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# Truth in Criminal Law and Procedure:

## The Erosion of a Fundamental Value

### 1. Introductory remarks

Writing or talking about ‘truth’ is walking through a minefield. For thousands of years, philosophers have debated the question of what truth is, as well as the related question of whether man can know the truth or can otherwise approach it, or whether he simply creates truth in his mind. It would be presumptuous of me to try to add anything of substance to this debate. I therefore take a very naive layman’s perspective and make a few basic everyday assumptions:

- Reality exists. But we cannot be certain that we can recognise it, because man can conceive of the world around him only within the capacity and limits of his mind. It is only within these limits that a person can make sense of reality and can make statements about it, but, on the other hand, this limited view of reality is sufficient for inter-human communication.
- People sometimes make statements that, with great probability, do *not* reflect reality and that we can therefore call ‘false’. Such statements may be consciously false (we then call them lies) or may be made in good faith – that is, the person wrongly believes that his or her words do reflect reality. The truth of a statement can thus be distinguished from the honesty of the person who makes it.<sup>1</sup>

In what follows, I will address the relevance of truth (and its protection) in criminal procedure and criminal law. Although these two areas are obviously interconnected in many ways, the significance of truth differs greatly between them. The justification (or, perhaps, excuse) for treating them jointly lies in the fact that the importance of truth seems to be receding in both areas, and there may be good reason for discussing whether the relevance of protecting the truth and searching for it was overrated in the past, and what changes may be necessary.

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<sup>1</sup> Although this distinction is clear in theory, one may ask whether criminal law should prohibit the spreading of ‘objective’ falsehood, or whether only those who act dishonestly should be subject to criminal punishment; for discussion of the concept of ‘false testimony’ in German law, see H.E. Müller, in: K. Miebach (ed.), *Münchener Kommentar zum Strafgesetzbuch*, Vol. 3, 3rd ed. 2017, §153, notes 41-53.

## 2. The relevance of truth in the criminal process

The purpose of the criminal process, it is often said, is to discover the truth about the crime committed and possibly about the offender's personality.<sup>\*2</sup> And a search for the truth is indeed indispensable for the criminal process. The law has assigned to the criminal justice system the task of re-establishing social peace after it has been disturbed by the raising of suspicion that a crime may have been committed. In order to carry out that task, the system of criminal justice must make an honest effort to find plausible answers to the basic questions about the offence and the offender: what happened, who committed the crime, and why did the perpetrator do so?<sup>\*3</sup> Against this background, the purpose of the criminal process is to determine whether the person suspected of having committed an offence is indeed guilty. Judgements based on assumptions unrelated to reality would be unable to fulfil that purpose and would thus frustrate the expectations of the public. It is, hence, not surprising that in the Anglo-American tradition, the end product of a trial is the 'verdict' – which, in its original Latin meaning, signifies 'telling the truth'.

On the other hand, even historians, disposing of generous amounts of time and having access to knowledgeable witnesses and a host of documents, sometimes have difficulty finding out what actually happened at a given time and place. In the criminal process, the means available to the judges are much more restricted: they have only limited time for the search for the truth, and rules of evidence strictly circumscribe what tools they may use for gathering information. Hence, if we take a realistic look at the criminal process and its limitations, it becomes clear that the trier of fact (judge or jury) will often be unable to draw a comprehensive picture of the crime with its causes and consequences, and even less so of the offender and his personal history.

Nor is it necessary that a criminal trial live up to the rigorous methodological standards of scientific historical research. The function of a trial is not to make a definitive statement about what happened on a particular day in a certain place, and on the life stories of the individuals involved. The purpose of a trial is much more limited. The trier of fact need only be able to determine those facts that are necessary for a verdict on the defendant's guilt or innocence and, if there is a finding of guilt, for the imposition of a fair sentence. In fact, the court can pass judgement even if it is unable to arrive at a firm conclusion as to certain relevant factual issues; for such a case, the law provides specific decision rules, most importantly the presumption of innocence and the (related) rule that the defendant shall be acquitted unless the court is convinced of his guilt beyond a reasonable doubt (*in dubio pro reo*).

