PLEA BARGAINING AND DISCLOSURE IN GERMANY AND THE UNITED STATES: COMPARATIVE LESSONS

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ABSTRACT

This Article analyzes recent trends in plea bargaining and disclosure of evidence in Germany and the United States. Over the last two decades, a number of U.S. jurisdictions have adopted rules requiring broader and earlier discovery in criminal cases. This development reflects a growing consensus that, in a system that resolves most of its cases through guilty pleas, early and extensive disclosure is necessary to ensure fair and informed outcomes.

The introduction of broader discovery in criminal cases in the United States aligns American rules more closely with longstanding German rules on access to the investigative file. At the same time, through its increasing reliance on negotiations to resolve criminal cases, the German criminal justice system has itself moved closer to the U.S. model of plea-based criminal justice. As the approaches of the two countries to disclosure and plea bargaining converge, it is worth reflecting on the German experience and examining which features of the German model have proven effective and which continue to pose challenges. The analysis of the German system offers some general ideas on regulating discovery and plea bargaining that could be of interest to U.S. scholars and policymakers, even if a number of the specific rules of German criminal procedure do not fit within the American adversarial tradition.

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INTRODUCTION

Guilty pleas have become the standard method of conviction in the American criminal justice system, and the staying power of plea bargaining is no longer in doubt. Yet even as criminal trials stand out as anomalies, many important criminal procedure rules remain tethered to the trial stage. The prosecutor's duty to disclose evidence is one such rule.[1] In many U.S. jurisdictions, certain evidence must be disclosed before trial, but not necessarily before a guilty plea.[2] Even certain potentially exculpatory evidence may be withheld from defendants before they plead guilty.[3] The different disclosure requirements at the pre-plea and pretrial stages have been defended on the grounds that early disclosure is more costly and increases risks to witnesses.[4]

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1. In this Article, I use the terms "disclosure" and "discovery" interchangeably because they are used to describe the same process. Disclosure focuses on the duties of the party turning over the evidence, while discovery focuses on the recipient of the evidence. American law tends to prefer the term "discovery," even though the defense in criminal cases is typically not permitted to actively conduct discovery akin to the process in civil cases. *See generally* Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1101 (2014). Rather, the defense receives disclosures by the prosecution, as other common law countries more aptly describe this process. *See, e.g.*, Criminal Justice Act 2003, c. 44, § 37 (Eng.); R. v. Stinchcombe, [1991] 3 S.C.R. 326, 326-28 (Can.).

2. *See, e.g.*, GA. CODE ANN. § 17-16-4 (2010) (calling for disclosure "no later than ten days prior to trial, or at such time as the Court orders"); VA. SUP. CT. R. 3A:11 (disclosure motion must be made "at least 10 days before the day fixed for trial").

3. *See* United States v. Ruiz, 536 U.S. 622, 625 (2002). *Ruiz* held that the government is not constitutionally required to disclose impeachment evidence before a guilty plea, but it did not squarely resolve whether the government must disclose factually exculpatory evidence. *See id.* at 625-34. Federal circuit courts have split on this issue. *Compare, e.g.*, Orman v. Cain, 228 F.3d 616, 617 (5th Cir. 2000) ("*Brady* requires a prosecutor to disclose exculpatory evidence for purposes of ensuring a fair trial, a concern that is absent when a defendant waives trial and pleads guilty."), *with, e.g.*, McCann v. Mangialardi, 337 F.3d 782, 787-88 (7th Cir. 2003) ("The Supreme Court's decision in *Ruiz* strongly suggests that a *Brady*-type disclosure might be required" when the prosecution "ha[s] knowledge of a criminal defendant's factual innocence but fail[s] to disclose such information to a defendant before he enters into a guilty plea").

4. *See, e.g.*, *Ruiz*, 536 U.S. at 631-32; Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 51-52 (2015); Bennett L. Gershman, *Preplea Disclosure of Impeachment Evidence*, 65 VAND. L. REV. EN BANC 141, 145-46 (2012), https://www.vanderbiltlawreview.org/wp-content/uploads/sites/89/2012/07/Gershman-Preplea-Disclosure-65-Vand.-L.-Rev.-En-Banc-141-20121.pdf [https://perma.cc/FY8J-KZCY]; Steven M. Goldstein et al., *Response to the Majority's Report*, *in* NYSBA TASK FORCE ON CRIMINAL DISCOVERY FINAL REPORT 76, 81 (2014); Meyn,

While acknowledging these concerns, a number of observers have argued that early and broad disclosure is critical to ensuring fair and informed guilty pleas.[5] Liberal pre-plea disclosure enables defense attorneys to counsel their clients more effectively, especially when those attorneys might lack the time or resources to investigate independently.[6] It allows defendants to make more informed decisions about pleading guilty or proceeding to trial.[7] By enabling the defense to respond to the charges early on, pre-plea discovery also gives the prosecution a better understanding of potential weaknesses in the case before trial.[8] And as both parties gain greater clarity about the facts in a timely fashion, early discovery facilitates a speedier resolution of the case.[9]

Lawmakers across the United States are increasingly hearing these arguments in favor of broader pre-plea discovery. High-profile exonerations have revealed that the withholding of evidence is a key factor contributing to wrongful convictions.[10] While most of the

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supra note 1, at 1127.

5. *See, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2495 (2004); R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1469-73 (2011); Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 106 J. CRIM. L. & CRIMINOLOGY (forthcoming 2016) (manuscript at 13-21), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532568 [https://perma.cc/A4TV-VKJH]; Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1372 (2012). *See generally* Eleanor Ostrow, Comment, *The Case for Preplea Disclosure*, 90 YALE L.J. 1581 (1981) (arguing that pre-plea disclosure is essential to fairness).

6. *See* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1624 (2005); Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Pretrial Cases*, 31 FORDHAM URB. L.J. 1097, 1145-46, 1152-55 (2004).

7. *See* Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. (forthcoming 2016) (manuscript at 12, 43) (on file with author).

8. *See id.* at 12.

9. *See, e.g.*, Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 516 (2009); McConkie, *supra* note 5 (manuscript at 19-20); Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1560 (2010); Turner & Redlich, *supra* note 7 (manuscript at 12, 43).

10. *See, e.g.*, EMILY M. WEST, INNOCENCE PROJECT, COURT FINDINGS OF PROSECUTORIAL MISCONDUCT CLAIMS IN POST-CONVICTION APPEALS AND CIVIL SUITS AMONG THE FIRST 255 DNA EXONERATION CASES 3 (2010), http://www.innocenceproject.org/files/imported/innocence_project_pros_misconduct.pdf [https://perma.cc/4UY9-V8MS]; Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 96 (2008). The problem of wrongful convictions resulting from withheld exculpatory evidence is not limited to the United States. For a discussion of the

uncovered wrongful convictions followed trials, roughly 13 percent resulted from guilty pleas.[11] Recognizing the unfairness and unjust outcomes that restrictive disclosure can produce, a number of U.S. states have reformed their discovery laws over the last decade to require earlier and more extensive disclosure by the prosecution.[12]

As U.S. jurisdictions continue to debate the scope of discovery and the effect it might have on witness safety and the efficiency of plea bargaining, it is useful to consider how other countries have approached these issues. In this Article, I examine how Germany, a country that requires extensive disclosure in criminal cases, has handled some of these same questions. I also discuss how the

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same problem in the English criminal justice system, see, for example, Hannah Quirk, *The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work*, 10 INT'L J. EVIDENCE & PROOF 42, 44 (2006); Jon B. Gould et al., Predicting Erroneous Convictions: A Social Science Approach to Miscarriages of Justice 70 (Dec. 2012) (unpublished manuscript), https://ncjrs.gov/pdffiles1/nij/grants/241389.pdf [https://perma.cc/QE5N-GJAN].

11. 277 of the 1748 wrongful convictions listed in the National Registry of Exoneration involved a guilty plea. *Browse Cases: Detailed List*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx [https://perma.cc/3BJY-36YF] (last visited Mar. 20, 2016) (filter "Tags" column with "P" selection). Of these guilty plea cases, at least 21 involved failure to disclosure exculpatory evidence. *Id.* The failure to disclose exculpatory evidence was a contributing factor in a much larger number of trial-based convictions. *See id.*

12. *See, e.g.*, ARIZ. R. CRIM. P. 15.1; COLO. R. CRIM. P. 16; N.J. CT. R. 3:13-3; N.C. GEN. STAT. § 15A-903 (2011); TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2015); *see also* Baer, *supra* note 4, at 22-23 (describing the trend toward requiring earlier and more extensive disclosure by the prosecution); Brown, *supra* note 6, at 1622-23 (same). The Texas and North Carolina reforms were driven in large part by notorious cases of wrongful convictions in those states. *See* TEX. HOUSE RESEARCH ORG., BILL ANALYSIS, SB 1611 (2013), http://www.hro.house.state.tx.us/pdf/ba83r/sb1611.pdf#navpanes=0 [https://perma.cc/32W5-5V6T]; Phillip Bantz, *Death Row Inmate's Exoneration in North Carolina Inspired Change*, N.C. LAW. WKLY., May 3, 2013, 2013 WLNR 11476236. Reforms in other states were triggered by a more general belief that broader discovery would make the criminal process fairer and more efficient. *See, e.g.*, ARIZ. R. CRIM. P. 15.1 committee cmt. to 2003 amend. ("Codification of the common practice of initial disclosure prior to or at the arraignment phase of the proceedings is intended to facilitate effective communication and the efficient resolution of issues."); OHIO R. CRIM. P. 16 staff notes to July 1, 2010 amends. ("The purpose of the revisions to Criminal Rule 16 is to provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice through the expanded scope of materials to be exchanged between the parties."). In Ohio, at least the defense bar specifically advocated for open-file discovery on the grounds that it would prevent wrongful convictions. *See* THE OHIO ASS'N OF CRIMINAL DEF. LAWYERS, BROKEN DUTY: A HISTORICAL GUIDE TO THE FAILURE TO DISCLOSE EVIDENCE BY OHIO PROSECUTORS, at i-ii (2005), http://www.oacdl.org/aws/OACDL/asset_manager/get_file/16884 [https://perma.cc/Y5YR-H2Q5].

German system has integrated rules on discovery with rules on plea bargaining.

The German approach is useful to study for several reasons. The introduction of broader and earlier discovery in criminal cases in the United States aligns our rules more closely with German rules on access to the investigative file.[13] At the same time, plea bargaining has become common practice in Germany since the 1980s, and it has been closely regulated by courts and by statute.[14] As the approaches of the two countries converge, it is worth reflecting on the German experience and examining which features of the German model have proven effective and which continue to pose challenges.

At the most general level, the German experience provides additional support for arguments that early and broad discovery should be a central feature of a fair criminal process. German courts and legislators have continually and unequivocally affirmed the defendant's right to inspect the evidence early in the pretrial process, and the scope of this right has expanded over time.[15] This expansion has occurred without undue risks to witness safety, at least in part because legislation has also provided for measures to minimize the conflict between open-file discovery and witness protection.[16] During the investigative stage, prosecutors may limit defense access to certain evidence gathered by the authorities in order to protect the integrity of the investigation and safety of witnesses.[17] Even after the investigation is complete, prosecutors and courts may keep certain witness identities and addresses confidential if a concrete risk from disclosure can be shown.[18] American open-file jurisdictions have adopted similar measures, but the German model provides another reference point for jurisdictions that are exploring how to balance witness safety and disclosure.[19]

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13. *See* Brown, *supra* note 6, at 1624-25.

14. *See infra* Part III.

15. *See infra* notes 30-36 and accompanying text.

16. *See infra* notes 50, 61, 71, 204-11 and accompanying text.

17. *See infra* notes 48-61 and accompanying text.

18. *See infra* note 71 and accompanying text.

19. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 39.14(c) (West 2015); N.Y. STATE BAR ASS'N TASK FORCE ON CRIMINAL DISCOVERY FINAL REPORT 13-21 (2014) [hereinafter NYSBA REPORT]; SUPREME COURT OF VA., REPORT OF THE SPECIAL COMMITTEE ON CRIMINAL DISCOVERY RULES TO THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA 6 (2014) [hereinafter VIRGINIA REPORT].

The German discovery regime also suggests that open-file discovery need not undermine the efficiency of plea bargaining. The right of German defense attorneys to inspect the entire investigative file before plea negotiations is considered a critical guarantee of fairness and accuracy in the bargaining process, and negotiations have proceeded without concerns about the costs of such discovery.[20] The idea of bargaining away the right to discovery, while increasingly common in the United States, would be incomprehensible to German courts and practitioners.[21] In fact, while the German criminal justice system suffers from caseload pressures that are in many ways similar to those in our system,[22] German law generally regulates plea bargaining more closely than does U.S. state and federal law, and concerns about fairness and the search for truth outweigh considerations of efficiency.[23] As Part II discusses, the German Criminal Procedure Code and case law impose limits on plea discounts, formally ban most charge bargains and negotiated waivers, and demand a more probing review of the factual basis for admissions of guilt.[24] Reviewing how these rules intersect with open-file discovery to produce fairer dispositions in Germany could offer additional insights for U.S. policymakers who are considering implementing more robust regulation of plea bargaining.

The German experience offers lessons beyond the usefulness of broad pre-plea discovery. It highlights three areas in which even the most liberal, open-file pre-plea discovery regimes in the United States may be failing to fulfill their potential. First, the German model emphasizes the need for more elaborate rules on investigations—specifically, what evidence is collected and recorded in the "file" and conveyed to the prosecution (and, thus, subsequently to the defense). Second, it reveals the importance of guidelines requiring that investigations be complete, whenever possible, before plea negotiations occur. And third, it highlights some of the advantages of providing discovery to the court as well as to the parties.

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20. *See infra* Part I.

21. *See, e.g.*, Interview with Prosecutors, in Cologne, Ger. (June 18, 2014) [hereinafter Interview with Prosecutors] (emphasizing the unwillingness of German prosecutors to compromise the investigative process in exchange for a confession).

22. *See infra* note 147 and accompanying text.

23. *See infra* Part II.

24. *See infra* Part II.

Some of these lessons from the German experience may appear too foreign to our adversarial tradition to be adopted. Indeed, given our two countries' distinct legal traditions, cultures, and institutions, wholesale transplants of German discovery or plea bargaining regulations in a U.S. setting would not be desirable or feasible.[25] Yet a review of the German system remains helpful as a lens through which to examine more carefully ideas for reform of plea bargaining and discovery that are also independently emerging in a number of American jurisdictions.[26] Moreover, as the systems increasingly converge in areas such as disclosure and plea bargaining, comparative conversations become more useful and productive.

