Shawn Marie Boyne

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Guardians of the Law?

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Shawn Marie Boyne
School of Law
Indiana University
Indianapolis
Indiana
USA

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To my parents,
John and Mary Jo Boyne

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When I left the practice of law after 9 years to begin my Ph.D. studies, I believed that I could make it through the process as the result of my own drive and determination. I was wrong. Without my indefatigable dissertation advisor, Kathryn Hendley, at the University of Wisconsin, I am confident that I would never have persevered to complete this project. The other members of my dissertation committee, Don Downs, Tamir Moustafa, Michael Smith, and Walter Dickey, read through early drafts of my original manuscript and provided crucial insights along the way. Howie Erlanger provided me an early home as a graduate fellow in the Institute for Legal Studies at the University of Wisconsin Law School. Pam Hollenhurst, the ILS Institute's Associate Director, often made me feel at home in the law school—though my primary home was across the quad in the political science department.

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hotel. Not only did they walk me to my intended destination but they also gave me a bus ticket and directions to the prosecution office. It turned out that the gentleman was a retired judicial employee. He was fascinated with my project.

The opportunity to participate in the Berlin Program for Advanced German and European Studies at Freie Universität during the 2005–2006 academic year was an unbelievably rich research experience. The program director, Karin Goihl, not only takes each fellow under her wing, but she also provided me with helpful assistance when I needed help navigating my way around Germany. During that year of fieldwork, I was also privileged to bounce my initial research ideas off of the members of the Young Researchers' Group on Comparative Micro-Sociology of Criminal Procedure, led by Dr. Thomas Scheffer, also housed at Freie Universität-Berlin, Germany.

After finishing my dissertation, I returned to Germany to continue my research as a DAAD postdoctoral fellow at the Max Planck Institute for Foreign and International Criminal Law. The Institute's library and staff are an incredible resource. During these periods, Prof. Dr. Ulrich Sieber graciously lent his support to my project enabling me to expand my interviews and observation activities across a wider cross section of Germany. In the interim period, I have rewritten and updated most of my original dissertation. I gathered the confidence to do so after participating in the *Annual Comparative Law Works-in-Process Workshop* held at Yale Law School in February 2011. At that workshop, I received helpful feedback from Jacqueline Ross, Mortimer Sellers, Kim Sheppele, Jim Whitman, and the workshop participants. I also presented portions of my work at the McKinney School of Law's Junior Faculty Workshop where Marcus Dubber and Cynthia Adams critiqued my work. Like many developing scholars in the Midwest, I owe a debt of gratitude to the Washington University School of Law's junior faculty workshop where I presented several chapters of my work.

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prosecutors who loosened up after observing me make mistakes. I remember in particular during one interview that I tried to ask a young prosecutor to describe a case that he had handled in which he was proud of the result. I mispronounced the German word for case (Fälle) and the question morphed into—What mistake (Fehler) are you most proud of? After the prosecutor realized what I was trying to say, we both broke into laughter. Gratefully many prosecutors spoke fluent English. Those who didn't were extremely patient with my language skills. Had so many individuals not found the time to spend with me, this book would never have made it off the ground. In deference to maintaining the anonymity of my interview subjects, I cannot cite them by name.

Writing this book was an iterative process that required the help of so many people that I am sure that some individuals will go unnamed. So many individuals guided me through the German legal system to whom I owe an enormous debt. In addition to my interviews with prosecutors and judges, I spoke with members of law enforcement, defense attorneys, officials employed in crime labs and prisons, social workers, as well as some defendants. All of them contributed to my understanding the complexities of the German criminal justice system.

My only regret in this whole process is that my mom, Mary Jo Boyne, who traced her roots back to Germany, did not live to see the book completed.

