IS THE CRIMINAL PROCESS ABOUT TRUTH?: A GERMAN PERSPECTIVE

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I. INTRODUCTION: THE IMPORTANCE OF KNOWING THE TRUTH

Finding the truth is a difficult task under any set of circumstances, but finding the truth in the context of crime and punishment is almost impossible. Even if we assume that an objective "reality" exists and that human beings are generally able to determine and to describe it in some adequate form so that we can reasonably distinguish between truth and falsehood, there is hardly an arrangement less likely than the criminal process to bring out the "truth." The reasons are obvious: crime is not something the culprit or the victim has reason to brag about (and if either does, he is unlikely to say the truth), and the impending consequences of an emergence of the truth are (at least for one party) quite unwelcome. The result is a strong incentive for passively or actively concealing relevant facts. The difficulty of determining the truth about crime stands in marked contrast with society's strong interest in doing so: crime, especially serious crime, disturbs the peace of the community and, if unresolved, raises the threat of repetition. Knowing exactly what has happened, who the culprit is, and why he committed the offense, is a necessary

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prerequisite for any attempt to re-establish social peace through justice. The determination of truth is indispensable for yet another reason—criminal sanctions are society's most severe expression of moral blame.[1] It is therefore imperative that criminal sanctions be imposed (only) upon those who are in fact guilty.

II. ADVERSARIAL AND INQUISITORIAL SYSTEMS: HISTORICAL FAILURES

The above-described dilemma explains why legal systems throughout history have struggled so hard to devise methods of getting at the truth in criminal matters. Traditionally, two basic approaches to resolving the problem of truth-finding have been distinguished: the adversarial system, which relies on opposing parties coming forward with their competing versions of the truth, challenging each other's accuracy, and thereby ultimately bringing about a composite picture of (or approximating) the truth; and the inquisitorial system, which entrusts an authoritative, neutral law officer with collecting relevant evidence, a process that includes the interrogation of suspects and witnesses.[2]

For different reasons, neither of these approaches has been particularly successful in reaching its goal. The adversarial system has been based on too many unrealistic assumptions; the inquisitorial system lost much of its efficiency when physical coercion of suspects became unfashionable.

Let me begin with the adversarial system.[3] Without a doubt, the partisan approach to gathering and presenting evidence is attractive, but its attraction lies on the surface rather than in its effectiveness at finding the truth. Ask any criminal lawyer worth his salt, and he will tell you that he prefers the adversarial mode because it permits him to actively help his client by digging up exonerating evidence and presenting it in court, as well as by challenging the evidence

1. *See generally* JOEL FEINBERG, *The Expressive Function of Punishment, in* DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY (1970); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS (1985).

2. *See generally* MIRJAN DAMASKA, *The Adversary System, in* 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 25-30 (Joshua Dressler ed., 2d ed. 2002); THOMAS WEIGEND, *Criminal Procedure: Comparative Aspects, in* 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 444-57 (Joshua Dressler ed., 2d ed. 2002). For a more detailed comparative explanation, see Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973).

3. For a more detailed and sophisticated analysis, see MIRJAN DAMASKA, EVIDENCE LAW ADRIFT 74-110 (1997).

presented by the prosecution. Moreover, the adversarial trial gives him a much greater opportunity to demonstrate his prowess as a lawyer in open court. On a more theoretical level, the adversarial process places the defendant on an equal footing with the prosecutor and protects the defendant's autonomy by allowing him the same freedom of action in conducting his defense as the prosecutor enjoys in presenting the state's case. Finally, nothing can compare with the adversarial trial in demonstrating the importance of getting at the truth. The judge admonishes witnesses to be truthful, and they solemnly swear to say the truth. Lawyers bring their skill to bear to expose falsehood, lies and inaccuracies; they bring up overlooked details and build and shatter hypotheses about what the "true" facts of the case may be.

Yet this spectacular show of searching for the whole truth and nothing but the truth cannot conceal the adversarial system's deficiencies with respect to truth-finding. This system is built on the theory that two halves (of the truth) make one whole, that the truth will appear like a bright streak of light born of the tension between opposite poles.[4] In this system, the truth ideally is discovered by testing differing versions of the relevant facts through cross-examination of the respective proponents, each side striving to present the facts favorable to its case in the best light possible while disparaging the opponent's version.[5] The neutral trier of fact, so the theory goes, needs only sit back and watch the spectacle unfold in order to be able to determine, when everything has been said and done, who is right and who is wrong.

