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Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Criminal Procedure

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SOME OBSERVATIONS ON THE ORIGIN AND STRUCTURE OF EVIDENCE RULES UNDER THE COMMON LAW SYSTEM AND THE CIVIL LAW SYSTEM OF "FREE PROOF" IN THE GERMAN CODE OF CRIMINAL PROCEDURE*

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I. INTRODUCTION

ONE of the most widespread clichés of comparative evidence law is the glib formula that, while the Anglo-American evidence law is a well-organized body of ready-to-hand rules containing the crystallized wisdom of many generations of judges, devised and well-fitted to protect the jury from dubious, misleading or inflaming evidence and the litigant parties from the arbitrariness of the individual judge, the modern civil law system of free proof is "no system at all," or, at best, a system where "the judge's discretion largely determines what evidence is to be used,"[1] or, even worse, where only "the examining judge . . . decides what witnesses shall be summoned."[2] Looked at from closer quarters, of course, some qualifications that leap to the eye prove this cliché to be a grave fallacy, conceived by those "who do not wish to be confronted with the confused picture of what is actually going on."[3]

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* References in this article are to the edition of the code (translated into English by Horst Niebler) in 10 American Series of Foreign Penal Codes, Germany (1965). The code is hereinafter cited as C.C.P.

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1. Wigmore, Evidence (student ed.) at 3, 4.

2. Committee on Supreme Court Practice and Procedure, Final Report, (presented by the Lord High Chancellor to Parliament, 1953) 84, 86 [quoted from Maguire, Weinstein, Chadbourn & Mansfield, Cases on Evidence at 3 (5th ed. 1965)].

3. Arnold, The Symbols of Government 53 (1962).

Add the labels "inquisitorial" and "accusatorial" to the respective systems of criminal procedure, and the ready-made and reach-me-down result of this type of comparative evaluation of legal systems is complete. As to the heuristic value of such classifications, perhaps it should give us pause that Yale Kamisar [*Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in Kamisar, Inbau & Arnold, Criminal Justice in Our Time 1-95 (1965)] calls the prevailing American system of criminal procedure with its heavy reliance on interrogations and confessions an "inquisitorial" system. On the other hand, Justice Frankfurter, in Watts v. Indiana, 338 U.S. 49, 54 (1949) lists the characteristics of an "accusatorial" as opposed to the "inquisitorial" (viz., Continental) system of criminal procedure. It is easy to point out, at every item, the respective provisions of the German Criminal Procedure Code of 1877, as it stands in 1966, that meet the requirements of Justice Frankfurter's definition [The references to the C.C.P. are given in brackets]: "The requirement of specific charges [§§ 200, 201, 202], their proof beyond a reasonable doubt [§ 261], the protection of the accused from confessions extorted through whatever form of police pressures [§§ 136, 136a, 163a C.C.P. and § 343 German Penal Code], the right to a prompt hearing before a magistrate [§§ 115, 115a], the right to assistance of counsel [§§ 163a, 169], to be supplied by government when circumstances make it necessary [§§ 140-146], the duty to advise an accused of his constitutional rights [§§ 136, 163a]—these are all characteristics of the accusatorial system and manifestations of its demands."

What then does go on? No more and no less than that the two systems of evidence law, though starting from entirely different points, have approached each other to a very large extent, technicalities omitted. This has resulted from the abandonment of dogmatic and ideological basic notions and the acceptance of a more practical and common-sense view.

II. The Two Phases of the Proof Process: Reconstruction and Evaluation

The mental process that, in a judicial or a comparable proceeding aimed at fact-finding, leads from uncertainty about a given proposition to a workable certainty supplying the basis for a subsequent decision, is customarily given one comprehensive name: PROOF. Verbally, we say, the contested facts are PROVED. Yet this seemingly uniform mental process involves two distinctly separate phases.

First, the fact (or facts) to be proved are normally related to an event or state of affairs in the past or, if in the present, not otherwise the object of the fact-finder's immediate perception (*e.g.*, the height above sea level of Mount Everest is at issue). This fact must therefore be reconstructed for and before the fact-finder. This construction of the replica of the fact in issue—the hearing of the evidence—is the first phase of the proof process as a whole. As a matter of fact, several conflicting replicas will normally emerge in a controversial case.

Secondly, to have this replica or model of the fact in issue—or a variety of replicas, for that matter—set up in the courtroom does not yet create the workable certainty that is needed to arrive at a decision. To reach such a decision, the replica, or one of the various replicas presented, or a combination of parts thereof, has to be *accepted* as truly representing the original fact. For it is the original fact, after all, that is to be determinative. The second phase of the process consists of the evaluation of the replica[s] with a view to its judicial acceptance as a *true* reconstruction of the original fact. If the evaluation results in an affirmative answer as to one of the replicas, the fact it represents is considered as proved, *i.e.*, to be or to have been congruent or coinciding with the replica. If the answer is a negative one with respect to all the replicas, the determinative fact has not been established. The basis for the decision is then artificially supplied by the rules concerning the burden of proof.

The evaluation can be either free or fixed, or at least guided, by certain rules. The general jury verdict under American law[4] is, in actual practice, an extreme example of the first type, since it does not set forth which facts were found, let alone how and why they were found, and is thereby not open to any localization of error in the reasoning process that led to the finding of the ultimate fact. The ancient Continental system of "legal proof" (*preuve légale, gesetzliche Beweistheorie*) where the evaluation by the fact-finder was governed by strict rules attributing certain quantities of weight to any given evidentiary

4. *Cf.* Sunderland, *Verdicts, General and Special*, 29 Yale L.J. 253 (1920); Frank, J., in Skidmore v. Baltimore & O.R.R., 167 F.2d 54 (2d Cir. 1948).

item,[5] was an extreme example of the latter type. Modern German evidence law[6] qualifies the principle of free evaluation by the requirement that the court opinion set forth in some detail not only all single facts that were found but also all inferences leading from one fact to another and the final combination of facts (*Beweiswürdigung*).[7] This requirement of a detailed *Beweiswürdigung* in the written opinion opens the door to an appeal (Revision) based on the alleged violation of rules of logic or experience or of the laws of nature,[8] and, in critical cases, even on the allegation that a particular inference, though logically possible, violated the laws of probability.[9]

In American law, the jury's free-wheeling evaluation of the evidence, whose results cannot be broken up into its constituent parts, is sought to be guided *in advance* by judicial instructions to the jury, cautioning them to consider certain evidence data for special purposes only (*e.g.*, prior inconsistent statements only for impeachment purposes but not for substantive purposes), to take into account the existence of a presumption, etc.

The problem posed in both systems by these corollaries to the freedom in the evaluation is the same: How can it be ascertained whether or not the jury did follow the instructions, or how can it be ascertained whether or not the written opinion really and truthfully *describes* the mental process by which the result was reached, instead of rationalizing it?

In any event, some sort of evaluation—whether by abstract or individualized standards, whether controllable or not—is necessary to connect the fact replica with the judicial decision, with a view to which the replica was after all made: the decision-maker must accept one fact replica as true before he acts upon it.

Now the result of the evaluation obviously depends upon its object, that is, the evidentiary material evaluated. Hence, the congruence between the real fact in issue and its reflection in the mind of the decision-maker is likely to be the more complete, and the final judicial decision therefore likely to be the more

5. *Infra*, p. 144.

6. A classical analysis of the problems involved may be found in Von Savigny's memorandum *Die Prinzipien in Beziehung auf eine neue Strafprozessordnung* (1846), published in 6 Archiv für Preussisches Strafrecht [Goltdammer's Archiv] 481-491 (1858).

7. By § 286 of the German Code of Civil Procedure (*Zivilprozessordnung*) this is required for civil cases without any restriction; *see* Egon Schneider, *Die Beweiswürdigung im Zivilprozess*, 1966 Monatsschrift für Deutsches Recht 192 *passim*, 385. The letter of the corresponding section in the C.C.P. (§ 267) provides this requirement only for circumstantial proof, but it has been the long-established practice of the trial courts to extend this provision to all cases, and the higher courts have increasingly reversed judgments where, in exceptional cases, the trial court did not follow this practice. See Bundesgerichtshof, Judgment of October 16, 1964, in 1965 Goltdammer's Archiv für Strafrecht 109; Wenzel, *Das Fehlen der Beweisgründe im Strafurteil als Revisionsgrund*, 1966 Neue Juristische Wochenschrift [hereinafter cited N.J.W.] 577.

8. See Sarstedt, Die Revision in Strafsachen [hereinafter cited Sarstedt] 212-31 (4th ed. 1962); Schwinge, Grundlagen des Revisionsrechts 186-203 (2d ed. 1960).

9. Oberlandesgericht Hamm, Judgment of July 1, 1965—2 Ss 602/65—(not published): trial court's finding that buyer of stolen automobile was deceived since he did *not* suspect vehicle was stolen, "improbable" under the circumstances of the case (low price, buyer, as operator of filling-station, likely to be familiar with market situation); judgment reversed.

appropriate to the true case, the more accurately and comprehensively the reproduction in court represents the true facts of the case. In order to secure the desirable accuracy and comprehensiveness of the reproduction, the common law and the civil law systems have developed two entirely different devices: the adversary system on the one hand and the clarifying duty of the judge, as expressed, for instance, in section 244(2), C.C.P., on the other hand. Section 244(2) reads as follows: "In order to explore the truth the court shall on its own motion extend the reception of the evidence to all facts and to all means of proof which are important for the decision."

The adversary system is recommended because "the best way for a court to discover the facts in a suit is to have each side strive as hard as it can, in a keenly partisan spirit, to bring to the court's attention the evidence favorable to that side," or because "when two men argue, as unfairly as possible, on opposite sides, . . . it is certain that no important consideration will altogether escape notice."[10]

The active clarifying function of the judge under the Continental procedural systems is often labeled as the typical "inquisitorial" feature as opposed to the "accusatorial" nature of the proceedings under the adversary system. I should therefore like to emphasize right away that section 244(2), C.C.P., does not by any means exclude, restrict or replace the right and the obligation of the parties to introduce relevant evidence or to ask any question pertinent to the case of any witness or expert witness.[11] Indeed a motion to receive evidence filed by either of the parties—provided only that the evidence is logically relevant—must normally be granted, and it is only in a few carefully listed cases that the judge can refuse to receive evidence thus moved for. Moreover, he can never refuse to receive relevant evidence that was adduced by the party itself.[12]

The main function of section 244(2), C.C.P., is now to make sure that where the parties failed to indicate—in the charge sheet, in formal motions to receive evidence, or in informal suggestions to the court—or to themselves adduce, under section 245, C.C.P., all pertinent evidence, the trial judge has to step in and to assume the role of defense or state counsel, respectively. He does this not as a partisan of either party but as a partisan only of the truth—adducing, on his own motion, all accessible evidence that may have a tendency to clarify the case in either way. As a matter of fact, section 244(2), C.C.P., makes the everyday *duty* of the German trial judge what, according to Wigmore, has always been considered as "the inherent and essential power" of the com-

10. Frank, Courts on Trial 80 (Atheneum ed. 1963); *cf.* Joint Conference on Professional Responsibility, Association of American Law Schools and the American Bar Association, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159-64 (1958).

11. See C.C.P. §§ 240, 241; 13 Entscheidungen des Bundesgerichtshofs in Strafsachen [reports of the Bundesgerichtshof in criminal cases, hereinafter cited BGHSt] 252 (1959).

12. *Cf.* C.C.P. §§ 244(3), 244(4), 245; and *infra* p. 159.

mon law judge. This power (though sparsely used) was enjoyed until, in the United States, the judges were "reduced to the position of mere umpires" that "sealed their own abdication" by acquiescing to a very passive role.[13]

It is obvious and logically cogent that the result of the evaluation of the evidence depends on the admitted evidence as its object. But it is no less true in both systems that the object, conversely, takes its shape from the principles that govern its evaluation, particularly from the mental structure of the evaluator—or from what that mental structure is believed to be. This influence that the principles of the evaluation of the object exercise on the object of the evaluation itself is perhaps not logically cogent—unless one believes in the neo-Kantian doctrine that method determines the subject matter—but it is this influence that has generated the bulk of the rules of evidence germane to either system, respectively, as I shall point out forthwith.

Under the combined jury and adversary system, with its separation of powers between judge and jury and the presentation of the evidence by the litigant parties only, the inherent distinction between the two functions of determining the scope of the reception of the evidence and of weighing the admitted evidence becomes enacted on the stage, so to speak, when the jury retires to deliberate the case in the deliberation room. The jury so far has been a passive observer of the scene and has had no say in the determination of the object now submitted to their evaluation. Under the old inquisitorial system on the Continent a comparable distribution of functions did not exist at all, since the investigating judge and the trial judge were identical, and the rules that regulated the admission of evidence and those regulating its weight were closely interwoven. Under the modern accusatorial system, introduced after the 1848 revolutions in the German states, the trial judge's function has become entirely separated from the investigatory and the accusatory functions, and the trial judge has become entirely emancipated from the old proof rules. Yet the personal union between the conductor of the trial and the free evaluator of the evidence has created serious misunderstandings and confusions between the principles governing the two phases of the proof process, as we shall see later.[14]

III. Changing Notions of the Juror's Mind—Changing Evidence Rules

A. *Traditional Exclusionary Rules*

Pure reasoning leads to the conclusion that the results of the proof-taking process must be best—in the sense of congruence with truth—if its two phases are at their best. And the two phases are at their best if the most accurate, reliable and comprehensive mass of evidentiary data, in short, all logically relevant data obtainable on the controversial facts, are appraised and weighed by the most critical, conscientious, considerate, well-trained, and painstaking

13. 1 Wigmore, Evidence [hereinafter cited Wigmore] § 8c, at 285 (3d ed. 1940); 9 Wigmore § 2484.