Indianapolis, IN Shawn Boyne
2013

Abbreviations

§	Section
§§	Sections
BGH	Federal Court of Justice
BGHSt	Federal Court of Justice Criminal Law Panel
BVerfGG	Federal Constitutional Court Decision
BvR	Federal Constitutional Court Decision
DVJJ	German Association for Juvenile Court and Juvenile Offenders
GG	Basic Law of the Federal Republic of Germany
GStA	General Public Prosecutor
GVG	German Code on Court Constitution
JGG	German Act on Juvenile Courts
LOSTA	Leading Public Prosecutor or Chief Office Prosecutor
NBG	*Niedersachsen* Civil Service Law
OStA	Senior Public Prosecutor or Department Manager
RiStBV	Guidelines for Criminal and Fine Proceedings
StA	Public Prosecutor
StBG	Code of Criminal Law
StPO	Code of Criminal Procedure

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Chapter 1
Introduction

> There are few bases for being able to radically change whatever society one is living in. There are many bases for making better use of its possibilities (Luhmann 1992, p. 182).

1.1 The Rechtsstaat and the Twenty-First Century

As the twenty-first century enters its second decade, Germany stands clearly on Europe's center stage. Propelled by an economy that has served as an engine of Europe's economic growth as well as a safety net for Europe's more troubled economies, German influence has been a driving force behind the continuing growth and form of the European Union (EU). Within the EU itself, German policy has decidedly influenced the contours of European policies regarding trade, environmental policies, security and justice, and human rights. In the legal arena, Germany's Basic Law has arguably supplanted the U.S. Constitution as a model for new democratic constitutions (Bahners 2009).

Despite Germany's influence on the European stage, Germany and its European partners face critical social, economic, and political problems that threaten the societal foundations of the democratic welfare state. While the aging of the European workforce calls for a narrowing of the each state's extensive social-welfare net, reforms designed to redefine that net stoke civil unrest. Just as challenging, ongoing tension over the integration of immigrant communities in both Germany, as well as into the larger European society, erupt on a regular basis and stoke anti-immigrant rhetoric and distrust. While centrist political elites frequently condemn such rhetoric, laws and norms of discourse that attempt to prevent and punish racist speech have at times ironically hamstrung public debate. Political reforms aimed at tackling integration challenges are often stymied.

Yet, as the tides of socioeconomic change have ebbed and flowed, post-war Germany's commitment to legal foundations of the state, the German *Rechtsstaat*, has continued to deepen. Since the creation of the post-war German *Rechtsstaat*, German policymakers have demonstrated increasing fidelity and trust in the law's

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ability to regulate and structure society. Indeed, the German Constitutional Court's decisions today constrain political action to an extent that is scarcely imaginable in common law states such as Great Britain and the United States. While the law and legal regulation play an integral rule in preserving societal order in many countries throughout world, it is difficult for outsiders to comprehend the degree to which law shapes daily societal interactions in Germany. Indeed, law is truly the glue that regulates German societal interactions.

What is a *Rechtsstaat*? To begin, there is no precisely equivalent concept in Anglo-American law. While it is tempting equate the concept with the common law rule of law state, seen through the lens of nineteenth century European liberalism, the starting point might be more accurately stated as a state governed by the law of reason. A common denominator shared by rule of law states and the *Rechtsstaat* is the fundamental imperative that it is "the state's duty to wield its power through laws in accordance with fundamental principles of legality" (Rosenfeld 2001, p. 1319). Scholars have drawn the key distinction that in a rule of law state, a tension exists between the law and state power. It is an individual's societal or civil rights that protect the individual from the power of the state (Loughlin 2010). Conversely in a *Rechtsstaat*, the relationship between law and the state is more symbiotic (Rosenfeld 2001). Rather than existing in tension with the state, rights are an integral part of the state's legal foundation. Indeed, according to German philosopher, Jürgen Habermas, in the German state, certain fundamental rights are the precondition for the establishment of democracy (Loughlin 2010).

The gap between these foundational conceptions of state power has widened during the last century. The original nineteenth century concept of a *Rechtsstaat* has expanded to embrace the "freedom, equality and autonomy of the individual within the framework of a unified legal order" that is defined by legislation and implemented by independent courts of law (Kommers and Miller 2012, p. 48). According to noted German constitutional scholar Donald Kommers, as the nineteenth century progressed, the concept of a *Rechtsstaat* evolved to "integrate state and society and to proclaim the unity of law and state" (Kommers and Miller 2012, p. 48). While this unified conception of law and state was a product of the emergence of European political liberalism, the modern conception of basic rights, in particular, the inviolable right to human dignity came to prominence only in the post-war period. Most importantly, the West German Basic Law, which today represents the Constitution of reunified Germany, "not only subjects law to the concept of justice; it also creates a fundamental system of values in terms of which all legislation or other official acts must be assessed" (Kommers and Miller 2012, p. 49). Prior to the adoption of the Basic Law, the continuity of rights in the positivist *Rechtsstaat* was subject to the legislature's continuing will. Rosenfeld (2001, p. 1328) has traced the evolution of the *Rechtsstaat* concept, noting:

