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Thomas Swenson

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THE GERMAN "PLEA BARGAINING" DEBATE†

Thomas Swenson‡

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† The author of this Article was able to translate German sources into English. Unfortunately, The Pace International Law Review is unable to verify these sources. Thus, we are relying on Mr. Swenson's translation, which we trust to be accurate.

‡ Thomas Swenson received his J.D. at the University of Colorado in Boulder. He would like to thank Prof. William T. Pizzi, University of Colorado School of Law, and Prof. Luca Marafioti, II University of Rome at Tor Vergata, for their advice. He also thanks Michelle Ingermann and the other members of the seminar in *Comparative Criminal Procedure* at CU, of whom some actually read the first draft.

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LIST OF ABBREVIATIONS

BGH	<i>Bundesgerichtshof</i> , Federal Court of Appeals
BVerfG	<i>Bundesverfassungsgericht</i> , Federal Constitutional Court
GG	<i>Grundgesetz</i> , Basic Law = constitution
LG	<i>Landgericht</i> , trial court for serious crimes
NJW	Neue Juristische Wochenschrift
NStZ	Neue Zeitschrift für Strafrecht
StA	<i>Staatsanwalt</i> , (office of the) state's attorney
StGB	<i>Strafgesetzbuch</i> , penal code
StPO	<i>Strafprozessordnung</i> , code of criminal procedure
ZRP	<i>Zeitschrift für Rechtspolitik</i>

I. INTRODUCTION

German criminal procedure contains no provision for guilty pleas to non-minor crimes. As a result, "plea bargaining," as it exists in the US, does not occur. Nevertheless, informal agreements among the parties, especially agreements involving a confession, can produce a similar result. Up to fifteen years ago, confession agreements were not an issue in Germany because no one openly acknowledged their existence. In 1982, however, an article was anonymously published under the pseudonym "Detlef Deal,"¹ describing the practice of "settlements" in criminal proceedings. This unleashed a heated debate in the legal profession about the legality and doctrinal acceptability of confession agreements. In the following years, scores of articles, books, and studies examined and analyzed the practice. The intense debate peaked in 1990 when the practice of agreements was the major topic of the criminal-law section of Germany's 58th *Juristentag* (biannual "jurists' meeting").

One of the leading critics of confession agreements is Dr. Bernd Schünemann. Dr. Schünemann presented a survey at the *Juristentag* in 1990 that provided a valuable guide for analyzing and organizing the articles and court opinions on the subject. The doctrinal arguments of Professor Schünemann and the other critics of confession agreements were very persuasive. Nevertheless, this paper attempts to present both sides of the debate.

¹ Detlef Deal, *Der strafprozessuale Vergleich*, 1982 STRAFVERTEIDIGER 545.

The proponents of agreements defend them with "pragmatic," "realistic" arguments, not dissimilar to the apologists of plea bargaining in the US. The critics of the practice take a more doctrinal approach. Similar to commentators in the US, they too are concerned about the procedural and substantive rights of the accused that confession agreements implicate. But, the critics disapprove of confession agreements for additional reasons. They fear that the practice tends to carve out a niche of immunity to the law for certain crimes. They also worry that the disposition of cases by state authorities in a manner not provided by written law actually endangers the rule of law. The liberal-democratic ideas associated with the expression "rule of law" are embodied in the German concept of the "*Rechtsstaat*." The *Rechtsstaat*-principles help to define the source and extent of governmental authority, as well as the proper role of a criminal justice system. Such principles form the heart of the debate in Germany. Both proponents and critics acknowledge the necessity of respecting *Rechtsstaat*-principles: proponents argue that confession agreements are compatible with the *Rechtsstaat*; but, critics argue that such agreements undermine the *Rechtsstaat*. Thus, instead of confining itself only to questions of defendant's rights and judicial economy, the German debate considers fundamental, philosophical principles of liberal-democratic government. It is this aspect of the debate that is so interesting to observers of plea bargaining in the US, and a serious study of the German debate by scholars and lawmakers in the US would likely result in a richer and more balanced discussion of plea bargaining.

The majority resolutions adopted at the *Juristentag* in 1990 were overwhelmingly in favor of confession agreements. Some commentators hoped in vain for legislative action to regulate the practice in one way or another. Others preferred to depend on case law to provide guidelines. A decision of the *Bundesgerichtshof* (BGH, Federal Court of Appeals) in January 1991 announced strict limits on confession agreements; yet, the decision of another Senate of the BGH in October 1991 seemed inconsistent with it. Thus, the debate has not been finally settled.

1. THE PRACTICE OF CONFESSION AGREEMENTS

Theoretically and practically the most significant agreements in German criminal proceedings concern the end-results, including the judgment and the dismissal of charges ("judgment agreements").² The heart of the debate in Germany and the focus of this paper is the extra-trial confession agreement, that is, an informal agreement reached outside of the courtroom, according to which the prosecuting state's attorney (*Staatsanwalt*, StA) or the court provides some benefit to the accused in return for a confession (*Geständnis*).

1.1 Description and Terminology

1.1.1 A Typical Confession Agreement

The practice of confession agreements in Germany differs from plea bargaining in the US. In the US, the prosecutor and defense attorney meet before trial, negotiate a "bargain," and then seek the approval of the judge, which is usually given. The defendant appears in court formally to plead guilty to specific charges, and the judge typically sentences him according to the prosecutor's recommendation.

In Germany, on the other hand, the presiding judge often plays an active role in the agreement process.³ Also, the process is much more subtle than in the US. A judge may not bind the court to give a benefit to the accused in return for a confession.⁴

² These are followed by agreements concerning the imposition or withdrawal of fines, the taking of evidence, and the procedural aspects of the trial. Bernd Schünemann, *Absprachen im Strafverfahren? Grundlagen, Gegenstände und Grenzen*, 1 VERHANDLUNGEN DES ACHTUNDFÜNFZIGSTEN DEUTSCHEN JURISTENTAGES B 15 (1990) [hereinafter Schünemann, *Absprachen*].

³ The judge plays a central role in the German trial. In contrast to the judge in the US, who is a passive referee in a jury trial, and who relies on the adversarial attorneys in a non-jury trial, the German judge is an active fact-finder. Within the regulations of the procedural code, he directs and controls the proceedings, questions the witnesses, and develops the evidence. Correspondingly, the attorneys in a criminal trial, although "antagonistic," play a less adversarial and less active role. For a description of a German criminal trial, see JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977) (describing a German criminal trial). See also Mirjan R. Damáska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975) (for an abstract description of the model civil law trial).

⁴ In trials for non-minor crimes, the court consists of three or five judges, including two lay judges. Therefore, a single judge formally may not bind the whole court to reach a particular verdict based on a confession agreement. Never-

As a result, a *de jure* non-binding "understanding" usually serves as the basis for a guilty confession by the accused. Trust among the parties to the agreement is, therefore, necessary for the functioning of the confession-agreement process. Trust among the professionals in the process is, however, sufficiently immanent that such non-binding "understandings" often are *de facto* binding.⁵ If this were not the case, the "secret," nonbinding practice could never have become so widespread. An informal agreement cannot be specifically enforced;⁶ nor can a confession be withdrawn, once it is made.⁷

German defense counsel has the right to inspect the prosecutor's investigation file. Thus, with complete knowledge of the evidence, the accused and defense counsel know what to expect in a trial.⁸ The accused sometimes participates in making the confession agreement. However, usually the communications and the agreement are made between the professionals: the presiding judge, defense counsel (*Verteidiger*) and the StA. Depending on the circumstances, any of the three could initiate the process. Before formal charges are made, negotiations occur between StA and defense counsel. Thereafter, either before or

theless, by reason of the pivotal role of the presiding judge in the proceedings, the accused is justified in relying on statements by the presiding judge concerning the conduct of the court. Judgment of June 7, 1989, 36 Bundesgerichtshofes in Strafsachen [BGHSt] 210, published in 1989 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2270 [hereinafter BGHSt 7.6.1989]. More importantly, there are legal and doctrinal impediments to a "binding" of the court before all evidence has been heard, and these will be presented below, e.g., see *infra* parts 3-4. See also Judgment of Apr. 1, 1960, 14 BGHSt 189, 191 [hereinafter BGHSt 1.4.1960]; Judgment of Jan. 27, 1987, BVerfG, published in 1987 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2662 [hereinafter BVerfG 27.1.1987]; Judgment of Jan. 23, 1991, 37 BGHSt 298, published in 1991 NJW 1692 [hereinafter BGHSt 23.1.1991]. See also Günter Haas, *Vereinbarungen im Strafverfahren—Ein Beitrag zur Lehre von den Prozesshandlungen*, 1988 NJW 1345, 1348-49 [hereinafter Haas].

⁵ Hans Dahs, *Absprachen im Strafprozess—Chancen und Risiken*, 1988 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 153, 154 [hereinafter Dahs].

⁶ However, if the accused relies on an agreement which is not honored by one of the government parties (i.e., the court or the StA), then the judgment might be invalidated by a higher court because of a violation of the accused's right to a "fair trial." See BGHSt 7.6.1989, *supra* note 4; Judgment of Apr. 18, 1990, 37 BGHSt 10, published in 1990 NJW 1924 [hereinafter BGHSt 18.4.1990].

⁷ Schünemann, *Absprachen*, *supra* note 2, at B 41.

⁸ Joachim Hermann, *Bargaining Justice—A Bargain for German Criminal Justice?*, 53 U. PITT L. REV. 755, 764 (1992) [hereinafter Hermann].

during trial, it is often the presiding judge who initiates discussions concerning the possibility of a confession.⁹

Although the form and content of agreements vary, Weigend described the basic scheme as follows: the defense offers cooperation in the finding of fact (frequently a confession by the accused), by which the trial can be shortened; the court then offers a sentencing reduction, which often requires the cooperation of the StA (e.g., in the form of a partial dismissal of charges under § 154(2) StPO);¹⁰ the defense accepts the tentative offer by agreeing to forego its right to appeal.¹¹

1.1.2 Terminology

The German commentators rarely employ the term "confession agreement," rather, they use a number of terms that mean "agreement" or sometimes "judgement agreement." Nevertheless, the debate revolves around the practice of "confession agreements," and that term will generally be used in this paper.¹²

Much of the debate centers on the procedural and doctrinal requirements that the court (i.e., the judges) maintain its unconstrained freedom to reach a verdict based on the material

⁹ *Id.*

¹⁰ See *infra* parts 3.1, 4.2.7 and note 145 (discussing § 154).

¹¹ Thomas Weigend, *Abgesprochene gerechtigkeit—Effizienz durch Kooperation im Straverfahren?* 1990 JURISTENZEITUNG 774 [hereinafter Weigend].

¹² Several terms are commonly used in the German literature to denote an agreement, among them: *Verständigung*, *Vereinbarung*, *Abrede*, and *Absprache*. *Vereinbarung* can probably best be translated as "agreement." *Verständigung* is better translated as an "understanding." The meanings of the other words fall in between. The terms are used more or less interchangeably in the literature, so the word "agreement" will be used here. The word *Vergleich* means "settlement" legally, and the German commentators generally avoid applying the term to criminal proceedings. Schünemann also included the concept *Antizipation* within the general term "agreement." Schünemann explained *Antizipation* to be when one or more parties do not give any assurances or promises, rather indicate that a possible, hypothetically anticipated behavior of the other would carry a certain legal consequence. Schünemann, *Absprachen*, *supra* note 2, at B 15. Thus, an *Antizipation* is seemingly very tentative and nonbinding. Yet, given a certain degree of trust between experienced professionals, such a communication can lose its tentative character and become the basis of a *de facto*-binding *Absprache*. Schünemann *Absprachen*, *supra* note 2, at B 74-77; Bernd Schünemann, *Die Verständigung im Strafprozess—Wunderwaffe oder Bankrotterklärung der Verteidigung?* 1989 NJW 1895, 1897 [hereinafter Schünemann, *Verständigung*].

evidence, that is, that the court not be "bound."¹³ In fact, the decisions of the higher courts in cases involving confession agreements often turned on the fine distinction of whether an informal communication by a judge to one of the parties was "binding" or "nonbinding."¹⁴ Schünemann reported that 56% of criminal defense attorneys characterize the concessions that the court makes in confession agreements as "concrete assurances."¹⁵

Schünemann also distinguished a "narrow" confession from a "qualified" confession.¹⁶ A narrow confession is a simple confession of guilt, without details. A qualified confession includes sufficient evidentiary information and details on which a court can base a guilty verdict.¹⁷

Schünemann further distinguished three types of results arising from judgment agreements: i) a process-economical disposition; ii) a *Verdachtssanktion*, that is, a non-prison sanction based on suspicion; and iii) a *Verdachtsstrafe*, that is, a prison sentence based on suspicion.¹⁸

A true process-economical disposition occurs when a judgment agreement is made on the basis of clear, unambiguous evidence that the accused is guilty.¹⁹ A *Verdachtssanktion*

¹³ See *infra* parts 3, 4.

¹⁴ Judgment of July 4, 1990, 37 BGHSt 99, published in 1990 NJW 3030 [hereinafter BGHSt 4.7.1990]; BVerfG 27.1.1987, *supra* note 4; BGHSt 23.1.1991, *supra* note 4. Thus, the definition of "nonbinding" is important. In order to differentiate between a truly nonbinding communication, on the one hand, and a formally nonbinding, but *de facto*-binding communication, on the other, Schünemann introduced the functional designations of a *stabile* and a *labile* (unstable) declaration of intent. With a *labile* declaration of intent, A indicates to B how A will probably act in view of the present evaluation of circumstances, if B behaves as A anticipates how B will behave. See *supra* note 12 (*Antizipation*). A *labile* communication is understood to be tentative and nonbinding. In contrast, a *stabile* declaration of intent is more definitive. Although it might imply or express some reservation, it shows a high and measurable degree of reliability, especially when developments in the situation occur rapidly. Schünemann, *Absprachen*, *supra* note 2, at B 73-76.

¹⁵ Schünemann, *Absprachen*, *supra* note 2, at B 75-76.

¹⁶ Schünemann, *Absprachen*, *supra* note 2, at B 24.

¹⁷ Schünemann, *Absprachen*, *supra* note 2, at B 24.

¹⁸ Schünemann, *Absprachen*, *supra* note 2, at B 20-21.

¹⁹ This is the situation for which § 153a was designed. Such a disposition can arise under § 153a or in a regular criminal trial. Agreements between the parties under certain, specific circumstances are formally recognized in the StPO. One category are dispositions according to § 153a; the second category comprises the penal orders (*Strafbefehle*) according to §§ 407-412, StPO. Such agreements will

("suspicion-sanction") results when a disposition is made under § 153a StPO, but outside its intended boundaries; that is, a judgment agreement is made despite unclear, incomplete evidence. A *Verdachtsstrafe*²⁰ ("suspicion-punishment") arises if the verdict results in a prison sentence based on unclear, incomplete evidence and the narrow confession of the accused, which does not provide sufficient detail to have otherwise justified a guilty verdict.