This theory rests on a number of assumptions: first, each side (i.e., in criminal cases, the prosecution and the defense) presents part of the truth, and neither has it all; second, each side has a genuine interest in bringing out the truth; third, each side has equal opportunity to convince the trier of fact of the accuracy of its version. Obviously, these assumptions are not always justified. First, it may well (and often will) be the case that the allegations made by the prosecution are consistent with the objective facts, at least in relevant part, and that the defense is reduced to throwing smoke bombs in order to confuse

4. *Cf.* 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (4th ed. 1974) (Cross-examination "takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth.").

5. *But see* Mirjan Damaška, *Truth in Adjudication*, 49 HASTINGS L.J. 289, 306 (1998) ("[T]he method of introducing evidence in two clashing cases, each presented in the most favorable light, further contributes to the perception of fact-finding difficulties.").

matters. If that is the case, the innate tendency of the adversarial system to balance the competing versions will run the risk of diverting from the truth rather than establishing it. Second, it is a typical feature of the criminal process that at least one party has a vested interest in concealing the truth; this party (most often the defendant) will thus not cooperate in the truth-finding process but try to obstruct it. Third, the reliability of the adversarial process is based on its fairness, especially on each party's equal access to evidence and on an equal distribution of competence and means to present evidence in court. Equality of this kind, more often than not, exists on paper only. Poor defendants must rely on underpaid and overworked public defenders or legal aid lawyers, whereas the state has at its disposal legal powers as well as sufficient means and expertise to make sure that evidence is collected and presented effectively in court—perhaps not in every single case, but whenever the public prosecutor sees fit to take a case to trial. In criminal matters, the "sporting theory of justice," which assumes that justice will emerge from a fair fight between equal partners, is hence more myth than reality.

Another feature of the adversarial system further reduces the chances of finding the truth—because this system concentrates on the trial as the relevant locus for fact-finding, only facts presentable at the time of the trial can contribute to the effort of determining the "truth." Because the system excludes from the court's view everything that cannot be introduced as evidence on the day set for trial, the "truth" is based only on the relatively small array of material then available, and valuable information will be ignored because one or both parties cannot present it at the right time in the legally prescribed manner. The adversarial system, at least in the form practiced in the Anglo-American world, therefore does not lead to the discovery of "true" truth but of an artificially generated set of facts euphemistically called "procedural truth."

Does the inquisitorial system fare better? The historical record does not so indicate. Although the inquisitorial system introduces the inquisitorial magistrate, a professional third party officially interested in determining the truth, and thus avoids the party-motivation problem that characterizes the adversarial system, this system also suffers from a psychological flaw—it overlooks the fact that truth cannot reliably be extracted from a person unwilling to reveal what he knows. Even torture, the most extreme form of overpowering the resistance of a recalcitrant witness or suspect, turns out to be less than

effective in producing the truth.[6] In the age of human rights, when concerns of individual autonomy and freedom preclude any recourse to measures of crude coercion, an inquisitorial judge is left with empty hands in his quest for the truth if those who possess relevant information refuse to cooperate. Today, the end result of the search for the truth in inquisitorial systems will often be strikingly similar to that of the adversarial process—a half-truth based on what the defendant and more or less interested third parties are willing to disclose.

III. COMPROMISE SOLUTIONS

Given the gradual assimilation of the two historical opponents, it is not surprising that several legal systems have adopted procedural arrangements that combine adversarial and inquisitorial features.

The first "reform" models of this kind were introduced on the European continent in the 19th century in the wake of the French Revolution.[7] The figure of the inquisitorial judge was retained, but he had to share his authority and his fact-finding role with other agents—most importantly, the public prosecutor (who moved a case from the investigatory stage to the trial stage) and the trial jury (which participated in determining the verdict). Moreover, legal systems began to acknowledge parties (i.e., the defendant, but also, to some extent, the victim) as subjects instead of mere objects of the process, and they were given a right to be heard and to have input into the fact-finding process. On the other hand, the suspect's right to withhold information and even to refuse cooperation (beyond physical presence at the trial) in the criminal process gradually evolved.

These developments were bound to create intrinsic tensions within the criminal process—the court's unilateral search for truth, formerly the sole purpose of the process, had to make room for active and passive rights of individuals who were often not interested in the discovery of the truth. What emerged, after a century of struggle, was a "reformed" inquisitorial process in which truth-finding remained the primary objective but which nonetheless accommodated, to a greater or lesser extent, the interest of individuals to keep certain (or all) information private. For example, under the German Code of Criminal Procedure, the trial court is responsible for gathering at the

6. *See* JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 8-10 (1977).

