HUMAN DIGNITY IN THE CRIMINAL PROCESS: THE EXAMPLE OF TRUTH-FINDING

*Winfried Hassemer**

The search for truth lies at the basis of German criminal procedure. Human dignity can be protected by basing criminal judgments on the truth, and human dignity must be protected against overreach by law enforcement agents in their effort to determine the truth. New instruments of investigation, including secret methods and measures affecting non-suspects, jeopardize human dignity. The same is true for plea bargaining, which signifies the abandonment of the search for the truth in the criminal process.

I. THE TRADITION

A. SUBSTANTIVE AND PROCEDURAL LAW

According to the Continental-European legal tradition, there exists a neat distinction between substantive and procedural law. Europeans have lived with this distinction for centuries and have rarely questioned it. The distinction, which is derived from the established general distinction between content and form, between substance and procedure, shapes all areas of the law—criminal law, civil law, administrative law, and constitutional law. It provides a tool for classification and analysis, and it can yield arguments for a certain outcome.

The distinction between substantive and procedural law has, for example, played a major role in the debate in Germany on the extension of statutes of limitation for Nazi crimes. Statutes of limitation have been categorized as procedural law, and it has therefore successfully been argued that retrospectively abolishing a statute of limitation for Nazi murders does not violate the constitutional prohibition of retroactively changing criminal laws to the detriment of the accused.[1] The German Constitution only forbids retroactive amendments of substantive criminal law. Statutes of limitation, it was argued, only pertain to the state's ability to prosecute, not to the

* Former Vice-President and Justice of the German Federal Constitutional Court; Professor Emeritus, Johann Wolfgang Goethe University, Frankfurt am Main (Germany).

[1] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, Bundesgesetzblatt, Teil I [BGBl. I], art. 103 § 2; STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BGBL. I, § 1.

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punishability of certain conduct, and are therefore part of procedural law, which is not covered by the strict prohibition of retroactivity.[2]

B. TRUTH AND JUSTICE

The distinction between substantive and procedural criminal law yields many insights into the areas of philosophy and politics of criminal justice. Of these, I will discuss only one, namely the attribution of certain fundamental functions to procedural or substantive law.

It has been said that justice is the paradigm of substantive law and that truth is the paradigm of procedural law. Like all stipulations that sum up fundamental insights in a short formula, this thesis is debatable at its margins, and its brief formulation may give rise to misinterpretation or misunderstandings. This thesis nevertheless forms a valuable basis for further reflection on the significance of criminal procedure, its present shape, and its development in the foreseeable future. I will concentrate my analysis on the question of how truth can be established in the criminal process.

The goal of the criminal process is the search for truth, or, in other words, the discovery of the events that are to be adjudicated by the court. All rules of criminal procedure serve, more or less directly, the goal of finding the truth: the rules on gathering and introducing evidence and jurisdiction; the sequence of investigation, trial and appeal; even the rules on the exclusion of participants from the proceedings and the right to silence. Each of these rules is meant to contribute to finding the truth. If the judges fail in their pursuit of the truth they are unable to correctly apply the substantive law. Truth is a necessary—albeit not sufficient—condition for achieving justice. This underlines the importance of criminal procedure law for achieving criminal justice. In civil law systems, legal scholars have traditionally underestimated the significance of procedural law, relegating this part of the law to an unjustifiably peripheral role. Similarly, German legal philosophy has long concentrated on justice, certainty, and equity as constitutive elements of the "idea of law," neglecting truth as a precondition for justice. Perhaps "truth" has too much of an epistemological, analytical, or even pragmatic ring for German philosophers, who aim for depth, seriousness, and substance. Yet, both the demands of the German Constitution and the current discourse on legal politics demonstrate the importance of the rules regulating the criminal process.

C. HUMAN DIGNITY

As fundamental principles of law, truth and justice lead directly to the principle of human dignity. Article 1(1) of the German Constitution proclaims that all branches

[2] *See* 25 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] [DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT] 269 (284-85); 46 BVERFGE 188 (193).