1.2 Scope and Origins of Extra-Trial Confession Agreements

Confession agreements typically occur in cases involving white collar crime, environmental crimes, and illegal drug dealing. The evidence in these cases tends to be complex. For example, in drug cases, key witnesses are often in foreign countries, and the court is unable to procure their attendance. The defense in such cases frequently uses its right to request evidence under § 244 StPO in order to purposely drag out criminal proceedings. Under such circumstances, the judge, StA, and defense attorney all have an interest in reaching some accord that would abbreviate the trial.

According to various estimates and surveys, about every fourth trial is settled through an informal agreement; and, in some courts handling white-collar crimes, a contested trial has

not be the subject of this analysis. Many of the legal and doctrinal concerns that arise in the debate over informal confession agreements might also apply to dispositions under § 153a and § 407. Nevertheless, there are important distinctions. Firstly, agreements under § 153a or § 407 are specifically codified and are, therefore, "legal." Secondly, because the procedures are codified, the state actors are operating within a limited, regulatable framework. Thirdly, the penalties imposed in such procedures do not include incarceration of the accused; rather, they are limited to monetary fines, reparation, and similar. Cases disposed under § 153a or § 407 often involve some degree of informal negotiating because the parties agree explicitly or implicitly to sanction the accused and to forego a fact-finding trial. See Hermann, *supra* note 8, at 757-763 (for a description of these procedures).

²⁰ The *Verdachtsstrafe* is historically and doctrinally significant. The inquisitorial procedures during the centuries before 1800 provided for imposition of a *Verdachtsstrafe* in cases where suspicion was strong, but evidence insufficient for a guilty verdict. To the extent that the current practice of confession agreements could result in a *Verdachtsstrafe*, critics worry about its erosion of the "guilt principle," that is, the doctrine that an accused should not be punished until proven guilty. See Schünemann, *Absprachen*, *supra* note 2, at B 20; see also ZRP *Rechtsgespräch mit Professor Dr. Gerd Pfeiffer "Ich bin gegen den Deal"* [published interview], 1990 ZEITSCHRIFT FÜR RECHTSPOLITIK 355, 355-56 [hereinafter Pfeiffer].

become the exception.²¹ Based on a survey done in 1986-87, Schünemann estimated that "disposition" agreements occur in at least 20-30% of all criminal cases, and in more than 80% of white-collar cases in some courts.²² There is also a strong tendency for courts to settle cases involving traffic crimes and shop-lifting.²³ On the other hand, crimes such as burglary are not as likely, and crimes involving state security and serious violence are even less likely to be settled through informal agreement(s).²⁴

Schünemann suggested that a change in the concept of justice, in contrast to the concept embodied in the StPO, is responsible for the high degree of acceptance (roughly 90%) of confession agreements among practitioners.²⁵ He identified three reasons for this change. The first, the perceptions of modern social science and the practical experience with "monster trials" have led to a demystification of the goal of "material truth through trial." The trial is considered hardly worth the effort to a defendant in view of an acquittal rate of only 4%, and when compared with the result achieved after a simple acceptance by the accused of the allegations in the trial file.²⁶ The second, a reorientation of the penal laws from an abstract idea of "justice," to the rational, goal-oriented deterrence principle, which finds nothing "per se offensive" with increasing judicial output through bargaining.²⁷ The third, an acknowledgement

²¹ Weigend, *supra* note 11, at 774.

²² Schünemann, *Absprachen*, *supra* note 2, at B 18.

²³ Schünemann, *Absprachen*, *supra* note 2, at B 19.

²⁴ Schünemann, *Absprachen*, *supra* note 2, at B 19; Pfeiffer, *supra* note 20, at 355. There is generally no such practice of turning state's witness and being rewarded with a reduction or dismissal of charges or penalties. An exception is a procedure under § 153e, the so-called Crown's Witness provision (*Kronzeugenregelung*). This section came into effect in June 1989 after much discussion and debate. It can be applied when the accused was a member of a terrorist group and has shown remorse by contributing to the prevention or resolution of a terrorist act. Application requires the approval of the federal attorney general (*Generalbundesanwalt*) together with that of the corresponding Higher Regional Court (*Oberlandesgericht*). See Hans Hilger, *Die Kronzeugenregelung bei terroristischen Straftaten*, 1989 NJW 2377.

²⁵ Schünemann, *Verständigung*, *supra* note 12, at 1898.

²⁶ Schünemann, *Verständigung*, *supra* note 12, at 1898.

²⁷ Schünemann, *Verständigung*, *supra* note 12, at 1898.

of the "autonomy" of the accused and the goal of consensus-building, such that the old ideal of material truth is in retreat.²⁸

But, Schünemann conceded, the main reason for the prevalence of confession agreements could be the increased burden of cases on the criminal justice system.²⁹ In addition, Hamm suggested that an overcriminalization of society's activities has resulted in complex and unclear laws, which the professionals are unwilling or unable to enforce as prescribed in the *Strafprozessordnung* (StPO).³⁰

2. THE *RECHTSSTAAT*-IDEA AND GERMAN CRIMINAL PROCEDURE

The debate over confession agreements concerns substantive and procedural principles of law. Many of these are identified as *Rechtsstaat*-principles. The concept of the *Rechtsstaat* has been compared to "due process" of US-American law. But, the concept of the *Rechtsstaat* means more than "due process." It not only has legal meaning, but it embodies political and philosophical principles as well. A better translation of *Rechtsstaat* would be "government of law."

2.1 The *Rechtsstaat*-Idea

The *Rechtsstaat* is a basic element of the German *Grundgesetz* (GG, constitution).³¹ The *Rechtsstaat*-idea embodies certain principles that are expressly provided in the constitution. These include: the subordination of the judicial and enforcement powers to statutes and law;³² and, equal treatment under the law.³³ Further, the idea guarantees historical principles traditionally associated with the *Rechtsstaat*, but not expressly provided in the constitution or in statutes; for example, the presumption of innocence.

Today, the rights of accused persons are embedded in the code of criminal procedure, in the constitution, and also in the

²⁸ Schünemann, *Verständigung*, *supra* note 12, at 1898.

²⁹ Schünemann, *Verständigung*, *supra* note 12, at 1898.

³⁰ Rainer Hamm, *Absprachen im Strafverfahren?*, 1990 ZRP 337, 340-342 [hereinafter Hamm].

³¹ GRUNDGESETZ [Constitution] [GG] art. 28(1) (F.R.G.).

³² *Id.* art. 20(3).

³³ *Id.* art. 3.

traditions of the *Rechtsstaat*. The *Rechtsstaat*-idea did not develop totally independently of the principles of law that safeguard the rights of the accused; nevertheless, the two are historically and conceptually distinct. The debate over confession agreements involves several *Rechtsstaat*-principles. Some of these concern the rights of the accused, but others involve broader issues, such as, equality before the law and the role of state power. Although the modern concept of the *Rechtsstaat* is only about two hundred years old, the factors which shaped it have their origins in the long political, legal, and philosophical history of Germany. Thus, for the sake of understanding the importance of *Rechtsstaat*-principles in the current debate, a brief historical overview follows.

2.2 Historical Background of the Law and the State in Germany

2.2.1 Law and State: Middle Ages Through the Age of Absolutism

Medieval law in Germany was an inherited system of custom, tradition and practice; it was viewed by the populace as part of the divine world order. The promulgation of new law had only secondary and complementary importance. Accordingly, the state had a subordinate role: it served merely as a means to preserve and realize the law, and rulers were bound by law.³⁴ However, as the idea of the territorial states replaced the tribal system during the 12th and 13th centuries, authority was gradually seen to rest in and emanate from the rulers, that is the princes, nobles, and bishops, who personified the state, instead of deriving from an inherited and popularly recognized lawful order.³⁵ Starting about the 12th century, the resurgent Roman-Italian law began to influence Germany, and it gained acceptance during the 15th and 16th centuries.³⁶ This acceptance (the "reception") was facilitated by the idea that the Ger-

³⁴ HERMANN CONRAD, *DEUTSCHE RECHTSGESCHICHTE BAND I FRÜHZEIT UND MITTELALTER 345-47* (1962) [hereinafter CONRAD I]; HERMANN CONRAD, *DEUTSCHE RECHTSGESCHICHTE BAND II NEUZEIT BIS 1806, 356-58* (1966) [hereinafter CONRAD II].

³⁵ CONRAD I, *supra* note 34, at 345-47; CONRAD II, *supra* note 34, at 356-58.

³⁶ CONRAD I, *supra* note 34, at 347-49; CONRAD II, *supra* note 34, at 339-42, 356-58.

man *Reich* was successor to the Roman Empire, expressed in the designation "Holy Roman German Empire." As a result, Roman law was viewed as imperial law, although local law maintained its primary status.³⁷ Instead of a system of popular custom and tradition, Roman law was a system of norms, based on reason and authority. Since the various territories (princdoms, bishoprics, free-cities, fiefdoms) that comprised the empire administered local law in increasingly complex social circumstances, there was little certainty and uniformity. Furthermore, the administration of criminal law had adopted extremely harsh and arbitrary practices. For example, depending on the type of crime, punishment could be death by gallows, drowning, boiling water, burying alive, quartering, burning, or the rack.³⁸

The development of an educated class of jurists accompanied the reception of Roman law in the German Empire. The desire of the jurists for a *ius certum et universale*, together with the humanist ideals of the late Middle Ages and the Renaissance, created pressure for reforms of the criminal law. As a result, the Empire adopted the *Peinliche Gerichtsordnung* of Karl V (also called the *Constitutio Criminalis Carolina*) in 1532. This new, imperial code, (the "Carolina"), was still a subsidiary of the local laws of the territories, but many adopted it or were influenced by it.³⁹ The *Carolina* was basically a code of procedure. Although it contained harsh practices consistent with the times, it represented a serious attempt to rein in the worst practices of the criminal courts. Torture was to be used only in cases of strong suspicion. Conviction required a credible confession by the accused, or the reliable testimony of two or three witnesses. In place of a general description of a crime, the *Carolina* stipulated separate elements. It recognized defenses, such as diminished mental capacity and self-defense. It also incorporated the guilt-principle, that is, no punishment without guilt (*nulla poena sine culpa*). It stipulated the procedures of the Inquisition, and preserved, at least formally, the principles of immediacy, orality, and publicity by providing for the *En-*

³⁷ CONRAD II, *supra* note 34, at 339.

³⁸ CONRAD I, *supra* note 34, at 439-450.

³⁹ CONRAD I, *supra* note 34, at 448-50; CONRAD II, *supra* note 34, at 339-41, 415.

dlichen Rechtstag ("final day in court") of the German common law. On the other hand, it provided for the *Verdachtsstrafe* in case of strong suspicion. Also, it did not incorporate the legality principle (*nulla poena sine lege*), in that it provided for "extraordinary punishment" by the court in case of undelineated misdeeds.⁴⁰ The *Carolina* remained a major influence in the German territories through the 18th century.⁴¹

Politically, monarchical absolutism developed in the various German territories in the years after 1500, as the territorial rulers succeeded in restricting the prerogatives of the nobility and the estates. This trend was fortified by the *ius reformandi*, the right of the territorial ruler to choose the religious confession of his subjects. It reached its peak after the Thirty Years War (1618-48), as the Treaty of Westphalen recognized territorial sovereignty (*ius territorii et superioritatis*).⁴² The ruler united all state power in his hand, and he was the sole bearer of power, with no legal limits to it from within the territory. The ruler personified the state.⁴³ In the old religious-patriarchal view, which was enforced by the Reformation and Counter-Reformation, the ruler's authority was derived from God. The prince was God's representative, who regulated the spiritual and worldly affairs of his subjects. This view persisted into the eighteenth century even in the Catholic states.⁴⁴

The criminal "common law" comprised, in varying degrees, Roman law, canon law, the *Carolina*, and German law. In the reformed, Protestant states, the mosaic law of the Old Testament also formed the basis for criminal laws. The common law, however, did not know the phrase "*nullum crimen, nulla poena sine lege*."⁴⁵ But, under the influence of Absolutism, the promulgation of law became the expression of the territorial ruler's majestarial law-making authority.⁴⁶ In order to curtail the influence of competing sources of law, there was a general trend

⁴⁰ CONRAD II, *supra* note 34, at 408-413.

⁴¹ CONRAD II, *supra* note 34, at 415.

⁴² CONRAD II, *supra* note 34, at 119, 234.

⁴³ CONRAD II, *supra* note 34, at 234; CLAUDIUS VON SCHWERIN, GRUNDZÜGE DER DEUTSCHEN RECHTSGESCHICHTE 311 (1950) [hereinafter SCHWERIN].

⁴⁴ CONRAD II, *supra* note 34, at 241.

⁴⁵ CONRAD II, *supra* note 34, at 421-23.

⁴⁶ CONRAD II, *supra* note 34, at 383.

among the the absolutist rulers to issue exclusive laws and to codify the criminal and private law.⁴⁷

2.2.2 Law and State: Early Enlightenment and Enlightened Absolutism

In the middle of the 17th century, with the arrival of the Age of Enlightenment, new intellectual currents began to course through Europe that profoundly affected the way people viewed themselves and society. Consistent with the rational, empirical approach to knowledge that accompanied the development of the sciences in the period 1650-1800, men rediscovered the concept of "natural law." Natural law writers tried to describe the laws that would govern the relations between people if they lived in a just society. These writers had a general aversion toward all that was lawless, arbitrary, and unjust.⁴⁸

The natural law thinkers can be divided roughly into two groups. The first, earlier group includes, among others, Hugo Grotius (1583-1645), Thomas Hobbes (1588-1679), Samuel Pufendorf (1632-1694), Christian Thomasius (1655-1728), and Christian Wolff (1679-1754). Consistent with the spirit of the Enlightenment, these thinkers succeeded in secularizing human law. They might have viewed themselves as Christians who strived for spiritual union with God; nevertheless, they recognized earthly laws as subject to nature and man's will and distinct from God's laws. They viewed the state as the community or society of men, in which man-made laws would be applied consistently with natural law. In addition, they viewed the territorial ruler as the proper unifying force of the state. Thus, their teaching supported the absolute monarchies of the era. "*Rex est civitas*" wrote Pufendorf.⁴⁹ According to these natural law theorists, even though the ruler might be the direct source of law and authority in society (i.e., in the state), he was also subject to the law, and he was obligated to rule not for his own benefit, but rather for the well-being of his subjects and the state. This teaching, the "welfare" rationale, became the philosophical justification of "enlightened Absolutism" and the con-

⁴⁷ CONRAD II, *supra* note 34, at 425-29.

⁴⁸ ERIK WOLF, *GROSSE RECHTSDENKER* 254 (1963) [hereinafter WOLF].