I. DEFENSE RIGHT TO INSPECT THE INVESTIGATIVE FILE IN GERMAN CRIMINAL CASES

Some authors have suggested that "strictly speaking, there is no such thing as a 'disclosure process' in Germany."[27] Indeed, German codes and decisions never use the term "discovery" or "disclosure," instead referring to a right to inspect the investigative

25. *Cf.* Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CALIF. L. REV. 539, 547-48 (1990) (noting that procedures that are fundamentally different from our own are not likely to be imported successfully, but transplants that build on procedures that already exist within our system are more likely to succeed). While concerns about transplanting foreign procedures are legitimate, a wealth of scholarship has fruitfully compared different facets of the German and U.S. criminal justice systems, at least in part with an eye toward informing U.S. criminal procedure debates. *See, e.g.*, JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 1-2 (1977); Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1032-34 (1983); Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 591-601 (1997); 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, 360 (1995); Erik Luna, *A Place for Comparative Criminal Procedure*, 42 BRANDEIS L.J. 277, 277 (2004). *See generally* FLOYD FEENEY & JOACHIM HERRMANN, ONE CASE—TWO SYSTEMS: A COMPARATIVE VIEW OF AMERICAN AND GERMAN CRIMINAL JUSTICE 2 (2005) (comparing the American and German criminal justice systems through a hypothetical case study).

26. *See, e.g.*, NYSBA REPORT, *supra* note 19, at 2-3; TEX. HOUSE RESEARCH ORG., *supra* note 12, at 1-4; THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 20 (2007), http://www.prearesourcecenter.org/sites/default/files/library/expandeddiscoveryincriminalcasesapolicyreview.pdf [https://perma.cc/VW64-FCP7].

27. ALEXANDER HEINZE, INTERNATIONAL CRIMINAL PROCEDURE AND DISCLOSURE 310 (2014).

file (*Akteneinsichtsrecht*). As a practical matter, however, German rules on defense inspection of the file before trial are in many respects similar to open-file discovery rules adopted by some American jurisdictions over the last decade.[28] In Germany, as in open-file jurisdictions in the United States, the defense is allowed to view and copy the entire prosecution file, with some exceptions made to protect work product, the integrity of investigations, and witness safety.[29]

The right to inspect the file under German law dates back to 1879, the year that the first German criminal procedure code came into force.[30] Although the early versions of the law had more significant restrictions on the right to inspect the file, these restrictions were first narrowed in a 1964 amendment to the Code[31] and subsequently under the influence of European Court of Human Rights jurisprudence.[32]

Today, the defendant's right to review the investigative file is grounded in the constitutional right to a fair hearing before a court of law, the principle of "equality of arms," and the rule of law principle.[33] The German Constitutional Court has held that a court decision may rest on only those facts and evidence that the defendant has had an opportunity to review and respond to; this is known as "*rechtliches Gehör*," or the fair hearing principle.[34] The right to

28. *Compare* Part I, *with infra* Part IV.

29. *See infra* Part I.A.

30. FEENEY & HERRMANN, *supra* note 25, at 413, 423.

31. *See id.*; *see also* LUTZ MEYER-GOSSNER, STRAFPROZESSORDNUNG, at xxxviii (48th ed. 2005).

32. *See* Christoph Safferling, *Audiatur et altera pars—die prozessuale Waffengleichheit als Prozessprinzip*?, Neue Zeitschrift für Strafrecht [NStZ] 181, 181-88 (2004).

33. Werner Beulke & Tobias Witzigmann, *Das Akteneinsichtsrecht des Strafverteidigers in Fällen der Untersuchungshaft*, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 254, 254 (2011). The right to access the file is based in part on article 103(1) of the German Constitution, which provides that "[i]n the courts every person shall be entitled to a hearing in accordance with law." GRUNDGESETZ [GG] [BASIC LAW] art. 103(1), *translation at* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html [https://perma.cc/5KRT-NM84]. It is also grounded in article 20(3), which provides that "[t]he legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice," and article 2(2), which states that "[e]very person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law." *Id.* arts. 2(2), 20(3).

34. *E.g.*, Beulke & Witzigmann, *supra* note 33, at 254; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 11, 1994, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3219 (3220), 1994.

review the file is also seen as an element of "equality of arms," another principle established in the jurisprudence of the German Constitutional Court and the European Court of Human Rights.[35] It helps ensure that the defense can be an adversary of equal weight at trial and that the defendant is not a mere "object" of the proceeding but rather an active participant in it.[36] At times, disclosure is also justified as contributing to the search for truth—another constitutionally grounded principle[37]—by strengthening the position of the defense at trial. On the other hand, truthfinding may occasionally justify restricting early disclosure in order to prevent potential interference with the investigation by the defendant.[38] Finally, some commentators have endorsed broad disclosure as a means of expediting the proceedings by allowing a speedy clarification of the facts and a prompt resolution of the case.[39]

A. Scope of Right to Inspect During the Investigative Stage

The scope of disclosure in German criminal cases is generally very expansive, but it varies somewhat depending on the stage of the proceedings. Although the prosecution can unilaterally restrict access to the file in some respects during the investigative stage

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35. *See* Safferling, *supra* note 32, at 181-88.

36. BJÖRN GERCKE ET AL., STRAFPROZESSORDNUNG 973, § 147 Rn. 1 (5th ed. 2012); Jan Bockemühl, *Verteidigung im Ermittlungsverfahren*, *in* HANDBUCH DES FACHANWALTS STRAFRECHT 49, 70 (Jan Bockemühl ed., 2000); Reinhart Michalke, *Das Akteneinsichtsrecht des Strafverteidigers—Aktuelle Fragestellungen*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2334, 2334 (2013); Wolfgang Wohlers & Stephan Schlegel, *Zum Umfang des Rechts der Verteidigung auf Akteneinsicht gemäss §147I StPO—Zugleich Besprechung von BGH—Urteil vom 18.6.2009—StR 89/09 (LG Hannover)*, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 486, 487 (2010).

37. BVerfG, 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11, Mar. 19, 2013, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/03/rs20130319_2bvr262810en.html [https://perma.cc/45GG-77AA] (noting the constitutional basis of the search for truth in criminal procedure). For a discussion of the tradition within inquisitorial systems to grant the defense access to the investigative file in the interest of promoting the search for truth, see Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 533-35, 535 n.64 (1973).

38. *See* Bockemühl, *supra* note 36, at 73 (citing BVerfG StV 1994, 465, 466).

39. *See id.*; *see also* Helmut Schäfer, *Die Grenzen des Rechts auf Akteneinsicht durch den Verteidiger*, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 203, 205 (1984) (arguing that the prosecution should provide disclosure to the defense at the earliest opportunity in order to avoid delays in the case).

(*Ermittlungsverfahren*), such restrictions must be lifted as soon as the prosecution has completed the investigation and is ready to file an indictment with the court.[40] To understand the timing of disclosure, it is useful first to outline the key stages of German criminal proceedings.

During the investigative stage police formally gather evidence under the guidance of the prosecution.[41] At this point in the process, defense attorneys can review all the evidence gathered by the police and the prosecution, unless, as discussed later, the prosecution restricts disclosure on specified grounds.[42] In fact, reviewing the file is frequently the principal activity of defense counsel during the investigative stage.[43] While defense attorneys can also investigate the case independently before trial, they rarely do so.[44] Several factors explain the relative passivity of defense attorneys during the investigative stage: lack of time and money,[45] concern about being accused of "interfering" with witnesses,[46] and the possibility of asking the court to gather additional evidence after the opening of the

40. *See infra* notes 48-65 and accompanying text.

41. In practice, prosecutors guide the investigation primarily in its later stages, for example, by suggesting additional measures for the police to take. *See, e.g.*, CLAUS ROXIN & BERND SCHÜNEMANN, STRAFVERFAHRENSRECHT § 9, Rn. 21 (28th ed. 2014). Prosecutors also guide the investigations more extensively in complex white-collar or organized crime cases. *See id.* But in ordinary cases, police conduct investigations largely on their own initiative and turn over the file to the prosecution when the investigation is largely complete. *See id.*

42. Defendants who are unable to afford an attorney may have an attorney appointed during the investigative stage if the assistance of defense counsel would be necessary later in the process (for example, if the case is a felony or pursuant to section 140(1) or 140(2), or if a defense attorney would be necessary to review the file during the investigative stage). *See* GERCKE ET AL., *supra* note 36, § 141, at 938-39; STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], § 141(1), (3), *translation at* http://www.gesetze-im-internet.de/englisch_stpo/german_code_of_criminal_procedure.pdf [https://perma.cc/ACY5-FNWY].

43. While reviewing the file is one of the most important tasks that defense counsel perform at this stage, other key functions include submitting a statement in response to the charges and the evidence in the file and representing the client at detention hearings. *See* StPO §§ 136, 163a; Bockemühl, *supra* note 36, at 67.

44. *See* Bockemühl, *supra* note 36, at 76 (noting that defense attorneys must check out potential defense witnesses at this stage to ensure that these witnesses would be favorable to the defense, but acknowledging that such investigations are still relatively rare); *see also* MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL PROCEDURE 67-68 (2012).

45. *See* BOHLANDER, *supra* note 44, at 68; Bockemühl, *supra* note 36, at 76.

46. Thomas Weigend & Franz Salditt, *The Investigative Stage of the Criminal Process in Germany*, *in* SUSPECTS IN EUROPE: PROCEDURAL RIGHTS AT THE INVESTIGATIVE STAGE OF THE CRIMINAL PROCESS IN THE EUROPEAN UNION 79, 91 (Ed Cape et al. eds., 2007); *see also* Bockemühl, *supra* note 36, at 76.

main proceedings.[47] The availability of the investigative file early in the process may itself contribute to defense passivity.

While the defense attorney is generally entitled to see the entire investigative file during the investigative stage, the law allows the prosecutor to limit access in certain specified circumstances. First, the prosecution need not share work product, such as internal memos interpreting the law or evidence in the case, because these types of documents are not considered part of the "file."[48] Second, the use and identity of undercover agents can be kept confidential during the investigative stage.[49] Likewise, prosecutors may withhold the names and addresses of endangered witnesses, though this is rarely done in practice.[50] Lastly, prosecutors may deny access to portions of the file if disclosure would jeopardize ongoing investigations.[51] This restriction must be based on concrete evidence of the potential danger to the investigation—for example, that the defendant (who has access to the file through his lawyer[52]) would seek to destroy evidence, interfere with investigative measures, or influence witnesses.[53] But the prosecutor's decision to withhold access to portions

47. *See* Weigend & Salditt, *supra* note 46, at 91. Regardless of whether the defense conducts its own investigations, it may also request the prosecution to gather certain exculpatory evidence during the investigative stage, and the prosecution will generally comply so long as it considers the evidence relevant. *See* StPO § 163a(2). On the other hand, the defense may refrain from requesting such assistance from the prosecution if it is uncertain whether the investigation would yield results favorable to the defendant. *See* Bockemühl, *supra* note 36, at 75 (noting that such requests may backfire against the defense).

48. The file comprises only what has to be transmitted to the court, upon the filing of the charges at a later stage in the proceedings. *See* StPO § 147(1). For a discussion of the work product exception to disclosure, see, for example, Wessing, Beck'scher Online-Kommentar StPO § 147, Rn. 15; Wohlers & Schlegel, *supra* note 36, at 489; Michalke, *supra* note 36, at 2335; *see also* SHAWN MARIE BOYNE, THE GERMAN PROSECUTION SERVICE: GUARDIANS OF THE LAW? 82 (2014).

49. StPO § 96; ULRICH SOMMER, EFFEKTIVE STRAFVERTEIDIGUNG 149 (2011); Hegmann, Beck'scher Online-Kommentar StPO § 110b, Rn. 10; *see also* BOHLANDER, *supra* note 44, at 92.

50. StPO §§ 68 (2)-(3), 200. On the relative rarity of such protections, see Interview with Prosecutors, *supra* note 21 (noting that while witness addresses are more commonly withheld, keeping the identity of witnesses confidential requires the approval of a supervisor and is rare in practice).

51. StPO § 147(2).

52. On the scope of this access, see *infra* Part I.D.

53. *See, e.g.*, SOMMER, *supra* note 49, at 140-41; Wessing, *supra* note 48, § 147 Rn. 5a.

of the file at the investigative stage is unreviewable if the defendant is at liberty.[54]

The restriction on grounds of risk to the investigation can only be justified on a temporary basis.[55] Once the danger passes, the prosecutor must inform the defense that the relevant portion of the file is now available for inspection.[56] For example, if the concern in question is that the defendant might find out about an upcoming search, access to the file must be granted once the search has been conducted.[57] In practice, prosecutors rarely withhold significant portions of the file from the defense during the investigative stage.[58] The most common reason for withholding appears to be that there is a pending investigative measure (for example, a search, wiretapping, or arrest) that must remain a surprise to the defendant or his associates in order to succeed.[59] In organized crime and trafficking cases, the identities of undercover agents are also frequently suppressed during the investigative stage.[60] On the other hand, witness identities are rarely kept confidential.[61]

While the above limitations can be applied to some of the evidence in the investigative file, three "privileged" categories of documents—the defendant's statements, documents laying out the results of proceedings that the defense attorney has the right to

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54. StPO § 147(5). For rules with respect to defendants in pretrial detention, see *infra* notes 63-64 and accompanying text.

55. StPO § 147(6).

56. *Id.*; GERCKE ET AL., *supra* note 36, § 147 Rn. 14, at 979.

57. *See* Interview with Prosecutors, *supra* note 21. Again, however, the prosecutor's decision to restrict access to the file on such grounds is not subject to review by the court, unless the defendant is detained. Bockemühl, *supra* note 36, at 73-74.

58. *See, e.g.*, FEENEY & HERRMANN, *supra* note 25, at 254; Interview with Prosecutors, *supra* note 21 (estimating that in sexual assault cases, disclosure is restricted to some degree in less than 5 percent of cases); Interview with Prof. Dr. Ulrich Sommer & Karoline Tharra, Defense Attorneys, in Cologne, Ger. (June 18, 2014) [hereinafter Interview with Sommer & Tharra] (noting that disclosure is rarely restricted, although it is typically restricted in cases where a search or seizure might be frustrated by disclosure; observing that disclosure is frequently delayed, but never past the point of the filing of charges).

59. *See* Interview with Prosecutors, *supra* note 21.

60. Undercover agents are typically not identified in the file at all, although the fact that an undercover agent has been used must be noted. *See, e.g.*, SOMMER, *supra* note 49, at 149. As Part I.B discusses, the identities of undercover agents may be withheld from the defense even during the trial, and the agent's police handlers would be allowed to testify in place of the agent. *See infra* notes 72-73 and accompanying text. Confrontation rights in this area are weaker in Germany than in the United States.