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of the state are obliged to respect and protect human dignity. Within this conceptual framework, truth-finding in the criminal process can be used as a concrete and instructive example of the relevance of the human dignity principle within the German legal system.

Two different paths connect criminal investigations with the principle of human dignity. First, truth-finding implies interfering with individual rights. Extracting information from defendants and witnesses by using threats and force can be a method of truth-finding. If we consider the extreme case of using torture to obtain information, it becomes clear that there must be limits to the search for truth. These limits are drawn by the Constitution, and criminal procedure law describes them in greater detail. The German Code of Criminal Procedure posits that no human being should become a mere object of questioning, a mere source of information.[3] This remains true even where the search for truth is of the greatest relevance for the criminal process. Every person therefore has a subjective right to be protected against abuse when he or she is interrogated by state agents.

This example shows that it would be naïve to believe that criminal justice automatically gets better as we find more of the truth. The world is not that simple and straightforward. Fundamental notions tend to be complex. They do not stem from a single source, and they do not follow a single path—not even the notion of truth. Even science and art, protected without any restriction by the German Constitution,[4] must be limited in practical operation, for example when freedom of art or science conflicts with individual rights. If even science and art, like the consumption of food or television, should have their limits, the same can be said of truth-finding in the context of the criminal process. Maximization of truth-finding does not equate to optimization of the criminal process. But perhaps one can at least argue that a more successful search for the truth (which is, after all, the ethos of the criminal process!) is to be welcomed as long as individual rights are still being respected.

This brings us to the second path connecting human dignity with criminal investigations. Human dignity is not only a shield against an excessive search for the truth. According to the German concept of the criminal process, truth-finding is also a tool for protecting and strengthening human dignity. If truth is a necessary precondition of justice, it is easy to see that truth must be found in order to treat the defendant in a way compatible with his or her human dignity. Only a process geared toward truth-finding can guarantee that the defendant is adjudged on the basis of facts rather than the pre-conceived views of others. Only when the court can confi-

[3] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBl. I at 1074, § 136 (granting suspects a right to silence) and § 136a (prohibiting certain measures of interrogation). These provisions are directly interrelated with the protection of human dignity in article 1(1) of the Basic Law.

[4] GG art. 5 § 3.

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dently assert that there is no basis for reasonable doubt about the defendant's guilt does the court convey to the defendant and the public the message that the verdict is based on truth as a necessary requirement of justice and that the defendant has been treated as a subject in the criminal process rather than as a mere pawn in an effort to arrive at a certain outcome of the process.

II. OPTIMIZING THE SEARCH FOR TRUTH

The search for truth in the criminal process is necessarily subject to restrictive conditions. These conditions, which are stable and well justified, imply that the relevant facts and events are generally not cleared up as thoroughly and completely as a scientific approach would require. The concept of truth in the criminal process turns out to differ from the concept of truth that we accept without question in ordinary life.

A. LEGAL OBSTACLES TO THE SEARCH FOR TRUTH

The German Code of Criminal Procedure itself creates several obstacles to the search for truth—obstacles that are sometimes difficult to overcome. With slight exaggeration, one might say that it tends to block access to those sources of information that would probably yield the most and clearest water if one let them bubble without obstruction. This fact provokes the worrisome question what kind of truth it is that can be established in the criminal process.

A primary obstacle to finding the truth is the suspect's right to silence. Under German law, judges are not permitted to draw negative conclusions from the fact that the suspect chooses not to speak.[5] This is true even though one can assume that the defendant is the best source of information available in the criminal process.[6] Persons close to the defendant, especially his or her relatives and spouse, have a right to refuse to give testimony, and the court and any interrogator even have to advise them of this right.[7] They can thus withhold testimony even though they may well have interesting things to tell, if not about the offense then at least about the defendant. Members of the clergy, defense counsel, physicians, pharmacists, solicitors, tax consultants, journalists, and many other professionals and their staff likewise have a right to withhold testimony with respect to information gathered in the

[5] *See* 42 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] [DECISIONS OF THE FEDERAL COURT OF JUSTICE IN CRIMINAL MATTERS] 139 (152) (1996); 45 BGHST 367 (2000).

