanimous jury verdicts for both convictions and acquittals.)\footnote[192]{Conference of State Court Administrators, \textit{State Court Organization 1987} 329–39 (1988) (absent mutual stipulation, only three states permitted non-unanimous verdicts, and only for certain crimes).} Thus, in mixed courts the lay judges together can veto any conviction.\footnote[193]{German lay judges also participate in the determination of the sentence since there is no procedural separation between verdict and sentence.} Yet, the actual impact of German lay judges on the outcome of trials should not be overestimated. Lay judges frequently accept the professional judge’s conclusions because of the latter’s superior experience and knowledge of the law. Moreover, because acquittals are subject to appeal by the prosecution, attempts at “jury nullification” do not go unchecked.

H. \textit{Plea Bargaining and Its Analogues}

Most American scholars have assumed that explicit plea bargaining is unheard of in European criminal justice systems.\footnote[194]{See generally Langbein, \textit{Land without Plea Bargaining}, supra note 1. See also Albert W. Alschuler, \textit{Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System}, 50 U. CHI. L. REV. 931, 976–95 (1983). But see Abraham S. Goldstein & Martin Marcus, \textit{The Myth of Judicial Supervision in Three “Inquisitorial” Systems: France, Italy, and Germany}, 87 YALE L.J. 240, 267–68 (1977) (referring to penal orders and uncontested trials as analogues of guilty pleas).} This is no longer true in Germany. Although the legality and desirability of
plea bargaining is still hotly debated, German judges, prosecutors, and defense attorneys increasingly arrange explicit negotiations as to both charge and sentence. The equivalent of charge bargaining involves the dropping of collateral counts, as previously discussed, usually in return for the defendant’s promise to make an in-court statement confessing to the remaining charges. In sentence bargaining, the court, with the consent of the prosecutor, indicates that a particular, more lenient sentence will be imposed. In addition, the parties usually promise not to appeal the judgment. One reason for the growth of plea bargaining is the increase of complicated cases of economic crime. These cases take months or even years to try if the defense makes use of all its procedural options, especially its right to request further proof-taking. A full confession, on the other hand, enables the court to drastically reduce the amount of evidence to be heard at trial.

Other forms of explicit negotiation include bargaining over penal orders, and bargaining over the conditions under which the prosecutor will decline prosecution under the German equivalent of pretrial diversion. With respect to penal orders, the prosecutor and the defendant may agree on a specific sentence to be imposed. That arrangement provides certainty for both sides and avoids the risk of a prolonged process with an unforeseeable result. The prosecutor can be sure that the defendant will not appeal the penal order and thus force a trial. The defendant knows what sentence to expect and does not risk a costly trial potentially result-

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195 The development of bargaining in German criminal justice is a phenomenon of the last one or two decades. Its rise has probably been caused by the increase of complex criminal trials in economic, environmental and drug crime cases. For a critical account of current practice, see Bernd Schünemann, Absprachen im Strafverfahren? Grundlagen, Gegenstände und Grenzen, I VERHANDLUNGEN DES ACHTUNDFUNFZIGEN DEUTSCHEN JURISTENTAGES, B 9 (1990); see also Herrmann, Bargaining Justice, supra note 135, at 755–56.

196 See supra notes 149–51 and accompanying text.

197 For appellate court cases discussing the legality of such deals, see, e.g., 38 BGHSt 102 (1991); 37 BGHSt 298 (1991); 37 BGHSt 99 (1990).

198 See Schünemann, supra note 195, at B 28–B 30; see also supra text accompanying note 175 (defendant’s proof-taking requests).

199 A confession does not have the same effect as a guilty plea since it theoretically leaves intact the court’s duty to establish the truth through taking evidence. Cf. StPO § 244(2). Yet in simple cases, an extensive and credible confession can make it unnecessary to hear additional witnesses. See Dr. Ellen Schlichter, in Rudolphi, supra note 4, § 244, no. 28.

200 See supra text accompanying notes 156–57.

201 See supra note 138 and accompanying text.

202 It is possible to impose a suspended prison sentence of up to one year, a fine, and/or a suspension of the offender’s driver’s license by penal order. StPO § 407(2).

203 Cf. id. §§ 410, 411(1).
ing in a more severe penalty in court. In the case of conditional dismissal, negotiations are also advisable in non-routine cases because the defendant's consent to that disposition is required. Finally, it seems to be generally recognized in German as well as in American jurisprudence that a confession or other cooperation on the part of the defendant is a legitimate ground for mitigating the sentence, even if no explicit promises or sentence recommendations have been made.

