

COUNTRY LAW STUDY

GERMANY

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I. INTRODUCTION

This Country Law Study for Germany focuses on German criminal law and procedure and has been prepared by the Foreign Law Branch, International Law and Operations Division, Office of the Judge Advocate, US Army Europe and Seventh Army. The study has been prepared in compliance with directives and regulations (particularly Department of Defense Directive (DoDD) 5525.1 and Army Regulation (AR) 27-50/SECNAVINST 5820.4G) implementing the United States Senate Resolution of 24 July 1953, advising and consenting to the ratification by the United States to the North Atlantic Treaty Organization Status of Forces Agreement of 19 July 1951 (hereinafter “NATO SOFA”).

The objectives of this Country Law Study are to set forth an overview of German substantive and procedural criminal laws and to compare the German provisions with the due process protections afforded a defendant in the United States.

This present revision has been prepared using “German Law and the Status of American Troops in Germany” (1986), an unpublished study by Paul J. Conderman; the German Criminal Code (*Strafgesetzbuch – StGB*) 13 November 1998 (with subsequent amendments through 13 April 2007); and the German Criminal Procedure Code (*Strafprozessordnung – StPO*), 7 April 1987 (with subsequent amendments through 13 April 2007). Many thanks to summer interns Ms. Jennifer Rouse, Ms. Megan Marchick, Ms. Katherine Uhl, and Mr. Stephen J. Rice for their contributions.

II. The German Criminal Law System

A. General

1. **Introduction.** This section concerning German laws and the German Court System is taken, in part, from the first three sections of Army in Europe Pamphlet 550-19, “Compilation of Selected German Laws” (17 March 2004, updated as changes in German law occur). English translations of specific German Laws can be found in the appendices of that regulation.

2. **Scope.**

a. The German Criminal Code (*Strafgesetzbuch (StGB)*) and German Youth Court Law (*Jugendgerichtsgesetz (JGG)*) provide the main bodies of German substantive criminal law. The German judicial system also provides criminal sanctions for violations of laws that are not in the field of general criminal law.

b. Criminal sanctions are normally found in the concluding portions of ordinary German laws and are referred to as auxiliary criminal laws (*strafrechtliche Nebengesetze*). There are penal provisions in the press law, pure food law, narcotics law, traffic law, hunting and fishing law, venereal disease law, tobacco tax law, and many others.

B. German Laws.

1. **Authoritativeness and Interpretation of Text.** The translations have been made to ensure clarity of English expression without distorting the original German text. The translated text is not official. The original German text will be consulted when the interpretation of a provision is in doubt. The German text is decisive in any question concerning the law.

2. **Technical Words.** Certain words and concepts in the original German text could not be translated exactly because of the lack of precise English equivalents. Consistency in terminology has been attempted throughout. Below is a selection of original German words with their English equivalents:

a. *Antrag*. Request.

b. *Berufung*. Appeal (on the facts; *trial de novo*).

- c. *Dauerarrest*. Long-term detention.
- d. *Einschließung*. Incarceration.
- e. *Erziehungsbeistandsschaft*. Disciplinary guidance.
- f. *Erziehungshilfe*. Corrective guidance.
- g. *Erziehungsmaßregeln*. Corrective measures.
- h. *Freizeitarrrest*. Detention during free time.
- i. *Freiheitsstrafe*. Imprisonment.
- j. *Haft*. Detention.
- k. *Heranwachsender*. Adolescent.
- l. *Kurzarrest*. Short-term detention.
- m. *Jugendarrest*. Youth detention.
- n. *Jugendlicher*. Juvenile.
- o. *Jugendstrafe*. Juvenile confinement (punishment).
- p. *Nebenstrafe*. Additional punishment.
- q. *Revision*. Appeal (on the law).
- r. *Verbrechen*. Major crime/Felonies.
- s. *Vergehen*. Minor Crimes/Gross Misdemeanors.
- t. *Vorsätzlich*. Intentional or intentionally.
- u. *Zuchtmittel*. Disciplinary means.

3. Criminal Offenses. German criminal offenses are classified in accordance with the type of punishment that can be imposed (*StGB*, § 12):

a. **Petty Misdemeanors** (*Übertretungen*). Petty misdemeanors have been removed from the German Criminal Code and are now punishable by fines. If the fines are not paid, the fines are converted to days of confinement at certain rates, for example, €30 per day of confinement (*StGB*, § 40, Imposition of Daily Rates).

b. **Minor Crimes** (*Vergehen*). Minor crimes are illegal acts punishable by imprisonment less than one year or a fine (*StGB*, § 12(2)).

c. **Major Crimes** (*Verbrechen*). Major crimes (felonies) are illegal acts punishable at a minimum by imprisonment for one year or longer (*StGB*, § 12(1)).

4. Venue (*StPO*, Chapter 2). Venue is vested in the court based on several factors:

- a. The place of the commission of the act (§ 7),
- b. The place of residence or place of abode of the accused (§ 8), or
- c. The place of apprehension (§ 9).

5. Basis of Punishability. Child's Lack of Criminal Responsibility (*StGB*, Chapter 2, § 19). A person not yet 14 years old on the date the offense is committed is incapable of acting culpably.

6. Statute of Limitations (*StGB*, Chapter 5). There is a Statute of Limitations (S/L) for all crimes except those under Section 211 (murder) and those crimes listed in the German Code of Crimes Against International Law (*Völkerstrafgesetzbuch*)

a. The S/L for other acts is based on the maximum term of punishment that may be imposed. For example, the S/L for crimes punishable by life imprisonment is thirty years and the S/L for crimes punishable by from one to five years imprisonment is five years.

b. The S/L for acts not otherwise covered is three years (*StGB*, Chapter 5, § 78).

7. Appeals (*Rechtsmittel*, *StPO*, Book Three). Unlike the Anglo-Saxon system, all parties (the accused, the prosecutor, and the intervenor [see text following footnote 103], if applicable) generally have an independent right to appeal a decision. Cases appealed by the Government result in a new decision that can be more severe on the convicted party than the original decision.

C. The German Judicial System. The division of the Federal Republic of Germany into sixteen *Länder* (states) suggests that the German judicial system is organized into state and federal courts as is the judicial system of the United States. This is only true, however, of the lower courts which are financed and operated by the various *Laender*. Above the level of the intermediate appellate courts, the German judicial organization is integrated and entirely under the control of the Federal Government. The list below, in ascending order, includes an explanation of the composition of German courts and their jurisdiction in criminal cases:

1. District Court (*Amtsgericht*).

a. This court is the lowest court having original criminal jurisdiction over less serious cases.

(1) When sitting as a single Judge (*Einzelrichter*), the judge may not assess a punishment exceeding imprisonment for 2 years (Law on the Constitution of Courts (*Gerichtsverfassungsgesetz (GVG)*, sec 25 No. 2). In this capacity, the judge of the district court (*Richter am Amtsgericht*) is called a penal judge (*Strafrichter*). These courts are scattered throughout the Federal Republic.

(2) There may be an *Amtsgericht* in a small town with a single chamber presided over by a single judge. On the other hand, an *Amtsgericht* in a larger community may have several chambers with a number of judges, based upon the volume of business handled by the court. They exercise criminal jurisdiction over certain offenses, principally *Übertretungen* (petty offenses) and *Vergehen* (minor crimes).

b. When the sentence expected to be imposed exceeds the authority of the *Strafrichter* sitting alone, the court may be constituted as a Lay Judges Court (*Schöffengericht*). This court consists of a professional judge (*Richter am Amtsgericht*) and two lay judges (*Schöffen*). The professional judge may assess a sentence not exceeding imprisonment for 4 years.

c. When sitting as a youth court (*Jugendgericht*), the *Amtsgericht* may be constituted as a single-judge court or as a Youth Lay Judges Court (*Jugendschöffengericht*). The youth judge (*Jugendrichter*) sitting alone may not assess a penalty exceeding 1-year juvenile punishment (confinement) (*Jugendstrafe*) (*JGG*, § 39(2)). The judge may not assess *Jugendstrafe* for an indefinite period or order placement in a psychiatric hospital. When the court is constituted as a *Jugendschöffengericht*, the judge may not impose a penalty exceeding 3 years imprisonment. This limitation does not apply to *Jugendstrafe* (juvenile punishment) (confinement). In cases over which the *Jugendschöffengericht* has jurisdiction, the judge may not impose a *Jugendstrafe* exceeding 5 years. If the offense is punishable under the general law with imprisonment exceeding 10 years, the judge may not impose a sentence exceeding 10 years (*JGG*, § 18(1)).

2. State Court (*Landgericht*).

a. This court sitting as a penal chamber (*Strafkammer*) exercises original jurisdiction over serious cases and appellate jurisdiction on *Amtsgericht* decisions (*GVG*, § 59ff). The *Landgericht* exercises original jurisdiction over—

(1) Major offenses (*Verbrechen*) that do not fall under the jurisdiction of the *Amtsgericht* or the *Oberlandesgericht* (Superior State Court).

(2) Cases in which imprisonment exceeding 4 years is to be expected.

(3) Cases in which commitment to a psychiatric hospital or in security detention is to be expected.

b. Under its criminal jurisdiction, the *Landgericht* may be constituted as a *kleine Strafkammer* (Minor Penal Chamber), a *große Strafkammer* (Major Penal Chamber), or as a *Schwurgericht* (Jury Court). The composition and jurisdiction of each court are as follows:

(1) The *kleine Strafkammer* consists of one judge and two lay judges.

Constituted in this way, the court has appellate jurisdiction to hear an appeal (*Berufung*) from the judgment of a *Strafrichter* (*GVG*, §§ 74(3) and 76(2), sentence 1).

(2) The *große Strafkammer* consists of three judges and two lay judges.

Constituted in this way, the court has original criminal jurisdiction over major crimes (*Verbrechen*) that do not fall within the jurisdiction of the *Amtsgericht* or *Oberlandesgericht* and over crimes for which imprisonment (*Freiheitsstrafe*) exceeding 4 years is expected. The court also has appellate jurisdiction to hear an appeal on facts and law (*Berufung*) from a judgment (*Urteil*) of a *Schöffengericht* (*GVG*, §§ 74(1) and 76(2), second sentence).

(3) The *Schwurgericht* is a special panel of the *große Strafkammer* consisting of three judges and two lay judges. Constituted in this way, the court has original criminal jurisdiction in the most serious cases, primarily major crimes resulting in death (*GVG*, §§ 74(2) and 76(2), second sentence).

3. Superior State Court (*Oberlandesgericht*). This court is composed of one or more civil or criminal senates (*Zivil- oder Strafsenate*) and is run exclusively by professional judges (*GVG*, § 115ff). Sitting as a *Strafsenat*, the court has original criminal jurisdiction over political offenses (for example, treason, endangering state security), over offenses of an international character (for example, offenses against foreign states, genocide), or over offenses within the jurisdiction of the *Landgericht* over which, because of their special importance, the Federal Prosecutor General (*Generalbundesanwalt*) assumes jurisdiction. The *Strafsenat* also has appellate jurisdiction, including authority to hear an appeal (*Revision*) from an appellate judgment (*Berufungsurteil*) of a *kleine* or *grosse Strafkammer*. The *Strafsenat* is composed of either three or five judges.

4. Federal Supreme Court (*Bundesgerichtshof*). This court is composed of one or more civil or criminal senates (*Zivil- oder Strafsenate*), currently with one senate in Karlsruhe and one in Leipzig (*GVG*, § 123ff). The number of senates is determined by the Federal Minister of Justice. Each senate is composed of five professional judges. Also constituted are a grand

senate for civil matters (*Grosser Senat fuer Zivilsachen*) and a grand senate for criminal matters (*Grosser Senat fuer Strafsachen*). Each grand senate is composed of a president and eight members (a total of nine judges). Further constituted are the united grand senates (*Vereinigte Grosse Senate*), each of which is composed of a president and all members of the grand senates. In criminal matters, the *Bundesgerichtshof* has jurisdiction over an appeal (*Revision*) from a judgment of the *Landgericht*, except in those cases when the *Oberlandesgericht* has jurisdiction. Essentially, the *Bundesgerichtshof* has jurisdiction over all appeals from judgments of first instance in cases tried in the *Landgericht*. If it appears that one *Strafsenat* intends to decide a question of law differently from the precedent established by another *Strafsenat*, the case will be referred to a *Grosser Senate fuer Strafsachen* for decision. Similarly, if it appears that one *Grosser Senat* intends to decide a question of law differently from the precedent established by another *Grosser Senat*, the case will be referred to a *Vereinigte Grosser Senat* for decision.

5. Federal Constitutional Court (*Bundesverfassungsgericht*). This court has no original criminal or civil jurisdiction as such. Rather, it decides, *inter alia*, if laws or decisions of courts or other agencies are compatible with the Basic Law (*Grundgesetz*), the German Constitution. The court would decide, therefore, if a criminal judgment violates a right of the accused guaranteed by the Basic Law (see *Gesetz ueber das Bundesverfassungsgericht (BVerfGG)* (Federal Constitutional Court Law)).