7. The first Continental reform legislation was the French *Code d'Instruction Criminelle* of 1808.

trial all relevant evidence necessary to "explore the truth,"[8] but the defendant has the right to remain silent,[9] and witnesses can refuse to answer questions if doing so would conflict with their privilege against self-incrimination.[10] The law also recognizes broad testimonial privileges for relatives, doctors, lawyers, and several other groups of professionals.[11] The Code contains specific rules on interrogations, searches, wiretaps and other invasions of privacy, and, in some cases, the court is barred from basing the judgment on evidence generated by violations of these rules.[12]

In spite of such limitations attributable to the recognition of individual rights and other exterior interests, "reformed" inquisitorial systems continue to rest on the assumption that a disinterested search for the truth by a neutral judicial officer will lead to optimal results. Parties can offer evidence, and the court is generally obliged to hear that evidence,[13] but they also have the option—frequently used in German practice—to sit back and let the court do the work of fact-finding.

In recent years, several European jurisdictions have boldly tested greater deviations from the inquisitorial model; Italy has been the most prominent example,[14] but Eastern European countries have also tried variations.[15] In Italy, the "neutral" investigation has been limited

8. § 244 Abs. 2 Strafprozeβordnung [StPO], *translated in* THE GERMAN CODE OF CRIMINAL PROCEDURE (Horst Niebler trans., 1965) [hereinafter GERMAN STPO]. The German StPO dates from 1877. It has since frequently been amended but has nevertheless retained its original structure. For a comparative analysis of the German StPO, see Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317 (1995).

9. *Cf.* § 136 Abs. 1 GERMAN STPO ("[T]he law grants him the right . . . not to answer regarding the charge . . . .").

10. *See id.* § 55 Abs. 1.

11. *See id.* §§ 52-53.

12. *Cf.* § 136a Abs. 3 GERMAN STPO (prohibiting the use of statements resulting from unlawful interrogations involving torture, coercion, threats, deception, and similar illegal methods).

13. *Cf.* § 244 Abs. 3 GERMAN STPO (court can refuse to hear evidence offered by parties only on narrow grounds specified in the statute).

14. For an analysis of the Italian Code of Criminal Procedure of 1989, see Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227 (2000). *See also* Rachel VanCleave, *Italy, in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 245 (Craig M. Bradley ed., 1999) (describing the details of the Italian Code); William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1 (1992).

15. *See, e.g.*, Kodeks Postepowania Karnego [POLISH CODE OF CRIMINAL PROCEDURE] arts. 167, 370, 387-88 (allowing not only the presentation of evidence by parties before the court, but also the consensual abbreviation of the trial and the equivalent of a guilty plea).

to the pretrial stage.[16] At the trial,[17] the parties are responsible for presenting the evidence to the court. The president of the court may, however, ask additional questions of witnesses, and the court may also introduce additional evidence if that appears necessary.[18] Ideally, in these systems, the pretrial and trial stages are kept strictly separate—the initial investigation serves only to determine the existence of probable cause to hold a trial, and the information gathered before trial remains unknown to the trial court and cannot directly be used as evidence at the trial.[19] The rationale behind this hybrid "best of both worlds" approach is that the combination of a neutral investigation and a partisan presentation of the evidence at trial will lead to the closest approximation to the truth; the pretrial magistrate, as well as the parties, are expected to be interested, each in their own way and from their individual perspective, to let the "truth" appear.

Yet a combination of virtues may also be a combination of vices. To the extent the role of the inquisitorial magistrate is reduced and his powers are diminished, his interest in determining the truth and his ability to do so will decrease. The magistrate's impetus to discover the truth is, however, the backbone of the inquisitorial system, and limiting his access to information by permitting individuals to remain silent reduces the chances of achieving the goal of complete fact-finding. Mixed systems may indeed combine the disadvantages of each of the "pure" models—the pretrial investigation may become a one-sided collection of evidence dominated by the prosecutor's office and the police, and the trial may suffer from the typical problems of adversariness (disparity between the parties, lack of an interest in bringing out the truth) that have been explained above.