I. Sentencing Severity

Sentencing severity, though mainly an issue of criminal law policy, has important ramifications for all aspects of the criminal justice system, including procedure. If most convicted offenders receive custodial sentences, it can be expected that: 1) arrest and pretrial detention will be frequently employed; 2) prosecutorial discretion will be necessary for the smooth functioning of the system (and will have great impact throughout the correctional stage); 3) there will be great pressure on defendants to admit guilt and negotiate the sentence, in order to avoid or minimize incarceration; and 4) there will be a great disparity in sentencing outcomes, given the importance of discretion and bargaining. The opposite applies if sentences tend to be more lenient and a noncustodial disposition is the outcome for most convicted offenders.

Some striking differences between the German and the United States systems can thus be explained by the fact that sentencing is much more lenient in Germany. This is so even after one adjusts for higher American violent and drug crime rates. Germany makes extensive use of fines and suspended sentences. German law also forbids prison terms of under six months, absent exceptional circumstances.

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204 If the defendant appeals, the court is not bound by the penalty originally imposed by penal order. Id. § 411(4). However, the defendant can, with the prosecutor's consent, withdraw his appeal and accept the penal order even during the trial, in order to avoid the risk of a stiffer sentence. Id. §§ 411(3), 303.

205 See id. § 153a(1).


207 See generally Frase, Comparative Criminal Justice, supra note 2, at 648 n.567.

208 In 1990, 78.5% of adult non-traffic offenders received a fine as the sole sanction, 14.2% received a suspended prison sentence, and only 7.2% were given a sentence of imprisonment. Statistisches Bundesamt 4, supra note 70, at 40-41.

209 StGB § 47(1).
One reason for the frequent use of fines in Germany is that there are very few defendants too poor to pay a fine, at least a fine scaled to the defendant’s income and payable in installments. Judges also know that, in the event of nonpayment, the fine will be transformed into a prison term or a community work assignment, with no need to show willful refusal to pay.

Applying the same statistical approach used in the previous study, we compared overall sentencing severity—frequency plus duration of custody sentences—by computing the number of sentenced inmates in each country (1989 one-day prison and jail population counts) as a percent of the number of persons charged by police with drug offenses or with the index crimes of murder, rape, robbery, burglary and theft. Our preliminary results are as follows:

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210 German law entitles residents with no other available income to minimum welfare benefits of approximately $300 per month plus a housing allowance. See ANTON KNOPP & OTTO FICHTNER, BUNDESSOZIALHILFEGESETZ, Anlage VII (7th ed. 1992). The minimum fine is $1.20 per day. StGB § 40(2).

211 Germany has adopted the day fine system under which the amount of the fine is computed by the following formula: seriousness of the offense multiplied by daily net earnings. StGB § 40; see Weigend, Sentencing, supra note 4, at 41–42.

212 One day in prison is equal to each day that the fine is not paid. StGB § 43. Upon the offender’s application, he can be permitted to do community work instead of going to prison. See Einführungsgesetz zum Strafgesetzbuch (Introductory Act to the Penal Code) art. 293, I BUNDESGESETZBLATT 469 (1974) and relevant State legislation.

213 See Frase, Comparative Criminal Justice, supra note 2, at 656–58.

214 Germany: Statistisches Bundesamt 3, supra note 63, at 44 (in March 31, 1989, there were 40,806 convicted prisoners); United States: BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUST., BULLETIN: PRISONERS IN 1989 1 (May 1990) (in December 31, 1989, there were 703,687 inmates in state and federal prisons); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUST., BULLETIN: JAIL INMATES 1989 2 (June 1990) [hereinafter JAIL INMATES 1989] (in June 30, 1989, the convicted jail population was 189,012). These two figures add up to 892,699.

215 Germany: Bundeskriminalamt, POLIZEILICHE Kriminalstatistik 1989 51 (1990) (625,289 individuals suspected of murder, manslaughter, rape, robbery, simple and aggravated theft, or drug offenses, including attempts; for violent crimes alone the total is 22,529). United States: Federal Bureau of Investigation, U.S. DEP’T OF JUST., 1989 UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 172 (1990) (3,889,970 persons arrested or summonsed for murder and non-negligent manslaughter, rape, robbery, burglary, larceny, motor vehicle theft, and drug violations; for the three violent crimes alone, the total is 226,470). Assault is excluded because German statistics may not be comparable to U.S. figures.