⁴⁹ *Id.* at 356.

servative, "Christian" state.⁵⁰ Depending on its particular variation, this concept justified extensive, even if paternalistic, intrusions into all spheres of an individual's life, for the welfare of the individual and the public.⁵¹

In the course of the 18th century, the rulers of several German states, including Prussia and Austria, adopted the rationale of enlightened Absolutism. The ruler's government became subject to the ideals of the Enlightenment, under which the purpose and goal of the state was the welfare of its subjects. The form of government did not change, nor did its subjects necessarily have any legal recourse against the ruler. Nevertheless, the state was conceptually no longer the tool of the ruler's arbitrariness; rather, the ruler became the premier servant of the state. In this manner, the state assumed an identity of its own. This also enabled the development of a bureaucracy and a populace whose first allegiance was to the state.⁵²

Although their influence was greater on legal science than on actual law-making, the natural law theories and the Enlightenment signalled major changes in criminal law and procedure. For example, Thomasius's dissertation in 1701 on the crime of witchcraft was a major impulse toward the disappearance of witch trials in the Protestant lands.⁵³ Consistent with the natural-law ideal of order and reason, there was a strong trend toward codification after 1750.⁵⁴ The first codes, however, showed little of the humanizing influence of Pufendorf and the natural law school.⁵⁵ In Bavaria, the *Codex Juris Bavarici Criminalis* of 1751 still included the harsh penalties of the Barock period.⁵⁶ The *Constitutio Criminalis Theresiana* of 1768 in Austria con-

⁵⁰ SCHWERIN, *supra* note 43, at 231.

⁵¹ "Every subject expects security and protection from his territorial prince." Joseph II, General Civil Code of 1, November 1786, Part 1: § 1. "It is therefore the duty of the prince clearly to define the rights of the subjects and so to regulate their actions, such as the general and particular welfare demand." *Id.*

⁵² CONRAD II, *supra* note 34, at 310, 235; SCHWERIN, *supra* note 43, at 311-13.

⁵³ A royal decree in Prussia in 1713 made the execution for witchcraft dependent on confirmation by the king. WOLF, *supra* note 48, at 395.

⁵⁴ The motivation for reform and codification in the enlightened absolutist states was partially humanitarian and "welfare-oriented." But, other important goals were: the establishment of central, imperial power through preemption of local law; and the cultivation of a law-abiding populace through clear, simple, uniformly applied law and procedure. CONRAD II, *supra* note 34, at 382-84, 443, 449.

⁵⁵ CONRAD II, *supra* note 34, at 425.

⁵⁶ CONRAD II, *supra* note 34, at 426.

tained similarly harsh penalties. On the other hand, the influence of Pufendorf became apparent in such aspects of the codes as: the preference for mild punishment; liberalization of the crimes of witchcraft and heresy; recognition of defenses and mitigating circumstances; the concept of equality before the law; and protection from arbitrariness.⁵⁷ As bases for punishment, the *Theresiana* listed rehabilitation of the criminal and general deterrence, as well as satisfaction of the injured state. The AGVB of Josef II in 1787 contained harsh penalties, but showed characteristics of the Enlightenment.⁵⁸ For example, it recognized the legality principle, *nulla poena sine lege*;⁵⁹ the death penalty was abolished except for treason; and, it emphasized deterrence instead of public retribution.⁶⁰

The torture of accused persons was abolished generally in Prussia in 1740, in Baden 1767, but as late as 1803 in Austria, and 1806 in Bavaria. The Prussian *Kriminalordnung* of December 11, 1805 still authorized the imposition of a *poena extraordinaria* (*Verdachtsstrafe*) in cases of strong suspicion, where the evidence was insufficient for conviction. The reforms of the 18th century represented reforms of the Inquisition.⁶¹

The teachings of the early Enlightenment thinkers were directed towards a humane, understandable and uniform law to serve the general welfare. Their goals were not only compatible with those of the ruling monarchs, but they served to support and legitimize the absolutist regimes of Europe as well.⁶²

2.2.3 Law and State: Late Enlightenment and the *Rechtsstaat*

The second, later group of natural law thinkers includes Montesquieu (1689-1755), John Locke (1632-1704), Jean Jacques Rousseau (1712-1778), and Immanuel Kant (1724-1804).

⁵⁷ CONRAD II, *supra* note 34, at 426-27.

⁵⁸ The major reforms in the area of criminal law and procedure started in Prussia in 1740, and full codification succeeded first in Austria 1787-88, then Prussia 1794-1805, and piecemeal in other German states (Baden, Bavaria, Saxony). CONRAD II, *supra* note 34, at 441.

⁵⁹ HEINRICH MITTEIS, *DEUTSCHE RECHTSGESCHICHTE* 212 (1966) [hereinafter MITTEIS].

⁶⁰ CONRAD II, *supra* note 34, at 442.

⁶¹ CONRAD II, *supra* note 34, at 447; SCHWERIN, *supra* note 43, at 353.

⁶² WOLF, *supra* note 48, at 467.

In contrast to the first group, they taught that individual freedom was innate and that the laws of the state should be limited to what was necessary to govern peaceful relations between men. They advocated the separation of powers. Furthermore, they taught that state sovereignty, the ultimate source of state power, resides in the people.

Immanuel Kant's influence was most enduring in shaping the modern doctrine of the *Rechtsstaat*.⁶³ The rise of Nationalism and Romanticism prevented his work from being the dominant force in the 19th century. Nevertheless, he was the starting point for many German thinkers in the last century, and his work forms the basis of *Rechtsstaat*-ideas in Germany today.⁶⁴

Kant defined the State (*civitas*) to be the union of a group of people under rightful laws.⁶⁵ He viewed the State as comprising three separate powers: the legislative, the executive, and the judicial, whereby the legislature is the ruling power, the sovereign.⁶⁶ The law-making sovereignty rests in and emanates from the united will of the people.⁶⁷ The executive, which enforces the law, is also subject to the law. It is the duty of the sovereign to establish a system of public law in the form of a constitution.⁶⁸ Kant's idea of a just law allows the greatest amount of individual freedom to co-exist with the freedom of others.⁶⁹ The characteristics of each member of society, that is, of the citizen, are freedom, equality, and independence: the freedom to obey no other law than the law to which he has given his consent; equality before the law; and the independence of his existence and sustenance from the arbitrariness of others.⁷⁰ Law, for Kant, is the essence of conditions under which the will

⁶³ HANS REISS, KANT POLITICAL WRITINGS 11 (1991).

⁶⁴ *Id.* at 11-13.

⁶⁵ IMMANUEL KANT, *Die Metaphysik der Sitten*, in KANT'S GESAMMELTE SCHRIFTEN—KANT'S WERKE, Vol. VI 313 (Königlich Preussische Akademie der Wissenschaften ed., Georg Reimer, Berlin 1914) (1797) [hereinafter KANT VI].

⁶⁶ *Id.* at 313.

⁶⁷ *Id.* at 313.

⁶⁸ *Id.* at 311-316.

⁶⁹ IMMANUEL KANT, *Kritik der reinen Vernunft*, in KANT'S GESAMMELTE SCHRIFTEN—KANT'S WERKE, Vol. IV 201 (Königlich Preussische Akademie der Wissenschaften ed., Georg Reimer, Berlin 1911) (1st ed. 1781) [hereinafter KANT IV].

⁷⁰ KANT VI, *supra* note 65, at 314.

of one individual can be reconciled with the will of another individual according to a general law of freedom.⁷¹

It is a "practical imperative" to act in such a manner that one treats himself and others as an end, and never merely as a means.⁷² Concerning judicial punishment, Kant wrote that it should never be used merely as a means to further some other good, either for the criminal or for society; rather, it should only be imposed on a person because he committed a crime. This is because a person may not be used as a mere means to realize the intentions of another and become the object of the law.⁷³ His innate personality guards him against this, even when he must be punished. He must be found punishable before any use can be drawn either for him or his fellow citizens.⁷⁴ Kant believed in retribution as the basis for punishment, for he believed that only retribution would ensure the "principle of equality," that is, the principle that a crime should be balanced by a punishment of equal weight.⁷⁵ Thus, Kant rejected general deterrence as a rationale for punishment. Nevertheless, general deterrence, as advocated by Feuerbach (1775-1833), became the dominant rationale for punishment in Germany.⁷⁶

Practically, the modern notion of the *Rechtsstaat* in Germany established itself through the Liberalism movement of the nineteenth century. Two basic ideas characterized Liberalism. One is the idea of personal liberty. The other is the idea of a national state.⁷⁷

It was only after the political revolts of 1848 that the inquisitorial procedures were generally replaced by the French model of criminal trial; for example, 1848 in Bavaria, 1849 in Prussia, 1850 in Austria. The French trial was based on principles of orality and publicity, an investigatory file, judicial independence, and trial by jury. These principles were adopted in the *Reichsstrafprozessordnung* of 1879.⁷⁸ The concept of the

⁷¹ KANT VI, *supra* note 65, at 230.

⁷² KANT IV, *supra* note 69, at 429.

⁷³ KANT VI, *supra* note 65, at 331.

⁷⁴ KANT VI, *supra* note 65, at 331.

⁷⁵ KANT VI, *supra* note 65, at 332.

⁷⁶ CONRAD II, *supra* note 34, at 450.

⁷⁷ SCHWERIN, *supra* note 43, at 234.

⁷⁸ SCHWERIN, *supra* note 43, at 354; MITTEIS, *supra* note 59, at 240.

"people's sovereignty" was first adopted in Germany in the Weimar constitution of 1919.⁷⁹

In summary: Certain rights of the accused, as well as a "humanization" of the criminal procedure in Germany, had their origins in the Middle Ages. Substantive and procedural rights of the accused were an integral part of the welfare rationale, and were compatible with the goals of the enlightened, absolutist state. The ideas of equality, individual freedom, and popular sovereignty, that is, the ideas of the liberal-democratic *Rechtsstaat*, found their expression in the teachings of the late Enlightenment thinkers, represented by Kant. Kant taught that the maker of law is the sovereign legislature, and that just law allows the maximum individual freedom which is compatible with the freedom of others.

3. ARGUMENTS IN FAVOR OF CONFESSION AGREEMENTS

The arguments in favor of confession agreements can be phrased as follows:

- 1) The current practice is legal because it is not expressly forbidden by the StPO. Indeed, the current practice corresponds, in principle, with procedures stipulated in § 153a StPO. Furthermore, current practice is consistent with other provisions of the StPO.
- 2) The judge in a criminal trial is permitted to conduct interim conferences with the parties outside of the trial, and to make prognoses concerning the evidence and the mitigating effects of a confession.
- 3) The goal of the trial is a fair and just result, and achieving consensus among the parties through the agreement process can help to reach this goal.
- 4) The current practice is well-established and cannot be reversed. But, inherent dangers must be avoided and *Rechtsstaat*-standards must be observed.

⁷⁹ Indeed, Friedrich Wilhelm IV of Prussia declined the "Kaiser's crown" in 1849 from the short-lived *Nationalversammlung* (National Assembly) because of his fundamental aversion to the concept of people's sovereignty. MITTEIS, *supra* note 59, at 222, 234-35; SCHWERIN, *supra* note 43, at 320-21.

3.1 Confession Agreements Compatible With the Law

Proponents of confession agreements argue that although the StPO does not expressly provide for the current practice, no provision forbids a "cooperative" disposition of the case.⁸⁰ In addition, dispositions under § 153a allegedly provide a justification within the StPO itself for informal confession agreements.⁸¹ Furthermore, the StPO provides for various other types of communications and agreements: for example, under § 265a, the court must consult with and obtain the agreement of the accused when issues such as reparation or drug treatment arise in sentencing.⁸² Under § 470, the accused can agree to assume his defense costs when a complaint is dismissed; and under § 61(5), a witness need not take the oath if all three parties of StA, defender and accused so agree.⁸³ While acknowledging that an extra-trial agreement between the parties may not compromise the court's search for the truth and its finding of a lawful, just verdict, Dahs argued that the duty to find the truth is no goal in itself; rather, under §§ 154 and 154a StPO, this duty of the court can be reined in for the sake of speeding up the trial.⁸⁴

3.2 Judge Permitted to Confer With the Parties

Schmidt-Hieber argued that the StPO specifies the path to be followed by the court, StA, and defense counsel in only a few areas. Otherwise, § 238 provides only a pattern that sets boundaries on the form of the trial, while leaving the judge wide latitude in conducting the trial and evaluating evidence.⁸⁵ He explained that the court may express its prognosis concerning the verdict and the future conduct of the accused (e.g., a confession or an act of reparation).⁸⁶ Indeed, previous high court decisions support this position. For example, in 1960 the BGH

⁸⁰ Dahs, *supra* note 5, at 154.

⁸¹ Werner Schmidt-Hieber, *Vereinbarungen im Strafverfahren*, 1982 NJW 1017, 1018 [hereinafter Schmidt-Hieber, *Vereinbarungen*].

⁸² Haas, *supra* note 4, at 1347.

⁸³ Haas, *supra* note 4, at 1347.

⁸⁴ Dahs, *supra* note 5, at 154.

⁸⁵ Schmidt-Hieber, *Vereinbarungen*, *supra* note 81, at 1019.

⁸⁶ Schmidt-Hieber, *Vereinbarungen*, *supra* note 81, at 1020; Schmidt-Hieber, *Absprachen im Strafprozess—Privileg des Wohlstandskriminellen?*, 1990 NJW 1884 [hereinafter Schmidt-Hieber, *Absprachen*].

reiterated an earlier BGH-decision holding that a judge may instruct the accused that a confession showing acceptance of guilt and repentance can have mitigating effects on the sentence, and that such an instruction to the accused would not violate § 136a StPO. "It would only be of concern to give a promise to the accused for his confession, i.e., to make a statement that could be viewed as a binding statement."⁸⁷ Since then, this view has been reflected in decisions of the higher courts. For example, in a decision regarding an extra-trial understanding between judge and defense counsel: "The BGH has repeatedly acknowledged, even if in another context, that the judge, namely the presiding judge, is fundamentally allowed to contact the parties, even outside the trial."⁸⁸ The prognosis of the court can also be detailed, as long as it preserves its tentative character, Schmidt-Hieber wrote. It should be reliable, however, it must be understood that the court is not bound.⁸⁹ Thus, he argued, one must distinguish between "reliable" and "being bound."⁹⁰ The factual binding effect of an agreement based on the court's prognosis is not in itself impermissible, as long as the binding effect does not lead to an obligation with respect to the verdict. Further, he warned against the circular reasoning of labelling all agreements "factually binding" in order to exclude them as impermissibly binding.⁹¹

3.3 The Modern Consensual Proceeding

In 1990 Schmidt-Hieber wrote that agreements are permissible as long as one views them as the "mutual search for the correct verdict."⁹² If one is honest about reality, he continued,

⁸⁷ BGHSt 1.4.1960, *supra* note 4, at 190-91. The trial judge had told the accused during trial that evidence against him was overwhelming and that mitigating circumstances could only be considered [under § 46 StGB] if he made a confession. The trial court included his confession in its judgement, and the accused appealed his conviction, claiming that although he had made a confession, the court did not consider mitigating circumstances. The convicted claimed, therefore, that the court had deceived him and violated § 136a StPO. The BGH ruled, however, that the trial court did not violate § 136a. *See infra* note 166 (for translation of § 136a).