There exists, moreover, a precarious relationship between the pretrial and the trial stages of the criminal process. In some legal systems, especially those belonging to the common law family, the

16. From an Anglo-American perspective, the pretrial investigation is not "neutral" at all—it is conducted by the public prosecutor. *See* CODICE DI PROCEDURA PENALE [hereinafter C.P.P.] arts. 326, 358 (Italy). *See also* V. CIRESE & V. BERTUCCI, THE NEW ITALIAN CRIMINAL PROCEDURE FOR FOREIGN JURISTS 148 (1993).

17. C.P.P. art. 498 (Italy). *See also* CIRESE & BERTUCCI, *supra* note 16, at 179-80 (describing the direct examination of witnesses).

18. C.P.P. arts. 506, 507 (Italy). *See also* CIRESE & BERTUCCI, *supra* note 16, at 181-82.

19. Reality sometimes deviates from the ideal, however. *See, e.g.*, C.P.P. arts. 511-13 (Italy) (permitting the introduction of transcripts of interrogations completed before trial under certain narrow circumstances). These provisions have been given a broad interpretation by Italian courts so that the filter between the pretrial and trial phases has steadily opened. *Cf.* Grande, *supra* note 14, at 237-40.

two phases of the criminal process are kept strictly separate, whereas other systems allow (more or less liberally) information to be imported from the pretrial investigation into the trial. One procedure for importing such information treats transcripts of pretrial interrogations and other acts of investigation as documentary evidence for the purposes of the trial. This allows the court or a party to read a witness' pretrial written and oral declarations (to the police, for example) into the trial record.[20] Any system attempting to create a hybrid between the inquisitorial and the adversarial models needs to decide whether to permit such easy transfers, and this choice has far-reaching implications. If "imports" into the trial are accepted, the momentum of the truth-finding process shifts to the (inquisitorial) pretrial stage, and whatever features are borrowed from the adversarial trial style may be little more than window dressing for a system that inherently remains inquisitorial. If, for example, it is possible to use as evidence transcripts of police interrogations, or if hearsay evidence is broadly accepted, the truth-finding efforts at the trial lose much of their significance, because the critical issues can be locked down in the pretrial phase. If, on the other hand, one opts for the common law solution of requiring evidence to be physically present on the day of the trial, one suffers a loss not only of efficiency (because much of the information-gathering before trial becomes irrelevant) but also of factual reliability of the verdict—as noted above, the spectacle of searching for truth by partisan presentation and mutual challenge of the evidence at common law trials often leads to judgments based on only a small segment of the relevant facts.

IV. TRUTH AND THE JURY

Lay persons participate in the adjudication process in many legal systems, and the jury trial is gaining popularity worldwide.[21] This is not the place to speculate on possible reasons for this development; what concerns us here is the relationship between lay justice and

20. German law generally disfavors "imports" of this kind. *See* § 250 GERMAN STPO (providing that interrogation of a witness at trial must not be replaced by reading the transcript of an earlier interrogation or a written declaration). *But see* §§ 251, 254 GERMAN STPO (providing that "imports" of transcripts of judicial pretrial interrogations are permitted whenever the witness in question is not easily available at the trial, and police interrogations can be used with the consent of the parties or when the witness has died or is otherwise unavailable).

21. *See* Symposium, *The Lay Participation in the Criminal Trial in the XXIst Century*, 72 REVUE INTERNATIONALE DE DROIT PÉNAL 15 (2001).

truth-finding in criminal matters. I suggest the following thesis—the greater the impact of a jury on the verdict, the less likely it is that the verdict is based on substantive truth. This is true independent of a system's general orientation on the inquisitorial versus adversarial spectrum. As a rule, though, lay judges generally tend to be more influential in adversarial systems.[22] Inquisitorial systems either dispense with lay judges altogether[23] or tend to use them as lay assessors who sit and decide together with professional judges, which dramatically reduces the lay element's impact on the verdict.[24]

Why should systems favoring trial by jury, on the whole, produce verdicts further removed from the "truth"?[25] Several factors tend to produce this result. First, a jury trial, with its technicalities and logistics, is less accommodating than other adversarial trials to the difficulties of timely production of evidence. A bench trial can be adjourned or adapted to an installment schedule more easily than the clumsy apparatus of a jury. This means that evidence not available for presentation on the date fixed for trial will be lost for good, and the jury's information base diminished accordingly. More importantly, the presence of laypersons as fact-finders bears on the substance of available evidence as well as the way in which it is presented.[26] Because jury systems assume (correctly or not) that laypersons are unable to digest and/or adequately process certain types of information, these systems carefully censor what the jury is told about a case. In the United States, evidence that appeals too strongly to

22. This may be a result of historical coincidence, but it is more likely that inquisitorial systems are structurally adverse to strong lay participation. The task of comprehensively gathering information is more easily carried out by one or more professional experts with a broad range of staff and legal authority at their command than by a group of lay persons. The American grand jury might be cited as a counter-example, but the grand jury can hardly be regarded as an effective instrument of information (beyond providing a forum for the prosecutor's efforts in this regard).

