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Uncertainty and the Search for Truth at Trial: Defining Prosecutorial "Objectivity" in German Sexual Assault Cases

Shawn Marie Boyne*

Abstract

According to German legal scholar, Claus Roxin, German prosecutors are the "most objective civil servants" in the world. Roxin's assessment of German prosecution practice reflects the conviction of many German legal scholars that prosecutors in Germany's inquisitorial system function as second judges dedicated to finding the objective "truth." In this Article I investigate how prosecutors "translate" the normative duty of objectivity enshrined in the German penal code into observable practices on the ground. I examine prosecutorial decision-making in three sexual assault trials. Sexual assault cases pose unique challenges to prosecutors as well as to the definition of objectivity. Because the crime typically occurs in private, the search for truth often focuses on the testimonies of the victim and the suspect. In cases in which the physical evidence is inconclusive and the defendant claims that the victim consented, the focus of the fact finder's inquiry is often directed at the victim's credibility.

Drawing on transcript and interview data, I propose three models of "faces" of prosecutorial "objectivity." Surprisingly, despite the fact that judges structure the presentation of evidence in German trials, prosecutors play a critical role in "interpreting" the facts presented at trial. In each of the cases examined in this Article, the face of objectivity is constructed through a relational process that unfolds between the presiding judge and the trial prosecutor. Although many legal scholars maintain that penal code sharply circumscribes prosecutorial discretion in major crime cases

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in Germany, my research demonstrates that a wide variation exists in the way that individual prosecutors interpret their duty to view the evidence objectively.

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"The score may be the same but if the instruments and players are not, the legal music will sound differently."¹

I. Introduction

According to rules of the German Code of Criminal Procedure, a German prosecutor does not function as a party but rather as a "second judge" who makes decisions based on the law and facts.² A German

1. Harry T. Edwards, *Comments on Mirjan Damaška's Of Evidentiary Transplants*, 45 AM. J. COMP. L. 853, 853 (1997).

2. See Joachim Herrmann, *The German Prosecutor*, in DISCRETIONARY JUSTICE IN EUROPE AND AMERICA 16, 18 (Kenneth Culp Davis ed., 1976) (explaining that the German prosecutor is "limited to the judicial task of applying the provisions of the Penal Code to the

prosecutor does not function from the standpoint of a party, but from a neutral, detached, and objective perspective.³ Although adversarial criminal justice systems presume that the "truth" will emerge from a battle between opposing parties, in Germany's inquisitorial system, in theory, the "truth" is the end result of a process that begins with an objective investigation supervised by the prosecutor and continues through to the presentation of the evidence at a main proceeding that is overseen by a judge or a judicial panel.⁴

This normative vision of prosecutors' dedication to truth is perpetuated in law schools where legal scholars educating new generations of lawyers repeat Roxin's maxim that German prosecutors are "the most objective civil servants in the world."⁵ Roxin's assessment of German prosecution practice reflects the conviction of many German legal scholars that prosecutors in Germany's inquisitorial system function as second judges dedicated to finding the objective "truth."⁶ German criminal procedure law attempts to mandate prosecutorial objectivity by requiring prosecutors to engage in certain activities such as investigating the facts for and against the suspect, summarizing the evidence for and against the accused during the main procedural hearing, and permitting prosecutors to file an appeal on behalf of a defendant when the prosecutor believes that the defendant either is not guilty or that the sentence imposed by the court is too harsh.⁷ Instilled with the vision to serve as "guardians of the law,"⁸ German

facts of each case," essentially making the prosecutor a judge-like figure).

3. See *id.* (describing how the German prosecutor is not an administrator trying to attain practical goals, but instead acts objectively in applying the provisions of the Penal Code to the facts of each case).

4. See John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 206-12 (1979) (describing the German way of trial as an effective truth-seeking framework).

5. Claus Roxin, *Zur Rechtstellung der Staatsanwaltschaft Damals und Heute*, 3 DRIZ 109, 113 (1997).

6. See, e.g., *supra* note 2 and accompanying text (discussing how a German prosecutor acts as a "second judge").

7. See STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT, Teil I [BGBl. I], § 296 (Ger.) [hereinafter STPO] (stating that both prosecution and defense counsel may file appeals on behalf of the accused).

8. See "Waldenburg" Training Materials (on file with the Washington and Lee Law Review) (stating that German prosecutors do not function as parties but they possess a duty to be objective and to ensure that justice is administered according to the law). Note: From 2004 through 2008, the author conducted field research in fourteen different prosecution offices in Germany. To protect the anonymity of the interviewees, fictitious place names and a numerical coding system have been used to identify documents and interviewees.

prosecutors lack the thirst for winning that their American colleagues display in the courtroom.⁹ As the chief of the investigation process, prosecutors function not as invested parties, but rather as objective truth-finders who are obliged to investigate the facts that weigh both in favor of, as well as against, a suspect's guilt.¹⁰

For decades, scholarship that described prosecutorial practice in Germany contended that the normative ideal of objective decision-making definitively shaped prosecutorial practice. In 1979, German legal scholar Klaus Sessar asserted that prosecutors' attention to the law, rather than pragmatic concerns about costs and efficiency, guided decisions to prosecute.¹¹ In a seminal article published in 1979, John Langbein boldly declared that Germany was the "Land Without Plea Bargaining."¹² Undoubtedly, part of this optimism in the law's efficacy stemmed from the civil law tradition's dogmatic belief that law was a science that could be applied methodically without political influence or interpretation.¹³

9. Because German prosecutors do not bear the burden of proof at trial, their role at trial is admittedly different than their American counterparts. See Langbein, *supra* note 4, at 208 ("Nonadversarial procedure recognizes no party burdens of proof. German law adheres to a standard of proof not materially different from our beyond-reasonable-doubt; but without the system of adversary presentation of evidence, there is no occasion to think of the 'prosecution case' The only burden is the court's.") In addition, the extent to which the nature of the adversarial system has shaped the trial practices of American prosecutors is open to debate. See WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIAL HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT 131–34 (1999) (showing how the American system values winning over truth-seeking). However, several prominent scholars have described American prosecutors as having this thirst when comparing them to their counterparts on the European continent. See, e.g., ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 83 (2001) (noting that American trials are much more susceptible to variability in the intensity of adversarial advocacy); PIZZI, *supra*, at 118 (proposing that the American criminal adjudication system is much more adversarial than other continental systems in that it encourages excesses of advocacy).

10. See STPO, *supra* note 7, § 160(2) (requiring the public prosecution office to reveal not only incriminating, but also exonerating, evidence). In addition, prosecutors possess the power to petition the court for an acquittal at the conclusion of a trial if they are not convinced that the evidence is legally sufficient to meet the standard of guilt; a prosecutor may also file an appeal on behalf of the accused. See *id.* § 296(2) (stating that the public prosecution office may also file an appeal for the benefit of the accused).

11. See Klaus Sessar, *Prosecutorial Discretion in Germany*, in THE PROSECUTOR 255, 255 (William F. McDonald ed., 1979) (stating that German prosecutors are more concerned with principles of law than with a pragmatic system that focuses on what can and cannot feasibly be prosecuted).

12. See Langbein, *supra* note 4, at 204–05 (discussing Germany's deliberate efforts to eliminate plea bargaining from criminal procedure).

13. Certainly, the development of the German concept of *Rechtstaat* or constitution-

Nevertheless, the sanguinity of German scholars regarding the ideals and orientation of the criminal justice system¹⁴ led reformers in Italy, Spain, South Korea, Latin America, and Japan to look to the German model for inspiration.¹⁵ The reputation of the German system did not escape notice by American scholars. For several decades, American scholars, seeking an antidote to the level of prosecutorial discretion and deal-making in the United States, praised the German model because it inculcated prosecutors with a truth-seeking lens and appeared to successfully limit prosecutorial discretion through the system's commitment to the bedrock principle of mandatory prosecution.¹⁶ That principle, which requires prosecutors to file charges in all cases in which sufficient evidence exists to believe that a crime has been committed, aims to ensure that prosecutors enforce the law in a uniform and nonarbitrary manner.¹⁷

based state and the concomitant desire to break with the destructive legacy of National Socialism also influenced the development of Germany's post-war legal scholarship. See Peter Graf Kielmansegg, *The Basic Law—Response to the Past or Design for the Future?*, in FORTY YEARS OF THE GRUNDGESETZ 5, 6 (Ger. Historical Inst. ed., 1990), available at <http://www.ghi-dc.org/publications/ghipubs/op/op01.pdf> ("There is general agreement that the Basic Law first and foremost is a reactive constitution. The past that had shaped the political outlook of the founding fathers and mothers had two faces: an ill-functioning, weak, and helpless democracy on the one hand and a cruel despotism on the other.").

14. This recognition extends to the theoretical structure of German criminal law, which Markus Dubber has described as "unparalleled in comprehensiveness and complexity." Markus Dirk Dubber, *The Promise of German Criminal Law: A Science of Crime and Punishment*, 6 GERM. L.J. 1049, 1051 (2005), available at http://www.germanlawjournal.com/pdfs/Vol06No07/PDF_Vol_06_No_07_1049-1073_Articles_Dubber.pdf.

15. See *id.* at 1054 ("As criminal law scientists, German professors traditionally have enjoyed significant influence on the doctrine of criminal law . . ."); Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective*, 12 INT'L CRIM. JUST. REV. 22, 30–48 (2002) (describing the similarities between the continental systems' curbing prosecutorial discretion, as compared to the American system).

16. See, e.g., Langbein, *supra* note 4, at 210–12 (explaining that the German system of compulsory prosecution does not alleviate the court of its truth-seeking duty even in the face of a guilty plea); see also KAGAN, *supra* note 9, at 232 ("[T]he need for intensely adversarial legal challenges would decline . . . if the United States emulated the more centralized judiciaries and prosecutorial organizations of European countries, with their . . . higher level of legal uniformity.").

17. See NIGEL FOSTER, GERMAN LEGAL SYSTEM & LAWS 214 (1996) ("The state attorney has a duty to prosecute offences under § 152 II. Where the decision not to investigate is taken, the victim has the right under § 172 et seq. to require the state attorney to investigate."); see also STPO, *supra* note 7, § 152(2) (stating the prosecutor's obligation, absent contrary law, to take action with regard to all prosecutable criminal offenses); *id.* § 172 (describing how individuals may compel the bringing of public charges).

More recently, the rising influence of legal scholarship that challenges the extent of the law's prescriptive force, coupled with changes in German prosecution practice, have raised the question of whether the prescriptive mandates that set forth the theory of prosecution practice actually shape practice on the ground.¹⁸ The extent to which German prosecution practice actually reflects the normative vision of objective fact-finding is an intriguing question. It is evident that, under the pressure of resource constraints, modern prosecution practice cannot meet the demands of the resource-intensive truth-finding process originally envisioned by Germany's post-war Code of Criminal Procedure.¹⁹ Most notably, during the past four decades, the increasing pressure of resource constraints have forced legislators to carve out ever larger exceptions to the principle of mandatory prosecution²⁰ and to grant prosecutors greater discretion in handling minor crimes cases.²¹

The development that has caused the greatest consternation among German legal scholars has been the growth of case settlement practices that were not formally sanctioned by statute but rather developed outside the boundaries of the formal law.²² While the Federal Constitutional Court (*Bundesverfassungsgericht*) acknowledged that the practice of negotiated settlements was not per se unconstitutional in 1987,²³ it was not until 2009

18. See, e.g., Thomas Weigend, *The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure*, in *CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT* 39, 44 (John Jackson et al. eds., 2008) ("[T]he times of full-scale trials for each case are long past. Today, a substantial part of criminal cases . . . are no longer resolved by trial . . . but on the basis of negotiations . . .").

19. See StPO, *supra* note 7, § 244 (establishing a process that culminates in a full presentation of evidence in a court proceeding); see also *id.* §§ 249, 252–60 (requiring that all of the evidence be presented orally in court).

20. See *id.* § 153(1) (granting prosecutors discretion to dismiss petty offenses without court approval if the minimum penalty is not subject to increase and the consequences ensuing from the offense are minimal).

21. See Sessar, *supra* note 11, at 256 (emphasizing Germany's efforts to eliminate prosecutors' discretion to prosecute through legislative definitions of what crimes should be punished); see also *infra* note 27 and accompanying text (listing ways in which prosecutors can use discretion to avoid bringing charges for petty offenses).

22. See Stephen C. Thaman, *Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases*, 11 *ELECTRONIC J. COMP. L.* 1, 43–44 (2007), available at <http://www.ejcl.org/113/article113-34.pdf> (tracing the evolution of plea-bargaining practices in Germany).

23. See Antonio K. Esposito & Christoph J.M. Safferling, *Report—Recent Case Law of the Bundesgerichtshof (Federal Court of Justice) in Strafachen (Criminal Law)*, 9 *GER. L.J.* 683, 702 n.68 (2008), available at http://www.germanlawjournal.com/pdfs/Vol09No05/PDF_Vol_09_No_05_683-710_Developments_Safferling.pdf (stating that a 1987 decision

that the legislature finally sanctioned the widespread practice.²⁴ The course of this practice-inspired change in the Code of Criminal Procedure ran sharply counter to the civil law tradition's circumscribed vision of the judicial role as well as the positivist vision of the nature of law itself.²⁵

These changes have prompted scholars to resoundingly criticize the growing gap between the inquisitorial ideal of a thorough fact finding and adjudication process and actual prosecution practice which has increasingly relied on practices that short-circuit that process.²⁶ In particular, scholars have criticized the growing ambit of prosecutorial discretion and the rise of negotiated settlements in so-called "minor" crime cases.²⁷ While there has always been some *spielraum* or wiggle room in the charging process, the increasing use of settlement agreements has critically weakened the prescriptive force of the principle of mandatory prosecution.²⁸ During my interviews with judicial officials, several judges at the appellate level, who do not face the same day-to-day workload pressures as prosecutors and trial court judges, joined in this criticism of prosecutorial practice.²⁹ In

of the Federal Constitutional Court held that plea-bargaining is basically not unlawful). In 1997, the *Bundesgerichtshof*, which is the highest court of appeals for criminal cases that do not involve constitutional issues, held that the Code of Criminal Procedure does not explicitly forbid sentencing agreements between the court and the parties. Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 28, 1997, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 43 (195), 1997 (Ger.).

24. See STPO, *supra* note 7, § 257c (laying out procedures, involving a confession by the accused, that would determine the outcome by agreement between the defendant, the prosecutor, and the court).

25. See Weigend, *supra* note 18, at 64 ("[T]he practice of negotiating for justice does not have a basis in law . . . or in procedural principle. Its basis is expediency only . . .").

26. See, e.g., *id.* at 39 (calling the change in Germany's criminal procedure a "decay of the inquisitorial ideal").

27. Volker Erb, *Absprachen im Strafverfahren als Quelle unbeherrschbarer Risiken für den Rechtsstaat*, in RECHT DER WIRTSCHAFT UND DER ARBEIT IN EUROPA: GEDÄCHTNISCHRIFT FÜR WOLFGANG LOMEYER 743, 743–58 (2004). Prosecutors now possess greater discretion in disposing of petty offenses without court action. See STPO, *supra* note 7, § 153 (describing situations when crimes of a minor nature may not be prosecuted, at the prosecutor's discretion). In cases involving less serious offenses, prosecutors, with the court's consent, may provisionally terminate proceedings subject to the condition that the defendant pays damages, makes a donation to a nonprofit organization, or performs other conditions. See *id.* § 153a (enumerating conditions that may be imposed instead of public prosecution).

28. See Weigend, *supra* note 18, at 54–56 (describing how settlement agreements in German criminal procedure undermine various protections previously afforded by the principle of mandatory prosecution).

29. See Interview with Appellate Judge-22FE (confidential interview) (July 22, 2004) (describing how more and more cases are ended by plea bargaining) (on file with the Washington and Lee Law Review).

particular, one appellate judge accused prosecutors of having adopted an "in and out box" mentality that privileges efficient file processing and case closing strategies at the expense of conducting an extensive investigation designed to discover the truth.³⁰ In the words of another appellate judge, "in the majority of low-level crime cases, prosecutors do the work of administration and not of justice—they get their papers signed and that is that."³¹

While scholars from systems that follow a common law tradition might be tempted to celebrate the demise of a system that was formally known as the "land without plea bargaining," the mandates established by law on the books in Germany have always set a standard that was primarily normative, if not mythological, in character.³² Even the prescriptive force of those norms have weakened in inquisitorial systems, while the adversarial vision of truth finding itself has fallen far short of its own truth-finding aspirations. There is extensive scholarship in the United States that criticizes prosecutors for abandoning their truth-seeking duties. William Pizzi, who derisively criticized the American system for producing "trials without truth," has alleged that a "conviction mentality" motivates prosecutors to privilege securing convictions over achieving justice.³³ Given that roughly 90% of cases are resolved through the use of plea bargains rather than trials, the vision of justice being settled by a jury of one's peers is one achieved more on television screens than in real life.³⁴ Struggling with high case loads and few resources, many public defenders lack the time and resources to mount a defense that might dislodge the coercive leverage that the state possesses in the plea negotiation process.³⁵

30. *See id.* ("If this would be my room, you would find furniture over there On one side you would find the remark 'entrance' and on the other side 'exit.' And this is the perspective of a good public prosecutor. That what is coming in now today has to be finished.").

31. Interview with Appellate Judge-13MU (confidential interview) (Apr. 10, 2004) (on file with the Washington and Lee Law Review).

32. Thomas Weigend, Remarks at the Washington and Lee Law Review Symposium, Prosecutorial Power: A Transnational Workshop (Apr. 2, 2010).

33. *See PIZZI, supra* note 9, at 221 ("A strong trial system has to place a high priority on truth Our trial system does not do this and, as a result, our trials lack focus.").

34. *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 50 (1968) ("Today, roughly ninety per cent of all defendants convicted of crime in both state and federal courts plead guilty . . .").

35. *See, e.g., id.* at 100 (describing how in Cleveland, Ohio, prosecutors and judges facilitate overcharging to coerce defendants into pleading guilty); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1985 (1992) (noting that innocent defendants can be coerced to plead guilty to avoid the risk of a hefty sentence).

The nature of the challenges facing both criminal justice systems underscores the critical role that prosecutors play in the "truth-finding" process. Thus, despite the fact that prosecutorial discretion in Germany has increased and that the principle of mandatory prosecution has lost much of its force,³⁶ it is worthwhile to examine what it means for prosecutors to function objectively in a system where success is not measured in terms of trial victories. Understanding German prosecution may further our understanding of the prosecutorial function, insofar as German prosecutors seek to honor their normative mandate to investigate and prosecute cases through a lens of objectivity. To the extent that prosecutors are not driven by political considerations or the desire to win, it is important to understand what factors shape the evidence-gathering and prosecution processes, as well as how those factors shape criminal justice outcomes.

Despite these criticisms, many of the core features and underlying normative assumptions of Germany's inquisitorial criminal justice system remain in place.³⁷ While it is true that the pressure of high caseloads and limited resources have encouraged prosecutors and courts to pursue negotiated settlements in many minor crime cases, statutory restrictions ban the use of "confession agreements" in major crime cases.³⁸ Charges in cases involving premeditated murder, for example, may not be negotiated downwards as they may be in the United States.³⁹ Given these restrictions, it is worth examining whether or how German prosecutors interpret their duty to function objectively and translate that duty into trial practice.⁴⁰

36. German scholars, in particular, have criticized the extent to which the German criminal justice system has deviated from the coveted principle of mandatory prosecution. See, e.g., Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 272-76 (1977) (describing various ways in which the principle of mandatory prosecution is not wholeheartedly implemented); John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1569 (1977) (acknowledging that summary procedures have been used to dispose of a large number of cases in France and Germany).

37. See Langbein & Weinreb, *supra* note 36, at 1563 (combating critics of the German mandatory prosecution rule for not pointing to a case that shows the impotence of the rule).