III. The NATO SOFA

The parties to the North Atlantic Treaty signed an agreement in 1951 regulating the status of forces of one NATO country while in the territory of another (hereafter “NATO SOFA”).¹ The NATO SOFA defines the status of US military members while in Germany. It also prescribes “policies, procedures, and responsibilities for the protection of U.S. personnel who may become subject to foreign jurisdiction, proceedings, or imprisonment.”² Germany became a party to NATO on October 23, 1954, and the NATO SOFA became effective in Germany on 1 July 1963. The NATO SOFA remains in force today and provides a framework for German-American relations pertaining to U.S. military members, civilian component and dependents in Germany.

With regard to criminal procedure, the countries party to the NATO SOFA certainly did not sign the agreement because they felt their various judicial systems were the same. Nor does the agreement itself purport to superimpose an all-encompassing, unifying code upon the signatory states. Rather, by ratifying the SOFA, the signatory countries were expressing faith in the rule of law in each of the countries.³

In the late Nineteenth Century, British jurist Albert Venn Dicey defined the rule of law by writing:

We mean in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before ordinary courts of the land...we mean in the second place,...not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is

¹ Agreement between the parties to the North Atlantic Treaty regarding the status of their forces, 4 UST 1792, 1794; TIAS 2848; 199 UNTS 67. Signed at London 19 June 1951, entered into force 23 August 1953. The original signatories to the North Atlantic Treaty were Belgium, Canada, Denmark, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the U.S.

² Army Regulation (AR) 27-50, Status of Forces Policies, Procedures, and Information, para 1-1 (1989). See also NATO SOFA, Article VII.

³ See NATO SOFA Article II: “It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State...”

subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.⁴

Both the U.S. and German legal systems are premised upon the rule of law. This survey begins with the assumption that both judicial systems are able to administer justice in a fair manner meriting mutual trust. Of course, that does not mean that the systems are identical, for they are not. To aid an American observer of the German criminal justice system by providing a field of reference, this survey will compare American criminal procedure with its German counterpart.

This survey has a secondary purpose as well, but one that history and practice has largely superseded. When the U.S. Senate agreed to the NATO SOFA's ratification, it exercised caution in expressing complete faith in the judicial systems of foreign countries. The Senate consented to the NATO SOFA with the express understanding that U.S. citizens tried by a receiving state shall be guaranteed the same constitutional rights they would enjoy if tried in the United States.⁵ As a result, if the Designated Commanding Officer (DCO) of the U.S. Armed Forces in the receiving state determines that the rights of the accused would be violated, the DCO will request that the receiving state waive jurisdiction over the case.⁶

The Senate further provided that if the authorities of the receiving state refuse to waive jurisdiction, the commanding officer shall seek the assistance of the Secretary of State. The Secretary of State shall, in turn, notify the Armed Services Committees of the Senate and House of Representatives.⁷ A U.S. representative will be appointed to attend the trial to ensure constitutional safeguards are enforced.⁸ This person is known as a "Trial Observer."

Article VII of the NATO SOFA defines the procedures for determining whether the receiving state (Germany, in the examples that follow) or the sending state (the U.S.) may exercise jurisdiction. The procedures contain the following rules:

⁴ Berta Esperanza Hernandez-Truyol, *The Rule of Law and Human Rights*, 16 Fla. J. Int'l L. 167 (2004) (quoting A.V. Dicey, *Introduction to the Study of Law of the Constitution*, 179, 185 (5th Ed. 1897)).

⁵ See 4 United States Treaties (U.S.T.) 1792 (Aug. 23, 1953), which contains the Senate Resolution of July 15, 1953, advising and consenting to ratification of the NATO SOFA.

⁶ AR 27-50, para 1-7a(3).

⁷ 4 UST 1792.

⁸ *Id.* See also NATO SOFA, Art VII, para 9g.

1. In Germany, the U.S. military authorities have the right to exercise all criminal and disciplinary jurisdiction conferred on them by U.S. law over anyone subject to U.S. military law.
2. In addition, U.S. authorities have the right to exercise exclusive jurisdiction over all offenses punishable by U.S. law, but not by the laws of Germany.
3. German authorities have jurisdiction over members of a force or civilian component and their dependants with respect to offenses committed within Germany and punishable by German law, and with respect to offenses punishable by German law but *not* by U.S. law.
4. When there is concurrent jurisdiction, the U.S. military authorities shall have primary jurisdiction over:
 - a. a member of a force or civilian component with respect to offenses solely against the property or security of the U.S.,
 - b. offenses solely against the person or property of another member of the force or civilian component of the U.S., or of a dependant, or
 - c. offenses arising out of any act or omission committed in the performance of official duty.

5. In all other cases of concurrent jurisdiction, Germany shall exercise primary jurisdiction. The NATO SOFA stipulates that Germany, where it is vested with primary jurisdiction, shall give “sympathetic consideration” to a request from U.S. authorities for a waiver of Germany’s right to prosecute a matter.⁹ By Note Verbale dated September 16, 1963¹⁰, Germany generally waived its right to try American soldiers where German courts would, according to the NATO SOFA, have primary jurisdiction. However, the Germans do sometimes recall jurisdiction, especially when a violent crime has been committed.¹¹ When this occurs, as well as when members of the civilian component and “dependents” are tried in German court, a certified U.S. attorney “Trial Observer” attends the defendant’s trial as an observer to ensure the defendant’s rights are protected.¹² This survey seeks to aid such a trial observer in identifying which rights

⁹ NATO SOFA, Art VII, para 3(c).

¹⁰ Foreign Office Note Verbale V 7 (507)-81.53/3, addressed to the Embassy of the United States of America

¹¹ NATO SOFA, Supplementary Agreement, Art 19, para 3.

¹² Army Regulation 27-50, para 1-8. See also Army in Europe Regulation (AER) 550-50, Section 19, and AER 550-56, para 1b (2).

are of paramount importance in the American judicial system, and how they compare with the German system.

IV. Due Process Protections in the U.S. Constitution

As provided for in the NATO SOFA, Germany periodically tries American military personnel in German courts. In giving its advice and consent to the ratification of the NATO SOFA, the U.S. Senate requested that:

Where a person subject to the military jurisdiction of the United States is to be tried by the authorities of a receiving state, under the treaty the Commanding Officer of the Armed forces of the United States in such state shall examine the laws of such state with particular reference to the procedural safeguards contained in the Constitution of the United States.¹³

The procedural safeguards contained in the U.S. Constitution as well as in the laws of Germany define in large part what due process protections an accused receives when being prosecuted. Due process is a vague concept, and its boundaries are continually refined by the U.S. courts each year. One judge, Henry Friendly, has enumerated some of the core tenets of due process. His list includes: 1) An unbiased tribunal; 2) notice of the proposed action and the grounds asserted for it; 3) an opportunity to present reasons why proposed action should not be taken; 4) the right to call witnesses; 5) the right to know the evidence against oneself; 6) the right to have a decision based exclusively on the evidence presented; 7) the right to counsel; 8) the making of a record; 9) the availability of a statement of reasons for the decision; 10) public attendance; 11) judicial review.¹⁴

Criminal procedure in the U.S. federal system exists somewhat independently on both the Federal and State levels. However, the Constitutional commands embodied in the Bill of Rights

¹³ 4 UST 1792, at 15ff. The language of the U.S. Senate in giving its advice and consent to ratification follows the treaty.

¹⁴ Judge Henry Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267 (1975).

have largely unified the core tenets of American criminal procedure.¹⁵ Though the Bill of Rights was initially conceived as a restriction on the Federal government alone,¹⁶ the Supreme Court eventually held that the Fourteenth Amendment extended the applicability of most of these protections to the States as well.¹⁷ Numerous Supreme Court cases throughout the first half of the twentieth century incorporated the various provisions of the Bill of Rights into the Fourteenth Amendment's Due Process Clause. Today, only the Eighth Amendment's "no excessive bail" provision and the Fifth Amendment's Grand Jury clause remain unincorporated.¹⁸ Because the Bill of Rights comprises the backbone of American criminal procedure, this survey will compare U.S. Constitutional criminal procedure with German criminal procedure.¹⁹

V. General Principles Underlying the Rule of Law

Individual freedom, dignity and popular sovereignty have formed the foundation of western democratic political philosophy since the Enlightenment.²⁰ Both the U.S. and German systems of criminal justice are premised on these values. Both systems seek, as their primary

¹⁵ See e.g. *Benton v. Maryland*, 395 U.S. 784, 795 (1969) ("Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the State and Federal Governments.")

¹⁶ *Barron v. Baltimore*, 32 U.S. 243 (1833).

¹⁷ See e.g. *Adamson v. California*, 332 U.S. 46 (1947) (Black, J., dissenting, arguing for total incorporation of the Bill of Rights).

¹⁸ See Joshua Dressler, *Understanding Criminal Procedure*, 3d Ed., Matthew Bender & Co. (2002) at 53. [Hereafter "*Dressler*"].

¹⁹ It is interesting to note that the debate on whether to incorporate the Bill of Rights into the Fourteenth Amendment was fought most heatedly around the time the NATO SOFA was ratified and thereafter. Legal scholars in 1951 might have come to different conclusions on many of the points contained in this survey. Both German and American law have been modified since the NATO SOFA went into effect, though those modifications in no way compromise the NATO SOFA itself.

²⁰ Ideas expressed in the Declaration of Independence as: "We hold these truths to be self-evident, that all men are created equal, that they are endowed, by their creator, with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." – U.S. Declaration of Independence (1776). Compare with Article 2(2) of Germany's Basic Law: "Every 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."

goals, to protect individual liberty and human dignity. Where a government infringes on individual liberty, it must be narrowly tailored and serve a compelling state interest.²¹

A state desiring to vindicate an alleged wrong in its courts must first determine whether the law permits punitive action. The U.S. Supreme Court has considered the validity of criminal laws in the framework of four general propositions:

1. The alleged wrongful conduct must be prohibited by some express, unambiguous provision of law;²²
2. Such law must have been in force at the time of the commission of the alleged offense;²³
3. No punishment may be imposed without a judicial proceeding;²⁴
4. The accused must not have been previously put in jeopardy of punishment by the same sovereign for the same offense.²⁵

Each of these propositions has nuances in each country's legal system that are beyond the scope of this general survey. Nevertheless, the following sections will better define the concepts underlying each proposition.

A. Penal Statutes Should Be Unambiguous

The Fifth and Fourteenth Amendments prohibit the government from depriving an individual of life, liberty or property without due process of law.²⁶ The Supreme Court has held that “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.”²⁷ Rather, individuals “are entitled to be informed as to what the State commands or forbids.”²⁸

²¹ See e.g. *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Korematsu v. U.S.*, 323 U.S. 214 (1944). See also *Adams v. Howerton*, 486 F.Supp. 1119 (D.D.Cal. 1980), aff'd 673 F. 2d 1036 (9th Cir), cert.denied 458 U.S. 1111 (1987), p 1124-1125.

²² See e.g. *Kolender v. Lawson*, 461 U.S. 352 (1983); *U.S. v. Reese*, 92 U.S. 214, 220 (1875) (“If the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind.”).

²³ See e.g. *Carmell v. Texas*, 529 U.S. 513, 531 (2000); *Calder v. Bull*, 3 Dall. 386, 390 (1798).

²⁴ *U.S. v. Lovett*, 328 U.S. 303, 315 (1946).

²⁵ Cf. *U.S. v. Lara*, 124 S.Ct. 1628 (2004).

²⁶ US Const. Amend. V and XIV.

²⁷ *Lanzetta v. State of N.J.*, 306 U.S. 451, 453 (1939).

A basic tenet of due process is that criminal laws must be clearly written “with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”²⁹ The Supreme Court has warned against two dangers arising from vague laws: first, the law may “fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits”; second, the law “may authorize and even encourage arbitrary and discriminatory enforcement.”³⁰ In addition, the Court has emphasized that vague laws are particularly offensive to the Constitution when they operate “to inhibit the exercise of individual freedoms affirmatively protected by the Constitution.”³¹ For example, U.S. courts cast an especially wary eye on the validity of laws that infringe upon an individual’s First Amendment freedoms.³²

The NATO SOFA does not expressly address the validity of laws of the signatory countries other than to state, in Article II, that the sending force and its civilian component should “respect the law of the receiving State.”³³ German criminal procedure is codified in the *Strafprozessordnung (StPO)*. Additional sources of law include Germany’s *Grundgesetz*, or Basic Law, which is the country’s constitution, the *Gerichtsverfassungsgesetz*, under which the court structure in Germany is codified; the *Strafgesetzbuch (StGB)*, which is Germany’s substantive Criminal Code; and the Council of Europe “Convention for the Protection of Human Rights and Fundamental Freedoms,³⁴” which is directly applicable to all criminal defendants in Germany, and Sections 5 to 7 of which mirror the protections in Amendments I-X to the United States Constitution, the “Bill of Rights.”³⁵

²⁸ *Id.*

²⁹ *Kolender*, 461 U.S. at 357 (1983); See also *City of Chicago v. Morales*, 527 U.S. 41 (1999).