23. Such is the case, e.g., in Italy and the Netherlands.

24. This system is employed, e.g., in France and Germany. For an argument in favor of lay assessors, see John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195; for an empirical account of the German system, see Stefan Machura, *Interaction Between Lay Assessors and Professional Judges in German Mixed Courts*, 72 REVUE INTERNATIONALE DE DROIT PÉNAL 451 (2001).

25. I do not intend to say that individual jury verdicts cannot accurately reflect the true facts of a case, but I make a general argument. This argument is theoretical rather than empirical; empirical validation is difficult to obtain except through experiments. For a rare empirical study on decision-making of German professional and lay judges, see Gerhard Casper & Hans Zeisel, *Bundesrepublik Deutschland*, *in* DER LAIENRICHTER IM STRAFPROZESS 21-86 (Casper & Zeisel eds., 1979).

26. For a more detailed and refined analysis of this issue, see MIRJAN DAMAŠKA, EVIDENCE LAW ADRIFT 28-37 (1997).

emotions (for example, color photographs of the murder victim's wounds)[27] or that invites certain improper inferences (for example, the fact that an alleged rape victim had had sexual relations with casual acquaintances before the event in question)[28] or that is overly suggestive (for example, the prior record of a suspect)[29] can be excluded for fear that jurors will be unduly influenced and will jump to conclusions.[30] To the extent that such information (although potentially misleading) is relevant to the issues of the case, exclusion diminishes or even distorts the factual base on which jurors eventually base a verdict.

The presentation of evidence in the presence of the jury is slanted in yet another way. Although the law strives to withhold from the jury potentially prejudicial evidence, lawyers often try to achieve the effect of emotional appeal anyway. Assuming that jurors decide with their hearts (or their gut) instead of their heads, advocates choose evidence and make statements in court designed to strike directly at the jurors' feelings by emphasizing the character and personalities of the parties rather than the cold factual or legal issues of the case. Because jurors are regarded as individuals driven by prejudice and uncontrolled emotions, the participation of a jury as ultimate decision-maker leads to a paradoxical situation at trial—the evidentiary base is reduced and yet the trial is emotionalized; neither characteristic is conducive to finding the truth.

Another feature of the jury trial exacerbates these problems. At least in the U.S. system, the jury serves as a black box. Because of the secrecy of jury deliberations, there is no way to discover what information the jury processes and how it processes those parts of the trial information that have not been missed or forgotten. Worse, the jury does not even have to strive toward a verdict based on the "truth" as it emerged at the trial, because the jury is not required to give reasons for its verdict and thus is not answerable to anyone regarding the rationality of its decision. In systems relying on professional judges to find the facts, on the other hand, the court must invariably explain in writing how it arrived at its verdict, and the court must

27. *See* Young v. State, 234 So.2d 341, 347-48 (Fla. 1970). *But see* State v. Robinson, 395 S.E.2d 402, 407-09 (N.C. 1990). Courts have significant discretion in this area.

28. *See, e.g.*, FED. R. EVID. 412. *But cf.* Michigan v. Lucas, 500 U.S. 145 (1991) (addressing the application of an exception to rape shield law permitting introduction by defendant of evidence of his own prior sexual conduct with the victim).

29. *See, e.g.*, FED. R. EVID. 404(a); *cf.* Michelson v. United States, 335 U.S. 469, 475-76 (1948).

30. *See generally* MCCORMICK ON EVIDENCE § 185 (John W. Strong ed., 5th ed. 1999).

relate the outcome of the case to the evidence presented.[31] The obligation to give reasons—which is subject to control by a superior court—is, in itself, a strong incentive toward rationality and toward basing the judgment on a plausible version of the facts.