If we acknowledge the fact that a criminal court cannot and need not grasp the totality of facts that together form the 'reality' of a crime and an offender, the issue is limited to the question of whether (and, if so, to what extent) the court must undertake an honest *effort* to determine the relevant facts before it may pass judgement. For the reason cited above, all legal systems oblige criminal courts to make a *bona fide* effort to find the facts that are relevant, under the applicable substantive law, with regard to the issues of guilt and sentencing.

Procedural systems differ, however, with regard to the method they regard as appropriate for searching for the truth.<sup>\*4</sup> The traditional *inquisitorial* system, which in principle still guides German criminal procedural law, relies on the serious effort of a powerful judge, who may – within the limits of the law – collect at the trial any evidence he or she deems necessary for investigating the matter before the court.<sup>\*5</sup> The judge's professionally dedicated but detached investigation is deemed to be the optimal method for determining

<sup>2</sup> E.g., see Bundesverfassungsgericht (Federal Constitutional Court), Judgment of 9 March 2013, Entscheidungen des Bundesverfassungsgerichts 133, pp. 168, 199; T. Weigend, Rechtsvergleichende Bemerkungen zur Wahrheitsuche im Strafverfahren, in: K. Bernsmann and T. Fischer (eds), Festschrift für Ruth Rissing-van Saan, 2011, pp. 749, 751-755. – DOI: <https://doi.org/10.1515/9783899498288.749>; C. Roxin and B. Schünemann, Strafverfahrensrecht, 28th ed. 2014, p. 87.

<sup>3</sup> For a more detailed account of this theory, see C. Trentmann, Wirklichkeitsstabilisierung als Funktion des Strafprozesses, Rechtswissenschaft 9 (2018), 332. – DOI: <https://doi.org/10.5771/1868-8098-2018-3-332>.

<sup>4</sup> For overviews, see G. Trüg, Lösungskonvergenzen trotz Systemdivergenzen im deutschen und US-amerikanischen Strafverfahren, 2003, p. 25 et seq.; J. Hodgson, Conceptions of the Trial in Inquisitorial and Adversarial Procedure, in: A. Duff, S. Farmer, S. Marshall, and V. Tadros (eds), The Trial on Trial, Vol. 2, 2006, p. 223. – DOI: <https://doi.org/10.5040/9781472559852.ch-013>; T. Weigend, Modelle des Strafverfahrens: Deutschland und USA, in: T. Fischer (ed.), Wahrheit, 2019, p. 31.

<sup>5</sup> See §244, Sec. 2 of the German Code of Criminal Procedure (CCP): 'For the investigation of the truth, the court shall *ex officio* extend the taking of evidence to all facts and items of evidence that are relevant for the decision.'

the relevant facts, especially since the judge not only pronounces the verdict and the sentence but also is obliged to give extensive reasoning for his or her decision in writing.<sup>\*6</sup>

By contrast, the *adversarial* system relies on the assumption that it is the dialectical competition between opposing parties that best serves the interest of finding the truth: if the accuser and the accused both invest their best efforts in presenting the facts favourable to their respective side, and if they may question their opponent's evidence, then the full picture of the truth will emerge in the end. At least that is the somewhat optimistic expectation of adversarial theory.

However different their psychological assumptions may be, the two systems have in common that 'searching for the truth' takes a lot of time, effort, and often financial expenditure. With the general increase in population and a concomitant increase in criminal cases in the course of the 20th century, pressure mounted to devise procedural modes that avoid the expensive search for the truth. On a worldwide scale, we can observe the advance of procedural arrangements that purport to replace the time-consuming and onerous search for the truth at a public trial by other forms of disposing of cases, relying on consensus (that is, the defendant's full or partial acceptance of the accusation) rather than thorough fact-finding as the basis for the disposition of the case.

The first and most prominent such mode was invented in the United States and has become known by the name of 'plea bargaining'.<sup>\*7</sup> Anglo-American jurisdictions offer the defendant the choice between pleading guilty and not guilty. If he pleads guilty, he acknowledges that the accusation represents the 'truth', so a trial is deemed unnecessary. Of course, the defendant's guilty plea does not provide any actual proof that the prosecutor's charges accurately reflect the facts. The court, in accepting a plea of guilty, formally examines whether the plea has been made voluntarily and has a factual basis but, in fact, takes the defendant's word as the truth.