³⁰ *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

³¹ *Cramp v. Board of Public Instruction of Orange County, Fla.*, 368 U.S. 278, 287 (1961).

³² See e.g. *Cramp*, 368 U.S. at 287; *Ashcroft v. American Civil Liberties Union*, 2004 WL 1439998 (U.S. Sup. Ct. Jun. 29, 2004).

³³ NATO SOFA Article II

³⁴ CETS No. 005, opened for signature by the member States of the Council of Europe in Rome on April 11, 1950, entered into force following ratification by ten members on March 9, 1953.

³⁵ **Article 5 – Right to liberty and security**

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1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a. the lawful detention of a person after conviction by a competent court;
 - b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
 - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
 3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b. to have adequate time and facilities for the preparation of his defence;
 - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

B. Laws Should Not Be Applied *Ex Post Facto*

The *Strafgesetzbuch (StGB)* begins with the general rule that “[a]n act may be punished only if the punishability was provided by law before the act was committed.”³⁶ Under the *Gesetzlichkeitsprinzip* (“*nullum crimen sine lege*” and “*nulla poena sine lege*”), every person must know in advance which acts are punishable and that the judiciary, not the legislature, will judge the merits of a case.³⁷

This is similar to the U.S. prohibition of *ex post facto* laws in the U.S. Constitution.³⁸

On a general level, U.S. and German law are substantially in accord that criminal laws must be unambiguous. As U.S. precedent indicates, an individual can challenge a law if he believes the law was so poorly drafted that it fails to put a reasonable person on notice of what action is prohibited. Certainly the same case-by-case (or law-by-law) analysis can be used in reviewing German laws.

The U.S. Constitution prohibits both Federal and State governments from enacting *ex post facto* laws, which are laws with retroactive effects.³⁹ Such laws impose “a punishment for an act which was not punishable at the time it was committed” or impose “additional punishment to that then prescribed.”⁴⁰

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 – No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

³⁶ *Strafgesetzbuch (StGB)*, § 1. See also Article 103 of the German Basic Law which uses the exact same language.

³⁷ Tröndle, Fischer, *Strafgesetzbuch und Nebengesetze*,“ 51st edition, C.H. Beck, Munich 2003, p.9.

³⁸ U.S. Constitution Article I, Sections 9 (applicability to federal law) and 10 (applicability to state law).

³⁹ *Stogner v. California*, 123 S.Ct. 2446, 2449 (2003) (citing Art. I, § 9, cl. 3 (Federal Government); Art I, § 10, cl. 1 (States)).

⁴⁰ *Cummings v. Missouri*, 4 Wall 277 (1866).

Historically, laws were considered *ex post facto* if they altered the rules of evidence so that less or different testimony would be sufficient to convict.⁴¹ However, the Supreme Court later held statutes that simply enlarge the class of persons who may be competent to testify at trial are not *ex post facto* if they do not alter the degree or lessen the amount of evidence necessary for conviction.⁴² Where a legislature does reduce the quantum of evidence necessary for conviction, however, the Constitution's *ex post facto* clauses protect an individual against being subjected to greater jeopardy.⁴³

No NATO SOFA provisions speak directly to protections against *ex post facto* laws. Under Germany's Basic Law and in its Criminal Code (*StGB*), however, an act "may be punished only if it was defined by a law as a criminal offense before the act was committed."⁴⁴ In addition, *StGB* § 2 provides that the punishment and its incidental consequences must be determined pursuant to the law in force at the time of the commission of an act.⁴⁵ If the designated punishment is changed after the date the act is committed, the law in force at the time of the completion of the act will apply.⁴⁶ If the law in force at the time of the completion of the act is changed before the decision, the most lenient law will be applicable.⁴⁷ Because German law protects its citizens from *ex post facto* laws in such ways, U.S. military personnel, their dependents and civilians are similarly protected and there should be few problems in this area of law.

C. Prohibition Against Bills of Attainder

A bill of attainder is a legislative act that inflicts punishment upon the accused without a judicial trial.⁴⁸ Historically, a bill of attainder was a punishment of death. Legislatively imposed

⁴¹ *Thompson v. Missouri*, 171 U.S. 380, 382 (1898).

⁴² *Id.* at 386-387.

⁴³ *Carmell v. Texas*, 529 U.S. 513, 532 (2000).

⁴⁴ Basic Law Article 103(2). Germany's Basic Law is translated into English through the government's website: <http://www.bundesregierung.de/en/Federal-Government/Function-and-constitutional-ba-,10212/IX.-The-Judiciary.htm>]; see also *Strafgesetzbuch (StGB)* § 1.

⁴⁵ *StGB* § 2(1).

⁴⁶ *StGB* § 2(2)

⁴⁷ *StGB* § 2(3).

⁴⁸ *Nixon v. Administrator of General Services*, 433 U.S. 425, 468-469 (1977).

punishments without trials that resulted in less than capital punishment were termed bills of pains and penalties.⁴⁹ The Supreme Court has held the constitutional prohibition against bills of attainder to apply equally to bills of pains and penalties.⁵⁰

The prohibition against bills of attainders ensures that a legislature cannot deny citizens due process of law by inflicting punishment through legislative acts alone. The prohibition makes the judicial system the sole conduit through which the state may punish an individual criminally. Historically, bills of attainder specifically named the individuals a legislature sought to punish.⁵¹ The Supreme Court has held, however, that such specificity is not a hallmark of modern bills of attainder.⁵² Rather, the hallmark of a bill of attainder is that the law both singles out an individual or class of individuals and also imposes a punishment upon that individual or class.⁵³

Though bills of attainder are not expressly addressed by the NATO SOFA, the agreement does address judicial procedures that suggest a prohibition against such laws.⁵⁴ Such procedures include a prompt and speedy trial, and notice before trial of the specific charges made against an individual.⁵⁵

Germany's Basic Law contains safeguards that prohibit bills of attainder. Article 104(1) states that an individual's freedom "may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein."⁵⁶ Furthermore, only "a judge may rule upon the permissibility or continuation of any deprivation of freedom."⁵⁷ In addition, the Basic Law guarantees that "[e]xtraordinary courts shall not be allowed" and that "[n]o one may be removed from the jurisdiction of his lawful judge."⁵⁸ These articles preclude the German executive and

⁴⁹ *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984).

⁵⁰ *Id.*

⁵¹ *Id.* at 847.

⁵² *Id.*

⁵³ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 [Footnote 9] (1995).

⁵⁴ SOFA Article VII, § 9(b).

⁵⁵ *Id.*

⁵⁶ Basic Law, Article 104(1).

⁵⁷ Basic Law, Article 104(2).

⁵⁸ Basic Law, Article 101(1).

legislative branches from arbitrarily interfering with personal liberty. They also underlie the constitutional separation of powers in German law.

D. Protections Against Double Jeopardy

1. US Constitutional Protections Against Double Jeopardy

The double jeopardy clause of the Fifth Amendment prevents an individual "subject for the same offence to be twice put in jeopardy of life or limb."⁵⁹ The clause protects an individual from both double jeopardy as well as double punishment.⁶⁰ Generally, the double jeopardy clause extends only to criminal, and not civil proceedings.⁶¹ In addition, the double jeopardy clause is not violated when different sovereigns – e.g., a U.S. state and the Federal governments – prosecute an individual separately.⁶²

At the most basic level, a court can only find a double jeopardy violation if it first determines that the government is prosecuting an offense that was previously prosecuted to a final judgment. A final judgment generally includes a former acquittal⁶³ or conviction,⁶⁴ but not a trial that resulted in a mistrial.⁶⁵ The Supreme Court defined the constitutional test for determining what constitutes a “same offense” in *Blockburger v. U.S.*⁶⁶ The Court stated that for purposes of double jeopardy, a court must compare the charges at issue to determine whether

⁵⁹ U.S. Const. Amend. V.

⁶⁰ See “Double jeopardy considerations in federal criminal cases--Supreme Court cases”, Donald T. Kramer, 162 A.L.R. Fed. 415 (Jun 05, 2000).

⁶¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964); but see e.g. *The Thirty-Second Annual Review of Criminal Procedure – Double Jeopardy*, 91 Geo. L.J. 409, which discusses Supreme Court precedent in which civil remedies may rise to a level meriting double jeopardy protection.

⁶² *Bartkus v. Illinois*, 359 U.S. 121 (1959).

⁶³ *Fong Foo v. U.S.*, 369 U.S. 141, 143 (1962).

⁶⁴ *Burks v. U.S.*, 437 U.S. 1 (1978); *Tibbs v. Florida*, 457 U.S. 31 (1982) [re-prosecution not barred because judgment overturned due to weight of evidence, rather than insufficiency of evidence].

⁶⁵ *Arizona v. Washington*, 434 U.S. 497 (1978) [elucidating four factors a court should consider when determining whether a mistrial bars re-prosecution.]

⁶⁶ *Blockburger v. U.S.*, 284 U.S. 299 (1932).

each charge requires proof of an additional fact that the other does not.⁶⁷ Only where both charges do contain unique facts that the prosecution must prove is there no double jeopardy bar.

Several U.S. states provide an accused with a still greater degree of double jeopardy protection than the federal constitutional standard. These states employ different tests for determining what constitutes the “same offense.” For example, under the “same transaction” approach, multiple prosecutions are prohibited if the crimes charged arose out of the same act, occurrence, transaction or episode.⁶⁸ This test basically requires joinder of all offenses in one prosecution. Another test, called the “same conduct” approach, is slightly more permissive of subsequent prosecutions and was briefly adopted by the Supreme Court.⁶⁹ Under this approach, some states prohibit subsequent prosecutions where the government, to establish an essential element of an offense charged, “will prove conduct that constitutes an offense for which the defendant has already been prosecuted.”⁷⁰

Finally, the Supreme Court has held that jeopardy first attaches in a proceeding when either 1) the jury is sworn in a jury trial; 2) the first witness is sworn in a bench trial or 3) if the defendant enters a plea, when the plea is accepted by the court.⁷¹

2. SOFA and German Protections Against Double Jeopardy

The SOFA has a double jeopardy provision that states:

Where an accused has been tried in accordance with the provisions of [Article VII] by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the State from trying a

⁶⁷ *Id.* The test is most clearly explained as a mathematical formula: if offense “1” consists of elements A, B & C, and offense “2” consists of elements B, C & D, then the offenses are separate for purposes of double jeopardy because offense “1” requires proof of element “A”, which offense “2” does not, and offense “2” requires proof of element “D”, which offense “1” does not.

⁶⁸ See e.g. Brennan, J., dissenting in *Ashe v. Swenson*, 397 U.S. 436 (1970).

⁶⁹ *Grady v. Corbin*, 495 U.S. 508 (1990) (overruled by *U.S. v. Dixon*, 509 U.S. 688 (1993), resetting the federal constitutional standard to the *Blockburger* approach described above).

⁷⁰ *Id.*

⁷¹ *Downum v. U.S.*, 372 U.S. 734 (1963); see also 162 A.L.R. Fed. 415 (2000).

member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party.⁷²

The import of the first sentence of this provision seeks to prevent an American serviceperson from being prosecuted first by the military, and subsequently by Germany. The first part of the provision is therefore a clear protection against double jeopardy. The second sentence has been read to mean offenses that are resolved using punishments imposed by a commanding officer such as proceedings under Article 15, UCMJ, including reprimands and admonitions, are not prohibited before or after a trial by another Contracting Party. This is because these proceedings do not constitute a “trial” which would be prohibited by the rules against double jeopardy and the first sentence.⁷³ The second sentence, therefore, seems to preserve military jurisdiction for the purposes of imposing minor disciplinary actions.

German Law satisfies the demands of Due Process found in the American system of justice in this area. German Law follows the maxim *ne bis in idem* (“not twice for the same act”) when it states in the Basic Law that “no person may be punished for the same act more than once under the general criminal laws.”⁷⁴ In addition, German courts have interpreted the *ne bis in idem* rule broadly in favor of U.S. soldiers. In a case from Stuttgart, for instance, the Superior State Court applied the rule even when the military court dismissed its charges against the soldier with prejudice.⁷⁵ It should also be noted that the principle of double jeopardy in the United States does not extend to cases successively tried by state courts and then federal courts.

It may be concluded that both the German and American systems of justice, as well as the SOFA, clearly seek to protect an accused against unfairly repetitive prosecution. In fact, insofar as the SOFA seeks to hinder multiple prosecutions by separate sovereigns (e.g. first by the U.S., then by Germany), which is otherwise acceptable under American double jeopardy jurisprudence, it goes further than the Constitutional protection. However, the real intent of the SOFA provision seems to be to ensure coordination between the contracting countries, not to pioneer new concepts of double jeopardy.