⁸⁸ BGHSt 7.6.1989, *supra* note 4; *see also* BVerfG 27.1.1987, *supra* note 4.

⁸⁹ Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1884.

⁹⁰ Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1884.

⁹¹ Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1885.

⁹² Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1884.

"one cannot deny that the cooperative disposition of cases leads to friendlier, more benevolent sentences."⁹³

'I have always found that so-called bad people gain when one knows them better, and so-called good people lose.' Therein lies the invaluable advantage that the cooperative proceeding offers in comparison with the conventional ritual. The accused increases his chance to lay out favorable circumstances to the court.⁹⁴

The advantage of cooperative proceedings, Schmidt-Hieber explained, is that one can argue in a relaxed conversation, demand replies, maintain a position or change it, interrupt, demand certainty, and correct undesired viewpoints, prejudices, and misunderstandings.⁹⁵ Further, one can even "bargain with justice" as long as the arguments are consistent with substantive and procedural law, and are not the result of simple compromise or convenience.⁹⁶

What has been completely overlooked in the debate, Schmidt-Hieber complained, is that agreements disposing of cases are used in other types of proceedings subject to the duty to investigate:

Why can one consult and agree in proceedings of tax courts, administrative courts and social courts (cf. §§ 93 FGO, 106 VwGO, 101 SGG), but not in criminal proceedings? Whoever says that the state's claim for criminal punishment outweighs the importance of other public-law conflicts has not looked beyond his criminal-law horizon for a long time. The question of termination of a civil servant, the denial of social security, or the recognition of a tax deduction: all are more significant for the affected person than the penalties imposed for minor crimes and misdemeanors.⁹⁷

In an early article, Schmidt-Hieber explained that the StPO anticipates or assumes consensus and consensus-building in various provisions. Thus, he claimed, such provisions cannot be exhaustive: "[f]or only parts of the StPO include detailed regulation of the StA, the court and the defense concerning the

⁹³ Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1884-85.

⁹⁴ Schmidt-Hieber quoting Christoph Lichtenberg, from 200 years ago, and commenting. Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1885.

⁹⁵ Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1886.

⁹⁶ Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1886.

⁹⁷ Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1884.

course they must follow in finding their common goal—a fair result of the proceeding.”⁹⁸ Although dominion over the accused is necessarily exercised during the criminal proceeding, the process does not consist merely of submission by the accused to authoritarian dictates of the court or StA. Numerous provisions of the StPO call for consensus or agreement or waiver, and such decision-making requires an exchange of opinion, not a mere either/or offer from the court or StA. Nor are such provisions restricted to mere formalities.⁹⁹ Also, the StA has discretionary power in that it controls the investigation and determines whether to bring a charge (§ 170) or drop the case (§ 153).¹⁰⁰ Schmidt-Hieber concluded: “[a]greements in the criminal proceeding are fundamentally acceptable; however, their content must not contradict any mandatory procedural rules.”¹⁰¹

If the accused makes reparation for the consequences of his crime, then according to Schmidt-Hieber, § 46(2) StGB clearly stipulates that this be considered, even if it occurs during trial. He welcomed the increasing acceptance of the idea that a confession is a contribution to the determination of facts, and that such contribution merits a milder sentence. Schmidt-Hieber further complained that the gloomy opinion of detached dogmatists that only the motives behind a confession—introspection and remorse—should count towards a reduced sentence would reward those who best play the repentant sinner.¹⁰²

3.4 Confession Agreements Acceptable Within Limits

“The settlement of criminal proceedings exists. It need not be legalized, and it cannot be forbidden.”¹⁰³ Thus, Widmaier began to argue that confession agreements relieve the burden on the justice system, provide “faster” justice, and produce the same end result without the elaborate play-acting and postur-

⁹⁸ Schmidt-Hieber, *Vereinbarungen*, *supra* note 81, at 1019.

⁹⁹ Schmidt-Hieber, *Vereinbarungen*, *supra* note 81, at 1018-19; *see supra* part 3.1 (discussing §§ 153a, 265a, 470, and 61(5)).

¹⁰⁰ Schmidt-Hieber, *Vereinbarungen*, *supra* note 81, at 1019.

¹⁰¹ Schmidt-Hieber, *Vereinbarungen*, *supra* note 81, at 1019.

¹⁰² Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1885; *see also* Gunter Widmaier, *Der Strafprozessuale Vergleich*, 1986 STRAFVERTEIDIGER 357, 358 [hereinafter Widmaier].

¹⁰³ Widmaier, *supra* note 102, at 357.

ing of the parties. Nevertheless, he warned of the danger of premature or false confessions.¹⁰⁴

Gatzweiler cautioned defense lawyers not to enter into confession negotiations without being conflict-ready. On the other hand, he consciously declined to discuss the fundamental issues of legality.¹⁰⁵ "Agreements must not become the surrogate for the formation and implementation of the always necessary defense strategy."¹⁰⁶

He explained that defense lawyers are finally ridding themselves of the burden of maintaining procedural harmony. Instead of orientating the defense on the good graces of the court, defense counsel is increasingly ready to serve the client through a "conflict-ready" defense.¹⁰⁷ However, a real danger exists, if the defense fails to prepare for the antagonistic trial and instead relies on confession negotiations. "The defender without a strategy who is swept along in the antagonistic proceeding is helplessly exposed in an informal-agreement situation."¹⁰⁸ The defender must use good judgment to determine when and under what circumstances he will participate in negotiations. Also, the standard by which to measure an informal agreement must be the result expected in a normally completed trial.¹⁰⁹

Even Schmidt-Hieber conceded that relevant, extra-trial agreements need to be presented at trial, but, he went further. He wrote that any prior communications must also be mentioned in order to avoid "misleading" the public. For example, if a judge indicates to the defender that compensation of damages would tend towards a milder trial result, then not only the fact of a subsequent compensation must be announced, but also the actual communication between judge and defender.¹¹⁰ In contrast to Schmidt-Hieber, Dahs wrote that "not all agreements that influence the end result of the proceeding need to be

¹⁰⁴ Widmaier, *supra* note 102, at 358. Dahs also warned against a premature indication of confession-readiness, because once that "point of no return" has been crossed, the goal of a not-guilty verdict is virtually unachievable. Dahs, *supra* note 5, at 156.

¹⁰⁵ Norbert Gatzweiler, *Die Verständigung im Strafprozess—Standortbestimmung eines Strafverteidigers*, 1989 NJW 1903, 1903-1906 [hereinafter Gatzweiler].

¹⁰⁶ *Id.* at 1903.

¹⁰⁷ *Id.* at 1904.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1904-1906.

¹¹⁰ Schmidt-Hieber, *Vereinbarungen*, *supra* note 81, at 1021.

presented to the public; only when the proceeding would otherwise remain incomprehensible to the public, should the court refer to the contacts between parties and their results.”¹¹¹ Widmaier, while advocating openness concerning the final results of agreements, stressed the importance of keeping all negotiations confidential so that judges would feel free to speak informally with the parties.¹¹²

Schmidt-Hieber was concerned that the benefits of confession agreements are enjoyed disproportionately by the affluent, charged with white-collar crimes, who are represented by energetic attorneys. Thus, the practice of confession agreements could carve out a niche where the powerful are beyond the law. In addition to the heavy burden of cases, he suggested that mere convenience is another motive for confession agreements.¹¹³ In order to eliminate arbitrariness and privilege in the practice, Schmidt-Hieber suggested several changes to the StPO. A new § 265(1) would include: “[u]pon a motion by the accused or his counsel, the court should discuss the factual and legal status of the case with the parties. The accused should be informed of the availability of such a motion.”¹¹⁴

A new § 219(3) would allow the court, upon initiative by the court, defense counsel or the accused, to discuss the factual and legal status of the case before the trial.¹¹⁵ Furthermore, a new § 140(2) would require the participation of defense counsel when his presence seems necessary under §§ 265(1), 219(3).¹¹⁶

Proponents of confession agreements acknowledged both the legal necessity and the doctrinal importance of satisfying standards set by the StPO and the *Rechtsstaat*-idea, and reaffirmed by the higher courts. Indeed, a line of decisions from the BVerfG and BGH implicitly accepts confession agreements, even while rejecting certain types of actions by the parties (*infra* part 5). Some jurists interpreted these decisions as articulations by the higher courts of minimal standards, and preferred

¹¹¹ Dahs, *supra* note 5, at 1318 (reviewing Werner Schmidt-Hieber, VERSTÄNDIGUNG IM STRAFVERFAHREN (1986)).

¹¹² Widmaier, *supra* note 102, at 359.

¹¹³ Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1885-87.

¹¹⁴ Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1887.

¹¹⁵ Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1887.

¹¹⁶ Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1887.

this type of judicial correction to legislative action.¹¹⁷ Thus, attempts have been made to conform the practice of confession agreements to uniform guidelines that would satisfy legal standards and curtail prohibited actions. For example, Böttcher, et al. reported that in March 1992, the “moderate rules” of BGHSt 30.10.1991 were substantially incorporated into the “Guidelines for Agreements in Criminal Proceedings”¹¹⁸ of the attorney general’s office of the state of Hessen, which had conducted the appeal in the case.¹¹⁹ At their meeting in November 1992, the attorneys general of the other German states agreed by a large majority to adopt guidelines approximating the Hessian guidelines in their respective jurisdictions.¹²⁰ As interpreted by Böttcher, Dahs, and Widmaier the guidelines postulate the fundamental acceptability of agreements for the disposition of cases, and they maintain *Rechtsstaat*-standards by assigning the following responsibilities to the prosecuting StA:

- all concerned parties must be included in the negotiations;
- the result of the agreement must be justifiable in view of all circumstances;
- a confession must be reviewed for its credibility, and pressing evidence must be taken;
- the agreement and its contents must be disclosed at trial;
- agreements may not exceed the official competence of the parties;
- agreements may not be binding, but deviations from them are only permitted if a valid justification is disclosed;
- an agreement made without the StA should be scrutinized for bias of the judge.

In January 1992, the criminal law committee (*Strafrechtsausschuss*) of the federal attorneys’ association (*Bundesrechtsanwaltskammer*, BRAK) also addressed the topic of agreements in its “theses for criminal defense.” These included:

¹¹⁷ Dahs, *supra* note 5, at 159; Volker Gallandi, *Anmerkung*, 1987 NSTZ 420; Hermann, *supra* note 8, at 771, 774.

¹¹⁸ Reinhard Böttcher et al., *Verständigung im Strafverfahren-eine Zwischenbilanz*, 1993 NSTZ 375 [hereinafter Böttcher]; see also Karl-Heinz Koch, *Ab-sprachen im Strafprozess*, 1990 ZRP 249-52 [hereinafter Koch].

¹¹⁹ Böttcher, *supra* note 118, at 375; see also part 5 *infra* (discussing BGHSt 30.10.1991).

¹²⁰ Böttcher, *supra* note 118, at 376. See *infra* part 4-5 (for a better understanding of the relevance of these guidelines).

- an agreement with the StA and the court concerning the proceeding's end result may be a sensible defense;
- agreements by the court are not legally binding;
- the defense attorney must thoroughly inform his client of the consequences both of an agreement (especially a confession agreement) and of the initiation of agreement negotiations;
- with the prior permission of the client, the defense attorney may withhold disclosure of the negotiation contents;
- the defense attorney may not participate in the conviction of an innocent person.¹²¹

4. ARGUMENTS AGAINST CONFESSION AGREEMENTS

The arguments against informal confession agreements can be categorized under four captions: 1) Unauthorized practices; 2) contrary to principles of law; 3) role of trial compromised and; 4) arbitrary results.

The categories are interrelated and the division of the issues among them is somewhat artificial. Nevertheless, such an organization will help to focus on the various aspects of the debate.

4.1 Confession Agreements Criticized As Constituting Unauthorized, Illegal Practices

Weigend pointed out that confession agreements are not mentioned in the German code of criminal procedure, and several of its provisions (§§ 244(2), 261 StPO) make clear that the verdict of a court must rest on a complete elucidation of the facts in trial.¹²² Schünemann made the same objection,¹²³ and raised the additional issue of whether the criminal prosecuting authorities and the court may even participate in such legally non-binding practices. In contrast to the accused, whose fundamental freedom to act is only limited by the law, the powers of the court and the prosecutor derive solely from the law, and outside the provisions of the law, the court and StA have simply

¹²¹ Böttcher, *supra* note 118, at 376.

¹²² Weigend, *supra* note 11, at 775. § 244(2) stipulates that in its investigation of the truth, the court should include all facts and evidence that are significant for the decision. § 261 provides that the court decide its finding of fact based on its unconstrained evaluation of evidence from the "essence of the trial."

¹²³ Schünemann, *Absprachen*, *supra* note 2, at B 67ff.

no authority to act.¹²⁴ Addressing the perceived benefit to the criminal justice system in the form of reduced trial times as a result of confession agreements, Pfeiffer insisted it is not the province of the StA, the defense counsel or the judge to deal with the problem of an overburdened judicial system; rather, it is purely a legislative concern.¹²⁵

4.2 Contrary to Principles of Law

Principles that protect the accused and regulate government institutions are embodied in the StPO, the *Grundgesetz*, and the *Rechtsstaat*-idea.¹²⁶ Critics argued that the practice of informal confession agreements violates these principles.

4.2.1 Court's Duty To Investigate All Facts and Evidence (*gerichtliche Aufklärungspflicht und Inquisitionsprinzip*)

The StPO in §§ 155(2) and 244(2) expressly creates a duty in the court to investigate freely all relevant facts and evidence, independent of the parties' motions. Schünemann explained that if a confession agreement is made after the point at which the evidence has put the court in a position to reach a verdict, then the confession will not conflict with the court's investigative duty. If, on the other hand, an agreement for a confession affecting the verdict is made before the court could have made a decision based on the evidence, then the agreement could conflict with the court's duty to investigate.¹²⁷ Whether it conflicts or not, he explained, depends on the type of confession. If a narrow confession¹²⁸ is made, providing no facts or evidence upon which the court can base a guilty verdict, and if the court accepts the confession and makes no further inquiries, then a conflict of duty with §§ 155 and 244 arises. The court's investigative duty is only satisfied when the accused makes a "qualified" confession, providing sufficient, reliable evidence to support a guilty verdict. Schünemann reported that confession

¹²⁴ Schünemann, *Absprachen*, *supra* note 2, at B 70-72. These considerations of Schünemann reflect the *Rechtsstaat* principles, as embodied in arts. 2 and 20 GG, of personal liberty and subordination of the executive and judicial powers to the law.

¹²⁵ Pfeiffer, *supra* note 20, at 356.

¹²⁶ See *supra* parts 2.1 (discussing the *Rechtsstaat*-Idea).

¹²⁷ Schünemann, *Absprachen*, *supra* note 2, at B 80-84.