Most defendants see no good reason to plead guilty and thereby forgo the chance – however slim – that the jury may find them not guilty. That is where the widespread practice of plea bargaining comes in: the defendant waives the right to a complete trial in exchange for a case disposition that is more lenient than would be expected after a trial. In many cases, plea bargaining implies a reduction of the original charges by the prosecutor. With regard to the 'truth' basis of the eventual case disposition, a reduction of charges means that the original accusation was too serious, the charges in adapted form fail to reflect the true facts of the crime, or both. In plea bargaining, the question of whether the accusation to which the defendant pleads guilty reflects the 'true' facts of the offence is never seriously posed, much less examined. It is the defendant's submission that is regarded as a sufficient foundation for conviction.

Similar modes of disposing of criminal cases have in recent decades spread to other systems, not only of the common law world but also to supposedly inquisitorial systems such as those of France and Germany. In 2009, the German legislature adopted a proceeding called *Verständigung* (agreement),<sup>\*8</sup> thereby legalising a practice that had developed behind closed doors of judges' chambers.<sup>\*9</sup> In the German version of plea bargaining, the presiding judge of the trial court offers the defendant, who has heretofore remained silent or has denied his guilt, a sentence within a particular range (say, between 18 and 24 months' imprisonment) if the defendant makes a full confession at the trial. If the defence agrees and the prosecutor does not veto the deal, the agreement becomes binding and the court must impose the sentence within that range as promised. The court's search for the truth at the trial, which officially is the cornerstone of the German criminal process, is reduced to listening to the defendant making a confession as to facts that mirror the legal elements of the relevant offence.

This type of procedure poses a host of problems. For example, the court may retract its sentencing offer if there is a relevant change of circumstances, in particular if the defendant does not provide a satisfactory confession. In that case, a full trial on the charges takes place before the same judges who heard the confession, but the confession cannot be used as evidence against the defendant.<sup>\*10</sup> There are also doubts as to the

<sup>6</sup> See §267 CCP.

<sup>7</sup> From the vast literature, see the recent overview by M. Vogel, Common Law Plea Bargaining, in: D. Brown, J.I. Turner, and B. Weisser (eds), *Oxford Handbook on the Criminal Process*, 2019, p. 729. – DOI: <https://doi.org/10.1093/oxfordhb/9780190659837.013.38>.

<sup>8</sup> §257c CCP.

<sup>9</sup> For an overview of the development, see T. Weigend, The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure, in: J. Jackson, M. Langer, and P. Tillers (eds), *Crime, Procedure and Evidence in a Comparative and International Context*, 2008, p. 39. – DOI: <https://doi.org/10.5040/9781472564528.ch-003>.

<sup>10</sup> §257c, Sec. 4 CCP.

voluntariness of the defendant's co-operation, which may well be induced by the (explicit or implicit) threat of a considerably more severe sentence in the event that he refuses the court's offer.<sup>\*11</sup> For our purposes, the relevant feature of the German version of plea bargaining is the replacement of the court's independent investigation by the unilateral declaration of the defendant that he committed the offence with which he has been charged. The judgement, in turn, is based on what the defendant said, not on the truth as discovered by the court.

But why should we object to the use of such abbreviated proceedings if the defendant really is guilty? Why waste time on presenting evidence in court if the outcome – that is, the sentence – will be the same? Isn't the same type of consensual disposition available in the civil process, in which the court adjudicates the plaintiff's claim without taking evidence to the extent that the defendant declares that he does not oppose the version of the facts alleged by the plaintiff<sup>\*12</sup>?

Upon closer inspection, however, there exist crucial differences between civil and criminal justice. Firstly, the suspicion that a serious crime has been committed will often raise alarm among the local population, who have a legitimate interest in learning what happened and who is the culprit. If the case is disposed of on the basis of a bargain, and the court takes no evidence beyond the defendant's declaration, this interest of the public is not satisfied. Further, negotiations on criminal matters differ from those on civil matters in that the agents of the state (i.e., judges and prosecutors) hold incomparably more power over the defendant than vice versa. The defendant and his lawyer may, by making extensive use of their rights, put some strain on the time and patience of the court, but the state can deprive the defendant of years of life in freedom, by imposing a heavy prison sentence. Hence, there exists in criminal cases a severe structural imbalance between the participants in any bargaining situation. It is therefore unlikely that a defendant's decision to accept a 'deal' offered by the prosecutor or the judge is truly voluntary in a strict sense; in many cases, his submission may be prompted by fear of a much worse outcome arising if he refuses to admit guilt.