[6] It is not a conclusive counterargument that defendants, as experience shows, tend to make false statements in order to protect themselves. Witnesses also do not necessarily volunteer to tell the truth if they testify under pressure or under the influence of personal interests, as is almost always the case. Professional lawyers are, after all, not entirely helpless when confronted with false statements.

[7] STPO § 52.

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course of their professional conduct.[8] Finally, any witness can refuse to answer questions if answering them may lead to criminal charges being laid against him or her or against a close relative.[9] German law thus recognizes an impressive list of testimonial privileges, and it makes sure that there are no negative consequences attached to using them, although it is clear that the silence of a defendant or a crucial witness can prevent the case from being solved.

Testimonial privileges are nevertheless justified in a deep and solid way. The defendant's right to silence is supported by constitutional law, which protects these privileges from being abolished even by statute. The right to silence and testimonial privileges rest on three foundations: the legitimate interests of individuals subject to an investigation, the public interest in the proper functioning of certain professions, and the principle of fair trial.

With respect to testimonial privileges of relatives, German law acknowledges that persons close to the suspect face a conflict between speaking the truth and maintaining peaceful relations with him or her. The law offers a way of resolving that conflict by leaving the decision whether or not to testify to the witness concerned. A witness may stay away from the state's search for the truth.

The law further assumes that members of the clergy, public notaries, and lawyers would not be able to survive professionally if they were unable to keep the secrets entrusted to them by their clients. It is also in the interests of society that these professions exist and that their proper functioning is protected by granting certain professionals testimonial privileges. For that purpose, the state's interest in finding the truth can justifiably be limited.

Finally, it is the principle of fair trial that demands that suspects are not forced to testify and that witnesses have a right to refuse to answer questions if the answer would make them risk criminal prosecution. Suspects and witnesses should also be informed of these rights. This issue is beyond debate in German courts.

German law also has rules according to which statements are excluded from evidence when they were obtained through undue pressure on the suspect or witness, including (threats of) torture but also false representations and promises.[10]

One might ask how the criminal process can ever arrive at the truth if the court has to slalom around so many obstacles to reach its goal. The absolute prohibition of torture has recently been debated again in Germany, and one of the popular arguments in this debate has been that criminal procedure law sets the hurdles for conviction too high.[11] I do not share this view. German police and prosecutors managed

[8] *Id.* § 53.

[9] *Id.* § 55.

[10] *Id.* § 136a.

[11] For a statement in favor of permitting torture in extreme cases, see Rolf-Dietrich Herzberg, *Folter und Menschenwürde*, 60 JURISTENZEITUNG 321 (2005).

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to do their job after the end of the Nazi regime even though they worked under an absolute prohibition of torture. This is sufficient proof that our system is not only based on adequate criminal law theory but also that it functions in practice.

On the whole, the German system is generous and shows proper respect for human rights. This aspect of German criminal procedure law not only deserves praise but also reveals the fact that, according to the standards set by the German Constitution, the search for truth cannot be the primary goal of the criminal process, and certainly not its only goal. In fact, the German Federal Court of Justice long ago declared that the search for the truth in the criminal process should not be conducted at any cost.[12] The search for the truth must be adjusted and modified according to the protective principles that form the core of our legal culture. If an unlimited search for the truth fails to stop at the boundaries drawn by constitutionally protected values, that search can infringe on individuals' privacy and harm the proper functioning of important professions as well as the principle of fair trial.

B. THE CONCEPT OF TRUTH

The long list of testimonial privileges and the defendant's absolute right to remain silent raises the critical question what kind of truth can be discovered on these twisted paths with their many obstacles and potholes. Does the description of facts established through court proceedings have anything to do with the "real," "historical" truth? And what happens to justice when the results achieved by the criminal process are not entirely reliable? Theorists of criminal law and procedure continuously ponder this question, and the public becomes interested when a criminal trial frightens them or touches their emotions. Can criminal justice, people ask, contribute to shedding light on historical events such as Nazi crimes, the shooting of fugitives on the former East-West German border, or sexual offenses against children?