¹²⁸ See *supra* part 1.1.2.

agreements usually consist of the mere acceptance by the accused of the results of the StA's investigation.¹²⁹

BVerfG 27.1.1987 suggested that a judge might violate § 244(2) if he fails to include formally the conditions, under which an extra-trial confession arose, during the presentation of evidence in trial.¹³⁰

4.2.2 Conflict With the Principle of Immediacy and Orality (*Unmittelbarkeits- und Mündlichkeitsprinzip*)

Under § 261 of the StPO, the court must decide its verdict according to its evaluation of evidence from the *Inbegriff der Verhandlung* ("essence of the trial"). If evidence of a fact is based on the testimony of a witness, then the witness must be examined at trial. The examination may not be replaced by reading a record of an earlier examination or by reading a written statement.¹³¹ These provisions incorporate the immediacy and orality principle into the StPO. This ensures that all events significant to a verdict occur at the oral trial, which is the core of the criminal proceeding and the sole basis for a verdict. This is in contrast to the "theatre" of the *endlichen Rechtstag* of the German common law¹³² and of the Inquisition, in which the results of the prior investigation and the verdict were formally announced by the judge in a public hearing. The obvious problem with informal confession agreements outside of the trial itself is that no part of the agreement can be used as basis for the verdict without violating the principle of immediacy and orality. The *Bundesverfassungsgericht* (BVerfG, Federal Constitutional Court) addressed the issue in its decision of 27.1.1987.¹³³

¹²⁹ Schünemann, *Absprachen*, *supra* note 2, at B 82-83.

¹³⁰ BVerfG 27.1.1987, *supra* note 4, at 2663.

¹³¹ STRAFPROZESSORDNUNG [StPO] sec. 250 (F.R.G.).

¹³² Schünemann, *Absprachen*, *supra* note 2, at B 84.

¹³³ BVerfG 27.1.1987, *supra* note 4. The accused had appealed his conviction on the grounds that an impermissible agreement, upon accused's initiative, occurred before the end of trial between the court, the StA, and the defender, whereby the accused would make a confession and the StA would refrain from prosecution of other offenses, under § 154. The constitutional court rejected the convicted's appeal on grounds that his right to a fair trial had not been abridged: the presentation of evidence at trial had been nearly completed; the confession itself had been made at trial. The court also reasoned that since the facts of the extra-trial agreement were not included in the trial court's evaluation of the con-

These principles [*Rechtsstaat*-principles] do not forbid an extra-trial agreement between the court and the parties concerning the status and perspectives of the trial, which is already delimited by the criminal law. They exclude, however, that the judge's investigative duty, legal subsumption, and the sentencing rules be arbitrarily manipulated or placed at the disposal of the court or the parties. It is, therefore, forbidden for the court or the StA to engage in a "settlement" in the guise of a verdict or to "bargain with justice". . . . That does not exclude a statement of instruction by the court concerning the status of evidence or the mitigating effect of a confession if it has a factual basis in the trial.¹³⁴

On the one hand, the court reiterated long-accepted practice that the court and the other parties may reach an understanding outside of the courtroom. On the other hand, it forbade a "settlement." Schünemann claimed to find the resolution to this contradiction in the suggestion of BVerfG 27.1.1987 that it could be a violation of the investigative duty (*Aufklärungspflicht*) of the court if it does not consider the conditions under which a confession agreement arises. If such conditions can influence the verdict, Schünemann wrote, they must be evaluated. Yet, according to the immediacy and orality principle, they may only be evaluated if presented as evidence in trial.¹³⁵ But who can present such evidence? Under § 22(5) of the StPO, the judge may not be a witness himself, nor may he officially comment at trial on his extra-trial observations that have been officially recorded in writing. Thus, Schünemann concluded, in order to reconcile case law with the requirements of the StPO, the court may contact the parties outside of trial only concerning procedural questions. He summarized: "[w]hile only procedural questions can be discussed outside the trial without violating the immediacy and orality principle, the initiation of a confession must always occur

fession, then no grounds existed for appeal based on § 261 (unconstrained evaluation of "trial" evidence). Significantly, the BVerfG implicitly suggested that a violation of the judge's investigative duty (§ 244(2) StPO) could be seen in the judge's failure to consider formally in trial the conditions under which the agreement arose. Yet, the BVerfG did not consider the issue because the appellant did not raise it on appeal or move to disqualify the judge.

¹³⁴ BVerfG 27.1.1987 *supra* note 4.

¹³⁵ Schünemann, *Absprachen*, *supra* note 2, at B 85-86.

within the trial because the conditions of its initiation are significant for the question of guilt and punishment."¹³⁶

4.2.3 Conflict With the Publicity Principle (*Öffentlichkeitsprinzip*)

The publicity principle requires that all trials be public. It is expressed in § 169 GVG (*Gerichtsverfassungsgesetz*, i.e., Judiciary Act).¹³⁷ Schünemann argued as follows: the immediacy principle of § 261 StPO requires inclusion of such evidence as a confession agreement in trial; § 169 requires that it be subject to public scrutiny; thus, § 169 and § 261 have the same range of application.¹³⁸ For example, whether an accused confesses because of overwhelming evidence, or whether he confesses because his defense attorney has been completely out-manuevered by the court, the process of making an agreement can only be evaluated by the public through observation of the confession-communication, not simply through receiving information about it.¹³⁹

4.2.4 Conflict with Attendance Duties (*Anwesenheitspflicht*)

The full trial "complement" comprises all deciding judges (including lay judges), StA, court registrar, the accused and his counsel (§ 231), possible joint plaintiffs (§ 397) and victim attorneys (§ 406g(2)).¹⁴⁰ The reality of current practice is that, at most, the presiding judge, StA, defender, and accused participate. Schünemann argued that a direct consequence of the im-

¹³⁶ Schünemann, *Absprachen*, *supra* note 2, at B 87.

¹³⁷ The trial in the court of decision, including pronouncement of the verdict and rulings, is public. GERICHTSVERFASSUNGSESETZ [GVG] § 169 (F.R.G.).

¹³⁸ Schünemann, *Absprachen*, *supra* note 2, at B 88.

¹³⁹ Schünemann, *Absprachen*, *supra* note 2, at B 89. At B 25-26, Schünemann described the confession agreement in a rape case, which he said was typical: the trial reached the critical stage, at which the victim (the only first-hand witness besides the accused) would have to testify under conditions that would be extremely taxing, mentally and socially, for her; the presiding judge and defense counsel agreed on a suspended sentence for the accused in return for his confession, although all parties had reckoned with actual prison time of several years if a full trial had resulted in conviction. According to Schünemann, practicing professionals maintain that a "narrow" confession always accompanies this type of disposition because the sordid details, which would endanger the public's "understanding" for a suspended sentence, are excluded by agreement from the public trial.

¹⁴⁰ Schünemann, *Absprachen*, *supra* note 2, B 89.

mediacy principle is that the lay judges must be present during the negotiation of a confession, as well as during any mid-trial consultation of the court with the accused concerning the court's prognosis of the trial result and the court's intent.¹⁴¹

4.2.5 Conflict with the Legality and Guilt Principles (*Gesetzlichkeit- und Schuldprinzipien*)

The legality principle means that an act can only be prosecuted if written law stipulated it as a crime before it was committed (*nullum crimen sine lege*).¹⁴² Similarly, an act can only be punished if the punishment was stipulated in the law before the act was committed (*nulla poena sine lege*).¹⁴³ This principle appeared in a German code for the first time in the *Josephiniana*,¹⁴⁴ promulgated by Josef II of Austria in 1787. This *Rechtsstaat*-principle is anchored in the constitution,¹⁴⁵ as well as in the penal code.¹⁴⁶

According to the guilt principle, guilt is the sole basis for an offender's punishment: no guilt, no punishment (*nulla poena sine culpa*).¹⁴⁷ Under § 261 StPO a guilty verdict by the court requires that it be "convinced" of the accused's guilt. Thus, the central concern of the criminal proceeding is the determination of the true facts, without which the substantive guilt principle cannot be realized.¹⁴⁸

Schünemann complained that if the accused makes a narrow confession as part of a confession agreement,¹⁴⁹ then the court does not have enough evidence to establish guilt.¹⁵⁰ Addressing the effect of the "Crown's Witness" provision¹⁵¹ on judges' view of the general acceptability of confession agree-

¹⁴¹ Schünemann, *Absprachen*, *supra* note 2 at, B 90.

¹⁴² CREIFELDS RECHTSWÖRTERBUCH 823 (C.H. Beck, 11th ed. 1992).

¹⁴³ *Id.*

¹⁴⁴ SCHWERIN, *supra* note 43, at 347.

¹⁴⁵ GRUNDESETZ [Constitution] [GG] art. 103(2) (F.R.G.).

¹⁴⁶ STRAFGESETZBUCH [Penal Code] [StGB] §§ 1 and 2(2).

¹⁴⁷ § 46 StGB. The guilt principle was included in the *Carolina*. In fact, the preoccupation with the determination of guilt as basis for punishment was one of the reasons for the widespread use of torture in order to extract a confession. CONRAD II, *supra* note 34, at 414, 442; MITTEIS, *supra* note 59, at 211-12.

¹⁴⁸ Judgment of May 26, 1981, 57 BVerfG 250, at 1981 NJW 1719, 1722.

¹⁴⁹ *See supra* part 1.2.

¹⁵⁰ Schünemann, *Absprachen*, *supra* note 2, at B 81-83.

¹⁵¹ *See supra* note 24.

ments, Pfeiffer insisted that the *Bestimmtheitsgebot* ("certainty doctrine") renders judicial discretion impermissible in the penal law: "The affected party must know exactly what is allowed and what is forbidden, and he must be able to read it exactly from the statutes."¹⁵²

4.2.6 Conflict with the Presumption of Innocence (*Unschuldsvermutung*)

The procedural counterpart to the substantive guilt principle is the presumption of innocence. This presumption has been explicitly identified by the BVerfG as an integral part of the law in Germany. "The presumption of innocence is a particular manifestation of the *Rechtsstaat*-principle, and therefore has constitutional status."¹⁵³

The BVerfG also named Art. 6(2) of the European Convention on Human Rights (ECHR) as a basis for the presumption of innocence.¹⁵⁴ The ECHR states that, "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law."¹⁵⁵

Schünemann reasoned that a guilty verdict based on a narrow confession would obviously violate the presumption of innocence if it were not for the fact that the European Commission on Human Rights had not attacked the English guilty-plea system.¹⁵⁶ Schünemann declined to discuss the compatibility of the English guilty-plea with the presumption of innocence. He emphasized, however, that in contrast to the English guilty plea, penalties imposed in Germany as a result of unqualified confessions outside the scope of § 153a do not satisfy the requirement "according to law" of ECHR Art. 6(2).¹⁵⁷

The legitimacy of the presumption of innocence in the criminal proceeding, Schünemann suggested, could be explained

¹⁵² Pfeiffer, *supra* note 20, at 356.

¹⁵³ Judgment of 26. Mar. 1987, 74 BVerfG 358, published in 1987 NJW 2247.

¹⁵⁴ Judgment of 15. Dec. 1965, 19 BVerfG 342, 347: "Although it is not expressly included in the *Grundgesetz*, it is a general principle of the *Rechtsstaat*, and it has been adopted into the positive law of the Federal Republic through Art. 6 ¶ 2 of the Human Rights Convention." *Id.*

¹⁵⁵ European Convention on Human Rights [ECHR], Nov. 4, 1950, art. 6(2), 213 U.N.T.S. 221, E.T.S. 5.

¹⁵⁶ Schünemann, *Absprachen*, *supra* note 2, at B 94-95.

¹⁵⁷ Schünemann, *Absprachen*, *supra* note 2, at B 94-95.

through two principles.¹⁵⁸ First, the court must decide the question of guilt through the determination of the actual facts.¹⁵⁹ Second, the court may not impose any conditions on the accused that, in the worst case, an innocent person would not be expected to endure for the sake of the public good.¹⁶⁰ He concluded that the court violates the presumption of innocence when it participates in an agreement that aims for a narrow confession.¹⁶¹ Further, the court violates that principle when it initiates any type of confession negotiation, even if the objective is a comprehensive, qualified confession.¹⁶² This principle is violated because the initiative by the court articulates a presumption of guilt and places the accused, an innocent person, in the intolerable situation of having nothing to offer the court except a false confession.¹⁶³

4.2.7 Conflict with the Right to Silence (*Schweigerecht*)

The right to silence has long been recognized as a basic tenet of criminal procedure (*nemo tenetur se ipsum accusare*).¹⁶⁴ Article 1 of the German Constitution guarantees the dignity of the individual, and it obligates the state to respect it; the accused's right to silence is considered to be an expression of this right.¹⁶⁵ The right to silence during initial interrogation is guaranteed by sec. 136a StPO.¹⁶⁶ This right is expressly ex-

¹⁵⁸ Schünemann, *Absprachen*, *supra* note 2, at B 95.

¹⁵⁹ Schünemann, *Absprachen*, *supra* note 2, at B 95.

¹⁶⁰ Schünemann, *Absprachen*, *supra* note 2 at B 95. This concern recalls Kant's imperative that the individual may not be used merely as a means to further a societal goal.

¹⁶¹ Schünemann, *Absprachen*, *supra* note 2, at B 96.

¹⁶² Schünemann, *Absprachen*, *supra* note 2, at B 96.

¹⁶³ Schünemann, *Absprachen*, *supra* at B 96. *See also* Weigend, *supra* note 11, at 780.

¹⁶⁴ Judgment of 13. Jan. 1981, 56 BVerfG 37, *published in* 1981 NJW 1431.

¹⁶⁵ *Id.*

¹⁶⁶ STRAFPROZESSODUNG [StPO] art.136a (F.R.G.) ["forbidden interrogation methods"] reads as follows:

(1) The accused's freedom to form and to exercise his free will may not be impaired through mistreatment, through fatigue, through bodily contact, through administration of drugs, through torture, through deception or through hypnosis. Compulsion can only be applied to the extent permitted by the law of criminal procedure. The threat with a measure not allowed by regulation or the promise of a benefit not provided in law are forbidden.

(2) Measures that impair the accused's capacity for recollection or understanding are not allowed.

tended to the criminal investigation and the trial by §§ 163a and 243(4), respectively.

Section 136a prohibits the use of both threats and rewards in order to protect the accused from undue compulsion to give up the right to silence. The pressure felt by an accused to agree to a confession, even when innocent, in return for an assured level of punishment in order to escape the risk of a possibly harsher punishment is obvious. Critics of confession agreements compare the compulsion represented by the threat of harsher punishment with the corporal torture used by the Inquisition centuries ago, the only difference being the methods used.¹⁶⁷

Important is the meaning of "a benefit not provided in law" in the sense of § 136a(1). Schünemann insisted that it is incorrect to base an interpretation of "provided in law" solely on the legality of the benefit itself, without considering the legality of promising such a benefit.¹⁶⁸ In acknowledging the acceptability of dispositions within the scope of special provisions, such as §§ 153e and 154, he emphasized the link between the "promise" and the "benefit" as contemplated in the law.¹⁶⁹ The power to grant a benefit that is legal and unobjectionable in special, statutorily specified conditions, in return for a confession or other information from the accused, gives no authority to officials to expand arbitrarily the decision-making power to other circumstances.¹⁷⁰

When the organs of criminal prosecution can apply the institutional and personal authority, given them for other purposes, which arises from any decision-making capacity, actually to reward the accused for a compliant statement, then in view of the structural, preponderant power of the justice system, the only vestige of the accused's freedom to form and exercise his free will will be the possibility under some circumstances to resist the

(3) The prohibitions of paragraphs 1 and 2 apply regardless of the consent of the accused. Statements that arise in violation of these prohibitions may not be utilized, even with the accused's consent.