In sum, the jury is not designed to function as a truth-finder, and hence it does not. The jury has a different function—it is meant to be a counterweight to the (supposed) rationality of the fact-finding process. Its purpose is to give the defendant an irrational second chance for an acquittal when an experienced, professional observer would not have a reasonable doubt of the defendant's guilt. This capacity of the jury to provide false acquittals is what endears it not only to proponents of populist justice, but also to defense lawyers. It is an open question, however, whether the institution of trial by jury actually works to the benefit of the accused. Not only do juries sometimes provide false convictions but, more importantly, defendants pay a heavy price for the "second bite" of a jury trial if they are convicted. Plea bargaining systems lead to severe sentencing surcharges for most defendants who invoke their right to a jury trial and lose. Because the right to a jury trial is one of the *raisons d'etre* of the plea bargaining system (which on the whole disfavors defendants), a systemic view would suggest that the jury right is a mixed blessing for defendants. Be that as it may, the jury is not a vehicle for discovering the truth. Instead, the institution of the jury is based on a different rationale—an individual should be convicted of a crime only if the heart, as well as the head, finds him guilty.

V. WHY CARE ABOUT THE TRUTH?

Our little excursion into the functions and mysteries of trial by jury has demonstrated the limited relevance of a search for truth in the criminal process. It is time, then, to question the assumption we have tacitly made at the outset—that it is important to find the truth.

None of the present-day judicial systems engage in an unconditional search for the truth. In famous dictum, the German Federal Court of Appeals has noted that it is not a principle of criminal procedural law that the truth should be sought at any price.[32] This principle also applies outside of Germany. Several considerations restrict and limit the search for the truth. These

31. See, *e.g.*, § 267 GERMAN StPO; C.P.P. art. 544-46.

32. 14 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN 358, 366 (1960).

considerations have been called "collateral values,"[33] and they comprise such diverse concepts as respect for individual privacy, concern for the integrity of certain professional relationships (for example, the relationship between client and attorney), a social interest in keeping state secrets, as well as (on a different level) a desire to keep the criminal process speedy, efficient and within the limits of reasonable expenditure. Moreover, many legal systems provide for the exclusion of otherwise relevant evidence as a sanction for the proponent's unrelated procedural faults. The most conspicuous example is exclusion of evidence that has been offered belatedly or obtained illegally.

Legal rules of this kind limit the pool of (relevant) information available to the decision-maker and thus reduce the chances that the verdict will be based upon a completely "true" finding of facts. Exclusionary rules can be found in every legal system, but they are more prevalent in systems adhering to the adversarial approach. This is not by coincidence. In adversarial systems, truth is ultimately a procedural concept—an idea that comports well with an entrenched Anglo-American skepticism about man's ability to discover the "substantive" truth.[34] To the extent that substantive truth is regarded as elusive, the fairness of proceedings becomes the main foundation of the verdict's legitimacy, and any result that has been found in conformity with procedural rules becomes acceptable. Under this approach, it is not anomalous to employ exclusion of evidence as a tool of enforcing adherence to procedural rules. The Continental inquisitorial model, on the other hand, insists that substantive truth can be found if enough effort is made and that the criminal process is, in principle, a search for substantive truth. This premise is inimical to any "artificial" exclusion of relevant and inherently reliable evidence. Exclusionary rules hence run counter to the goals and the spirit of the inquisitorial model; they are therefore used only as a last resort to safeguard indispensable procedural values, such as the absence of physical coercion in interrogations or respect for marital privacy.

The fact, however, that even inquisitorial systems acknowledge the existence of practical as well as normative limits to determining the "true" facts by the means available in the criminal process indicates that truth-finding is unlikely to be the ultimate goal of that process. If

33. *See* Damaška, *supra* note 5, at 301.

34. *But see* Damaška, *supra* note 5, at 290-302 (defending the correspondence theory of truth as a foundation of the process).

it were otherwise, the process would have to result in a statement of facts found to be true (and not in a judgment), and the process would have to be structured much more like a historian's research into events of the past, collecting and processing information from all possible sources. In fact, the discovery of the "truth" is not the objective of the criminal process, but only a means to reach that objective. The purpose of the criminal process is not to find facts but to resolve a conflict—a conflict that can be defined in a variety of ways. In the common law tradition, the relevant conflict is between the prosecutor and the defendant about the defendant's guilt; from another perspective, the conflict is between the victim (or "society") and the offender; in yet another view, the conflict to be resolved is the social unrest caused by the suspicion of a crime.[35] Whichever definition one prefers, the purpose of the criminal process reaches beyond accurate fact-finding; its goal is achieved only when a judgment has been reached which effectively restores the balance disturbed by the occurrence of a criminal offense.