As noted in the earlier study, cross-jurisdictional studies should also compare total inmate populations, sentenced and unsentenced, since many pretrial detainees are already serving what will later be deemed part or all of their “sentence.” Frase, Comparative Criminal Justice, supra note 2, at 658. Adding unsentenced inmates to the numerator raises unweighted- and weighted-arrest incarceration rates for both countries, but the United States rates are still about three times the German rates. See Statistisches Bundesamt 5, supra note 71, at 43 (12,222 pretrial inmates); JAIL INMATES 1989, supra note 214, at 1 (395,553 jail inmates, including pretrial).
prisoners per crime charged, unweighted %
weighted % (violent arrests times 10)

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Thus, the overall sentencing severity per crime was about three times more severe in the United States than in Germany.216

J. Appeals

A distinctive feature of continental criminal justice is the right of appeal granted to both defendant and prosecutor. In Germany, an appeal with a demand for trial de novo is available against county court judgments as a matter of right to both parties.217 Either side can also appeal the sentence, leaving the verdict intact.218 In the United States, by contrast, de novo review is occasionally available, but only for minor offenses tried before a magistrate, and prosecutors may never appeal an acquittal.219 While sentencing appeal rights are becoming more common in the United States, they are not as extensive as in Germany.220

In Germany, decisions of the district court are appealable only for errors of law,221 not de novo. Errors can be found in the written judgment order (e.g., the reasons given for the verdict), as well as in the trial process. In either case, the appellate court will usually reverse the judgment and order a new trial. Since the judgment

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Even after adjusting for the four-fold greater U.S. population, American crime (arrest) rates for the offenses studied were 56% higher than German rates. American property crime rates were only nine percent higher, but U.S. rates for murder and non-negligent homicide, rape and robbery were 151% higher, and U.S. drug crime rates were 366% higher.

216 Cf. James P. Lynch, A Comparison of Prison Use in England, Canada, West Germany, and the United States: A Limited Test of the Punitive Hypothesis, 79 J. Crim. L. & Criminology 180 (1988) (German incarceration rates per arrest were much lower than U.S. rates for property offenses, but were higher for homicide; lower German rate for robbery might be due to lower incidence of firearm use).

217 StPO § 312 (Berufung).

218 Id. § 318.

219 KAMISAR ET AL., supra note 24, at 7, 19, 20 (de novo review); id. at 1435 (prosecution appeal of acquittal).

220 4 AM. B. ASS'N, STANDARDS FOR CRIMINAL JUSTICE 20–1.1 (2d ed. Supp. 1986) (over half the states permit appellate review of sentence in some circumstances; the availability of such review is growing steadily).

221 StPO §§ 333, 337 (Revision). Revision is available against first instance, as well as second instance judgments of the district court. This means that the most petty criminal cases can be litigated through three instances (trial, trial de novo, and review for legal error); whereas only one review, for legal error, can be demanded in the most serious cases initially tried in district court. See id.
order includes the lower court’s sentence, appeals for error of law can also attack the lower court’s sentence decision.222

In 1989, fifteen percent of county court judgments were appealed,223 of which approximately ninety-two percent were filed by the defense.224 Of all judgments (first and second instance) of the district courts, twenty-eight percent were appealed for legal error to a high court225 (State Court of Appeals or Federal Court of Appeals) consisting of three or five professional judges, and again, in the great majority of cases the defendant was the moving party.226 Overall, in 1989, twenty-one percent of appeals for legal error in the State Courts of Appeal, and eighteen percent in the Federal Court of Appeals, led to a reversal of the judgment and a remand of the case to the lower court.227

If the regular avenues of appeal fail, German defendants can obtain redress in a special proceeding, the constitutional complaint (Verfassungsbeschwerde). The Basic Law contains a Bill of Rights including guarantees of equality before the law (article 3), personal freedom (article 2, section 2), freedom of expression (article 5, section 1), assembly (article 8), and a general right to “unfold one’s personality” (article 2, section 1). The state is also bound to respect the dignity of each person (article 1, section 1) and the principle of Rechtsstaatlichkeit (due process of law, article 20, section 3). Whenever a citizen feels that an agent of the state has deprived him of one of these basic rights, he can—after exhausting the regular means of judicial review—file a complaint with the Constitutional Court and ask for relief.228 Since criminal convictions usually touch upon one or several of the basic rights, many convicted offenders petition the Constitutional Court,229 usually without success.230

222 Id. §§ 267(3), 337(2).
223 See Statistisches Bundesamt 2, supra note 23, at 128.
224 Id. at 176.
225 Id. at 158, 178.
226 96% of appeals to State courts of appeals were filed by the defendant. Id. at 216. Statistics for appeals to the Federal Court of Appeals are not available.
227 Id. at 222, 238–39.
228 GG art. 93 § 1, no. 4a.
229 In 1991, 3,904 constitutional complaints, many of them by convicted prisoners, were filed with the Constitutional Court. See Statistisches Bundesamt, Statistisches Jahrbuch 1992 für die Bundesrepublik Deutschland 396 (1992) [hereinafter Statistisches Bundesamt 6].
230 In 1991, 88% of constitutional complaints were rejected summarily for obvious lack of merit by a panel of three justices. See id. The possibility of lodging constitutional complaints, nevertheless, has been of great significance for the development of criminal procedure law, as it has brought about rulings of the Constitutional Court on many important issues.
K. Rights of Victims