In response, one has to admit that the facts established by the courts are too selective to yield a reliable picture of historical events. The criminal court uses an entirely different script than a historical researcher. The court does not aim to discover an "event" but only those elements of the event that correspond to the elements of a crime. For the criminal judge, the general context of the crime is only of value as background information. The judge's immediate focus is on details that are relevant for substantive criminal law: violence, loss of property, and loss of assets. Criminal lawyers therefore distinguish "forensic" truth from "substantive" truth. The truth discovered in the criminal process depends on the search program based on criminal and constitutional law, and forensic truth is limited by this search program.

[12] *See* 14 BGHST 358 (365) (1960).

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Can this selective and fragmentary piece of truth be the foundation of a just judgment and a proper basis for convicting the defendant? The answer is yes: forensic truth is a sufficient basis for a criminal conviction even though it would not be sufficient for a historical judgment or even for a weather forecast. The reason is that criminal procedure law includes mechanisms to ensure that this form of searching for the truth avoids unjust convictions as much as possible. The most important of these mechanisms are two principles that instruct judges to deal with the fragmentary piece of truth they have managed to establish in a way that makes sure that errors, inaccuracies, and misrepresentations do not work to the disadvantage of the convicted: the principles of "free evaluation of the evidence" and "*in dubio pro reo.*"

The principle of free evaluation of the evidence is the answer that has been found on the European continent to the strict and formal evidence rules in the former inquisitorial criminal process. The principle of free evaluation of the evidence means that the court can derive the judgment from any rational evaluation of the evidence that has been before it during trial; the judges' inner conviction (*intime conviction*, as the French say) is to be the only yardstick by which they appreciate the facts. There are no legal rules that would oblige judges to evaluate any piece of evidence in a particular way, for example to give preference to the testimony of five witnesses over one written document or to believe a police officer's testimony rather than the defendant's own assertion. According to the case law of the German high courts, trial judges are in fact not quite as free as the name of the principle might indicate. They must at least give detailed explanations for their evaluation of the evidence, and appellate courts will review whether these explanations are internally consistent and whether they comply with the laws of logic and experience.[13]

One of the advantages of the judge's freedom to evaluate the evidence is that it is well suited to the judges' psychological situation. The principle of free evaluation permits judges to convict a defendant even where there is not a large quantity of incriminating evidence but where that evidence is qualitatively sufficient to convince the judge, in accordance with his life experience, that the defendant is indeed guilty. The former system of strict rules on the quantitative sufficiency of evidence, while seemingly more beneficial to the defendant, actually led to abuses, because it prevented judges from implementing a judgment based on the "truth." For example, under the ancient inquisitorial process, a defendant could be convicted only if two eye-witnesses testified that he had committed the offense. Since few offenses were committed in front of two eye-witnesses, the courts found themselves compelled to circumvent the evidentiary rule by obtaining the defendant's confession (which was the alternative grounds for a conviction). In that sense, torture has correctly been

[13] 3 BGHST 213 (215) (1952); 14 BGHST 162 (1960). For a collection of case law on this issue, see Hanns Engelhardt, *in* KARLSRUHER KOMMENTAR ZUR STRAFPROZESSORDNUNG § 267, marginal notes 13-20 (Rolf Hannich ed., 6th ed. 2008).

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called a child of formal rules of evidence. If neither eye-witnesses nor a voluntary confession were available, torturing the defendant to make him confess appeared to be the only alternative to letting most suspects go free. Under today's principle of free evaluation of the evidence, torture is no longer "necessary," because the court can convict even when there is no eye-witness, on the basis of any evidence that the judges deem sufficient to convince them of the defendant's guilt. From the perspective of defendant's rights, the principle of free evaluation of evidence appears acceptable as long as the judges' evaluation of evidence is guided by rules that do not force results but encourage certain ways of reasoning.

The requirement that judges should, if in doubt, decide in favor of the defendant (*in dubio pro reo*) is a continuation of the principle of free evaluation of the evidence. The rule that the court must acquit if it has doubts about the defendant's guilt does not emphasize rules or violations of rules but centers on the psychological situation of the individual judge who must take responsibility for the verdict. The maxim *in dubio pro reo* focuses on the judge's confidence—doubt is the hostile brother of confidence. In German law, the maxim applies only to findings of fact; it does not extend to doubts about the law or about the justice of the verdict itself.