14. *Infra*, p. 155.

mind. Now it is widely conceded that the evidence admitted under the traditional Anglo-American evidence rules does not meet the first requirement. Instead, "the generally accepted rules of evidence [exclude] . . . much evidence of real and substantial probative value . . . on considerations irrelevant to its probative weight but relevant to possible misunderstanding or misuse by the jury,"[15] and "they limit, absurdly, the courtroom quest for the truth. The result, often, is a gravely false picture of the actual fact."[16] In less iconoclastic language one of the most distinguished American evidence scholars expresses the same idea: Maguire[17] warns us of the

> false assumption—namely, that in a trial all evidence which is relevant, which has a logical tendency to establish one way or another the contested issues of fact, is going to be admitted for consideration of the trier of fact. Instead, the real truth is that courts and legislatures, most particularly in these United States, have over the years made up many rules for excluding from trials a great deal of relevant evidence. Operating these rules has kept judges and lawyers and law professors so fully occupied that they have not yet satisfactorily explored the important questions of evidential cogency. They have been too busy deciding what should be kept out to make, much less teach, systematic appraisal of what they let in. So . . . evidence has to do with exclusion rather than evaluation.

Dean Wigmore passed this verdict on the traditional exclusionary rules: "They serve, not as needful tools for helping the truth at trials, but as game-rules, afterwards, for setting aside the verdict."[18] And the draftsmen of the American Law Institute's Model Code of Evidence found them "so defective that instead of being the means of developing truth, they operate to suppress it."[19]

The exclusionary rules that are mainly responsible for this result, since they are by far the most numerous and far-reaching, are those of "auxiliary probative value,"[20] to use Wigmore's classification, namely, the hearsay rule, the opinion rule, the best evidence rule, and the character rule. It is these rules that distinguish Anglo-American evidence law from its Continental counterpart, not the "rules of extrinsic policy,"[21] comprising, *e.g.*, the various privilege rules, and the rules excluding illegally obtained evidence, irrespective of its probative value. The differences with respect to the latter group of rules are of no basic but rather of an accidental nature (*e.g.*, under German evidence law, not only the spouse of the accused, but also the fiancée and certain relations of the third degree are entitled to refuse testimony).[22]

15. Mr. Justice Rutledge in Brinegar v. United States, 338 U.S. 160, 173 (1949).
16. Frank, *op. cit. supra* note 10, at 123.
17. Evidence—Common Sense and Common Law 10 (1947).
18. 1 Wigmore § 8c.
19. ALI, Model Code of Evidence, *Introduction* at viii (1942).
20. 4 Wigmore § 1171 *passim.*
21. 8 Wigmore § 2175 *passim.* On the role of these rules in German evidence law, *see infra*, p. 149.
22. C.C.P. § 52; *cf.* Code of Civil Procedure § 383.

Of course, the exclusionary rules of probative policy are deeply rooted in the jury system. "These rules are aimed at guarding the jury from the overweening effect of certain kinds of evidence. The whole fabric is kept together by that purpose. The rules are supposed to enshrine that purpose."[23] Similarly, Lord Coleridge, in *Wright v. Tatham*,[24] called it a "fallacy" to believe "that whatever is morally convincing and whatever reasonable beings would form their judgments and act upon, may be submitted to a jury."

The frailty of jurors' minds is also responsible for the exclusion of inflammatory, gruesome or, eventually, too appealing evidence.[25] Likewise, the authentication rules are put down to a jury's tendency to jump to the conclusion that because a writing offered by a party purports to be of a certain authorship does indeed prove the authorship.[26] The application of the authentication rule resulted in the direction of a verdict for the defendant in a recent case[27] where the plaintiff brought action against a canned food manufacturer for damages alleging that the defendant had negligently prepared, manufactured, packed and distributed a can of peas which contained a sharp piece of metal concealed in the peas, and that the plaintiff while eating them swallowed the piece of metal, which lodged in her throat. The label encircling the can that was alleged to have contained the peas was excluded because, naturally, the plaintiff had no possibility to authenticate it.

Can a jury really not be trusted to take into consideration the possibility that the label was falsified and to reject this possibility if, as it happened in the case, the defendant does not offer the slightest evidence to that effect?

Thus, it is the structure of the jury's mind—an element belonging to the evaluation phase—that gives rise to hard and fast rules for the reproduction phase. Through the application of these rules the case may then be disposed of altogether without its ever reaching the mind that is supposed to find the facts.

The structure of the jury's mind—what do we know about that phenomenon? Has anyone ever X-rayed it? Do judges communicate with jurors so that they get an idea of what goes on in their minds? Do jurors ever tell? Indeed, can they? If we knew what test jurors number one to two thousand thought or felt about a particular group of evidentiary items,[28] would that be a reliable basis to conclude that these twelve men and women in the jury box would even now and then think or feel the same way? What then did judges rely upon

23. 1 Wigmore § 8a, at 250.

24. 5 Clark & F. 670, 690, 7 Eng. Rep. 559, 566 (H.L. 1838).

25. In Radosh v. Shipstad, 17 A.D.2d 660, 230 N.Y.S.2d 295 (2d Dep't 1962), a breach of contract case where the defendant claimed that plaintiff, a professional skater, had weighed too much to perform, the court felt that the jury was distracted from the issue of her prior weight by having her appear in court in her skating costume.

26. 7 Wigmore § 2130.

27. Keegan v. Green Giant Co., 150 Me. 283, 110 A.2d 599 (1954).

28. *Cf.* Kalven, Report on the Jury Project, Conference on Aims and Methods of Legal Research (ed. Conard 1955). Jeremy Bentham deplored the lack of any such experience on the part of the judges and warned against their "rash suspicion" that "if the jury were suffered to hear [certain evidence], they would be sure to be deceived by it." 3 Bentham, Rationale of Judicial Evidence 553 (J. S. Mill ed. 1827).

when they created exclusionary rules shaped to the minds of jurors? Was it throughout what Erskine, arguing against the admission of an unauthenticated document purported it to be, namely, "great wisdom, in that which . . . forms the glory of the English law in all its parts, in an acquaintance with the human character, in the recognition of all that belongs to the principles of the human mind, in the recollection of our wise ancestors that men are not angels, that they carry about them . . . all the infirmities of humanity. . ."?[29] Or is it sometimes rather an educated guess or rather the guess of educated men whereby the jury's mind becomes what educated and sophisticated men believe a juror's mind to be?

According to the judges' wisdom or their guesses, then, the jury's mind must combine some conflicting features that seem somewhat difficult to reconcile with each other. Sometimes, the exclusionary rules of probative policy seem to presuppose a jury composed of what Professor Morgan called "a group of low-grade morons."[30] On the other hand, the jury is supposed to be capable of and indeed is carefully instructed to perform intellectual differentiations and a mind-splitting that would do honor to the most sophisticated self-analyst.

According to the judges' notion of the jury's mind, jurors are capable to disregard any incompetent evidence that slipped in inadvertently or that was admitted conditionally and not "connected up" properly,[31] or to disregard outside[32] information prejudicial to the defendant that, since prejudicial, would be inadmissible in evidence.[33] And "where an attorney in argument travels outside the record to import matters calculated to inflame the passions and prejudices of a jury, his opponent should request and the court should give an instruction directing the jury to disregard such appeals."[34] Are passions and prejudices, once aroused, switched off so easily?

According to the judges' notion, the jury has the mental capacity, where evidence of prior convictions or of bad reputation for truth and veracity is introduced to impeach the credibility of the defendant who took the stand, to let the bad character evidenced by those prior convictions or bad reputation influence only their estimate of the credibility of his testimony. But at the same time the jury is *not* to be influenced by this impeaching evidence in its consideration of whether or not the defendant committed the offense in issue. Jurors, in short, are supposed to be able to use such evidence "for impeaching purposes only," but not "substantively." But what is supposed to go on in the mind of a juror who, as a result of the impeachment use, comes to the conclusion that

29. Horne Took's Trial, 25 How. St. Tr. 1, 78 (Eng. 1794).
30. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 105 (1956).
31. 1 Wigmore § 14; see also White v. United States, 279 F.2d 740 (4th Cir.), *cert. denied*, 364 U.S. 850 (1960).
32. *E.g.*, newspaper or other news media.
33. *Cf.* Marshal v. United States, 360 U.S. 310 (1959); United States v. Accardo, 298 F.2d 133 (7th Cir. 1962) (newspaper information).
34. Busch, Law and Tactics in Jury Trials § 564 (1949) (collecting cases).

the defendant is untrustworthy, and who then has to weigh the contention of the untrustworthy defendant that he is innocent? If he follows the judge's instructions conscientiously he must at that stage forget that the defendant has been shown to be untrustworthy. For to remember it would mean to realize that this man is untrustworthy when he claims to be innocent, and to realize this would be making "substantive use" of the proven untrustworthiness, which would be illegitimate.[35]

In the lawyer's eyes the jury will be equally capable to distinguish between impeachment use and substantive use of prior inconsistent statements of a witness or a party.[36] This task is assumed to be possible even if these prior inconsistent statements were contained in a coerced—but possibly true—confession not substantively usable as such due to the coercion involved.[37] Again, the juror, after having heard W's testimony as to fact A and X's testimony that W had previously stated non-A may use this testimony to doubt or even disbelieve W's present testimony as to A, but he must not use it to believe that non-A is true. But if only A or non-A can be true, what other than substantive use can the jury make of this statement containing non-A if they—legitimately—disbelieve A? If A is not true, then non-A must be true.

The same difficulty of discrimination can be found in *United States v. Klass*,[38] a prosecution for selling a house at more than the authorized maximum price. The defendants denied having received excess payments on *other* house sales; three other witnesses contradicted these denials. If, on the basis of this testimony, one disbelieves the defendants as to the prior sales, and therefrom deduces that, since they once lied on the same issue, their present testimony is also to be disbelieved, the only alternative is that they did overcharge in the case at bar. In other words: the impeaching effect supplied by proof of a previous lie has been used directly for the substantive proof of the present charge.

Do jurors' minds operate in a way that permits the distinction required by the judge's instructions to make no substantive use of the prior inconsistent statements or the statements of the impeaching witnesses?

According to the law's image of the jury's mind, the jury can further be credited with what Morgan calls "a super-human ability"[39] in joint trials where the confession of one of several defendants is introduced and where the

35. *E.g.*, in State v. Ternan, 32 Wash. 2d 584, 203 P.2d 342 (1949), the Supreme Court of Washington stated that the trial judge "excluded from the minds of jurors the idea that they might consider such evidence [of a bad reputation for truth and veracity] in determining whether the appellants were guilty of any offense." *Id.* at 591, 203 P.2d at 346. Dean Griswold, 51 A.B.A.J. 1021 (1965) calls it a "self-deception" to make these distinctions. *Cf.* 1 Wigmore § 194; McCormick, Evidence [hereinafter cited McCormick] 94 (1954).

36. For an intricate situation of this kind, see United States v. Reinecke, 354 F.2d 418 (2d Cir. 1965).

37. State v. Turnbow, 67 N.M. 241, 248-55, 354 P.2d 533, 538-43 (1960).

38. 166 F.2d 373 (3d Cir. 1948).

39. Morgan, *op. cit. supra* note 30, at 105.

jurors are supposed to be able to think of the confession against one defendant only but to dismiss it from their minds when considering the guilt or innocence of the other defendants. Some recent cases that we shall discuss shortly[40] seem to acknowledge that Judge Frank was right when he called the taking for granted of this ability "unmitigated fiction,"[41] a statement to which Justice Frankfurter expressly subscribed.[42]

B. *Reliability of the Factual Representation*

Since the result of the first phase of the proof-taking process (that is, the evidence that goes to the jury for their evaluation) is the product of admissibility rules that are based on such diverging and conflicting notions of the jury's mind, we may well have to face the possibility that the replica of the facts thus presented is indeed often "gravely false." The replica produced in court is the reflection of the notions that created the rules governing its production, and thus its ratio to the true facts must be similar to the ratio of those notions to the true structure of the fact-finder's mind. That is, it must of necessity be a picture of which we cannot say whether it is true, any more than we can say whether the image of the jury's mind that we apply is true. And this all the more so, the more general and unmitigated by exceptions and individualizations the rules are, because the diversity and the possible falsity of the basic notions are then reflected to their fullest extent, without any corrections by taking into consideration the individual features of the case. If we imagine for one moment that there were no exceptions to the hearsay rule at all because the frailty of jurors was believed to be too great altogether to allow for any—what would the fact replica that could go to the jury for their evaluation look like? Of course, there are numerous exceptions to the hearsay rule as to other exclusionary rules, but the net result seems to be that the evidentiary material admitted for the consideration of the trier of fact still falls short, to a substantial extent, of the ideal that Thayer proclaimed more than half a century ago and that Morgan and Maguire, looking backward and forward at evidence, made their own: that "(1) nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) everything which is thus probative should come in, unless a clear ground of policy or law excludes it."[43]

Now let us place ourselves in the role of a law enforcement officer or prosecutor who realizes that the evidence he has gotten so far or that he thinks he can possibly get will be partly inadmissible according to those rules, or that, at best, to establish his case by "evidence independently secured through skillful

40. See *infra*, pp. 133-38.

41. United States v. Delli Paoli, 229 F.2d 319, 323 (2d Cir.) (dissenting opinion), *aff'd*, 352 U.S. 232 (1957).

42. Delli Paoli v. United States, 352 U.S. 232, 248 (1957) (dissenting opinion).

43. Morgan and Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909, 922-923 (1937).

investigation"[44] will be extremely difficult. Will not his natural reaction be to look for a confession or for hearsay evidence of an out-of-court confession? With these—provided that the confession is proper, of course—he will not only get over the admissibility hurdle but he is also most likely to get a conviction since nothing is more persuasive than a confession. Experienced prosecutors speak of the sigh of relief in the jury box when in a critical case evidence of a confession is put forth.