38. See STPO, *supra* note 7, § 153 (allowing prosecutors discretion only with regard to petty crimes). Admittedly the list of crimes included in the German category of "minor crimes" is an expansive one that includes some crimes that are considered to be felonies in the United States. See, e.g., Weigend, *supra* note 18, at 47 (suggesting that in Germany the crime of extortion may be mitigated to a lower sentence in plea bargaining).

39. See Interview with Appellate Judge-22FE, *supra* note 29 (noting that there is an absolute punishment of fifteen years imprisonment for murder, which may not be bargained down).

40. Given the differences in the procedural posture of adjudicatory hearings in

While recent critics have derided the use of confession agreements to short-circuit the truth finding process,⁴¹ it may be short-sighted to conclude that the use of those agreements has undermined prosecutors' commitment to objectivity in major crimes cases. More specifically, the simple rise in the numbers of confession agreements tells us little about the stance that prosecutors take in the court room and whether and how their daily decision-making reflects a commitment to viewing the evidence from an objective standpoint.⁴²

While prior research studies of the German prosecution function have emphasized how bureaucratic organizational practices have shaped the prosecutorial behavior during the case investigation stage, those studies shed little light on prosecutorial decision-making in the courtroom.⁴³ In particular, the bulk of the research that explores prosecutorial decision-making processes focuses on the mass processing of low-level crime cases where case-closing strategies are said to reflect bureaucratically constituted decision practices.⁴⁴ This research argues that bureaucratic practices undermine prosecutors' application of the principle of legality, as prosecutors, besieged with a crushing case load, must adopt efficient strategies to close cases.⁴⁵ While this research has broken important ground, it not only fails to explain what happens in the courtroom, but it also ignores prosecutorial practice in major crime cases.

This Article explores that gap. In particular, I examine the decisions that prosecutors make in the courtroom and argue that how prosecutors both view and perform their duty to function as second judges impacts the outcome of the truth-finding process. Using data gathered from interviews and participant observation studies, I show how consensual decision-

Germany, I refer to these hearings as "main proceedings," which is a rough translation of the German term for those hearings, throughout the rest of this Article.

41. See Weigend, *supra* note 18, at 54 (describing how a proposed draft of Section 257c of the StPO would allow the court to consider procedural conduct—namely, whether to accused confessed—when determining the sentence).

42. See *id.* at 47–53 (describing the origins and growth of the practice of plea bargaining in German criminal trials).

43. See Hans-Joachim Asmus, *Der Staatsanwalt—ein bürokratischer Faktor in der Verbrechenskontrolle?*, 17 ZEITSCHRIFT FÜR SOZIOLOGIE 117, 117–31 (1988) (describing the bureaucratic elements of prosecution practice).

44. See *id.* at 118 (describing several studies that argue that prosecutors' relationships are bureaucratically motivated).

45. See E. BLANKENBURG ET AL., DIE STAATSANWALTSCHAFT IM PROZESS STRAFRECHLICHER SOZIALKONTROLLE 313–19 (1978) (arguing that the prosecution service performs a case settlement function that reflects pragmatic considerations).

making norms often determinatively shape both the nature and rigor of the truth-finding process. The bulk of the article traces and analyzes the role played by prosecutors in three sexual assault trials. By closely examining decision-making at trial, I show how prosecutors translate their duty to view the evidence objectively into a myriad of observable courtroom practices.⁴⁶

Rape cases offer us a unique lens through which to view the nature of objectivity. Prosecutors in both adversarial and inquisitorial systems play a gate-keeping role.⁴⁷ Through their discretionary decision-making, prosecutors determine what claims will proceed to trial.⁴⁸ In the context of rape cases, that role is particularly contested. The trajectory of a rape case is strongly shaped by the prosecutor's appraisal of witness credibility.⁴⁹ Because the crime of rape typically occurs in private, the search for truth often focuses on the testimony of the victim and the suspect.⁵⁰ In cases in which the physical evidence is inconclusive, a prosecutor's assessment of witness credibility is often dispositive.⁵¹

In the United States, a large percentage of reported rape cases never reaches the trial stage.⁵² Many victims of rape never report the crime out of fear of being stigmatized by the "fact-finding" process and facing hostility from the police, prosecutors, and juries.⁵³ Prosecutors are often reluctant to

46. I observed these trials during an extended period of field research conducted in Germany between 2005 and 2008. I supplement discussion of those cases with material drawn from my interviews of over one hundred prosecutors, as well as fifty interviews with judges, defense attorneys, and ministry officials conducted during that same period.

47. See Herrmann, *supra* note 2, at 24 (noting that German prosecutors can decide when to bring a charge by deciding whether or not there is sufficient evidence for a conviction and contrasting American prosecutors' wide discretion to bring cases to the relatively strict restraints on discretion in the German criminal system).

48. See *id.* at 23–28 (describing circumstances in which prosecutors may exercise discretion to not pursue charges).

49. See SUSAN ESTRICH, REAL RAPE 19 (1988) (noting that the factors in whether a prosecutor dismisses or downgrades a rape case are whether the prosecutor finds the victim's testimony plausible and whether her account can be corroborated).

50. See *id.* at 43 (stating that a major impediment to the disposition of rape cases is a fundamental distrust of the victim which in turn makes corroboration of testimony difficult).

51. See *id.* at 42 ("[T]he absence of corroborating evidence was most critical where the case turned on questions of attitude . . . or where the woman's story was considered incredible or inculpatory.").

52. See David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1210–12 (1997) (noting the "striking" rape case attrition rates may be a product of "institutionalized sexism" and the "judgmental policies" of police and prosecutors, but arguing that victims' decisions not to prosecute and the criminal justice system's screening of faulty cases are among other diverse factors at work).

53. See ESTRICH, *supra* note 49, at 1–5 (describing common deterrents faced by rape victims in the U.S., including reluctant police and prosecutors, heightened evidence

file charges in rape cases and even less likely to bring those cases to trial unless there is a high certainty that a jury will return a guilty verdict.⁵⁴ Those cases that do proceed to trial may be motivated by political reasons.⁵⁵ In the absence of compelling physical evidence, rape cases may be difficult to prosecute given that the crime often occurs in private and the issue of consent is often contested.⁵⁶

At first blush, one might expect that German prosecutors, who do not view their role in adversarial terms, would be less gun-shy about filing rape cases than their American counterparts. The fact that professional judges, rather than lay juries, dominate the fact-finding process would seem to make the process less intimidating for victims.⁵⁷ Moreover, rape victims in German courts need not struggle to conform their testimony to the strict evidentiary guidelines that bind testimony given in American courts.⁵⁸ Witnesses in German courts may speak in a narrative form, which would be considered unresponsive in American courtrooms.⁵⁹ Additionally, because German law allows victims the right to be represented by a collateral

standards in certain jurisdictions, and juries' knee-jerk suspicions of victim complicity).

54. See *id.* at 8–9 (characterizing one prosecutor's refusal to prosecute an acquaintance rape as a typical prosecutorial response to rape scenarios not guaranteed of a conviction).

55. One need look no further than the recent "Duke Lacrosse scandal" for evidence that prosecutors, motivated by potential political gain, have deviated from their truth-finding missions. See, e.g., Lenese Herbert, *Prosecutorial Discretion Meets Disaster Capitalism*, in RACE TO INJUSTICE: LESSONS LEARNED FROM THE DUKE LACROSSE RAPE CASE 211, 226 (Michael L. Seigel ed., 2009) (characterizing prosecutor Mike Nifong as a "disaster capitalist" who abused prosecutorial discretion for short-lived political gain). The structure of the German system also suggests that the hurdles to convictions in rape cases might be less significant.

56. See Bryden & Lengnick, *supra* note 52, at 1316–17 (noting the government's burden of proving nonconsent beyond a reasonable doubt, often in sole reliance on the victim's uncorroborated testimony, is the "essential practical difficulty" in prosecuting acquaintance rape—by far the most common form of rape).

57. See *id.* at 1196 ("[T]he [American] system puts the victim rather than the defendant on trial. Juries, motivated by the same biases as other participants in the system, often blame the victim and acquit the defendant.").

58. See William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 42–43 (1996) (arguing German courts' preference for narrative testimony arises from the civil law notion that "relevant evidence should be obtained in as near to its original form as possible," as well as a systemic optimism that "factfinders will be able to separate the more probative from the irrelevant evidence").

59. See *id.* ("[I]t is not unusual for a witness at a German criminal trial to mention something that would bring an immediate objection in an American courtroom—perhaps because it is hearsay, contains an opinion, or is not directly relevant . . . , and may even be prejudicial to the defendant.").

prosecutor (*Nebenklager*) at trial, one would expect that victims' rights would be more protected than in a system in which no lawyer is appointed to protect the victim's specific interests.⁶⁰ Given these procedural differences, one would expect German courtrooms to be friendlier to rape victims and, as a result, victims to be more willing to report the crime and cooperate in the prosecution.

Thought experiments do not tell us how German prosecutors wrestle with conflicting evidence and assess witness credibility in the courtroom.⁶¹ Key questions remain. How do German prosecutors translate their duty to be objective in rape cases that go to trial? Do they ask the court to acquit a suspect when they doubt the victim's credibility?

By examining prosecutorial decision-making during rape trials, we can understand more fully how German prosecutors interpret their duty to view the evidence objectively and how their function as a "second judge" shapes their decision-making at trial. Moreover, by examining prosecutorial decision-making in cases in which the credibility of the victim, witnesses, and defendant is extremely contested, we are afforded a unique window into the truth-finding role of a German prosecutor. It is my contention that, in cases in which the facts are particularly uncertain, consensual decision-making norms between prosecutors and judges drive prosecutorial behavior.

German legal scholarship of the twentieth century postulated that prosecutors would function as second judges who weigh case facts like detached legal scientists.⁶² In this Article, I challenge that idealized picture of technocratic decision-making. I argue that prosecutors possess wide flexibility at trial in applying "objective" legal standards and

60. See *id.* at 59 (observing how the *Nebenklage* system's unique advantages have led to widespread participation, in allowing sexual assault victims to enjoy a level of involvement commensurate with their personal stake in the proceeding).

61. While there can be numerous problems with comparing statistics from different criminal justice systems, a recent study, funded by the European Commission's Daphne II Programme, found that German conviction rates for rape in 2006 ranked in the mid-range of European countries. See JO LOVETT & LIZ KELLY, DIFFERENT SYSTEMS, SIMILAR OUTCOMES?: TRACKING ATTRITION IN REPORTED RAPE CASES THROUGHOUT EUROPE 21 (2009), http://cwasu.org/publication_display.asp?pageid=PAPERS&type=1&pagekey=44&year=2009 (last visited Oct. 27, 2010) (ranking Germany's rape conviction rate near the bottom of the group of European countries, with a "mid-range" conviction designation) (on file with the Washington and Lee Law Review).

62. See, e.g., Hans-Heinrich Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508, 516 (1970) (characterizing the office of the German prosecutor as a "judicial agency" with "restricted power limited to particular situations").

determining what constitutes justice. While the law may play a role in creating courtroom procedures that produce a commitment to prosecutorial objectivity at a ritual-like level, I argue that the degree of an individual prosecutor's commitment to the performance of objectivity is shaped by institutional and individual-level factors. The face of objectivity is constructed through a series of work practices that begins with the investigation of a complaint and proceeds to the end of the appellate stage. Because a prosecutor makes decisions and undertakes actions while embedded in an organization, a prosecutor's ability to function in an objective manner is driven not only by the individual's mindset, but perhaps more importantly by organizational norms, practices, resources, and inter-institutional relationships.

In Part I, I introduce the reader to the basic function and structure of the German prosecution service. In Part II, I discuss the importance of the prosecutor's relationship with the presiding judge in the main proceeding and suggest three different stances that prosecutors may take during the main proceeding vis-à-vis the presiding judge. Drawing on interview data and participant observation studies of German prosecutors, I argue that any prosecutor's definition of objectivity is constructed through his or her own daily decision-making practices and is "situationally contingent." In Part III, I draw on participant-observation studies of three different main proceedings to show how these different relational stances between the prosecutor and the court shape the construction of objectivity. Finally, in the paper's conclusion, I argue that, while the law creates and partially defines the duty of objectivity, prosecutors interpret and enact the full meaning of objectivity through their daily decision-making.

II. The German Prosecution Function

A. Institutional Position and Role

The mindset that German prosecutors bring to their decision-making is a product of the criminal justice system's institutional structure, the designated function that prosecutors perform within that structure, and the key statutory precepts that seek to guide their decision-making. The original conception of the prosecution service that developed in the mid-nineteenth century envisioned that prosecutors would supervise the investigation process and serve as "second judges" during the criminal

proceedings.⁶³ The liberal reformers who created the Prussian prosecution service believed that by transferring responsibility for the investigation process to the prosecution service, this two-judge structure would diminish the conviction mentality that judges and the police acquired during the investigation.⁶⁴ This institutional change mirrored other changes throughout Europe which transformed the search for truth from "unilateral inquiries into a sort of collective enterprise."⁶⁵ Thus, although German prosecutors' primary functions are to supervise the investigation process and determine whether criminal charges should be initiated, from a systems perspective, their role is to enhance the "neutrality of the official search for truth."⁶⁶

Despite the apparent similarities between the prosecutorial charging function in the two systems, key provisions in the German Code of Criminal Procedure define the prosecution's intentionally "judicial"—rather than "adversarial"—character and attempt to prescribe standards of conduct that aim to shield prosecutorial decision-making from political influence.⁶⁷

63. See John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 449 (1974) (noting the German prosecutor's functions were extracted from the former duties of the "all-powerful" Prussian inquisitorial judge and therefore retained a "continuing judicial character").

64. See Peter Collin, *Die Geburt der Staatsanwaltschaft in Preußen*, FORUM HISTORIAE IURIS, Mar. 12, 2001, at ¶¶ 23–24, http://www.forhistiur.de/index_en.htm (last visited Nov. 16, 2010) (describing the concerns of liberal reformers about judicial investigations) (on file with the Washington and Lee Law Review).

65. Elisabetta Grande, *Dances of Criminal Justice: Thoughts on Systemic Difference and the Search for the Truth*, in CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT 145, 154 (John Jackson et al. eds., 2008).

66. *Id.*

67. Chief among the provisions designed to limit discretion is the famous "legality principle" (*Legalitätsprinzip*), often referred to as the "principle of mandatory prosecution." This principle, which requires that prosecutors file charges in all cases in which sufficient evidence exists to indicate guilt, has been the bedrock of German prosecutorial practice. Leading legal reformists of the late nineteenth century believed that adopting the principle would help prevent the state from interfering in the administration of justice by binding decision-makers to following codified precepts. See Mirjan Damaška, *The Reality of Prosecutorial Discretion: Comments on a German Monograph*, 29 AM. J. COMP. L. 119, 125 (1981) (attributing the principle's emergence to a "liberal ideology" that championed set prosecutorial guidelines as an antidote to inappropriate charging decisions). The inclusion of the principle of legality in the Code came in response to the Prussian experience with a prosecution corps that had exploited its freedom to define which cases should be prosecuted on public interest grounds by leveling charges against the regime's political opponents. See *id.* (noting the significance of mistrust in the prosecutors' offices during the "turbulent years of 1848–1849"). Consistent with Germany's civil law tradition, lawmakers viewed the charging decision as the logical conclusion of a decision-making process in which a legal scientist classified facts within the correct legal categories. See *id.* (describing the

Consistent with their normative role as guardians of the law, the chief obligation of prosecutors is to ensure that the investigation process is conducted fairly.⁶⁸ To this end, prosecutors are charged with the responsibility to gather both inculpatory and exculpatory evidence against a suspect during the investigation phase of a proceeding.⁶⁹ As Dr. Jescheck stated, "[T]he prosecutor is placed in a position which obligates him as much to protect the accused as to come forward against him."⁷⁰ After an investigation is complete, prosecutors send the investigation file to the court to determine whether enough evidence exists to open a main proceeding.⁷¹ Like their American counterparts, German prosecutors possess a monopoly over the criminal charging function.⁷²

Consistent with their function as "second judges," prosecutors do not present a case against the defendant during the main proceeding.⁷³ Unlike an adversary proceeding, in which prosecutors bear the evidentiary burden of presenting evidence against the accused, in a German courtroom, the presiding judge bears the responsibility of conducting the hearing, examining the defendant, and taking evidence.⁷⁴ If the court decides that

reformers' belief that "charging decisions . . . should never be grounded on equitable or policy reasons, but remain solely a matter of legal sufficiency"). The criminal process itself was viewed as a "decision involving correct subsumption under legal categories." *Id.* at 125.

68. See Jescheck, *supra* note 62, at 510–11 ("The prosecutor as guardian of the law should be empowered to operate from the beginning in the proceedings against the accused in such a manner that the law is satisfied in all ways." (internal quotation marks omitted)).

69. See STPO, *supra* note 7, § 160 (directing the public prosecution office to consider incriminating and exculpatory evidence, as well as any other circumstances that might impact the legal consequences of the act).

70. Jescheck, *supra* note 62, at 511.

71. See STPO, *supra* note 7, §§ 199, 200 (requiring the prosecutor to submit to the competent court, along with his application to open main proceedings, the investigation file and a bill of indictment identifying the charges, the relevant law, the evidence, the witnesses, and the investigation results).

72. See *id.* § 152(1) (granting the *Staatsanwaltschaft* a monopoly over the preferment of public charges).

73. See *id.* §§ 243, 244 (stating the prosecutor's responsibility is to read the charges and the legal assessment on which the application to open a main proceeding was based, after which the court assumes responsibility for examining the defendant and taking evidence).

74. See *id.* § 238(1) (outlining the judicial function in the main proceeding). At the *Amtsgericht* level, a single judge is in charge of the proceedings. See GERICHTSVERFASSUNGSGESETZ [GVG] [COURTS CONSTITUTION ACT], Sept. 12, 1950, BUNDESGESETZBLATT [BGBL.] I, as amended, §§ 24, 25 (Ger.) [hereinafter GVG] (granting jurisdiction to a single judge at the local *Amtsgericht* level over minor criminal matters). The *Schöffengericht* level utilizes a panel of one professional and two lay judges. See *id.* §§ 28, 29 (providing for the organization of three-judge panels in the local courts to hear

sufficient evidence exists to hold such a proceeding, it is the court that controls how to structure the presentation of evidence.⁷⁵ When each witness is called to the stand, the judge or panel of judges will initiate the questioning and then inquire whether the prosecutor and the defense attorney have additional questions.⁷⁶ Consistent with the prosecutor's obligation to be objective, a prosecutor may present evidence that favors the accused.⁷⁷ At the close of the presentation of evidence, the prosecutor will summarize the evidence for and against the defendant and recommend a specific disposition given his or her factual and legal appraisal of the case.⁷⁸ In accord with their duties under the principle of legality, prosecutors are free to recommend that the court acquit a suspect.⁷⁹

Under German law, the sentencing hearing is not a separate proceeding.⁸⁰ Instead, at the conclusion of the presentation of evidence, the

cases involving potential sentences of up to four years imprisonment). At the *Landgericht* level, there is typically a panel of three professional judges and two lay judges. *See id.* §§ 74–76 (establishing the *Landgericht* criminal division panels and granting jurisdiction over most serious criminal offences). The judge will read the investigation file compiled by the prosecution office and use that file to determine whether there is enough evidence to open a main proceeding. *See* STPO, *supra* note 7, § 199 (directing the prosecutor to submit his dossier for the court's review along with the application for a main proceeding).

75. Although the prosecution service compiles a written case file that includes the investigation results, the case file itself is not evidence. *See* STPO, *supra* note 7, § 250 (requiring any proof of fact based on a witness' observation to be ascertained by the court's examination of that witness in court); *see also* JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 67 (1977) ("The effect of STPO § 250 is to reduce the pretrial dossier to a subsidiary role."). As a general rule, the court may not rely on the file in reaching its judgment. *See id.* (observing a primary purpose of this requirement is to insulate the judge from "prosecutorial bias"). To attain evidentiary status, information must be presented orally in court. *See id.* (likening this "orality principle" to the hearsay rule in the American system).