> Although today's *Rechtsstaat* in some sense incorporates elements of both its Kantian and positivistic counterparts, it is in key respects different from its predecessors and thus raises novel questions regarding law's legitimacy. Like its Kantian counterpart, today's *Rechtsstaat* enshrines fundamental rights above the realm of ordinary laws, although these rights are substantive rather than formal and differ significantly in content from

> their Kantian predecessors. On the other hand, like its positivistic predecessor, today's *Rechtsstaat* institutionalizes legality, but it is a legality that is not merely dependent on consistency and predictability, but also contingent on constitutional conformity and on the realization of constitutionally recognized substantive goals.

At the risk of oversimplifying the differences between the two concepts, one might predict that, in a rule of law state, state power will trump individual rights more frequently, than in the Rechtsstaat as courts weigh the relative importance of state interests and individual rights across various contexts. A prime example is the American war on terror where courts have often privileged the state's interest in security over an individual's right to privacy (Huysmans 2004). In contrast, although some rights in the *Rechtstaat* may be subjected to a proportionality review, the right to human dignity is an absolute right not subject to judicial balancing (Lepsius 2007).

Indeed, as Germany has navigated its way through reunification, EU expansion, and the rise of radical Islamic terrorism, the judiciary's commitment to the *Rechtsstaat* has altered state policy and underscored the state's ongoing commitment to fundamental human rights. Political leaders who have attempted to implement policies that threaten individual liberties have had to contend with an increasingly activist Federal Constitutional Court (*Bundesvefassungsgericht*). Emboldened by a Constitution that balances international human rights with the state's interest in preserving a democratic state, the broadening scope of the FCC's decision-making underscores the German judiciary's deep commitment to the *Rechtsstaat* ideal.

Perhaps nowhere is evidence of the law's pervasive constraining impact as clear as in Germany's response to terrorism. While the United States declared "war" on terrorism and sought to defend its response by reframing international law, German policymakers crafted, and the German public supported, a more measured response more carefully bounded by international legal norms. While the German government has at times attempted to privilege state power at the expense of basic rights, Germany's top court has not hesitated to intervene-ruling, for example, in 2004 that the state could not lawfully monitor individual computers absent a judicial order.[1] Furthermore, 2 years later, the FCC held that the military could not shoot down a plane commandeered by terrorists.[2]

1.2 American Power and the American Prosecutor

In contrast to the restraint exercised by the German government in the post 9/11 era, the United States has declared a "war on terror." The scope of state power has expanded and the intrusiveness of federal government's investigative powers has increased. While legislation like the PATRIOT Act has drawn the attention of

[1] BVerfG, 1 BvR 2378/98 of March 3, 2004.

[2] BVerfG, 1 BvR 357/05 of February 5, 2006.

organizations and individuals who are concerned about human rights and civil liberties, these developments have overshadowed long standing systemic problems in the nation's criminal justice system. In particular, the gross underfunding of indigent defense services, coupled with a rapid growth in prosecutorial power and discretion, have transformed a system premised on a battle between equal parties into one in which a powerful prosecutor dictates the course of justice. As the government's relative power in the courtroom has grown, many prosecutors have abandoned their duty to seek justice in favor of a single-minded pursuit of convictions. While a large number of prosecutors stay within ethical boundaries, there is also mounting evidence that suggests that prosecutors ignore their constitutional obligation to reveal exculpatory evidence (Cohen 2013), mislead jurors (West 2012, pp. 6–7), and privilege political considerations over the dictates of justice (Gordon and Huber 2009, p. 1434). In key respects, the rise of American prosecutors' unbounded power and the dominant role that prosecutors play in shaping the face of justice in America today is but one symptom of the law's inefficacy in halting the growth in the government's punitive power. In both the courtroom and in the public sphere, the arc of justice is bending in the favor of the state's increasing power. The law has proved to be an imperfect tool in halting this advance. Since prosecutors operate within the framework of a rule of law state, this portrait of prosecution practice calls into question whether or not prosecutorial decision-making conforms to the requirements of a rule of law state (Raz 1979).