Although truth-seeking is not the ultimate purpose of the criminal process, the process' goal of conflict resolution cannot be reached by a disposition (openly) based on a fictional version of facts. Take, for example, a prosecution for murder and assume that the court declares at the end of the trial that the defendant did not participate in the killing of the victim, but that the defendant will nevertheless be convicted of murder because the parties have negotiated this verdict as the desirable outcome of the case. In this situation, a murder conviction does not resolve any of the conflicts that may have led to the initiation of the criminal process—the victim's survivors will not be satisfied, society will not see its retributive and crime-preventive interests fulfilled, and the disturbance caused by the original murder suspicion will not be laid to rest. At most, one could say that the criminal process was formally resolved by a final judgment, but even this result is doubtful because a defendant convicted on ostensibly false factual grounds can be expected to later try to have his case reopened.

We can learn from this little thought experiment that justice (or any satisfactory outcome of a criminal process) cannot be based on falsehood or fiction. But this leaves the critical question yet to be answered—how much truth is necessary? Certainly, we should not

35. For a more extensive argument on this point, see THOMAS WEIGEND, DELIKTSOPFER UND STRAFVERFAHREN 195-219 (1989).

aspire to have the "whole truth" laid out in the criminal process—who would have the time and means necessary to develop the myriad facts including the psychological and biographical factors that might help explain why the offense was committed? This kind of thorough analysis is necessarily reserved for the "crime of the century" variety, and even then, a criminal trial is not the appropriate device to get into the depths and details of the actions and motives of all individuals involved, actively or passively, in a crime. What is needed in every trial, however, is a persuasive factual foundation of the verdict—a set of facts sufficient to overcome the presumption of innocence and any reasonable doubt a neutral observer might have of the defendant's guilt.[36]

VI. TOWARD A DEFINITION OF PROCEDURAL TRUTH

"Truth," in the context of the criminal process, is procedural truth, a function of what the process is to achieve. And it is "procedural" truth in yet another sense—it is limited by the rules governing the criminal process and the presentation of evidence therein. I have pointed out above that every legal system accommodates certain interests exogenous to the goal of truth-finding. Some of these interests (for example, excluding evidence obtained by means of illegal wiretaps) pertain to the overriding concern of keeping the criminal process fair, while others (for example, avoiding the revelation of state secrets) are completely foreign to the purpose of the criminal process. But the totality of these rules limits the amount and quality of information to be introduced or used in the criminal process. Because the criminal process aims at fulfilling certain social functions (conflict resolution of some kind or other, as shown above), it is necessarily these functions, in addition to limits of time and economy, that define the "truth" that will optimally be discovered in the process.

Even if one accepts this general thesis, however, "procedural truth" can be defined in different ways. According to the inquisitorial principle, truth (however limited the means to search for it) remains an approximation to the historical facts, and the process is geared toward finding these facts to the extent necessary for a credible judgment, regardless of the wishes of individual participants. In a party-oriented process, by contrast, "truth" can be defined as a version

36. Or, in the case of an acquittal, a set of facts that presents a plausible explanation of the victimization in which the defendant's involvement is not a necessary causal factor.

of facts acceptable to all concerned.[37] The contrast between these two versions of "procedural truth" is clearest when there exist relevant facts that none of the parties wishes to bring up at trial. For example, if the defendant suffers from a mental disease, he may not wish to introduce that fact because of its stigmatizing effect, and the prosecutor may not wish to raise the issue because it could lead to the defendant's acquittal on the grounds of insanity. In an adversarial system, this will normally be the end of the matter, and the defendant's insanity will not be part of the "truth" of the case. In an inquisitorial system, by contrast, the court must (and will) explore the issue of the defendant's mental state on its own initiative. Thus, the court strives to paint a complete picture of the "substantive truth" even if it is against the wishes of the parties.[38]

In the struggle between these two concepts of "procedural truth," the recent international trend seems to favor the "party consent" version traditionally prevalent in the Anglo-American world. One clear indication of this trend is the quick expansion of various forms of negotiated criminal justice in parts of the world—especially Continental Europe—where it had been anathema just 20 years ago. Plea bargaining of one kind or another has been formally recognized in new criminal procedure laws of, for example, Italy,[39] Poland,[40] and Spain,[41] and has invaded German practice.[42] Plea bargaining cannot be reconciled with the inquisitorial version of truth-seeking. For the court to passively accept the parties' proposition as to the outcome of the process means to abdicate the inquisitorial court's prime mission to independently establish the factual foundation of the verdict. Plea bargaining, even if it is "only about the sentence," necessarily implies truth bargaining, at least as long as the system adheres to the principle

37. Consensus cannot always be achieved. An adversarial system therefore needs to have rules on how the court should decide in a situation of continuing dissent as to relevant facts. Rules on burdens of proof, and most prominently the reasonable doubt rule, are examples on point.