⁷² NATO SOFA Article VII, § 8.

⁷³ See Guenter Witsch, *Deutsche Strafgerichtsbarkeit ueber die Mitglieder der U.S. Streitkraefte und deren Begleitende Zivilpersonen*, at 126.

⁷⁴ Basic Law, Article 103(3).

⁷⁵ OLG Stuttgart-Beschl. V. 19.7.1976-3 WS 9/76, printed in *N.J.W.* 1977.

VI. The Bill of Rights and Related German Safeguards

A. Notice to the Accused and the Beginning of Criminal Proceedings

1. U.S. Procedures

In the U.S. Constitution, the Bill of Rights contains the general safeguards afforded criminal defendants. In particular, the Sixth Amendment contains a “compact statement of the rights necessary to a full defense.”⁷⁶ The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.⁷⁷

In the U.S., the government has specific obligations when it begins a criminal prosecution. One obligation emanating from the Sixth Amendment is that the accused must be “informed of the nature and cause of the accusation.” Such notice to the accused occurs most commonly through the following steps:

1. The police or a prosecutor file a complaint with a court, outlining the essential facts of the offense charged;
2. If a pre-arrest warrant was not already issued, the court conducts a hearing to determine whether probable cause existed for an arrest;⁷⁸
3. Upon arrest, the accused must be brought “without unnecessary delay”⁷⁹ before a judicial officer. At this hearing, the accused receives formal notice of the charges against him and is informed of his constitutional rights. In addition, a date for a preliminary hearing is set and the judicial officer decides whether the individual should be freed pending

⁷⁶*Faretta v. California*, 422 U.S. 806, 818 (1975).

⁷⁷ U.S. Const. Amend. VI.

⁷⁸ *Gerstein v. Pugh*, 420 U.S. 103 (1975).

⁷⁹ Fed. R. Crim. P. 5.1(a); depending on the jurisdiction, this hearing is called the “initial arraignment,” “arraignment on a complaint,” “first appearance” or “initial appearance,” among other terms.

further proceedings, and under what conditions (e.g. released on own recognizance, bail etc.);

4. Next – depending on the jurisdiction – either a preliminary hearing is held or, where indictments from a grand jury are necessary (as they are in all federal cases), the grand jury issues an indictment through the prosecutor.
5. Finally, the accused is arraigned in open court, at which time he enters a plea to the offenses charged.⁸⁰ In addition, and subsequent to the plea, the accused (now a defendant) can make various pretrial motions in an attempt to have the charges dismissed.

In addition to the above, if an accused does not understand English, U.S. courts have held that he is entitled to a translation of the charges and the material aspects of the proceedings.⁸¹ As one court has written, for example, “the right to confront witnesses would be meaningless if the accused could not understand [the witness’] testimony, and the effectiveness of cross-examination would be severely hampered.”⁸²

2. SOFA Provisions Regarding Notice and Discovery

NATO SOFA Article VII paragraph 9 reflects many of the rights contained in the Bill of Rights.⁸³ Notice to the accused is addressed in subsection (b), which states a defendant shall be entitled to “be informed, in advance of trial, of the specific charge or charges made against him.”⁸⁴ In addition, subsection (c) states that a defendant may, “if he considers it necessary,” be entitled to “the services of a competent interpreter.”⁸⁵

3. German Procedures

German law follows the same policy of appraising the accused of the charges against him so that he can adequately prepare his defense. The Basic Law defines some of the fundamental

⁸⁰ Pleas include “not guilty,” “guilty,” “*nolo contendere*” and, in some states, “not guilty by reason of insanity.”

⁸¹ *U.S. v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973).

⁸² *Id.*

⁸³ NATO SOFA Article VII, §9.

⁸⁴ NATO SOFA Article VII, §9(b).

⁸⁵ NATO SOFA Article VII, §9(f).

procedures dealing with notice to an accused and pre-trial safeguards regarding detention. It states in part:

- (1) Freedom of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein...
- (2) Only a judge may rule upon the permissibility or continuation of any deprivation of freedom. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. The police may hold no one in custody on their own authority beyond the end of the day following the arrest. Details shall be regulated by a law.
- (3) Any person provisionally detained on suspicion of having committed a criminal offense shall be brought before a judge no later than the day following his arrest; the judge shall inform him of the reasons for the arrest, examine him, and give him an opportunity to raise objections. The judge shall, without delay, either issue a written arrest warrant setting forth the reasons therefor or order his release.⁸⁶

Building upon these provisions, the *StPO* contains more detailed safeguards designed to ensure that the accused has full and timely knowledge of the charges against him, and is not taken by surprise. Regarding notice to the accused, for example, the accused “shall be informed of the content of the warrant of arrest at the time of his arrest.”⁸⁷ In addition, the *StPO* requires the authorities to present the accused with a copy of the warrant itself “without delay.”⁸⁸

When the accused is not detained, he is entitled to service of a copy of the charges by the court bailiff or the mailman.⁸⁹ If the service cannot be made on the accused in person, substituted service on an adult member of the family or his landlord will suffice.⁹⁰ The same rule applies to notices of the opening and closing of the judicial pre-trial examination,⁹¹ of the hearing respecting the opening of definitive proceedings,⁹² and to the notice to appear at the

⁸⁶ Basic Law, Article 104 (subsection (d) omitted).

⁸⁷ *StPO* § 114a(1).

⁸⁸ *Id.*

⁸⁹ *StPO* § 216(1); See also § 35 and § 40.

⁹⁰ *StPO* §181.

⁹¹ *StPO* §§ 199-201.

⁹² *StPO* § 201.

trial.⁹³ However, except where the accused is in detention or is arrested, German law does not require that the accused receive personal service of the charges.

Section 35 of the *StPO* provides that decisions made in the presence of the accused will be made orally.⁹⁴ Upon request, the accused is entitled to receive a copy of the summons or ruling.⁹⁵ Decisions made out of the presence of the accused are conveyed by mail.⁹⁶ Informal communication of decisions suffices if the running of a statutory period is not contingent upon such notice.⁹⁷ Detained persons are entitled to notice of decisions by mail.⁹⁸ Also, if a decision is appealable, the accused must be informed of how and when to appeal.⁹⁹

Decisions requiring the execution of punishment are entrusted to the prosecution to carry out.¹⁰⁰ Other decisions, such as service of notices, summonses and the execution of rulings and decrees are delivered by personnel working for the courts.¹⁰¹ For these matters, the same provisions apply as they do in the Code of Civil Procedure.¹⁰² Generally, service is accomplished under the supervision of the Clerk of Court by a *Gerichtswachmeister* (Messenger of the Court) or in most cases by the postal service.¹⁰³

Germany also has a provision that allows private citizens to act, in effect, as “private-attorney-generals” (also called “intervenors”). Such actions are called *Privatklagen*. In cases where the victim of the offense initiates a prosecution by *Privatklage*, the court communicates the complaint to the accused and fixes a time within which the accused must reply.¹⁰⁴ A hearing is then held on the question of opening the main proceeding. If it is decided that the trial will be

⁹³ *StPO* § 216.

⁹⁴ *StPO* § 35.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *StPO* § 35(2).

⁹⁸ *StPO* § 35(3).

⁹⁹ *StPO* § 35a.

¹⁰⁰ *StPO* § 36(2).

¹⁰¹ *StPO* § 36(1).

¹⁰² *StPO* § 37. The provisions of the Code of Civil Procedure on point are §§ 166 to 213.

¹⁰³ *StPO* § 37.

¹⁰⁴ *StPO* § 382.

held, the accused is summoned in accordance with the rules prescribed for summonses where public charges have been filed.¹⁰⁵

The communication of the indictment to the accused requires personal service¹⁰⁶ If it fails to reach the accused at all, or in time, he is entitled to demand postponement of the trial.¹⁰⁷ If the accused is not available or cannot be found, the service can be made upon a person close to him.¹⁰⁸ In the regular criminal proceedings, there is little danger that the accused does not have ample opportunity to be timely and adequately informed of the charges so as to prepare his defense.¹⁰⁹ If, because of special circumstances more time should be needed, he has the right to insist, by timely motion, to postponement or interruption of the trial.¹¹⁰ The Code of Criminal Procedure specifies that at least one week transpires between the service of the summons and the trial,¹¹¹ Erroneous rejection may constitute reversible error.¹¹² Except where expeditious proceedings are employed, the accused, if he does have actual notice, can be fairly certain that he will be fully informed of the charges, so that he will know what allegations he must defend. The German Code of Criminal Procedure authorizes an “accelerated” form of procedure in cases which belong to the jurisdiction of the single judge or the *Schoeffengericht* (Lay Judges’ Court) if the facts are simple and the expected punishment does not exceed one year’s confinement. Under this procedure, neither a written indictment nor an order initiating the main proceedings is required.¹¹³ Although this procedure is not supposed to be used where it curtails the defense of

¹⁰⁵ *StPO* §§ 383, 384; See *StPO* § 216.

¹⁰⁶ *StPO* § 201.

¹⁰⁷ *StPO* §§ 203 and 215.

¹⁰⁸ *StPO* §181.

¹⁰⁹ As a practical matter, service of process on members of the “force,” “civilian component” or “dependents” within the meaning of Article I, NATO SOFA, is effected through the assistance of a network of Land and Local Legal Liaison Authority (LLLA) offices, (*Verbindungsstelle*) contemplated by Articles 19 and 37 of the NATO SOFA Supplementary Agreement, which will translate the indictment and provide the accused a copy in accordance with Army in Europe Regulation 550-56, para 7f (1).

¹¹⁰ *StPO* §228.

¹¹¹ *StPO* § 217 I. Violation of this rule entitles the defendant to demand adjournment of the trial, if he raises the issue at the commencement thereof, § 217 II.

¹¹² *StPO* § 338 (8).

¹¹³ *StPO* §§ 417 et seq.

the accused, the latter has no opportunity formally to object.¹¹⁴ “Accelerated” proceedings (*Beschleunigte Verfahren*) are not authorized in criminal proceedings against members of a force, or a civilian component, or against “dependents.”¹¹⁵ In the case of expeditious proceedings, the accused is entitled to twenty-four hours’ notice¹¹⁶. Where the trial is by penal order or decree, the accused can expect at least two week’s advance notice of the date of the trial. In other cases, the date for trial is fixed by the judge during the hearing on the issue of opening the main proceedings.

The German Code of Criminal Procedure authorizes proceedings against absent persons if their whereabouts are unknown or if they are abroad and not expected to be available in the near future.¹¹⁷ No trial (*Hauptverhandlung*), however, will be held in the absence of the accused. The sole purpose of the proceedings is to secure evidence pending later apprehension of the accused.¹¹⁸

Finally, there is no statutory requirement that the indictment charging a foreigner without knowledge of the German language with an offense must be communicated with a translation.¹¹⁹ This gap is filled by Article 6 paragraph 3e of the Council of Europe, “Convention for the Protection of Human rights and Fundamental Freedoms,” (see footnote 35, *supra*), however, and in practice, United States Personnel receive translation assistance. Also, under German law, the arguments of counsel need not be translated to an accused who does not understand German.¹²⁰ Again, however, in practice, court provided translators provide translations of the arguments for the accused.

B. Assistance of Counsel

¹¹⁴ *StPO* § 419.

¹¹⁵ Article 27, NATO Status of Forces Supplementary Agreement (SOFSa).

¹¹⁶ *StPO* § 418.

¹¹⁷ *StPO* §§ 276, 277 III.

¹¹⁸ *StPO* § 285 I.

¹¹⁹ Normally, a translator is provided. Where members of the “force,” the “civilian component,” or “dependents” are concerned, however, Army in Europe Regulation 550-56 provides for assistance in securing a translated copy of the indictment through the Local Legal Liaison Authority.

¹²⁰ *StPO* § 259.

1. Discovery and the Right to Counsel in the U.S.

Discovery is the process through which the parties to a lawsuit or prosecution gather information independently or obtain it from the opposing party. Criminal discovery rules in the U.S. are specifically defined under either the Federal Rules of Criminal Procedure or similar legislative acts in each of the fifty states. Liberal discovery rules, especially with regard to information that may exculpate an accused, are important to ensure a defendant due process of law. In recognition of that fact, the modern trend in the U.S. has been to expand the scope of discovery.¹²¹ There are, however, important Constitutional limits on discovery.