76. *See* STPO, *supra* note 7, § 240 (requiring the presiding judge to permit associate judges, defense counsel, and prosecutors to question any defendant, witness, or expert).

77. *See supra* note 62 and accompanying text (noting the prosecutor's duty of objectivity requires him to protect the accused when warranted); *see also* FOSTER, *supra* note 17, at 222 ("[T]he state attorney has a very minor role in the main trial and is bound to seek justice rather than convictions. As such he is under a duty to raise an objection if the court commits an error that is detrimental to the accused").

78. *See* STPO, *supra* note 7, § 258(1) (providing for closing arguments by the prosecutor and defendant); *see also* RICHTLINIEN FÜR DAS STRAFVERFAHREN UND DAS BUßGELDVERGAHREN [RiStBV] [GUIDELINES FOR CRIMINAL AND FINE PROCEEDINGS] §§ 138, 139 (describing the procedures that prosecutors should follow when they argue for an acquittal).

79. C.H. BECK, *KARLSRUHER KOMMENTAR ZUR STRAFPROZESSORDNUNG* § 258 n.8 (Rolf Hannich et al. eds., 6th ed. 2008) (noting that a prosecutor must judge the evidence like a judge at the close of the trial).

80. *See* STPO, *supra* note 7, § 160 (requiring the court to terminate the main hearing

judge or judges will adjourn to deliberate simultaneously about the verdict and sentence.⁸¹ Perhaps the most striking difference between American and German prosecution practice is that, in contrast with American practice, the majority of German prosecutors do not regard convictions as victories and acquittals as losses.⁸²

B. Organization

Germany's prosecution offices, as well as its court system, are organized on the state or *Länder* level⁸³ and are subsumed within the state-level Ministries of Justice.⁸⁴ While the Minister of Justice at the state level

by announcing its final judgment following the deliberations).

81. Both prosecutors and defense attorneys may challenge a local court's (*Amtsgericht* or *Schöffengericht*) factual and legal findings. *See id.* § 296 (stating both the prosecution and the accused are entitled to appeal a defendant's conviction and sentence). If the district court (*Landgericht*) agrees to hear the appeal, a de novo proceeding occurs. *See id.* § 323, 324 (providing for witnesses to be recalled, defendants re-examined, and new evidence admitted for consideration). The *Amtsgericht* level includes two "first instance" venues for cases involving adults. *See* GVG, *supra* note 74, §§ 24, 25 (stating the jurisdiction of the *Amtsgericht* courts over lesser criminal matters). A local criminal judge (*Strafrichter*) sitting alone can hear cases involving a possible criminal sanction of up to two years imprisonment. *See id.* (granting jurisdiction to the local criminal judges over minor offenses). The *Schöffengericht*, a three-judge panel in the local court, is competent to hear cases involving a potential sentence of up to four years imprisonment. *See id.* §§ 28–30 (stating a *Schöffengericht* panel consists of two lay judges presided over by one professional judge). Cases with potential sentences of four or more years imprisonment—as well as any others of special significance that the prosecutor deems appropriate for resolution in district court—begin at the *Landgericht* level. *See id.* §§ 24, 74 (enumerating the criminal offenses over which the district court has original jurisdiction).

82. *See* Damaška, *supra* note 67, at 131 (noting that a prosecutor's failure to secure a conviction carries less stigma in Germany because the system may favor bringing charges even when the prosecutor is not certain of a conviction).

83. From here forward, I use the word "state" as a substitute for the German term *Länder*, while acknowledging that, although Germany possesses a federal system like the United States, the distribution of power between federal and state entities differs.

84. There is also a smaller federal prosecution office known as the *Bundesanwaltschaft*. The primary mandate of the Federal Prosecutor General (*Generalbundesanwalt*) and his staff is to represent the Federation before the Federal Court of Justice. *See* GVG, *supra* note 74, § 142(1) (granting exclusive jurisdiction over cases in the Federal Court of Justice to the *Bundesanwaltschaft*). Otherwise, their jurisdiction is limited to prosecuting serious offenses implicating national interests (e.g., treason or terrorism). *See id.* § 142(a) (detailing additional matters within the federal prosecutors' domain). The *Länder* prosecution services represent the Federation at the *Amtsgericht*, *Landgericht*, and *Oberlandesgericht* (Higher Regional Court) levels. *See id.* §§ 142(2), (3) (delegating local, district-level, and regional responsibilities to the public prosecutors).

is a political appointee, appointed by the state's Minister-President, prosecutors are career civil servants, who are protected from arbitrary dismissal after they complete a period of probationary service.⁸⁵ Because the prosecution service's structure is relatively flat, the decision-making practices that occur at the bottom of the organization determine the extent to which those practices mirror the system's theoretical assumptions.⁸⁶ Despite the fact that the prosecution service possesses a strong hierarchical structure on paper, in practice, German prosecutors possess a great deal of decision-making authority.⁸⁷ This authority stems from the flat organizational structure,⁸⁸ the protection of lifetime employment,⁸⁹ increasing workloads;⁹⁰ and a new, independent mindset found in young prosecutors that have entered the service since the 1970s.⁹¹

85. See *infra* note 89 and accompanying text (discussing prosecutors' employment protections); see also Hans-Heinrich Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, 56 VA. L. REV. 239, 245 (1970) (describing the public prosecution office as a hierarchy agency staffed by career civil servants). An exception to that rule exists in four states, where the office of General Public Prosecutor (*Generalstaatsanwalt*) is filled by a political appointee who serves at the pleasure of the Minister of Justice. Regardless of that fact, all prosecutors at the state level are members of a hierarchically ordered bureaucracy.

86. See *e.g.*, MICHAEL LIPSKY, *STREET LEVEL BUREAUCRACY* xiii (1980) (arguing that front-line workers work in a "corrupted world of service" in which work habits and attitudes reflect the practical realities of the position).

87. See Erhard Blankenburg & Hubert Treiber, *The Establishment of the Public Prosecutor's Office in Germany*, 12 INT'L J. SOC. L. 375, 375 (1985) (noting that the 1975 amendments to the Code of Criminal Procedure expanded considerably public prosecutors' autonomy).

88. This flat structure reflects the judicial service's desire to preserve prosecutors' independent decision-making authority. See Interview with Prosecutor-9BU (confidential interview) (May 4, 2005) (noting the reason that the prosecution service has fewer career steps than the administration is to encourage independence) (on file with the Washington and Lee Law Review).

89. Once prosecutors satisfactorily complete a two to three year probationary period (*Probezeit*), they cannot be fired unless they commit a serious criminal offense. See Interview with Prosecutor-5BC (confidential interview) (Jan. 16, 2006) (describing the rigid, bureaucratic nature of the *Staatsanwaltschaft*, the difficulty of securing advancement, as well as the rarity of demotion) (on file with the Washington and Lee Law Review).

90. See *id.* (observing excessive caseloads affect the public prosecution offices in many ways, such as creating significant prosecutor autonomy).

91. See Interview with Appellate Judge-13MU, *supra* note 31 (describing the young prosecutors' movement in the 1970s to revitalize the prosecutorial corps through an ethos of self-confidence and independence, as well as through their superior quality of work); see also MODERNE STAATSANWALTSCHAFT: NOTWENDIGE REFORMEN STAATSANWALTSCHAFT UND POLIZEI 8 (1975) (arguing that prosecutors should abandon a culture of obedience).

At the local office level, the flat organizational structures are staffed primarily with prosecutors holding the title of prosecutor (*Staatsanwalt*) or supervising prosecutor (*Oberstaatsanwalt*).⁹² Offices are directed by a Chief Office Prosecutor (*Leitende Oberstaatsanwalt*) and managed on the departmental level by the supervisory prosecutors.⁹³ The chief office prosecutor possesses the authority to issue instructions to prosecutors handling individual cases and may strictly oversee all of the department managers.⁹⁴ The degree of individual decision-making discretion varies from office to office and reflects the leadership style of each office's chief prosecutor.⁹⁵ Despite wide variations in management style, with respect to the vast majority of their cases, individual prosecutors exercise a moderate degree of decision-making room.⁹⁶

Despite the fact that prosecutors possess more decision-making discretion than ever before, their decisions are still not completely autonomous because prosecutors remain embedded in institutions with norms, expectations, and resource constraints.⁹⁷ As with many bureaucratic organizations, there are internal guidelines that define case-handling procedures.⁹⁸ The degree of prosecutors' adherence to those guidelines varies from office to office.⁹⁹ The most important factor shaping prosecutors' daily choices is not a set of written guidelines, but rather the informal traditions of practice communicated from colleague to colleague.¹⁰⁰ This communication takes place not in formal office meetings

92. See FOSTER, *supra* note 18, at 99–100 (describing the organization of the prosecution offices).

93. *Id.* at 100.

94. See, e.g., Interview with Prosecutor-13WT (confidential interview) (Dec. 6, 2005) (noting that the chief office prosecutor will be involved in most serious cases and will participate in preparing a report to the state Ministry of Justice) (on file with the Washington and Lee Law Review).

95. I found support for this statement in the course of conducting numerous interviews in fourteen different prosecution offices.

96. See, e.g., Interview with Prosecutor-5BC, *supra* note 89 (noting subordinate prosecutors are responsible for their own decisions and only consult superiors when making difficult decisions regarding dismissals (*Einstellung*)).

97. See *id.* (noting that cases are not always resolved quickly because of bureaucratic restraints).

98. See, e.g., Interview with Prosecutor-13WT, *supra* note 94 (explaining an internal memo (*Anweisung*) from the Ministry dictating protocol for case assignments).

99. See, e.g., Interview with Prosecutor-18UE (confidential interview) (June 24, 2004) (observing that a guideline would give him an overall objective but would not "tie [his] hands in individual cases") (on file with the Washington and Lee Law Review).

100. In their first six months on the job, new prosecutors consult with their supervisors

but in informal coffee "meetings" held each morning between colleagues.¹⁰¹ At these "coffee meetings" amongst discussions of office gossip and social plans, prosecutors discuss cases and try to come to a common point of view on matters such as charging decisions and sentencing recommendations.¹⁰² The case-related conversations at these meetings offer a forum for exchanging information on office practices that are not found in code books or formal guidelines.¹⁰³ Coffee breaks are an important mechanism promoting organizational cohesion and education in prosecution offices.¹⁰⁴ The meetings cut down on the isolation of prosecutors working in large, bureaucratic organizations and represent a key horizontal means of communication in an organizational structure that appears very hierarchical on paper.

The informal transmission of these decision-making norms also helps prosecutors recognize decision-making boundaries. While an individual prosecutor may be free to make a decision outside those boundaries, in so doing, the individual risks making a decision that may be tougher to defend to the court or to a supervisor.¹⁰⁵ In this way, the coffee meetings serve as a vehicle for transmitting knowledge of organizational practices as well as a

often, as the supervisor must approve every written instruction that a new prosecutor writes. See Interview with Prosecutor-13WT, *supra* note 94 (recalling close supervision by his chief office prosecutor in the initial months of employment). It is through this process of consultation with their supervisors and colleagues that new prosecutors learn not only the language of writing instructions but also the standard decision-making practices employed by prosecutors in the office. See *id.* (noting the constructiveness of frequent discussions with his chief prosecutor, colleagues, and police regarding ongoing cases). The initial supervisor who signs off on a prosecutor's instructions in their first six months on the job plays an instrumental role in helping to build the body of tacit knowledge that a new prosecutor needs to perform the job. See *id.* (noting the constructiveness of frequent discussions with his chief prosecutor, colleagues, and police regarding ongoing cases).

101. See Interview with Prosecutor-5BC, *supra* note 89 (noting one department leader's (*Abteilungsleiter*) view that coffee meetings are important in providing young prosecutors with opportunities to trade opinions about cases).

102. See Interview with Prosecutor-4GG (confidential interview) (Jan. 30, 2006) (stating that prosecutors use their coffee break discussions to arrive at a "common understanding" regarding judges and case decisions) (on file with the Washington and Lee Law Review).

103. See *id.* (observing that an atmosphere of collegiality and mutual assistance characterizes these meetings).

104. See *supra* note 102 and accompanying text (noting a cohesion benefit from coffee breaks); see also *infra* note 106 and accompanying text (noting the educational benefits from such meetings).

105. See Interview with Prosecutor-18UE, *supra* note 99 (relating one prosecutor's view that a "good prosecutor" is one who displays "some initiative" but is not "too independent").

mechanism that enhances decision-making conformity.¹⁰⁶ The informal communication between prosecutors creates a temporal link between different generations of prosecutors as local practice norms are communicated to new prosecutors.¹⁰⁷ As one prosecutor described:

[T]his is typical what I do [every day], as you saw today at 10:00 o'clock I go to the *Kaffeerunde* [coffee circle]. As you saw today, it is very funny, the young prosecutors, we have a lot of fun there. We can discuss our files where we have problems where you have the general question and you hear all the news in the office.¹⁰⁸

The reference points provided by these collegial discussions impact how a prosecutor handles a case in court. Because of scheduling practices, the prosecutor who directed the investigation may not be the prosecutor who handles the case at trial.¹⁰⁹ In this circumstance, the prosecutor assigned to handle the main proceeding will be more likely to consult the prosecutor who investigated the case prior to trial to get his or her perspective of the case and the recommended sentencing range.¹¹⁰ For example, in the *Rosenberg* case, discussed later in this Article, the trial prosecutor came from the environmental crimes department.¹¹¹ In making his sentencing recommendation, he deferred to his colleague's recommendation.¹¹² A courtroom prosecutor who fails to consult his or her colleague risks damaging a collegial relationship. One young prosecutor from the sexual crimes department recalled a prosecutor from the office's

106. See Interview with Prosecutor-13BC (confidential interview) (Dec. 12, 2005) (attributing some consistency in case-related decisions to the informal education of novice prosecutors by other young prosecutors with greater experience) (on file with the Washington and Lee Law Review).

107. See Interview with Prosecutor-13WT, *supra* note 94 (describing the value of a close relationship with the *Oberstaatsanwalt* and ability to seek advice frequently from a more experienced prosecutor).

108. Interview with Prosecutor-8PT (confidential interview) (Dec. 6, 2005) (on file with the Washington and Lee Law Review).

109. See Interview with Prosecutor-18UE, *supra* note 99 (stating the responsibility for a case may shift after completion of the investigation).

110. See, e.g., Interview with Prosecutor-13WT, *supra* note 94 (recounting one prosecutor's experience with taking over another's rape case).

111. See *infra* Part IV.B (detailing a trial in which a Latvian national was charged with forcibly raping a woman and stealing her purse).

112. See Interview with Prosecutor-13WT, *supra* note 94 (noting that he deferred to the investigating attorney's sentencing recommendation due to lack of experience in sex crimes prosecutions).

drug crimes unit reprimanding her for agreeing to a light sentence in a drug case that she handled in court.¹¹³

This mindset, in which decision-making is informed by a sense of collegial sensitivity, sometimes creates problems for prosecutors who rotate into judicial positions throughout their career.¹¹⁴ As one appellate judge commented:

[I]n Germany there is a possibility [to] begin your first [assignment] as a prosecutor and you change, you become a judge. And later on, you go back to the prosecutor[']s office]. . . . [But] your mind will not *begleiten* the change, will not follow the change. It's a real problem.¹¹⁵

This culture of collegiality restricts the decision-making discretion of prosecutors at trial in another way as well. When the prosecutor who handles the case at trial differs from the prosecutor who supervised the case investigation, the courtroom prosecutor may be hesitant to take actions that implicitly criticize the quality of the investigation. This restriction on decision-making freedom may strongly affect a prosecutor's interpretation of objectivity in the courtroom.

Imagine a case where the investigating prosecutor failed to interview several potential witnesses. If a defense counsel petitions the court to call those witnesses to the stand, the courtroom prosecutor may be reluctant to support that motion. It is not hard to imagine that the trial prosecutor may be reluctant to overturn or implicitly criticize the prior work done on the case. This may occur when the office practice is to check with the prosecutor who investigated the case and seek their opinion on sentencing, or when the investigating prosecutor will look for the results of the main

113. See Interview with Prosecutor-13BC, *supra* note 106 (noting the drug crimes prosecutor reprimanded her because the light sentence was inconsistent with their normal penalties). Although most prosecutors would want to avoid this type of inter-departmental policy conflict, this does not mean that a trial prosecutor is bound by the investigating prosecutor's sentencing recommendation. Rather, according to one department supervisor, the trial prosecutor is always free to disagree with the investigations results. See Interview with Prosecutor-13BR (confidential interview) (Nov. 18, 2005) (disagreeing with the claim that a trial prosecutor cannot challenge the investigation results) (on file with the Washington and Lee Law Review).

114. In some German states (*Länder*), individuals do not remain in the prosecution service for their entire career; instead, they rotate between positions in the prosecution service, judiciary, and Ministry of Justice. See, e.g., Interview with Prosecutor-8PT, *supra* note 108 (discussing plans to return to school for a doctorate in law and then enter the judiciary); see also Interview with Ministry Official-9CK (confidential interview) (May 4, 2006) (discussing perspective on sentencing decisions based on twelve-year tenure in the judiciary) (on file with the Washington and Lee Law Review).

115. Interview with Appellate Judge-13MU, *supra* note 31.

proceeding. In these cases, the investigating prosecutor has created a path-dependent case trajectory—because a certain outcome is expected at trial, the trial prosecutor is not completely free to look at the evidence with a fresh set of eyes. In this way, subsequent prosecutors may be reluctant to deviate from a prior understanding of the case at the expense of damaging collegial relationships.

The degree to which the duty of objectivity shapes prosecutorial decision-making varies.¹¹⁶ Some prosecutors may believe that they have satisfied this duty when they make a charging decision that is not likely to be overturned by their supervisor or the General Prosecutor's office. In the context of trial, many prosecutors believe that if they comply with the statutory requirement to make a closing argument that summarizes the facts for and against the suspect, that action in itself is enough. Other prosecutors sincerely weigh the testimony presented by each witness, wrestle with the truth, and are not afraid to argue for acquittal when the evidence at trial fails to satisfy the standard of proof.¹¹⁷

C. Normative Theory of Prosecutorial Decision-Making

Consistent with the civil law vision of law as a science, judges and prosecutors are expected to function as technical specialists who follow predetermined legal rules, rather than as political officials who interpret the law.¹¹⁸ This vision of the law serves as the cornerstone of the legal

116. See Interview with Prosecutor-8PT, *supra* note 108 (describing as "outrageous" the number of cases dropped in certain *Länder* due to the excessive workload, suggesting adherence to the principle of legality is not uniform across the states).

117. Nearly every prosecutor interviewed was able to point to at least one case in which they had asked for an acquittal. See, e.g., Interview with Prosecutor-6SB (confidential interview) (Feb. 23, 2006) (relating that she asked for acquittals after hearing the evidence three to four times a year in small cases) (on file with the Washington and Lee Law Review). Although one would expect prosecutors to be concerned about incurring the wrath of their supervisors in such cases, many prosecutors described their petitions for acquittal with pride. That a prosecutor may discuss key decisions with his or her supervisor does not necessarily mean that the prosecutor will hesitate to move for an acquittal at trial if unsure of the suspect's guilt. See, e.g., *id.* (noting this same prosecutor consulted her department manager on decisions to dismiss any big cases, yet had asked for acquittal in two big cases in her career). One sex crimes department prosecutor related that she had argued for an acquittal at trial in ten cases in the previous two years. See Interview with Prosecutor-8AR (confidential interview) (May 23, 2006) (noting a judge may ignore the request for acquittal and impose a sentence, which defendants generally will appeal to the *Landgericht*) (on file with the Washington and Lee Law Review).