38. It is a different question whether the court will be successful in finding the "truth" about the defendant's mental state if the defendant refuses to cooperate. This depends on the court's powers to invade the defendant's privacy by, for example, ordering a thorough psychiatric examination.

39. *See* C.P.P. arts. 444-48.

40. *See* KODEKS POSTEPOWANIA KARNY art. 387 (Poland).

41. *See* LEY DE EJUICIMIENTO CRIMINAL arts. 655, 694 (Spain).

42. *See* Joachim Herrmann, *Bargaining Justice—A Bargain for German Criminal Justice?*, 53 U. PITT. L. REV. 755 (1992). For an overview in German, see Thomas Weigend, *Der BGH vor der Herausforderung der Absprachenpraxis*, *in* 4, 50 JAHRE BUNDESGERICHTSHOF: FESTGABE AUS DER WISSENSCHAFT 1011 (Roxin and Widmaier eds., 2000).

that criminal judgments (including the sentence) should have some rational relationship to what actually happened. To the extent that plea bargaining becomes an accepted means of resolving criminal cases, the party-determined version of "procedural truth" prevails.

Which leads us, finally, to the critical issue of the limits of party disposition of "the truth." Resolution of the criminal process can certainly be built on a consensus between the parties, but can it be built on fiction? Is it acceptable, for example, to convict the defendant of an offense he could not possibly have committed when he voluntarily submits to the consequences of this offense? Is it acceptable for the parties to agree, for the purposes of case disposition, on a set of facts and at the same time to publicly declare that these facts are not true? Even though U.S. plea bargaining law permits practices at least bordering on such fictitious convictions,[43] I submit that a system openly promoting or even condoning such practices would, in the long run, lose all credibility with the public. This is so because truth and justice are intimately intertwined. A system cannot claim to seek justice while at the same time abdicating its claim for truth. Basing judgments in important matters on fictions would thus be as unacceptable as determining a defendant's fate by throwing dice.

This explains why even legal systems that in fact leave the outcome of a case to the unrestricted disposition of the parties cling to the theory (or, indeed, the fiction) that the parties know best about the "truth," and that, therefore, whatever they agree upon will be closest to the (substantive) truth. In plea bargaining, we encounter the related myth that the agreed-upon sentence is a just sentence because it reflects the defendant's "true" responsibility taking into account his remorse and contrition.[44] The bargained sentence is thus styled a product of "natural" justice.[45] These efforts at cloaking the results of a power struggle between the prosecution and the defense in considerations of truth and justice demonstrate that legal systems

43. *See* North Carolina v. Alford, 400 U.S. 25, 37 (1970); Gilbert v. United States, 466 F.2d 533, 534 (5th Cir. 1972); People v. Foster, 19 N.Y.2d 150, 154 (1967). These and related cases are also discussed in WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 180-86 (2d ed. 1999).

44. As Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459, 473 (1988), has (critically) put it, "bargaining attorneys may attempt to make the crime fit the punishment rather than the punishment fit the crime."

45. *Cf.* WAYNE R. LAFAVE ET AL., *supra* note 43, at 12 (examining a similar justification for plea bargaining by arguing that plea bargains produce more intelligent results where questions of culpability fall along a spectrum, rather than presenting a clear dichotomy).

cannot afford to openly declare the will of parties to be the supreme value; if they did, they would undercut the very foundations on which the administration of law—as a social institution—rests. The public will accept whatever is presented as "justice" only if justice is perceived to be based on an honest effort to find the "truth."[46] There are no great expectations beyond that. Most people know that the search for the "truth" equals the task of Sisyphus. Yet they expect their courts and lawyers to undertake that task—to move the rock upward toward that elusive summit of knowledge. If the people feel that an honest effort has been made to find the "truth," they will mostly be happy to accept as justice whatever is offered as a result.

What, then, are the necessary ingredients of procedural truth? It does not matter who is charged with collecting and presenting evidence, nor does it matter whether the judgment relies on party consensus or is the result of a contested trial—the essential element is a visible, honest effort to collect and introduce facts on which the decision-maker can base a rationally defensible verdict.

46. For a thoughtful sociological analysis of this idea, see the now classic work of NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN (3rd ed., Darmstadt 1978) (1969).