The Supreme Court has set Constitutional limits on discovery in a number of cases. The Court has held, for example, that prosecutors must disclose evidence of an exculpatory nature to a defendant once that defendant has requested such evidence.¹²² However, prosecutors are not compelled to disclose the identity of government witnesses in order to protect witnesses from discouragement and in order to protect the integrity of their testimony.¹²³ Nevertheless, trial court judges are vested with broad authority to control and supervise discovery proceedings. This authority includes the power to compel the deposition of government witnesses, for example.¹²⁴

On the defense side, there are Constitutional limits on a defendant's duty to disclose evidence by virtue of the self-incrimination protections afforded by the Fifth Amendment. For example, a defendant can refuse to submit to questioning. The Court has held, however, that state rules requiring defendants to disclose an alibi defense the defendant intends to present at trial are not covered by the Fifth Amendment.¹²⁵

¹²¹ See e.g. *Coleman v. Burnett*, 477 F.2d 1187, 1213 (D.C.Cir. 1973) (Senior Circuit Judge Fahy concurring in part and dissenting in part); *U.S. v. American Oil Co.*, 286 F.Supp. 742, 753 (D.C. NJ 1968) (stating "There are those, and this Court counts itself among them, who feel that in the long run, expanded discovery will promote rather than hinder the ends of criminal justice"); See also 21 Am. Jur. 2d Criminal Law § 226, (updated May 2003), addressing the validity of alibi notice statutes.

¹²² *Brady v. Maryland*, 373 U.S. 83 (1963).

¹²³ See e.g. *U.S. v. Carrigan*, 804 F.2d 599, 602-603 (10th Cir. 1986); Fed. R. Crim. Pro. 16.

¹²⁴ *Id.* at 603.

¹²⁵ *Williams v. Florida*, 399 U.S. 78 (1970).

In the U.S. adversarial system of justice, the importance of securing counsel cannot be underestimated. The discovery process in the U.S. is normally guided by the attorneys on either side of a dispute. The Sixth Amendment states that in “all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense.”¹²⁶ The Supreme Court has held that the right to government-appointed counsel exists for all cases in which the penalty could include incarceration.¹²⁷ The right to counsel also extends to cases in which a judge imposes a suspended sentence.¹²⁸ An appellant also has a Constitutional right to counsel on his first appeal.¹²⁹ Counsel shall also be appointed for individuals who, by reason of ignorance, mental capacity, or insanity are incapable of adequately representing themselves.¹³⁰ Finally, the Court has held that the right to counsel presumes the “effective” assistance of counsel.¹³¹ However, the Court has also held that an individual has a constitutional right to represent himself, should he so choose.¹³²

2. Discovery and the Right to Counsel in Germany

Generally, German law gives full recognition to the desirability and, under pertinent circumstances, necessity of the accused being assisted by counsel. Apart from two issues discussed below, German law, therefore, satisfies the requirements of opportunity for, and availability of effective assistance by, counsel existing under the standards of Due Process. German law accords any person charged with the commission of an offense the sweeping right to avail himself of the aid of counsel at any stage of the proceedings.¹³³

The SOFA does not directly speak about discovery procedures other than to assure the defendant of adequate notice in advance of trial. However, the SOFA does directly address the right to counsel, stating a defendant shall be entitled to “have legal representation of his own

¹²⁶ U.S. Const. Amend VI.

¹²⁷ *Scott v. Illinois*, 440 U.S. 367 (1979).

¹²⁸ *Alabama v. Shelton*, 535 U.S. 654 (2002).

¹²⁹ *Douglas v. California*, 372 U.S. 353 (1963).

¹²⁵ *Massey v. Moore*, 348 U.S. 105 (1954).

¹³¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

¹³² *Faretta v. California*, 422 U.S. 806 (1975).

¹³³ *StPO* § 230.

choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State.”¹³⁴ In addition, the SOFA permits a defendant the right to “communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial.”¹³⁵

In Germany, the rules of discovery differ from those in the U.S., but they achieve substantially the same result leading to trial. As in the U.S., prosecutors in Germany work in conjunction with the police to investigate and prosecute crime.¹³⁶ While they are on duty, police are typically only responsible for situations demanding immediate attention; however, most officers are also specially authorized to conduct investigations in a manner similar to those conducted by police detectives in the U.S.¹³⁷

Unlike the U.S. system, discovery in Germany does not occur primarily between the parties with the court’s supervision.¹³⁸ Rather, the court is charged with compiling a dossier, which is a master file containing all of the relevant evidence pertaining to the charges.¹³⁹ The dossier contains evidence supporting the charges as well as any exculpatory evidence.¹⁴⁰ The police and the prosecutors are primarily responsible for compiling the dossier, and the defense can add evidence to the file when the evidence is deemed to be meaningful.¹⁴¹ An important right of the defense is to be able to examine the entire dossier prior to trial.¹⁴² However, this

¹³⁴ NATO SOFA Article VII § 9(e).

¹³⁵ NATO SOFA Article VII § 9(g).

¹³⁶ Much of what follows is from the following law review article, which provides a very good basic overview of German criminal procedure, as well as comparisons with U.S. procedure: *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, Richard S. Frase and Thomas Weigend, 18 B.C. Int’l & Comp. L. Rev. 317, Summer 1995. [hereafter “Frase”].

¹³⁷ *Frase* at 322-323.

¹³⁸ *Id.* at 341.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*; *StPO* § 163a(2) and § 166 both state that exculpatory evidence offered by the defendant shall be admitted if it is relevant (*erheblich*).

¹⁴² *Id.* See also *fn. 168*, “The rationale of this rule is the fear that the defendant might lose, damage, or destroy the file...Defense counsel is not precluded from informing the defendant of the contents of the file and from giving him a copy.”

right does not belong to the defendant personally; rather, only counsel may inspect the dossier.¹⁴³ Once the prosecutor's investigation is closed, nearly everything of relevance should be contained in the dossier, enabling the judge to examine witnesses and conduct the proceedings as he sees fit.¹⁴⁴

The defendant's right to counsel in Germany is more circumscribed than in the U.S. However, there is an absolute right to counsel at the *Landgericht*¹⁴⁵-level, where more serious cases are tried.¹⁴⁶ Where the seriousness of the offense merits an "obligatory" defense (*notwendige Verteidigung*), a defendant must accept representation (i.e. may *not* choose to represent himself).¹⁴⁷ Even at the *Amtsgericht*¹⁴⁸-level, counsel is obligatory if:

- 1) the defendant is charged with a felony;
- 2) the prohibition to practice a profession may be ordered;
- 3) the defendant has spent at least three months in pretrial detention;
- 4) a psychiatric examination or treatment of the defendant may be necessary;
- 5) the previous defense counsel was discharged by the court because he was suspected of being an accomplice in the offense to be tried;
- 6) the facts or law of the case are extraordinarily complicated; or
- 7) the defendant is unable to conduct his own defense.¹⁴⁹

German courts appoint counsel for those defendants who cannot afford their own counsel.¹⁵⁰ Any attorney licensed to practice law in Germany can be appointed as defense counsel, as well as any law professor at a German university.¹⁵¹ Lawyers admitted to practice in other jurisdictions may be permitted to appear upon motion to the court, but if the case is one requiring compulsory defense a foreign lawyer may only appear as an associate of a German

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 342.

¹⁴⁵ *Landgericht* is translated as "State Court," though it should be noted that this does not imply dual State and Federal court systems as in the U.S.

¹⁴⁶ *Frase* at 323.

¹⁴⁷ *Id.* at 324; *StPO* § 140.

¹⁴⁸ *Amtsgericht* translates to "County" or "District" Court.

¹⁴⁹ *Frase* at 324; *StPO* § 140.

¹⁵⁰ *Frase* at 324.

¹⁵¹ *StPO* § 138(1).

attorney.¹⁵² Also, a law student who has passed his first bar examination¹⁵³ and who has served in the capacity of a *Referendar*¹⁵⁴ for at least one year and three months may be appointed defense counsel with the consent of the accused.¹⁵⁵ The fees of counsel are fixed by law and, where the accused has court-appointed counsel, the attorney is compensated by the Treasury for his fees and out-of-pocket expenses.¹⁵⁶ In addition to the assistance of counsel, the *StPO* provides that the accused's spouse or his legal representative (parent or guardian) are entitled to assist at the trial.¹⁵⁷ These individuals may also participate in the preliminary proceedings at the discretion of the magistrate.¹⁵⁸

The difference in the right to counsel between the U.S. and German judicial systems can be explained, in part, by the attorney's role in the system. Where U.S. attorneys actively lead the judicial proceedings before a largely passive judge, the roles are reversed in Germany: the judge actively conducts the trial with the dossier as his guide, and the attorneys take a largely passive role.¹⁵⁹ The *StPO* does not prohibit attorneys from taking an active role, but the rigorous cross-examination and protracted presentation of evidence inherent in U.S. trials is not generally a feature of a German trial. The German Federal Supreme Court has made it perfectly clear, however, that the necessity of representation by counsel is more than a formal requirement and has insisted that a proper assignment requires adequate time for efficient preparation and conduct of the defense.¹⁶⁰

At a German trial, the presiding judge directs the conduct of the trial.¹⁶¹ He calls witnesses and experts to give their testimonies concerning the case. Ordinarily, the order of

¹⁵² *StPO* § 138(2).

¹⁵³ In Germany, law students must pass two bar exams to be fully licensed to practice law.

¹⁵⁴ As part of their legal education, every German law student must perform a *Referendariat*, or legal clerkship, for courts, law firms and attorneys between their first and second bar exams.

¹⁵⁵ *StPO* § 139.

¹⁵⁶ *StPO* §§ 464-464b.

¹⁵⁷ *StPO* § 149(1) (2).

¹⁵⁸ *StPO* § 149(3).

¹⁵⁹ *Frase* at 342.

¹⁶⁰ See authorities cited in Löwe-Rosenberg, *Kommentar zur Strafprozessordnung*, (20th ed. 1953), § 142, comment 6.

¹⁶¹ *StPO* § 238(1). Objections to the conduct of the trial are ruled on by the court (*StPO* § 238(2)).

appearance of witnesses is left up to opposing counsel with the proviso that prosecution witnesses testify first.¹⁶² The witness tells his story without interruption, and after he has finished, the presiding judge interrogates the witness on any matters that require further clarification.¹⁶³ After the members of the court have interrogated the witness, the presiding judge permits the prosecution, the defense counsel, the accused, and the lay judges to interrogate the witness.¹⁶⁴ This interrogation resembles cross-examination.¹⁶⁵

The direct interrogation of an accused by a co-accused is not permitted.¹⁶⁶ The rules say that questions which the parties wish to ask witnesses other than a co-accused should be submitted to the judge, but, in practice, parties are regularly allowed to directly ask questions without the judge as go-between. The presiding judge has the right to reject improper or irrelevant questions.¹⁶⁷ Also, a person who abuses the right of cross-examination may be denied permission to directly interrogate a witness.¹⁶⁸ Doubts about the admissibility of a question are always decided by the court.¹⁶⁹

As in the U.S., trials in Germany conclude with the attorneys summarizing the facts and what they believe to be the applicable law, and the presiding judge applying what he determines to be the applicable law.¹⁷⁰ In Germany, though, greater importance is placed upon giving the defendant the opportunity to comment on the evidence.¹⁷¹ In fact, the *StPO* gives the defendant the right to comment upon the evidence after the court hears a co-accused, as well as after the presentation of any documentary evidence.¹⁷² Though the defendant has the right to remain

¹⁶² *StPO* § 239(1).

¹⁶³ *StPO* § 239(2).

¹⁶⁴ *StPO* § 240 (2).

¹⁶⁵ *StPO* § 240.

¹⁶⁶ *StPO* § 240(2). Questions can, however, be indirectly posed by requesting the judge make the inquiry.

¹⁶⁷ *StPO* § 241(2).

¹⁶⁸ *StPO* § 241.

¹⁶⁹ *StPO* § 242.

¹⁷⁰ *StPO* § 258.

¹⁷¹ *Id.*

¹⁷² *StPO* § 257.

silent, German defendants often participate more directly in their trials than U.S. defendants do.¹⁷³

3. Conclusion

The American and German legal systems have different roles for the actors in each system. In the U.S., defense attorneys and prosecutors take an active role by presenting evidence and cross-examining witnesses and experts. However, in the German system, inquiry is primarily conducted by a judge. Furthermore, where a trial in the U.S. can be fundamentally unfair because of the poor performance of a defendant's attorney,¹⁷⁴ the same cannot be said in the German system. The German system relies on highly trained judges who are charged with discerning the truth in order to render a verdict. The responsibility for a defendant to receive a fair and accurate trial largely falls upon U.S. attorneys – and defense counsel in particular. For the most part, this responsibility is transferred to a judge in the German system.¹⁷⁵ This is an important consideration when comparing discovery and the right to counsel between the two systems.

Ultimately, both the right to counsel and the discovery process in the American and the German systems seek to ensure fair and accurate results at trial. Instances where a defendant is deprived of his due process are likely to be the exception and are grounds upon which appeals can be taken. In exceptional cases, an American defendant who is being tried in Germany might require a more active defense attorney. In that case, nothing in the *StPO* prevents an attorney – even an American attorney – from being appointed to aid the German attorney during the trial. Overall, the German system contains safeguards similar in nature to those in the American system.

C. Judicial Protections Against Unlawful Investigative Practices

¹⁷³ *Frase* at 343.

¹⁷⁴ See e.g. *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984).