¹⁶⁷ Weigand, *supra* note 11, at 788; Schünemann, *Verständigung*, *supra* note 12, at 1901-02.

¹⁶⁸ Schünemann, *Absprachen*, *supra* note 2, at B 102.

¹⁶⁹ Schünemann, *Absprachen*, *supra* note 2, at B 101.

¹⁷⁰ Schünemann, *Absprachen*, *supra* note 2, at B 102-03.

temptation—which was no different even with the worst torture, and is, therefore, not the freedom meant under § 136a.¹⁷¹

Schünemann made the additional point that, in view of § 136a(3), and unlike the presumption of innocence, it makes no difference who initiates the confession negotiations. Regarding partial dismissals, Schünemann also warned that § 154 was not designed as a tool for pressuring an accused to capitulate to one charge in return for dismissing another charge.¹⁷² Schünemann worried that if the state is no longer held to the test of fully investigating at least one charge and has the power to achieve a premature guilty verdict by employing multiple charges, then the StA's duty to investigate will be compromised.¹⁷³ Without an investigation, serious crimes might be dismissed and escape punishment. Furthermore, the extraction of a confession resulting from the pressure of other charges is fundamentally no different from a confession extracted under the threat of torture and is, therefore, in violation of § 136a.¹⁷⁴

With regard to an indication by the court of the mitigating effect of a confession, Schünemann explained that there is no room for informal agreements.¹⁷⁵ During "negotiations," remorse and acknowledgement of guilt are incompatible with bar-

¹⁷¹ Schünemann, *Absprachen*, *supra* note 2, at B 103. Schünemann continued:

An example that cannot be surpassed, with respect to its radicality and candor, is the American plea-bargaining system, which gets approximately 90% of the accused to give up their constitutionally-guaranteed jury trial (with all its procedural guarantees and fact-finding provisions) simply through rewarding the guilty plea with a huge reduction of the draconian punishment expected from a guilty verdict at trial, whereby the official sentences (fixed in the Sentencing Guidelines) after a jury trial, as also the magnitude of the reduction attained through a plea-bargain, are so obviously outside the bounds of any sentencing structure based on a legitimate punishment objective that the whole system represents a gigantic, but successful guilty-plea extraction machine that leaves only a remnant of formal decision-making behind, in place of the free will intended by § 136a.

¹⁷² Schünemann, *Absprachen*, *supra* note 2, at B 106-07 (discussing BVerfG 27.1.1987). In § 154 the StPO provides that the StA can decline prosecution of a minor offense when punishment of the accused for the offense would be insignificant compared to the punishment imposed or expected from the prosecution of another crime, or if the imposed or expected punishment sufficiently punishes the accused and satisfies the public's interest in punishment.

¹⁷³ Schünemann, *Absprachen*, *supra* note 2, at B 108.

¹⁷⁴ Schünemann, *Absprachen*, *supra* note 2, at B 108.

¹⁷⁵ Schünemann, *Absprachen*, *supra* note 2, at B 111. See also part 3.2.(for a discussion of BGHSt 1.4. 1960).

gaining over a confession agreement. A truly repentent accused does not require concessions in order to acknowledge his guilt. If a judge initiates the confession before sufficient evidence of guilt, then the judge is "partial." However, if he offers a mild sentence in return for a confession after sufficient evidence of guilt is present, he is "deceptive," since such a late confession should not influence sentencing at all.¹⁷⁶

As stated in Part 3.3, *supra*, Schmidt-Hieber suggested that a confession be viewed as a contribution to the determination of facts, which deserves a milder sentence; and also, that the confession be viewed as an attempt by the accused to ameliorate the damaging consequences of his crime under § 46(2) StGB, also earning a reduction in sentence.¹⁷⁷ Schünemann responded, however, that the legislature did not intend to include the investigation and prosecution of an offense as one of the "damages" of the crime to which it referred in § 46(2) StGB.¹⁷⁸ To do so would mean a return to the Inquisition, a long trial would become a grave and punishable consequence of the act. The accused would be punishable according to the difficulty of establishing evidence, thus, this would create an implicit duty, as in the days of torture, to make a confession.¹⁷⁹ Schünemann also rejected the argument that a confession can be rewarded for its contribution to the discovery of evidence and shortening of the trial.¹⁸⁰ This would mean nothing more than an increased punishment for the accused's exercise of procedural rights guaranteed in the constitution and the StPO.¹⁸¹

4.2.8 Conflict with the Principle of Compulsory Prosecution (*Legalitätsprinzip*)

Compulsory prosecution is included in § 152(2) StPO, according to which, the StA is obligated to pursue all prosecutable offenses for which sufficient factual grounds are present. The principle seeks to ensure equal treatment (*Gleichbehandlung*) by the law, by removing arbitrariness and discretion from the

¹⁷⁶ Schünemann, *Absprachen*, *supra* note 2, at B 111; see also, Weigend, *supra* note 11, at 779.

¹⁷⁷ Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1885.

¹⁷⁸ Schünemann, *Absprachen*, *supra* note 2, at B 112.

¹⁷⁹ Schünemann, *Absprachen*, *supra* note 2, at B 113.

¹⁸⁰ Schünemann, *Absprachen*, *supra* note 2, at B 113.

¹⁸¹ Schünemann, *Absprachen*, *supra* note 2, at B 113.

decision to prosecute.¹⁸² Although § 152 does not expressly stipulate it, one could assume that it obligates the StA to pursue to the fullest extent the state's claim to punishment.¹⁸³ Thus, an extra-trial confession agreement resulting in a softer penalty would violate the principle of compulsory prosecution.

Nevertheless, two of the main critics of confession agreements do not find an inherent conflict with the principle of compulsory prosecution. Weigend wrote that the current practice of confession agreements only marginally invokes the principle because the compromises to the principle through the dispositions under §§ 153a(2) and 154(2) provide sufficient room for maneuver.¹⁸⁴ Schünemann wrote that a narrow, doctrinal focus on an individual in such a case might identify a conflict; yet, a comprehensive view of the objective of the justice system in connection with dispositions under §§ 153a and 154 suggests that the current practice of confession agreements can be reconciled with the principle.¹⁸⁵ He explained that §§ 152ff are based on the maxim of equal treatment by the law, and not on the unconditional prosecution of the law.¹⁸⁶ Furthermore, through confession-agreements, the limited resources of the justice system can more effectively achieve its goals of enforcing the substantive law and exercising deterrence.¹⁸⁷ Thus, according to Schünemann, independent of the substantive legal significance of a confession, the concession on punishment given in return for a confession is fundamentally reconcilable with the current concept of the *Legalitätsprinzip*.¹⁸⁸

4.3 Role of Trial Compromised

Critics insist that a full trial, as provided in the StPO, functions to protect the rights of the accused and to confine the authority of the court and StA. They also perceive the practice of confession agreements as undermining this role of the trial.

¹⁸² Schünemann, *Absprachen*, *supra* note 2, at B 90; NIGEL FOSTER, *GERMAN LAW AND LEGAL SYSTEM* 178 (1993).

¹⁸³ Weigend, *supra* note 11, at 777.

¹⁸⁴ Weigend, *supra* note 11, at 777.

¹⁸⁵ Schünemann, *Absprachen*, *supra* note 2, at B 90.

¹⁸⁶ Schünemann, *Absprachen*, *supra* note 2, at B 91.

¹⁸⁷ Schünemann, *Absprachen*, *supra* note 2, at B 92-93.

¹⁸⁸ Schünemann, *Absprachen*, *supra* note 2, at B 92-93.

The following lines from BVerfG 27.1.1987 give an idea of the milieu in which the debate proceeds:

[t]he constitutional duty of the state to provide effective criminal justice includes its duty to ensure the completion of commenced criminal proceedings. It may not fail to do this by its own volition either generally or in a particular case. In order to safeguard the *Rechtsstaat*-principle, the duty of the state, the security of its citizens, and their confidence in the effectiveness of state institutions, and in order to protect the right of all accused persons to equal treatment, it is fundamentally necessary that the demand for punishment be realized, that is, that proceedings be continued. The *Rechtsstaat* can prevail only if according to valid laws, criminals are prosecuted, convicted, and justly sentenced. The central concern of the criminal trial is the determination of the true facts, without which the substantive guilt principle cannot be realized.¹⁸⁹

4.3.1 Right to a "Fair Trial" (*faïres Verfahren*)

The right to a "fair trial" has been confirmed by the BVerfG, in language that recalls Kant's imperative, that the accused not be used as the means to a societal end.

The right to a defense and the right to a fair trial belong to the basic principles of a criminal proceeding in a *Rechtsstaat*. The accused may not be simply an object of the proceedings; rather, he must be given the possibility to influence the course of the proceedings and their result in order to protect his rights.¹⁹⁰

The BVerfG recognized a constitutional basis for the fair trial principle: the right to a fair trial has a basis in the constitution through Art. 2(1) together with Art. 20(3).¹⁹¹

¹⁸⁹ BVerfG 27.1.1987, *see supra* note 4.

¹⁹⁰ Judgment of June 3, 1969, 26 BVerfG 66, 71.

¹⁹¹ Judgment of Jan. 21, 1976, 41 BVerfG 246, 249. The cited sections of the *Grundgesetz* recall Kant's teachings, and read as follows:

Every person has the right to the unconstrained development of his personality, as long as it does not injure the rights of others and does not violate the constitutional order and public morals. GRUNDGESETZ [Constitution] [GG] art. 2(1) (F.R.G.).

The enactment of law is bound by the constitutional order; the executive power and the administration of justice are bound by statutes and law. GRUNDGESETZ [Constitution] [GG] art. 20(3) (F.R.G.).

Furthermore, under Art. 103(1)(GG), the right to a judicial hearing is guaranteed in the constitution: "[e]very person has the right to a judicial hearing when before the court." The German courts¹⁹² find support for a "fair trial" in the European Convention on Human Rights, which contains the following: "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."¹⁹³

Finally, the importance of this right was expressed by the BVerfG as follows:

The right of the accused to a hearing in procedural law has long been recognized and extensively observed. . . . Its inclusion in the constitution was supposed to make impossible the abuses in court proceedings as occurred during the national-socialist regime.¹⁹⁴

While none of the German commentators question the right to a "fair trial," the critics argue that the practice of confession agreements deprives the accused of trial protections. Schünemann argued as follows: [t]he state institutions exercise a preponderance of power over the accused; the criminal investigation by the StA is biased against the accused, despite the StA's duty to pursue all relevant evidence, including exculpatory (§ 160(2) StPO); the court inevitably has an initial bias against the accused through its study of the StA's case file; the rights guaranteed to the accused in trial are his counterweight to the state power over him; yet, confession agreements all too often represent a capitulation by the defense to the results of the StA's investigation.¹⁹⁵

Prof. Dr. Gerd Pfeiffer, President of the BGH from 1977 to 1987, listed some of his objections to informal confession agreements:

[h]e [the accused] is usually not included in the agreement negotiations, thus he is practically an object of a trade. His presumption of innocence is naturally compromised. In addition, the

¹⁹² Judgment of Mar. 17, 1971, 24 BGHSt 125, 131.

¹⁹³ European Convention on Human Rights, Nov. 4, 1950, art. 6(1) 213 U.N.T.S. 221, E.T.S. 5.

¹⁹⁴ Judgment of Jan. 8, 1959, 9 BVerfG 89, 95.

¹⁹⁵ Schünemann, *Verständigung*, *supra* note 12, at 1902.

defender can get no legally binding commitment. . . . Also, a negotiated confession is no compelling mitigator, because a confession made for tactical reasons is meaningless. . . . And, the accused assumes the risk of a *Verdachtsstrafe*, because the truth is not judicially determined.¹⁹⁶

The benefits to the accused were seriously questioned by critics. First, it is not clear that the individual accused gets a lighter sentence than he would have if he had insisted on a full-fledged trial.¹⁹⁷ Second, even if the initial sentencing tends to be lighter, generally these benefits are only an "introductory bonus."¹⁹⁸ The courts, the StA and the lawmakers will make sure that criminals who confess end up with the sentence they "deserve;" the result will be higher sentences for those convicted in a full trial.¹⁹⁹

4.3.2 Schünemann's Sociological Analysis of the Criminal Trial

As part of Schünemann's argument that the current practice of confession agreements and "cooperative proceedings" does not serve well the accused, Schünemann analyzed the criminal trial with the aid of models from conflict theory.²⁰⁰ Accordingly, the criminal trial is a conflict, determined and delimited by rules that replaces the underlying meta-conflict between the complaining victim and the accused. It differs from the meta-conflict because of two new characteristics: first, the addition of the judge broadens the conflict from the dyad of the two parties to a triad; second, this transforms the conflict from an interest-conflict between the two parties, to a value-conflict, decided by values and standards.²⁰¹

In order to be accepted, the new third party must be impartial, and must decide the value-conflict according to objective standards, and not on the basis of a "normative alliance" with a party.²⁰² The conditional programming of his decisions with the

¹⁹⁶ Pfeiffer, *supra* note 20, at 355.

¹⁹⁷ Schünemann, *Absprachen*, *supra* note 2, at B 38; Schünemann, *Verständigung*, *supra* note 12, at 1901.

¹⁹⁸ Weigend, *supra* note 11, at 780.

¹⁹⁹ Weigend, *supra* note 11, at 780.

²⁰⁰ Schünemann, *Absprachen*, *supra* note 2, at B 50-54.

²⁰¹ Schünemann, *Absprachen*, *supra* note 2, at B 50.

²⁰² Schünemann, *Absprachen*, *supra* note 2, at B 51.

aid of legal formulas of the "if-then" type are the best way to ensure objective decision-making by the third party.²⁰³ The uncertainty of the proceeding's outcome is the driving force of the three parties' cooperation, and the source of the proceeding's legitimacy.²⁰⁴

Structurally, according to Schünemann, the German criminal proceeding corresponds to the model of a triadic value-conflict: the victim's need for retribution is replaced by society's need for deterrent action, which is transformed into the state's demand for punishment, with the judge conditioned to act as an impartial third party.²⁰⁵

In fact, an actual alliance of the StA and the court arises because of the inquisitorial position of the judge in combination with his knowledge of the prosecutor's investigation file.²⁰⁶ As a result, the StPO tries to compensate for this by providing a "qualified counterforce" to the defense: in contrast to US criminal procedure, German law, § 147, provides defense counsel with the right of unlimited inspection of the StA's official file, without having to reciprocate by showing his information to the StA; furthermore, § 244 provides the right of the defense to request evidence (*Beweisantragsrecht*).²⁰⁷

In the case of a true process-economical disposition, a genuine value-conflict no longer exists, at least as far as "guilt" is

²⁰³ Schünemann, *Absprachen*, *supra* note 2, at B 51.