The rights accorded to victims of crime are more extensive in Germany than in the United States. First, the 1987 Victim Protection Act grants victims the right: to be informed of the outcome of the criminal process;\(^{231}\) to assistance of an attorney (who can be present when the victim is interrogated as well as at trial);\(^{232}\) to financial assistance if the victim is indigent and if the case presents difficult factual or legal issues or the victim cannot effectively represent himself;\(^{233}\) for the victim’s attorney to inspect the prosecution file if the victim’s need to do so outweighs the interests requiring secrecy.\(^{234}\)

Second, certain victims of personal crimes (e.g., intentional infliction of bodily harm, most sexual offenses, libel, and slander) may join the prosecution as auxiliary prosecutors (\textit{Nebenkläger}) with rights almost equivalent to those of the public prosecutor (e.g., the right to ask questions of witnesses and experts, to make requests of proof, and to appeal against an acquittal of the defendant independently of the public prosecutor).\(^{235}\) In fact, however, \textit{Nebenkläger} usually play a rather passive role; they rarely request additional evidence to be taken, and they almost never appeal the judgment.\(^{236}\)

Third, as previously noted, victims may protest declinations of prosecution for evidentiary reasons, and can obtain a mandamus of prosecution from the State Court of Appeals.\(^{237}\) If granted, the victim can join the prosecution as \textit{Nebenkläger}, with the rights described above.\(^{238}\) Few such mandamuses are issued, however,\(^{239}\) and even

\(^{231}\) StPO § 406d(1).
\(^{232}\) Id. §§ 406f, 406g.
\(^{233}\) Id. §§ 406g(3), 397a.
\(^{234}\) Id. § 406e.
\(^{235}\) Id. §§ 395, 397.
\(^{237}\) StPO §§ 172–75.
\(^{238}\) Id. § 395(1), no. 3.
\(^{239}\) In 1989, only 2,323 petitions for mandamus were filed with State courts of appeals. \textit{See} Statistisches Bundesamt 1, \textit{supra} note 22, at 226. According to recent empirical studies, less than one percent of such petitions are successful. WEHNERT, \textit{Rechtliche und Richts Tatsächliche Aspekte des Klageerzwingungsverfahrens} 151 (1988) (0.6%); Georg Bischoff, \textit{Die Praxis des Klageerzwingungsverfahrens}, 8 \textit{Neue Zeitschrift für Strafrecht} 63, 64 (1988) (0.4%).
when they are, the cases rarely result in conviction.\textsuperscript{240} The State Courts of Appeal apply stringent rules to mandamus applications,\textsuperscript{241} and the applications must be presented by an attorney.\textsuperscript{242}

Fourth, for certain offenses (libel and slander, abduction or seduction, breach of secrecy, theft or fraud committed against a co-resident, trespass and destruction of property), public prosecution requires the victim’s explicit petition for prosecution (\textit{Strafantrag}).\textsuperscript{243} This, in effect, gives the victim a veto over the public prosecution.\textsuperscript{244}

Fifth, for certain offenses (trespass, libel and slander, violation of mail secrecy, destruction of property, patent and trademark violations, unfair competition, assault and battery, and negligent wounding), the victim is authorized to personally conduct the prosecution (\textit{Privatklage}).\textsuperscript{245} However, the risk of losing and being assessed for costs and attorney’s fees,\textsuperscript{246} and the requirement of posting security for these assessments in advance,\textsuperscript{247} tends to discourage this procedure.\textsuperscript{248}

Finally, Germany grants victims the right to file a claim for civil damages in the criminal process which is heard together with the criminal charges (\textit{Adhäsionsverfahren}).\textsuperscript{249} This procedure is rarely used, however, because courts can and often do decline to rule on the civil claim.\textsuperscript{250} Attorneys are therefore reluctant to invest much energy in pursuing the victim’s claim in criminal court.

\textsuperscript{240} Bischoff found that only one out of eight trials brought about by a mandamus resulted in conviction of the defendant. Bischoff, \textit{supra} note 239, at 64.

\textsuperscript{241} See Helmut Moschüring, \textit{in} Wassermann, \textit{supra} note 4, § 172, nos. 80–87 with references.

\textsuperscript{242} StPO § 172(3).

\textsuperscript{243} StGB §§ 77–77d.

\textsuperscript{244} The victim may withdraw the petition at any time, which, in turn, leads to the termination of the process. \textit{Id.} § 77d.

\textsuperscript{245} StPO §§ 374–94.

\textsuperscript{246} \textit{Id.} § 471(2). Since the court can at any time dismiss the case because of the defendant’s “minor guilt,” \textit{id.} § 383(2), and can then assess costs and attorneys’ fees at its discretion, \textit{id.} § 471(3), no. 2, the victim cannot calculate his financial risk in advance.

\textsuperscript{247} \textit{Id.} §§ 379, 379a.