¹⁷⁵ Since American judges are also responsible for ensuring that defendants receive a fair and accurate trial, this is an oversimplification. Additionally, German judges may also be substantially aided by the attorneys and also by the jurors.

Over the past fifty years, the Supreme Court has added teeth to the provisions of the Fourth Amendment by creating judicially enforced rules excluding certain evidence obtained by investigators.¹⁷⁶ These rules often create contention during U.S. criminal proceedings because of their strategic importance to the defense. More generally, though, the rules implicate fundamental issues of human dignity, and for this reason, German law also reflects these rules.

1. U.S. Protections

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁷⁷

These provisions have spawned countless Supreme Court decisions and contain some of the most oft-litigated issues in American courts.

In the past, warrants and writs allowed government actors an extraordinary abuse of power by modern-day standards, permitting searches of unlimited discretion that lasted the king's lifespan.¹⁷⁸ Although the life of the king is no longer at issue, the Supreme Court has connected the contemporary concern of a "general, exploratory rummaging in a person's belongings" to the same fears the Colonists harbored.¹⁷⁹ Supreme Court precedent has gradually defined two primary issues emanating from the Fourth Amendment: first, when is a warrant overbroad, and second, when can the warrant requirement be dispensed with entirely?

¹⁷⁶ See e.g. *Weeks v. U.S.*, 232 U.S. 383 (1914) (imposing the exclusionary rule for federal cases); *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending the exclusionary rule to the States via the Fourteenth Amendment); *Miranda v. Arizona*, 384 U.S. 436 (1966) (applying the exclusionary rule to incriminating statements made by a suspects who are not informed of their right to counsel and to remain silent).

¹⁷⁷ U.S. Const. Amend. IV.

¹⁷⁸ See Potter Stewart, *The Road to Mapp v. Ohio and Beyond*, 83 Colum. L. Rev. 1365, 1369 (1983).

¹⁷⁹ *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971).

There are two schools of thought among Fourth Amendment scholars.¹⁸⁰ The first school of thought advocates a strict interpretation of the clause and takes the position that a warrant is *always* required when it is practicable to obtain one.¹⁸¹ Proponents of this position believe that any exceptions to the warrant clause should be “jealously and carefully drawn” and made only on “a showing...that the exigencies of the situation made that course imperative.”¹⁸²

The second school of thought advocates an interpretation of the warrant clause that separates the first clause of the Amendment, dealing with reasonableness, from the second clause, dealing with warrants. Under this interpretation, the warrant clause informs law enforcement officers “when warrants may not issue, not when they may or must.”¹⁸³ As one commentator has written, the “practical significance of the debate is enormous.”¹⁸⁴ Under the former interpretation, the power to initiate searches almost always begins with a judicial officer, not the police. Under the latter interpretation, however, the police have greater leeway in effectuating warrants, whereas the courts are a remedy in cases where a judicial officer decides after the search whether it was reasonable or unreasonable.¹⁸⁵

In actuality, the Supreme Court has espoused both views throughout its history, leaving today’s law enforcement officials with a mixed bag of exceptions to the warrant requirement.¹⁸⁶ Most recently, the Court seems to have tended in the direction of the “reasonableness” requirement by creating an increasing number of exceptions to the warrant requirement.¹⁸⁷ Regardless of which interpretation controls, the Court has set the remedy for a Fourth Amendment violation to be the exclusion of the evidence unconstitutionally obtained.¹⁸⁸

¹⁸⁰ For an overview of the Fourth Amendment generally and the debates surrounding its interpretation, see *Dressler* at 75-87.

¹⁸¹ *Dressler* at 184-185.

¹⁸² *Dressler* at 184, citing *Jones v. U.S.*, 357 U.S. 493, 499 (1958). , and *McDonald v. U.S.*, 335 U.S. 451, 456 (1948).

¹⁸³ *Dressler* at 185, citing Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 774 (1994).

¹⁸⁴ *Dressler* at 185.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 189-192.

¹⁸⁸ *Weeks v. U.S.*, 232 U.S. 383 (1914).

Nevertheless, both courts and legislatures have imposed exceptions to the exclusionary rule, making it less than an absolute mandate.¹⁸⁹

2. German Protections

As in the U.S., warrants are generally required under the due process protections encompassed in Germany's Basic Law. In particular, the Basic Law specifically references home searches, stating:

Searches may be authorized only by a judge or, when time is of the essence, by other authorities designated by the laws, and may be carried out only in the manner therein prescribed.¹⁹⁰

In addition, the *StPO* contains numerous provisions pertaining to who can be searched and what procedures govern such actions.¹⁹¹ These provisions articulate a standard of similar precision to the U.S. Constitution's Fourth Amendment standards.

Generally, searches of a person or place are only permitted with a magistrate's authority, unless exigent circumstances exist to excuse such a requirement. In practice, exigent circumstances are often presumed to exist, and a judge will exclude evidence unlawfully obtained only when the violation is egregious.¹⁹² However, the *StPO* contains a number of protections that are not reflected in American law. For example, the *StPO* grants the owner/occupant of a house or room searched the right to be present or to have a person representing him present.¹⁹³ If the police are unable to secure such people, then the authorities are supposed to bring an impartial witness in to view the search.¹⁹⁴

Overall, the German protections most closely align with the less-absolute interpretation of the Fourth Amendment that the modern U.S. Supreme Court has espoused. Of course, any real comparison must take into account how often courts actually enforce such provisions through the use of exclusionary rules. Many scholars suggest that the exclusion of evidence is

¹⁸⁹ *Dressler* at 81-82.

¹⁹⁰ Basic Law, Article 13(2).

¹⁹¹ *See e.g.* *StPO* §§ 102-110.

¹⁹² *Fraser* at 331, footnote 89.

¹⁹³ *Fraser* at 331; *StPO* § 106(1).

¹⁹⁴ *Id.*

more common in the U.S. than in Germany.¹⁹⁵ A possible reason for this discrepancy is that the exclusionary rule's rationale in Germany is less to deter police misconduct than to ensure "the 'purity' of the judicial process and the protection of the individual rights violated by illegal acts."¹⁹⁶ To the contrary, the U.S. Supreme Court has identified deterrence, rather than judicial integrity, as the American rule's primary rationale.¹⁹⁷

In conclusion, the law regulating searches and seizures in both the U.S. and Germany is highly developed. A more practical balancing between the usefulness of the evidence and its effect on the judicial proceeding is more likely to guide a German judge's evidentiary decisions than a judge in the U.S. Nevertheless, in both countries courts seek to guard against police abuses and unreasonable infringements on individual liberty.

D. Compulsory Process – Compelling Witnesses to Testify

The Supreme Court has written that, just as an accused "has the right to confront the prosecution's witnesses for the purpose of challenging their testimony," he also "has the right to present his own witnesses to establish a defense."¹⁹⁸ The defendant's ability to compel witness testimony, then, "is a fundamental element of due process of law."¹⁹⁹ The Court has further held

¹⁹⁵ See e.g. Kuk Cho, "Procedural Weakness" of German Criminal Justice and its Unique Exclusionary Rules Based on the Right of Personality, 15 Temp. Int'l & Comp. L.J. 1 (2001) (hereafter "Cho"); Richard D. Friedman, Book Review, *Anchors and Flotsam: Is Evidence Law "Adrift"* 107 Yale L.J. 1921, 1925 (1998). Friedman's article is a critical review of Mirjan R. Damaska's book *Evidence Law Adrift*, published by Yale University Press, 1997. The law review suggests, as does the book, that though prophylactic measures also exist in the continental judicial systems, they are much less enforced under those systems.

¹⁹⁶ Cho at 28.

¹⁹⁷ See e.g. *Stone v. Powell*, 428 U.S. 465, 492 (1976) (stating "Evidence obtained by police officers in violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future violations will decrease."); *U.S. v. Calandra*, 414 U.S. 338, 347 (1974) (stating "the [exclusionary] rule's prime purpose is to deter future unlawful police conduct...").

¹⁹⁸ *Washington v. Texas*, 388 U.S. 14, 19 (1967).

¹⁹⁹ *Id.*

that a defendant can compel, not only the production of witnesses, but also of documents relevant to his defense.²⁰⁰

The SOFA addresses the right to compulsory process in Article VII. The Article states that the defendant is entitled to have “compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State.”²⁰¹ German law, too, provides the defendant with compulsory process through various procedures. First, the defendant can request that the court summon witnesses.²⁰² In making such a request, the defendant must indicate to the court which facts the witness will testify about. The court may reject such a request if the introduction of the evidence involved would violate a statutory prohibition, is superfluous because of general knowledge, lacks relevance, is valueless, or is inaccessible.²⁰³ Alternatively, the defendant may summon the witnesses directly himself, regardless of whether he has requested the court to summon them.²⁰⁴ However, witnesses directly summoned must be compensated by the defendant.²⁰⁵ The compensation consists of the witness’s travel expenses and compensation for loss of earnings.²⁰⁶ If a witness directly summoned turns out to be material to the disposition of the case, the defendant is entitled to reimbursement.²⁰⁷

Ordinarily, the witnesses to be summoned are named in the written charge.²⁰⁸ Should additional witnesses be required, each party must furnish the other the names and addresses of such witnesses as soon as practicable.²⁰⁹ However, in contrast to the U.S. where the parties call the witnesses themselves, German judges call the witnesses they consider necessary.²¹⁰ The

²⁰⁰ See *U.S. v. Burr* 25 Fed. Cas. 30, no.14,692d C.C.D.Va. 1807 located at http://press-pubs.uchicago.edu/founders/documents/a2_1_1s19.html (accessed June 23, 2004).

²⁰¹ SOFA Article VII, § 9(d).

²⁰² *StPO* § 219.

²⁰³ *StPO* § 244(3).

²⁰⁴ *StPO* § 220(1).

²⁰⁵ *StPO* § 220(2).

²⁰⁶ *Id.*

²⁰⁷ *StPO* § 220(3).

²⁰⁸ *StPO* § 222.

²⁰⁹ *Id.*

²¹⁰ *StPO* § 221; Under Federal Rule of Evidence (FRE) 706, U.S. judges are also empowered to call their own expert witnesses, or even to deny calling an expert that the parties have agreed upon. Under FRE 614, judges are even

witness list is compiled by the parties, but may also be supplemented by the judge, should the judge determine that further fact finding is necessary.

The right to compulsory process in Germany is substantially similar to the rights granted American defendants. Though the concept of having to reimburse witnesses for their appearance seems unusual, the requirement is an exception and not the rule, since a German judge is obligated under these rules to hear all relevant testimony and would probably call most witnesses himself. Additional witnesses a defendant wishes to call are, therefore, paid in a similar manner as expert witnesses for the defense are paid in the states.²¹¹

E. Protection Against Self-Incrimination

An individual's right not to incriminate himself is an important exception to the right to compulsory process, especially where a court tries multiple defendants for the same act. In the U.S., the privilege against self-incrimination is contained in the Fifth Amendment, which states in part that "[n]o person...shall be compelled in any criminal case to be a witness against himself."²¹² The Supreme Court has written that this "privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty."²¹³

An individual can claim a Fifth Amendment privilege if the government attempts to compel either testimony or some other form of communication that could incriminate that individual.²¹⁴ This privilege adheres not only to defendants, but also to witnesses, including

allowed to call their own fact witnesses. In practice, of course, judges rarely make use of these powers. As one commentator has written, although the statutory power of American judges to control the trial process may equal or even supercede the power of German judges, our legal culture generally discourages them from exercising that power. See John C. Reitz, *Why we probably cannot adopt the German Advantage in civil procedure*, 75 Iowa L. Rev. 987, 992 (1990) (hereafter "*Reitz*").

²¹¹ Though this does not imply that in Germany only expert witnesses are the ones who must be paid; a non-expert witness could, theoretically, also be paid. But again, eye-witnesses will generally be called by the court.

²¹² U.S. Const. Amend. V.

²¹³ *Kastigar v. U.S.*, 406 U.S. 441, 444 (1972).

²¹⁴ See e.g. *Kastigar*, 406 U.S. at 445; *Hibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S.177.

those witnesses who claim innocence.²¹⁵ The government can grant a witness immunity, and in doing so, the government can neutralize the incriminating nature of any statement by shielding the individual from future prosecutions.²¹⁶ The Supreme Court has held, however, that compelling someone to stand in a line-up²¹⁷ or provide a handwriting sample²¹⁸ is not protected under the Fifth Amendment.