118. See *supra* note 67 and accompanying text (discussing the principle of mandatory prosecution and the prosecutor's duty of objectivity).

system's legitimacy.¹¹⁹ To that end, it is critical that decision outcomes are not seen as the end product of interpretive processes that serve as a cover for the decision-makers policy preferences.¹²⁰ The principle of mandatory prosecution serves as the centerpiece of normative dogmatic scheme that seeks to control prosecutorial discretion and ensure that the law is applied uniformly.¹²¹ As Langbein states:

[T]he German rule of compulsory prosecution of serious crime is no happenstance. The statutory standards, limitations, and remedies have been meticulously designed to fit the institutional structure and to serve the larger policies of the German criminal justice system. The rule is meant to achieve ends that are immensely important in the German tradition: treating like cases alike, obeying faithfully the legislative determination to characterize something as a serious crime, preventing political interference or other corruption from inhibiting prosecution, and more.¹²²

The principle of mandatory prosecution is not the only constraint on prosecutorial discretion. From a theoretical perspective, the scientific nature of the law itself binds discretion by turning legal decision-making into a routine, and primarily classificatory, exercise in logic. According to many German legal scholars, a "right" legal answer exists for each legal problem.¹²³ The decision-making process does not rest on an individual's interpretation of facts but rather the "correct subsumption under legal categories."¹²⁴ Accordingly, facts and laws function as numerical values that can be inserted into specific formulas that will produce the correct legal answer. There is no range of possible correct answers generated by each individual's own subjective lens.

Under this theory of legal decision-making, the investigation or "fact-finding" process assumes an almost outcome-determinative significance. The prosecutor, as master of the investigation stage of the proceedings,

119. See Langbein, *supra* note 63, at 449 ("In Savigny's famous phrase, the prosecutor is the 'watchman of the law,' as evenhanded an officer of enforcement as could be devised.").

120. See Damaška, *supra* note 67, at 125 (noting the German philosophy that "[procedural rules] must not be softened by the dumb goddess of equity").

121. See Langbein, *supra* note 63, at 450 ("The dual function of the rule mirrors the dual character of the German prosecutor's office: [H]e is obliged to perform an executive function according to judicial standards of conduct.").

122. Langbein, *supra* note 4, at 211-12.

123. See *supra* note 67 and accompanying text (describing the German theory of legal decision-making as the placement of legally relevant facts within appropriate results boxes).

124. Damaška, *supra* note 67, at 125.

performs a critically important function.¹²⁵ By viewing facts through the lens of the law, prosecutors make objective decisions. Moreover, despite the fact that prosecutors are members of a bureaucracy, a prosecutor "does not act as an administrator trying to attain practical goals; instead his function is limited to the judicial task of applying the provisions of the Penal Code to the facts of the case."¹²⁶ This depiction of prosecutors as objective decision-makers not only mirrors the image of the detached and neutral judge but also is similar to the portrayal of the prototypical scientist.

III. Relational Constraints on Prosecutorial Decision-Making

A. The Nature of the Prosecutor-Judge Relationship

Whether one envisions a prosecutor making a decision to file charges, posing a certain question to a witness on the stand, or proffering a sentencing recommendation to the court, it is evident that a prosecutor's institutional role factors into his or her daily decision-making. Although judges need not confirm a prosecutor's decision not to prosecute petty offenses under Section 153 of the Strafprozessordnung (STPO), they must approve the termination of proceedings in minor crime cases under Section 153(a).¹²⁷ Moreover, the decision to open a main proceeding is made by a judge after reviewing the investigative file collected by the prosecution service.¹²⁸ In stark contrast to criminal practice in the United States, the negotiation of plea agreements in Germany involves the court.¹²⁹ In some instances, judges will initiate the plea negotiation process by contacting the prosecutor or defense attorney to explore whether the case may be resolved short of a full main proceeding.¹³⁰ Thus, while German law defines their

125. See Jescheck, *supra* note 62, at 509–10 (noting that "the functional subordination of the police" to the prosecutor subjects the entire investigative process to this prosecutorial discretion, as colored by the *Legalitätsprinzip* mandate).

126. Joachim Hermann, *The German Prosecutor*, in *DISCRETIONARY JUSTICE IN EUROPE AND AMERICA* 16, 18 (Kenneth Culp Davis ed., 1974).

127. See STPO, *supra* note 7, § 153(a) (permitting the prosecution office, subject to the court's consent, to forego issuing public charges in favor of the imposition of fines, driving school, community service, or mediation with the victim).

128. See *id.* § 199 (directing the competent court to review the indictment and investigation dossier, and decide whether to dismiss the case or open main proceedings).

129. See JENIA I. TURNER, *PLEA BARGAINING ACROSS BORDERS* 104 (2009) (noting most German courts participate in plea bargaining from the outset in serious cases, though in minor cases negotiations may be confined to the prosecutor and defense attorney at first).

130. See, e.g., Interview with Prosecutor-6SB, *supra* note 117 (noting that juvenile

function as second judges, they are second judges who cannot act fully independently of the judiciary.

Although procedural rules reinforce the prosecutor's role as a second judge, those procedures, standing alone, do not guarantee that a prosecutor will take an active role in searching for the truth. For example, while a prosecutor may comply with the procedural rule that requires prosecutors to summarize the facts for and against the accused, that rule does not require a prosecutor to pose questions to witnesses in an effort to resolve factual ambiguities.¹³¹ It is thus possible for a prosecutor to comply on a superficial level with the duty of objectivity by participating in certain procedures that have become mere ritualized manifestations of that duty.

While statutory mandates force prosecutors to pay lip service to objectivity, the level of reflexivity mandated by the law is limited.¹³² In fact, in my interviews, prosecutors would point to the fact that they had summarized the evidence in favor of the accused at the conclusion of trial—supporting the contention that German prosecutors did, in fact, view the case through an objective lens.¹³³ Nonetheless, a prosecutor's minimal

court judges or defense counsel will always be first to propose a plea agreement). Several prosecutors, as well as one former judge, noted that informal pre-trial conversations between prosecutors and judges occur regularly. *See, e.g.*, Interview with Ministry Official-9CK, *supra* note 114 (recalling that as a judge he would sometimes remand the application for main proceedings with instructions to remedy defects in the investigation file); *see also* Interview with Prosecutor-4GG, *supra* note 102 (noting that, especially in cases involving direct citizen complaints making meritless charges against another citizen, it is common for the prosecutor to send in the application with the investigation file but then telephone the judge and request him to deny main proceedings).

131. *See, e.g.*, STPO, *supra* note 7, § 293(1) (requiring the public prosecutor to examine prosecution witnesses, but not extending this requirement to defense witnesses).

132. *See, e.g., id.* § 243(3) (requiring the prosecutor to read charges and submit a legal assessment at the beginning of a proceeding in court).

133. *See* Participant Observation-3TW (Nov. 9, 2005) (discussing the prosecutor's duty to summarize the evidence both in favor of and against the defendant and, if necessary, recommend a verdict in favor of the defendant) (on file with the Washington and Lee Law Review). I observed the conclusion of a main proceeding in a fraud case involving two female defendants who had ordered a number of products online but never paid for the products. *Id.* In the prosecutor's final argument, the prosecutor pointed out that the value of the fraud committed had been relatively small and that the merchandise ordered were gifts for one of the defendant's children. *Id.* The prosecutor also mentioned that both defendants had confessed and that they had expressed remorse. *Id.* The prosecutor then moved on to cite that the main points against the defendants were that their criminal behavior reflected a certain level of initiative and intelligence. *Id.* For example, the defendants had put false names on their mailboxes that corresponded to the aliases that the suspects had used to order the merchandise. *Id.*

compliance with ritualized procedural requirements may not move the truth-finding process forward.

From an empirical standpoint, it cannot be said that a prosecutor functions as a "second judge" on the basis of a single prosecutorial decision. For example, a prosecutor who merely summarizes the evidence presented at trial cannot be said to function objectively if the prosecutor failed to order the police to pursue potentially exculpatory evidence during the investigation phase. Discovering the meaning of objectivity in practice requires going beyond a mere checklist evaluation of prosecutorial practices. In an effort to bring the analysis of prosecutorial objectivity beyond mere conformity with procedural requirements, I explore the relational stance that a prosecutor takes vis-à-vis the presiding judge in a courtroom to produce a richer analysis of the face of prosecutorial objectivity. Since the presiding judge organizes the presentation of evidence and initiates the questioning of witnesses at trial, a prosecutor's stance in the courtroom is necessarily reactive and responsive.¹³⁴ It is the presiding judge who sets the tone for the main proceeding and the prosecutor who decides how to position himself or herself in relation to the role that the judge plays in the courtroom.¹³⁵ As one prosecutor described it, "the prosecutor's task in the courtroom is a difficult one."¹³⁶ Before making a recommendation that the court should convict or acquit a defendant, a prosecutor's main task is to "clarify the facts of the case."¹³⁷ Given this role, it is erroneous to say that a prosecutor has a completely disinterested stake in the main proceeding.¹³⁸ What actions a prosecutor

134. See Interview with Prosecutor-8AR, *supra* note 117 (describing the process of asking questions at a main proceeding).

135. See Interview with Prosecutor-18UE, *supra* note 99 (discussing professional dynamics in the German courtroom). The ambiguous nature of the prosecutor's role is reflected in courtroom architecture throughout Germany. See Interview with Prosecutor-5BC, *supra* note 89 (describing the theory behind the arrangement of furniture in German courtrooms). In some courtrooms, the prosecutor takes a seat adjacent to and level with the judge or judicial panel. *Id.* In other courtrooms, the prosecutor sits at a table that is separate from the judicial bench and on par with the defense counsel's seat in the courtroom. See Participant Observation-13WT (Dec. 8, 2005) (describing alternative courtroom arrangement) (on file with the Washington and Lee Law Review). According to one senior prosecutor, older courtrooms tend to conform to the former style which reflected a view of the prosecutor as an "organ of the judiciary." Interview with Prosecutor-5BC, *supra* note 89. The newer courtrooms which conform to the later style reflect a view of the prosecutor as an "organ of justice." *Id.*

136. Interview with Prosecutor-18UE, *supra* note 99.

137. Interview with Prosecutor-5DK (confidential interview) (Jan.19, 2006) (on file with the Washington and Lee Law Review).

138. See *id.* (arguing that the prosecutors' role in the investigation affects their

might take to accomplish that task may differ depending on their own level of initiative as well as the clarity of the evidence presented. According to one experienced prosecutor:

[I] listen to the evidence presented in the main proceeding I then must summarize the evidence at the end of the proceeding and explain why I believe whether a certain charge has been proven or not. I will state whether [I think] a witness has lied and whether or not they have told the truth I will state why a witness is credible [or not].¹³⁹

At the outset, it should be noted that procedural factors encourage cooperation between judges and prosecutors. From a procedural perspective, the prosecutor's office supervises the collection of evidence, documents that evidence in written form, and presents that written file to the court.¹⁴⁰ Therefore, both judge and prosecutor enter the main proceeding having formed preliminary assessments of the case based on a shared body of evidence. This decision-making lens is starkly different from the lens possessed by the jurors, who serve as fact-finders in American courtrooms and are likely to be unfamiliar with the evidence that will be presented in court.¹⁴¹

There is a second procedural factor that encourages cooperation. Because the prosecutor functions as a "second judge" rather than as a party, it is perfectly legitimate for a judge to speak with a prosecutor without communicating with the defense attorney.¹⁴² In fact, it is a common practice for a judge and a prosecutor to speak before a proceeding to get a sense of the other's view of the case.¹⁴³ Since most criminal cases do not present complicated legal issues, the court's attention during the main

objectivity).

139. Interview with Prosecutor-12CJ (confidential interview) (Nov. 29, 2005) (on file with the Washington and Lee Law Review).

140. See STPO, *supra* note 7, §§ 158–77 (detailing procedures for investigation and preparation of public charges).

141. This assumes no significant pretrial publicity of the case.

142. See Interview with Ministry-9CK, *supra* note 114 (describing pre-trial communication between judges and prosecutors).

143. See *id.* (describing the close working relationship between judge and prosecutor). A prosecutor may work in tandem with the judge on a case in which no main proceeding is held. See *id.* (detailing cooperation between judges and prosecutors). See also Interview with Prosecutor-4GG, *supra* note 102 (detailing how prosecutors will sometimes work in tandem with judges to try to get a judge to refuse to open a case by determining that there is insufficient evidence to open a main proceeding). This cooperation may be helpful to prosecutors who may be reluctant to close a case themselves short of trial because the victim in the case is likely to file a complaint with the *Generalstaatsanwalt's* office. See *id.* (discussing a provoking dismissal by a judge).

proceeding is focused primarily on collecting facts and determining an appropriate sentence.¹⁴⁴ The pre-trial conversations allow judges and prosecutors to determine points of agreement and disagreement prior to the presentation of evidence. They may also identify areas in which the evidence is conflicting and uncertain. These conversations are more likely to occur when either the judge or the prosecutor is relatively inexperienced and would like to ameliorate the decision-making uncertainty that comes with that inexperience.

From a normative perspective, a German prosecutor should enter the trial with an open mind. In fact, according to an appellate judge that I interviewed, when a prosecutor states publicly prior to trial that he or she is convinced that a suspect is guilty, it violates the duty of objectivity.¹⁴⁵ Commitment to this duty is underscored by the fact that German prosecutors do not meet with the witnesses prior to trial and attempt to shape their testimony or structure the presentation of witnesses to convince a jury of the defendant's guilt.¹⁴⁶ Ideally, a prosecutor should approach the trial with an open mind. The structure of questioning in German courtrooms supports this unrehearsed style. Unlike American procedure, the form of the questions and answers is less regulated.¹⁴⁷ Witnesses often give long narrative answers, which American courtrooms would consider to be unresponsive. This unregulated style and the lack of witness preparation makes the presentation of evidence at trial less certain. According to one prosecutor, even though a prosecutor may have presented the court with a thick file, the facts that are "revealed" at trial may change your opinion of the case.¹⁴⁸ The fact that the judge structures the presentation of evidence at trial and conducts most of the questioning combined with this less constrained structure of the evidence presentation gives the prosecutor the opportunity to view the evidence from a more objective standpoint.

144. See Stefan Machura, *Interaction Between Lay Assessors and Professional Judges in German Mixed Courts*, 72 INT'L REV. PENAL L. 451, 454 (2001) (explaining most German criminal cases are legally simple, thus the court focuses on facts).

145. See Interview with Appellate Judge-13MU, *supra* note 31 (discussing duty of prosecutor to remain objective).

146. See Interview with Prosecutor-3TW, *supra* note 133 (noting that prosecutors do not meet with witnesses to prepare them for trial); see also Interview with Prosecutor-4GG, *supra* note 102 (describing the German view of U.S. justice system).

147. See, e.g., STPO, *supra* note 7, § 239 (describing questioning by the judge, prosecutor, and defense counsel).

148. See Interview with Prosecutor-12CJ, *supra* note 139 (stating that witness testimony at trial may reveal new information that changes your opinion of the case).

Because most of the evidence-collection process is dominated by the police, a prosecutor may have prepared the case file and filed charges without ever meeting a single witness.¹⁴⁹ In this circumstance, the courtroom procedure may give the prosecutor his or her first opportunity to size up the credibility of the witnesses, as well as the defendant. In sexual assault cases, which may turn on the credibility of the victim and the defendant, there may be more factual uncertainty at the outset of trial than in other types of cases.¹⁵⁰ It is possible to theorize that, in sexual assault cases, German prosecutors may possess a more open mind toward the evidence than in other types of cases; additionally, they may be more inclined to adopt a less biased stance towards the testimony presented at trial.¹⁵¹ In the United States, on the other hand, the prosecutor's opinion is largely set in stone before the trial, and the trial is a play designed to "show" those facts to the jury.¹⁵² Evaluating and weighing the evidence in rape cases can be difficult for prosecutors when the case comes down to the suspect's word versus the victim's word.

These procedural differences between the unstructured presentation of testimony in German courtrooms and the rigid evidentiary rules in American courtrooms reflect different normative visions of the path to "truth." As Elisabetta Grande has pointed out, in "the Continental world,

149. The role played by the police in the investigation process differs depending on the nature of the crime as well as the investigation practices of a particular prosecution office. See StPO, *supra* note 7, § 163 (discussing the duties of the police to conduct criminal investigations). In general, a prosecutor handling a sexual assault case will be more involved in the investigation than a prosecutor in other departments. It remains true, however, that the prosecutor may not have actually met the victim prior to trial.

150. See, e.g., Participant Observation-13WT, *supra* note 135 (describing a rape trial where the credibility of the victim was in serious doubt).

151. See Grande, *supra* note 65, at 155 (comparing adversarial and inquisitorial justice systems).

152. In the American system, prosecutors attempt to structure witness testimony in a way that will "prove" their case, to secure a conviction, on the charges set forth in the complaint. The rules of evidence, through the prohibition on using leading questions on direct examination, attempt to ensure that the presenting party is not shaping the testimony to advance that party's version of the truth. By permitting opposing counsel to use leading questions during cross-examination, the rules also attempt to subject testimony to the rigor of being fully tested by opposing counsel. Yet, there is no prohibition on meeting with witnesses prior to trial and rehearsing testimony (as long as the lawyer is not suborning perjury). To secure a conviction, a prosecutor may meet with the key witnesses prior to trial to ensure that the witness testifies in a manner that will help the prosecutor convince the jury that the defendant is guilty as charged. See Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 833-44 (2002) (arguing that it is evident that prosecutors coach witnesses and that some prosecutors do it with the objective of encouraging false or misleading testimony).

neutrality is still considered attainable in the criminal process" and officials are still charged with searching for the objective rather than an "interpretive" truth.¹⁵³ The alchemy of justice is not achieved through strict reliance on a fair process, but rather through a neutral search for a substantive truth.¹⁵⁴ Viewed from this perspective, the prosecutor's duty of objectivity in the German system requires that prosecutors make a more robust commitment to discovering the objective truth.

Where German prosecutors start to show an adversarial face in a certain case, the judge may discount their opinion.¹⁵⁵ As one Justice Ministry official related to me, when prosecutors from a certain prosecution office acquired a reputation for recommending harsh sentences in the courtroom, the judges stopped treating the prosecutors as second judges whose opinion should be considered with the deference accorded to a colleague and instead discounted their opinion as a party opinion.¹⁵⁶

B. A Proposed Model of Prosecutorial Behavior at Trial

For analytical purposes, one might imagine three different stances that a prosecutor might adopt towards the judge's presentation of evidence in the main proceeding. First, a prosecutor might elect to play an *acquiescent role* in the courtroom, in which he or she asks few questions of the witnesses and is content to allow the court's presentation of evidence to stand on its own. Second, a prosecutor might play a *supportive role* in the courtroom by asking questions and making arguments that support the judge's understanding of the case. Finally, a prosecutor might disagree with the judge's conclusion of the case and play an *independent role* in the courtroom.

To some extent, these categories over-simplify prosecutorial decision-making because a prosecutor's actions may not fit neatly into a single category. However, these categories are useful analytical constructs because they allow us to categorize prosecutorial behavior and create a richer description of how prosecutors interpret their duty to function as "second judges" and to begin to identify factors that may influence the

153. Grande, *supra* note 65, at 155.

154. *See id.* at 159 (describing the introduction of all relevant evidence, even if defendant may not confront it).

155. *See* Interview with Ministry-9CK, *supra* note 114 (describing the disregard of a prosecutor's opinion when the judge viewed him as biased).

156. *See id.* (discussing disregard for harsh recommendations).

strategy that a prosecutor adopts during trial. To the extent that the factors that drive a choice of strategy are institution-based, understanding those factors will shed light on how organizational factors shape the meaning of prosecutorial objectivity. To that end, it is useful to define three different potential trial strategies.