²⁰⁴ Schünemann, *Absprachen*, *supra* note 2, at B 51-52. Schünemann has his doubts about the "uncertainty of the outcome" in view of the acquittal rate of only 4% (compared to 30% in the US). Nevertheless, the exact content and the sentencing range in each individual trial is uncertain. Furthermore, the judge can be challenged on grounds of bias.

²⁰⁵ Schünemann, *Absprachen*, *supra* note 2, at B 51-52. The fact that the StA assumes the role of victim, he continued, is not problematic for his duty of objectivity because such duty only guarantees that charges will be brought only to satisfy the state's deterrence requirements, not for the victim's interests. Thus, only the general societal interest in deterrence is enforced.

²⁰⁶ Schünemann, *Absprachen*, *supra* note 2, at B 53.

²⁰⁷ Schünemann, *Absprachen*, *supra* note 2, at B 53. A request for evidence can be denied only for the specific reasons listed in § 244. Through § 244, the accused can virtually obligate the court to obtain and evaluate evidence (including witnesses), as long as the request (demand) is specific and well-grounded. Thus, § 244 creates more potential for abuse than in the US, where it is the defendant's responsibility to provide evidence. See also Rudolf Wassermann, *Von der Schwierigkeit, Strafverfahren in angemessener Zeit durch Urteil abzuschliessen*, 1994 NJW 1106 (for a recent commentary on the abuse of § 244(2)).

concerned.²⁰⁸ However, in the case of a “settlement” between the parties, the triadic structure of the value-conflict is re-transformed into an interest-negotiating session, in which the judge functions as a party in the negotiation-dyad. The judge thereby pursues his own interests (a shorter trial), while the accused pursues his own. Even though their interests might converge in the agreement on a reduced sentence, the unequal distribution of power in favor of the combined team of judge and StA will lead, practically, to an asymmetric result to the accused’s detriment.²⁰⁹ With respect to sentencing, the accused who accepts guilt (or shows a willingness to accept it) must struggle from the morally inferior position in his endeavor to get a milder sentence.²¹⁰

Schünemann discussed and dismissed two other theoretical justifications for informal agreements: “ungovernability” and “autopoietic systems.”²¹¹ The neoliberal “ungovernability” concept supplied by political scientists explains the ungovernability of modern democracies as the result of too much state activity and of the overburdening of the state by societal demands. They see the solution in the shifting of state functions to the private sector, that is, in “deregulation.”²¹² Schünemann rejected the application of this theory to criminal procedure and confession agreements. First, the modern overburdening of the state is by social welfare activity, whereas criminal law serves the purpose of delimiting the freedom of action between members of society. Secondly, criminal justice has traditionally been administered by the state. Thirdly, the practice of informal agreements leads neither to deregulation nor to a re-assignment of conflict resolution to society; rather, it serves merely to widen the scope of activity of judicial structures. Indeed, the *Rechtsstaat* restrictions on state enforcement and authority were heavily influenced by German Liberalism. Thus, it would be incongruous, he claims, to loosen those very restrictions by applying segments of the ungovernability debate that advocate a return to basic liberal values.²¹³

²⁰⁸ Schünemann, *Absprachen*, *supra* note 2, at B 54-55.

²⁰⁹ Schünemann, *Absprachen*, *supra* note 2, at B 49,56.

²¹⁰ Schünemann, *Absprachen*, *supra* note 2, at B 56.

²¹¹ See *infra* p. 59.

²¹² Schünemann, *Absprachen*, *supra* note 2, at B 63.

²¹³ Schünemann, *Absprachen*, *supra* note 2, at B 64.

The theory of autopoietic systems holds that the self-dynamic of societal subsystems leads to ever decreasing central political control because the subsystems are closed to outside influence.²¹⁴ The control problem is supposedly resolved by adoption of "reflexive law" which would regulate only the decision-making structures within which negotiations would occur. Thus, the subsystems would be granted "regulated autonomy," and the state would restrict itself to a "decentralized regulation of content."²¹⁵ Schünemann explained that the current informal agreements are not the forerunners of an evolution to "reflexive law," rather the employment of a superficial form in an unaltered substance. In reality, confession agreements do not represent societal conflict resolution within a structure organized by law. Instead, the judge still has the full weight of the law available as a powerful bargaining tool. Thus, the accused is "bargaining in the shadow of the law" and there is no "regulated autonomy."²¹⁶

4.3.3 Weigend's Criticism of the Modern, Consensual Proceeding and the General Deterrence Rationale

Weigend disagreed with the notion that the current practice of confession agreements represents merely a change in the paradigm of criminal procedure. He suggested that the pervasiveness of the practice and its theoretical legitimization with concepts of conflict resolution and community harmony are not an isolated phenomena; rather, they represent a transformation of the justice system into a tool for the realization of general deterrence.²¹⁷

The traditional model of the criminal justice system was based on a pursuit of truth and justice, Weigend explained.²¹⁸ On the other hand, the modern state, which acts and regulates

²¹⁴ Schünemann, *Absprachen*, *supra* note 2, at B 64.

²¹⁵ Schünemann, *Absprachen*, *supra* note 2, at B 64-65.

²¹⁶ Schünemann, *Absprachen*, *supra* note 2, at B 65.

²¹⁷ Weigend, *supra* note 11, at 780.

²¹⁸ Weigend, *supra* note 11, at 780-81. Compare with Widmaier, *supra* note 102, at 359 ("In our present State, the judiciary is not an irrational sovereign, rather a functional instrument of society for the maintenance of the communal peace"). See also, Schmidt-Hieber, *Absprachen*, *supra* note 81, at 1888 (discussing measures to remove inequality in the application of cooperative procedures: "Further, it must be recognized that the strict ritual of the criminal trial is no goal in itself, rather it serves conflict resolution exclusively").

in many new areas of an increasingly complex society, views criminal justice as a regulatory tool. Its goal is no longer uniformly applied retribution, rather, its purpose is efficient deterrence. It seeks to enforce its concepts of order so that it will reduce deviation. Its regulations are so comprehensive that their rigorous enforcement is not only impossible, but never intended. Instead, the State uses punishment in order to make all members of society conscious of the risk associated with violations of societal norms. The function of confession agreements in such a system is obvious, they serve as a forum "to negotiate the facts" and reach a pragmatic verdict.²¹⁹ As long as conflicts are solved among the "experienced and rational" lawyers, the case can be disposed of by submerging the accused. At the same time, the verdict is legitimized by the obvious agreement of all parties. This concept is "seductively expedient," but its implementation, Weigend warned, would mean a "complete instrumentalization" of the individual for social objectives.²²⁰ An individual would be subjected to criminal justice not for his own sake, but for the sake of society: the concept of general deterrence picks someone out in order to make an example of him; a streamlined procedure assures no resistance by the accused; the accused who insists on the protective forms of a traditional trial can have them—but at the cost of a higher potential sentence.²²¹

4.4 Arbitrary Results

Even Schmidt-Hieber has serious reservations with respect to the arbitrariness of the confession agreement process. He lamented about the blatant self-interest with which the criminal justice system engages in agreements. If the trial threatens to be complex, difficult and burdensome, then agreements can be

²¹⁹ Weigend, *supra* note 11, at 781.

²²⁰ Weigend, *supra* note 11, at 781. *See also*, Schünemann, *Absprachen*, *supra* note 2, at B 61-62 (doubting whether the increased "output" of the present judicial system actually achieves its goals of "negative deterrence" and "positive-integration general-deterrence"): the reduction in penal sanctions granted could decrease the "negative" deterrent effect on potential criminals. On the other hand, the general populace's view of negotiated judgments as unjust, or its view of the accused as a victim caught up in the deal-making machinery, could reduce citizen identification with the law and the justice system.

²²¹ Weigend, *supra* note 11, at 781.

had. If defense counsel is conflict-ready, well-armed and clever, then the court settles. These benefits flow mainly to affluent accused; the smaller and weaker encounters the ritual of an ice-cold criminal proceeding.²²² Schmidt-Hieber contrasted the "distance" maintained in a common criminal trial, with the courteous, conference-like atmosphere in a white-collar criminal trial.²²³ He warned of a loss of public respect for the justice system.²²⁴ More significantly, he suggested that the practice of informal agreements could be the preliminary stage to immunity.²²⁵ He referred to Nietzsche's idea that the law can only partially restrain the "will to power," and that "the self-dissolution of justice" is a privilege of the strongest, his sphere "beyond the law."²²⁶

Weigend first complained about the fact that an accused who is unwilling to cooperate in the confession-agreement milieu is automatically disadvantaged. Secondly, the white-collar accused benefits disproportionately because of the complexity of his case and the skill of his well-paid defender. Finally, the result of the agreement communications depends on the skill and devotion of the acting parties, which makes each individual disposition arbitrary.²²⁷

5. HIGH COURT DECISIONS

The treatment of informal confession agreements in decisions of the higher courts, the BVerfG and BGH, have been ambiguous. Several decisions set out clear limitations on confession agreements. In other cases, the appeal court criticized some aspect of the agreement, but implicitly accepted its general validity.

²²² Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1885.

²²³ Schmidt-Hieber, *Absprachen*, *supra* note 86 at 1886.

²²⁴ Schmidt-Hieber, *Absprachen*, *supra* note 86 at 1886.

²²⁵ Schmidt-Hieber, *Absprachen*, *supra* note 86 at 1886.

²²⁶ Schmidt-Hieber, *Absprachen*, *supra* note 86 at 1887. See FRIEDRICH NIETZSCHE, *Zur Genealogie der Moral*, NIETZSCHE WERKE, PART VI, VOL. 2 325 (Walter de Gruyter & Co, Berlin 1968) (1887). Such concerns recollect the *Rechtsstaat* principle of equality before the law. Schmidt-Hieber, however, in defense of confession agreements, recommended changes in the StPO to make the process more accessible to all accused persons. Schmidt-Hieber, *Vereinbarungen*, *supra* note 81, at 1887. Compare, Schünemann, *Absprachen*, *supra* note 2, at B 165.

²²⁷ Weigend, *supra* note 11, at 780.

The first landmark decision was made by the constitutional court in 1987,²²⁸ discussed in Part 4.2.1, *supra*. The BVerfG rejected the constitutional complaint of the convicted appellant that the court, StA and defense counsel had engaged in an impermissible "verdict agreement." The BVerfG emphasised the importance of observing *Rechtsstaat*-standards and procedural safeguards in order to protect both the accused's right to a fair trial and the public's right to a functioning judicial system. These measures included: equal treatment; the search for material truth; the material guilt principle; and, participation by the accused as a subject in the proceeding, instead of his treatment as an object.

The rule of BGHSt 7.6.1989 is that the accused must be able to rely on expectations regarding the court's conduct if the court itself aroused the expectations.²²⁹ If the court determines during the course of the proceedings that it cannot fulfill its previous assurances, then the accused's right to a fair trial obligates the court to notify the accused of the court's changed position. The BGH explained here that it need not consider the legality of the extra-trial agreement because, in any case, the defense counsel may rely on the court's assurances. The BGH reiterated here, however, that the presiding judge is permitted to take up contact with the parties outside the trial itself.²³⁰ Thus, it could be argued, this decision of the BGH implicitly condoned extra-trial agreements.²³¹

²²⁸ BVerfG 27.1.1987, *supra* note 4.

²²⁹ BGHSt 7.6.1989, *supra* note 4. Three people were tried for illegal dealing in cocaine. During a pause on the second of three trial days, the StA told the defense lawyers that he intended to demand prison terms of 3 1/2 years for accused S and R, and 4 years for accused M. BGHSt 7.6.1989, *supra* note 4. In two conversations initiated by the presiding judge during pauses, the judge led defense counsel to believe that the court's sentencing would not exceed the terms requested by the StA. BGHSt 7.6.1989, *supra* note 4. Nevertheless, the court sentenced the accused S and R to 4 1/2 years, and accused M to 5 1/2 years. BGHSt 7.6.1989, *supra* note 4. In their appeal to the BGH, the convicted argued that their defense counsel would have made additional motions for evidence if they had not relied on the court's assurance that its sentences would remain within the StA's ranges. BGHSt 7.6.1989, *supra* note 4. The BGH vacated the sentences imposed by the trial court. BGHSt 7.6.1989, *supra* note 4.

²³⁰ BGHSt 7.6.1989, *supra* note 4.

²³¹ Weigend, *supra* note 11, at 776; Hermann, *supra* note 8, at 767.

BGHSt 18.4.1990 also involved the right to a fair trial.²³² If the StA declines, under § 154, to prosecute a crime, the StA is fundamentally free to resume prosecution later. But, according to this decision, if the accused declines to pursue a potential avenue of defense to one charge in reliance on a statement by the StA not to prosecute a second charge, then the StA's later prosecution of the second charge would violate the fair trial principle. In this case, the BGH allowed the conviction for the second crime to stand, but it insisted that the violation of the fair trial principle was valid justification for imposing a mild sentence.

BGHSt 4.7.1990 once again avoided an explicit decision on the legality of the confession agreement.²³³ Nevertheless, it implicitly condoned agreements as it cautioned against impermissible practices. The BGH ruled that the appellant correctly challenged the three professional trial judges on grounds of bias. The trial judges reached a confession agreement with two other accuseds without the participation of the appellant. The BGH held that such an agreement was not in itself unacceptable; but, the trial court had failed to protect the interests of the nonparticipant and avoid the legitimate concern of bias by failing to disclose completely the negotiation's details.

Within the scope of its legal permissibility, such an understanding is not ruled out by the refusal of one of several accused persons to participate correspondingly. On the other hand, in view of the conflicting interests of such an accused, the court is obligated to give special consideration to the accused's interest in being informed.²³⁴

²³² BGHSt 18.4.1990, *supra* note 6. The office of the StA originally investigated the accused for income tax evasion and nonpayment of social insurance contributions. A penal order under § 407 for nonpayment of insurance contributions was issued. BGHSt 18.4.1990, *supra* note 6. The accused agreed to drop his contest of the penal order in return for StA1's agreement under § 154 not to prosecute the tax evasion. BGHSt 18.4.1990, *supra* note 6. But, StA2, who was StA1's successor, did not honor the agreement. BGHSt 18.4.1990, *supra* note 6. The trial court convicted the accused for tax evasion, but it considered the unfair circumstances of the prosecution as it sentenced the accused to 2 years 10 months prison. BGHSt 18.4.1990, *supra* note 6. The accused appealed his conviction; the StA appealed the court's mild sentence. The BGH upheld the conviction, as well as the mild sentence. BGHSt 18.4.1990, *supra* note 6.

²³³ BGHSt 4.7.1990, *supra* note 14.