The theory is therefore submitted, with deference, that the function of the exclusionary rules to exclude substantial portions of relevant (and also constitutional) evidence on grounds of jury protection must have greatly contributed to the emphasis on confessions (and admissions as well) that still characterizes American evidence law in theory and practice. As to confessions, a recent note,[45] covering almost two hundred pages, though omitting the concededly "major field" of confessions used at joint trials,[46] is a documentation of the great concern of American jurisprudence with this problem. And Dean Griswold in his article dealing with "The Long View" on American criminal procedure,[47] seems to be less confident than his students that the practical problems involved here have been largely solved.

The second contributory factor in this direction, it is further submitted, must be the requirement of unanimity of the jury verdict, a requirement that has not been mitigated in criminal cases. Unanimity of a jury of twelve laymen is certainly easier to reach on the basis of a confession than on the basis of an array of indicia in circumstantial evidence, since the former has the seductive "persuasiveness of apparent conclusiveness."[48]

If these theses are accepted, it follows again that it is the structure of the juror's mind that determines the scope of the presentation phase and the shape of the replica of the relevant facts of the case.

In the German criminal procedure of the twentieth century—with the exception of the Nazi period, when extortion of confessions by most brutal methods was rampant chiefly in political cases—and particularly in these last twenty years, there is no counterpart, neither on the factual nor on the legal level, to the expansive discussion of confession problems in this country. According to the theories developed here, the fact that this goes along with the virtual absence of the jury system and of strict exclusionary rules of probative policy as well as with the absence of a unanimity requirement would be not merely accidental, but indicative of the viability of the theory that confessions serve to build up parts of the fact replica that otherwise would not come in at all as a result of the exclusionary rules.

44. Watts v. Indiana, 388 U.S. 49, 54 (1949). Independently, as used here, means without use of the suspect's own statements.

45. *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935-1119 (1966).

46. *Id.* at 939 n.10; see also *infra*, p. 133.

47. 51 A.B.A.J. 1018 (1965). This view obviously underlies Miranda v. Arizona, 384 U.S. 486 (1966).

48. Stein v. New York, 346 U.S. 156, 192 (1953).

But are these parts reliable representations of the represented facts? As to confessions in criminal cases, the tests for trustworthiness that were developed in the common law (voluntariness, corroboration, corpus delicti requirement) are as many guarantees of this reliability. As to admissions in non-criminal cases, the answer seems to be less reassuring. Seeing that the admissions doctrine undercuts not only the hearsay rule but also the best evidence rule, the opinion rule, the firsthand knowledge rule and incompetency rules—so many guarantees of evidential trustworthiness—and seeing that admissions by "privies in estate" or adoptive admissions are widely admitted, and all this with hardly another justification than a somewhat defiant "adversary theory argument"[49] and "largely without regard to reliability of evidence,"[50] one cannot but feel that admissions serve to a large extent as a substitute rather than as a tool for finding the truth.

Again, in German civil procedure, there is no counterpart to the elaborate body of rules dealing with evidential admissions and certainly no counterpart to the enormous number of pertinent cases.[51]

C. *The Changing Scope of the Proof-Taking Process*

Evidence rules change as the judicial image of the jury's mind changes. In other words, a changed notion of the jury's mind entails—through changed evidentiary rules—a change in the scope of the proof-taking process and thereby a change in the kind of replica of the real facts. This will finally result in a change in the outcome of the trial of cases. In short, the outcome of cases is largely determined by the notions—based largely on guesses, fictions, and assumptions—that judges have of the lay fact-finder's mind. This I want to demonstrate by some instances:

In *Stein v. New York*[52] and *Jackson v. Denno*[53] the Supreme Court gave diametrically opposite answers to the same question, namely, whether the jury is able to separate the issues of the voluntariness and the truthfulness of a confession. The *Stein* case upheld the giving of both issues to the trial jury under limiting instructions, and the *Jackson* case expressly overruled this aspect of *Stein*. The conflicting answers rested entirely on conflicting notions of the jury's mental capacities. In both cases the jury was at once given the (hearsay) evidence of a confession, the evidence going to the voluntariness of this con-

49. Stated by Maguire, Evidence, Common Sense and Common Law 143 (1947) in these words: "Your own words or other actions have turned out helpful to your adversary; because you are their author, evidence of them is admissible against you; explain away the damaging effect if you can."

50. *Id.* at 142; *cf.* McCormick § 239, at 502: "No objective guaranty of trustworthiness is furnished by the admissions-rule."

51. Judicial admissions are dealt with in §§ 288-90 of the Zivilprozessordnung. The leading commentary by Baumbach refers to evidential admissions only in one phrase, grouping them among normal indicia; *Introduction* to § 288 (28th ed. by Lauterbach 1965).

52. 346 U.S. 156 (1953).

53. 378 U.S. 368 (1964). See Paulsen, *The Winds of Change: Criminal Procedure in New York 1941-1965*, 15 Buffalo L. Rev. 297, 306-07 (1965).

fession, and of all the corroborating evidence tending to show that the confession was true and that the defendant had committed the crime. This procedure is known as the "New York Rule." In both cases there was sufficient independent evidence—apart from the confessions—on which the defendant could reasonably be found guilty.[54] In both cases the jury was told that if it found the confession involuntary, it was to disregard it entirely, and to determine guilt or innocence solely from the other evidence in the case; alternatively, if it found the confession voluntary, it was to determine its truth or reliability and afford it weight accordingly.

In both cases a general verdict of guilty was returned by the jury, and thus in both cases it was impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it. The convicted defendants, "being cloaked by the general verdict, . . . [did] not know what result they really [were] attacking. . . ."[55] In both cases the jury "[might] have agreed that the confessions were coerced, or at least that the state had not met the burden of proving beyond a reasonable doubt that they were voluntary,"[56] and yet they might have reached the verdict of guilty entirely on the independent evidence.

The Court in *Stein*, though aware of "the difficult problems raised by such jury trial" that "relies heavily on the jury"[57] in effect did itself rely on the jury. The Court relied on the jury's capacity to separate the issues of voluntariness and truthfulness, and to keep their appraisal of the other evidence uninfluenced by the fact that there was a confession, and their appraisal of the voluntariness of the confession uninfluenced by the fact that there was "ample other evidence,"[58] which might have had a tendency to assuage lingering doubts as to the voluntariness. Thus the Court assumed that one of the "hypothetical alternatives," namely, that the jury either admitted and relied on the confession, or rejected it and convicted on the other evidence, must have been chosen by the jury. This the Court assumed in the face of the consideration that, perhaps,

> the confessions . . . serve[d] as make-weights in a compromise verdict, some jurors accepting the confessions to overcome lingering doubts of guilt, others rejecting them but finding their doubts satisfied by other evidence, and yet others or perhaps all never reaching a separate and definite conclusion as to the confessions but returning an unanalytical and impressionistic verdict based on all they had heard.[59]

This consideration though is pushed aside by the statement that such a danger "is inherent in jury trial of any two or more issues, and departure from instruction is a risk inseparable from jury secrecy and independence."[60]

54. 346 U.S. at 192; 378 U.S. at 393-95.
55. 346 U.S. at 177; 378 U.S. at 380.
56. 346 U.S. at 177.
57. *Id.* at 172, 179.
58. *Id.* at 177.
59. *Id.* at 177-78.
60. *Id.* at 178-79.

In *Jackson v. Denno* the Court called the basic assumption of the Court in *Stein* "unsound,"[61] citing Professor Morgan who, in turn, named the *Stein* Court's belief that the jury could have split their minds sufficiently so as to follow the trial judge's instruction "pious fictions." Professor Morgan said of those instructions: "the rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which, as every judge and lawyer knows, cannot be obeyed."[62] Instead, the *Jackson* Court pointed out "the dangers to an accused's rights under either of the alternative assumptions"[63] of the *Stein* decision:

> The jury, however, may find it difficult to understand the policy forbidding reliance upon a coerced, but true, confession, a policy which has divided this Court in the past, see *Stein v. New York, supra,* and an issue which may be reargued in the jury room. That a trustworthy confession must also be voluntary if it is to be used at all, generates natural and potent pressure to find it voluntary.[64]

Indeed, "the danger that matters pertaining to the defendant's guilt will infect the jury's findings of fact bearing upon voluntariness, as well as its conclusion upon that issue itself,"[65] is so serious, that "under the New York procedure, the evidence given the jury inevitably injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness."[66] This must invariably lead to an "admixture of reliability and voluntariness in the considerations of the jury."[67]

On the other hand, the other alternative hypothesized in *Stein*—that the jury found the confession involuntary and disregarded it—is equally rejected:

> If it finds the confession involuntary, does the jury—indeed, can it—then disregard the confession in accordance with its instructions? If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?[68]

It is clear that the Court's answer to all these rhetorical questions is "No."

The jury, then, in the *Jackson* Court's opinion is not capable of the mind-splitting that the *Stein* Court postulated to be possible, and, according to the *Jackson* Court, to rely on that capacity was to deprive the defendant of his constitutional right "to have a fair hearing and a reliable determination on the issue of voluntariness. . . ."[69] To Mr. Justice Black, dissenting, to permit "this

61. 378 U.S. at 381, 387.
62. Morgan, *op. cit. supra* note 30, at 104-05.
63. 378 U.S. at 381.
64. *Id.* at 382 (italics added.).
65. *Id.* at 383.
66. *Id.* at 386.
67. *Id.* at 387.
68. *Id.* at 388.
69. *Id.* at 377.

down-grading of trial by jury" is "to challenge the soundness of the Founders' great faith in jury trials."[70] Whether that is so, I dare not say. But anyhow, the notion of the jury that underlies *Jackson* is somewhat more skeptical—and should we not say, more realistic?—than that of the *Stein* Court and, if Mr. Justice Black is right, of the Founders. For our purposes it suffices to state that this new attitude of the Court created a new evidence rule, namely the requirement of separate resolutions of the voluntariness and the truthfulness issues by separate fact-finders, and the exclusion of the evidence pertaining to the voluntariness from the convicting jury. This new evidence rule may of course result in a different outcome of the trial of a case if we only accept the theory least sceptical of the jury's capacities, namely, that the question of reliance on a coerced but true confession could be reargued in the jury room.

In *Delli Paoli v. United States*[71] and *People v. Aranda*[72] the written confession of one of several co-defendants was admitted in evidence at a joint trial under the confessions exception from the hearsay rule. In both cases, another co-defendant who had not confessed was alleged in the confession to have been involved in the crime as a conspirator, and his name was not deleted from the confession when it was read to the jury. In both cases, the confession was admissible only against the confessor and inadmissible against the co-defendant. Accordingly, the trial judge instructed the jury to consider it only against the confessor but to exclude it from their determination of the guilt or innocence of the non-confessing co-defendant. In both cases the issue was whether these instructions to the jury provided the non-confessor with sufficient protection, that is, "whether it was reasonably possible for the jury to follow them."[73] The Supreme Court in *Delli Paoli*[74] answered the question in the affirmative, stating "that possible prejudice against other defendants may be overcome by clear instructions limiting the jury's consideration of a post-conspiracy declaration solely to the determination of the guilt of the declarant," and that it *was* reasonably possible for the jury to make the required distinctions:

> It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense.[75]

The majority not only trusted that the jury endeavored to follow the Court's instructions, but also that they managed to do so.

In his dissent, Mr. Justice Frankfurter disputed this very faculty:

70. *Id.* at 405.
71. 352 U.S. 232 (1957).
72. 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965).
73. 352 U.S. at 239.
74. *Ibid.*
75. *Id.* at 242.

> The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. . . . The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.[76]

Judge Frank with whose dissent, below, Justice Frankfurter expressly agreed, had stated his belief that "the cautionary admonition had no effect on the jury" and that "the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."[77]

In *People v. Aranda* this view was shared by the California Supreme Court. The California court maintained that "a jury cannot segregate evidence into separate intellectual boxes," that to expect this from the jury was charging them with an "overwhelming task," and that the result of leaving this psychologically impossible mind-splitting to the jury was inevitably "prejudicial and unfair to the nondeclarant defendant" and must be avoided by either a severance of trials or complete deletion of the co-defendant's name from the confession.[78] The California court's arguments are largely drawn from *Jackson v. Denno:*

> Although *Jackson* was directly concerned with obviating any risk that a jury might rely on an unconstitutionally obtained confession in determining the defendant's guilt, its logic extends to obviating the risks that the jury may rely on any inadmissible statements. If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a co-defendant's confession implicating another defendant when it is determining that defendant's guilt or innocence.[79]

Again, it is the judge's image of the jury's mind that determines the evidence rules and thereby the mode and scope of the hearing of evidence, and the outcome of a case may well depend on the judge's estimate of the functioning of the jury's mind. But the trend is clearly away from the dogmatic and mechanical notions and toward a more realistic and psychologically more viable notion.

A very similar trend can be discerned in recent cases that are concerned with the question of substantive or mere impeachment use of prior inconsistent statements. Whereas Dean Wigmore, in the third edition of his treatise on evidence still stated the "orthodox view"—which he attacked vehemently—

76. *Id.* at 247, 248.
77. United States v. Delli Paoli, 229 F.2d 319, 323 (2d Cir. 1957).
78. 63 Cal. 2d 518, at —, 407 P.2d 265, at 271, 272, 47 Cal. Rptr. 353, at 359, 360.
79. *Id.* at —, 407 P.2d at 271, 47 Cal. Rptr. at 359.

"that prior self-contradictions are not to be treated as having any substantive or independent testimonial value,"[80] but could be used for impeachment purposes only, as "universally maintained by the courts," the situation today is greatly different. Not only do both the Model Evidence Code of the American Law Institute[81] and the Uniform Rules of Evidence[82] provide for the use of prior inconsistent statements as substantive evidence, but the courts, too, have begun on a wide front to reject the notion of the juror who can "segregate evidence into separate intellectual boxes" and to replace it by a more realistic view.