61. Interview with Prosecutors, *supra* note 21.

attend, and expert reports—cannot be withheld from the defendant under any circumstances.[62] Likewise, if a defendant is detained, the attorney has an unconditional right to inspect any evidence material to the court's decision on detention.[63] Defendants can seek judicial review of the prosecutor's refusal to disclose any of these "privileged" materials.[64]

B. Scope of Right to Inspect After Charges Are Filed

Once the prosecution concludes that it has sufficient evidence to proceed with the case to trial, it records the end of the investigation in the file and soon thereafter files formal charges with the court.[65] The decision to file charges typically occurs at a later stage of the investigation than in the United States and is therefore based on a more thorough inquiry into the facts.[66] Once the charges are filed, the court will review them, together with the evidence in the file, and will decide whether sufficient evidence exists to confirm the charges and open the main proceedings.[67] Depending on the

62. StPO § 147(3). Investigative measures that the defense attorney is permitted to attend include the interrogation of the defendant by a prosecutor or investigative judge and a detention hearing.

63. *Id.* § 147(2); BVerfG, NJW 3219 (3220-21), Nov. 7, 1994. Courts and commentators have disagreed on what constitutes evidence that is "material" to detention. A key open question is whether the prosecutor must provide access to only incriminating evidence or also potentially exculpatory evidence relevant to the question of detention. *See* Beulke & Witzigmann, *supra* note 33, at 254-59; Michalke, *supra* note 36, at 2335. If the evidence is material to detention, and yet the prosecution has failed to grant access to the file, the court may not rely on any of the undisclosed evidence to support a decision to detain. BVerfG, NJW 3219 (3220-21), Nov. 7, 1994.

64. StPO § 147(5); *see also* SOMMER, *supra* note 49, at 145.

65. StPO §§ 169a, 170.

66. In the United States, prosecutors feel pressure to file charges within forty-eight hours of the suspect's detention in order to prevent the suspect's release from custody. By contrast, in Germany, the court does not need an initial charge document to decide on detention—the investigative file is sufficient. Therefore, German prosecutors have more time to prepare a charging document. Because the expectation is that the charging document will be more detailed and that the investigative stage will be complete by the time prosecutors file charges, the filing of formal charges tends to occur later in the process in Germany than it does in the United States. *See, e.g.*, FEENEY & HERRMANN, *supra* note 25, at 29-30, 34, 373; *cf.* BOHLANDER, *supra* note 44, at 68 (making a similar comparison between the timing of charges in Germany and in England).

67. The court may decide to conduct a supplementary investigation before deciding whether to confirm the charges. *See* StPO § 202. The defendant may also request that evidence be taken on his behalf and may file objections to the admission of the indictment. *See*

complexity of the case and the schedule of the court, the period between the filing of the charges and the start of the main proceedings may last several months.[68] During that time, both the court and the defense have full access to the investigative file.[69]

Even if defense attorneys were granted access to the file early in the proceedings, they typically demand to consult the file again once it has been passed on to the court because they may then find information that had previously been unavailable to them.[70] The only items that may be withheld at this point are work product and, in cases in which witness safety might be a concern, the addresses (and very rarely, the names) of witnesses.[71] The identities of undercover agents may also remain confidential during trial, and agents may testify under an alias, or their police handlers may be allowed to testify in their place.[72] Such protection of undercover agents and related files must be justified on the grounds of "national or state interest" and requires preapproval at the ministerial level.[73]

C. Contents and Completeness of the File

The "investigative file" that the court and the defense review contains documents relating to the case that the prosecution or any

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id. § 201(1).

68. *See* BOYNE, *supra* note 48, at 142 (noting that in white-collar crimes cases, which tend to be more complicated and lengthier, it often takes "between 6 months to 2 years to review an investigation file and decide whether or not to open a main proceeding").

69. *See* StPO § 199 (noting that the file is submitted to the trial court together with the charging instrument).

70. *See* Interview with Daniel Wölky, Defense Attorney, in Cologne, Ger. (June 18, 2014) [hereinafter Interview with Wölky]; Interview with Sommer & Tharra, *supra* note 58.

71. The names and addresses of witnesses normally must be included in the indictment, which is part of the file. StPO § 200(1). If there are concerns about the witness's safety, then the address may be omitted from the indictment and the file. *Id.* §§ 68(2), 200(1). If the prosecution can point to concrete evidence that the witness's safety may be endangered, the name of the witness may also be kept confidential even after the investigation is complete, and the witness may be permitted to testify under an alias at trial. *Id.* §§ 68(3), 200(1).

72. *See id.* § 110b(3) ("[M]aintaining the secrecy of the identity in criminal proceedings shall be admissible pursuant to Section 96, particularly if there is reason to fear that revealing the identity would endanger the life, limb or liberty of the undercover investigator or of another person, or would jeopardize the continued use of the undercover investigator."); SOMMER, *supra* note 49, at 149; Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 AM. J. COMP. L. 493, 506 (2007).

73. StPO § 96; SOMMER, *supra* note 49, at 149.

state investigative agency have gathered.[74] It may contain exculpatory as well as inculpatory evidence.[75] Under the law, German police and prosecutors have a duty to gather both types of evidence as part of their duty to investigate the case objectively.[76] In practice, as a result of cognitive biases and structural roles that tend to produce a more partisan approach to the investigation, the police and the prosecution may not always appreciate the exculpatory nature of certain evidence and therefore may not collect the evidence.[77] But at the very least, they appear to follow up on defense requests to interrogate specific witnesses or check an alibi or affirmative defense.[78] The file may therefore contain documents that have been gathered by state authorities at the request of the defense.

Importantly, under the principle of "completeness of the file" (*Aktenvollständigkeit*), police are required to record and include in the file all information that is potentially relevant to the case.[79] As

74. These include expert reports, statements by the defendant, witness statements, police reports, and instructions from the prosecution about investigative steps to be taken in the case. It also covers files in related noncriminal proceedings, as long as these may be relevant to the defendant's case. *See, e.g.*, Schlothauer, MAH Strafverteidigung, § 3 Ermittlungsverfahren, Rn. 48 (2d ed. 2014); *see also* BOHLANDER, *supra* note 44, at 104 n.20. The file does not include physical evidence, which can be reviewed by the defense attorney as early as the investigative stage at the office of the prosecutor, but cannot be copied or taken out of the prosecutor's office. StPO § 147(1), (4). For an understanding of the difficulties of inspecting certain "physical" evidence, such as DVD recordings of telephone surveillance, see Daniel Wölky, *Beschränkung der Verteidigung durch Einschränkung des Akteneinsichtsrechts*, STRAFVERTEIDIGER FORUM [StraFo] 493 (2013).

75. StPO § 160(2).

76. *Id.*

77. *See* SOMMER, *supra* note 49, at 32-36; *see also* Wölky, *supra* note 74 (noting the difference between the ideal of the objective prosecutor and the reality of prosecutors who may be careless, overzealous, or cognitively biased and may therefore not be best positioned to determine the relevance of evidence to the case).

78. The law requires the prosecution to follow up on the defense's request if the evidence sought is relevant to the case. StPO § 163a(2). This leaves some unreviewable discretion to the prosecutor in determining relevance, but defense attorney manuals do not point to a problem with prosecutorial practice in this respect. *See, e.g.*, SOMMER, *supra* note 49, at 88-89; Bockemühl, *supra* note 36, at 75.

79. The Code of Criminal Procedure formally requires the *prosecution* to record the "results" of investigative measures in the file. *See* StPO § 168b(1); MEYER-GOSSNER, *supra* note 31, § 168b(1), at 712. But the majority view tends to support application of the provision to the police. LÖWE-ROSENBERG, DIE STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ: GROSSKOMMENTAR, § 168b(1) Rn. 2a & n.7 (26th ed. 2008); Wohlers & Schlegel, *supra* note 36, at 487. The prosecution is responsible for terminating the investigation and must note this final step in the file. StPO § 169a.

courts have affirmed, this principle means that there cannot be gaps in the file.[80] The file thus includes records of every relevant investigative measure taken by the police, the prosecutor, or an investigating judge, as well as any of the prosecutor's written instructions for such investigative measures.[81] The police also have a duty to transmit the file to the prosecution "without delay."[82] The comprehensive record of investigative steps allows the defense and the court to understand the chronology of investigative decisions made in the case and, in some cases, to determine whether relevant evidence may have been overlooked.[83] Defense attorneys note that police do occasionally omit relevant investigative steps from the file, particularly with respect to the use of undercover agents.[84] While no empirical study of the frequency of such omissions from the file appears to exist, commentators have not identified the omission of investigative steps as a systematic problem.

Some practitioners have also voiced concerns about the occasional omission of so-called *Spurenakten* from the file.[85] The term *Spurenakten* (literally, "trace documents") refers to leads that the police or

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80. *See* Wohlers & Schlegel, *supra* note 36, at 487 (citing Bundesgerichtshof in Strafsachen [BGHST] [Federal Court of Justice for Criminal Matters] Oct. 10, 1990, 37 (204)); *see also* Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 12, 2013, NJW 277 (281), 2014.

81. *See* BOYNE, *supra* note 48, at 53 ("[P]rosecutors record virtually every decision related to a criminal case's investigation and prosecution in case files."). These instructions are the standard method of communication between prosecutors and investigative agencies and other prosecutors who might work on the case at a later point.

82. StPO § 163(2); *see also id.* § 163(1) ("The authorities and officials in the police force shall investigate criminal offenses and shall take all measures that may not be deferred, in order to prevent concealment of facts.").

83. *See* BOYNE, *supra* note 48, at 50-53. As subsequent discussion reveals, however, if the police fail to follow up on certain leads, or if they do not consider investigated leads relevant to the case, these leads would not be mentioned in the file. *See* Interview with Prosecutors, *supra* note 21. A lack of record in such cases would make it difficult for the defense and the judges to appreciate that certain evidence may have been overlooked.

84. *See, e.g.*, Interview with Sommer & Tharra, *supra* note 58 (an experienced defense attorney noting that, in his practice, he has often seen omissions of relevant investigative measures from the file, particularly when it comes to the use of undercover agents). *But cf.* Interview with Prosecutors, *supra* note 21 ("We [prosecutors] document everything in the file. We follow the principle of truth and completeness of the file. We don't know what the police do [whether they enter all investigative measures in the file]. We assume that the file is complete. Sometimes the police call us and say that witnesses have said something in addition. Then we write this down in the file. From our perspective the file should be complete.").

85. *See, e.g.*, SOMMER, *supra* note 49, at 148; Interview with Sommer & Tharra, *supra* note 58.

prosecutors have investigated but dismissed as immaterial.[86] Such failed leads must only be made part of the file and disclosed to the defense if they are relevant to the defendant's case.[87] But since relevance is assessed by the police, potentially exculpatory evidence may be omitted from the file because the investigating authorities may not be able to appreciate the value it may have to the defense.[88] If the defense believes that relevant *Spurenakten* have been omitted from the file, it can petition the court for access to the documents.[89] There is no empirical evidence of the frequency with which relevant and perhaps even exculpatory evidence might be lost in *Spurenakten*.[90]

Another potential concern with the completeness of the file is the rarity of audio or video recording of interrogations and witness interviews.[91] Police officers typically provide only a detailed summary of the interview or interrogation.[92] The defendant or witness may

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86. *See* Lutz Meyer-Gossner, *Die Behandlung kriminalpolizeilicher Spurenakten im Strafverfahren*, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 353, 353 (1982); Michalke, *supra* note 36, at 2335.

87. *See* BVerfG [Federal Constitutional Court] Dec. 1, 1983, NJW 273 (276), 1983; *see also* BOHLANDER, *supra* note 44, at 62.

88. *See, e.g.*, SOMMER, *supra* note 49, at 148; Karl Peters, Anmerkung, BVerfG, Beschluss vom 12.01.1983—2 BvR 864/81, NStZ 273 (276), 1983; Interview with Sommer & Tharra, *supra* note 58.

89. The petition is filed under Section 23 of the Introductory Law to the Judicature Act (EGGVG). MEYER-GOSSNER, *supra* note 31, at 614, § 147 Rn. 40 (citing BVerfG [Federal Constitutional Court] Dec. 1, 1983, NJW 83 (1043), 1983); PFEIFFER, STRAFPROZESSORDNUNG § 147 Rn. 3 (5th ed. 2005).

90. Some commentators have pointed out that, with scientific and technological advances that allow the police to conduct "dragnet" investigations more easily, *Spurenakten* will increase in number. *See, e.g.*, Meyer-Gossner, *supra* note 86, at 353. Commentators, however, have not complained about systematic exclusion of relevant *Spurenakten* from investigative files. *But cf.* SOMMER, *supra* note 49, at 148 (suggesting that in order to guarantee that all relevant documents are included in the file, the investigating authorities should at least list the *Spurenakten* they have gathered); Interview with Sommer & Tharra, *supra* note 58 (suggesting that it is problematic that the police and prosecution decide without input from the defense which acts are relevant to the case).

91. *See* Weigend & Salditt, *supra* note 46, at 84 (noting that interrogations are not routinely recorded); *see also* StPO § 58a(1) (providing for optional video recording of witness interviews).

92. *See* MEYER-GOSSNER, *supra* note 31, § 163a Rn. 10, 31 (noting that the protocol of the interrogation of the defendant must be detailed); Richtlinien für das Strafverfahren und das Bußgeldverfahren [RiStBV] [Guidelines for Criminal Procedures and Fines] § 45(2), http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_01011977_420821R5902002.htm [https://perma.cc/AP6J-78RC] (recommending, inter alia, that for important

review summaries of the questions and answers, but this does not eliminate the risk that the summary includes occasional misinterpretations of the original statements.[93]

While the lack of recording or verbatim transcript and the occasional omission of *Spurenakten* may reduce the accuracy of German investigative files, on the whole, they remain quite detailed, particularly in comparison to police reports in the United States.[94] German files typically include records of every relevant investigative measure, including measures requested by the defense.[95] Moreover, because the investigation generally must be finished by the time the prosecutor files formal charges with the court, the file is comprehensive and "trial-ready" even before plea negotiations begin.[96]

D. Defendant and Defense Attorney: Different Rights of Access to the File

The right to inspect the evidence—whether at the investigative or the trial stage—belongs to the defense attorney and not to the defendant.[97] Accordingly, self-represented defendants are merely given excerpts or summaries of the evidence in the file, as necessary, to

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parts of the interrogation, the transcript should, to the extent possible, contain a verbatim record of the questions and answers). Although these guidelines are directed at prosecutors, they also apply to police officers as agents of the prosecution. *See, e.g.*, Meyberg, Beck'scher Online-Kommentar StPO, RiStBV 45, Form der Vernehmung und Niederschrift, Rn. 1 (2015). For examples of detailed summaries of police interrogations and witness interviews, see FEENEY & HERRMANN, *supra* note 25, at 208-11, 218-21, 226-28.