Even adherence to the rules on freedom of evaluation of the evidence and *in dubio pro reo* does not guarantee that the court bases the judgment on a "correct" image of reality (assuming that an objective "reality" exists—which I do not believe because what is "real" depends on the viewpoint and the methods applied). Yet, we must assume that the small piece of "reality" that the conviction has to rely upon has been established in accordance with the applicable standards of empirical science. No more can be demanded for forensic truth.

After having laid out the jurisprudential foundations of the relationship between truth and human dignity in the criminal process, I will now focus on recent developments connected with this relationship in the criminal process.

III. Recent Developments

Since the middle of the 1980's, German law relating to interventions of the state in citizens' lives has undergone remarkable changes. These changes, which extend not only to criminal law but also to police law, the law on the secret services, and data protection law, can also be found in other Western European countries. The fear of Islamic terrorism did not create but has nevertheless intensified these developments.

A. "Risk Society" and the Urge to Control

The new legal developments are based on normative disorientation among many citizens. This disorientation, which engenders an increased fear of crime and a concomitant growth of an urge to control, has been related to the sociological concept of

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"risk society."[14] This concept starts from the premise that people nowadays perceive themselves to be surrounded by grave risks beyond their control: worldwide financial crises, pollution of the environment, uncontrolled migration, youth violence, job loss, decline of social ties, terrorism and organized crime, wars, and dangers of war. These risks differ from those known in the past in that they cannot be controlled by the individual and appear to be particularly destructive. The cumulative presence of these risks tends to paralyze the power of resistance of both the individual and society. Individuals begin to panic. They feel an urgent and desperate need to regain control of their lives. This urge leads to irrational reactions. Like the drunk at night who searches his lost house key only beneath the street lamp, arguing that this is where there is light, many people limit the search for control to those areas where it still seems possible to regain it. One of these areas is crime. In the eternal conflict between freedom and security, the weight has consequently shifted toward security. New legislation has emphasized the goal of establishing and strengthening internal security, at the cost of a diminished sphere of individual liberty.

For example, the protection of the privacy of personal data as a matter of liberty has been disparaged as "protection of criminal offenders," and there have been demands to make data collected for entirely different purposes (e.g., tax collection) available for criminal investigation. Moreover, the heretofore strict line of separation between the police and the secret services is now said to impede law enforcement—with the consequence that the competence of internal security forces has been extended. Substantive criminal law has not remained unaffected by the new trend toward tightening security. Quite a number of new offenses have been created and sentences increased in the "modern" areas of substantive criminal law, e.g., organized crime, business crime, drug offenses, environmental crime, terrorism, and computer crime.

B. NEW CRIMINAL PROCEDURE

The German law of criminal procedure, in essence dating from 1877,[15] has been amended almost 200 times since its conception but has never undergone a thorough reform. Yet, in the wake of the new trend toward strengthening security at the cost of liberty, legislative efforts have in recent decades focused on the investigative stages of the criminal process and have sharpened and augmented the state's tools for investigating crime. These changes are partly due to the progress of information technology but are also shaped by society's perceived urge to take control. Both

[14] The seminal monograph is by ULRICH BECK, RISIKOGESELLSCHAFT. AUF DEM WEG IN EINE ANDERE MODERNE (1986).

[15] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Feb. 1, 1877, REICHSGESETZBLATT [RGBL.] 253. After many amendments, the Code of Criminal Procedure was repromulgated in 1987 as STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBL. I at 1074.

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sources of change are in fact interrelated: technology has offered society's urge to control a number of highly efficient tools, and politicians have been eager to make their use possible. One frequently-used argument in favor of employing new technologies for criminal investigation has been that offenders also rely on these tools, and that the state must therefore not be limited to using inferior technology.

Two features stand out among the characteristics of the "new" investigation process: its secrecy and its independence of any prior suspicion.