1.3 The Adversarial System and the Quest for Truth

The Anglo-American system of justice is premised on the assumption that the truth will emerge from a battle between the parties. In structuring the criminal process as a binary process, our founders assumed that members of the jury would possess the insight necessary to sort the true from the false. However, for decades dozens of scholars have called into question the accuracy of the system's underlying assumptions (Luban 1989). As the advent of DNA testing has drawn attention to the problem of wrongful convictions, those concerns have intensified. Research conducted by the Veritas Institute found over 800 cases of prosecutorial misconduct in California between 1997 and 2010.[3] Studies like these have led a growing number of scholars to question whether prosecutors are working harder to secure convictions than to achieve justice.

Extensive scholarship on the American system criticizes prosecutors for abandoning their truth-seeking duties. Scholars such as Culp Davis (1976), Pizzi (1999), and Kagan (2001) argue that the adversarial nature of the American criminal justice system influences behavioral norms. Proponents of this argument maintain that, the system's underlying normative assumption that the truth will

[3] Veritas Initiative, First Annual Report (2011) 11.

emerge from a battle between parties emboldens prosecutors and defense attorneys to treat trials as contests. Pizzi (1999), who has derisively criticized the American system for producing "trials without truth," has alleged that a "conviction mentality" motivates prosecutors to privilege securing convictions over achieving justice. Although the system attempts to screen out evidence that may bias jurors, some commentators have charged that those complex procedural rules allow lawyer to dominate trials. Despite the fact that disciplinary rules govern the behavior of attorneys and prosecutors, neither ethical guidelines nor legal sanctions have proven robust enough to deter prosecutors' unethical behavior (Rudin 2011). Comparative law scholars have joined the chorus of critical voices. For example, the eminent legal historian, John Langbein, considers American trials to be a "truth defeating enterprise" (Langbein 1985).

The most serious allegation against the system is that the parties no longer view the criminal process as a search for the truth, but rather as a quest for victory. According to proponents of this argument, the adversarial nature of the process has affected how lawyers view the system's end results. Although prosecutors possess an ethical obligation to pursue justice, some prosecutors seem driven by a "win at all costs" conviction-oriented mentality (Ma 2002). In this context, winning trials, securing stiff sentences, and boosting the district attorney's reelection chances can overshadow due process considerations. As a result, prosecutors may be disinclined to pursue certain leads or to disclose exculpatory information despite the fact that the law and professional rules of conduct mandate disclosure. Influenced by the institutional orientation of the prosecution function, even conscientious prosecutors may develop the attitude that all defendants are guilty and convey their conviction-oriented mentality to new hires (Miller and Remington 1969).

Given that over 95 % of cases in the American system are resolved through the use of plea bargains rather than trials, the vision of justice being settled by a jury of one's peers occurs with greater frequency on television screens than in real life. Given that only a small percentage of cases are resolved at trial, one might wonder the extent to which courtroom battles sidetrack the search for truth. In response to that criticism, Pizzi (1999) has argued that the adversarial process's conflictual nature colors case investigation processes as well leads prosecutors to suppress exculpatory evidence.

High case loads affect the ability of both prosecutors and public defenders to discover the truth. The drive for efficiency, motivated by the need to process a large number of cases with limited resources, is a dominant force shaping prosecutorial practice in the United States today. On the defense side of practice, most Americans cannot afford to fund an effective defense effort in a felony case. As a result many suspects are represented by public defenders who lack the time and resources to mount a defense that might dislodge the coercive leverage that the state possesses in the plea negotiation process (Alschuler 1968). In a number of cases, less than effective defense efforts have culminated in the state's execution of an innocent defendant.