In postulating what an *acquiescent trial strategy* might look like, one might include the following behaviors:

1. The prosecutor chooses not to ask questions that might provide more detail into the nature of the events that have transpired.
2. The prosecutor takes no active steps to challenge witness credibility.
3. The prosecutor does not attempt to acquire background information on the defendant's life circumstances.
4. The prosecutor does not petition the court to fill in evidentiary gaps in the evidence.
5. Although the prosecutor is not convinced that the suspect is guilty, the prosecutor would recommend that the court convict the defendant if the court is leaning towards conviction.

In postulating what a *supportive trial strategy* might look like, one might include the following behaviors:

1. The prosecutor takes the initiative to determine what the judge's view of the evidence is prior to the commencement of the main proceeding.
2. The prosecutor plays an active role in questioning the witnesses, but asks questions that attempt to fill in the gaps in the judge's theory of the case.
3. The prosecutor recommends a sentence that will provide the court with a reference point for its own sentencing decision.¹⁵⁷

Finally, in categorizing the trial behaviors of a prosecutor who plays an *independent role*, those behaviors might include:

157. As one former judge explained to me, in some cases that at first glance look like there is disagreement between the sentencing recommendation made by the prosecutor and the judge's sentence, the prosecutor has elected to make a recommendation that is purposely more severe than the sentence that the court will impose. See Interview with Ministry-9CK, *supra* note 114 (discussing sentencing). By inflating their sentencing recommendation, the prosecutor may be trying to increase the likelihood that the defendant will not file an appeal. *Id.* The greater the difference between the judge's final determination and the prosecutor's recommendation, the more likely it will be that the defendant will not challenge the sentence by filing an appeal. *Id.*

1. Reaching an independent opinion of witness credibility and stating that opinion in the final argument to the court.
2. Arguing in favor of acquittal when the court seeks to convict or arguing in favor of conviction when the court believes that the evidence is insufficient.
3. Posing provocative questions to witnesses to test their credibility.
4. Suggesting that the court obtain further evidence such as calling additional witnesses to testify.

It is important to note that although a prosecutor may elect to act independently of the judge, a judge may concur with the prosecutor's assessment of the case.¹⁵⁸ In fact, this scenario may represent the ideal script from a normative perspective—the two institutions, acting independent of each other, reach the same legal conclusion.¹⁵⁹ In this spirit, one prosecutor stated that:

[My] satisfaction comes from making a decision about a case that the court concurs in. When the court agrees with my recommendation, I feel that I have fulfilled my duty. I am not satisfied and can get annoyed when the judges ignore my recommendations and make decisions that I think are incorrect.¹⁶⁰

IV. The Construction of Prosecutorial Objectivity: A Look at Three Cases

A. Overview

The German Code of Criminal Procedure defines a minimal set of bench-line parameters designed to ensure that prosecutors function as neutral and objective second judges in the courtroom.¹⁶¹ In this Section, I examine the decisions made by three prosecutors in three different sexual assault cases in order to understand how prosecutors interpret this duty. I have purposely selected three cases in which the "truth" was difficult to determine in order to highlight the complex range of prosecutorial behavior in the courtroom. Although the task of evaluating the evidence may be straightforward, there are

158. *See id.* (describing communications prior to the main proceeding).

159. *See id.* (describing views on cooperation).

160. Interview with Prosecutor-5DK, *supra* note 137.

161. *See generally* STPO, *supra* note 7, Part II (describing the prosecutor's role in a main proceeding).

many cases in which the evidence conflicts. These cases offer a rich opportunity to see how prosecutors navigate an uncertain truth-finding process.

It is important to note that the definition of rape in German criminal law makes the prosecution of rape cases more difficult. In the words of one sexual crimes prosecutor, the definition of rape under German law is "archaic," because the victim's lack of consent is not sufficient.¹⁶² The court must find that the suspect used force or a serious threat to effectuate the crime.¹⁶³ The threat must refer to a loss of life or a serious injury.¹⁶⁴ While some courts have shown their willingness to interpret the requirement of force liberally, this requirement represents a hurdle that is not found today in many other Western countries.¹⁶⁵ This requirement, coupled with the fact that the evidence in sexual assault cases may be conflicting and subject to interpretation, often means that the central evidentiary issue facing prosecutors is the credibility of the victim.¹⁶⁶ While prosecutors in some jurisdictions commonly rely on reports prepared by expert witnesses to evaluate a victim's credibility,¹⁶⁷ in other jurisdictions prosecutors will retain expert witnesses only if the victim is extremely young or suffers from a mental disorder.¹⁶⁸

B. Case One: Rosenberg

In the first case, the investigating prosecutor charged a Latvian national with forcibly raping a woman and stealing her purse in a large German city

162. See Interview with Prosecutor-8PT, *supra* note 108 (comparing German and English rape laws).

163. See *id.* (describing German rape law).

164. See STAFGESETZBUCH [STGB] [Penal Code], Nov. 13, 1998, BUNDESGESETZBLATT, TIEL I [BGBL. I] at 3322, as amended § 177 (Ger.) [hereinafter STGB] (describing the offense of rape). STGB § 177 states:

Whoever coerces another person: 1) with force; 2) by a threat of imminent danger to life or limb; or 3) by exploiting a situation in which the victim is unprotected and at the mercy of the perpetrator's influence, to suffer the commission of sexual acts of the perpetrator or a third person on himself or to commit them on the perpetrator or a third person shall be punished

Id.

165. See Interview with Prosecutor-8PT, *supra* note 108 (discussing the force requirement of German rape law).

166. See *id.* (discussing bias in rape trials).

167. See Interview with Prosecutor-7CX (confidential interview) (Apr. 7, 2006) (discussing how the victim is typically evaluated by a psychologist before trial) (on file with the Washington and Lee Law Review).

168. See Interview with Prosecutor-8AR, *supra* note 117 (describing the use of a *Gutachten*).

(Rosenberg).¹⁶⁹ The case was handled at trial by a prosecutor who does not normally handle sexual assault cases.¹⁷⁰ Prior to trial, the trial prosecutor contacted the prosecutor who had directed the investigation and was told that an appropriate sentence in the case would be three years.¹⁷¹ According to the complaint in the case file, the defendant attacked a woman behind a public restroom on the city's pedestrian mall.¹⁷² The investigating prosecutor had alleged that the suspect had violated statutes prohibiting assault with bodily injury,¹⁷³ rape,¹⁷⁴ and

169. See Interview with Prosecutor-13WT, *supra* note 94 (describing the charges in the *Rosenburg* case). Please note that Rosenberg is a pseudonym.

170. See *id.* (discussing the unusual nature of the current case for the assigned prosecutor).

171. See *id.* (discussing the sentencing recommendation of the prosecutor who drafted the charge).

172. See Participant Observation-13WT, *supra* note 135 (describing the charges read in court).

173. See STGB, *supra* note 164, § 223 (detailing German bodily injury law). Section 223 provides: "(1) Whoever physically maltreats or harms the health of another person, shall be punished with imprisonment for not more than five years or a fine. (2) An attempt shall be punishable." *Id.*

174. See *id.* § 177 (detailing German rape law). Section 177 provides:

(1) Whoever coerces another person:

1. with force;
2. by a threat of imminent danger to life or limb; or
3. by exploiting a situation in which the victim is unprotected and at the mercy of the perpetrator's influence, to suffer the commission of sexual acts of the perpetrator or a third person on himself or to commit them on the perpetrator or a third person, shall be punished with imprisonment for not less than one year.

(2) In especially serious cases the punishment shall be imprisonment for not less than two years. An especially serious case exists, as a rule, if:

1. the perpetrator completes an act of sexual intercourse with the victim or commits similar sexual acts on the victim, or allows them to be committed on himself by the victim, which especially degrade the latter, especially if they are combined with penetration of the body (rape); or
2. the act is committed jointly by more than one person.

(3) Imprisonment for not less than three years shall be imposed, if the perpetrator:

1. carries a weapon or another dangerous tool;
2. otherwise carries a tool or means in order to prevent or overcome the resistance of another person through force or threat of force; or
3. places the victim by the act in danger of serious health damage. (4) Imprisonment for not less than five years shall be imposed, if:

1. the perpetrator uses a weapon or another dangerous tool during the act; or
2. the perpetrator:

- a) seriously physically maltreats the victim through the act; or
- b) places the victim in danger of death through the act.

robbery.¹⁷⁵

According to the facts stated in the complaint, the suspect hit Frau H. on the back of her head with his fist; forced Frau H. to have anal intercourse with him; and finally took Frau H.'s pocketbook containing the victim's keys and money before leaving the crime scene.¹⁷⁶ While the police investigation revealed that the victim was in a blackout at the time of the alleged rape, the officers took statements from two other witnesses.¹⁷⁷ One was a Turkish gentleman who, for cultural reasons, was extremely reluctant to describe what he observed in open court.¹⁷⁸ The second was an elderly woman who witnessed the defendant leaving the crime scene.¹⁷⁹

In accord with German criminal procedure, the prosecutor read the complaint in open court to commence the trial.¹⁸⁰ The judge then began questioning the defendant about his personal circumstances.¹⁸¹ Although he was not required to do so, at this time, the defendant elected to tell the judge his account of the events.¹⁸² Although the defendant began to tell the judge what happened in general terms, the judge stepped in and posed specific questions to the defendant.¹⁸³ The defendant related to the court that he was a Latvian resident and currently separated from his wife.¹⁸⁴ At the time of his arrest, he was traveling through Germany on his way to France to look for work.¹⁸⁵ He proceeded to tell the court that on the date

(5) In less serious cases under subsection (1), imprisonment from six months to five years shall be imposed, in less serious cases under subsections (3) and (4), imprisonment from one year to ten years.

Id.

175. See *id.* § 249 (detailing the German crime of robbery). Section 249 provides:

(1) Whoever, by force against a person or the use of threats of imminent danger to life or limb, takes moveable property not his own from another with the intent of appropriating the property for himself or a third person, shall be punished with imprisonment for not less than one year.

(2) In less serious cases the punishment shall be imprisonment from six months to five years.

Id.

176. Participant Observation-13WT, *supra* note 135.

177. *Id.*

178. *Id.*

179. *Id.*

180. See StPO, *supra* note 7, § 136(1) (detailing the first examination of the accused).

181. Participant Observation-13WT, *supra* note 135.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

in question he had been drinking with six to eight people when a young woman approached the group.¹⁸⁶ The suspect claimed that the young woman propositioned two other men in the group before she walked up to him, put her key in his pocket, and told him that she wanted to go with him to her house.¹⁸⁷ The suspect followed the young woman willingly out of the bar, walking with her along the pedestrian walkway until they reached the public toilet facilities.¹⁸⁸ At that point, Frau H. lifted up her shirt and kissed him.¹⁸⁹ They proceeded to have consensual sex.¹⁹⁰ During the defendant's entire testimony, the prosecutor only posed a single question to the defendant—namely, whether he had struck the victim on the back of her head.¹⁹¹

The first witness to take the stand was the alleged victim, Frau H.¹⁹² According to the complaint the victim was a twenty-seven year old unemployed woman, living on government support in a small town on the city outskirts.¹⁹³ The judge's initial questioning proceeded as follows:¹⁹⁴

Judge: *On the fifth of September there were charges made. We heard from Mr. S. Now we would like to hear from you what happened.*

Frau H.: *I went to the police*¹⁹⁵

Only a few minutes into Frau H.'s testimony, the prosecutor interrupted:

Prosecutor: *Have you been drinking today. I can smell alcohol.*

Frau H.: *Yes. I had 2-3 vodkas this morning. I was nervous.*¹⁹⁶

At this interesting juncture, the defense attorney alleged that the witness was incapable of testifying because, in her impaired condition, she

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. As the proceedings were not recorded or taped, I compiled the "transcript" from my handwritten notes.

195. Participant Observation-13WT, *supra* note 135.

196. *Id.*

could not understand the importance of telling the truth.¹⁹⁷ The judge, however, hearing no objection from the prosecutor, allowed the questioning to proceed.¹⁹⁸ As the victim continued to testify, it became apparent that she remembered little from the event:

- Judge: *Can you describe him?*
- Frau H.: *Thin. Tall . . . the defendant is now bigger.*
- Judge: *We have photos in the file. Please come forward and look at them.*
- Frau H.: [Pointing to a picture of the suspect in the file]. *He kissed me . . . I am not sure.*
- Judge: *Do you remember identifying the suspect to the police?*
- Frau H.: *I went to the police [voice trails off].*
- Judge: *The suspect has a good memory. We need to know the truth. The suspect said that you kissed and you gave him your key and that you wanted to take him to your apartment. We have photos from the crime scene that you can look at. Do you remember these steps? [Judge points to a photo].*
- Frau H.: [No response].
- Judge: *The suspect said that you pulled up your t-shirt and walked arm in arm. Then you went behind the toilet and removed your pants.*
- Defense: *If she doesn't remember . . . [cut off by victim].*
- Frau H.: *I was at the toilet. It hurt.*
- Judge: *What happened here? [The judge points to a photo in the file of the public restroom].*
- Frau H.: *I tried to take my purse. I can't remember. I was drunk. [She begins to cry]. I can't say clearly. I didn't give anyone my key. He lifted my t-shirt and took my pocketbook away. I'm sure he took my purse*
- Defense: *He took your money away? Was it consensual intercourse?*
- Frau H.: [Crying].

197. *Id.*

198. *Id.*

- Judge: *You are only here as a witness. We just want to know what the truth is. Did it take a long time or was it a short time? . . . It is important that you tell us what you remember. You have a duty to tell the truth. Did he hit or force you?*
- Prosecutor: *Can you remember the steps?*
- Frau H.: *There was pressure on my head and pain. My purse was gone. He pulled it away from my arm.*
- Prosecutor: *Do you know that or do you suspect that?*
- Frau H.: *I was so drunk that I could not stand. I tried to push him away. What could it have been?*
- Judge: *I believe that you are trying to be objective . . . Are there further questions?*
- Frau H.: *I can definitely say that he took my purse away.¹⁹⁹*

These excerpts illustrate the critical role that the presiding judge plays in leading the fact-finding process at trial and suggest that the prosecutor acted as a neutral fact-finder during Frau H.'s questioning. It was the prosecutor, rather than the defense attorney or the judge, who first raised the issue of the victim's competency to testify.²⁰⁰ During the trial the prosecutor continued to press the victim, adopting an almost confrontational stance.²⁰¹ For example, while the prosecutor tried to ascertain whether or not the rape was committed forcibly, he probed the accuracy of victim's memory.²⁰² The tone of the questions that he proffered to the victim was not the tone of a supportive advocate; rather, he adopted the tone of an individual determined to test the victim's credibility.²⁰³

Because the prosecutor had not personally supervised the case investigation, he faced an additional challenge at trial when it became evident there were several witnesses cited in the police report whom the police never elected to interview.²⁰⁴ Prior to trial, neither the investigating prosecutor, nor the judge, nor the defense attorney deemed it necessary to attempt to locate these individuals. When this prosecutor was assigned to

199. *Id.*

200. *See id.* (describing the prosecutor's questioning of Frau H. regarding whether she had been drinking).

201. *See id.* (relating the prosecutor's aggressive questioning).

202. *Id.*

203. *Id.*

204. *See, e.g., id.* (describing Frau H.'s recollection of a Polish man).

handle the court hearing, the investigative file had already been sent to the court.²⁰⁵ The trial prosecutor himself was only in possession of the prosecution office's thin court file (*Handakte*), which did not contain all of the evidence collected in the case.²⁰⁶ It is also surprising that the investigating attorney did not petition the court to appoint an expert witness.²⁰⁷ German prosecutors frequently ask the court to hire a psychological expert witness in cases in which the credibility of the victim may be questioned.²⁰⁸

Given that the defendant's testimony was evasive and the victim's testimony inconclusive, the chances for obtaining a conviction in the case rested on the remaining witnesses.²⁰⁹ The key remaining witness was a Turkish gentleman who had previously told the police that he had witnessed a rape.²¹⁰ Unfortunately, when it came time for to testify in court, the witness was extremely reticent.²¹¹ In the excerpt below, both the judge and the prosecutor press the witness to explain what he had seen.²¹² Additionally, the prosecutor invokes the full power of the state by threatening to file charges against the witness to force him to reveal the truth.²¹³ In this capacity, the prosecutor not only supports the judge's efforts, but additionally he plays the role of the "bad cop." Within the context of his quasi-judicial role, the prosecutor has room to play the heavy hand.

Judge: *What can you say about how the woman appeared?
Was she drunk?*

Witness: *The girl was very drunk. She was in his arms . . . I
don't know if it was rape . . .*

205. See *id.* (discussing the charges filed by a different prosecutor).

206. See *id.* (explaining that the trial prosecutor often goes to trial with a file prepared by his colleague).

207. See Interview with Prosecutor-7CX, *supra* note 167 (discussing typicality of psychological evaluations in rape cases). Another prosecutor told me that she will ask for an expert opinion in any case in which she is not sure whether or not the victim is telling the truth. See Interview with Prosecutor-8AR, *supra* note 117 (describing the use of experts in rape trials).

208. See, e.g., Interview with Prosecutor-24AZ (confidential interview) (Apr. 10, 2008) (discussing the prevalence of expert testimony in rape cases) (on file with the Washington and Lee Law Review).

209. See Participant Observation-13WT, *supra* note 135 (relating trial testimony).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

- Judge: *You only need to say what you saw. You don't need to say if you think it was a criminal act. [The judge begins reading part of the witness's prior statement to the police]. "The man had pushed the woman against the wall. He grabbed her arm and then lifted her clothes high."*
- Witness: *That is correct.*
- Judge: *I believe you. We just need to know what happened.*
- Witness: *I told the police that I saw a crime.*
- Judge: *I don't expect you to say whether or not it was a rape. What really happened? [The Judge continues reading from the witness's prior statement given to the police]. "He put his hands on her breasts. He left by himself with her pocketbook."*
- What did you see of the rape? A rape occurs when someone has sex with force.*
- Witness: *Yes.*
- Judge: *You told the police more than you are saying here. You don't need to be ashamed to say these things. Just say what you saw. Just tell us about the crime. In Germany it is a crime. [The Judge continues reading the file]. "He kissed her on the breasts."*
- Witness: *Yes. That is normal.*
- Judge: *No, that is not normal. [Emphatically].*
- Witness: *I am a foreigner.*
- Judge: *You have lived in Germany for ten years. How often have you seen this on the street? Three months is not so long. What can you remember? What did you see after he kissed her on the breast?*
- Witness: *He licked and kissed the breast.*
- Judge: *How was the woman standing?*
- Witness: *Her back was on the toilet. It was a rape.*
- Judge: *[Reading from the witness's prior statement to the police]. "The man pushed the woman's arms away. He opened his pants and took his penis out and pushed her head"*
- Witness: *I can't say.*

Prosecutor: [With raised voice]. *"Stop playing with us and tell us what you know."* [Slamming his fist onto the table]. *"I can charge you with a crime . . . the failure to report a rape."*²¹⁴

Witness: *I am not a child.*

Judge: *Just tell us what you saw.*

Witness: *"I saw him take her arm . . . he grabbed her breast and pushed her head. I can't remember more . . . he went away."*²¹⁵

Finally, in the following excerpt extracted from the prosecutor's concluding statement, the prosecutor weighs the inconsistencies in the testimony presented during the proceeding.²¹⁶ Because none of the witnesses who testified had stated that the defendant had used violence while raping the victim, in response to the suggestion of the presiding judge, the prosecutor elected not to argue that the case qualified as a rape under the definition provided in Section 177.²¹⁷ After the trial, he explained that obtaining a conviction under Section 177 was precluded by the fact that the victim had made conflicting statements about the use of force.²¹⁸ At one point Frau H. testified that the defendant had forcefully hit her head against the wall; later in her testimony, however, she contradicted that statement.²¹⁹

Prosecutor: *What crime do we have here? It is not clear how much alcohol the victim consumed. The defendant himself said he met the victim and talked to her and that she had been drinking. We know that they went to the public toilet. He kissed her. He pushed her against the wall. There was intercourse with force. The case is difficult . . . the victim cried out. The defendant left the area with the victim's purse.*

The defendant has denied that he stole the victim's purse. But one witness said that she saw the defendant

214. See, e.g., Thomas Weigend, *Is the Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 160–61 (2003) (stating that the investigation process in inquisitorial systems only works when a person is willing to reveal what they know).