1. SECRECY

The original version of the German Code of Criminal Procedure was premised on the notion that criminal investigations were to be carried out before the eyes of suspects, with the single exception of the seizure of letters in the custody of state postal services.[16] All other acts of investigation—pre-trial detention, examinations of the suspect's body, searches, and seizures—could be witnessed by suspects, thereby not only affording them an opportunity to immediately react to these measures but also making them aware of the fact that they were under suspicion. Suspects were thus able to adapt their behavior to the situation and react rationally to the investigation.

Today, by contrast, criminal investigations are largely secret explorations. The legislature has introduced a host of new investigatory measures that have in common that they are deliberately kept secret. Starting with the introduction of wiretapping in 1968,[17] the arsenal of surreptitious measures of surveillance has been expanded to include, for example, the secret monitoring of conversations inside and outside private homes,[18] the collection of data concerning an individual's telephone conversations[19] and the location of his mobile phone unit,[20] the continuous observation of a person and taking pictures of him in public places,[21] and the use of undercover police officers.[22] Some of these new techniques of information gathering have been put to frequent use—which is of course unobjectionable as long as the individual rights of the affected persons are respected. At first blush, it seems that we even ought to welcome these changes. If the tools of modern information technology work—and we have good

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[16] STPO § 99. According to § 100 of the Code of Criminal Procedure, the seizure of mail requires a judicial order, and only a judge can open and read seized items, unless the judge has delegated that task to the prosecutor. The sender and the addressee of seized items have to be informed, but information can be delayed until the purpose of the investigation has been reached (STPO § 101, paras. 4 & 5).

[17] *Id.* § 100a.

[18] *Id.* §§ 100c & 100f.

[19] *Id.* § 100g. The so-called contact data include the number called and the time and duration of the call.

[20] *Id.* § 100i.

[21] *Id.* § 100h. Secretly taking pictures of persons in private homes is not (yet) permitted.

[22] *Id.* § 110a.

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reason to assume that they do—then their employment can be expected to strongly enhance the prospect of finding the truth in the criminal process.

However, subjecting a person to long-term observation by the police, wiretapping, or bugging only make sense if the persons under investigation do not have (precise) knowledge of these measures. For the purpose of the investigation, there is no simple alternative to secrecy, and a suspect has no subjective right to have an investigation conducted openly. Yet the character of the criminal investigation changes when most of the information is gathered surreptitiously. Most importantly, persons who are unaware of the fact that they are under observation behave differently from persons who have been informed of the suspicion against them. If suspects are unaware of the investigation, their chances of defending themselves successfully against the accusation are drastically reduced. It is not by coincidence that many recent rulings of the German Federal Constitutional Court deal critically with secret measures in the course of criminal proceedings.[23]

2. INVESTIGATION EXTENDING BEYOND PERSONS UNDER SUSPICION

Generally, German procedural law permits measures of criminal investigation to be directed only against persons who are suspected of having committed a criminal offense. In recent years, this rule has been eroded by laws extending investigatory measures to third persons. This dramatic development has not yet been properly recognized, let alone analyzed, by German theorists.

Invasions of privacy such as searches and wiretaps require not only a statutory basis (which the Code of Criminal Procedure provides) but also a substantive justification. Traditionally, such interventions have been justified by a reasonable suspicion that the individual had committed a criminal offense that needs to be investigated, yet modern methods of investigation have cast the net much wider. If a wiretap has been placed on a telephone line, or a hidden microphone has been installed in someone's home, it is impossible for technical reasons to "look the other way" when a person not involved in the alleged offense takes an active part in a conversation. The person against whom there exists no suspicion whatsoever gets caught in the investigation, and his or her privacy rights are interfered with.

Even in the non-technological context of establishing a suspect's identity, German law permits police to establish the identity of a non-suspect "to the extent that is necessary for the investigation of a criminal offense."[24] When a person has been put

[23] *See, e.g.*, 109 BVERFGE 279 (323-25) (2004) (surveillance of conversations in homes); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Aug. 22, 2006, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 351, 2007 (surveillance by using the location of mobile phone); BVerfG, Apr. 18, 2007, NJW 2749, 2007 (surveillance of a defense lawyer's mobile phone); 120 BVERFGE 274 (2008) (secret online surveillance of private computer).