In 1962, the U.S. Court of Appeals for the First Circuit said in *Asaro v. Parisi,* "One can hardly expect jurors, however conscientious, to perform the mental gymnastic of distinguishing between using a witness's prior statement for testimonial purposes and using it only to contradict. The orthodox rule is not realistic."[83] In 1964, the U.S. Court of Appeals for the Second Circuit described that expectation as a "pious fraud," "artificial," "basically misguided," "a mere verbal ritual," and "an anachronism that still impedes our pursuit of the truth." That court expressed its view of a juror's capacity to put on schizophrenia in this language:

> To tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable. Beyond this, the orthodox view defies the dictate of common sense that the fresher the memory, the fuller and more accurate it is.[84]

Whether this liberal view that may result in the conviction of a defendant on an unsworn, out-of-court statement of a witness runs counter to the confrontation clause of the sixth amendment,[85] since the witness, though now available for cross-examination, was not so when he made the prior statement, is a question that cannot be decided here. Suffice it to state here that the court opinions cited above hinged only on a particular and, it seems, psychologically realistic and convincing notion of a lay fact-finder's mind.

D. *Inferences From "State of Mind" Testimony*

If the judges' notions as to how a jury will react to certain evidentiary data are largely based on guesses and surmises, there is one thing that we can be fairly certain of: jurors are human beings and therefore in all probability capable of logical reasoning. *Sunt, ergo cogitant.* Therefore, a jury could follow this chain of inferences (all possible but not compelling) in deciding whether D, now unavailable, was in Crooked City on a certain day: W testified on the

80. 4 Wigmore § 1018(b).
81. Rule 503 (1942).
82. Rule 63(1) (1953).
83. 297 F.2d 859, 864, (1st Cir.), *cert. denied,* 370 U.S. 904 (1962).
84. United States v. DeSisto, 329 F.2d 929 (2d Cir.), *cert. denied,* 377 U.S. 979 (1964).
85. See Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials,* 113 U. Pa. L. Rev. 741 (1965).

stand that D told him he planned to go to Crooked City on the day in issue. From this testimony, it can be inferred that D did have that plan in mind. From this state of D's mind, it can be inferred that he did go there, since plans have a tendency to be carried out and that there is no reason why D should not have carried out his plan. Therefore, D was there on the day in issue.

Under the landmark decision in *Mutual Life Insurance Co. v. Hillmon*,[86] this use of D's declaration is not a hearsay use, since from the point where the fact-finder takes D's state of mind (plan) for granted (D may have been lying about his intention), he proceeds on an entirely inferential path. In other words, the gap between D's state of mind (as testified to by W) and the fact to be proved (that D was in Crooked City) is bridged by the juror's reliance on his own reasoning, not by his reliance on the testimonial qualities of D. He would have to rely on those testimonial qualities if, instead, W had testified that D had told him that he had gone to Crooked City on a previous day, *i.e.*, a day prior to the narration of the trip. Therefore, in the latter case, the testimony of D would be inadmissible hearsay.[87]

What do we mean by saying that in the latter case the fact-finder would have to rely on D's testimonial capacity? In order to reach the result that D went, the fact-finder would have to proceed from D's state of mind (this being taken as established) along these lines: D believed he went. He believed so because he went and because he remembered that he went.

The fact-finder, then, in the first case is trusted to be able to perform, inferentially, the gap-bridging from the state of mind of the declarant to the fact related to that state of mind, by interjecting into the reasoning process the result of the everyday common sense experience that plans, intentions, or motives have a tendency to be realized. He is also trusted to be sufficiently aware of the equally generally known fact that often enough people do *not* carry out their plans or intentions or do *not* act according to their motives. To be sufficiently aware, that is, to be able to weigh the cogency of the inference "A planned X, *ergo* A did X," and to eventually reject this inference. In short, the jury is trusted to be able to perform a rational operation of some intricacy and is yet given the responsibility to discharge this duty. Its capacity for reasoning and weighing arguments is indeed greatly relied upon when an out-of-court statement of a declarant's state of mind is to be used inferentially to cast light on the time *subsequent* to that state of mind.

But what if the declarant's state of mind is to cast light on an event *in the past* instead of an event in the future, if for instance, his memory of his own conduct or of an observation of facts is to be used to cast light on that conduct

86. 145 U.S. 285 (1892); see the discussion of this case in 1 Wigmore §§ 102-13 and McCormick § 270.

87. *Cf.* Uniform Rules of Evidence 63(12): [No hearsay involved in evidence of the out-of-court statement] "of the declarant's (a) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, . . . but not including memory or belief to prove the fact remembered or believed. . . ."

or other fact? *E.g.*, W testifies that D told him that he *went* to Crooked City.[88] The functional role of the experience that plans have a tendency to be carried out is here taken by the more neutral but no less common experience that memories or beliefs are sometimes true and sometimes false. And before the fact-finder can assess whether the fact in issue is true (did D go?), he must decide whether he thinks the memory of the declarant to be true, that is, congruent with the facts, just as, in the former case, he had to decide whether the plan was indeed carried out. The greater neutrality of memory in comparison with plan and intention is undeniable, but equally undeniable is the fact that every man or woman in his or her senses is aware of this. Will not this awareness lead him or her to attribute less weight or cogency to the out-of-court statement of memory or belief? Cannot this awareness be trusted to balance the closer relation between plan and fact as opposed to memory and fact? Analytically, the affirmative answer seems to be inevitable, as was pointed out, as early as 1912, by Seligman.[89] As a matter of fact, it is rejected by the courts. The Supreme Court, when faced with this question gave this answer:

> The ruling in [the *Hillmon*] case marks the high-water line beyond which courts have been unwilling to go. . . . Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.[90]

This is an argument that draws its force entirely from the axiomatic fact of the existence of the hearsay rule whose "odor of sanctity"[91] forestalls further questioning. Further questioning of the principle is forestalled, it is true, but not its gradual undermining. In one group of cases evidence of memory or belief to prove the fact remembered or believed, that is, evidence of a state of mind to cast light into the past, is increasingly received in the face of the *Shepard* doctrine: in wills cases,[92] evidence of the testator's declarations that he has or has not made a will, or a will of a particular purport, or has or has not revoked his will, is admitted. This is true even though it must be conceded that in no small number of instances a testator may tell lies about the contents of a will in order to deceive his fellow men. Volpone is an exception in dimension, but not so much in essence. The conscientious fact-finder who realizes this —and indeed a jury, in a case like that, is expected to realize it—must therefore certainly weigh the deceased's declaration very carefully before he proceeds to the assessment of the facts stated therein.

88. Let us remember that as far as our reliance on the declarant's truthfulness in expressing his state of mind is concerned, we are now in the same situation as in the first group of cases; there we assumed that D truthfully stated his plan, here we assume that he truthfully stated his memory.

89. *An Exception to the Hearsay Rule*, 26 Harv. L. Rev. 146, at 156-57 (1912).

90. Shepard v. United States, 290 U.S. 96, at 105-06 (1933).

91. McCormick § 271, at 576.

92. *Id.* at 577 *passim* (Collection of cases).

What can we deduce from these observations?

The notions of the functioning of the juror's mind that stand behind the state of mind cases are entirely different from the general notions that created the hearsay rule. No corresponding deep-rooted difference can be detected in the chain of reasoning which the fact-finder must follow. Both notions stand so far unreconciled in contemporary jurisprudence. Uniform Rule 63(4)(c),[93] though providing for an enormously wide liberalization of the hearsay rule,[94] is not a reconciliation of these conflicting principles, since it is not based on the analytical observations outlined above, but on the mere pragmatic reasons of necessity and particular trustworthiness of the declarant's statement as estimated by the judge. It is only in the practical results that the application of Rule 63(4)(c) and the analytically determined view would coincide in large regions.

A distinction very similar to that between hearsay use [relying on the testimonial qualities of the declarant] and circumstantial use [based on the fact-finder's ability to draw inferences from the declarant's state of mind] is that made between the exclusion, in principle, of character evidence to prove the accused's propensity to commit an alleged crime as part of the prosecution's case-in-chief,[95] and the admission, for the same purpose, of evidence of other crimes of the accused where this evidence is relevant to show, circumstantially, the existence of a larger plan, a scheme, motive, malice, deliberation, or other like crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused.[96] If, in the famous "brides of the bath" case, evidence that the accused had previously drowned two other brides in the bath in the same manner as that he is now charged with is admitted and given to the jury for consideration, we rely on the jury's capacity to draw inferences of a rational character from the previous crimes. We rely as well on their capacity to resist the temptation to be overwhelmed, in the case at bar, by the fact that this accused is a "bad man," who ought to be punished for the earlier crimes anyhow.

E. *The Hearsay Rule in German Criminal Procedure*

It may be interesting at this point to take a short glance at the development of the hearsay problem in German procedural law. When the system of "legal proof"[97] was incorporated in the first code of criminal procedure for the German Reich,[98] the "hearsay witness" (that was obviously also the witness not speaking from first-hand knowledge) was rejected as being "not sufficient." His testimony, if received, was not to be considered. Since each evidentiary item was attributed a particular fraction of weight, this was rather easily accomplished

93. Uniform Rules of Evidence.
94. See the analysis in Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 Harv. L. Rev. 932 (1962).
95. 1 Wigmore §§ 57, 194.
96. 2 Wigmore §§ 300 *passim;* McCormick § 157.
97. See *infra*, p. 144.
98. *I.e., Constitutio Criminalis Carolina* (1532).

without creating an exclusionary rule.[99] In the subsequent codes of the German states up to the early nineteenth century, we find basically the same provisions.[100] All these codes were based on the principle of "legal proof," and throughout, the hearsay element could be easily eliminated at the evaluation stage when the weight fractions were put together. When, in the middle of the nineteenth century, the principle of "free evaluation of the evidence" (*freie Beweiswürdigung*) was introduced[101] the hearsay problem could not survive as an admissibility problem, because it had only been considered as an evaluation problem. Consequently, the solution of the difficulties involved in the hearsay problem was left entirely to the trier of fact in the particular case. He was trusted to be able to give to the hearsay evidence whatever weight it, in his opinion, deserved. This was in accordance with the great trust that the judge and the jury were given under the principle of free evaluation of the evidence.

Under the C.C.P. for the German Reich of February 1, 1877[102] hearsay is therefore admissible in principle.[103] Written hearsay, however, is excluded as far as depositions are concerned, unless the declarant is dead, out of the country, or otherwise unavailable.[104] Confessions made before a judge and put down to writing are also admissible[105] unless obtained through coercive methods or trickery.[106]

The theoretical justification for the broad admission of hearsay[107] corresponds exactly to the rationale given by the American courts and writers in the state of mind cases that we discussed. It is said that the out-of-court statements of a declarant that are reported by a witness on the stand are as many indicia for the existence of the facts stated. They are indicia, that is to say, which permit an inferential approach to the facts stated in the same way as any other indicium, with the only exception that their probative value is often smaller than that of other indicia. Altogether, a basic difference between inferential or circumstantial evidence on the one hand and testimonial evidence on the other hand is not recognized, since reliance on testimonial evidence, too, involves, in the final analysis, reliance on *inferences*.[108] These inferences are: that because the trier of fact heard W say fact X was true, W did say so; that W said so because he believed so; that he believed so because he had had certain sensory

99. See Schoetensack, Der Strafprozess der Carolina 73 (1904), and Art. 66, C.C.C.

100. *E.g.*, Austria, Gesetzbuch über Verbrechen und Schwere Polizey-Übertretungen § 403 (1803); Bavaria, Strafgesetzbuch II, art. 277 (1813); Prussia, Criminalordnung §§ 324, 386 (1805) and Allgemeine Gerichtsordnung §§ 239, 241 (1793).

101. See *infra*, p. 146.

102. Effective October 1, 1879.

103. See 1 Löwe-Rosenberg, Strafprozessordnung [hereinafter cited Löwe-Rosenberg] § 250, comm. 3, at 1016 (21st ed. 1963) (collecting cases and citing authorities); 1 Eb. Schmidt, Lehrkommentar zur Strafprozessordnung 253-60 (2d ed. 1964) (analytical discussion).

104. C.C.P. §§ 250-52.

105. C.C.P. § 254.

106. C.C.P. § 136a.

107. Schmidt, *op. cit. supra* note 103.

108. Engisch, Logische Studien zur Gesetzesanwendung 61-71 (2d ed. 1960).

impressions; and that he had these sensory impressions because a corresponding event took place in reality that created these impressions.

All this does not mean that the trial court may content itself with hearing hearsay evidence in every case. If the court does so, though better evidence is available, it violates its obligation to clarify the case[109] and the judgment will invariably be reversed on that ground.[110]

These last observations lead us to a broader consideration of the background before which evidence rules must be viewed under the modern system of German criminal procedure.

IV. Enforcing the Admission of Evidence by "Free Proof" and Evidence Rules

A. *The Historical Background*

In German procedure, after the reception of the Romanesque law, the fact-finding function became increasingly, and for a long time entirely, the task of the learned judge.

> In modern German criminal procedure there is, it is true, lay participation in virtually every trial court, except for magistrates courts dealing with petty offenses and for the highest court dealing with some treason and similar political cases. But the lay judges—either two or six, and always vested with the power to bring about an acquittal—are regarded by the law not as a jury in the Anglo-American sense but rather as a kind of temporary career judges. They deliberate together with the career judges and, after proper instruction by them, take full part, with a full vote, in the decision of legal as well as factual questions, and also in the sentencing. The jury system, introduced after the 1848 revolution, was abolished in 1924.[111]

The historical predecessors of the modern Continental judiciary were the law-trained official of the Pope, cardinal or bishop charged to exercise his master's judicial power, and, after the renaissance of Roman law at the Italian law schools had produced the "learned" secular lawyer, the crown official representing the monarch in court. It was only in the late eighteenth and early ninteenth centuries that the emancipation of the judge from the monarch as his employer and superior took place, and that the judiciary achieved independence in terms of appointment for life, irremovability from local office, independence above all from orders of the monarch. Finally, after World War II, judicial review was established in Germany over virtually every action of the executive and legislative branches of government.[112]

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109. C.C.P. § 244(2); see *infra*, p. 160.
110. See note 103, *supra*, and Sarstedt, 190-93 (4th ed. 1962).
111. See Mannheim, *Trial by Jury in Modern Continental Criminal Law*, 53 L.Q. Rev. 99, 388 (1937) (two parts).
112. Schmidt, *op. cit. supra* note 103, at 260-318; see also Einführung in die Geschichte der deutschen Strafrechtspflege 273-79, 339-42. For the role of the judiciary see Grundgesetz für die Bundesrepublik Deutschland, Art. 19, 92-100 (1949).