215. Participant Observation-13WT, *supra* note 135.

216. *Id.*

217. *Id.*

218. Interview with Prosecutor-13WT, *supra* note 94.

219. See Participant Observation-13WT, *supra* note 135 (describing previous testimony by Frau H.).

leave by himself with the purse. The victim lives in [another town]. Why would a person [from another town] give a person in Rosenberg her apartment key? That makes no sense.

We cannot believe that the defendant did not look in the victim's purse. We also know from Herr D. that the victim was very drunk. She probably has an alcohol problem. We know she was pushed against the wall . . . the victim was helpless. One witness said that it was unusual to see a person so drunk.

What is the legal conclusion? The defendant pressed the victim's head against the floor. The victim was very drunk. He hurt her when he pushed her against the wall. There is the objective evidence that she had pain, there was bleeding, and she was helpless. However, it was not a forcible rape under Section 177 . . . but a crime under Section 179 [sexual abuse of persons incapable of resisting].²²⁰ The taking away of the purse constitutes robbery under Section 249.

As to the matter of culpability . . . I do not understand why the defendant did not say that he had made a mistake, he had been drinking. The suspect was not so drunk that he did not know what he was doing.

Because the victim was so drunk, Section 179 applies. The minimum punishment for this crime is two years. The normal punishment is a range between two and fifteen years. I recommend a punishment of three years.²²¹

After a short period of deliberation, the panel of one professional judge and two lay judges announced their verdict.²²² The panel found the defendant guilty of the crimes of sexual abuse of a person incapable of

220. See STGB, *supra* note 164, § 179 (defining the crime of sexual abuse of person incapable of resisting). Section 179 states:

(1) Whoever abuses another person who is incapable of resisting; 1) because of a mental or emotional illness or disability, including an addiction or because of a profound consciousness disorder Imprisonment for no less than one year shall be imposed, if: The perpetrator completes an act of sexual intercourse or similar sexual actions with the victim, which are combined with a penetration of the body, or allows them to be committed on himself by the victim.

Id.

221. Participant Observation-13WT, *supra* note 135.

222. *Id.*

resisting as well as theft.²²³ The court immediately proceeded to sentence the defendant to a term of imprisonment of two years and six months on the ground that the minimum punishment for a charge of sexual abuse was a two year sentence.²²⁴ According to the court, the case qualified as a case of serious abuse under the statute.²²⁵ For that reason, the court had the authority to impose a sentence totaling fifteen years of incarceration.²²⁶

In this case, the prosecutor defined his role not as an advocate arguing for a conviction on the highest possible charge but rather as a second judge whose role was to neutrally weigh the evidence presented by the court.²²⁷ In line with his duty to weigh the evidence objectively, the prosecutor questioned the victim whether or not she had been drinking the day of the trial.²²⁸ While the prosecutor could have remained silent, because it was only a matter of time before the odor of alcohol filled the courtroom, the prosecutor's actions may have merely preempted a likely comment from the defense or the court. Given that the prosecutor confronted the victim about her alcohol consumption and threatened to file charges against a witness if he did not tell the whole truth, one might be tempted to conclude that the prosecutor adopted an *independent trial strategy*. By performing an inquisitive fact finding role, the prosecutor did not function like an interested party. However, the prosecutor's demeanor and language did not project the image of a dispassionate fact-finder; rather, it mirrored the role of a spokesman for the state's quest for truth.

Because the prosecutor in this case aggressively questioned the witnesses, his trial strategy does not fall into the *acquiescent* category. Based on his aggressive challenge to the victim's testimony in the case, it might be tempting to categorize his strategy as being *independent*. However, in other key respects, the prosecutor did *not* act in a manner that was independent of the presiding judge. Despite the evidentiary gaps, the prosecutor did not suggest that the court call additional witnesses to testify.²²⁹ It is possible that one of those witnesses may have observed the suspect use force against the victim. The prosecutor could have challenged the victim's competence to testify. For these reasons, the prosecutor did not

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. See Interview with Prosecutor-13WT, *supra* note 94 (discussing role of the prosecutor at trial).

228. See *id.* (describing questioning by prosecutor).

229. *Id.*

act with complete independence. His actions, by design or accident, supported and reinforced the judge's perspective of the case. Moreover, the prosecutor conformed to the investigating colleague's expectations, agreed with his recommendation that the suspect should be found criminally liable, and recommended the sentence of three years that his colleague proposed.²³⁰ For these reasons, the prosecutor's strategy in this case was largely *supportive* of the presiding judge's perspective of the evidence.

C. Case Two: Schneekopf

The second trial involves a serious sexual abuse of a child.²³¹ Because the proceedings involved a child, I have changed many of the case's descriptive details to further protect the victim's anonymity. In this case, a middle aged family man was accused of sexually abusing an eleven-year-old child.²³² Prior to the incident, the suspect and the victim's family frequently attended the same social events.²³³ Because the victim was a child, prior to trial, the judge appointed an expert witness who was charged with interviewing the victim and evaluating her credibility.²³⁴ According to

230. See *supra* note 221 and accompanying text (describing the prosecutor's closing statement in the Rosenberg case).

231. See Participant Observation-4AJ (Feb. 1, 2006) (describing observations from the *Schneekopf* case) (on file with the Washington and Lee Law Review). Punishment for a serious sexual abuse of a child is codified in section 176a of the STBG. See STGB, *supra* note 164, § 176a (defining punishment for sexual abuse of children). Section 176a provides:

(1) The sexual abuse of children shall be punished with imprisonment for no less than one year in cases under Section 176 subsections (1) and (2), if:

1. a person over eighteen years of age completes an act of sexual intercourse or similar sexual acts with the child, which are combined with a penetration of the body, or allows them to be committed on himself by the child;
2. the act is committed jointly by more than one person;
3. the perpetrator by the act places the child in danger of serious health damage or substantial impairment of his physical or emotional development; or
4. the perpetrator has undergone a final judgment of conviction for such a crime within the previous five years. . . .

(3) In less serious cases under subsection (1), imprisonment from three months to five years shall be imposed, in less serious cases under subsection (2), imprisonment from one year to ten years.

Id.

232. Participant Observation-4AJ, *supra* note 231.

233. *Id.*

234. *Id.*

the expert, the victim was telling the truth.²³⁵ While the defense attorney hired his own expert witness, that witness did not attack the victim's credibility but rather challenged the procedures that the court's expert used to formulate his evaluation.²³⁶

In contrast to the first case, a collateral attorney (*Nebenkläger*) appeared in court to represent the victim's interests during the proceedings.²³⁷ The main proceeding began with the judge questioning the defendant about his personal circumstances.²³⁸ At the time of the hearing, the defendant stated that he was thirty-five years old, happily married, and employed in a good position with a government agency.²³⁹ After testifying about his personal information, the defendant informed the court that he wished to testify about the events in question.²⁴⁰ During his statement to the court, the defendant testified that on the date of the alleged incident, he and his wife hosted a neighborhood party where the defendant consumed alcohol with his guests.²⁴¹ As the party was winding down, the defendant spotted the victim, who was a local neighbour, standing outside.²⁴² The victim told him that she had lost her house key.²⁴³ Since it was too late to go home, the defendant invited her inside his house.²⁴⁴ The defendant proceeded to tell the court that his wife had asked him to sleep in the living room because he snores after he drinks alcohol.²⁴⁵ At this point in the proceeding, the judge began to interrupt the defendant and ask specific questions about the events in question.²⁴⁶ The defendant continued to testify, telling the court that both he and the victim slept on separate couches in the living room.²⁴⁷ When they woke up in the morning, nothing

235. *Id.*

236. *Id.*

237. See StPO, *supra* note 7, § 395 (permitting a victim or the victim's personal representative to obtain the services of a collateral prosecutor who participates in the trial as a private prosecutor); *id.* § 397 (allowing the private prosecutor to view the case files, petition the court to take additional evidence, and appeal the court's judgment).

238. Participant Observation-4AJ, *supra* note 231.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

abnormal had occurred.²⁴⁸ After the defendant finished his account, the judge gently confronted him and reminded him that he should testify honestly.²⁴⁹ At this point, the prosecutor took over the questioning.²⁵⁰ In the excerpt below, the prosecutor asks the defendant about a prior allegation made against the defendant by the victim's father.

Prosecutor: *The victim's father said that you also touched his other daughter's leg at a birthday party, is this true?*

Defendant: *I don't know.*

Judge: *Do you remember what happened at the birthday party?*

Defendant: *I was sitting next to a girl and merely pinched her near her waist.*

Prosecutor: *What clothing were you wearing when you went to sleep?*

Defendant: *Boxer shorts.*

Prosecutor: *One of your neighbors told the police that you are usually a friendly person except when you are drunk. Then you try to touch women. Is this true?*

Defendant: *I have no reply.*

Prosecutor: *Did you see the victim after the night of the alleged incident?*

Defendant: *No. I never talked to her about this event. My relationship with her did not change until she talked to her mother about it.*²⁵¹

After the prosecutor concluded his questioning, the collateral prosecutor had this exchange with the defendant:

Collateral P: *Was there another room in your house that the victim could have slept in?*

Defendant: *No.*

Collateral P: *I don't believe your story but you want to stick with it.*²⁵²

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* While this statement would undoubtedly draw an objection in an American

At this point in the hearing, the judge announced that the court would take a short break so that the attorneys, the prosecutor, and the presiding professional judge could meet in the judge's chambers to discuss the possibility of a plea.²⁵³ In the cases that I observed, this occurred frequently.²⁵⁴ The parties then adjourned to the judge's chambers and the defense attorney began the discussion by stating that the defendant would only accept a punishment of less than one year.²⁵⁵ The defense counsel stressed that the defendant would lose his job in the armed forces if the defendant received a more severe sentence.²⁵⁶ Counsel proposed that the defendant admit that he only touched the girl and that the court impose a sentence of less than one year.²⁵⁷ Immediately, the prosecutor categorically rejected the offer:

I cannot agree to a different criminal act because *that is not what happened in this case*. The minimum penalty for this crime is two years. It is not my job to worry about the defendant's job; the burden is on the defendant to start a new career.²⁵⁸

The prosecutor's stance underscores a key difference between American plea bargaining practices and the German practice of "confession bargaining." In the German system, the constitutional principles of fair trial and guilt²⁵⁹ impose limits on the bargaining process that aim to preserve the key elements of an inquisitorial system's truth-finding process.²⁶⁰ After this

court because it is not a question, German procedural rules permit a wider range of questioning practices. See STPO, *supra* note 7, § 136a (delineating the boundaries of questioning broadly).

253. Participant Observation-4AJ, *supra* note 231.

254. *Id.*; Participant Observation-4BI (Feb. 3, 2006) (on file with the Washington and Lee Law Review); Participant Observation-13WT, *supra* note 135.

255. Participant Observation-4AJ, *supra* note 231.

256. *Id.*

257. *Id.* A one year sentence would apply only if the court found the defendant guilty of the less serious offense. See STGB, *supra* note 164, § 176a (mandating a minimum two-year sentence for aggravated child abuse).

258. Participant Observation-4AJ, *supra* note 231.

259. See Turner, *supra* note 129, at 89 (explaining that criminal responsibility must be proportionate to personal culpability under the guilt principle).

260. See Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 3, 2005, 50 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN STRAFSACHEN [BGHST] 40, 48 (Ger.) (holding that plea bargains are generally permissible under German law). The German Federal Supreme Court explained:

The defendant has a right to a fair trial based on the rule of law. The way in which the court fulfills its duty to investigate the facts, the legal qualification of

exchange, the collateral prosecutor stated that she too would not agree to the deal because it would send a signal to the victim that the court did not believe her.²⁶¹ Moreover, the advocate reminded defense counsel that if the defendant were to insist on going forward with the trial, the defendant could receive a prison sentence of more than four years.²⁶² After the defense counsel consulted with his client, the defendant rejected the deal.²⁶³

At this point in the case, in a private conversation, the prosecutor related to me that, because the defendant's testimony had been so inconsistent, it was likely that the defendant had lied.²⁶⁴ Ironically, when the victim in the case took the stand it quickly became apparent that her testimony was also problematic. In response to open-ended questioning from the court, the victim testified initially that she had simply fallen asleep on the couch and then woke up the next morning.²⁶⁵ The judge then shifted to a more focused, but still gentle, questioning technique attempting to prod the victim forward by reading excerpts from the victim's prior statement.²⁶⁶ While the victim then confirmed her initial allegations, she then alleged that the defendant had actually penetrated her.²⁶⁷ In her prior statement, the victim had maintained that the defendant had only touched her private parts.²⁶⁸ The judge greeted this new allegation with skepticism and told the victim that this new revelation will make the court's decision difficult.²⁶⁹ The judge specifically told the victim: "We must determine what

the offense, and the principles of sentencing cannot be left to arbitrariness or to the unfettered disposition of the parties and the court. Therefore the court and the prosecutor are not allowed to engage in a settlement in the guise of a verdict or to barter with justice. . . .

A central goal of a criminal process conducted under the rule of law is the ascertainment of the true facts as the necessary foundation for a just verdict. The examination of the facts by the trial court is governed by the requirement "to clarify the facts in the best possible manner"; this requirement is inherent in § 244 of the Criminal Procedure Code and the Constitution.

Id.

261. See Participant Observation-4AJ, *supra* note 231.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

happened. There are two possibilities. First, nothing more happened than you said before. Second, the defendant's actions went further."²⁷⁰

After the prosecutor and collateral attorney concluded questioning the victim, the defendant's attorney submitted his questions to the judge who, under German law, decided which questions she would pose to the victim.²⁷¹ In addition, the judge may decide whether the other attorneys may directly question the victim.²⁷² In some jurisdictions, the prosecutor, collateral prosecutor, and the defense attorney will type the questions that they would like the court to pose to the victim into a computer.²⁷³ However, if a judge refuses to pose a question requested by one of the attorneys, the refusal may create an appellate issue.²⁷⁴ Even in cases involving adult victims, the judge is obliged to intervene to stop the cross-examination if the attorney's interrogation becomes too aggressive.²⁷⁵

The challenge of finding the truth increased when the facts in the victim's testimony shifted on the stand. One of the two lay judges actually began to shake her head as the victim was testifying.²⁷⁶ After the victim's testimony concluded, the court announced another break.²⁷⁷ At this point, the prosecutor related to me: "I am no longer convinced that the defendant is guilty. The victim has told three different versions of what happened This latest allegation is completely new I cannot argue that the suspect is guilty unless I am *convinced* that the allegations are true."²⁷⁸ When the proceedings resumed, the judge read out loud a section of the Code of Criminal Procedure in open court, which detailed the potential penalties that the defendant would face if he was convicted in the

270. *Id.*

271. In cases involving the testimony of children under the age of sixteen, the judge screens the defense attorney's questions and then may decide which questions will be permitted as well as whether the judge or the defense attorney shall pose those questions to the child. *See* STPO, *supra* note 7, § 241a (granting the judge the authority to screen potential questions posed to witnesses under the age of sixteen).

272. *See id.* (granting the presiding judge discretion to allow direct questioning by attorneys).

273. *See* Interview with Prosecutor-8AR, *supra* note 117 (describing the process for interviewing children).

274. *See id.* (noting that a defense attorney can challenge a refusal to pose a question in an appeal).

275. *See* STPO, *supra* note 7, § 241(2) (allowing the presiding judge to reject an inappropriate or irrelevant question).

276. Participant Observation-4AJ, *supra* note 231.

277. *Id.*

278. Interview with Prosecutor-4AJ (confidential interview) (Feb. 1, 2006) (emphasis added) (on file with the Washington and Lee Law Review).

district court (*Landgericht*).²⁷⁹ In choosing to do so, it seemed clear that the judge was trying to suggest that the defendant confess. If the defendant elected to seek a retrial at the higher court level, he could have faced a sentence that exceeded four years of imprisonment. Because the current local court (*Amtsgericht*) was limited to imposing a sentence of less than four years, the judge had hinted that it would be a wise decision for the defendant to confess.²⁸⁰ The defendant and his counsel left the courtroom to once again discuss the possibility of a confession agreement.²⁸¹ During the break the prosecutor related to me: "I am still concerned about whether the victim is telling the truth or not. Now it is apparent that she told the psychologist that she had never injured herself and yet on the stand she testified that she had injured herself. There are too many inconsistencies."²⁸² The judge then called the prosecutor into her chambers and asked him what he thought about the evidence so far.²⁸³ Because the judge had subtly suggested that the defendant confess, it was evident by this point that the judge was leaning towards convicting the defendant. Despite that fact, the prosecutor informed the court that he could not argue that the defendant was guilty.²⁸⁴ The prosecutor's potential pursuit of an

279. Participant Observation-4AJ, *supra* note 231. The *Landgericht* is above the *Amtsgericht*. See GVG, *supra* note 74, § 12 (outlining the jurisdictions of the various German courts).

280. The jurisdiction of the *Amtsgericht* is specified in sections 21 and 24 of the German Code on Court Constitution, while the jurisdiction of the *Landgericht* is specified in section 74. See generally GVG, *supra* note 74, §§ 21–21j, 24, 74–74f (regulating the jurisdictions of the *Amtsgericht* and the *Landgericht*). It is currently an undecided issue in German law as to whether rape cases may be filed directly into the *Landgericht* or regional court bypassing the local court (*Amtsgericht*). Participant Observation-4AJ, *supra* note 231. The prosecutor who tried the case told me that he would have filed the case directly into the *Landgericht* and that the prosecutor who initially filed the case in the local court may have made that choice because it was easier for him to do so. *Id.* However, filing the case in the local court places an extra burden on the victim. Because defendants in local court (*Amtsgericht*) cases have the right to a de novo appeal, the victim may have to testify in two proceedings. *Id.* Regional Court (*Landgericht*) trials typically take longer than local court (*Amtsgericht*) proceedings as the court is likely to take testimony from all of the available witnesses. *Id.* The reason for this is that there is only one level of appeal from cases heard at the regional court (*Landgericht*) level—an appeal to the Federal Criminal Court challenging legal issues in the case. *Id.*

281. Participant Observation-4AJ, *supra* note 231.

282. Interview with Prosecutor-4AJ, *supra* note 278.

283. Participant Observation-4AJ, *supra* note 231.

284. *Id.*

independent trial strategy drew a look of concern on the judge's face and the meeting ended.²⁸⁵

After the defendant and his attorney returned to the court room, the defense attorney stated that his client wanted the trial to continue.²⁸⁶ At this point, the prosecutor requested that the court take the testimony of the victim's teacher.²⁸⁷ By suggesting that the court call an additional witness to the stand, the prosecutor took an affirmative step towards clarifying the facts in the case and playing a potentially independent truth-finding role.

On the stand, the teacher testified that the victim had approached her after class one day crying.²⁸⁸ When she asked the victim what was wrong, the victim told her that her neighbor had sexually touched her.²⁸⁹ This new evidence corroborated the victim's initial account of the incident and appeared to tip the scales against the defendant.

After this witness departed from the stand, the collateral prosecutor directly addressed the defendant in open court informing him that, in her opinion, the witness was extremely credible.²⁹⁰ The victim advocate proceeded to tell the defendant that, the longer the trial lasted, the more it would traumatize the victim.²⁹¹ In closing, she suggested to the defendant that continuing to call the victim a liar would further traumatize the victim.²⁹² These comments highlighted the collateral prosecutor's role as a party acting on the victim's behalf and led the defense attorney to request a meeting in the judicial chambers.²⁹³ The judge began the meeting by stating outright that he believed the defendant was guilty.²⁹⁴ In contrast to the American plea bargaining process, in which the judge merely confirms or rejects an agreement negotiated between the prosecution and the defense, the court's leadership role in the "confession bargaining" process represents a distinct difference between the roles of the players in the two systems. Since the presiding judge structures the presentation of evidence and dominates the questioning process, the presiding judge has a stake in moving the case towards a resolution. Until this point in the case, it was the

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

collateral prosecutor and the presiding judge who exerted pressure on the defendant to confess.²⁹⁵ That pressure eventually swayed the defendant.