[24] STPO § 163b, para. 2.

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on a list for "police observation" and is stopped by police, the identifying data of any accompanying person can be recorded and stored.[25] Section 111(1) of the Code of Criminal Procedure authorizes the police to establish, with judicial permission, roadblocks to investigate certain offenses. At a roadblock, everyone must allow the police to establish their identity and search their person and belongings. This interference with the privacy rights of persons without any suspicion of wrongdoing is not trivial. Neither a general "investigative necessity," nor the mere fact that the person in question is in some way "close" to the offense or the suspect, nor a police interest to enhance control is sufficient to justify such invasions by the state.

I regard such infringements of individual rights as monstrous and unjustifiable in a state based on the rule of law (*Rechtsstaat*). Prior suspicion against the person affected by a measure is the only consideration that can provide a justification for interfering with individual rights in the context of the criminal process. A criminal investigation without suspicion fails to fulfill a central element of its theoretical justification.

There are certainly pragmatic remedies when an investigation has been extended into the sphere of a non-suspect. For example, the affected persons have the right to be informed about the investigative measures as soon as the purpose of the investigation is no longer jeopardized by disclosing such information. It is also possible to subsequently delete data or to restrict access to them.[26] But such measures only serve to minimize the damage that has already been done. Sometimes even this pragmatic approach creates considerable practical difficulties. For example, when the Federal Constitutional Court declared that information gained through hidden microphones cannot be used when it relates to the "core area of privacy,"[27] the question of how to deal with these protected parts of an ongoing conversation proved almost intractable. How can a police officer determine in advance whether a man and a woman sitting in the kitchen of an apartment will discuss crime rather than cooking? Does the police officer who listens in to a private conversation have to stop listening when the conversation takes an "innocent" turn? If so, at what time can he or she make another attempt at obtaining information relevant to the investigation?[28] All these open

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[25] *Id.* § 163e, para. 3.

[26] *See, e.g.*, STPO § 101, para. 8: "When personal data obtained through one of these measures are no longer necessary for criminal investigation or for a review of these measures, they shall be deleted without delay." *But see* STPO § 477, para. 2, second sentence, which permits evidence found "by chance" in the course of an investigation to be used in any other investigation for which this evidence could have been lawfully obtained.

[27] 109 BVERFGE 279 (323-25) (2004).

[28] In implementation of the ruling of the Federal Constitutional Court, the legislature adopted an amended version of STPO § 100c, para. 5, which reads: "The surveillance and recording [of conversations] shall be interrupted immediately when, during surveillance, indications appear that the surveillance covers utterings that are to be attributed to the core sphere of private life. Recordings of such utterings shall be deleted immediately. Information about such utterings shall not be used [as evidence]."

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questions show the inherent problem of trying to limit a boundless invasion into a person's private sphere.

C. NEGOTIATIONS IN THE CRIMINAL PROCESS

Judgment bargaining is one feature of today's German criminal process that drives crowds of proselytes into favoring an unlimited search for the truth. In the German version of plea bargaining, the court promises the defense to impose a lenient sentence in exchange for the defendant's confession. The maximum severity of the sentence is subject to negotiation between the parties and the court.[29]

Primarily in those areas where the search for truth is time-consuming and complex (e.g., business crime and organized crime), criminal law practice tends to conduct proceedings not according to the established *lex artis* but to simplify and abbreviate them. Negotiations focus on short-cutting the search for truth and, in particular, on curtailing the defendant's right to demand the taking of further evidence.[30] Demands for taking additional evidence, if used by a competent defense lawyer, are a powerful weapon for prolonging the trial, annoying the judges, and creating time pressure. Courts therefore have an interest in arriving at an agreement with the defense lawyer (and the prosecution) in order to obviate demands for the introduction of evidence or avoid the presentation of evidence altogether.