Finally, the character of a criminal judgement, being an expression of moral reprobation, strongly suggests the need for a careful investigation of the matter before a judgement is pronounced, and so does the severity of the consequences of a criminal conviction.

For these reasons, a thorough search for the truth should remain an indispensable feature of any criminal process. It does not matter that a criminal court can never be certain of having found the whole truth. What counts is the judges' honest, visible effort to establish the facts that are necessary to arrive at a plausible verdict.

This effort need not necessarily be made at a traditional trial conducted in the inquisitorial or adversarial mode. It is conceivable, and in some cases perhaps even preferable, to conduct the main part of the search for the truth in a partly written, consecutive proceeding, as is now typical for the pretrial investigation.<sup>\*13</sup> However, such a proceeding can be a reliable basis for any judgement only if certain preconditions are met. First, the defence must have a broad and practicable right to actively participate in the investigation: leads offered by the defence must be followed up, and witnesses must be subject to questioning by the defence lawyer. Ideally, the investigation should, moreover, be conducted not by the prosecutor but by a neutral judge, or at least under the general supervision of a judge.

Only if these preconditions are met can the results of an investigation be regarded as sufficiently reliable that a judge can base the judgement on them, limiting himself to a review of the written record produced in the course of the investigation. If, however, serious contradictions or disputes as to the evidence or as to the law remain, an entirely or partially new process of evidence-taking will be necessary.

It is debatable whether the choice should be for the defendant to make, and, if so, whether waiver of an oral trial should be rewarded by sentencing concessions. A number of other issues remain to be resolved. But the general idea of a flexible system that abandons the ancient notion of finding the truth in one day of trial may be worthwhile to pursue, as an alternative to shortcuts to justice that rely exclusively on the defendant's acceptance of an offer he cannot well refuse.

<sup>11</sup> For a critical assessment of the constitutionality of the law on *Verständigung*, see the decision of the Federal Constitutional Court of 19 March 2013, 2 BvR 2628/10 (133 *Entscheidungen des Bundesverfassungsgerichts* 168).

<sup>12</sup> Cf. § 288 German Code of Civil Procedure.

<sup>13</sup> For an example of the such a procedure (judgement based on results of pretrial investigation), see Art. 438 et seq. of the Italian Code of Criminal Procedure (*Giudizio abbreviato*). See also F. Bommer et al., *Alternativ-Entwurf Abgekürzte Strafverfahren im Rechtsstaat*, *Goltdammer's Archiv für Strafrecht* 2019, 1, 66 et seq. (*Abgekürzte Verhandlung*).

### 3. Truth in criminal law

Turning now to the protection of the truth by means of criminal law, we should initially take note of the fact that public debate is more and more affected by the spreading of false information meant to influence the opinion of many people, especially potential voters. Should criminal law react to this phenomenon and, if so, how?

Criminal codes do not generally prohibit people from telling lies. Philosophers, such as Immanuel Kant,<sup>14</sup> have long debated whether there exists an unconditional duty to tell the truth.<sup>15</sup> But even if such a duty should exist, it belongs to the realm of morality<sup>16</sup> and is not reflected in criminal law. German criminal law, for example, does not generally punish a person for telling lies, but it does provide for criminal punishment for telling lies in any of several specific contexts.

Let me cite just a few instances from the German Penal Code (PC). It is punishable, for example, to commit perjury or to testify untruthfully in any judicial proceeding (§§ 153, 154 of the PC); to make a factually false statement in a public document or to bring about such a false statement (§§ 348, 271 of the PC); to convey false news to a foreign power, thereby endangering Germany's foreign relations or security (§ 100a of the PC); to make false statements, even if only by omission, to tax authorities (§ 370 *Abgabenordnung* – Tax Code) or to agencies in charge of granting subsidies (§ 264 of the PC); to falsely alert the police that a criminal offence has been committed or is about to be committed (§ 145d of the PC); to create a false suspicion that another person has committed a criminal offence (§164 of the PC); to falsely pretend to have an academic or other honorary title or to have the right to practise a protected profession (§132a, Sec. 1 of the PC); to publicly deny that the Holocaust happened, if that claim is apt to disturb the public peace (§130, Sec. 3 of the PC); to commit fraud (§263 of the PC), that is, to mislead another person about facts with the consequence of causing financial harm to another person; and to commit libel, that is, to disseminate falsehoods with regard to another person, having the potential of damaging that person's honour or credit (§ 187 of the StGB).<sup>17</sup>