1.4 The Most Objective Civil Servants in the World

Against this backdrop of criticism, in the 1980s comparative law scholars began to suggest that the model of German prosecution practice, with German prosecutors' commitment to objectivity, offered instructive lessons for an American system besotted by claims of prosecutorial overreaching. While scholars have condemned American prosecutors for their "conviction mentality," for decades, comparative legal scholars held up German prosecutors for their dedication to objectivity. As the supervisor of an objective investigation process that is not driven by the desire to secure a conviction, German prosecutors spearhead a truth finding process that commences with an objective investigation and continues through to main proceeding where the chief judge overseas the presentation of the evidence (Langbein 1979). Described by one scholar as the "most objective civil servants in the world," German prosecutors are inculcated through their training and socialization processes with the mandate to serve, not as zealous adversaries, but as "guardians of the law." This optimistic assessment of German prosecution practice also reflects the conviction of many German legal scholars that prosecutors in Germany's inquisitorial system function as second judges dedicated to finding the objective "truth." Instilled with the vision to serve as "guardians of the law,"[4] German prosecutors lack the thirst for winning that their American colleagues display in the courtroom (Langbein 1979). Protected by the guarantee of life time employment, German prosecutors appear to be insulated from political influence and free to enforce the law as it is written. On paper, the German model of prosecutorial decision-making appears to more effectively balance a state's desire for retribution with the need for justice than America's conviction oriented system.

Indeed, German scholars have enthusiastically promoted the key ideals and orientation of the German system (Dubber 2005). This publicity has led reformers in Italy, Spain, South Korea, Latin America, and Japan to look to the German model for inspiration (Dubber 2005, p. 1054; Ma 2002). The reputation of the German system has even attracted the attention of American scholars (Foster 1996). For several decades, American scholars, seeking an antidote to the problems created by widening prosecutorial discretion in the United States, praised the German model because the system's commitment to the bedrock principal of mandatory prosecution appeared to constrain prosecutorial discretion (Langbein 1979, pp. 201–212; Kagan 2001 p. 232). That principle, which requires prosecutors to file charges in all cases in which sufficient evidence exists to believe that a crime has been committed, aims to ensure that prosecutors enforce the law in a uniform and non-arbitrary

[4] *See* "Waldenburg" Training Materials (on file with author) (stating that German prosecutors do not function as parties but they possess a duty to be objective and to ensure that justice is administered according to the law). From 2004 through 2010, the author conducted field research in 16 different prosecution offices in Germany. To protect the anonymity of the interviewees, fictitious place names and a numerical coding system have been used to identify documents and interviewees.

manner.[5] At first glance, then, German prosecution practice seemed to offer a striking exception to the mantra of American law and society theorists that the law is not enforced as it is written.

A key factor that drove German scholars to promote the advantages of the German prosecution service was the fact that many of these scholars possessed the civil legal tradition's positivistic faith that legal practice accurately mirrored the law on the books. The scholars' faith in the prosecution service's objectivity reflected their conviction in the law's ability to shape prosecutorial practice. As a prime example, part of this optimism rested on the assumption that prosecutorial practice mirrored prosecutors' obligations as they were stated in the statutory code. Thus, because the Code of Criminal Procedure obligates prosecutors to investigate the facts that weigh for and against a suspect's guilt, scholars presumed that all prosecutors faithfully followed that mandate.[6] Indeed, time and time again, scholars have cited particular code provisions as conclusive evidence of prosecutorial practice. To American scholars, familiar with the rich tradition of law and society scholarship in this country, the comparative paucity of research in Germany that explores the gap between the law on the books and the law in practice has been puzzling (Goldstein and Marcus 1977; Langbein and Weinreb 1978; Goldstein and Marcus 1978). Writing in the 1970s, Goldstein and Marcus (1978, p. 1575) offered one explanation for German scholars' hesitancy to explore this gap:

> It should be noted that American scholars frequently assume that the American system deviates from its formal requirements. The writing on European systems, however, reflects the contrary assumption that differences between practices and formal requirements are bad and to be avoided. This attitude may explain the reluctance to develop an empirical literature that searches for such differences.