It is therefore in the notion of the judge that we must look for the key to the understanding of the German evidence law system.

The counterpart of the notion of the judge as a civil servant of the ruler (a high cleric or, later, a monarch) was the theory and system of "legal proof."[113] Rejecting the ancient Roman law doctrine that proof of a fact meant nothing unless the judge was thoroughly convinced of its existence, that is, rejecting the idea of a judge vested with an enormous power, the canonist lawyers had built up by the end of the fifteenth century an elaborate system of rules regulating in subtle detail both the taking and the weighing of evidence. This system was adopted by the secular courts all over Europe in the early decades of the sixteenth century and remained in force, with ever-increasing modifications and, later, liberalizations. In France the system lasted until the French Revolution, and in Germany, until the middle of the nineteenth century. The system of legal proof was politically and sociologically inspired by the desire to restrain the judge's power, which was to be achieved by making him an executor of prescribed rules rather than the decisive factor in a legal proceeding. Intellectually, it rested on two pillars:[114] several references in the Bible that *"in ore duorum vel trium testium stat omne verum,"* and on the canonist notion that in criminal matters a confession was the preferable proof, since it involved not only the greatest degree of certainty but also warranted the perpetrator's insight and penitence and was thereby the first step toward his improvement. Thus two witnesses or a judicial confession constituted "full proof." But the witnesses had to be *"testes classici,"* that is, fully trustworthy witnesses, and the confession had to be *creditworthy,* indeed it had to be corroborated. From these additional requirements which still left an immense amount of discretion to the fact-finder,[115] a host of rules ensued laying down in great detail when witnesses had to be regarded as *"classici," "minus habiles"* (not to be given full credit), or *"inhabiles"* (incompetent). The group of incompetent witnesses was, by and large, congruent with the group of witnesses that were incompetent under the common law up to the middle of the nineteenth century. In addition to parties, near relatives, all persons interested in the outcome of the case, etc., this group comprised also hearsay witnesses.[116] So, broadly speaking, the basic difference between the Anglo-American and the Continental systems of evidence by the time of, say, the coming of the French Revolution, was not the existence or nonexistence

113. For a historical survey see Planck, 4 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 248 *et seq.* (1862). For detailed accounts see Endemann, Die Beweislehre des Zivilprozesses (1860) and Mittermaier, Die Lehre vom Beweise im Deutschen Strafprozesse (1834). For the development of the doctrine in Canon Law see Gross, Die Beweistheorie im Canonischen Prozess (1867) and Das Beweisverfahren im Canonischen Prozess (1880). As to the situation in France, see Esmein, History of Continental Criminal Procedure 251-271 (1913).

114. Gross, *op. cit. supra* note 103, at 96, 292.

115. As expressed in, *e.g.*, the Prussian Criminalordnung of 1805 §§ 359, 393, 401, 402; *cf.* Von Savigny, *Die Prinzipien in Beziehung auf eine neue Strafprozessordnung* (1846), published in 6 Archiv für Preussisches Strafrecht [Goltdammer's Archiv] 481-91 (1858).

116. See *supra,* p. 141.

of admissibility rules but the existence or nonexistence of evaluation rules.[117] Or, if juries were given evaluation instructions by the judges, the difference remained that their ineffectiveness could not be discerned in the general verdict of the jury, whereas in the Continental system the arithmetic of the proof evaluation by the lower court had to be fully disclosed in that court's opinion and was open to the review by a higher court. For on the Continent, the evaluation of the evidence under the theory of "legal proof" had become, at least in theory, an almost entirely arithmetic procedure. The weight of a witness's testimony was assessed beforehand by abstract rules, according to his belonging to a particular group of persons, as constituting "half" or "quarter" proof.[118] As to circumstantial evidence,[119] indicia were classified and the necessary number of prospectant, concomitant, and retrospective indicia was set forth in great detail in the codes.[120] Indicia, though, could never constitute "full proof" by themselves.

It is obvious that all these efforts could never banish judicial discretion entirely from the evaluating process. The assessment of such qualities as the trustworthiness of a confession, or the "suspect" character of a witness as being interested in the outcome of the case, or, above all, the weight of indicia, could never be assessed beforehand and *in abstracto* without allowing the judge to exercise some amount of discretion. It has therefore often been observed[121] that the theory of legal proof existed in books rather than in reality, since it enabled the judge to apply seemingly all the technical details of the rules in his written opinion and yet allow his discretion to slip in through the back door, which the reviewing court could not possibly supervise.

To complete the theoretical picture it remains to be said that the gap between "half" or "more than half" proof (*semiplena, plus quam semiplena probatio*) and "full" proof was bridged, in criminal procedure, by a confession (obtained, if necessary, by torture),[122] and in civil procedure, by the oath of the party who had established at least "half proof."[123]

B. *"Intime Conviction" Replaces "Legal Proof"*

The abolition of the system of "legal proof" that had been much ridiculed by the writers of the enlightenment period (above all by Voltaire) started, first

117. Mittermaier, *op. cit. supra* note 113, at 110 *passim*.

118. One "classic" witness constituted "half proof," for "*si duo testes faciunt plenam probationem, ergo unus semiplenam*," as the *glossatores* reasoned convincingly (Gross, Beweisverfahren 293, 301 [*supra*, note 113]). A "suspected" witness constituted "less than half proof," others were "almost classic" (*Cf.* Hommel, Catalogus Testium Alphabeticus, ex Quo Cognoscitur, Qui Testes Plane Inhabiles, Qui Semitestes, Qui Plus Quam Semitestes et Qui Semitestibus Fide Minores Sint [1780]).

119. See Bauer, Die Theorie des Anzeigenbeweises (1843).

120. *E.g.*, Articles 308-30 of the Bavarian Code, cited *supra* note 100.

121. *E.g.*, by Von Savigny, *op. cit. supra* note 115.

122. Torture was abolished in France in 1788 and in Germany between 1740 (Prussia) and 1828 (Gotha); see Esmein, *op. cit. supra* note 113, at 393-94; Von Kries, Lehrbuch des deutschen Strafprozessrechts 45-46 (1892).

123. Wetzell, System des ordentlichen Civilprocesses 277 *passim* (3d ed. 1878); Rached, De l'intime conviction du juge 106-08 (1942).

in France, and sixty years later in Germany, in criminal procedure. It went along with, and indeed was supposed to be the necessary corollary of, the introduction of the jury system for criminal cases very much along Anglo-American lines. In France the "legal proof" system was abolished by the law passed by the Constituent Assembly on September 16, 1791; in Germany the abolition was accomplished by the "reformed" state codes of the years 1848-1851.[124] Instead of quantitative rules governing the weight of the evidence, the *"intime conviction,"* "moral certainty" or "full persuasion" of the jurors and—in non-jury cases—of the judges was to determine guilt or innocence, and later also, in civil cases, the existence or non-existence of a factual contention to support a claim.

> It must be emphasized here that in German civil procedure (section 286 German Civil Procedure Code) the same principle of full persuasion or persuasion beyond a reasonable doubt governs the evaluation of the evidence in civil cases as in criminal cases. A differentiation between "preponderance of the evidence" and "proof beyond a reasonable doubt" does not exist in principle. The only difference between civil and criminal procedure is that in civil procedure a number of presumptions alleviate the burden of persuasion, whereas in criminal procedure presumptions against the defendant do not exist.

Article 342 of the Napoleonic Code d'Instruction Criminelle of November 17/27, 1808, expressed the new principle of *intime conviction*—introduced already by the law of September 16, 1791—in the formulized charge to the jury:

> La loi ne demande pas compte aux jurés des moyens par lesquels ils se sont convaincus; elle ne leur prescrit point de règles desquelles ils doivent faire particulièrement dépendre la plénitude et la suffisance d'une preuve: elle leur prescrit de s'interroger eux mêmes dans le silence et le recueillement, et de chercher, dans la sincérité de leur conscience, quelle impression ont faite sur leur raison les preuves rapportées contre l'accusé, et les moyens de sa défense. La loi ne leur dit point: *Vous tiendrez pour vrai tout fait attesté par tel out tel nombre de témoins;* elle ne leur dit pas non plus: *Vous ne regarderez pas comme suffisamment établie, toute preuve qui ne sera pas formée de tel procès-verbal, de telles pièces, de tant de témoins out de tant d'indices;* elle ne leur fait que cette seule question, qui renferme toute la mesure de leurs devoirs: *Avez-vous une intime conviction?*[125]

The new principle was made applicable also to all proceedings before career judges alone, that is, before the tribunaux de police and the tribunaux en matière correctionnelle.

The criminal procedure codes of the German states that were promulgated

124. Esmein, *op. cit. supra* note 113, at 408 *passim;* 1 Glaser, Handbuch des Strafprozesses 162-87 (1883); Schwinge, Der Kampf um die Schwurgerichte bis zur Frankfurter Nationalversammlung 74-91 (1926); 1 Holtzendorff, Handbuch des deutschen Strafprozessrechts 65 *et seq.* (1879).

125. Emphasis in original.

in the aftermath of the Revolution of 1848 contained very similar provisions.[126]

But so mesmerized were the proponents of the new principle of the *intime conviction* as a substitute for the hated system of legal proof both in France and in Germany that they were carried away with their enthusiasm. They lost sight of the interdependencies, in the much-admired Anglo-American jury system, between (1) the principle of "moral proof," *i.e.*, the principle that, once evidence has been sent to the jury, the individual and total weight of probative value is to be assessed by the jury alone, with hardly any rules regulating the weight; (2) the principle of excluding altogether certain relevant evidentiary data from the jury by exclusionary rules; and (3) the less active but rather detached role of the judge in the proof-production process. Thus, the jury system was imported in France, and later in Germany, without the exclusionary evidence rules of probative policy and without the Anglo-American notion of the role of the judge. Esmein and Faustin Hélie in their comprehensive descriptions[127] of the debates in the French Constituent Assembly that resulted in the law of September 16, 1791, do not refer to a single realization of these interrelationships. And the Code d'Instruction Criminelle of 1808 that became the model for the "reformed" codes of the German states after the 1848 Revolution certainly does not contain anything faintly resembling Anglo-American evidence rules of probative policy. Mittermaier, the prominent German evidence scholar, blamed the French proponents of the jury for not having informed themselves about these concomitant features of the Anglo-American jury system.[128] But by his time, the high-pitched sentiments of the revolutionary period, when the jury was enthusiastically welcomed as an instrument of democracy rather than as a vehicle of technical evidence rules, had greatly subsided. In the meantime there had also arrived, in England and the United States, what Wigmore has called the "spring-tide" of more and more elaborate evidence rulings.[129] This was mainly due to the increase of printed reports of nisi prius rulings in the quarter century from 1790 to 1815, so that Mittermaier had far better access to the cases (and far more leisure to study them) than the French writers two or three generations earlier.

The French Code of 1808 had also made the presiding judge a very strong figure. He conducted the proceedings in a way not very much different from the way the old inquisitorial judges had operated. His *"pouvoir discrétionnaire"*[130] included, for instance, not only the right to examine the witnesses adduced by the parties, but also the right to adduce other witnesses on his own motion, and the even more important right to reject evidence proffered by the

126. See Sammlung der neuen deutschen Strafprozessordnungen (ed. Haeberlin 1852).
127. *Id.* at 408-26. 4 Faustin Hélie, traité de L'instruction criminelle 336-41 (2d ed. 1866).
128. Mittermaier, Erfahrungen über die Wirksamkeit der Schwurgerichte in Europa und Amerika 131, 176 (1865).
129. 1 Wigmore § 8, at 238.
130. Art. 268 of the Code.

parties;[131] in short to *"prendre sur lui tout ce qu'il croira utile pour découvrir la vérité."*[132]

In Germany, Mittermaier, who had carried out extensive comparative studies, advocated the adoption of the Anglo-American jury system as a whole in criminal cases, including the evidence rules and the umpire function of the judge.[133] But his proposals went largely unheeded. One of the reasons undoubtedly was that when the revolutions of 1848 broke out in the German states and the state governments had to satisfy the strong popular demand for a "reformed" criminal procedure,[134] there was not enough time to prepare more than roughly revised copies of the French Code of 1808 and to introduce in a somewhat precipitated way the politically urgent innovations.[135]

The jury system was introduced for political cases and felonies, but not for petty offenses and misdemeanors. The accusatorial principle, with the requirement of the public prosecutor investigating the case and filing a charge sheet before the case could reach the trial court, was introduced throughout. This distinguishes modern German criminal procedure most sharply from the old inquisitorial system where the investigating judge and the trial judge were either identical, or where the trial judge adjudicated the case on the basis of the *dossiers* of the investigating judge according to the "legal proof" rules, without ever having seen the accused face to face. Furthermore, the principles of publicity, orality, and immediacy were made basic requirements of the criminal trial; that is, the whole case had to be tried to the judge or panel that decided the case, and nothing but what had been discussed in open court could be made a basis for the verdict and the sentence.

But there were more intrinsic reasons for not following Mittermaier's proposals: neither in jury nor in non-jury cases was the career judge's impartiality regarded to manifest itself in his passivity with respect to the production of the evidence. But rather, it was considered to be one of his most noble obligations to elicit exonerating as well as incriminating facts from the accused or the witness before him, or to call, on his own motion, exonerating witnesses and expert witnesses. In short he was to "extend the reception of the evidence to

131. Art. 270 reads: "Le président devra rejeter tout ce qui tendrait à prolonger les débats sans donner lieu d'espérer plus de certitude dans les résultats."