\textsuperscript{248} The number of private prosecutions has declined steadily. In 1989, only 4,604 private prosecutions were filed in West Germany. \textit{See} Statistisches Bundesamt 2, \textit{supra} note 23, at 126.

\textsuperscript{249} StPO §§ 403–06c.

\textsuperscript{250} According to the Code of Criminal Procedure, the court can decline to decide on the civil claim if that claim does not lend itself to adjudication in a criminal trial. \textit{Id.} §405. In 1989, only 1,577 of 335,908 county court judgments (0.5%) contained a ruling on the victim’s civil claim. \textit{See} Statistisches Bundesamt 2, \textit{supra} note 23, at 128, 140.
II. Discussion

The summary above reveals many differences between German and American criminal justice, but also many similarities. These similarities—most of which are found in the French system as well—suggest not only the underlying functional similarity of all Western systems of criminal justice, but also the feasibility of transplanting rules and practices from one system to another—"donor" and "recipient" are compatible.

In particular, the United States and German systems have the following general features in common: 1) German police and prosecutors, like their American counterparts, tend to function more as adversaries than as the neutral investigators envisaged in continental legal theory; 2) in practice, in the vast majority of cases, German pretrial procedure closely resembles the American model (the police investigate, the prosecutor charges, and judges merely approve extraordinary investigatory measures); 3) both countries employ a "four-tier" adjudication system: petty cases and uncontested matters are handled by scheduled fines, penal orders, and accelerated or streamlined hearings; single judges conduct trials of other minor charges; small collegial courts (three judges or six jurors) hear intermediate charges; larger collegial courts conduct trials of the most important cases; 4) each country recognizes analogous evidence-gathering procedures, substantive rights, and exclusionary remedies, with very similar exceptions to both rights and remedies; 5) analogous arrest and detention rules are found in both systems, including similar prompt-appearance and speedy trial rules designed to limit pre-conviction detention; 6) Germany and the United States have developed very similar "middle options" in the areas of pretrial release, declination of prosecution, and sentencing; 7) in practice,

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251 See generally Frase, Comparative Criminal Justice, supra note 2.

252 Id. at 546 n.22:

Western systems of criminal justice are very similar because they face similar problems. These problems include limited resources, political pressures, the conflict between generally applicable law and the desire for case-specific "equity," the inherent dominance of the police over the investigative process despite efforts to impose judicial control, and the tendency in criminal justice systems for reforms in one part of the system to be cancelled out by compensating changes in other parts ... (the "system hydraulic").

despite the German rule of “compulsory” prosecution, broad initial charging discretion is exercised by prosecutors in both countries, as to both declination and level of charges filed; 8) defendants who cooperate often receive more lenient charges and/or sentences, tacitly or explicitly; 9) a variety of victim’s rights are recognized in each country; and 10) human rights limitations contained in national constitutions and/or multi-national charters play an important role in both systems.

Indeed, in most respects, the German system—although closer to the French than to the American system—has more in common with American criminal justice than does the French system. Thus, like the United States, Germany has a federal system. In criminal matters, lay judges participate to a considerable extent. Germany, like the United States, limits the role of the magistrate before trial to authorizing certain investigative acts carried out by the police. Trials in Germany are more “adversarial” than in France, with more extensive use of live witness testimony. Additionally, there are increasing instances of explicit charge and sentence bargaining in Germany.

But even if borrowing from Germany seems quite feasible, what is there that Americans might want to borrow? Is the German system too similar to suggest desirable American reforms? The summary in Part I suggests that many of the attractive features of French criminal justice, identified in a previous study, are also present in the German system, as follows:


2. Narrower scope of the criminal law (including both the downgrading of offense severity and complete deregulation of many “victimless” crimes). Partial or total decriminalization reduces the problems associated with enforcement of these crimes (e.g., police corruption, discrimi-

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253 The first German Code of Criminal Procedure, adopted in 1877, derived directly from the 1808 French Procedure code. See Edward M. Wise, Editor’s Preface to Frase, FRENCH CODE, supra note 3, at xv.

254 For a comparison of the French system, see Frase, Comparative Criminal Justice, supra note 2, at 553–67 (national police, magistrates); id. at 666–69 (judicial investigation); id. at 673–75 (non-adversary trials); id. at 677–82 (relaxed evidence rules); id. at 626–47 (absence of explicit plea bargaining); see also id. at 581–82, 575 (more limited Miranda, probable cause, and warrant safeguards).

255 See supra text accompanying notes 7–11; see also Frase, Comparative Criminal Justice, supra note 2, at 553–67.

256 See supra text accompanying notes 13–15; see also Frase, Comparative Criminal Justice, supra note 2, at 567–73.
natory enforcement, entrapment), and allows police and courts to concentrate their efforts on violent crime and serious property offenses.