1.5 Cracks in the Edifice

For decades, scholarship that described prosecutorial practice in Germany contended that the normative ideal of objective decision-making shaped prosecutorial practice. As one example, in 1979, German legal scholar Klaus Sessar asserted that prosecutors' attention to the law, rather than pragmatic concerns about costs and efficiency, guided decisions to prosecute (Sessar 1979). In that same year, John Langbein boldly declared that Germany was a "land without plea bargaining" (Langbein 1979, pp. 204–205). Typical of the faith that German scholars vested in the theory of limited discretion are Dr. Jescheck's comments (1970, p. 511):

> Certainly even the "legality principle" contains an unavoidable degree of discretion-namely, that the obligation to press charges arises only if 'sufficient factual clues' are available. If on the results of the investigation, however, it is merely a question of whether

[5] See §152(2) StPO and §172.

[6] *See* §§160(2) and §296 (2) StPO.

> there exists proof sufficient for conviction of the suspect, the prosecutor is still obliged to file the charge. He may not take the question upon himself whether it might not be in the interest of the state or more expedient for the parties to drop the proceedings completely. The legality principle does not arise-as one might suppose-from any absolute requirement that the state revenge every criminal act, for modern German penal law recognizes many sanctions which are entirely free of any retaliatory objective. The decisive idea is rather that it is one of the primary tasks of the state to guarantee fairness and justice without consideration of the individual involved, and without considerations of expediency, matters which have very little to do with retribution.

Despite scholars' bold claims about the law's efficacy, in the late 1970s, shifts in practice began to emerge. Significantly, tightening resource constraints began to impinge on prosecutors' ability to conduct the resource-intensive truth-finding process originally envisioned by Germany's post-war Code of Criminal Procedure.[7] As the resource constraints became more severe, rising caseloads forced legislators to carve out ever larger exceptions to the principle of mandatory prosecution specifically granting prosecutors greater discretion in handling minor crimes cases (Sessar 1979, p. 256).[8] Despite these changes, many scholars continued to maintain that German prosecutors' duty to function as "objective" fact-finders had not changed and that prosecutorial discretion in Germany was limited. For example, Sessar (1979, p. 257) argued that "dismissals of felony cases was (and is) not permitted by law." In the late 1970s, both Sessar and Weigend claimed that the government increased prosecutorial staff to respond to rising case loads (Sessar 1979, p. 261; Langbein and Weinreb 1978, pp. 45–46). Even the eminent Roxin (1991) argued that, although practical developments have lead to a growth in the number of exceptions to the principle of legality, those exceptions had not overtaken the principle's theoretical validity.

For quite some time, the number of dissenting voices who questioned whether or not the principle of legality was still honored in practice was limited. When criticism did exist, it tended to attack a narrow range of practices. Some scholars conceded a bit of ground by admitting that, although prosecutors possessed the discretion to dispose of minor crimes, they were bound to apply the principle of mandatory prosecution to serious crimes (Jescheck 1970; Culp Davis 1976; Hermann 1974; Felstiner 1979; Langbein and Weinreb 1978; Weigend 2004).

Yet, fiscal constraints, combined with the emergence of new types of economic crimes, continued to put pressure on the ability of the prosecution service to fulfill the ambitious fact-finding function mandated by the German Code of Criminal Procedure (StPO). Moreover, the forces of globalization have nurtured new forms of criminality that have outpaced both developments in the law as well as the capacity of judicial institutions. One source of constraint is the fact that in some cases, the "technology" of prosecutorial practice has not kept pace with the sophistication of criminal activity. For example, while organized criminal actors have exploited global communication networks to commit crime, some police and

[7] *See* §§244, 249, 252–60 StPO.

[8] §153(1).

prosecution offices continue to rely on internal bureaucratic practices that use handwritten instructions to direct investigative activity. As corporations and individuals utilize technology to circumvent the law, thick case files may languish unread in courtroom offices for months. Although sophisticated criminals can launder money with the push of a computer button, judges on the front lines are buried in paperwork. Both judges and prosecutors often lack the capability and resources to diligently review complicated cases on a timely basis.

As workload pressures in both prosecution offices and the courtroom chambers continued to intensify, both prosecutors and judges were caught in a vise between trying to fulfill their legal duty to investigate the material truth and rising organizational pressures to close cases quickly. To balance these competing concerns, prosecutors began to use a variety of procedural mechanisms to dismiss cases or defer prosecution in the majority of cases that crossed their desk. As a result, today many cases no longer enjoy a full investigation of the facts. Consequently, in some cases, the resulting punishment is proportionate only to a vague outline of criminal activity contained in an incomplete file. In cases resolved through confession agreements,[9] the court may settle for a version of the "truth" which may be largely painted by the suspect themselves, rather than expend the time and resources required for a full investigation of the facts surrounding the crime.[10] Although German prosecutors possess broad investigative powers, they no longer possess the resources to initiate the extensive search for the material truth envisioned by civil law tradition legal theorists.