The SOFA does not address an individual's right against self-incrimination. Since many countries do not recognize such a right or grant the right as broadly as the American rule does, this may have been a conscious omission.²¹⁹ In Germany, however, the rules permit not only the defendant's refusal to testify but also permit members of the defendant's immediate family (including spouses and certain members of the spouse's family) to refuse to testify.²²⁰ As in the U.S., suspects have a right to remain silent.²²¹ Furthermore, in Germany suspects must be informed of this right before they are questioned by the police.²²²

German procedures against self-incrimination are equal to, or perhaps even stronger than, American standards. However, unlike in America, "most German defendants waive their right to remain silent."²²³ On the one hand, this may be a cultural difference bolstered by the atmosphere and customs of a German trial. But there is also a procedural distinction that underpins the difference: defendants in Germany are allowed to give unsworn statements at trial, and they cannot be held criminally liable for these statements.²²⁴ Importantly, though, this encourages the

²¹⁵ *Ohio v. Reiner*, 532 U.S. 17 (2001). In *Reiner*, the defendant, who was accused of killing his child, challenged the grant of immunity given to a babysitter, who testified against him. The defendant argued that a grant of immunity is improper if a witness claims innocence, because that witness should consequently have no fear of incriminating himself. The Court held that the grant of immunity was proper, since the Fifth Amendment also protects a witness from becoming "ensnared by ambiguous circumstances."

²¹⁶ *Id.*; see also *Kastigar*, 406 U.S. at 453.

²¹⁷ *United States v. Wade*, 388 U.S. 218 (1967) (reasoning that standing in a line-up is not testimonial).

²¹⁸ *Gilbert v California*, 388 U.S. 263 (1967) (reasoning that handwriting samples are analyzed for their physical qualities, not any testimony or words they contain).

²¹⁹ See *Frase* at 335.

²²⁰ *StPO* § 55.

²²¹ *StPO* § 136.

²²² See *Frase* at 333.

²²³ *Id.* at 343.

²²⁴ *Id.*

defendant to testify, and German judges are not supposed to hold the silence of a defendant against that person.²²⁵

In conclusion, there would appear to be few differences between the German and American systems arising from this body of law. A defendant or trial observer should keep in mind that a judge in the German system, who is focused on ascertaining all of the relevant facts, might look unfavorably on an individual's silence because such silence is not customary. Unless a judge commits the error of explicitly stating he relied on such silence in reaching his verdict, however, there is no real way to discern a violation of this right. Of course, this difficulty is no different than in U.S. trials, since the ultimate basis for a verdict remains a mystery to all but the jury or, in some cases, the judge.

F. Confrontation of Witnesses During Trial

In a brief survey of the historical pedigree of the right to confront witnesses, the Supreme Court recently wrote:

English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.²²⁶

The common law preference for in-court, live confrontation is the belief that cross-examining a witness is the “greatest legal engine ever invented for the discovery of truth.”²²⁷ Perhaps in recognition of this statement, German criminal procedure affords defendants a fairly broad right to confront the witnesses against them. How does that right correspond to the U.S. constitutional right, however, which the Court recently refined and strengthened?²²⁸

²²⁵ *Id.*

²²⁶ *Crawford v. Washington*, 124 S.Ct. 1354, 1359 (2004) (citing 3 W. Blackstone, *Commentaries on the Laws of England* 373-374 (1768)).

²²⁷ See e.g. *California v. Green*, 399 U.S. 149, 158 (1970) (citing Wigmore); *Lilly v. Virginia*, 527 U.S. 116, 124 (1999).

²²⁸ See e.g. Neil P. Cohen and Donald F. Paine, *Crawford v. Washington: Confrontation Revolution*, 40-MAY Tenn. B.J. 22 (2004).

A defendant's right to confront the witnesses against him is defined in the Sixth Amendment, which states that "the accused shall enjoy the right to...be confronted with the witnesses against him."²²⁹ The Supreme Court has made clear that, absent limited exceptions, statements that are "testimonial" fall within the ambit of the confrontation clause.²³⁰ The Court defined various classes of materials that are inherently testimonial, including "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used by the prosecutor."²³¹ Although the Court has not decided whether non-testimonial statements fall within the ambit of the confrontation clause, the Court has indicated that a future case could create such a distinction.²³²

German law recognizes the importance of live testimony in what is called the *Unmittelbarkeitsprinzip*, which translates to the principle of immediacy or directness.²³³ According to this principle, if a piece of evidence is based on a witness's perception, then the witness must testify before the court.²³⁴ As in the U.S., there are exceptions to this general rule. For example, prior testimony can be read into the record if the testimony came from previous judicial interrogations, and police transcripts of a witness's statement are admissible if the witness is no longer available.²³⁵ In accelerated proceedings the principle of immediacy is not applicable (§ 420 *StPO*).

²²⁹ U.S. Const. Amend. VI.

²³⁰ *Crawford*, 124 S.Ct. at 1365.

²³¹ *Id.* at 1364.

²³² The Court in *Crawford* indicates that a future decision might draw a strict testimonial/non-testimonial distinction, but the holding in *Crawford* itself did not draw that distinction. *Crawford*, 124 S.Ct. at 1370 (2004).

²³³ *StPO* § 250; Compare with Fed. R. Crim. Pro. 26: "In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072- 2077."

²³⁴ *Id.*

²³⁵ *StPO* § 251; See generally *StPO* §§ 250-256, which outline various exceptions to the *Unmittelbarkeitsprinzip*. Other exceptions include: when a witness has died, gone insane, is seriously ill or cannot be located (*StPO* § 251; compare with U.S. Fed. R. Ev. (FRE) 804); when the distance a witness must travel is too great in proportion to the importance of his testimony (*StPO* § 251(1)); when both parties consent to non-live testimony (*StPO* § 251(1)); to refresh the memory of a witness (*StPO* § 253; compare with FRE 803(5)); where a document is either from a doctor or a public agency (*StPO* § 256; compare with FRE 803(4), 803(8)).

Substantively, German law provides a defendant both the right to compulsory process and the right to cross-examination that permit an adversarial vetting of the facts and testimony. The *StPO* demands that all witnesses necessary for determining the truth be heard by a judge.²³⁶ The judge, based on the materials in the dossier, is the first person to question each witness.²³⁷ After he is finished, the parties are given the opportunity to pose follow-up questions.²³⁸ The text of the *StPO*²³⁹ logically states that the party which called the witness will be the first (following the Presiding Judge) to examine, followed by (cross-examination conducted by) the opposing counsel. The *StPO* suggests that such follow-up questions be submitted to and asked by the judge. In practice, however, attorneys are usually allowed to directly question witnesses.²⁴⁰

Though these procedures may seem to produce a substantive equivalence to American trial procedure, an American criminal defense attorney would be wrong to assume that these rules of the road dictate the driving conditions on Germany's legal Autobahn. In reality, German attorneys do not regularly make use of the powers of cross-examination.²⁴¹ Also, while both U.S. and German judges have the ability to limit cross-examination,²⁴² a U.S. judge imbued with the cultural legal norm of vigorous cross-examination is less likely to impose such limits. By the same token, an American attorney is also less likely to acquiesce to such limits by using them as a basis for appeal.

In conclusion, where the American legal system promotes an active role for the attorney and a passive role for the judge, the German legal system flips the active/passive role of these

²³⁶ *StPO* § 239, *Kreuzverhoer* (Cross-Examination). The commentary to the *StPO* indicates that in practice, little use is made of the right to cross-examine, Meyer-Gossner, *Strafprozessordnung*, 49th edition, C.H. Beck, Munich, 2006.

²³⁷ *Reitz* at 993.

²³⁸ *Id.*

²³⁹ *StPO* §239 paragraph 1, second sentence.

²⁴⁰ *Id.*

²⁴¹ *Reitz* at 993 – (An analogy to the latent powers of a German attorney is the broad statutory power of U.S. judges that go underutilized – see *supra* n.).

²⁴² See e.g. *StPO* § 241; *Olden v. Kentucky*, 488 U.S. 227 (1988) (holding that the trial court's refusal to allow the defendant to cross-examine a witness as to a material fact violated his Sixth Amendment right to confront the witnesses against him).

legal actors. Although the two systems do not differ greatly on paper, the legal culture is a greater indicator of what actually occurs in the courtrooms of both countries.

G. Rules of Evidence Regarding Hearsay

Since a section on evidentiary rules could easily comprise a comparative treatise in itself, this survey will focus on the aspect of evidentiary law that intersects with the discussion of witness confrontation: hearsay rules.

The rules of evidence in each U.S. jurisdiction are the same as, or very similar to, the Federal Rules of Evidence (FRE). The FRE apply to proceedings in all U.S. Federal District Courts. The rules provide a framework for guaranteeing a fair, accurate, and efficient trial.²⁴³ Judges have a duty to apply the rules in a manner that preserves the integrity of the judicial proceedings. The FRE are particularly important in jury trials, where jurors need to be protected from evidence that is unfairly prejudicial, cumulative, misleading and confusing.²⁴⁴

Hearsay rules are likely the most frequently used evidentiary rule employed during trials. Article VIII of the FRE defines hearsay and its exceptions. Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”²⁴⁵ The baseline rule in the U.S. is that hearsay is inadmissible at trial.²⁴⁶ Nevertheless, there are more than 23 express exceptions to the baseline rule, and FRE 807 provides a catchall “residual exception” if a judge finds that certain evidence should be admitted absent an express exception.²⁴⁷ Although the Confrontation Clause and the hearsay

²⁴³ FRE 102: “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”

²⁴⁴ FRE 403: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

²⁴⁵ FRE 801(c).

²⁴⁶ FRE 802; *See e.g.* Young's Federal Rules of Evidence Rule 802 (7th ed.) (“The hearsay rule is one of excludability, rather than admissibility...”).

²⁴⁷ FRE 807.

rules are not coterminous, the Supreme Court has written that they are “generally designed to protect similar values.”²⁴⁸

The hearsay exceptions contained in Article VIII of the FRE provide an efficient method for admitting evidence that is deemed inherently reliable. Justice Rehnquist has written that “[e]xceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made.”²⁴⁹ In addition to judicially created exceptions, Congress has also passed additional exceptions.²⁵⁰ Some common exceptions include those for present sense impressions, excited utterances, statements for the purpose of medical diagnosis or treatment, public records and reports, and market reports or commercial publications.²⁵¹

The SOFA, as a general agreement, does not speak to detailed issues, such as the rules of evidence or hearsay. German law addresses hearsay with less detail than the FRE, but with judicial results that indicate a general confluence of thought between U.S. and German courts.

StPO § 250 states that:

If evidence of a fact rests upon a person's observation, this person must be examined at the trial. The examination shall not be replaced by reading out the record of a previous examination or reading out a written statement.²⁵²

The prevailing opinion in Germany is that this passage applies narrowly to written records and not more broadly to oral testimony.²⁵³ The practical effect is that written testimony is disfavored where a court can produce a live witness to relate the same testimony. Exceptions exist, however. Testimony can be admitted, for example, where a witness is unavailable at trial but has been previously judicially examined on the point in question.²⁵⁴ Also, records of police

²⁴⁸ *White v. Illinois*, 502 U.S. 346, 352-353 (1992).

²⁴⁹ *Crawford v. Washington* 124 S.Ct. at 1377 (2004) (Rehnquist, J. concurring in the judgment).

²⁵⁰ See 28 U.S.C. § 2072, delegating rule-making authority to the judiciary.

²⁵¹ FRE 803 (1), (2), (4), (8) and (17) respectively.

²⁵² *StPO* § 250; See Mirjan Damaska, *Of Hearsay and its Analogues*, 76 Minn. L. Rev. 425 (1992) (hereafter “*Damaska*”).

²⁵³ *Damaska* at 449-450.

²⁵⁴ *Id.* at 450 (citing *StPO* § 251(2)).

interrogations can also be admitted to examine a witness on his own inconsistent statements, as well as the statements of others.²⁵⁵ Importantly though, Germany maintains an unconditional exclusionary rule that a defendant's confession cannot be read into evidence.²⁵⁶

Because German judges have full access to everything in the dossier, the fact-finder in Germany (namely the Presiding Judge, aided by lay judges for serious offenses) cannot be protected from hearsay testimony the way a jury in America can be shielded from potentially prejudicial hearsay. One commentator has written that because "it would be unrealistic to deny that documents in the dossier leave at least some imprint upon the presiding judge's mind, this most important member of the trial court is regularly exposed to written hearsay."²⁵⁷

Since most German courts do not hold oral hearsay to be addressed by *StPO* § 250, it is not covered by any *StPO* provision.²⁵⁸ Indirectly, German judges are somewhat compelled by the requirement in *StPO* § 244 that the court receive "all means of evidence which are important for the decision." Because German courts do not render simple verdicts of "guilty" or "not guilty" as American trial courts do, the basis for a court's decision is reviewable in greater detail by appellate courts.²⁵⁹ This gives German judges an increased incentive to avoid relying on hearsay because, "a German judge who examines a hearsay witness while refusing to call the original declarant...faces a difficult task in justifying this omission to the appellate court."²⁶⁰

Whether this deterrent is sufficient to preclude harmful hearsay testimony is largely an epistemological question. The question is just as difficult to answer in the U.S. because even though hearsay rules are more clearly delineated, they are also subject to myriad exceptions. Often, U.S. courts wrestle with the trustworthiness of witnesses and the reliability of statements

²⁵⁵ *Id.* at 450-451 (citing *StPO* § 253(2)). The article states that "Although this provision is sometimes understood as designed solely to enable the court to expose the witness's own inconsistencies, in practice witnesses are often confronted with inconsistent statements made by other persons as well.