93. FEENEY & HERRMANN, *supra* note 25, at 357.

94. *See id.* at 356-57; *see also* BOYNE, *supra* note 48, at 51-52; Máximo Langer & Kent Roach, *Rights in the Criminal Process: A Case Study of Convergence and Disclosure Rights*, *in* ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 273, 277 (Mark Tushnet, Thomas Fleiner & Cheryl Saunders eds., 2013) (describing how the weight of the dossier in inquisitorial criminal proceedings incentivizes more thorough record keeping).

95. BOYNE, *supra* note 48, at 53.

96. This statement applies with respect to felony cases, which are the focus of this Article. In less serious cases, plea negotiations may be conducted before the conclusion of the investigation, and a disposition through penal order under section 407 or a conditional dismissal under section 153a of the Code of Criminal Procedure may be agreed upon. *See* StPO §§ 153a, 407.

97. StPO § 147(1) ("*Defence counsel* shall have authority to inspect those files which are available to the court or which will have to be submitted to the court if charges are preferred, as well as to inspect officially impounded pieces of evidence.") (emphasis added); *see also* Wessing, *supra* note 48, § 147 Rn. 1.

ensure adequate self-representation.[98] This restriction is of limited practical significance, however, because, at least in serious cases, the principle of mandatory defense applies, which means that the court will appoint an attorney for the defendant even if the defendant objects.[99] Consequently, the question of access to the file for pro se defendants arises only in minor cases.

In cases where the defendant is represented, the law also imposes some limits on the attorney's ability to share information from the file with the client. In general, defense attorneys are able, and even professionally obligated, to tell their clients about relevant information gleaned from the file.[100] They can inform clients of the information orally, or, as is more commonly the practice, simply forward copies of the file to clients.[101] But if there is concrete evidence that the defendant would misuse certain information in the file to endanger the investigation (especially to threaten a witness), or if possession of some of the documents themselves is a crime (as in cases of child pornography), then, according to the prevailing view, the attorney may not provide copies of the materials to the client.[102]

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98. StPO § 147(7). European Court of Human Rights jurisprudence has clarified that self-represented defendants have an independent right to inspect at least some of the evidence in the case, and this prompted the German legislature to amend the Code of Criminal Procedure in 2000 to provide pro se defendants some access to the evidence.

99. For a listing of the various situations in which the principle of mandatory defense applies, see StPO § 140 (providing that a defense attorney must be appointed in certain complex or serious cases, such as felony cases, cases in which the mental capacity of the accused might be in question, and other cases of factual or legal complexity). The need to inspect the file can itself be grounds for appointing an attorney, if, for example, the file contains inconsistent witness statements or expert reports critical to the resolution of the case, or more generally, if a comprehensive evaluation of the file is necessary for adequate representation. *See* MEYER-GOSSNER, *supra* note 31, § 140 Rn. 27, at 559.

100. BOHLANDER, *supra* note 44, at 63.

101. *See* SOMMER, *supra* note 49, at 149-50; Bockemühl, *supra* note 36, at 74; Weigend & Salditt, *supra* note 46, at 93.

102. *See* Oberlandesgericht Frankfurt a.M. [OLG] [Higher Regional Court of Frankfurt] Apr. 11, 2013, NJW 1107, 2013 (holding that defense attorney can be convicted of distribution of child pornography after passing along to his client images of child pornography contained in the investigative file); Bundesgerichtshofes in Strafsachen [BGHSt] [Federal Court of Justice for Criminal Matters] Mar. 10, 1979, 29 (99, Rn. 9-11), 1979 (noting that a defense attorney may not pass along information from the file to the client if this would endanger the investigation, for example, by thwarting a pending investigative measure).

The question of whether and under what circumstances a defense attorney may be prohibited from passing along information from the file to the client remains controversial. Most commentators seem to agree that such a prohibition would be valid during the investigative stage if the attorney knows that transmission to the client would result in a concrete

E. Lack of Reciprocal Disclosure by Defense Attorneys

In Germany, unlike in most U.S. jurisdictions, the defense has no reciprocal obligation to disclose evidence gathered before trial.[103] The defense does have to disclose (typically after the indictment is filed and before trial begins) names and addresses of witnesses that it intends to present at the trial.[104] But defense attorneys rarely use this method to bring witnesses to court because it obliges them to pay for the witnesses' travel and lost-wages expenses.[105] Instead, defense attorneys typically ask the court to call the witnesses, and

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danger to the investigation. *See, e.g.*, PFEIFFER, *supra* note 89, § 147 Rn. 8, 10 (noting that a defense attorney may be prohibited from disclosing to his or her client information that would endanger the investigations); SOMMER, *supra* note 49, at 55; Annekatrin Donath & Bastian Mehle, *Akteneinsichtsrecht und Unterrichtung des Mandanten durch den Verteidiger*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1399, 1399-1400 (2009) (noting that disclosure cannot be restricted on vague suspicions that the defendant might interfere with the investigation; the danger must be concrete); Michalke, *supra* note 36, at 2336; Wessing, *supra* note 48, § 147 Rn. 23 (noting that a defense attorney may be prohibited from transmitting to his or her client information from the file when that information could be used for no legitimate purpose and would endanger the investigation; the mere possibility that the defendant might misuse the materials is insufficient to prohibit transmission); *see also* Interview with Prosecutors, *supra* note 21 (noting that prosecutors occasionally appeal to defense attorneys not to disclose certain portions of the file to their clients and remind them that they are also "organs of justice," but adding that the prosecution cannot prohibit a defense attorney from disclosing the file to his or her client).

Contrary to the majority view, some defense attorneys and commentators have argued that such restrictions, particularly if interpreted broadly, could infringe on the attorneys' duties to their clients. *E.g.*, SOMMER, *supra* note 49, at 55; Wilhelm Krekeler, *Strafrechtliche Grenzen der Verteidigung*, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 146, 149-50 (1989) (noting that a defense attorney may not be prohibited from telling the client about a pending search or arrest, but that the attorney may be prohibited from sharing information that he or she knows would be used for criminal purposes, such as threatening a witness); Volkmar Mehle, *Weitergabe von Informationen als Strafvereitelung*, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 556, 558 (1983) (critiquing the "prevailing view" that attorneys could be prohibited from passing along information from the file to clients when such transmission would endanger the investigation); Wessing, *supra* note 48, § 147 Rn. 5a (noting that the prosecution cannot impose a condition on the defense attorney not to inform clients of future investigative measures, even when such information would endanger the investigation); *see also* Oberlandesgericht Hamburg [OLG] [Higher Regional Court of Hamburg] Sept. 9, 1991, NStZ 50, 1992 (holding that a defense attorney may not be banned from passing materials to a client that might endanger the investigation once the investigative stage is over, but noting controversy as to whether such a prohibition may be possible during the investigative stage).

103. Weigend & Salditt, *supra* note 46, at 94; *see also* BOHLANDER, *supra* note 44, at 114.

104. StPO § 222(2); *see also* BOHLANDER, *supra* note 44, at 114.

105. StPO § 220(2).

the court then informs both parties about the selected witnesses.[106] This can occur either just before trial or during trial itself, depending on the timing of the defense motion.[107]

Given the commitment of German criminal procedure to the search for truth, it may seem surprising that reciprocal discovery is not required of the defense. But the lack of reciprocal discovery likely reflects the inquisitorial view that the proceedings should be conducted as one objective inquiry into the evidence, rather than two competing investigations.[108] Moreover, because German defense attorneys remain relatively passive and rely heavily on the court and the prosecution for the collection of evidence, the lack of reciprocal disclosure obligations is less practically significant.

In short, German defense attorneys receive broad pretrial disclosure from the prosecution, but they are under no duty to reveal evidence they have gathered in return. The court also receives the entire investigative file as soon as charges are filed.[109] Because the investigative file is very detailed and the investigation is generally complete before the trial begins, the file is regarded as a reliable and sufficient source of information for the parties and the court before trial.[110] As the next Part lays out, in plea bargained cases the investigative file also informs both the defense and the court about the evidence before negotiations begin.

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106. *Id.* §§ 219(1), 222 (1).

107. *Id.* §§ 219(1), 244(2), 246; *see also* BOHLANDER, *supra* note 44, at 114. Defense motions to take evidence (including to call specific witnesses) can be denied only if:

> the fact to be proved is irrelevant to the decision or has already been proved, the evidence is wholly inappropriate or unobtainable, the application is made to protract the proceedings, or an important allegation which is intended to offer proof in exoneration of the defendant may be treated as if the alleged fact were true.

StPO § 244(3).

108. *See* Langer & Roach, *supra* note 94, at 278.

109. StPO § 199.

110. While the court may take additional evidence before deciding whether to confirm the charges, this rarely happens in practice. *See id.* § 202; GERCKE ET AL., *supra* note 36, § 202 Rn. 1.

II. THE RELATIONSHIP BETWEEN DISCLOSURE AND PLEA BARGAINING IN GERMAN CRIMINAL CASES

In a number of adversarial jurisdictions that have recently adopted broad pre-plea disclosure, such disclosure has been defended as a means of expediting cases.[111] Advocates have argued that issues are clarified more quickly and that defendants are more likely to plead guilty once they see the evidence against them.[112] But other commentators and policymakers have claimed that a requirement of pre-plea disclosure would in fact undermine the efficiency of plea bargaining.[113] While the efficiency of pre-plea disclosure remains disputed, few would disagree with the argument that early disclosure produces more informed guilty pleas and a fairer process. To understand how disclosure and plea bargaining interact in Germany, it is worth examining briefly how German law has regulated the relatively recent practice of "negotiated judgments."[114]

For a long time, the German criminal justice system resolved cases without resorting to plea bargaining. But as caseloads began to swell in the 1970s, the German legislature introduced a number of simplified trial and diversion procedures to allow the system to process cases more efficiently.[115] For various reasons, these measures were insufficient to address the problem, and by the 1980s, German judges and practitioners began negotiating cases informally, without any legislative authorization.[116] In 1987, the German Constitutional Court first acknowledged the practice and attempted

111. *See infra* note 159 and accompanying text.

112. Turner & Redlich, *supra* note 7 (manuscript at 12, 43).

113. *See, e.g.*, United States v. Ruiz, 536 U.S. 622, 631-32 (2002); Baer, *supra* note 4, at 51.

114. In describing the German practice of exchanging an admission of guilt for a reduced sentence, the term "negotiated judgment" is technically more accurate than the term "plea bargaining." German defendants do not merely enter a guilty plea, but rather tender a confession, which does not obviate the subsequent trial. German courts therefore call the practice an "understanding," "deal," or "negotiated judgment." Because "plea bargaining" is the term commonly used in the U.S. literature, however, I use this term throughout the rest of the Article for the sake of convenience and clarity.

115. This overview of the plea bargaining process in Germany is based in large part on Thomas Weigend & Jenia Iontcheva Turner, *The Constitutionality of Negotiated Criminal Judgments in Germany*, 15 GERMAN L.J. 82, 83-85 (2014).

116. For a discussion of the possible causes of the spread of plea bargaining, see *id.* at 86.

to establish some basic guidelines for its operation.[117] The Federal Supreme Court subsequently elaborated on the rules for negotiating judgments, drawing on both constitutional and statutory principles.[118] But as the practice grew, the court eventually acknowledged the limits to its ability to regulate the practice in the absence of express statutory authorization. In 2005, the court called on the German legislature to develop clear rules with respect to plea bargaining,[119] and the legislature did so in 2009 with an amendment to the Code of Criminal Procedure.[120] The statute largely codified the existing case law, with a few minor modifications.[121] The German Constitutional Court upheld the statute and reaffirmed the limits on plea bargaining in a 2013 decision.[122]

From a comparative perspective, several key features of German law and practice of plea bargaining stand out. The first is the timing of plea bargaining and the effect that it has on the participants' information base. At least in more serious cases, bargaining occurs after the investigation has been closed and formal charges have been filed with the court.[123] This means that the police and prosecution have compiled all the evidence they need to present the case at trial. Because the file is available to the court and the defense as soon as the investigation is completed, this helps to ensure that all of the relevant actors have a good understanding of the case before they negotiate a resolution. Plea bargaining in Germany is therefore used not so much to truncate the prosecution's inquiry into the

117. *See* BVerfG [Federal Constitutional Court] Jan. 27, 1987, NJW 2662, 1987.

118. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 28, 1997, *translated in* STEPHEN THAMAN, COMPARATIVE CRIMINAL PROCEDURE 145-46 (2002).

119. *See* BGH [Federal Court of Justice] Mar. 3, 2005, *translated in* JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS 96 (2009).

120. *See* Entwurf eines Gesetzes zur Regelung der Verständigung im Strafverfahren, DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 16/1230, http://dip21.bundestag.de/dip21/btd/16/123/612310.pdf [https://perma.cc/MMJ9-HG8R].

121. *See, e.g.*, StPO §§ 257b, 257c.

122. *See* BVerfG [Federal Constitutional Court], 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11, Mar. 19, 2013, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/03/rs20130319_2bvr262810.html [https://perma.cc/HQ8E-HVP7] [hereinafter 2013 Constitutional Court Decision].

123. *See* StPO § 257b. In certain relatively minor cases, where the prosecution has the discretion to refrain from pressing charges on certain conditions, negotiations occur between the prosecution and the defense and typically do not involve the court. These negotiations occur before the filing of charges. *See id.* § 153(l).

facts, as often happens in the United States, but rather to shorten the trial proceedings.[124]

The second notable feature of German plea bargaining is the active role that judges play in the process. German judges discuss the case with the parties and indicate what sentence might be appropriate in light of the facts presented in the file and during the discussions.[125] They also verify that the admission of guilt corresponds to the facts in the investigative file, and if they have any doubts about the case after the discussions, they have both the duty and the ability to investigate the facts independently—for example, by calling witnesses during the main proceeding, which occurs even in negotiated cases.[126]

The position of German prosecutors is also distinctive. They are legally prohibited from negotiating charge bargains, at least in more serious cases, because they are bound by the principle of mandatory prosecution in such cases and because the plea bargaining provision of the Criminal Procedure Code expressly bans agreements concerning the guilt of the accused.[127] Moreover, the final decision on the charges rests with the judges, who can (and often do) convict on charges different from those listed in the indictment.[128] A limited form of charge bargaining occurs on occasion, but it is the court that

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124. Again, this statement applies only to the more serious cases. In less serious cases, the investigation can be cut short if the parties agree to a conditional dismissal under section 153a or a penal order under section 407. *See id.* §§ 153a, 407.