132. Art. 268. *Cf.* Lacuisine, Traité du puovoir judiciaire dans la direction des débats criminels (1845); Mittermaier, *Über die Stellung des Assisenpräsidenten*, 1 Der Gerichtssaal 17, 19 (1849); Mittermaier, Erfahrungen (fully cited *supra*, note 128) at 133, 159.

133. *Die gesetzliche Beweistheorie in ihrem Verhältnis zu Geschwornengerichten*, 12 Neuese Archiv des Kriminalrechts 488 (1830); 13 *id.* 120-40, 280-303 (1832); Die Lehre vom Beweise 112 (1834); see also note 132, *supra.*

134. The "prosecutions of the demagogues" [*i.e.*, the liberal politicians] in carrying out the Karlsbad Resolutions of 1819, the strong weapon of the Restoration, had been one of the main causes of dissatisfaction with the old criminal procedure. See Schwinge, Schwurgerichte (fully cited, note 124, *supra*) 45.

135. *Id.* at 156, 158; 1 Glaser, Handbuch (fully cited, note 124, *supra*) 162; Binding, Grundriss des Strafprozessrechts 13 (3d ed. 1893). As to the results, see Planck, Systematische Darstellung des Deutschen Strafverfahrens iv *passim* (1857). The texts are reprinted in Haeberlin, *op. cit. supra* note 125. For the legislative history see Glaser, *supra;* Holtzendorff, *op. cit. supra* note 124, at 65.

all facts and to all means of proof which are important for the decision."[136] On the other hand, exclusionary rules similar to the Anglo-American evidence rules of probative policy were deemed to be incompatible with the prevailing veneration for the newly introduced jury as a body of mature and responsible citizens, and also with the great trust that the more or less liberal legislatures of the post-1848 period and of the Reich in 1877 put in the professional judges. These professional judges, it must be remembered, continued to be the only responsible fact-finders in petty offenses and misdemeanor trials. The suggestion to grant to the jury the *intime conviction* principle and to retain the system of legal proof for the career judges was rejected by the argument that the judges' independent position, their academic training and their social responsibility certainly called for their equal treatment with jurors. This required the judges' emancipation from the old evidence rules.

C. *Exclusionary Rules of Extrinsic Policy*

If for these reasons a body of exclusionary rules of probative policy was not adopted by the post-1848 state codes nor by the Reich Code of 1877/79, the body of exclusionary rules *of extrinsic policy* that we find in the C.C.P. of 1877/79 for the then unified Reich—bypassing now the earlier state codes—is certainly as large and as elaborate as in the common law jurisdictions. This code has ever since been enlarged and refined by numerous amendments and judicial decisions. Here is an exemplary but by no means exhaustive survey:[137]

(1) According to sections 52-54, C.C.P., the following groups of persons are entitled to refuse testimony: the person engaged to marry the accused; the spouse of the accused, even if the marriage no longer exists; whoever is related directly by blood, marriage or adoption, or collaterally related by blood to the third degree or by marriage to the second degree, to the accused, even if the marriage upon which the relationship is based no longer exists; (with regard to certain professional and confidential communication): clergymen, defense counsel of the accused, attorneys-at-law, patent attorneys, sworn accountants, auditors, tax advisers, authorized tax agents, physicians, dentists, pharmacists, mid-wives, members of Parliament, editors, publishers, printers, producers, and public officials, unless their superior authorizes them to testify.

Evidence obtained in violation of the invocation of one of the privileges mentioned above—*e.g.*, even statements made and recorded before the privilege was invoked or before the ground for the privilege existed—is inadmissible (section 252 C.C.P.); admission constitutes reversible error. There are some rather controversial exceptions to this rule that cannot be discussed here.[138]

136. C.C.P. § 244(2); see *infra*, p. 160.

137. See Alsberg-Nüse, Der Beweisantrag im Strafprozess [hereinafter cited Alsberg-Nüse] 89-107 (2d. 1956).

138. For an example of a statement taken in violation of the privilege, see Judgment of Bayerisches Oberstes Landesgericht, 1966 N.J.W. 117; See also 6 BGHSt 279. The exceptions are discussed in Müller-Sax (KMR), Kommentar zur Strafprozessordnung [herein-

(2) The privilege against self-incrimination, according to the jurisprudence of the Bundesgerichtshof (Federal High Court)[139] guaranteed by the broad provision of the constitution protecting human dignity, is spelled out in several detailed code provisions. Section 136a, C.C.P., forbids, and section 343, Penal Code, makes it a felony, to impair the freedom of the accused to determine and to exercise his will by ill-treatment, by fatigue, by physical interference, by dispensing medicines, by torture, by deception or by hypnosis, or by threatening him with a measure not permitted by the provisions of the law, or by promising an advantage not provided by law. These prohibitions apply irrespective of the accused person's consent, and statements obtained in violation of these prohibitions may not be used even if the accused agrees to said use.[140] Thus the lie-detector and narco-analysis are prohibited even if the accused gives his consent. All this applies to all stages of the criminal investigation, including police interrogation.[141] Failure to comply with these exclusionary rules vitiates the judgment and inevitably results in reversal on appeal (Revision).[142]

Any person charged with any offense must be informed, by the police officer first interrogating him, by the state attorney, by the investigating judge and by the trial judge, of his "right to respond to the accusation, or not to answer regarding the charge, and at all times, even before his examination, to consult with defense counsel of his choice."[143] The extent to which failure to give this information to the suspect or the accused vitiates a verdict of guilty based, at least in part, on his own statement, is still a matter of controversy.[144] This will be one of the chief topics of the DEUTSCHER JURISTENTAG 1966. The present writer's view is that *any* failure to give the suspect the information required by sections 136, 163a(3), (4), and 243(3) must be considered as a "deception" in the meaning of section 136a(1). First, it is clear that a deliberately false information to the effect that the suspect was under a legal obligation to make a statement would be a "deception." The same would be true of a deliberate omission to give the correct information, for this is the equivalent of the first case, both in the reprehensibleness on the part of the interrogator and in the resulting ignorance of the suspect. The remaining question is whether *inadvertent* failure to give the prescribed information can also be regarded as a "deception."[145] It is submitted that the answer must be in the affirmative.

after cited Müller-Sax (KMR)] § 252, comm. 1-6 (6th ed. 1966), collecting cases and citing authorities.

139. 14 BGHSt 358, 364 (1960).

140. C.C.P. § 136a(3); see 5 BGHSt 333; 11 BGHSt 211.

141. C.C.P. §§ 136, 163, 163a.

142. For a collection of cases under § 136a, C.C.P., see Müller-Sax (KMR) § 136a, comm. 1-7; Schwartz-Kleinknecht, Strafprozessordnung [hereinafter cited Schwarz-Kleinknecht] § 136a, comm. 1-6 (26th ed. 1966).

143. C.C.P. §§ 136, 163a(3), (4), 243(3). Counsel is appointed by the court in every case involving a serious misdemeanor or a felony; C.C.P. §§ 140-46.

144. See Schwarz-Kleinknecht § 136, comm. 11; Müller-Sax (KMR) § 136, comm. 2; Dahs, 1965 N.J.W. 1266; 1 Löwe-Rosenberg § 136, comm. 14; Müncheberg, Unzulässige Täuschung durch Organe der Strafverfolgungbehörden 36 (Diss. Münster 1966).

145. Under English law, inadvertant or otherwise excusable failure to comply with

The result for the accused is the same as if the omission had been deliberate, since his lack of understanding of the situation and of his rights is the same in either case. And it is from this result that section 136a is intended to protect the subject, no matter how it came about. Furthermore, if this consequence were denied, the escape into the pretext of mere inattentiveness would be made too easy. Once this interpretation of section 136a(1) is accepted, the absolute exclusion of any statement obtained after failure to inform the suspect of his rights provided for by sections 136, 163a(3), (4) and 243(3), follows from the express language in section 136a(3).

Under section 55 every witness may refuse to give information in regard to questions the answers to which would place him or any of the relatives designated in section 52(1) in danger of criminal prosecution. The witness, too, has to be informed of this right before he is interrogated by any judge or law enforcement officer.[146]

(3) Sections 94 *et seq.* contain detailed provisions with respect to the permissibility and the requirements, such as a judicial search warrant, of search and seizure. Many, but not all violations of these very detailed and complicated provisions result in the inadmissibility of evidence thus obtained.[147] For example, many objects and documents listed in section 97 as not subject to seizure are inadmissible as demonstrative or documentary evidence. This field is still very controversial and will also be the subject of the discussions of the upcoming JURISTENTAG. The doctrine of the inadmissibility of the "fruit of the poisonous tree" has so far been rejected by most of the courts.[148]

The absence of exclusionary rules of probative policy in the codes that were created after the 1848 Revolution could partly be explained by the political situation and the precipitate haste with which they were drafted. Their absence in the Code of Criminal Procedure for the Reich of February 1, 1877 was rather the result of the high esteem in which the legislature held jurors, career judges and lay judges. The reason for the replacement of the jury system by the lay judge system in 1924 was the belief that the ends of lay participation in the administration of criminal justice could be served better by a free flow of communication between career judges and lay judges in the deliberation room, than by a "separation of the benches." But the capacity of jurors, career judges and lay judges for unbiased and responsible fact-finding has indeed never been seriously questioned since the latter part of the nineteenth century. Thus, the principle that Morgan and Maguire[149] proclaimed should govern the law of evidence, (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2), that everything which is thus

the Judges' Rules will *not* result in the exclusion of evidence obtained through that failure; see Devlin, The Criminal Prosecution in England 45 (1958); Fellman, The Defendant's Rights Under English Law 36 *et seq.* (1966).

146. C.C.P. §§ 55(2), 163a(5).

147. See Müller-Sax (KMR), comm. 6 preceding § 94, comm. 2 preceding § 48.

148. See Sendler, Verwertung rechtswidrig erlangter Beweismittel 37 (1956).

149. *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909 (1937).

probative should come in, unless a clear ground of policy or law excludes it, has been followed throughout. But the grounds of policy for the exclusion are located entirely in other areas than in the consideration for the frailty of the fact-finder's mind.

Even though there are no equivalents to the hearsay rule,[150] the opinion rule or the character rules that call for the exclusion of any relevant evidence falling within their scope, this does not mean that hearsay, opinion or character evidence, though admissible in principle, may be used as bases for a conviction where better evidence is available.[151] On the contrary, the clarifying duty of the judge as stated in section 244(2), C.C.P., requires him to adduce on his own motion the accessible better evidence that shines through the second best evidence. Where the trial court failed to fulfill this clarifying duty, or where it failed to explain convincingly in its written opinion why it relied on second best evidence, the judgment is invariably subject to a reversal on appeal for violation of section 244(2).[152] Similarly, the rule as to prior convictions of the accused is not, as in Anglo-American law, one of exclusion in principle, with exceptions for certain groups of cases,[153] but a more flexible one of admissibility under the condition that it is "relevant for the decision."[154] As to opinion evidence, the superiority of a statement of fact to a declaration of opinion is certainly recognized, but it is also recognized that the opinion which a witness or an expert witness has formed on certain facts of his narration or report in court is also a relevant fact which the court may be well advised to take into consideration. The enormous difficulties that the hypothetical question put to expert witnesses has created under American evidence law[155] have been avoided, in German evidence law, by the following procedure:[156] after hearing all evidence on the controversial facts that the expert witness has not observed himself but that are relevant for the expert opinion, the court deliberates, assesses the facts it believes to be true, and orders the expert witness—in open court—to base his opinion on these facts. Surprisingly, the question has not been posed[157] whether under American procedural law a similar result could be reached by making the assessment of the controversial facts the object of a special verdict or a fact verdict.[158] The reason seems to be that only "ultimate facts" but not "evidentiary facts" can be submitted to the jury for a special verdict.

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150. With the exceptions mentioned *supra*, p. 142.

151. For instance, the eye-witness of an event referred to by a hearsay witness.

152. See notes 103 and 110, *supra*.

153. See pages 140-41, *supra*.

154. C.C.P. § 243(4).

155. The "practical incubus" that "has in practice led to intolerable obstruction of truth"; 2 Wigmore § 686. Uniform Rule of Evidence 58 has abandoned the requirement of hypothetical presentation.

156. Jessnitzer, Der gerichtliche Sachverständige 79, 81 (1963) (citing pertinent cases).

157. See 5 Moore, Federal Practice §§ 49.01-49.06.

158. *Cf.* Fed. R. Civ. P. 49.

D. *Judge's Power of Discretion Over Reception of Evidence*

In German evidence law, in short, exclusionary rules of probative policy are not considered to be a central problem connected with the power of the trier of fact to evaluate freely—that is, without weight regulations—the evidence put before him. Therefore I do not want to elaborate on this question but rather to proceed to a problem and an ensuing group of rules in German criminal evidence law that are as germane to the particular position of the judge as the trier of facts as the exclusionary rules of probative policy are germane to the institution of the jury.

To realize the special character of the career judge's position after the turning-point of German criminal procedure in the post-Revolutionary years between 1848 and 1851 we have to remember that the career judge, in jury as well as in non-jury cases, was no longer at once prosecutor, fact-finder and decision-maker. But the career judge still conducted the trial proper in the sense that he examined the witnesses before the parties were allowed to ask additional questions and that he could call witnesses and adduce other evidence on his own motion. The judge's function as an impartial elicitor of exonerating as well as incriminating facts was thought to be the greatest safeguard against partisan distortion and partial suppression of relevant facts by zealous adversaries.[159] It is still believed to "prevent degeneration of the trial into a kind of duel where guilt or innocence of the defendant is at stake."[160]

But it was from this high-minded faith of the legislature in the judge and from a misunderstanding of the new principle of free evaluation of the evidence that a very serious problem arose, a problem which was solved, after a long struggle, not by the legislature but by a body of judge-made rules of evidence.

The problem was this: If the judge[161] was to determine according to the best of his belief as to the way of finding the truth, how far the reception of evidence should be extended, how could either of the parties get in that evidence which the judge or the panel of judges had overlooked or refused to take when asked by the party? In other words, was the judge to be the sole master of the proceedings, or were the parties to influence the scope of the proof-taking process?