After a discussion between all of the participants, everyone settled on a recommended sentence of two years of probation.²⁹⁶ When the parties returned to court, the defendant admitted that he had abused the victim.²⁹⁷ Consistent with German practice, the admission was accepted as part of the trial testimony itself rather than as the basis for a free-standing plea hearing.²⁹⁸ The confession was followed by the attorneys' closing statements. In his closing, the prosecutor complied with his statutory duty to cite the factors that weighed both in favor as well as against the defendant by stating:

The range of sentences for this charge is from 2 to 15 years. I recommend two years of probation. On the one hand, the crime is severe. On the other hand, because the defendant has admitted committing the crime, he can get treatment The defendant has two children of his own. In addition, he is going to lose his job as well as his pension. . . . There were also problems with the victim's account of what happened. We heard different versions of the story.²⁹⁹

After the final arguments concluded, the presiding judge retired to "deliberate" with the two lay judges.³⁰⁰ Theoretically, the lay judges could have outvoted the professional judge and refused to accept the agreement.³⁰¹ Nevertheless, when the judges returned to the court room, the presiding judge announced that the defendant had been found guilty and that the court had decided to impose a two year suspended sentence with certain other conditions.³⁰²

What does prosecutorial objectivity mean in this case? First, on the basis of the prosecutor's questioning, it appears that the prosecutor tested the credibility of both the victim and the defendant. In this respect, the prosecutor appeared open to the possibility that neither side was telling the

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. See Machura, *supra* note 144, at 461–63 (arguing that consensual norms between lay and professional judges make it unlikely that lay jurors will vote against the professional judges).

302. Participant Observation-4AJ, *supra* note 231.

truth.³⁰³ Second, while the prosecutor did not serve as the victim's advocate, he was not the defendant's advocate either. Although he privately voiced his doubts to the presiding judge and collateral prosecutor, he did not voice his doubts publicly until a deal had been struck.³⁰⁴ Interestingly, the collateral prosecutor was the driving force behind the deal. The presence of the collateral party, in effect, enabled the prosecutor to remain neutral. It was the collateral prosecutor, as well as the presiding judge, who continued to confront the defendant in order to sway the defendant to admit his guilt.³⁰⁵ During the trial, the prosecutor and the judge disagreed as to whether the evidentiary burden had been satisfied.³⁰⁶ The corroborating testimony of the teacher enabled the collateral prosecutor and the judge to push the defendant towards a confession. It was a confession that came with a reduced sentence of probation rather than imprisonment.³⁰⁷ This reduction in sentence is common in rape cases adjudicated in German courts when witness credibility is at issue.³⁰⁸

The dynamic of the proceeding is an interesting one that calls into question the ability of analysts to draw bright line distinctions between the roles played by the different actors in the case. While the judge hinted that the defendant could face a higher imprisonment level if he insisted on pursuing the case further, the collateral prosecutor continued to stress the trauma that the process was causing the victim.³⁰⁹ During this exchange, the prosecutor stayed on the sidelines.³¹⁰ Once the negotiations over the deal had commenced, however, the prosecutor set a bottom-line for the sentence which cost the defendant his employment.³¹¹ It would have been interesting to see whether the prosecutor would have actually recommended an acquittal had the trial continued. In essence, while the prosecutor viewed the evidence through an objective lens, he stayed in the background while other participants steered the trial towards an agreement. He did, however, set a bottom line for a recommended sentence even before he was

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. See Interview with Prosecutor-13WT, *supra* note 94 (noting that rape cases often weigh the victim's word against the defendant's word—making it difficult to be certain who is telling the truth).

309. Participant Observation-4AJ, *supra* note 231.

310. *Id.*

311. *Id.*

convinced that sufficient evidence existed to show guilt.³¹² When an agreement was in sight, the prosecutor represented the state and the law's interest by refusing to redefine the crime to allow the defendant to protect his job.³¹³ Although the prosecutor acted independently of the presiding judge throughout most of the main proceeding, when the scales of credibility tipped towards the victim, the prosecutor joined in confirming the confession agreement.

While the prosecutor pursued an *independent strategy*, one could argue that the role played by the collateral prosecutor both created the space that allowed him to voice his doubts as well as narrowed his decision-making options once the collateral prosecutor and the judge convinced the defendant to confess. It is not clear, however, in what sense the trial represented an objective search for the truth. The active role that the presiding judge played in trying to effectuate a deal raises a question as to whether the judge's desire to conclude the case colored his objectivity.

From the prosecutor's perspective, "confession agreements" may be seen not merely as time-saving, but also as a means of reducing evidentiary uncertainty.³¹⁴ When the evidence presented in the courtroom is indeterminate, a prosecutor who is charged with the duty to view that evidence through an "objective" rather than adversarial lens may be in a more uncertain decision-making position. While a prosecutor in an adversarial system may simply argue for a conviction and leave the outcome up to the jury, the decision-making posture of German prosecutors is more ambiguous. As one prosecutor in a money-laundering trial related to me, "conflicts in witness testimony make me uncomfortable."³¹⁵ By agreeing to a "confession agreement," a prosecutor can minimize the uncertainty of the fact-finding process created by evidence that is conflicted. Although the suspect's confession may confirm the suspect's guilt, that level of guilt may be diminished. In essence, the confession may be viewed as a move towards the truth, but it is not necessarily "the truth." In this light, a prosecutor is willing to accept a confession agreement when the degree of movement towards the truth outweighs the degree of guilt confirmed by the sentence. Viewed from this perspective, these agreements do not necessarily short-circuit the truth-finding process, but rather help the system achieve some level of justice. Against an uncertain evidentiary

312. *Id.*

313. *Id.*

314. *Id.*

315. Interview with Prosecutor-5DK, *supra* note 137.

backdrop, the interrelationships between the courtroom actors not only affects the delivery of justice but also delineates the extent to which the truth-finding process is an objective one.

*D. Case Three: Strehlen*³¹⁶

In this final case, the interrelationships between the presiding judge and the defense attorneys complicated the prosecutor's willingness to perform a robust fact-finding role in the courtroom. Moreover, as in the *Rosenberg* case, the trial prosecutor did not supervise the investigation conducted in the case.³¹⁷ These factors dramatically shaped the courtroom's decision-making dynamic.

In 2008, the state charged two eighteen-year-old young men for seriously abusing a child under the age of fourteen—a major crime (*Verbrechen*) under German law.³¹⁸ In contrast to the other case-studies discussed in this Article, which took place in lower (*Amtsgericht*) courtrooms,³¹⁹ the investigating prosecutor filed this case in the regional court (*Landgericht*).³²⁰ Although regional court panels usually contain three professional judges and two lay judges, the presiding judge turned the case over to a smaller panel and appointed a less experienced colleague to serve as the presiding judge.³²¹ As will become apparent, the judge's inexperience and personality complicated the truth-finding process as the judge lacked the requisite skill necessary to question the key witness in the

316. Strehlen is a fictitious name that I have assigned to a city where the proceeding was held.

317. Participant Observation-13WT, *supra* note 135.

318. *Id.* According to section 176a, the minimum punishment is a term of imprisonment no less than one year; the maximum punishment is ten years of imprisonment. See STGB, *supra* note 164, § 176a (promulgating sentencing guidelines for child abuse).

319. The *Amtsgericht* cases are tried in front of a judicial panel comprised of one professional and two lay judges. See GVG, *supra* note 74, §§ 28, 29 (mandating the inclusion of lay judges in local courts that decide criminal matters).

320. Participant Observation-4BI, *supra* note 254.

321. See *id.* German procedural law permits a smaller panel of *Landgericht* judges to hear less serious cases. See GVG, *supra* note 74, § 76(2) (providing that the chief judge may decide, at the beginning of the main proceedings, whether it will be composed of only two judges unless the participation of a third judge appears necessary due to the scale or complexity of the case).

case—the victim.³²² In addition, the two defense attorneys adopted a combative trial strategy that was more reflective of adversarial trials.³²³

As the case file arrived before the court, it was evident to the trial prosecutor that the investigation had been hastily performed.³²⁴ As I learned from the prosecutor who handled the trial, the prosecutor assigned to the case at the investigation stage had been about to go on maternity leave when the alleged rape occurred.³²⁵ Rather than send the case to a colleague to complete the investigation, the prosecutor elected to file charges without requesting DNA testing of the evidence or ordering that a psychologist evaluate the victim's credibility.³²⁶ According to the trial prosecutor, the original prosecutor had expected that the judge would order the DNA testing as well as the psychological evaluation if necessary.³²⁷

By the time the trial reached its second day, the uncertain nature of the victim's testimony, as well as the conflict between the presiding judge and the defense attorneys created an uncharacteristically contentious trial. It had become apparent to both the prosecution and the defense by the second day of trial that the evidence presented in court so far had been inadequate to establish the defendants' guilt. Thus, a key issue put to debate in the trial's second day was whether or not the trial court should order that the state complete additional investigation in the case.³²⁸

As the second day of trial began, the defense called into question the victim's credibility by highlighting differences between the victim's original statement to the police and her testimony on the stand.³²⁹ On the night of the alleged rape, the victim told the police that two young men had climbed into her open bedroom window.³³⁰ While one of the unknown suspects threatened her with a gun, the other suspect raped her.³³¹ On the

322. Participant Observation-4BI, *supra* note 254.

323. *Id.* Although prosecutors and judges acknowledge that defendants have a right to an attorney under German law, many of them look on the so-called "conflict defense attorneys" (*Konfliktverteidiger*) with disdain. See Interview with Prosecutor-13WT, *supra* note 94 (noting that these attorneys are "bad lawyer[s]" whose clients receive a "higher punishment"). As one prosecutor related to me, "the defense counsel's job is to secure a confession." *Id.*

324. Participant Observation-4BI, *supra* note 254.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

stand however, the victim testified that only one young man had entered her room and that she had previously met that young man at a party.³³² Complicating the fact-finding process further was the fact that the initial interview conducted by a police officer was replete with leading questions and answers in which the victim essentially confirmed verbatim the wording of the officer's questions.³³³

The inconsistency in the victim's testimony was not the only reason that the truth-finding process at trial proved to be difficult. During trial, the victim's parents admitted that the victim had been previously hospitalized several times for mental health issues.³³⁴ Had the investigating prosecutor petitioned the court to order a psychological exam of the victim, the court and the prosecutor would have had additional expert insight into the victim's credibility.³³⁵ As the trial continued, the factual uncertainty increased. The next witness, who was the victim's close friend, testified that both she and the victim had conducted a séance after the alleged rape in which a ghost appeared and told the victim that she had not been raped.³³⁶

The testimony of the two defendants was also problematic. While one of the defendants testified that he had in fact slept with the victim, he claimed that the sex was consensual.³³⁷ Although the second defendant denied having had sex with the victim, when the police searched his bedroom, they found a gun that the victim identified as having been used in the rape.³³⁸ The available forensic evidence could not settle the testimonial uncertainty. Although the victim had been examined by hospital personnel immediately following the incident and her medical exam had showed evidence of trauma, by the time of the trial, neither the prosecutor's office nor the court had ordered the forensic lab to test the DNA evidence collected during the exam.³³⁹

In response to the inconsistent evidence revealed during the proceeding, both defense attorneys moved the court to appoint a

332. *Id.*

333. *Id.*

334. See Interview with Prosecutor-4BI (confidential interview) (Feb. 3, 2006) (noting that the victim had been hospitalized in a psychiatric facility four times) (on file with the Washington and Lee Law Review).

335. Participant Observation-4BI, *supra* note 254.

336. *Id.*

337. Interview with Prosecutor-4BI, *supra* note 334.

338. Participant Observation-4BI, *supra* note 254.

339. *Id.*

psychologist to evaluate the victim's credibility.³⁴⁰ According to a prosecutor who deals with sexual crime cases in another office, expert witnesses are routinely used to assist the court in evaluating the victim's credibility:

[With sexual crimes involving children] it is the task of the expert witness to investigate whether or not the child has been exposed to suggestive influences There are many possibilities which must be properly investigated I have also seen expert opinions where the expert states that there has been so many statements that the expert can no longer discern what the truth is.³⁴¹

Although the trial prosecutor confided to me that he would have petitioned the court to appoint an expert psychologist on the case had he supervised the case investigation,³⁴² he took no position in open court on the defense motion.³⁴³ His inaction on the discovery request fell far short of a dedicated pursuit of the truth.

The defense also requested that the court order the forensic laboratory to test the evidence collected at the scene and from the victim.³⁴⁴ Complying with this request was well within the power of the court. According to the Code of Criminal Procedure, when it becomes apparent during the main proceeding that the investigation conducted by the prosecution is insufficient, a court is free to extend the taking of evidence "in order to establish the truth . . . to all facts and means of proof relevant to the decision."³⁴⁵ Moreover, this provision grants the court the authority to summon witnesses and experts who were not interviewed during the case investigation process.³⁴⁶ Under German law, both the prosecutor, as well as the defense counsel, possess the right to petition the court to hear the testimony of additional witnesses.³⁴⁷ The prosecutor failed to support this motion as well.³⁴⁸

340. *Id.*

341. Interview with Prosecutor-5CK (confidential interview) (Jan. 22, 2006) (on file with the Washington and Lee Law Review).

342. See Interview with Prosecutor-4BI, *supra* note 334 ("I would have ordered an expert report on the victim.").

343. Participant Observation-4BI, *supra* note 254.

344. *Id.*

345. STPO, *supra* note 7, § 244(2).

346. See *id.* (allowing the court to take any evidence necessary to reach a decision).

347. See *id.* § 245(2) (obliging the court to extend the taking of evidence to witnesses summoned by the defendant or prosecutor).

348. Participant Observation-4BI, *supra* note 254.

The defense argument regarding the two motions provoked a contentious exchange between defense counsel and the presiding judge.³⁴⁹ As the prosecutor remained silent, the presiding judge denied both motions and stated that it was obvious that there was no need to take further evidence to render a verdict.³⁵⁰ The judge then closed the proceeding's evidentiary phase and announced a short break.³⁵¹ During the break, the judge pulled the prosecutor aside and informed him that he should prepare to make his closing argument.³⁵² Ironically, the prosecutor did object to the judge at this point as the clock approached 7:00 p.m.³⁵³ This objection however drew the curt response from the judge to the effect that "he [should] start living in the real world."³⁵⁴

Prior to the reading of the court's verdict, I asked the prosecutor whether or not he believed that the victim's testimony was sufficiently credible to recommend that the court convict both defendants. The prosecutor responded: "I believe her [the victim] but only in a small part because there are so many inconsistencies."³⁵⁵ The prosecutor further explained to me:

I am only sixty percent convinced that the second defendant is guilty. I have been thinking about my closing argument and I am having difficulty reaching a "certain" decision because the victim's statements are inconsistent. This is only the second time in my fifteen[-]year career that I am not satisfied with the evidence presented during the main proceeding The maximum sentence available against both defendants is four years. They are both very young. I think I will recommend a sentence of four years for both defendants. I think that the Federal Criminal Court will overturn the decision in any case . . . I have a bad feeling in my gut about this case. Although there is uncertainty, there is not enough uncertainty to recommend that the court acquit the defendants . . . I believe at the center of the case is a truth but around the center are inconsistencies. I wish that we had had an expert report in the case on the subject of the victim's truthfulness.³⁵⁶

In this case, it appeared that the decisions made during the investigation stage of the proceeding had a binding impact on the trial

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. Interview with Prosecutor-4BI, *supra* note 334.

356. Participant Observation-4BI, *supra* note 254.

prosecutor's conduct.³⁵⁷ In particular, neither the judge nor the prosecutor was inclined to stop the proceedings to allow more evidence to be collected.³⁵⁸ While the judge was convinced that the evidence presented during the trial was sufficient, the prosecutor was more equivocal; he merely wished that he could rely on an expert witness's report.³⁵⁹ Moreover, the prosecutor recommended that the court convict both defendants and impose a prison sentence despite the fact that he was not fully convinced of their guilt.³⁶⁰ While he doubted the reliability of some of the testimony, he was also confident that the higher court would overturn the convictions.³⁶¹ That result, however, would have imposed an additional cost on the victim. A new trial would have forced the victim to testify a second time.

In this case, the trial prosecutor's decision-making could be categorized as an *acquiescent* strategy. Although the trial highlighted gaps in the investigation, the prosecutor was unwilling to support the defense attorneys' requests to supplement those gaps.³⁶² While the prosecutor who handled the case at trial had the advantage of viewing the evidence through fresh eyes, the prosecutor's timidity in confronting the court and his unwillingness to side with the opinion voiced by conflict-oriented defense attorneys led him to acquiesce to the opinion of the presiding judge.³⁶³ Rather than take the initiative to challenge the court's opinion,³⁶⁴ his commitment to objectivity was relegated to merely hoping that the appellate court would overturn the decision. In this case, the prosecutor's allegiance to informal collegial controls and his acquiescence to the presiding judge's courtroom decisions suggest that, under certain conditions, some prosecutors may be reluctant to perform a robust fact-finding role in the courtroom.

Although German law envisions that courts will aggressively pursue the truth at trial through a full examination of the evidence,³⁶⁵ that truth-

357. Unfortunately, as of this date, I have been unable to discover the outcome of the case from either the prosecution or the defense.

358. Participant Observation-4BI, *supra* note 254.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. See STPO, *supra* note 7, § 244 (establishing a process that culminates in a full presentation of evidence in a court proceeding).

finding process was certainly short-circuited in this case. The confluence of dynamic relational forces between the investigating and trial prosecutors, between the presiding judge and defense counsel, and between the prosecutor and the presiding judge, handicapped the search for truth. Concomitantly, a series of unique circumstances created a decision-making dynamic that was far different from the process of constructive compromise reflected in the *Schneekopf* case.³⁶⁶ Those circumstances included the fact that the initial prosecutor on the case had filed the charges prematurely because she was leaving on maternity leave.³⁶⁷ Due to the chief judge's decision not to participate in the case, a less experienced judge, who had difficulty managing the proceeding, directed the proceeding.³⁶⁸ The two defendants were represented by attorneys who elected to pursue a conflict-oriented strategy.³⁶⁹ Finally, the prosecutor's last argument to the court assumed the character of a hedged bet. While he recommended that the court convict the defendants, he fervently hoped that the higher court would overturn the conviction.³⁷⁰ The prosecutor's acquiescent strategy did nothing to countermand the direction of a truth-finding process that fell short of a thorough investigation of the facts.

Ultimately this case underscores the fluid and contextual nature of the evidence-weighting process. The interrelationships between the parties involved in the case strongly impacted the case outcome. The prosecutor's decision-making process seemed calculated to preserve the prosecutor's relationship with the presiding judge, rather than to preserve the system's commitment to finding the truth. It is certain that the prosecutor did not act as a truly independent second judge; rather the prosecutor chose to speak out in favor of a conviction despite questionable decision-making by the presiding judge.³⁷¹ The prosecutor's decision to recommend that the court find the defendants guilty was far removed from a detached weighing of the facts and the law and, instead, underscored the interdependence of the prosecutorial and judicial functions. The case raises questions as to whether the prosecutorial and judicial branches can truly function

366. Participant Observation-4AJ, *supra* note 231.

367. Participant Observation-4BI, *supra* note 254.

368. See Interview with Prosecutor-4BI, *supra* note 334 (noting that the presiding judge's inexperience and lack of training).

369. Participant Observation-4BI, *supra* note 254.

370. See Interview with Prosecutor-4BI, *supra* note 334 (noting that the judge's inexperience and lack of special training and that the prosecutor's belief that the decision would be overturned enabled him to recommend a conviction).