²⁵⁶ *Id.*

²⁵⁷ *Damaska* at 451.

²⁵⁸ *Id.* at 453-454.

²⁵⁹ *StPO* § 267.

²⁶⁰ *Damaska* at 454. Compare, for example, the German case described in *Damaka's* article and *Tome v. U.S.*, 513 U.S. 150 (1995), dealing with similar issues of when hearsay can be admitted.

in determining whether to admit statements.²⁶¹ It is rare for cases to be overturned on appeal because of admitted hearsay.²⁶² Ultimately, the differences between the German and American systems of evidentiary procedure are “not nearly as overwhelming as is often thought.”²⁶³

H. The Trial Structure: Juries versus Judges, and Germany’s Mixed Courts

1. The U.S. Court Structure

Perhaps the greatest procedural difference between the U.S. and German criminal justice systems is the manner in which cases are actually tried.²⁶⁴ The U.S. employs a jury system in which a defendant is entitled to have a jury, which is composed of citizens in the community, render a verdict.²⁶⁵ The right to a jury does not apply to crimes carrying possible penalties of less than six months, if they are classified as petty offenses.²⁶⁶ A defendant can waive his right to a jury trial and be tried by a judge alone, but such waiver requires the assent of the prosecution and judge.²⁶⁷ The normal jury size is twelve members; however, juries may contain as few as six members for non-capital cases.²⁶⁸ For capital trials, juries must contain twelve members. In most jurisdictions, including Federal jurisdictions, a unanimous jury verdict is required, although

²⁶¹ The affect of *Crawford v. Washington*, 124 S.Ct. 1354 (2004) on the manner in which courts admit some hearsay has yet to be seen. Quite probably it will shift courts’ focus away from the reliability of a statement to whether a statement is testimonial in nature.

²⁶² See generally Eleanor Swift, *The Hearsay Rule at Work: Has it Been Abolished De Facto By Judicial Decision?*, 76 Minn. L. Rev. 473 (1992).

²⁶³ *Damaska* at 452.

²⁶⁴ See generally John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 Am. B. Found. Res. J. 195 (1981) (hereafter “*Langbein*”).

²⁶⁵ U.S. Const. Amend. VI.

²⁶⁶ *Duncan v. State of La.*, 391 U.S. 145 (1968).

²⁶⁷ *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979).

²⁶⁸ See *Williams v. Florida*, 399 U.S. 78 (1970) (holding a jury of six is allowed) and *Ballew v. Georgia*, 435 U.S. 223 (1978) (holding a jury of five is not allowed).

the Supreme Court has held that unanimous verdicts are not constitutionally mandated for state courts.²⁶⁹

In addition to the numeric requirements, the Supreme Court has also held that the Sixth Amendment contains the qualitative requirement that a jury pool must represent a “fair cross-section” of the community.²⁷⁰ A state may not, therefore, systematically exclude significant groups of individuals, such as women or minorities, from the rolls of prospective jurors.²⁷¹ Similarly, a prosecutor or defense attorney is forbidden from striking individual jurors because of their race or gender.²⁷²

2. The German Court Structure

The German criminal justice system contains a variety of courts and trial procedures, depending on the severity of the offense. German courts do not employ juries in the Anglo-American sense, but do incorporate citizen participation for all crimes punishable by over one year of prison. German jurors are often called “lay judges” in academic literature and will be referred to accordingly in the pages that follow.

a. *Amtsgerichte* and *Schöffengerichte*

The least severe offenses (Petty Misdemeanors and Minor Crimes) are handled by the *Amtsgerichte*. Misdemeanors are tried in the *Amtsgerichte* by a single judge, who can impose a sentence of up to two years. Appeals from convictions for such offenses are heard *de novo* by the *Kleine Strafkammer* (minor penal chamber), which contains a trial panel of one judge and two lay judges.²⁷³ A further appeal (*Revision*), which is not *de novo* but rather an appeal of law,

²⁶⁹ See *Johnson v. Louisiana*, 406 U.S. 356 (1972) (upholding a 9-3 guilty verdict), but see *Burch v. Louisiana*, 441 U.S. 130 (1979) (striking down a statute allowing 5-1 guilty verdicts by six member juries).

²⁷⁰ *Taylor v. Louisiana*, 419 U.S. 522 (1975).

²⁷¹ *Id.*

²⁷² See *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that defense counsel is also prohibited from excluding jurors based on race); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (gender).

²⁷³ De novo appeals are called *Berufung* in German. Appeals based on law alone, like in the U.S., are called *Revision*.

goes to the *Oberlandesgericht* (Superior State Court). Though there are 16 German states, there are 25 *Oberlandesgerichte*.

An *Amtsgericht* can also try offenses with sentences of one to four years in a different chamber, the *Schöffengericht*.²⁷⁴ For such offenses, the judge is assisted at trial by two lay judges. Appeals from these trials also occur *de novo*, but they are heard by three judges and two lay judges in the *Grosse Strafkammer* of the *Landgericht* (the large criminal chamber of the state court). A second appeal on law (Revision) goes to the *Oberlandesgericht*.

b. *Landgerichte*

Serious crimes, for which penalties of over four years are authorized, are tried by the *Landgericht*.²⁷⁵ The *Landgericht* is the same level court that hears *de novo* appeals of *Amtsgericht*-decisions. The penal chamber of the *Landgericht* normally sits with a panel of one professional judge and two lay judges. For serious crimes in which the *Landgericht* is the initial trial court, it sits with a panel of three judges and two lay judges. Appeals go to the *Oberlandesgericht* for an appeal of law and, if permitted, to the *Bundesgerichtshof*²⁷⁶ for a final appeal.

c. Selection of Lay Judges²⁷⁷

Local authorities choose lay judges every four years by compiling a list of candidates from the community.²⁷⁸ The list should contain a representative cross-section of the community, especially with regard to gender, age, employment, and social status.²⁷⁹ Some studies suggest, however, that German lay judges are much less representative in reality than they are on paper

²⁷⁴ In German, the word for lay judges is *Schöffen*, and the chamber of an *Amtsgericht* in which the fact-finder consists of a judge along with two lay judges is called the *Kleines Schoeffengericht*.

²⁷⁵ *Gerichtsverfassungsgesetz (GVG)* § 74. Jurisdictionally, German criminal law is situated at the state (*Land*) level. A *Landgericht* is, therefore, a court of one of the 16 German states. The *Oberlandesgericht* is the high court of each of the respective states. A still higher appeal is possible.

²⁷⁶ The *Bundesgerichtshof* is the Federal Supreme Court with jurisdiction over criminal matters.

²⁷⁷ See generally *Langbein* at 206.

²⁷⁸ *GVG* § 36.

²⁷⁹ *GVG* § 36(2).

because there is no set procedure for communities to follow when choosing the candidates.²⁸⁰

Also, a defendant has no real possibility to reject the panel that tries him because lay judges, just like their professional counterparts, are only challengeable for cause.²⁸¹

d. Court procedures

In direct contradiction to our law, criminal appeals in Germany can be taken by both the defense and the prosecution.²⁸² In the U.S., where the Constitutional command of double jeopardy protection makes a verdict of acquittal a final resolution regardless of its accuracy, the judicial system in Germany places more weight on discerning the truth.²⁸³ Although permitting the State to appeal may seem unfair in light of the comparative resources of the State and the defendant, such a view is more fitting in the American adversarial system than in the German inquisitorial setting.

The “German criminal justice system considers the prosecutor as a ‘guardian of the law’ or ‘the most objective public official in the world.’”²⁸⁴ The prosecutor in Germany is not intended to be a zealous advocate opposed to the defendant. Rather, he fills the role that inquisitorial judges filled prior to the legal reforms of the 19th century; in other words, he is responsible for investigating crime in an impartial manner.²⁸⁵ The prosecutor is, therefore, viewed as a neutral judicial official charged with upholding the law.²⁸⁶ To that end, he must

²⁸⁰ See *Langbein* at 208: “Although the statute states that the list of nominees should be representative of ‘all groups of the population,’ neither the statutory procedures nor the practices of the local authorities and commissions seem directed to that end.”

²⁸¹ *Id.*

²⁸² See *Langbein* at 200: “German law adheres to the Continental tradition that appeal lies against acquittal as well as conviction (a question that once split the U.S. Supreme Court in *Kepner v. U.S.*, 195 U.S. 100 (1904) , with Justice Holmes arguing that our constitutional double jeopardy prohibition should not be construed to prevent the state’s appeal of an acquittal.)”

²⁸³ See *StPO* § 244(2).

²⁸⁴ See Cho, *supra* n. 195, citing Hans-Heinrich Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 Am. J. Comp. L. 508, 510 (1970) [hereafter “*Jescheck*”].

²⁸⁵ See *Jescheck* at 510.

²⁸⁶ *Id.*

investigate both inculpatory as well as exculpatory evidence.²⁸⁷ Though this conception of a prosecutor is “entirely alien to the Anglo-American law,” it helps explain the reason that the German judicial system does not view an appeal by the prosecutor as unfair.

As in the U.S., the great majority of German criminal proceedings do not reach the trial stage.²⁸⁸ For minor offenses, as well as for some offenses Americans consider felonies but Germans do not, German courts issue Penal Orders (*Strafbefehle*) based on the prosecutor’s case file.²⁸⁹ In addition to the material facts supporting the charge, a *Strafbefehl* contains the prosecutor’s suggested penalty. Though a *Strafbefehl* may not impose incarceration directly, it can impose a suspended sentence of up to one year so long as the defendant is represented by counsel.²⁹⁰ In the vast majority of cases, *Strafbefehle* are accepted by judges without changing what the prosecutor has written.²⁹¹ Offenses commonly dealt with in the *Strafbefehle* include assault, larceny, fraud, tax evasion, and more serious traffic offenses.²⁹²

Although the process of issuing a *Strafbefehl* is *ex parte*, a defendant may, within two weeks of receiving the order, object.²⁹³ Absent an objection, the *Strafbefehl* becomes a final judgment. If the defendant does file an objection, he may reject the charge outright or challenge certain aspects of it.²⁹⁴ An objection then entitles a defendant to a trial and all of the normal due process procedures described in the pages above. A defendant should know, however, that a

²⁸⁷ *Id.*

²⁸⁸ “Ninety-five percent of convictions occurring within 1 year of arrest were obtained through a guilty plea. About 4 in 5 guilty pleas were to a felony.” Department of Justice’s Bureau of Justice Statistics, *Criminal Case Processing Statistics 2000*, available at <<http://www.ojp.usdoj.gov/bjs/cases.htm>> (last visited July 1, 2004). Compare with Thomas Wiegand, *Sentencing in West Germany*, 42 Md. L. Rev. 37 (1983) [hereafter “Wiegand”] at 54-55, which states that roughly half of all criminal proceedings are satisfied with *Strafbefehle*. Approximately eighty-five percent of these orders become final.

²⁸⁹ Wiegand at 53-55.

²⁹⁰ *StPO* § 407(2). See also Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int’l L.J. 1 (2004) [hereafter “Langer”]. See footnote 187.

²⁹¹ Wiegand at 54.

²⁹² *Id.* See also Cho at 321 (Footnote 15).

²⁹³ *StPO* § 410.

²⁹⁴ *StPO* § 410(2).

judge at trial is not limited to the findings of the prosecutor's *Strafbefehl* and may, if the facts support a greater penalty, impose such a penalty.²⁹⁵

For Americans subject to the German criminal system it is clearly important that notice of the charges be conveyed to an accused, and it is equally important that an accused is appraised of the consequences of remaining idle. This is especially important because a *Strafbefehl*, as an *ex parte* procedure, may lead the accused to believe that he is not threatened with any serious legal consequences. Considering the rather broad range of offenses that are punishable with *Strafbefehle*, however, any such assumption would be clearly erroneous. In addition, as a foreigner coping with a strange legal system and culture, it is equally important that an American accused be represented by counsel throughout every step of German criminal proceedings.

VII. Conclusion

The foregoing study is an endeavor to delineate carefully the United States federal constitutional rights which protect an accused in criminal proceedings in a state court and compare them with the legal guarantees which a person charged with a crime enjoys under German law for the purpose of determining whether or not the latter fall short of the American minimum standards of fairness.

As has been pointed out, this task is rendered particularly complicated by two intrinsic factors. On the one hand, German criminal procedure possesses a different basic orientation with respect to the position and function of the court in criminal proceedings from that generally followed by American tradition. On the other hand, the American pattern of Due Process is often blocked out by the Supreme Court by tests which cannot easily be translated into separate and prospective mandates as required by the Senate resolution. Nevertheless, a detached and cautious analysis permits the arrival at the conclusion that German law, as it exists in the books and as applied by German courts, grants to an accused substantially the same rights as those he would enjoy in a court of the United States.

²⁹⁵ *StPO* § 411(4).