Several drawbacks and risks of negotiated judgments have been identified. They violate the principle that trials are public, because negotiations are typically conducted in back rooms and not in public proceedings. More importantly, the practice of negotiation creates the risk that innocent persons are convicted. If offered a lenient sentence—especially one without a custodial sentence to be served—an individual may be willing to make a false confession in order to avoid a more severe sentence after a lengthy trial with ample media coverage.[31]

Criminal law theorists, judges, and members of the legislature have long debated other ways out of the dilemma of case overload.[32] Today, many practicing lawyers and some theorists of penal procedure[33] believe that negotiations are the only means

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[29] *See* STPO § 257c, para. 2.

[30] According to STPO § 244, para. 3, the court can deny a party's motion to hear additional witnesses only on narrow grounds (redundancy, irrelevance, or illegality).

[31] False confessions in "bargained" cases can also be induced by pressure from others, for example the defendant's employer.

[32] For an overview and a discussion of this practice, see DIE PRAXIS DER ABSPRACHEN IN WIRTSCHAFTSSTRAFVERFAHREN (Karsten Altenhain et al. eds., 2007); Eberhard Kempf, *Gesetzliche Regelung von Absprachen im Strafverfahren? Oder: Soll Informelles formalisiert werden?*, 2009 STRAFVERTEIDIGER 269.

[33] *See* Matthias Jahn & Martin Müller, *Der Widerspenstigen Zähmung—Aktuelle Gesetzgebungsvorschläge zu den Urteilsabsprachen im Strafprozess*, 2006 JURISTISCHE AUSBILDUNG 681; Herbert Landau & Ralph Bünger, *Urteilsabsprache im Strafverfahren*, 2005 ZEITSCHRIFT FÜR

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of coping with the flood of criminal charges (which are partly a consequence of extending the scope of the criminal law). Since both the Federal Court of Justice[34] and the legislature[35] eventually recognized judgment negotiations as legal, however, the remaining meaningful question is what consequences the practice of judgment negotiations has for truth-finding and the concept of truth in the criminal process. The answer is obvious: the concept of truth has become a fatality. In the structural context of the German criminal process, negotiations mean no less than a systematic abstinence from the search for truth. In the end, the defendant is convicted and sentenced not because he has been proved to have committed a crime but because he—represented by his counsel—has given his consent. Consent rather than truth becomes the foundation and the justification of the verdict and sentence. Analyzing this phenomenon can therefore help to understand the value of the search for truth. Only if one realizes to what extent negotiations have damaged the German criminal process can one appreciate how important and valuable the concept of finding the truth is (or, more precisely, was).

IV. CONCLUSION

Having reviewed the traditions behind the search for truth in the criminal process and the consequences derived from the criminal law's concept of truth, we are now in a better position to evaluate the recent developments in the German criminal process. On the one hand, we are witnessing an abandonment of the value of truth in favor of a bureaucratic, consent-based disposition of criminal cases. On the other hand, we see developments toward optimizing the search for truth. Yet, the introduction of more efficient methods of finding the truth does not necessarily optimize the criminal process. The search for the truth is not the only goal of the criminal process. The interest in finding the truth is at continuous and fundamental tension with the procedural rights of those who participate in the criminal process. These procedural rights aim to protect human dignity, and they shape the notion of a fair trial. We should not forget that the state of the law on criminal evidence indicates the state of a country's legal culture.

RECHTSPOLITIK 268; Gunther Widmaier, *Die Urteilsabsprache im Strafprozess—ein Zukunftsmodell?* 2005 NJW 1985.

[34] The first judgment of the Federal Court of Justice recognizing—within certain limits—judgment negotiations was rendered in 1997 in 43 BGHST 195 (1997).

[35] The legislature introduced STPO § 257c in 2009. This new provision legalizes and purports to regulate judgment negotiations between the court, the prosecution, and the defense. For an overview of the German debate, see Thomas Weigend, *Plea Bargaining in Germany*, *in* CURRENT TRENDS IN CRIMINAL PROCEDURE AND EVIDENCE: A COLLECTION OF ESSAYS IN HONOR OF PROFESSOR ELIAHU HARNON 265 (Anat Horovitz & Mordechai Kremnitzer eds., 2009).

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