The final government draft of the Code of Criminal Procedure, submitted to the Reichstag in 1874,[162] gave a radical answer, using a radical argument.

Both parties, it is true, were granted the right to file a motion, *before*

159. For a vivid and impressive description of a somewhat ideal but on the whole typical conduct of a trial along these lines in a German *Schwurgericht* in the 1950's, see Bedford, The Faces of Justice 101 (1961).

160. Eb, Schmidt, *Introduction* to the English translation of the C.C.P., in 10 American Series of Foreign Penal Codes, Germany, at 16 (1965).

161. In cases under the original jury system (abolished in 1924), the judge alone made these decisions regarding the scope of the evidence, without the participation of the jury. Today, the lay judges have a full vote in these matters; see note 177, *infra*.

162. 1 Hahn, Die gesamten Materialien zur Strafprozessordnung [hereinafter cited Hahn] 4-296 (1880).

the trial, that certain relevant evidence of their choice be taken (the state attorney had this right in addition to his obligation to list all evidence in the charge sheet). The accused was even allowed to have witnesses and expert witnesses summoned if he advanced the expenses. But the judge or the panel of judges (without the participation of the jury in jury cases) was to have unfettered discretion as to whether these persons were finally examined in court or not. The draft provided in its section 207: "The extent to which evidence is received shall be determined by the court. The court is not bound in its determination by motions, former conclusions, or waivers."

And the "motifs" for the draft made it entirely clear that this absolute power of the judge to determine the scope of the reception of evidence was to extend to each and every situation, even to witnesses summoned at the defendant's expense.[163]

The arguments to justify this radical answer were no less radical:

> The denial of a motion to receive evidence implies the statement of the court that the proffered evidence, even if it confirmed the contention of the proponent, would have no influence upon the judicial conviction as to guilt or innocence of the defendant. The denial of such a motion is therefore in a sense already a constituent part of the final verdict.

Therefore, the argument ran on, it was only proper for those who had to pass the final verdict to anticipate this constituent part of it.

Of course, this argument failed to fit into the pattern of the jury court, shaped after the Anglo-American model, that was (ever since 1848) to have jurisdiction over the most serious felonies. There it was the jury that passed the verdict but the panel of three career judges was to pass upon evidence motions. The conflict was solved by a rhetorical trick: the judges, it was said, *represented* the jury in this respect, and this distribution of function was necessary for reasons of expediency.

As a result of the violent attacks that liberal parliamentarians launched at this draft,[164] a compromise was finally reached in section 244, C.C.P.[165] It was made the court's inevitable duty to hear witnesses and expert witnesses that had been summoned by either party and that had appeared in court at the trial. This principle was inapplicable only in cases that were subject to full de novo trial on appeal (that is, cases before the Schöffengericht) and to the de novo appellate trial of petty offenses. In these groups of cases the scope of the reception of evidence was left entirely to the discretion of the judge, in accordance with the government draft.[166]

163. 1 Hahn 192, 193.
164. 1 Hahn 849, 852; 2 Hahn 1185 *passim*, 1315 *passim*, 1634.
165. The original code provision has been changed many times; *see infra*, p. 156.
166. These provisions applied only where the party had been denied a pre-trial motion to receive certain evidence and where the party had then summoned the witness or expert witness or produced the other evidence himself and at his own expense.

As to the situation at the trial proper, when, on the basis of evidence produced so far, either party wanted the court to receive additional evidence not moved for by a pre-trial motion, the 1877 Code was reticent. But on the other hand, section 207 of the draft had also disappeared. The legislative materials do not satisfactorily answer the question whether all this was due to negligent drafting or whether it was the deliberate result of the struggle between the state governments and the liberal legislators working together in a special committee of the Reichstag.

Anyhow, in the first few years following the promulgation of the code, it was a common belief among judges and writers[167] that outside the range of section 244 (relating to evidence produced by pre-trial party activity) the court was entirely free to determine the extent to which evidence was to be received. The rationale given for this view was that the judge's complete freedom in the evaluation of the admitted evidence necessarily presupposed his freedom to receive only the evidence he thought necessary and to stop receiving evidence when, on the basis of the evidence heard so far, he had reached a certain result as to the guilt or innocence of the defendant. Since the only requirement for the conviction was that the judge (or a majority of judges) *was thoroughly convinced,* what more could be achieved once he was?

This reasoning is based on a confusion of the principle of evaluation and the object evaluated: the code itself, in its section 261, defines the object of the free evaluation as the *"result* of the reception of evidence."[168] The freedom to evaluate the evidence that was produced at the trial has nothing whatsoever to do with the question of discretion or lack of discretion as to the scope and mode of the reception of the evidence. Logically the evaluation comes into play only after the evidence has been produced. The statement that the evaluation is free does not, however, tell us anything about the nature of the proceedings in which the evidence is produced. But curiously enough, evidence scholars have again and again fallaciously assumed that it does. Thus, Arthur Lenhoff[169] explains the comparative dearth of admissibility rules in Continental evidence law as being attributable to the unfettered discretion enjoyed by the judge in evaluating the evidence. The same fallacy underlies the writings of some German scholars who regard the emergence of the evidence rules that we are going to discuss shortly[170] as an encroachment on the principle of free evaluation of evidence.[171] A French writer, Rached, comes to the same conclusion: "La liberté du juge dans l'admission des preuves est une conséquence logique de

167. See Klee, Die Bestimmung des Umfangs der Beweisaufnahme im Strafverfahren 102-31 (1937); Ditzen, Dreierlei Beweis im Strafverfahren 16-35 (1926).

168. *"das Ergebnis der Beweisaufnahme."* See *supra,* p. 148.

169. Lenhoff, *The Law of Evidence—A Comparative Study Based Essentially on Austrian and New York Law,* 3 Am. J. Comp. L. 313, 335 (1954).

170. *Infra,* pp. 157-60.

171. Löwe-Rosenberg § 244, comm. 12; Karl Peters, *Freie Beweiswürdigung und Justizirrtum,* Festskrift Tillägnad Karl Olivecrona 532, 548 (1965); Sarstedt 164; Schwarz-Kleinknecht § 261, comm. 4; Wimmer, 1950 Deutsche Rechts-Zeitschrift 394.

la preuve morale."[172] Furthermore, as the careful comparative study by Elisabeth Kreuzer[173] indicates, the prevailing opinion in Italian and, to a somewhat lesser degree, in French criminal evidence law is still that, by virtue of his freedom in the evaluation, the judge may reject evidence offered by the parties.

E. *Inadmissible Evidence*

This was also the view taken by the German courts immediately after the C.C.P. had become effective on October 1, 1879. The German Reichsgericht, in a few decisions early in 1880, confirmed some lower court decisions arguing along those lines.[174] But as early as February 6, 1880, the Reichsgericht began to oppose that argument by ruling that to pre-judge the value of evidence offered by the defendant before the evidence had ever been received constituted an improper limitation of the defense. A few years later the court developed the broader theory (applicable also to motions of the prosecution) that "anticipated evaluation of the evidence" was not permissible if the evidence offered was relevant and not in itself inadmissible.[175] This was the recognition of the right of the parties to the reception of relevant evidence that the judge refused to receive because on the basis of the evidence he had heard he had already formed his opinion. The recognition of this *Beweiserhebungsanspruch* became the basis for the spinning out, over the years, of a most elaborate system of rules with respect to the admission and exclusion of relevant evidence offered by either of the parties. When, in 1930, Max Alsberg wrote his path-breaking essay *Der Beweisantrag im Strafprozess*, he systematized more than twelve hundred decisions of the Reichsgericht and the state high courts dealing with this question. These decisions revealed an underlying assumption that, irrespective of the trial court's own opinion, it had to receive each and every evidence moved for by either party, provided only that it was relevant to the issue and sufficiently specified, and that the trial court could refuse to receive evidence only in some exceptional groups of cases. These exceptions, as defined by the Reichsgericht, were finally adopted wholesale by the legislature. I cannot here discuss the details of this incorporation process that went forward and backward in several steps and finally led to the present formulation of sections 244, 245, C.C.P., by the Act For the Restoration of Uniformity of Law, of September 12, 1950.[176] Suffice it to list and to discuss in brief the pertinent

172. Rachel, De l'intime conviction du juge 179 (1942).

173. Elisabeth Kreuzer, Die Bestimmung des Umfangs der Beweisaufnahme im deutschen, französischen und italienischen Strafprozess 77-186 (1964).

174. See Klee, *op. cit. supra* note 166, at 102.

175. For the history of this development, see Klee, *supra;* for the result see Alsberg-Nüse, beginning at page 61.

In American evidence law, the judge performs such an anticipated evaluation when, *e.g.*, he excludes evidence because in his opinion it would unduly prejudice the jury sitting before him. See Note, 70 Yale L.J. 763, 771-74 (1961). He anticipates the influence of the proffered evidence on the jury in the same way that the German judge was trusted to be able to anticipate the influence of the proffered evidence on his own mind.

176. 1950 Bundesgesetzblatt (pt. I) 455, 515.

groups of cases in which the court[177] may reject evidence proffered by either party.[178]

(1) A motion to receive evidence *must* be denied if the evidence offered is in itself inadmissible. As to instances of inadmissible evidence, I refer to the survey given above[179] on exclusionary rules of extrinsic policy. Two more examples of inadmissible evidence are the testimony of a psychiatrist or psychologist as to the trustworthiness of a witness whom he has examined, if the witness himself or his legal representative have not given their valid consent to the examination,[180] and, secondly, the production of a tape recording if the speaker had not consented to the recording.[181]

It goes without saying that in all these cases of inadmissibility of the evidence not only can the parties not move for its introduction but the court, too, may not introduce such evidence on its own motion.

(2) A motion to receive evidence *may* be denied:

(a) if the allegation to be proved concerns a matter of common knowledge or judicial notice. In this latter case it has to be announced in open court if judicial notice is to be taken so that the parties can discuss the matter;[182]

(b) if the fact to be proved is of no importance for the decision; this is largely congruent with the familiar Anglo-American notions of irrelevancy and immateriality[183] so that no further discussion seems necessary here;

(c) if the fact to be proved has already been proved. In this case the court has to notify the proponent (if necessary, after a deliberation on this point) that the truth of the allegation will be regarded as established. Of course, the court must not deviate from this point of view in its final judgment. This is a suitable device for the parties to test the court's attitudes to certain issues and to pin the court down to a certain attitude;[184]

(d) if the proof offered is completely unsuitable because it is inherently incapable of furthering the exploration of the truth.[185] For instance, a mere witness is completely unsuitable where expert knowledge and expert conclusions are required to determine an issue.[186] Likewise, the opinion of an expert witness is completely unsuitable proof if it is impossible to furnish him with the factual data on which the desired inference could be based.[187] The driving test offered

177. The lay judges now do fully participate in the deliberation and have a full vote in the decisions on the pertinent motions.

178. C.C.P. § 244(3), (4).

179. At page 149.

180. State v. H., Bundesgerichtshof (II. Strafsenat), 11 November 1959, 14 BGHSt 21, 23.

181. State v. A., Bundesgerichtshof (I. Strafsenat), 14 June 1960, 14 BGHSt 358; see Löwe-Rosenberg § 244 comm. 27; Alsberg-Nüse 89.

182. Judgment of Bundesverfassungsgericht (I. Senat), 3 November 1959, 1960 Monatsschrift für Deutsches Recht 24.

183. See Löwe-Rosenberg § 244, comm. 28; Alsberg-Nüse 66.

184. Alsberg-Nüse 146 *passim.*

185. Löwe-Rosenberg § 244, comm. 30; Alsberg-Nüse 207.

186. Judgment of Bundesgerichtshof (IV. Strafsenat), 6 October 1961, 21 Verkehrsrechtssammlung [hereinafter cited VRS] 429.

187. State v. B., Bundesgerichtshof (I. Strafsenat), 14 June 1960, 14 BGHSt 339, 342.

by a vehicle driver who admits having operated a car with a blood-alcohol concentration of .2% to prove that he is capable of safe driving in spite of that intoxication is completely unsuitable proof, since it is established by scientific research that beyond a blood-alcohol concentration of .15% no driver can drive safely.[188] Since this ground to reject evidence constitutes an exception from the general prohibition against the "anticipated evaluation of evidence," strictest standards, as indicated by the examples given above, have to be applied;[189]

(e) if the evidence offered is beyond reach, *e.g.*, the witness has gone abroad and his present domicile is unknown;

(f) if a material allegation which is to be proved *for the exoneration of the defendant* may be treated as though the alleged fact were true.[190] This taking for granted (*Wahrunterstellung*) of an exonerating allegation of the defendant has the same effect as if the allegation had been proved. Since the court has the obligation to extend *sua sponte* the reception of the evidence to all facts and to all means of proof which are important for the decision,[191] the court must not resort to this substitute of proof before it is satisfied that a clarification of the issue is impossible, so that the defendant has to be granted the benefit of the doubt.[192] Here is an illustrative example:[193] defendant is charged with the murder in the first degree of his wife. He invokes as a mitigating circumstance provocation by the victim and moves for the reception of the testimony of his neighbors who, he alleges, will testify that they heard a violent altercation shortly before the time the killing occurred. Here the court may argue: if the neighbors confirmed this allegation it might have to be taken as established (if the neighbors are trustworthy). If they denied having heard anything the defendant still would be protected by the benefit of the doubt because that testimony would not permit an inference either way. Therefore the allegation of the defendant might as well be treated as if it were true. In a case like that, the time, cost and effort of receiving the profferred evidence may be saved. Of course, the court must take as established the allegation that it has, by rejecting the evidence for it, promised to treat as though it were proved. In our case this means that mitigating circumstances have to be recognized and given effect.