3. Less frequent use of custodial arrest and pretrial detention, with greater use of summons and conditional release.\textsuperscript{257} Unnecessary pre-conviction custody is costly to the public, imposes great hardships on suspects and their families, exposes suspects to the criminalizing influence of other inmates, and burdens the exercise of trial rights.

4. Stricter control of prosecutorial charging discretion\textsuperscript{258} (although not nearly as much as has been claimed by some American reform-oriented researchers).\textsuperscript{259} Charging discretion is especially problematic when concessions are conditioned on defendant's cooperation. However, even unconditional charging discretion raises problems of discriminatory enforcement (e.g., against minorities or political opponents) and of under-enforcement (unwarranted dropping of provable charges).

5. Less frequent and abusive forms of plea bargaining.\textsuperscript{260} Although explicit charge and sentence bargaining has recently become more common in Germany, such practices still appear to be less frequent than in the United States (especially in very serious cases),\textsuperscript{261} and sentencing concessions may be less extreme.\textsuperscript{262} Thus, German plea bargaining and its analogues, although problematic, may still be preferable to the more frequent and heavy-handed style of bargaining found in the United States. In particular, German practices appear less likely to cause major sentencing disparities, to encourage initial over-charging, or to create undue risks of convicting the innocent.

\textsuperscript{257} See supra text accompanying notes 53–72; see also Frase, Comparative Criminal Justice, supra note 2, at 594–610.

\textsuperscript{258} See supra text accompanying notes 136–44, 158–65; see also Frase, Comparative Criminal Justice, supra note 2, at 610–26.

\textsuperscript{259} Compare Davis, supra note 1 with supra text accompanying notes 146–57.

\textsuperscript{260} See supra text accompanying notes 194–206; see also Frase, Comparative Criminal Justice, supra note 2, at 626–47.

\textsuperscript{261} See Herrmann, Bargaining Justice, supra note 135, at 756, 763 (plea bargaining is still exceptional in "violent and other very serious cases" and in "ordinary" cases; it is primarily used in "large and complex cases" involving white collar crime, tax evasion, drugs, or environmental crime).

\textsuperscript{262} See supra text accompanying notes 159, 196; Herrmann, Bargaining Justice, supra note 135, at 764. But see id. at 760 (examples of reducing a felony charge to a misdemeanor, to permit conditional dismissal). In addition, German plea bargaining occurs in the context of "open files" discovery, id. at 764, thus making pleas more informed and less subject to prosecutorial bluffing. There are also fewer problems of extreme coercion and sentencing disparity, since German sentences are generally much less severe. Id. at 769. The most frequent instances of concessions occur in the context of conditional dismissal, where the stakes are low and there is no finding of guilt. See StPO § 155a.
6. **Broader pretrial defense discovery rights.** Defense discovery avoids unfair surprise and delays at trial, permits counsel to more effectively and efficiently prepare for trial and sentencing, and helps compensate for the investigative advantage (in timing and resources) typically enjoyed by the prosecution. Since the prosecution file often reveals a much stronger case on issues of guilt than the client has previously admitted to counsel, discovery also encourages the defense to accept the existence of provable facts. This helps the court to focus on genuinely contested issues. In the United States system, broader discovery rules would also eliminate guilty pleas induced by threats of unprovable charges, and would reduce the prosecutor's incentive to overcharge.

7. **Much more frequent use of noncustodial sentencing alternatives, especially fines.** Germany's low sentenced inmate population, relative to the volume of serious crime, shows that it is possible to impose just and effective punishment by means which are more humane, less criminogenic, and far less costly than the lengthy custodial terms frequently employed in the United States. Less harsh sentencing practices also help to discourage unnecessary arrest and pretrial detention, and reduce the need to retain broad charging discretion and plea bargaining.

8. **Frequent lay input into guilt and sentencing decisions.** "Mixed" courts of lay and professional judges appear to be used more often in Germany than in France. The advantages of these courts include the following: collegial determination of all issues of law, fact, and sentencing; lay input into sentencing; professional input on issues of guilt; lessened need for the complex, delay-producing safeguards associated with common law juries (separate trials of offenses and offenders, elaborate evidence-admissibility rules, lengthy jury instructions); and potentially speedier trials due to shortened jury selection, instruction, and deliberation.

9. **A greater variety of rights and resources available to crime victims.** The German victim's rights to compel or conduct the prosecution provide a safeguard against unjustified failures to prosecute (and promote public confidence in prosecution decisions, even if these

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263 See supra text accompanying notes 166-72; see also Frase, Comparative Criminal Justice, supra note 2, at 672-73.