125. *See id.* §§ 257b, 257c; Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 219-20 (2006).

126. In practice, judges often rely solely on the confession and the investigative file as a factual basis for the conviction. KARSTEN ALTENHAIN ET AL., DIE PRAXIS DER ABSPRACHEN IN STRAFVERFAHREN 93, 99-100 (2013). Since the results of the study were released, the German Constitutional Court has emphasized that judges must do more to corroborate a negotiated confession. *See* 2013 Constitutional Court Decision, *supra* note 122, ¶ 71; *see also* Andreas Mosbacher, *The Decision of the Federal Constitutional Court of 19 March 2013 on Plea Agreements*, 15 GERMAN L.J. 5, 8 (2014); Alexander Schemmel et al., *Plea Bargaining in Criminal Proceedings: Changes to Criminal Defense Counsel Practice as a Result of the German Constitutional Court Verdict of 19 March 2013?*, 15 GERMAN L.J. 43, 59-60 (2014).

127. *See* StPO §§ 170(2), 257c(2). By contrast, limits on charge bargaining are the exception rather than the rule in the United States. *See, e.g.*, TURNER, *supra* note 119, at 28.

128. The court may convict the defendant of different (including more serious) crimes than those charged, as long as the court bases the new charges on facts in the indictment and gives the defendant proper notice. *See* StPO § 265.

determines the charges to be requalified or dismissed, not the prosecution.[129]

Prosecutors also have comparatively minor influence over the negotiated sentence.[130] Judges make sentencing decisions, for both negotiated and contested cases, and they have relatively broad discretion in the matter.[131] Judges are prohibited from promising a specific sentence during plea negotiations, but surveys reveal that in practice, judges often indicate indirectly what sentence a defendant might expect if he admits guilt.[132] And although both the prosecutor's and the defendant's consent is required for a sentence offer to become binding,[133] the judge's ultimate authority to impose punishment in the case means that he or she has significant influence over the sentence negotiated.

Judges' sentencing discretion is not entirely unrestrained, however. Even a bargained sentence must remain proportionate to the defendant's blameworthiness.[134] In practice, the reduction for admitting guilt tends to be no higher than one-third of the expected trial sentence.[135] Unlike their U.S. counterparts, German courts have proven willing to strike down sentences that reflect more substantial discounts on the grounds that such discounts are both disproportionate and potentially coercive.[136]

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129. *See id.* § 154. When the case contains a number of repetitive offenses, the court may dismiss counts "so as not to waste time in reviewing each individual count of the accusation," and such charge reduction typically does not result in a significant sentence discount. Turner, *supra* note 125, at 219. A more recent empirical study also found that, despite legal prohibitions, more problematic charge bargaining occasionally does occur in German courtrooms. *See* ALTENHAIN ET AL., *supra* note 126, at 77-78, 86-87. For example, roughly 14 percent of judges surveyed admitted that, as a result of negotiations, they had at some point agreed to requalify criminal conduct as negligent rather than intentional. *Id.* at 86.

130. Turner, *supra* note 125, at 215, 218.

131. *See id.* at 215, 218, 223.

132. *See* ALTENHAIN ET AL., *supra* note 126, at 118, 123; *see also* Turner, *supra* note 125, at 222.

133. *See* StPO § 257c(3).

134. *See* 2013 Constitutional Court Decision, *supra* note 122, ¶¶ 74, 105, 111, 113.

135. *See* ALTENHAIN ET AL., *supra* note 126, at 130-31; Turner, *supra* note 125, at 235.

136. *See, e.g.*, 2013 Constitutional Court Decision, *supra* note 122, ¶ 130 (striking down a negotiated sentence as disproportionately lenient); Turner, *supra* note 125, at 217 & n.86 (citing cases). In most cases, proportionality is enforced when plea negotiations fail, the defendant is sentenced after contested proceedings, and he or she appeals the posttrial sentence as disproportionate. The parties typically do not have the incentive to appeal a negotiated sentence as disproportionate. *See* Turner, *supra* note 125, at 216.

German courts also differ from American courts in their approach to negotiated waivers. As a general matter, German law prohibits the parties from bargaining for any waivers that are not inherent in an admission of guilt.[137] For example, negotiated appeals waivers are expressly prohibited on the grounds that they undermine the judicial accountability required in a system based on a rule of law.[138] Defendants are also unable to bargain away their right to counsel and their right to effective counsel.[139] Indeed, defendants may not even waive the right to trial as they can in the United States; the main proceeding occurs even after an admission of guilt, but it is shorter than a contested trial.[140] Bargained-for discovery waivers cannot occur in practice because the defendant receives access to the file before negotiations occur.[141] Even if they could, they would violate the Criminal Procedure Code and would almost certainly be held unconstitutional.[142]

Finally, the German Constitutional Court has emphasized that plea negotiations must be conducted in a transparent fashion. The contents of the agreement between the parties and the court must

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137. *See* Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505 (2016). A waiver of the right to remain silent is inherent in the admission of guilt and accepted in German law. TURNER, *supra* note 119, at 108-09. Other waivers commonly inherent in plea bargaining, such as the waiver of the right to a contested trial before an impartial court or the waiver of the right to confront witnesses, do not formally accompany an admission of guilt in Germany. *Id.* at 109. Although the admission shortens trial proceedings, it does not eliminate them. *Id.* The defendant likewise retains the right to confront witnesses at the abbreviated trial. *Id.* As a practical matter, an admission of guilt essentially results in a noncontested proceeding at which the defense confronts witnesses only in an exceptional case. *Id.*

138. *See* StPO § 302(1); BGH [Federal Court of Justice], GSSt 1/04, 50 Entscheidungen des BGHSt [Federal Court of Justice] 40 (Mar. 3, 2005), *translated in* TURNER, *supra* note 119, at 96. A survey found that despite the prohibition, the parties frequently agree to waive appeals after a sentence agreement is reached. ALTENHAIN ET AL., *supra* note 126, at 183.

139. *See* StPO § 140; Weigend & Turner, *supra* note 115, at 103.

140. Andreas Ransiek, *Zur Urteilsabsprache im Strafprozess: ein amerikanischer Fall*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK [ZIS] 116 (2008).

141. *See, e.g.*, Interview with Sommer & Tharra, *supra* note 58. Although discovery waivers cannot be negotiated, in one case, a court attempted to limit the defense's right to review the file during the main proceeding, after supplementary evidence was added, in order to expedite the proceedings. This decision by the trial court was firmly rejected on appeal. *See* BGH [Federal Court of Justice] Apr. 30, 2003, NStZ 666, 2003.

142. *See* StPO § 257c(2). On their likely unconstitutionality, see 2013 Constitutional Court Decision, *supra* note 122, ¶¶ 73-74, 109.

be placed on the record once the main proceedings begin.[143] The court must also place certain warnings to the defendant on the record—for example, a warning that judges may deviate from the bargain if new legal or factual circumstances emerge before sentencing, and that an appeals waiver cannot form part of the agreement.[144] Although a 2012 empirical study found that courts frequently failed to follow these requirements, compliance may improve, as the Constitutional Court's 2013 decision has made it easier for defendants to challenge verdicts based on procedural violations of the plea bargaining statute.[145]

In sum, in several important respects, plea negotiations in Germany are regulated more closely than negotiations in the United States. Limits on sentencing discounts and charge bargains reduce the possibility that negotiations would result in a disproportionate sentence or coerce innocent defendants to admit guilt. Open-file disclosure to the defense and to the court before negotiations is an important element of Germany's regulatory framework. Broad and early disclosure permits the court and the defense to ensure that the admission of guilt rests on a valid factual basis, that punishment fits the blameworthiness of the defendant, and that the investigation has been conducted fairly.

Although these various legal constraints may reduce the efficiency of plea bargaining, the tradeoff is generally accepted. Occasional deviations from the regulations occur with respect to judicial scrutiny into the factual basis of the guilty plea, the documentation of the bargain, and appeals waivers, but foundational rules such as proportionate sentencing, the right to counsel for negotiated judgments, pre-plea discovery, and the prohibition on charge bargains are generally respected.[146] These limits on plea bargaining are respected despite caseload pressures that are in many ways similar to those in the U.S. criminal justice system.[147]

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143. *See* StPO § 243(4); 2013 Constitutional Court Decision, *supra* note 122, ¶¶ 67, 80-86.

144. *See* StPO § 257c(5); 2013 Constitutional Court Decision, *supra* note 122, ¶¶ 95-96, 126-27.

145. *See* 2013 Constitutional Court Decision, *supra* note 122, ¶¶ 96-99; *see also* Mosbacher, *supra* note 126, at 12-13; Schemmel et al., *supra* note 126, at 60.

146. *See* ALTENHAIN ET AL., *supra* note 126, at 181-83.

147. *See* Volker Krey & Oliver Windgätter, *The Untenable Situation of German Criminal Law: Against Quantitative Overloading, Qualitative Overcharging, and the Overexpansion of*

III. COMPARING GERMAN DISCLOSURE RULES TO OPEN-FILE DISCLOSURE IN THE UNITED STATES

For a long time, German law provided the defense with significantly greater rights to review evidence in criminal cases in comparison to the law in adversarial jurisdictions such as the United States.[148] Traditionally, this neglect of disclosure rights in adversarial systems was explained with reference to the lesser emphasis on the search for truth in criminal cases in these systems.[149] In this view, the primary aim of adversarial procedure is the settlement of the conflict between the parties, and a broader inquiry into the facts of the case is deemed unnecessary.[150]

Another explanation for the more limited disclosure in adversarial systems is the competitive element inherent in the traditional procedures of those systems. The defense and the prosecution are responsible for developing their own cases.[151] Accordingly, the defense is expected to investigate the facts independently rather than relying on the state for information.[152] By contrast, inquisitorial systems view evidence gathering not as a competitive enterprise, but rather as a neutral inquiry into the truth; disclosure to the defense is understood as part of the effort to advance that unified inquiry.[153]

Criminal Justice, 13 GERMAN L.J. 579, 586-92 (2012); *see also* BOYNE, *supra* note 48, at 8-9, 72-80.

148. *See* Weigend & Salditt, *supra* note 46, at 79.

149. *See* Peter Duff, *Disclosure in Scottish Criminal Procedure: Another Step in an Inquisitorial Direction?*, 11 INT'L J. EVIDENCE & PROOF 153, 174 (2007).

150. *See* HEINZE, *supra* note 27, at 310 ("A process devoted to the absorption of disputes does not tolerate compelled disclosure of material beyond the ambit of the issues defined by the parties; such information can open up new controversies rather than advancing the resolution.").

151. Duff, *supra* note 149, at 173.

152. *See id.*; Langer & Roach, *supra* note 94, at 276-77.

153. *See, e.g.*, FEENEY & HERRMANN, *supra* note 25, at 424 ("Because it focuses on the case rather than the parties, the inquisitorial German system has had no hesitation in directing the prosecution and the court to disclose the whole case file."). The move toward broad disclosure of evidence in criminal cases, which occurred in the late nineteenth century, was relatively modern in the history of the German inquisitorial system. It reflected not merely a belief that disclosure would help advance the inquiry into the facts, but also a recognition of the defendant as a subject in the process. *See supra* note 37 and accompanying text.

Approaches to disclosure have begun to converge over the last couple of decades as adversarial systems like those in Australia, Canada, England, New Zealand, Scotland, and several U.S. states have implemented reforms to expand defense discovery rights.[154] These reforms recognize that broad discovery in criminal cases is consistent with key goals of both adversarial and inquisitorial systems: fairness and efficiency, as well as the search for truth.

In the United States, states such as North Carolina and Texas have recently adopted open-file discovery, which generally entitles the defense to review the entire prosecution file.[155] A number of other states, including Arizona, Colorado, New Jersey, and New Mexico, have very expansive pre-plea discovery, almost equivalent to open-file.[156] In all of these states, the defense obtains access to the prosecution's evidence early in the process, typically before any plea negotiations take place.[157] Expansive pre-plea disclosure is supported on the grounds that it ensures fair proceedings and promotes the search for truth.[158] In some states, pre-plea disclosure is further justified as a means of expediting proceedings—an argument not usually made in defense of the German discovery regime but recognized more commonly by commentators in adversarial systems.[159]

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154. *See, e.g.*, ARIZ. R. CRIM. P. 15.1; COLO. R. CRIM. P. 16 ; N.J. CT. R. 3:13-3; N.M. R. CRIM. P. 5-501; N.C. GEN. STAT. § 15A-903 (2011); OHIO R. CRIM. P. 16; TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2015); Criminal Justice Act, 2003, c. 44 § 37 (Eng.); Criminal Disclosure Act 2008 s 13 (N.Z.); R. v. Stinchcombe, [1991] 3 S.C.R. 326 (Can.); Baer, *supra* note 4, at 22; Duff, *supra* note 149, at 174.

155. N.C. GEN. STAT. § 15A-903; TEX. CODE CRIM. PROC. ANN. art. 39.14. In North Carolina, open-file discovery applies only to cases within the original jurisdiction of the Superior Court—essentially, open-file discovery is limited to felonies. Open-file legislation typically excludes from disclosure the following categories of documents: the prosecution's work product; certain personal data about witnesses (for example, social security number); witness identity and/or address if the court authorizes the nondisclosure on the grounds that the witness's safety may be at risk; and the identity of confidential informants. N.C. GEN. STAT. § 15A-904; TEX. CODE CRIM. PROC. ANN. art. 39.14 (a), (c), (f).

156. *See, e.g.*, ARIZ. R. CRIM. P. 15.1; COLO. R. CRIM. P. 16; N.J. CT. R. 3:13-3; N.M. R. CRIM. P. 5-501; OHIO R. CRIM. P. 16. *See generally* Baer, *supra* note 4, at 22.

157. In Texas, before a defendant pleads guilty, the parties must "acknowledge in writing or on the record in open court the disclosure, receipt, and list of all documents, items, and information provided to the defendant under [the law]." TEX. CODE CRIM. PROC. ANN. art. 39.14(j). In North Carolina, requests for discovery are to be filed within ten days of a probable cause finding (or the date the defendant waives probable cause). N.C. GEN. STAT. § 15A-902(d).