²³⁴ BGHSt 4.7.1990, *supra* note 14.

In contrast to the above decisions, BGHSt 23.1.1991 was extremely critical of confession agreements.²³⁵ The StA's appeal was based on the obvious bias of the professional judges going into trial after they reached a confession agreement with the accused. The BGH agreed with the StA:

[a]s opposed to the view of the LG [*Landgericht*, trial court], it is not a matter of a "binding" agreement, a "final" commitment, rather it depends on the clear, outward appearance of the judge's inner standpoint. . . . External comments on the non-binding or provisional character of the sentence make no difference. . . . When the defender speaks with the court and a particular sentence is set in view, then the court creates at least the impression that it will hold itself to it, that it is bound. . . . A binding of the court, even if just the impression of being bound, before the last word of the accused, creates a bias of the court.²³⁶

But, the BGH went further and launched a fundamental attack on the practice of confession agreements in general. The BGH rejected the views of both the LG and the StA that such pre-judgment discussions among the judge, StA and defender were permissible according to previous high court decisions.²³⁷ The BGH insisted that agreements concerning the sentence expected in return for a confession contradict valid regulations if

²³⁵ BGHSt 23.1.1991, *supra* note 4. Before trial, and without participation of the lay judges, the presiding judge had conducted confidential negotiations separately with the StA and the defender concerning the sentence he would impose if a confession were made. His interest was to shorten the trial, which he expected to involve many witnesses, and to run at least eight months. BGHSt 23.1.1991, *supra* note 4. The professional judges contemplated a four-year suspended sentence; the StA insisted on five years, without suspension. The presiding judge sought the intervention of the StA's supervisors to influence the prosecuting StA. BGHSt 23.1.1991, *supra* note 4. On the first day of trial, the accused made a thorough confession. BGHSt 23.1.1991, *supra* note 4. The StA insisted on calling more witnesses, so the trial continued. BGHSt 23.1.1991, *supra* note 4. Thereupon, the accused complained to the media that he had been deceived, that he had made his confession only to get the mild sentence promised by the court. BGHSt 23.1.1991, *supra* note 4. As a result of this, the StA challenged the professional judges on grounds of bias; the trial court rejected the challenge and sentenced the accused to four years, two months prison. BGHSt 23.1.1991, *supra* note 4. Based on the StA's appeal, the BGH set aside the judgment of the trial court. BGHSt 23.1.1991, *supra* note 4.

²³⁶ BGHSt 23.1.1991, *supra* note 4, at 1693.

²³⁷ BGHSt 23.1.1991, *supra* note 4, at 1693.

made in the absence of the accused or any lay judges.²³⁸ "The sentence announced by a court in its decision may not be determined without the legal guarantees of attendance and participation of all parties, in violation of immediacy and orality, or by circumvention of the publicity principle."²³⁹

This decision announced several rules. Firstly, for the sake of trial efficiency, the judge may "feel out" the parties outside of trial and encourage appropriate motions. Nevertheless, he must avoid every appearance of bias. Secondly, such "feeling out" may only involve trial procedure, including potential suggestions concerning §§ 154, 154a StPO, but not sentencing, probation, or the manner of carrying out the sentence. Thirdly, there is no procedure consistent with the *Rechtsstaat*-principle for agreements concerning the verdict. Indeed, the court is forbidden to engage in "a settlement" in the guise of a verdict or in a "bargain with justice."²⁴⁰

Thus, BGHSt 23.1.1991 concluded that informal, extra-trial confession agreements are impermissible and inconsistent with the *Rechtsstaat*-principle. Yet, BGHSt 30.10.1991,²⁴¹ a decision by another Senate of the BGH a few months later, disallowed an agreement between the presiding judge and defense counsel because the StA was not promptly informed, not because it was an extra-trial confession agreement.²⁴² BGHSt 19.10.1993, decided by still another Senate, involved an appeal

²³⁸ BGHSt 23.1.1991, *supra* note 4, at 1694.

²³⁹ BGHSt 23.1.1991, *supra* note 4, at 1694.

²⁴⁰ BGHSt 23.1.1991, *supra* note 4, at 1694.

²⁴¹ Judgment of Oct. 30, 1991, 38 BGHSt 102, *published in* 1992 NJW 519 [hereinafter BGHJSt 30. 10.1991].

²⁴² Judgment of 30. Oct. 1991, 38 BGHSt 102, *published in* 1992 NJW 519 [hereinafter BGHSt 30.10.1991]. In this case, the accused was convicted of illegal dealing in narcotics and illegal possession of a gun, and was sentenced to five years and four months prison. The StA appealed the verdict, claiming that during the proceeding, the trial court reached an agreement with defense counsel in the absence of the StA. *Id.* The agreement was that the accused could reckon with a sentence between five years and five years and eleven months if he made a confession. The accused confessed, and the StA learned about the agreement upon the presiding judge's oral announcement of the grounds of the verdict. *Id.* The BGH decided in favor of the StA. *Id.* But, this Senate of the BGH did not find error in the extra-trial agreement itself. Rather, it found error only in the fact that the court gave an "interim report" to defense counsel before giving the StA an opportunity to address the issue. *Id.*

by the convicted robber-murderer to specifically enforce an alleged confession agreement with the court.²⁴³ As fundamental grounds for rejecting the convicted's arguments, the BGH cited BVerfG 27.1.1987 and BGHSt 23.1.1991, and reiterated that extra-trial agreements may not prejudice the court's judgment.²⁴⁴ BGHSt 19.10.1993 also explained that there were practical reasons for its decision; namely, the impossibility of determining the actual content of an extra-trial conference when both sides tell different versions.²⁴⁵

6. SUMMARY AND PROGNOSIS

The debate about confession agreements is about the rights of the accused, about the purpose of criminal trials, and about the "rule of law." Proponents of confession agreements argue that cooperative consensus-building produces well-balanced verdicts. The process of cooperative negotiating, they claim, actively empowers the accused, establishes his autonomy and enforces his status as an equal, which, thereby enables him to protect his rights. Furthermore, confession agreements justifiably reward the accused for his contribution to a speedy trial. The proponents also argue that agreements in criminal trials are compatible with the StPO and have generally been condoned by high-court decisions.

The critics argue that extra-trial confession negotiations undermine the rights of the accused because outside of trial the accused loses the protections of procedural and substantive law that the StPO, the constitution, and the *Rechtsstaat*-tradition have incorporated into the trial. Without the protection of the trial, they argue, the accused loses his counter-balancing power and is exposed to the overwhelming authority of the court and

²⁴³ Judgment of 19. Oct. 1993, BGHSt, published in 1994 NJW 1293 [hereinafter BGHSt 19.10.1993]. The convicted youth was sentenced to 10 years, then complained on appeal that the presiding judge did not honor an alleged extra-trial confession agreement, according to which the presiding judge supposedly committed the court to a sentence of no more than eight years in return for a repetition by the accused of the confession he had made during the investigation. The BGH rejected the appellant's arguments. *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

the StA, which the trial proceeding would otherwise hold in check. The critics question whether the individual accused can rely on receiving a benefit. In any case, they predict that any short-term benefits to the accused persons, in general, will soon be neutralized by an inflation of initial charges and penalties, as in the US. Critics warn against: the *Verdachtsstrafe*, arbitrary results, and a virtual penalty for exercising the right to trial.

The critics also have a deeper, more fundamental concern: the effect of the practice of informal confession agreements on the judicial system of a *Rechtsstaat*. This concern is three-fold. First, they see a surrender of the individual to the efficiency concerns of the general welfare. Second, they fear an aggrandisement of personal and institutional power in the state authorities, outside of the law and unchecked by it. Third, they view the arbitrariness of the process, on the one hand, and the privileges enjoyed by the accused with respect to certain categories of crimes (white collar, environmental, drug), on the other hand, as threats to the principle of equality before the law.

It is unclear what will happen next. BGHSt 23.1.1991 (see part 5, *supra*) was relatively explicit in the limitations it imposed on extra-trial confession agreements. It included many of the proscriptions advocated by critics of confession agreements, and it cited some of their works. Yet, the precedent of high court decisions does not carry quite as much weight as in common law jurisdictions; and, there are a number of other decisions which implicitly recognize the validity of confession agreements. Thus, without explicit regulations, it is unlikely that the limitations of BGHSt 23.1.1991 will be rigorously followed. Confession agreements are widespread because they serve the interests of, at least, the professionals. If the professionals make an informal, extra-trial agreement and are satisfied with it, then there is no reason why it will ever be scrutinized for its legality. If the deal goes sour, or if the accused is unhappy with it, only then will the confession agreement itself and the pre-agreement negotiation perhaps come to light.

In order to curb the practice, Schünemann recommended several changes in the StPO which include: the offer of a partial dismissal or a more-or-less definite sentence in return for a confession would be included in the forbidden interrogation practices of § 136a (*see supra* note 141); a confession could become the basis of a verdict under § 261 only if it provided information on all elements of the crime; the accused would have the right under § 368 to withdraw a confession and have a new trial if he was not properly advised about confessions; and, anytime a confession is considered, an advisement of the accused of his rights under the above changes would be required in § 243.²⁴⁶

Schünemann also suggested that a slight re-shuffling of the accused's procedural rights might be necessary.²⁴⁷ In order to contain the "power to obstruct" that the defense is able to exercise through its right to request evidence under § 244, he suggested that the defense be limited to a right to present evidence, as provided in § 245, which is similar to the practice in the US. However, in order to maintain the balance of power, he suggested an increase in the defense's rights during the investigatory process (e.g., a right to compel the StA to investigate certain evidence).²⁴⁸

Finally, Schünemann conceded that the current concept of the criminal trial as embodied in the StPO is not necessarily the only potentially valid one.²⁴⁹ There is no constitutional barrier to developing a substitute proceeding, (even if it would incorporate confession agreements), as long as it would perform the required function of determining the material truth and avoiding imposition of a *Verdachtsstrafe*.²⁵⁰

Despite his strong position against confession agreements, Weigend felt that a prohibition would only force the well-established practice underground, making its abuses impossible to monitor. Thus, he considered guidelines to rein in the practice

²⁴⁶ Schünemann, *Absprachen*, *supra* note 2, at B 158-160.

²⁴⁷ Schünemann, *Absprachen*, *supra* note 2, at B 161.

²⁴⁸ Schünemann, *Absprachen*, *supra* note 2, at B 161-62, 164.

²⁴⁹ Schünemann, *Absprachen*, *supra* note 2, at B 146.

²⁵⁰ Schünemann, *Absprachen*, *supra* note 2, at B 145-46.

to be the least bad alternative for the present.²⁵¹ Pfeiffer hoped for legislative action to regulate or eliminate the practice.²⁵² Schmidt-Hieber, on the other hand, suggested changes to the StPO to assure the access of all accused persons to the confession-agreement option.²⁵³ Hamm advised a retreat of criminal law from areas in which other forms of law (e.g., civil, administrative, fiscal) could provide the desired result and reduce the pressure on professionals to "settle."²⁵⁴ Böttcher *et al.* hoped that if the practice of agreements confined itself within the guidelines set out by the attorneys general and the BRAK, then the "moderate" rules of BGHSt 30.10.1991 would prevail over the "overcritical" position of BGHSt 23.1.1991, and legislative action would be unnecessary.²⁵⁵

I. CONCLUSIONS

The provision of substantive and procedural rights to protect accused persons is a necessary characteristic of the liberal-democratic state, that is, of the *Rechtsstaat*. However, protection of the accused is not peculiar to liberal democracy. Rights of the accused are also consistent with the enlightened absolutist state and they are a logical component of the "welfare"

²⁵¹ Weigend, *supra* note 11, at 781-82.

²⁵² Pfeiffer, *supra* note 20, at 356. So far, the legislature has taken no explicit action with respect to informal, extra-trial confession agreements. Nevertheless, it did make some relevant changes to the StPO. As of March 1, 1993, a disposition under §§ 153a or 407 can include more serious crimes. This was done with the explicit intention of relieving the extra burden of cases on the system resulting from reunification. Also, a request to take the evidence of a witness can be refused by the court under § 244(5) if it would have to be done in a foreign country; the duty to take the evidence of foreign witnesses is required only if the evidence is essential to reach a verdict. Lutz Meyer-Gossner, *Änderungen der Strafprozessordnung durch das Rechtspflegeentlastungsgesetz*, 1993 NJW 498. As of mid-1994, the German legislature was considering changes to the StPO that would provide for an accelerated trial for offenses punishable up to one year in prison. Critics are concerned about the potentially negative effect of such changes on *Rechtsstaat*-guarantees. Uwe Scheffler, *Kurzer Prozess mit rechtsstaatlichen Grundsätzen?*, 1994 NJW 2191. See also, Bernd Schünemann, 1994 NJW 1338 (reviewing PFEIFFER, *GRUNDZÜGE DES STRAFVERFAHRENSRECHTS* (1993)).

²⁵³ Schmidt-Hieber, *Absprachen*, *supra* note 86, at 1887.

²⁵⁴ Hamm, *supra* note 30, at 340-42.

²⁵⁵ Böttcher, *supra* note 118, at 375-76.

rationale that served to legitimize absolute monarchies in Germany. According to such a rationale, rule-making authority resides in the enforcing power, and the state has a positive duty to regulate its "subjects" for the individual and general welfare. But, if the executive or the judiciary makes or modifies rules (i.e., exercises sovereignty) with respect to the treatment of accused persons, then, both the rights of the accused and the rights of the general citizenry are less secure from abuses of state power than they would be if *Rechtsstaat*-principles of government were observed. Further, if officials individually act outside the scope of lawful regulations, then the administration of justice is uncertain, non-uniform, and unregulatable.

The debate in Germany goes deeper than the rights of the accused. Its literature contains frequent references to historical practices: for example, the *Verdachtsstrafe*, the closed proceedings of the Inquisition, the compelled confession, and arbitrary government. The commentators see the specter of these practices in the modern confession agreement. Further, they see the defense against such abuses not only in the protection of the accused's rights, but also in the application of fundamental *Rechtsstaat*-principles. As a result, the German commentators view the unauthorized and unregulated decision-making by state officials in the same light as the dilution of the accused's "natural," constitutional rights. The commentators view the privilege of "immunity" from the law for certain types of criminals not only as unfair, but also as a direct threat to the ideal of equality and to the integrity of the criminal justice system and the democratic state.

In the US, on the other hand, the plea-bargaining debate revolves around the issues of judicial economy and defendant rights. The focus of commentators on such issues is proper, yet myopic. Even though its conclusions might be different, the terms of the debate in the US are fundamentally the same as an 18th-century, early-enlightenment discourse in which jurists and lawmakers balance the rights of the accused against the administrative demands of the state. Arguments in the US that do not include the added dimension of liberal-democratic concerns not only protect defendants rights less persuasively (if

that is a goal), but, they also overlook equally grave issues, such as, the abuse and usurpation of governmental power, unequal treatment by the law, the attachment of impunity to criminal acts, and a decrease in the legitimacy of both government and law.