264 See supra text accompanying notes 207-16; see also Frase, Comparative Criminal Justice, supra note 2, at 648-62.

265 See supra text accompanying notes 18-23, 192; see also Frase, Comparative Criminal Justice, supra note 2, at 675-77.

266 See supra text accompanying notes 231-50; see also Frase, Comparative Criminal Justice, supra note 2, at 669-72.
rights are rarely exercised). Other rights—to be informed of and to participate in (or veto) the prosecution—accord crime victims greater respect, promote understanding of and satisfaction with the disposition of criminal charges, and encourage victims to report crimes and cooperate with law enforcement authorities.

10. Broad and frequently-used appeal rights, including de novo review of most verdicts and further on-the-record review of all verdicts and sentences, based on detailed judgment orders. 267 Defendant de novo appeals appear to play a more important role in Germany than in France, since they occur more frequently and are heard by a mixed court. Such appeals thus provide an important safeguard against erroneous decisions of law, fact, or sentencing, especially for the decisions of single-judge trial courts. Prosecution appeal rights help to reassure the public that the guilty will be punished and that acquittals, when they occur, are justified. German judgment orders, which are much more detailed than in either France or the United States, improve the quality of decisions both at the trial level and in the appellate process.

The features noted above give German criminal justice its particular character, distinct from other European systems and from U.S. criminal justice. Americans might well wish to examine more closely several of these features, whose adoption might help to solve some of the problems besetting federal and state criminal justice systems in the United States.

This study has already shown, however, that seemingly separate aspects of German criminal justice are in fact interrelated. For example, the sparing use of pretrial detention is closely connected with a generally reduced reliance on the deprivation of liberty as a reaction to crime. Systems which rely primarily on imprisonment as a sanction tend to show little hesitation in jailing suspects before trial, and vice versa. Similarly, pretrial diversion is facilitated when sentences after conviction consist solely of fines. Monetary sanctions can then easily be labelled “penance payments” and be made “voluntarily” by the offender before, or in lieu of, trial without losing their punitive and preventive effect. 268 In addition, if suspended

267 See supra text accompanying notes 189, 217–30; see also Frase, Comparative Criminal Justice, supra note 2, at 682–83.

268 This may explain the popularity of conditional dismissal under § 153a of the Code of Criminal Procedure, despite strong scholarly criticism. See H. Schöch, in Wassermann, supra note 4, § 153a, nos. 71–76. The amount of the “penance money” to be paid under this provision in fact often reflects the amount of a possible fine. Id. § 153a, no. 50.
sentences are frequently given, outright declination of prosecution may gradually appear more appropriate. By contrast, in a system which sends most of its offenders to prison, diversion and declination become devices of extraordinary leniency.269

Similar interrelations exist between the structure of the criminal process and parties’ rights to participate. When the criminal process is designed as an adversary contest between prosecution and defense, it makes sense to grant each side wide latitude in devising trial strategy and tactics; to minimize requirements of exchanging information; to limit the court’s authority to introduce additional information; and to avoid interventions of third parties, such as the victim. As has been shown, most of these adversarial features are absent from the German criminal process. Although the defendant can largely determine to what extent he will actively participate in the process, the prosecution must open their files to the defense. The court is responsible for “finding the truth” and therefore determines what evidence is to be taken. In addition, victims have input in the process at various steps.270 It may be difficult to transplant some of these German features into the American adversary system.

German criminal procedure provides an example of this phenomenon. The authors of the German Code of Criminal Procedure were, like many other Continental lawyers, impressed by the Anglo-American system of subjecting witnesses to cross-examination by the opposing party. They introduced into the Code of Criminal Procedure (in section 239) the possibility of substituting party examination and cross-examination for the regular interrogation of witnesses by the court. This option is available whenever prosecution and defense agree to it; the court cannot deny a joint motion of the parties, but retains the right to ask additional questions of witnesses.271

Yet, such party-controlled examination is practically unheard of in German courts272 because section 239 does not fit into the structure of the German criminal process. Attorneys have no expertise in developing their case through questioning witnesses, and are even less knowledgeable in the art of cross-examination. Judges regard

269 The previous study found similar patterns in France. See Frase, Comparative Criminal Justice, supra note 2, at 567–73 (decriminalization); id. at 594–610 (arrest and pretrial detention); id. at 610–15 (declination of prosecution); id. at 648–62 (sentencing severity).

270 See supra text accompanying notes 167–71, 176, 231–42.

271 StPO § 239, ¶ 2.

272 See Walter Gollwitzer, in Löwe-Rosenberg, supra note 4, § 239, no. 1; E. Schlüchter, in Rudolph, supra note 4, § 239, no. 2.
motions under section 239 as expressions of criticism of their own interrogation methods. In addition, aggressive partisan “distortions” of a witness’ recollection are seen as irreconcilable with the overall stress on inquisitorial methods of finding the truth.\textsuperscript{273}

German law, however, also offers examples of successful transplants. It is difficult to reconcile an inquisitorial search for the truth conducted by a state official with the idea of granting the defendant the right to interfere with the official investigation. He may interfere by withholding testimony, introducing his own evidence, and even obliging the court to hear additional witnesses.\textsuperscript{274} The nineteenth century influence of English criminal procedure law helped to promote the idea that the defendant is a subject, not a mere object of the process—a maxim which is by now well established in German law. This recognition has undoubtedly led to palpable tensions within the inquisitorial structure. The challenge of resolving these tensions, however, has enriched legal doctrine and has, by and large, led to acceptable practical results.