158. *See, e.g.*, Turner & Redlich, *supra* note 7 (manuscript at 12-13, 43).

159. *See, e.g.*, ARIZ. R. CRIM. PROC. 15.1 committee cmt. to 2003 amend. ("Codification of the

As in Germany, limits on disclosure at the pretrial stage in U.S. open-file jurisdictions can be imposed if there are particularized concerns about the safety of witnesses or the integrity of the investigation.[160] Such restrictions must be approved by the court on a case-by-case basis.[161] In at least some U.S. open-file jurisdictions, self-represented defendants also receive more limited disclosure because of concerns that such defendants might tamper with the evidence or otherwise interfere with the investigation.[162] Finally, restrictions may be placed on the ability of defense attorneys to communicate certain witness information (such as home address and other personal data) to their clients.[163]

Although the broad outline of discovery in U.S. open-file jurisdictions and Germany is the same, notable distinctions remain. The first important difference relates to the role of the court in the discovery process. In Germany, once formal charges are filed, the court receives the complete investigative file.[164] As discussed earlier, the file contains all documents and records relevant to the case.[165] Disclosure to the court allows judges to fulfill the central role they are accorded in German criminal procedure, both during negotiations

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common practice of initial disclosure prior to or at the arraignment phase of the proceedings is intended to facilitate effective communication and the efficient resolution of issues."); THE JUSTICE PROJECT, *supra* note 26, at 19. For a suggestion from a German commentator that disclosure can clear up the issues and help expedite the proceedings, see Bockemühl, *supra* note 36, at 73, and Schäfer, *supra* note 39, at 205. For a common law perspective on the link between early disclosure and efficiency, see, for example, Duff, *supra* note 149, at 156, 174; Allard Ringnalda, *Procedural Tradition and the Convergence of Criminal Procedure Systems: The Case of the Investigation and Disclosure of Evidence in Scotland*, 62 AM. J. COMP. L. 1133, 1151 (2014).

160. *See, e.g.*, COLO. R. CRIM. P. 16 (III)(d); N.C. GEN. STAT. §§ 15A-903(a)(3), 15A-908(b); OHIO R. CRIM. P. 16(D); TEX. CODE CRIM. PROC. ANN. art. 39.14(c).

161. *See* COLO. R. CRIM. P. 16 (III)(d); N.C. GEN. STAT. §§ 15A-903(a)(3), 15A-908; TEX. CODE CRIM. PROC. ANN. art. 39.14(c); *see also* NYSBA Report, *supra* note 19, at 15-16. This is somewhat different from the German regime, which vests the prosecutor with complete discretion over such decisions during the investigative stage, at least in cases where the defendant is not detained.

162. *See* OHIO R. CRIM. P. 16(L)(2) ("The trial court specifically may regulate the time, place, and manner of a *pro se* defendant's access to any discoverable material not to exceed the scope of this rule."); TEX. CODE CRIM. PROC. ANN. art. 39.14(d) (pro se defendants may review but not copy materials in the file).

163. *See, e.g.*, ARIZ. R. CRIM. P. 39(b)(10); OHIO R. CRIM. P. 16(C); TEX. CODE CRIM. PROC. ANN. art 39.14(f).

164. StPO § 199.

165. *See supra* Part I.C.

and at trial—to investigate independently the facts of the case and to ensure the fairness of the proceedings.[166] By contrast, in the United States, the prosecution discloses evidence only to the defense, and the court reviews evidence as part of the disclosure process only when necessary to resolve disputes between the parties.[167] This process is consistent with the adversarial tradition—the belief that the case is for the parties to develop, and the concern that the court might be prejudiced by reviewing the evidence ahead of trial.[168]

Another contrast between the U.S. open-file discovery rules and German rules on access to the file is that the former usually require reciprocal disclosure from the defense, whereas the latter do not. In both countries, the defendant's presumption of innocence, right to remain silent, and attorney-client privilege constrain defense disclosure to some degree.[169] But in the United States, recent reforms have imposed greater disclosure obligations on both the defense and the prosecution.[170] Defense disclosure is justified on the same grounds as prosecutorial disclosure—that it promotes the search for truth, renders the process fairer, and eliminates "trial by ambush."[171] Although the trend toward reciprocal disclosure may appear rather "inquisitorial," as noted earlier, it is actually peculiar

166. *See* StPO § 244(2) (noting the court's duty to establish the truth, if necessary, by gathering additional evidence); *supra* notes 33-36 and accompanying text (discussing the duty to provide a fair hearing).

167. *See, e.g.*, FED. R. CRIM. P. 16.

168. *See infra* notes 218-20 and accompanying text; *see also* Duff, *supra* note 149, at 154.

169. *See, e.g.*, Wardius v. Oregon, 412 U.S. 470 (1973). *But see* United States v. Nobles, 422 U.S. 225 (1975); Williams v. Florida, 399 U.S. 78 (1970). *See generally* Eric D. Blumenson, *Constitutional Limitations on Prosecutorial Discovery*, 18 HARV. C.R.-C.L. L. REV. 123 (1983); Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF. L. REV. 1567 (1986). For a discussion of similar restrictions on the ability of the state to gain the cooperation of the accused in German criminal cases, see, for example, BGH [Federal Court of Justice] NJW 2940 (2942), 1996 (discussing the "nemo tenetur" principle, under which the state cannot force a defendant to cooperate in his own prosecution, and citing authorities); Bockemühl, *supra* note 36, at 90.

170. *See, e.g.*, N.C. GEN. STAT. § 15A-905 (2011). In Texas, however, the defense must only disclose the names and addresses of testifying experts. TEX. CODE CRIM. PROC. ANN. art. 39.14(b) (West 2015). *See generally* TEX. DEF. SERV. & TEX. APPLESEED, IMPROVING DISCOVERY IN CRIMINAL CASES IN TEXAS: HOW BEST PRACTICES CONTRIBUTE TO GREATER JUSTICE 6, 15, 38 (2013), http://texasdefender.org/wp-content/uploads/tds_report.pdf [https://perma.cc/JMC2-H5VA] (noting that, unlike Texas, almost all states require discovery from the defense).

171. Therese M. Myers, Note, *Reciprocal Discovery Violations: Visiting the Sins of the Defense Lawyer on the Innocent Client*, 33 AM. CRIM. L. REV. 1277, 1281 (1996).

to common law jurisdictions.[172] Reciprocal disclosure reflects a conception of a criminal process as a contest between two opposing sides, rather than one official inquiry into the truth.[173]

Discovery operates differently in Germany and the United States for another reason as well—the file available to the parties before plea bargaining is generally much less comprehensive in the United States than in Germany.[174] This occurs for three principal reasons. First, U.S. rules, unlike those that govern investigations in Germany, do not require police or prosecutors to investigate thoroughly all material evidence before plea negotiations.[175] To the contrary, early pleas are typically rewarded more generously precisely because they save valuable investigative resources.[176] The reasoning behind rewarding early pleas is that if a defendant is willing to admit guilt, there is little point in expending time and effort to investigate the details of the crime. The focus is on a speedy resolution of the case, rather than on the search for truth. Moreover, because American police officers are not required to actively seek out exculpatory evidence, investigations are more likely to present a one-sided and incomplete picture of the events.[177]

Second, U.S. police reports tend to be less detailed than German police reports because of weak legal rules, a partisan organizational

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172. Langer & Roach, *supra* note 94, at 278.

173. *See id.*

174. *See* Turner & Redlich, *supra* note 7 (manuscript at 54) (survey finding that even in open-file jurisdictions, defense attorneys frequently express concern about the completeness of the file they receive as part of pre-plea discovery); *see also* Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 18 (1993) ("With the exception of very serious or unusual cases, many defendants enter negotiated guilty pleas on the basis of inadequately developed accounts of the relevant facts.").

175. *See* Fisher, *supra* note 174, at 38-39.

176. *See* Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After* Brady v. Maryland, 38 N.Y.U. REV. L. & SOC. CHANGE 407, 408 & n.6 (2014); *See also* 2 CHRISTOPHER A.W. BENTLEY, CRIMINAL PRACTICE MANUAL § 45:12 (2000) (discussing timing in plea bargaining).

177. *See, e.g.*, People v. Hayes, 950 N.E.2d 118, 122 (N.Y. 2011); *see also* Baker v. McCollan, 443 U.S. 137, 145-46 (1979); United States v. Rodriguez, 496 F.3d 221, 224 (2d Cir. 2007); United States v. Martinez-Mercado, 888 F.2d 1484, 1488 (5th Cir. 1989) ("[B]ecause *Brady* and its progeny only serve to restrict the prosecution's ability to suppress evidence rather than to provide the accused a right to criminal discovery," the *Brady* rule does not "displace the adversary system as the primary means by which truth is uncovered." (quoting United States v. Bagley, 473 U.S. 667, 675 (1985))).

culture, and poor structural incentives.[178] No statutes or procedural rules require U.S. police reports to include the results of every investigative measure taken.[179] Department policies at times include provisions demanding that reports be comprehensive,[180] but these policies are typically vague and are not judicially enforceable.[181] Comprehensive report policies also stand in tension with other messages conveyed to officers through training, office culture, and resource allocation. Training materials emphasize the importance of including essential facts in police reports, but at the same time encourage officers to be concise and suggest that details that are not directly relevant to the case should be omitted.[182] Likewise, some department policies urge officers to write down "approximations" of witness statements, which undermines the thoroughness and accuracy of the report.[183] Finally, report forms usually provide templates for basic descriptions of the persons and items involved in the incident, but the gist of the report is in free-form narrative.[184] The discretion left to officers with respect to the narrative section leads to inconsistent approaches with respect to the level of detail included.[185]

Incident reports also reflect the partisan culture and resource constraints of our police departments. As a general rule, department

178. *See* BOYNE, *supra* note 48, at 4-5; FEENEY & HERRMANN, *supra* note 25, at 356-57; *cf.* Fisher, *supra* note 174, at 6-16; Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1974-77 (2010) [hereinafter *New Perspectives on* Brady].

179. *See* Fisher, *supra* note 174, at 5-6, 7-8.

180. For two rare examples of more thorough regulation of report writing, see ANAHEIM POLICE DEP'T, POLICY MANUAL, POLICY 344, at 158 (2013), http://www.anaheim.net/documentCenter/home/view/328 [https://perma.cc/6U66-ESCH] (reports should be "sufficiently detailed for their purpose and free from errors prior to submission" and "accurately reflect the identity of the persons involved, all pertinent information seen, heard or assimilated by any other sense, and any actions taken"); Minneapolis Police Dep't, *Policy & Procedure Manual, § 4-600 Specific Report Policies and Procedures*, MINNEAPOLISMN.GOV http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy_4-600_4-600 [https://perma.cc/9BA5-TK9G] (last updated Sept. 17, 2013).

181. *See* Fisher, *supra* note 174, at 27-28.

182. *See id.* at 28.

183. *See id.* at 29.

184. *See id.* at 27-28.

185. *See, e.g.*, WILLIAM F. MCDONALD, NAT'L INST. OF JUSTICE, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 22 (1985); Michael Bruckheim, *Dealing with Witnesses During a DUI Case*, *in* WITNESS PREPARATION AND EXAMINATION FOR DUI PROCEEDINGS, ASPATORE, 2012 WL 1670094 (2012).

policies do not require officers to include exculpatory evidence (either as a general category or as a specific listing such as "alibi") in their reports.[186] Training materials likewise emphasize the importance of writing the report in a way that protects it from subsequent challenges by the defense, further discouraging the recording of facts that might favor an alternative explanation of the crime.[187] Finally, resource constraints, and particularly the "severe time pressure to respond to calls," leaves officers with "little time to investigate or to write reports," especially in busy metropolitan departments.[188] Police departments tend to focus on clearing cases through arrests and not on investigations to build up the case for trial.[189]

A third reason why the file that is disclosed to the defense might be incomplete in U.S. jurisdictions is the lack of adequate procedures

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186. *See* Fisher, *supra* note 174, at 28; *see also* TIMOTHY P. MARTA, CRIMINAL JUSTICE INST., POLICE REPORTING (2004), http://www.cji.edu/site/assets/files/1921/police_reporting.pdf [https://perma.cc/C2SW-K3GF].

187. *See* Fisher, *supra* note 174, at 30-31. Some practitioners and commentators worry that the tendency of officers to summarize and omit details in the narrative section of the report would increase as states adopt open-file discovery. They argue that open-file may discourage police officers from recording some of the investigative steps they take or information that they gather, in order to avoid defense scrutiny of their work methods. *See* Turner & Redlich, *supra* note 7 (manuscript at 50) (noting that some Virginia prosecutors surveyed viewed this as a major disadvantage of open-file policies); *cf.* Brown, *supra* note 6, at 1623 n.139 (noting that rules requiring the state to turn over statements of persons with relevant information to the case, even if those persons would not testify at trial, could discourage police from investigating fully: "If police know all people they speak to will be disclosed to the defense, they may selectively investigate, seeking only witnesses they suspect have incriminating evidence, or stopping after they have some incriminating witnesses to avoid the risk of discovery-conflicting ones"). Others, however, believe that regular defense scrutiny of the reports would encourage more thorough reporting. *See, e.g.*, Fran Hart, *10 Steps to Improve Your Written Reports*, POLICEONE.COM (Oct. 19, 2000), http://www.policeone.com/training/articles/44385-Ten-Steps-to-Improve-Your-Written-Reports [https://perma.cc/24Q6-DYXW] ("In the early eighties, a number of officers decided that their reports were going to be short and to the point, eliminating as much detail as possible. They were convinced that if they wrote less, they were less likely to be challenged in court on various points or to have their actions twisted by a clever defense attorney. They were wrong!").

188. Fisher, *supra* note 174, at 8; *see id.* at 20-21; *see also* James Schnabl, *Reinventing the Police Report for the 21st Century: Are Video Police Reports the Answer?*, POLICE CHIEF (Sept. 2012), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2757&issue_id=92012 [https://perma.cc/V932-4DTR].