The development that has caused the greatest consternation among German legal scholars has been the growth of case settlement practices that initially developed outside the boundaries of the formal law (Thaman 2007, pp. 43–44). While the Federal Constitutional Court acknowledged that the practice of negotiated settlements was not per se unconstitutional in 1987 (Esposito and Safferling 2008), it was not until 2009 that the legislature finally sanctioned the use of negotiated settlements.[11] The course of this practice-driven change in the Code of Criminal Procedure, sanctioned first by the judiciary rather than by the legislature, ran sharply counter to the civil law tradition's circumscribed vision of the judicial role as well as the positivist vision of the nature of law itself (Weigend 2008). Yet, since the disposition of major crimes continues to require that a judge conduct a main proceeding, this practice appears to remain consistent with the principle of mandatory prosecution.

While the principle still exists on the books, a growing number of scholars have concluded that the widening range of discretionary decision-making authority that German prosecutors now possess has substantially undercut the force the principle

[9] An abbreviated criminal procedure involving an agreement between the defendant and court that is roughly similar to an American plea bargain.

[10] In the absence of a confession agreement, it is the duty of the court to establish the truth through the taking of evidence. See §244(2) StPO.

[11] *See* §257c StPO.

in practice (Eisenberg and Conen 1998; Weigend 2004; Elsner and Peters 2006). As Elsner and Peters (2006, p. 234) state "[t]here is a clear trend moving away from the principle of legality towards more powerful and independent prosecuting institutions." Scholars such as Geisler (1999, p. 11) argue that the judicial community is no longer adhering to the law with respect to the prosecution and disposition of minor- and middle-level criminality and that prosecutors are ignoring the principle of legality. In 2004, the respected scholar, Weigend (2004, p. 215) wrote that "[t]oday prosecution is in effect mandatory only with respect to most felonies."

Although the German Code of Criminal Procedure has, in some ways, evolved to more closely represent the discretionary decision-making opportunities available on the ground, it is worthwhile examine the extent to which prosecutors still serve as "guardians of the law." Although the law no longer requires prosecutors to investigate and prosecute every case, the code provisions on the books that attempt to mandate objectivity still exist. With a wide range of decision choices before them, the role of German prosecutors has shifted from serving as chief of the investigation process to more of a gate-keeping function. Under the stress of rising caseloads, through their daily decision-making, prosecutors determine what actions should be sanctioned as well as those that do not merit punishment.

The widespread scope of the changes in prosecution practice have called into question prosecutors' degree of fidelity to the remaining parts of the statutory code that mandate that prosecutors function as objective decision-makers. Given that prosecutors, with the judiciary's indulgence, bent the law to accommodate the demands of daily practice, some scholars have declared that the inquisitorial ideal of sharply constricted prosecutorial discretion is dead (Weigend 2008).

Indeed these developments have prompted scholars to criticize the growing gap between the inquisitorial ideal of a thorough fact finding and adjudication process and current prosecution practices-some of which have short-circuited the truth-finding process (Erb 2004). In particular, scholars such as Weigend (2008) have sharply criticized the growing ambit of prosecutorial discretion and the rise of negotiated settlements in so-called "minor" crime cases. While there has always been some wiggle room in the charging process, the increasing use of settlement agreements has critically weakened the prescriptive force of the principle of mandatory prosecution. Scholars are not alone in criticizing the expansion of these new procedural mechanisms. During my interviews with judicial officials, several judges at the appellate level, who do not face the same day-to-day workload pressures as prosecutors and trial court judges, joined in this criticism of prosecutorial practice.[12] One outspoken appellate judge accused prosecutors of having adopted an "in and out box" mentality that privileges efficient case closing strategies at the expense of conducting an extensive investigation designed to discover

[12] Appellate Judge Interview [22FE], 22 July 2004.