The fact that Germany (along with many other Continental systems) has recognized not only the importance of human rights, but also the “equality of arms” between the defendant and the agents of the state, as a guiding principle of the criminal process,\textsuperscript{275} has contributed to a process of convergence between the common law and the civil law systems. Another aspect of convergence is the rise of negotiated dispositions in the German system.\textsuperscript{276} This development, which has occurred only in the last decade, may be a late consequence of the recognition of the defendant as a key player in the process. The defendant’s participation right enables him to influence—most likely inhibit, complicate and protract—the process. This, in turn, jeopardizes the state’s control over the smooth functioning of the criminal justice system as a whole. In order to regain control, the state must seek compromise with the defendant to


\textsuperscript{275} See Röxin, supra note 4, at 67; Peter J. Tettinger, \textit{Fairness und Waffengleichheit} (1984); \textit{Commission Justice Penale et Droits de L’Homme}, supra note 45, at 121; see also European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6 § 1, 213 U.N.T.S. 221 (“everyone is entitled to a fair and public hearing”).

\textsuperscript{276} See supra text accompanying notes 195–205.
encourage him to give up some of the procedural options the state
had accorded him. This system-oriented mechanism seems to operate
regardless of the legal rules and the particularities of the trial
structure.

Convergence of the systems may ultimately lead to the universal
emergence of a two-tier system of criminal justice similar to the
American system: an elaborate trial system in which the defendant
has a broad range of procedural options, but risks severe punish­
ment if convicted; and, a “cooperative” short-cut to conviction and
relatively moderate sanctioning. If convergence along these lines
actually occurs, the two systems might still profit from considering
each other’s solutions to “middle-range” problems because the as­
similation of the overall structures makes transplants from one to
the other easier and less risky—both “donor” and “recipient” have
become even more compatible.

If one broadens the perspective beyond the scope of Germany
and the United States, intriguing questions arise. Although the gap
between the German and American systems may be smaller than was
traditionally assumed, conspicuous rifts remain on the presumably
monolithic Continental shelf. Several features of the present-day
German system—the strict separation of prosecutorial and judicial
functions, the concern for full and fair warnings of suspects before
any interrogation, the preference for oral over written testimony at
the trial, frequent appeals, and, in particular, the existence of nego­
tiated judgments—are largely absent in the system of neighboring
France. On the surface, the French system thus still seems to be
much more inquisitorial than the German, leaving the German
system located somewhere in the middle between the American and
the French systems. If this diagnosis proves true after closer inspec­
tion of actual practice, one would have to speculate about political,
cultural or other factors explaining these differences. This specula­
tion could be a task for a whole generation of new research.

CONCLUSION

The present study suggests that Western systems of criminal justice
are similar in a number of important respects, and may be converg­
ing. Foreign systems seem to be evolving toward a more “adversary,”

277 Cf. Weigend, Continental Cures, supra note 252, at 404–22 (recognizing the ubiquity of
the two-tier model but emphasizing differences between United States and Continental sys­
tems with regard to inducements to bargaining).
due process-oriented model,278 whereas the United States has recently been evolving in the opposite direction.279 Certain foreign systems, however, including Germany, are changing faster than others. The increasing similarity of German and American practices suggests that these two systems are sufficiently compatible to permit reform "borrowing" from Germany to the United States, and vice versa. The different rates of change and convergence, among the countries of Europe, also suggest interesting possibilities for further research on the evolution of legal systems.

Whether from a reform-oriented, or a theoretical perspective, the present study underscores the need to examine each system—whether foreign or domestic—as a whole, in practice, as well as in theory. Such an analysis reveals the inter-relatedness of rules and practices found in very different parts of the criminal justice system. In some cases, these different features seem to reinforce each other, as in the case of arrest, pretrial detention, and custody sentencing. In other cases, adversary rules at one stage (evidence-gathering limits and adversary trial procedures) may be undercut by compensating practices at other stages (plea bargaining).

The opposite may also be true: looser evidence-gathering rules may be justified by greater limitations in other spheres (e.g., better selection, training and supervision of police and prosecutors).280 Future researchers must continue to look for these important systemic connections, and must also be sensitive to the even broader societal contexts which may help explain differences among countries, and which could also pose obstacles to reform borrowing.


280 See Frase, Comparative Criminal Justice, supra note 2, at 553–54.