189. *See* Fisher, *supra* note 174, at 8, 20-21; *see also* BRUCE FREDERICK & DON STEMEN, NAT'L INST. OF JUSTICE, THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING—TECHNICAL REPORT 62-63 (2012), https://www.ncjrs.gov/pdffiles1/nij/grants/240334.pdf [https://perma.cc/424M-EUEH].

to ensure that relevant evidence is promptly and consistently transmitted to the prosecution.[190] Within police departments, certain types of material, such as the investigatory notes or internal memos, may not be passed along to the prosecutor at all, under the theory that the police report contains all information that is necessary to the case.[191] Other evidence is conveyed with considerable delay.[192] Particularly when numerous agencies are involved in the investigation of a case, prosecutors have difficulty collecting information from all relevant agencies in a timely fashion.[193] As a result of these various gaps and delays in the transmission of evidence to the prosecution, the file available to the defense before negotiations may not fully reflect the facts of the case.[194]

Finally, discovery in the United States not only reveals less about the case, but it also can be entirely waived by the defense as part of a plea deal. In contrast to German law, U.S. law tolerates the negotiation of a broad variety of waivers that are not inherent in guilty pleas, such as waivers of civil rights remedies, the right not to be placed in double jeopardy, the right to effective counsel, and the right to discovery.[195] Studies have shown that in some U.S. jurisdictions, the parties frequently bargain for waivers of discovery rights.[196] This is true in jurisdictions with restrictive discovery, such as the federal system and that in New York, as well as in some open-file jurisdictions, such as Texas.[197]

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190. *See, e.g.*, Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2093 (2010); Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379, 1415-16 (2000); Meyn, *supra* note 1, at 1093.

191. *See* Fisher, *supra* note 174, at 37-38; Meyn, *supra* note 1, at 1093.

192. *See* NYSBA REPORT, *supra* note 19, at 68-72. *See generally* Turner & Redlich, *supra* note 7.

193. *See* NYSBA REPORT, *supra* note 19, at 68-72. Because of the effort involved, prosecutors often postpone checking up on relevant information until after negotiations have failed and the case is headed to trial. *Id.*

194. *See, e.g.*, Turner & Redlich, *supra* note 7 (manuscript at 55).

195. *See, e.g.*, TURNER, *supra* note 119, at 35-36; Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73 (2015); Slobogin, *supra* note 137.

196. *See* NYSBA REPORT, *supra* note 19, at 66; Klein et al., *supra* note 195, at 83-85.

197. *See* NYSBA REPORT, *supra* note 19, at 66; Klein et al., *supra* note 195, at 83-85; TEX. CRIMINAL DEF. LAWYERS ASS'N & MANAGING TO EXCELLENCE CORP., THE COST OF COMPLIANCE: A LOOK AT THE FISCAL IMPACT AND PROCESS CHANGES OF THE MICHAEL MORTON ACT 24 (2015), http://www.tcdla.com/Images/TCDLA/%20Temporary%20art/MMA%20Final%20Report.pdf

IV. OPEN-FILE DISCOVERY AND BEYOND: COMPARATIVE INSIGHTS

What insights does the comparison between the German and U.S. models of pre-plea discovery offer for policymakers? At the most general level, the German experience provides an additional data point for the proposition that broad disclosure is essential to ensuring fair and accurate dispositions in criminal cases. German defense attorneys describe access to the investigative file as one of the most critical defense rights at the pretrial stage—whether to prepare them for plea negotiations or for trial.[198] Courts also underscore that the right to access the file is critical to guaranteeing fair proceedings.[199] The German approach suggests that open-file disclosure can occur before plea negotiations without serious risks to witnesses or undue burdens on criminal justice resources.

With respect to witness protection, the German experience suggests that courts and prosecutors can ensure the safety of witnesses by imposing measures on a case-by-case basis, while retaining a general rule of open-file disclosure. German practitioners, including prosecutors, do not view witness safety as a significant problem that needs to be addressed through broad restriction of disclosure.[200] It is possible that the lower violent crime rate explains the lack of concern, at least to some degree. The intentional homicide rate in Germany is roughly six times lower than that in the United States, and the rate of major assaults is roughly 60 percent lower than the U.S. rate.[201] Moreover, gang violence does not appear to be as

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[https://perma.cc/55KW-ND7S]. By contrast, discovery waivers are reported to be extremely rare in Virginia (a state with restrictive discovery rules) and in North Carolina (a state with open-file discovery). Turner & Redlich, *supra* note 7 (manuscript at 7).

198. *See* SOMMER, *supra* note 49, at 139; Bockemühl, *supra* note 36, at 70.

199. *See, e.g.*, BVerfGE 18, 399, 404; BVerfG NJW 3219 (3220), 1994; BVerfG, Beschluss vom 12.01.1983—2 BvR 864/81, NStZ 273, 1983.

200. This perception was shared by the three prosecutors and three defense attorneys whom I interviewed, and is confirmed by the lack of discussion of this problem in legal literature. *See* Interview with Prosecutors, *supra* note 21, at 2-3; Interview with Sommer & Tharra, *supra* note 58; Interview with Wölky, *supra* note 70.

201. U.N. OFFICE ON DRUGS & CRIME [UNODC], TENTH UNITED NATIONS SURVEY OF CRIME TRENDS AND OPERATIONS OF CRIMINAL JUSTICE SYSTEMS, COVERING THE PERIOD 2005-2006 (2008), http://www.unodc.org/documents/data-and-analysis/CTS10%20homicide.pdf [https://perma.cc/PA5J-F6EF]. For the data on Germany, see UNODC, GERMANY 2005-2006, at 729, 730-31 (2008), http://www.unodc.org/documents/data-and-analysis/Germany.pdf [https://

prevalent in Germany as it does in the United States.[202] If, as a result of these lower rates of gang-related violent crime, German prosecutors encounter fewer cases in which they must consider protective measures to compensate for liberal discovery, then they are less likely to worry about the cost and effectiveness of such measures (or of open-file discovery).

While differences in crime rates may offer part of the explanation, existing mechanisms for protecting witnesses in individual cases have also helped ward off potential dangers.[203] These mechanisms include withholding of witness addresses, and in exceptional cases, witness names;[204] providing only limited disclosure to self-represented defendants;[205] imposing conditions on defense attorneys' ability to communicate information from the file to their clients when doing so might endanger a witness;[206] prosecuting defendants or others for tampering with witnesses when necessary;[207] using detention to keep potentially dangerous defendants incapacitated;[208] and relying on police-administered witness protection programs.[209]

Similar protective measures are either already available, or can be made available, in open-file jurisdictions in the United States,

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perma.cc/9XPY-G6T2] (reporting a homicide rate of 0.94 and a major assault rate of 178 per 100,000-person population in 2005). For the data on the United States, see UNODC, UNITED STATES OF AMERICA 2005-2006, at 2277, 2278-79 (2008), http://www.unodc.org/documents/data-and-analysis/USA.pdf [https://perma.cc/2YKE-Z5CD] (reporting a homicide rate of 5.58 and a major assault rate of 287.55 per 100,000-person population in 2005). On the difficulty of comparing European and U.S. crime rates, see Ineke Haen Marshall, *How Exceptional Is the United States? Crime Trends in Europe and the US*, 4 EUR. J. CRIM. POL'Y & RES. 7, 8-10 (1996).

202. *See* Scott H. Decker & David C. Pyrooz, *Gang Violence Worldwide: Context, Culture, and Country*, *in* SMALL ARMS SURVEY 2010: GANGS, GROUPS, AND GUNS 129, 136-37 (2010), http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2010/en/Small-Arms-Survey-2010-Chapter-05-EN.pdf [https://perma.cc/FW9Y-C73C]; Malcolm W. Klein et al., *Street Gang Violence in Europe*, 3 EUR. J. CRIMINOLOGY 413, 422 (2006).

203. Interview with Prosecutors, *supra* note 21, at 1.

204. *See supra* notes 50, 61 and accompanying text.

205. *See supra* note 98 and accompanying text.

206. *See supra* note 102 and accompanying text.

207. *See* STRAFGESETZBUCH [StGB] [PENAL CODE], § 258, http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf [https://perma.cc/VJ5Y-86V6].

208. *See* StPO § 112.

209. *See* Johan Peter Wilhelm Hilger, *Organized Crime/Witness Protection in Germany*, 58 UNAFEI RESOURCE MATERIAL SERIES 99, 99 (2001), http://www.unafei.or.jp/english/pdf/RS_No58/No58_12VE_Hilger3.pdf [https://perma.cc/ZSD9-KGMS]; Interview with Prosecutors, *supra* note 21, at 2.

and they can help accommodate concerns about the integrity of investigations and witness safety.[210] In certain violent crime cases (particularly those involving organized crime), more than one type of protective measure may be necessary. If prosecutors must request protective measures on a regular basis in certain types of cases, the cost of litigating and imposing them may become so high as to prompt jurisdictions to reconsider the presumption in favor of full disclosure. Further empirical study is needed to understand the cost and effectiveness of different witness safety measures in these circumstances. But in the vast majority of cases, which tend not to raise concerns about witness intimidation, U.S. jurisdictions can follow the German model of allowing open-file discovery, while providing for court-imposed protective measures on a case-by-case basis.

Some may also worry, particularly in an adversarial system like ours, that open-file discovery may lead to "defense abuses" other than the intimidation of witnesses—for example, the fabrication of defenses based on the evidence disclosed.[211] As one American prosecutor lamented, open-file rules lead to "[m]isuse by defense attorneys who twist the information they receive, and misrepresent the law to the court, and use the information in a way that is not supported by statute or case law to impeach witnesses."[212] Under this view, generous disclosure succeeds in Germany because defense attorneys are generally more passive and have a duty to be truthful as "organs of the administration of justice"; as a result, they are less likely to distort the evidence.[213] Yet there is no evidence that U.S. defense attorneys misuse evidence more frequently in jurisdictions

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210. *See supra* notes 160-63 and accompanying text; *see also* NYSBA REPORT, *supra* note 19, at 15-21.

211. At least some U.S. prosecutors see the possibility of such defense abuse as one of the major disadvantages of open-file discovery. *See* Turner & Redlich, *supra* note 7 (manuscript at 14) (noting such concerns among Virginia prosecutors).

212. *Id.* (manuscript at 48) (footnote omitted).

213. For a discussion of German attorneys' duties as "organs" of justice, see, for example, JOACHIM KRETSCHMER, DER STRAFRECHTLICHE PARTEIVERRAT 76 (2005) (citing to court decisions making the connection between the duty as *Organ der Rechtspflege* and the duty to the truth); Wilhelm Krekeler, *Strafrechtliche Grenzen der Verteidigung*, 4 NEUE ZEITSCHRIFT FÜR STRAFRECHT (NStZ) 146, 152 (1989); Gerd Pfeiffer, *Zulässiges und Unzulässiges Verteidigerhandeln*, 9 DEUTSCHE RICHTERZEITUNG (DiRZ) 341 (1984).

that have adopted open-file discovery than in those that have not.[214] More broadly, it is not clear that U.S. defense attorneys today are significantly more aggressive than their German counterparts. Whereas German courts and scholars are increasingly concerned about the rise of "conflict defense" in Germany, American commentators worry about underfunded, overwhelmed, and insufficiently zealous lawyers in the United States.[215] It is thus unlikely that defense attorney behavior can fully explain or justify the different approaches to disclosure in Germany and the United States.

Still, German disclosure rules remain heavily influenced by the inquisitorial tradition, and this limits the extent to which U.S. jurisdictions could or should emulate these rules. For example, the success of the German model of discovery depends to a great degree on judicial review of the investigative file. Judges review the file before confirming the charges, which encourages the police and prosecution to be more thorough in their pretrial investigation. Judges' ability to review the evidence once the indictment is filed also allows them to play an active role in plea negotiations and to ensure that any negotiated judgment reflects the facts of the case. These functions are fully consistent with the inquisitorial tradition, under which judges have the duty to investigate the facts independently. Also consistent with this tradition is the relative lack of concern that judges might be prejudiced by reading the file or taking part in plea negotiations. By virtue of their training and professional expectations, judges are presumed to be independent and dispassionate. Although commentators are increasingly questioning this presumption, it remains widely held and explains Germany's willingness to entrust judges with reviewing the file and participating in plea negotiations.

In the United States, many of the conditions that allow judges to be active in German criminal cases are absent. Because of our historical skepticism of domineering judges, we tend to worry more

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214. *See* Turner & Redlich, *supra* note 7 (manuscript at 48) (finding that North Carolina prosecutors, who are required to provide open-file discovery, do not see defense misuse as a serious problem).

215. For a discussion of conflict defense in Germany, see, for example, Michael Bohlander, *A Silly Question? Court Sanctions Against Defence Counsel for Trial Misconduct*, 10 CRIM. L.F. 467, 470-71 (1999). For a discussion of defense attorney behavior in the United States, see, for example, Brown, *supra* note 6, at 1590.

about entrusting the court with an active role in managing discovery or participating in plea negotiations.[216] Judges are often elected and lack specialized judicial training before assuming the bench, which raises additional concerns about their ability to remain impartial. Not surprisingly, a number of courts and commentators predict a higher likelihood of coercion and bias if judges were to review evidence before trial and become involved in negotiations.[217] As a result of these entrenched attitudes, some U.S. judges themselves are likely to resist a more active role in discovery and plea bargaining, even if they were permitted to assume such a role under the law.[218] This is especially likely to the extent that greater judicial involvement of the kind described here—reviewing all the evidence disclosed to ensure that plea bargains are fair and truthful—would slow down the disposition of cases. Because of our limited judicial resources, the pressure to process cases is significant, and any procedure that stands in the way would face at least some resistance.[219]

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216. Yet at least when it comes to civil cases, this attitude has not prevented the rise of "managerial" judges who actively supervise both pretrial discovery and settlement discussions. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376-80 (1982) (describing how, despite traditional resistance to judicial activism, federal judges assumed a more managerial role in civil cases, in response to changes in civil procedure rules and a burgeoning caseload).

217. *See, e.g.*, FED. R. CRIM. P. 11 advisory committee's note to 1974 amendment (citing United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966)); Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1351-52 (2004).

218. Judges are keen to engage in this role when they believe it will expedite the proceedings. But it is unclear whether many would be willing to devote additional time to reviewing discovery and investigating facts during plea negotiations or hearings in order to ensure more truthful and fair dispositions. For a discussion of the disagreement among practitioners as to whether judges involved in plea negotiations are mainly focused on disposing of cases or on reaching a fairer and more informed disposition, see Turner, *supra* note 125, at 253-54. For evidence that at least some judges get involved in plea negotiations primarily to obtain "more complete information to render an adequate sentence," see Allen F. Anderson, *Judicial Participation in the Plea Negotiation Process: Some Frequencies and Disposing Factors*, 10 HAMLINE J. PUB. L. & POL'Y 39, 46 (1989).

219. *See* Darryl K. Brown, *Defense Counsel, Trial Judges, and Evidence Production Protocols*, 45 TEX. TECH L. REV. 133, 144-45 (2012) ("Thorough evidence preparation often, though not always, takes more time, which could delay dispositions. While the policy choice for reliable adjudication over speedy adjudication should be easy in theory, in reality judges often face significant pressure to move their dockets efficiently. Judges, after all, are monitored by their own principals for whom docket backlogs may be salient: chief judges, legislatures (who may control reappointment), or even electorates (who also may).").