(3) In addition to the grounds listed above, a motion to receive evidence by examining an expert witness may also be denied:

(a) If the court itself possesses the necessary expert knowledge.[194] The purported expert knowledge must be carefully displayed in the written statement of grounds for the judgment.[195] This requirement, which is enforced with

188. State v. W., Bundesgerichtshof (IV. Strafsenat), 11 April 1957, 10 BGHSt 265.
189. Löwe-Rosenberg § 244, comm. 30.
190. *Id.*, comm. 29(c); Alsberg-Nüse 146.
191. C.C.P. § 244(2).
192. Judgment of Bundesgerichtshof (IV. Strafsenat), 14 July 1961, 1961 N.J.W. 2069.
193. Löwe-Rosenberg § 244, comm. 29(c).
194. *Id.*, comm. 31-33; Alsberg-Nüse 237.
195. Sarstedt 176, 177; Alsberg-Nüse 256 n.30 (citing cases).

great strictness by the appellate courts, naturally tends to deter a trial court from claiming any such expertise unless it is prepared to render a full-fledged expert opinion. In practice, this has led to a very cautious self-restraint of trial courts.

(b) The hearing of a *further* expert can also be denied if the contrary of the alleged fact has already been proved by the prior expert opinion; this does not apply if the expert knowledge of the prior expert is doubtful, if his opinion is based on incorrect factual premises, if the opinion contains contradictions or if the new expert has means of research at his disposal which appear superior to those of a prior expert.[196]

(4) The only motion the denial of which is in the discretion of the court is the motion to take a view.[197]

(5) If the defendant, instead of moving for its adduction by the court, adduces the evidence himself, that is, subpoenas witnesses or expert witnesses at his expense[198] or produces real evidence or documents, the court is[199] practically never entitled to reject the evidence thus offered and presented but it has to receive it.[200] This is the most powerful weapon of the defendant to introduce any admissible and relevant evidence he wants.[201] It gives the modern German criminal procedure a very strong adversary feature but has, not unlike the American adversary system, a tendency to favor the defendant of means who can afford to adduce, *e.g.*, a host of expert witnesses testifying on his behalf.

(6) Theoretically, the court may reject any motion to receive evidence and refuse to receive any evidence adduced by the defendant under section 245 if the sole motive of the motion or the production was to delay the proceedings and thereby to abuse the right to introduce evidence.[202] Practically, a refusal to receive evidence under this provision is extremely rare, since proof that sole intention was to delay the proceedings is hardly ever possible, and since a legitimate purpose is presumed by the law on the part of an attorney-at-law.[203] Thus the commentaries on the C.C.P. list only a handful of cases where the rejection of evidence on this ground was upheld by the appellate courts. A typical case is that decided by the Federal Supreme Court on December 11, 1953:[204] defense counsel wanted to "prove," by a motion to receive evidence, an allegation of the defendant which counsel himself expressly declared to disbelieve. The situation would have been entirely different if the defendant him-

196. Löwe-Rosenberg § 244, comm. 34; Alsberg-Nüse 256 *et seq.*
197. C.C.P. § 244(5).
198. C.C.P. §§ 219, 220.
199. Subject only to the exception discussed in ¶ (6) herein.
200. C.C.P. § 245.
201. See Alsberg-Nüse 488 *passim.*
202. *Id.* at 30-75.
203. Löwe-Rosenberg § 244, comm. 27(b); Müller-Sax (KMR) § 244, comm. 15 (citing cases).
204. Judgment of Bundesgerichtshof (I. Strafsenat), BGH 1 StR 284/53 (unpublished; cited by Müller-Sax (KMR) § 244, comm. 15).

self had put forward that motion, which he would have been entitled to do independently.

(7) Belatedness of a proffer of evidence alone is never a reason for its rejection, as expressly stated in section 246, C.C.P.

(8) Section 244(6) and section 34, C.C.P., require a specific court order with detailed reasons if a motion to receive evidence is denied so that the party moving for the reception of the evidence may adapt its further trial tactics to the rejection.

Every denial of a motion to receive evidence is subject to appellate review,[205] and high court decisions dealing with these questions fill many a volume.

F. *The Court's Duty of Clarification*

By a motion to receive evidence which cannot be rejected under sections 244 and 245, C.C.P., the court (especially the presiding judge who conducts the proceedings and prepares for it by studying the files and dossiers and, on that basis, works out a preliminary scheme of the scope and mode of the trial) is forced to receive evidence which it thought unnecessary to receive on its own motion. Since the grounds for the denial of such a motion are very limited, as we have seen, it is obvious that as far as the scope of the reception of evidence is concerned—and this is of course the core of the criminal procedure—it is the parties, and not the judge who are, at least potentially, "masters of the trial," that is, if they exercise their rights.

But what if they do not? What if, for instance, the defendant has a poor attorney or no attorney at all?[206] In this situation, the old notion of the judge's impartiality as the guarantee of the exploration of the truth—a notion that the necessity of the provisions in section 244–245, C.C.P., proved to need some qualifications—has been forged into another sharp weapon for the defendant to enforce the court's obligation to become active on his behalf. This is the device of the *Aufklärungsrüge*. This device was first developed by the Reichsgericht only thirty-five years ago. It is now the most frequently used attack against convictions, though the code itself does not even use the word or a similar language, and though, according to one writer, the device in its present shape cannot even be deduced from other provisions of the code as it stands today.[207]

What it this device? By the *Aufklärungsrüge* the convicted defendant claims that the court was thoroughly convinced of the incriminating fact A but that it arrived at that result in violation of its clarifying duty.[208] The court, it is claimed, violated its duty by not receiving, on its own motion, further evidence possibly favorable to the defendant of which there were strong indica-

205. See Alsberg-Nüse 433.

206. Apart from minor trials for petty offenses, the court has to assign a lawyer where the defendant has not retained counsel, and failure to do so leads to reversal on appeal. See C.C.P. §§ 140-146.

207. Sarstedt 162, 168.

208. C.C.P. § 244(2)(c).

tions in the facts established so far, the dossiers, or, simply in fair reasoning. This evidence, if received, would have tended to establish the court's conviction of fact B or fact non-A, or at least to shake its conviction of fact A. In other words, the defendant claims that the court did reach an *intime conviction* of the defendant's guilt but reached it on a factual basis that should not have used, and that, therefore, the court has reached its conviction unlawfully. This attack is launched *after* the trial, and it is only the appellate court that may grant relief by stating that section 244(2), C.C.P., was violated and by remanding the case for new trial. Whereas in the case of the unlawful rejection of a motion to receive evidence the trial court was first formally asked to act by the party filing the motion, no such requirement is necessary to launch the *Aufklärungsrüge*. Here the defendant need only point out—and this must be done in some detail in the motion that he files with the appellate court—that the trial court neglected to do its duty of all-round clarification, which exists even if the defendant or defense counsel do not open their mouths. The defendant or defense counsel thereby become a kind of supervisor of the trial court's official function to clarify the facts. In other words, by the *Aufklärungsrüge* the defendant can, in principle, reach the very same results as by a motion to receive evidence: he can force the court to hear further evidence, even if the court is already convinced of the defendant's guilt but realizes—or ought to realize—that a situation exists which, if gone into more deeply, might shake that conviction. As a matter of fact, it has been pointed out that by a motion to receive evidence the party does nothing but call the court's attention to its clarifying function.[209]

In practice, the situation is somewhat different. The standards applied by the appellate courts to the trial court's obligation to adduce evidence in favor of the defendant on its own motion are, of necessity, based on the trial court's more limited access to the facts of the case, compared with the defendant himself and defense counsel.[210] So while practically every offer of evidence by the defendant (and by the state attorney, for that matter) must be accepted as long as the evidence offered is relevant, the *Aufklärungsrüge* is successful only if it can be pointed out that there was some indication, *accessible to the court*, of the existence of the exonerating evidence. Such indications can be furnished (and it can be argued that the trial court should have followed them) by the results of the evidence heard so far, by the contents of the dossiers, by suggestions from the defendant or defense counsel, suggestions not containing the specificity of a formal motion to receive evidence, or by simple reasoning, *e.g.*, that the case might be clarified in a way favorable to the defendant by calling an expert witness. Failure of the trial court to appoint an expert witness on its own motion to exonerate the defendant has thus become the most frequently

209. Beling, Note, 1925 Juristiche Wochenschrift 2782.
210. See Sarstedt 169.

used hook on which to hang a successful *Aufklärungsrüge*.[211] Here are two typical examples:

(1) Failure to appoint an additional expert to explain a discrepancy between the results, testified to respectively by other experts, of a blood-alcohol concentration examination and a clinical examination of the defendant.[212]

(2) Failure to appoint an additional hand-writing expert after one expert had testified that a signature on a falsified document was performed by the defendant.[213]

The appellate court's reasoning in the second case is particularly interesting: Here the trial court had denied, under section 244(4), C.C.P., a formal motion by the defense to appoint a further expert. The appellate court, while conceding that the denial was perfectly justified under that provision, proceeded to state that the trial court's obligation to clarify the facts may even exceed its duty to receive evidence moved for by the defendant. The judgement was therefore reversed for failure of the trial court to appoint a further expert on its own motion.

This makes it clear that the *Aufklärungsrüge* has outgrown its original role of serving as a substitute for the rules regulating the court's duty to receive evidence on the motion of a party, when those rules were repealed by the Nazi legislature.[214]

It is clear that the rules regarding a party's motion to receive evidence and the *Aufklärungsrüge* reflect a notion of the fact-finder's mind that is totally different from the notion underlying the government draft of 1874.[215] What is left of the notion of the judge who, by virtue of his power to freely evaluate the evidence produced in court, is also capable to pre-evaluate the evidence not produced and to predict what influence it would have on his *"intime conviction,"* had it been produced? In short, what is left of the notion of the judge who could be trusted with anticipatory evaluation of the evidence? Hardly anything, to be sure. The mode and scope of the proof-taking process is now regulated by a net of hard and fast rules that are binding on the trial court and leave no room whatsoever for the exercise of discretion. As a matter of fact, the enforcement of these rules is guaranteed because every violation of them constitutes reversible error. It is therefore only after the hearing of the evidence is concluded and both parties have had an opportunity to present their arguments and to comment freely on the evidence, that the judge's power to follow his own personal *"intime conviction"* can come into play. However this power, once so delimited, may be exercised without restriction by any regulation or rules, except for the rules of logic and the laws of nature. There

211. Löwe-Rosenberg § 244, comm. 11 (collecting numerous cases).
212. Judgment of Bundesgerichtshof (III. Strafsenat), 12 December 1953, 6 VRS 48.
213. State v. H., Bundesgerichtshof (II. Strafsenat), 19 November 1956, 10 BGHSt 116.
214. See Sarstedt 168: the substitute could be dismissed now that those rules have been re-introduced into the code.
215. Discussed *supra*, p. 151.

are no presumptions, no corroboration rules, no "legal proof" rules. The principle of free evaluation of the evidence, in short, has been reduced to its proper dimensions.

V. Summary and Conclusions

Let us summarize the results of our observations and add some concluding remarks:

The typical feature of the Anglo-American evidence law that distinguishes it from the Continental system is the existence of exclusionary rules of probative policy. These rules stem from the use of the jury trial and reflect varying and conflicting notions of the jury's mental capacities that were now over-, and now underrated on the basis of more or less unwarranted guesses and speculations. The trend of the most recent development is to replace these guesses and dogmatic speculations by a more realistic view. In this connection, it should have been pointed out in greater detail that a great deal of relaxation of, for instance, the hearsay rule and the opinion rule, that is, the widening of the scope of admissible evidence, is due to a growing confidence in the greater sophistication of the modern jury. Moreover, great efforts are made to develop particular rules of evidence for non-jury trials, rules which are shaped after the notion of a trained fact-finder's mind.[216] The adversary notion of the trial—the basic safeguard for the discovery of the truth, and yet "one of the causes of the failure of the jury to give satisfactory service"[217]—is greatly mitigated by discovery devices, the imposition on the prosecution of the duty to divulge evidence favorable to the accused,[218] and a growing tendency to strengthen the position of the judge by giving him the power to appoint expert witnesses and, in his discretion, to refrain from putting hypothetical questions to expert witnesses,[219] which devices may result finally in the elimination of the "battle of experts" from the courtroom.

On the other hand, the typical feature of German criminal evidence law is the strong and active position of the judge, reflecting an enormous confidence in his ability to be both active and impartial and to give every item of relevant evidence the weight that it deserves. Some decades ago, we found confidence in his ability to perform the superhuman task of assessing what weight ought to be given to evidence that he had not even heard or seen. The trend of modern development, as in American evidence law, is toward a more realistic view, based on the experience that too great a confidence in the judge's capacity to combine the roles of both the proponent and the evaluator of the evidence may tend to generate prejudice on his part. Hence, the right of the parties to

216. Davis, *An Approach to Rules of Evidence for Non-Jury Cases*, 50 A.B.A.J. 723 (1964); Love, *The Applicability of the Rules of Evidence in Non-Jury Trials*, 24 Rocky Mt. L. Rev. 480 (1952); Note, *Improper Evidence in Non-Jury Trials: Basis for Reversal?*, 79 Harv. L. Rev. 407 (1965).

217. Morgan *Foreword* to the Model Code of Evidence, p. 10.

218. Brady v. Maryland, 373 U.S. 83 (1962).

219. See Fed. R. Crim. P. 28; Uniform Rules of Evidence 58, 59.

move for the reception of evidence and to adduce evidence themselves, and the granting of the *Aufklärungsrüge* to the defendant, two devices designed to compel the admission of relevant evidence that the judge originally thought unnecessary. This has given to the modern German criminal procedure a marked adversary character and at the same time has preserved the benefits of the notion of the "active" judge, his activity in favor of the defendant being enforced by the threat of reversal of the judgment for failure to have been sufficiently active in that direction.

A common feature in the recent development in both evidence law systems seems to be that ideological and dogmatic assumptions are replaced by more realistic and commonsense views. The result is a tendency to introduce *more* relevant evidence and to submit it to the trier of fact in a way that facilitates its unbiased evaluation. Is our initial statement not justified, then, that the two systems are approaching each other though the starting-points are far apart?