371. *Id.*

independently as well as the extent to which trial prosecutors are willing to *correct* mistakes made by the investigating prosecutor. In order to act in a manner that evidenced a stronger commitment to supporting a full investigation of the victim's allegation, the prosecutor would have had to adopt a more confrontational tone against the presiding judge. That strategy could have compromised the prosecutor's relationship with his colleague as well as with the presiding judge and violated unwritten norms of collegiality between judges and prosecutors. More problematic was the fact that by joining in the defense motions, the prosecutor would have had to violate a clear norm against cooperating with conflict-oriented defense attorneys.³⁷²

V. Conclusion: The Relational Construction of Prosecutorial Objectivity

The face of objectivity in German courtrooms is both constitutive and relational. According to German law, prosecutors possess a duty to conduct an objective investigation while trial courts are bound to ensure that all evidence that is necessary to discover the truth is presented at trial.³⁷³ Ideally, the presiding judge serves as a check on the prosecutor's decisions during the investigation stage, while the prosecutor serves as a check on judicial decision-making at trial. Although German law posits that the prosecutor and the court function as independent organs of justice,³⁷⁴ a

372. When I asked prosecutors what the role of the defense attorney was, many prosecutors criticized defense attorneys who adopted a confrontational courtroom style. As one prosecutor explained to me:

I think it's good to be aggressive, if you feel that there's a chance for you at the end that the judge thinks that, "Okay, maybe he hasn't committed the crime." That's okay. It is the task of [a] good defense attorney. But in cases where you have a defense attorney that makes mistakes and I think he is not a bad one but you see I think in those cases then we help him. We say let us do it this way, it is better for the client and if he says okay I think you are right. Then I think it's no problem if you have a bad lawyer. But I think as I told you, these cases, if there's a case, for example. Rape is a typical case. In rape, you have to see at the beginning of a trial if you are a good defense attorney, you have to [look at] this case [and ask] what should you do? Then I think it's better for you to say, "Okay, my client's guilty but you have to tell the reasons he did what he did." But sometimes the lawyer is not good then they blame the victim, the victim was guilty and then you are aggressive against them. I think judges, that is not okay. I think you get a higher punishment.

Interview with Prosecutor-13WT, *supra* note 94.

373. See StPO, *supra* note 7, § 244(2) (mandating that courts take all evidence necessary to establish the truth).

374. See GVG, *supra* note 74, § 150 (commanding public prosecution offices to operate

desire to achieve consensus affects the interrelationship between the two institutions at trial. Because the two institutions function in an interdependent manner, through their courtroom decision-making, prosecutors are more likely to support or acquiesce to judicial decision-making. As a result, trial outcomes are a function of a "relational dance" between the judge and the prosecutor and the other parties involved in the case. Although the institutions of the prosecution and the judiciary are separated on paper, my research demonstrates that they often dance together. In this respect, my research confirms Grande's characterization of Continental procedure as a "rumba" dance "in which many dancers of different capacities dance together in the common enterprise of discovering the truth."³⁷⁵

While prosecutors and judges play interdependent roles, that interdependence does not completely handcuff prosecutorial decision-making at trial. As these three cases illustrate, individual prosecutors interpret the principle of objectivity differently.³⁷⁶ That difference manifests itself in the courtroom decisions that prosecutors make. Whether a prosecutor chooses to adopt an acquiescent, supportive, or independent strategy towards the presiding judge, those decisions help not only to shape case outcomes in the criminal justice system, but also to determine how the extent to which the truth-finding process mirrors the normative ideal of neutrality.

For comparison purposes, I have summarized the key characteristics of the three cases below. In the *Rosenberg* case, while the prosecutor played a neutral role and challenged the credibility of several of the witnesses, his view of the evidence in the case ultimately coincided with the presiding judge's vision.³⁷⁷ Although he appeared to play the role of the "bad cop" towards courtroom witnesses, in the end, the prosecutor and court agreed on the case disposition.³⁷⁸ Together, the presiding judge and the prosecutor in that case dominated the trial process and guided the trial's outcome.³⁷⁹

independently of the courts).

375. Grande, *supra* note 65, at 155.

376. See *supra* Part IV.B (discussing the *Rosenberg* case and arguing that the prosecutor's strategy was supportive); Part IV.C (discussing the *Schneekopf* case in the context of the "confession agreements" prosecutorial strategy); Part IV.D (discussing the *Strehlen* case in the context of the "acquiescent" prosecutorial strategy).

377. See *supra* notes 227–31 and accompanying text (explaining that the prosecutor took a neutral role in questioning witnesses but also that his strategy was largely supportive of the presiding judge's view of the evidence).

378. *Id.*

379. See *supra* Part IV (discussing the roles of the prosecutor and the presiding judge in

In contrast, in the *Schneekopf* and *Strehlen* trials, the assessment of the evidence made by the prosecutors and the presiding judges differed.³⁸⁰ Although the prosecutors in both cases possessed varying levels of doubt about whether a conviction was warranted, neither prosecutor openly challenged the court's decision-making.³⁸¹ The dynamic of both cases differed considerably. In the *Schneekopf* case, the presiding judge reached out to the prosecutor to determine his opinion of the evidence, and the prosecutor responded by voicing his doubts.³⁸² In essence, the collateral prosecutor resolved the disagreement between the prosecutor and the judge by pushing for a "confession agreement."³⁸³ Ironically, it was the actions of an interested party working on the victim's behalf and the acquiescence of defense counsel that led to the case's cooperative resolution. Despite his doubts about the case, however, the prosecutor was not willing to hand over the store to reach an agreement.³⁸⁴ He insisted on a sentence that would cost the defendant his employment and pension.³⁸⁵ Absent an activist collateral prosecutor, it is likely that the prosecutor would have recommended that the court acquit the defendant.

Finally, in the *Strehlen* case, neither the court, nor the prosecutor took the steps necessary to supplement the evidence presented in court when it became apparent that the victim's credibility was open to question.³⁸⁶ While the prosecutor had doubts about the case, he recommended a conviction hoping that an appellate court would overturn it.³⁸⁷ Although the defense attorneys in the case petitioned the court to supplement the case investigation, the prosecutor failed to support that motion.³⁸⁸ Through his

the *Rosenberg* case).

380. See *supra* Part IV.C (describing how the prosecutor informed the judge—who believed that the defendant was guilty—that he could not argue the defendant was guilty in the *Schneekopf* case); *supra* Part IV.D (explaining that the prosecutor had doubts about the credibility of the evidence while the judge was convinced of the credibility in *Strehlen*).

381. See *supra* Part IV.C (describing how the prosecutor had serious doubts about the case, which seemed to diminish after he listened to the suspect's explanation of the event, and how, in the end, the prosecutor merely acquiesced to the collateral prosecutor's effort to force a plea); Part IV.D (describing how the prosecutor requested a psychologist to evaluate the victim's credibility).

382. Participant Observation-4AJ, *supra* note 278.

383. *Id.*

384. *Id.*

385. *Id.*

386. Participant Observation-4BI, *supra* note 278.

387. *Id.*

388. *Id.*

acquiescence the prosecutor did not attempt to navigate an intermediate truth-finding path that might have dampened the impact of the defense attorneys' aggressive, conflict-provoking strategy or the presiding judge's inexperience.

Figure 1.0 summarizes the strategies implemented by the various players in these cases.

Figure 1.0 Summary of Cases

Case	Judge	Prosecutor	Defendant	Collateral P.
<i>Rosenberg</i>	Leads Questioning and Conviction	Supports Judge	Mild Opposition	N/A
<i>Schneekopf</i>	Convinced of Guilt	Unconvinced	Wants a Deal to Preserve Job	Pushes for Tough Plea
<i>Strehlen</i>	Cuts Further Investigation Short	Not Happy with Judge But Will Not Challenge Judge	Conflict Defense Strategy	Supports Victim

In each of these cases, the evidence presented in court did not present a clear picture of guilt. The malleability of facts and memory, which occurs regularly in sexual assault cases, shapes the fact-finding process at trial. In all three cases, victim interview evidence that appeared reliable during the case investigation stage morphed into inconsistent memories at trial.³⁸⁹ In two of the cases, the prosecutor responded to that uncertainty by affirmatively questioning the witnesses in an attempt to pin down the truth.³⁹⁰ In the third case, where the evidentiary uncertainty was perhaps

389. See *supra* note 218 and accompanying text (explaining that the victim had conflicting statements about the use of force in *Rosenberg*); note 265 and accompanying text (pointing to inconsistencies in the victim's testimony in *Schneekopf*); note 328 and accompanying text (pointing to inconsistencies in the victim's testimony and her statement to the police in *Strehlen*).

390. See *supra* notes 265–72 (describing the questioning of the victim in *Schneekopf*); note 228 and accompanying text (describing the prosecutor's questioning of the victim in *Rosenberg*).

the highest of the three cases, the prosecutor took no affirmative step to reduce that uncertainty and, in fact, recommended that the court convict the defendants.³⁹¹ The level of evidentiary uncertainty that prosecutors are willing to tolerate and still proffer a conviction recommendation obviously varies. The fact that some German prosecutors do indeed wrestle with the truth at trial shows that, in major crime cases, German prosecutors take their commitment to serve as objective fact-finders seriously. Further empirical research will be necessary to identify both the degree as well as the extent to which prosecutors evidence a commitment to objectivity at trial. This Article has merely opened the door to that inquiry.

The degree of that commitment varies substantially. While it would be imprudent to draw broad conclusions based on the excerpts of only three trials, it is clear that the parameters of prosecutors' role in the truth-finding process are drawn not only by the law, but also by the beliefs of individual prosecutors about the scope of their duty. Although I did not personally observe a case in which a prosecutor recommended that a court acquit a defendant, my interview data indicated that such cases do exist.³⁹² Several prosecutors related to me that in the course of their careers, they had participated in trials in which their opinion of the evidence shifted dramatically.³⁹³ With few exceptions, every prosecutor that I interviewed could proudly point to a case in which they personally had recommended an acquittal or filed an appeal on the defendant's behalf.³⁹⁴ Although that anecdotal evidence falls short of conclusive proof, it suggests that prosecutors' duty of objectivity is part of the organizational norms. Although this Article has explored the impact collegial norms play in restricting a prosecutor's decision-making freedom, the control over prosecutor's decision-making at trial exercised by supervisors must be addressed in future research.³⁹⁵

391. See Part IV.D (describing the prosecutor's inaction in the *Strehlen* case).

392. See, e.g., Interview with Prosecutor-8AR, *supra* note 117 (asserting that, on multiple occasions, she has asked for acquittal because she was unconvinced of the defendant's guilt).

393. See, e.g., *id.* (asserting that, on multiple occasions, she has asked for acquittal because she was unconvinced of the defendant's guilt); Interview with Prosecutor-6SB, *supra* note 117 (stating that a colleague had twice filed appeals arguing for a lower sentence).

394. See, e.g., Interview with Prosecutor-8AR, *supra* note 117 (asserting that she will ask for acquittal if she is unconvinced of the defendant's guilt and has done so on multiple occasions).

395. A preliminary impression is that prosecutors possess wide decision-making latitude at trial. For example, one law student who was completing her practical training in a

The face of objectivity is not merely the product of organizational norms. An individual prosecutor's self-image is a key factor that determines whether a prosecutor is simply content to remain on the sidelines during the truth-finding process. When I asked one senior prosecutor to describe the characteristics of an ideal prosecutor, he responded:

[Y]ou must reflect about what you do. [You must ask] what will be the effect of your accusation on the accused? What will be the impact on the social situation of the accused? . . . Prosecutors have a clear self-understanding Naturally, the personality of the prosecutor, whether they are active in the main proceeding, [is important]. There are also those who make no comments and do not talk. On the other hand it is also true that the judge will sometimes also [take] a difficult [position]. One would like those who represent [themselves] well in court [by presenting] the state's view of the law and [reflecting on] the personality of the suspect.³⁹⁶

These cases demonstrate that, despite the fact that judges structure the presentation of evidence during the main proceeding, prosecutors may influence trial outcomes. There is a wide variation in the approaches that particular prosecutors adopt when assessing the credibility of testimonial evidence. In particular, prosecutors interpret their duty to investigate the facts differently. As a result, while prosecutors possess the ability to actively participate in the truth-finding process by directly questioning witnesses and requesting that the court obtain additional evidence, they may also elect to stand in the background and play an inconsequential role. When a prosecutor elects to play an acquiescent role at trial, that passivity cannot be equated with neutrality. In Germany's nonadversarial system, finding the "objective truth" requires that prosecutors make an affirmative commitment to discovering the truth.

When the evidence presented at trial is inconsistent, prosecutors' individual comfort zones with uncertainty vary. Admittedly, the impact of the choices that prosecutors make at trial may be less significant than the influence that they exert during the investigation stage. Nevertheless, the

prosecutor's office told me that her supervisor would not allow her to argue for an acquittal in a hit and run case where the key witness testified that he had not seen the accident. Interview with Professor-18UE, *supra* note 99. The student informed the court after the verdict that she had not been permitted to recommend that the court acquit the defendant. *Id.* The judge, reading between the lines, informed her that if she had actually been employed as a prosecutor rather than as a student intern, she would have had the freedom to argue for an acquittal. *Id.*

396. Interview with Prosecutor-13BR, *supra* note 113.

amount of initiative that prosecutors demonstrate during the truth-finding process may affect trial outcomes. Because judges control the trial process, the impact of prosecutorial discretion at trial is severely bounded and is mediated through the actions of the other players who participate in the proceedings. Despite that limitation, prosecutors possess the potential to function in the capacity of a "second judge" at trial. Whether they choose to exercise that potential remains an open question.

Due to the fact that both prosecutors and judges receive the same legal training and are typically members of the same social class, prosecutors may be reluctant to challenge judges with whom they disagree.³⁹⁷ Moreover, because prosecutors do not function as adversaries and do not see a need to "win" a case, prosecutors have an incentive to yield to a judge's perspective of a case. A potential for disagreement between a prosecutor's view of a case and the judge's view exists. A prosecutor who is intimately familiar with the evidence and may have personally directed the course of the investigation may see the facts of the case differently than a judge whose first impression of the case is the paper file. A judge who has not previously worked as a prosecutor may have an unrealistic view of the investigation resources at a prosecutor's disposal as well as the realities of a prosecutor's caseload.

In addition, there is a potential for tension between the prosecutor assigned to handle a case in court and the prosecutor who investigated the case. Many prosecutors who handle cases at trial that were investigated by another prosecutor will touch base with the investigation prosecutors to get a sense of their ideal outcomes. In order to preserve collegial relations, prosecutors who handle a case in court are typically reluctant to criticize the investigation decisions made by another prosecutor. In the *Strehlen* case, this desire to preserve collegiality placed the trial prosecutor in a difficult position.³⁹⁸ It was clear that the investigating prosecutor had not conducted a thorough investigation.³⁹⁹ In fact, the trial prosecutor told me that one of the reasons why there were problems with the case was that the investigating prosecutor filed charges before she completed the investigation.⁴⁰⁰ When the defense attorneys raised issues about the case

397. See Interview with Appellate Judge-22FE, *supra* note 29 (stating that close working and social relationships and similar backgrounds make it unlikely that prosecutors and judges will oppose each other in the courtroom).

398. Interview with Prosecutor-8AR, *supra* note 117.

399. See *id.* (noting that the investigating prosecutor had filed the case before fully investigating the case).

400. *Id.*

during trial that the chief judge categorically dismissed, the trial prosecutor was reluctant to challenge the judge or to critique the quality of the initial investigation.⁴⁰¹ In the end, she elected not to side with the defense because she was confident that the case would be overturned on appeal.⁴⁰²

In the other two cases, *Rosenberg* and *Schneekopf*, the dance between the prosecutor and the judge unfolded quite differently.⁴⁰³ In *Rosenberg*, the prosecutor's initial confrontation with the victim concerning her drinking appeared to be a move towards an independent assessment of objectivity.⁴⁰⁴ As the case progressed, the prosecutor and judge appeared to work in tandem.⁴⁰⁵ In particular, the judge attempted to coax the "truth" out of the victim, urging her to remember what happened.⁴⁰⁶ The prosecutor did not hang back and accept the lack of corroborating testimony in the case.⁴⁰⁷ He threatened the Turkish witness with a criminal charge and worked to undermine the logic of the defendant's testimony.⁴⁰⁸

The interaction between the prosecutor and the chief judge in *Schneekopf* was extremely interesting. The prosecutor did not hesitate to tell the judge that he had concerns about the victim's credibility during a break in the case.⁴⁰⁹ The judge seemed genuinely concerned that the prosecutor might ask for an acquittal at the trial's conclusion.⁴¹⁰ But for the collateral prosecutor's efforts to negotiate a plea, it is possible that the prosecutor and judge might have reached a different conclusion about the evidence in the case. Critically, the source of this tension was not a difference of opinion about the law that applied to the case. Instead the difference of opinion emanated from a different perspective of the main witness's credibility. In a legal system that privileges a positivistic vision of the penal law, on a theoretical level there exists the possibility that a judge and a prosecutor could reach a different conclusion about the facts in

401. *Id.*

402. *Id.*

403. *See* Part IV.B (describing the interactions between the prosecutor and judge in the *Rosenberg* case); Part IV.C (describing the interactions between the prosecutor and judge in *Schneekopf*).

404. Participant Observation-13WT, *supra* note 135.

405. *Id.*

406. *See id.* ("You are here only as a witness. We just want to know what the truth is.").

407. *Id.*

408. *See id.* ("Stop playing with us and tells us what you know. . . . I can charge you with a crime . . . the failure to report a rape.").

409. Participant Observation-4AJ, *supra* note 231.

410. *Id.*

a case. In that case, if the judge and the prosecutor strictly adhered to criminal procedure, they might have voiced those differences in the courtroom. For example, the prosecutor could move for an acquittal while the judge leans to convict or the prosecutor could ask for a conviction, while the judge elects to acquit. I would suggest, however, that the common socialization of judges and prosecutors and their interdependence in the courtroom would exert pressure on the parties to negotiate their conflicting visions of truth. From a sociological perspective, it is worth emphasizing that the public prosecutor and the judge likely studied the same courses, may socialize together, and must continue to work with each other on future cases. As one appellate judge stated:

Well, the public prosecutor and the judge twenty years ago studied the same classes at the university. They know each other; in the afternoon they play tennis together, why should the judge blame the public prosecutor? They have to work together the next twenty years and if one person started to bother the other, the other would bother the first person, so you don't want to have any wall between these two institutions. That's how it works in practical life. You will not find any institutional changes. If you want institutional changes, you need a radical turnaround of the legal system.⁴¹¹

The downside of the more active role that prosecutors in the United States play is that they may become blinded to contradictory evidence and prosecute a case too aggressively. The more passive role played by German prosecutors possesses a downside as well. When prosecutors narrowly interpret or abdicate their duty to participate in the truth-finding process, they forfeit the opportunity to enhance the objectivity of the fact-finding process. While German criminal procedure law does not aim to establish a truth-finding process in which the truth is produced from a battle between adversaries, the system requires prosecutors to fulfill an independent fact-finding role.⁴¹² Although the law posits that the judge and prosecutor will function independently while viewing the evidence through an objective lens, this Article demonstrates that objectivity is the end product of a constitutive process in which the nature of the relationship between the prosecutors and judges as well as the temporal relationship between the trial and investigating prosecutors give birth to the face of objectivity. In sum, where prosecutors are content to play a passive role in the truth-finding process, that passivity may not satisfy the duty of

411. Interview with Appellate Judge-22FE, *supra* note 29.

412. See STPO, *supra* note 7, § 160(2) (mandating that prosecutors ascertain both incriminating and exonerating evidence).

objectivity. Consequently, in some situations Germany's two-judge system does not create a level of redundancy that enhances the accuracy of the decision-making process at trial. In cases in which a prosecutor possesses a more robust self-image, the prosecutor plays a critical role in the courtroom truth-finding process.