These concerns about the feasibility of judicial intervention in an adversarial system are valid, at least to some degree. But it is important not to overstate the risks of greater court involvement and to recognize the benefits it offers. Consider first the argument that judges would be unduly prejudiced if they reviewed the evidence disclosed between the parties. Judges already regularly review substantial portions of the evidence in order to rule on pretrial motions (including discovery motions), yet they are not subsequently recused from presiding over plea colloquies or trials. There is no reason to believe that reviewing the entire set of discovery materials would prejudice them any more. In fact, the danger of prejudice is in some respects less serious in our system of reciprocal discovery than it is in Germany. Here, disclosure to the court would include evidence produced by both parties, which would reduce the risk that the court would see a one-sided version of the facts. Concerns related to participation in plea negotiations could also be alleviated by providing that judges who participate in any failed negotiations are then to be disqualified from presiding over a subsequent trial, as already occurs in some U.S. jurisdictions.[220]

More importantly, judicial review of the evidence before plea negotiations could offer distinct benefits that are currently missing from the American system. Judicial scrutiny of the file could encourage more thorough pre-plea investigation by police and prosecutors. Providing the court with disclosure would also allow it to make a more informed decision on the validity of guilty pleas. The rules already require judges to review the factual basis of a guilty plea, and reviewing the disclosed evidence would help judges do so more accurately. In jurisdictions that permit judicial involvement in plea negotiations, disclosure to the court would also facilitate a more informed and more neutral assessment of the fairness and accuracy of any plea bargains discussed by the parties.[221] These benefits may be significant enough for at least some U.S. jurisdictions to consider

220. *See, e.g.*, State v. Revelo, 775 A.2d 260, 268 (Conn. 2001); State v. D'Antonio, 830 A.2d 1187, 1194 (Conn. App. Ct. 2003); *see also* Turner, *supra* note 125, at 263.

221. *See generally* Turner, *supra* note 125 (discussing the benefits of judicial participation and measures that can be taken to mitigate potential downsides of such participation). *See also* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/ [https://perma.cc/5TXR-BLB6].

investing the resources needed to allow such judicial involvement to succeed.

Even if disclosure to the court is seen as too costly and too foreign to be implemented in the near future, the German model may offer more promising leads in other respects. Specifically, it underscores the importance of regulating investigations in order to ensure that open-file disclosure works effectively. Disclosure in Germany is valuable to the parties and to the court because police are required to record each investigative step undertaken and transmit the file containing these records to the prosecution without delay. German scholars and legal practitioners recognize the importance of such regulations and have argued for strengthening the demands on the police to keep records of investigations and to audiotape or videotape interrogations and witness interviews.[222] Similar proposals to regulate more closely the documentation of evidence and its transmission to the prosecution are already emerging independently in certain U.S. jurisdictions. The German experience offers additional endorsement for them.

First, American police departments can do more to regulate the documentation of investigations and the transmission of all relevant evidence to the prosecution. The increasing adoption of rules and policies requiring interrogations, interviews, and police encounters to be videotaped is a promising step in this direction.[223] Another positive reform, already enacted by some American police departments, has been to create specific headings for evidence in police reports, thereby making the reports more comprehensive.[224] Along the same lines, at least one police department has revised its report forms to include a specific category for exculpatory evidence, in order to

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222. *See* Thomas Weigend, *Strafprozessreform und Rechtsprechung*, *in* DEUTSCHE STRAFPROZESSREFORM UND EUROPÄISCHE GRUNDRECHTE (Matthias Jahn & Henning Radtke eds., forthcoming 2016).

223. *See* LINDSAY MILLER ET AL., POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 1 (2014) http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf [https://perma.cc/U2CT-D3X2]; Schnabl, *supra* note 188; Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J.L. & SOC. POL'Y 400, 409 (2012) (acknowledging trend but adding that "the vast majority of police departments still do not record all interrogations").

224. *See* MARTA, *supra* note 186, at 9, 15.

encourage a more balanced recording of the facts.[225] Departments could go even further and adopt rules that specifically require officers to document each investigative measure they take, rather than merely demanding that reports be comprehensive (as current department policies tend to do). An Illinois commission that was created to propose reforms of the criminal process in order to reduce miscarriages of justice recommended that police "keep schedules listing all relevant evidence and ... provide copies of the schedules to the prosecutor."[226] With advances in technology, electronic forms and checklists could arguably make such documentation feasible for even the busiest metropolitan police departments. Such concrete reforms could help police departments overcome ingrained adversarial habits and move closer to the German practice of ensuring complete and accurate recording of investigative steps.

Likewise, American legislatures, prosecutors, and police departments could promulgate rules and policies that require officers to convey the complete record of the investigation to prosecutors. U.S. commentators have already remarked upon the need to improve procedures, training, and the use of technology "to ensure that all information generated by a police agency is preserved and provided to prosecutors promptly when requested."[227] Two more concrete steps that have been recommended include checklists and software prompts which would remind officers what information needs to be transmitted, allowing supervisors, prosecutors, and courts to verify the completeness of the file.[228]

The German model suggests another policy that could help produce more comprehensive files for the parties to use in plea bargaining: encouraging more complete investigations before plea negotiations occur. U.S. commentators have discussed the perils of "meet 'em and greet 'em" pleas, mostly as an ethical problem for the

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225. *See* Fisher, *supra* note 174, at 28 (mentioning the Atlanta Police Department as the only department in his study that specifically called for the inclusion of exculpatory facts in police reports).

226. Susan S. Kuo & C.W. Taylor, *In Prosecutors We Trust: UK Lessons for Illinois Disclosure*, 38 LOY. U. CHI. L.J. 695, 710 (2007) (citing ILL. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 19, Recommendation 2 (2002)).

227. NYSBA REPORT, *supra* note 19, at 73.

228. *See, e.g.*, *New Perspectives on* Brady, *supra* note 178, at 1974; *see also* Baer, *supra* note 4, at 62; Brown, *supra* note 219, at 146-47, 147 n.85; Fisher, *supra* note 174, at 50.

defense.[229] But early plea negotiations, which allow prosecutors to dispose of cases on a thin factual basis, could be equally problematic.

To avoid poorly informed dispositions, chief prosecutors could set office guidelines encouraging more thorough investigations before plea negotiations. These guidelines would operate only internally, as American prosecutors—unlike their German counterparts—have no supervisory authority over the police.[230] While U.S. prosecutors could not order police officers to conduct full investigations at an earlier point in time, they could use informal and indirect means to nudge officers to give them more developed files before initial charges are filed.[231] Where this process is insufficient, prosecutors could also rely on their own investigators to conduct additional fact collection before negotiations.[232]

Another feature of the German investigative framework—the duty of the prosecution to gather all relevant evidence—would be too inimical to our adversarial model to succeed. In Germany, the duty to gather exculpatory evidence has the benefit of making investigations more objective and directing state resources on behalf of defendants (which is critical for defendants who lack the funding to investigate on their own). This arrangement leads most German defense attorneys to remain passive during the pretrial stage and to rely primarily on state authorities to gather evidence. This is not a feature that American jurisdictions would wish to import.[233] Even in Germany, practice manuals caution defense attorneys about the cognitive biases of state authorities and about the likelihood that

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229. *E.g.*, Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 975 (2012); Geri L. Dreiling, '*Meet-and-Greet' Pleas Not Good Enough: Public Defender in Florida Bans Long-Standing Practice*, ABA J. EREPORT, June 24, 2005; Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 473-74 (2007).

230. *See New Perspectives on* Brady, *supra* note 178, at 2023.

231. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 32 n.9, 63, 65 (2002); *see also New Perspectives on* Brady, *supra* note 178, at 1973. Because our system of prosecution is decentralized, such relationships between prosecution and police have to be forged jurisdiction-by-jurisdiction and office-by-office.

232. *See* Wright & Miller, *supra* note 231, at 63, 65.

233. As noted earlier, criminal defense in the United States has already lost much of its potency as a result of severe funding cuts and other practical and legal constraints. *See, e.g.*, Brown, *supra* note 6, at 1590. But open-file discovery should not be used as an excuse to entrench such underfunding. *See infra* note 241 and accompanying text.

police and prosecutors would not recognize and seek out exculpatory evidence.[234] A few defense attorneys have taken this advice seriously and have begun to investigate cases on their own before trial. But in most cases, entrenched attitudes, practical constraints, and even certain legal rules continue to inhibit independent defense investigation.[235]

A rule requiring police to seek out exculpatory evidence is not likely to succeed in the United States. As an initial point, the adversarial conception of having two lines of investigation remains strong and would likely prevent the rule's adoption.[236] Our courts have consistently rejected the idea that police have a legal duty to seek out evidence favorable to the defense, instead emphasizing the duty of counsel to investigate adequately.[237]

Even if such a rule were to be adopted, it likely would not be effective, unless accompanied by a more fundamental change in police culture. As the recent experiences of England and Scotland suggest, the tradition of partisan evidence-gathering is too deeply rooted to be displaced by a formal rule that police should seek out exculpatory as well as inculpatory evidence.[238] Police officers in adversarial systems have difficulty abandoning the "us against them"

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234. *See* SOMMER, *supra* note 49, at 32-39, 88-89. Others recommend defense investigations at the pretrial stage as a necessity to avoid unpleasant surprises at trial. *See* Bockemühl, *supra* note 36, at 75-76.

235. *See* Bockemühl, *supra* note 36, at 76; Weigend & Salditt, *supra* note 46, at 91.

236. *See* ILL. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 20 (2002) (proposing that Illinois adopt a duty for police "to pursue all reasonable lines of inquiry"); Kuo & Taylor, *supra* note 226, at 710 & n.93 (noting that the legislature failed to adopt the recommendation of the Illinois Governor's Commission for police to pursue exculpatory evidence); *see also* Fisher, *supra* note 190, at 1399-1401, 1415-20 (noting the uncertain effects of the English rule requiring police to seek exculpatory evidence and discussing the improbability of a similar rule being adopted in the United States).

237. On the lack of a duty by the police to investigate evidence favorable to the defense, see Langer & Roach, *supra* note 94. On the duty of counsel to investigate, see, for example, Foust v. Houk, 655 F.3d 524, 537-38 (6th Cir. 2011); Jones v. Ryan, 583 F.3d 626, 646-47 (9th Cir. 2009). For a discussion of the *Brady* due diligence rule, which provides that the state need not disclose evidence that the defense could have obtained through reasonable effort, see 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(b), at 1105 (3d ed. 2000); Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and* Brady *in the Balance*, 28 GEO. J. LEGAL ETHICS 1, 3 (2015); Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 138 (2012).

238. *See* Quirk, *supra* note 10, at 49; Ringnalda, *supra* note 159, at 1155, 1160.

mentality that has long characterized their function in the criminal process.[239] As a result, they frequently fail to recognize exculpatory evidence altogether, and even when they do recognize it, they resist the notion that it is their responsibility to collect it and provide it to the defense.[240]

Finally, the adoption of a rule that charges the state with gathering exculpatory evidence may have perverse effects for the defense. It may discourage some defense attorneys from investigating cases proactively. Moreover, it may be used as an excuse for insufficient funding of defense investigations on the theory that such investigations are no longer needed once the state gathers evidence on the defense's behalf.[241]

In short, certain features of the German investigative model—those emphasizing more thorough investigation before plea negotiations and more comprehensive documentation—could be beneficial to U.S. jurisdictions that wish to reap the full potential of open-file discovery. Other procedures—such as those imposing a duty on police and prosecutors to gather exculpatory evidence—are simply too foreign to our adversarial tradition to succeed.

CONCLUSION

The fact that more U.S. jurisdictions are adopting open-file discovery rules reflects a growing consensus among adversarial and inquisitorial systems about the importance of broad disclosure in criminal cases. As our model aligns more closely with foreign approaches to disclosure, comparative analysis becomes more relevant and useful.

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239. *See* Quirk, *supra* note 10, at 48 (quoting a sergeant as saying: "[W]e're salesmen for jail ... it's us against them").

240. *See id.* at 47-48; *see also* PETER HENRY GROSS, REVIEW OF DISCLOSURE IN CRIMINAL PROCEEDINGS 56 (2011), https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/disclosure-review-september-2011.pdf [https://perma.cc/NBP8-GM5P] (reporting that U.S. federal prosecutors, in interviews by the report's contributors, expressed the following concerns about the imposition of a duty to seek out exculpatory evidence: "[N]ot only would there be serious resource implications for prosecutors but this would be a difficult task for prosecutors to undertake, given the absence of any requirement for a defence case statement. In any event, if put more colloquially—as it was to us—the prosecution was not there to do the job of the defence").

241. *See* Duff, *supra* note 149, at 176; Ringnalda, *supra* note 159, at 1153-54.

A review of German rules on disclosure offers three concrete insights about the design of disclosure rules, and one broader point about the regulation of discovery and plea bargaining. First, the comparison shows that thorough and well-documented investigations are critical to making pre-plea discovery more effective. Second, it suggests that disclosure to the court could provide a helpful complement to open-file discovery. Such disclosure allows judges to monitor the factual basis and fairness of plea bargains and guilty pleas, and to intervene when necessary to prevent unjust outcomes. The German model also indicates that protective measures can be used in individual cases to minimize the risk that disclosure would endanger witnesses.

More generally, comparative review underscores that open-file discovery is just one element of a broader framework regulating plea bargaining. Other criminal procedure rules combine with discovery rights to ensure fair and accurate guilty pleas. German law regulates plea bargains more closely than U.S. law in several significant ways. It requires that plea negotiations occur after investigations are complete. It limits plea discounts and charge bargains. And it prohibits negotiated waivers and demands a more probing review of the admission of guilt. These requirements all work together with open-file discovery to reduce the risk of coercive and truth-distorting plea bargains, although they also undoubtedly reduce the efficiency of plea bargaining to some degree.

Analysis of the German system offers some general ideas on regulating discovery and plea bargaining that could be of interest to U.S. scholars and policymakers, even if many of Germany's specific criminal procedures may not fit well within the American adversarial tradition. Differences in procedural traditions, organizational cultures, judicial resources, and crime rates all limit the extent to which particular procedural schemes from one system could be imported to the other. Yet careful comparison, attentive to the distinct social and legal contexts of each criminal justice system, could identify discrete areas in which the German experience offers useful guidance to American legal audiences. As U.S. jurisdictions increasingly discuss and implement rules on disclosure and plea bargaining that are similar to Germany's rules, such comparison becomes ever more relevant.