Through the first six of these ten provisions, the Penal Code seeks to protect certain particularly sensitive aspects of public administration, the judicial process, and the state's fiscal interests against harm caused by lies. Similar protected interests are the trust of the public in honours and titles conferred by the state or state-controlled institutions and the 'public peace', which in Germany can be disturbed by debates about the question of whether the killing of millions of Jews in the 1940s actually occurred.

The rationale for prohibiting untruthful statements in these areas is mostly to make certain that decisions of courts and state agencies are based on 'true' facts. Yet a person is subject to punishment only if he or she *dishonestly* makes a false statement – that is, if the actor knows or at least accepts the possibility that his or her statement is untrue.<sup>18</sup> Honesty is required only with regard to factual statements (as opposed to expressions of opinion) and in relation to past or present facts, including the speaker's present intentions (as opposed to general prognoses).<sup>19</sup> It is only with regard to such facts, to which the relevant individual has exclusive or primary cognitive access, that the state and its agencies need to rely on citizens' honest co-operation.

The state's interest in basing its agencies' decisions on true facts, as protected by criminal law, corresponds with the truth orientation of the criminal process. As we have seen from Part II, criminal judgments should reflect the truth to the extent that it can be discovered within a reasonable time and with the available evidence. If judges disposed of criminal cases on the basis of fictitious or 'bargained' facts, they would not only abandon the general obligation to base their decisions on true facts but also disavow the obligation of witnesses to tell the truth, for why should a witness be punished for perjury if it is generally irrelevant whether the verdict is based on the truth?

<sup>14</sup> See, especially, *I. Kant*, Über ein vermeintes Recht aus Menschenliebe zu lügen, in: W. Weischedel (ed.), *Kant Werke*, Vol. 7, 5th ed. 1968, p. 637.

<sup>15</sup> See the philosophers cited in E. Hoven, Zur Strafbarkeit von Fake News – de lege lata und de lege ferenda, *Zeitschrift für die gesamte Strafrechtswissenschaft* 129 (2017), 718, 739-740. – DOI: <https://doi.org/10.1515/zstw-2017-0036>.

<sup>16</sup> See F. Rostalski, "Fake News" und die "Lügenpresse" – ein (neuer) Fall für das Straf- und Ordnungswidrigkeitenrecht? *Rechtswissenschaft* 2017, 436, 445. – DOI: <https://doi.org/10.5771/1868-8098-2017-4-436>.

<sup>17</sup> For a discussion of the applicability of § 187 and § 145d Penal Code to the spreading of fake news, see E. Hoven, Zur Strafbarkeit von Fake News – de lege lata und de lege ferenda, *Zeitschrift für die gesamte Strafrechtswissenschaft* 129 (2017), 718, 719-727, 735-737. – DOI: <https://doi.org/10.1515/zstw-2017-0036>.

<sup>18</sup> With the exception of negligent false swearing, § 161 PC.

<sup>19</sup> See, for example, N. Bosch and U. Schittenhelm, vor §153, note 7, in: A. Schönke and H. Schröder (eds), *Strafgesetzbuch*, 30th ed. 2019.

It is the exception rather than the rule that criminal law protects *private* interests against false claims. Most penal codes cover the crimes of fraud<sup>\*20</sup> and libel, protecting, respectively, a person's financial interests and his or her honour and credit. This anomaly may be explained by the fact that property and honour were supreme values in European societies of the second half of the 19th century, when the present German Penal Code and many other penal codes were originally devised.

In today's world, one may well ask whether a person has a legitimate claim to another person's honesty in financial matters and, if so, why.<sup>\*21</sup> We have seen, after all, that telling lies as such is not a criminal offence. The reason for the special treatment of lies related to facts relevant for financial matters is not ethical but pragmatic: economic transactions would be burdened with additional costs if the truth of each business partner's representations had to be checked in each particular instance. The threat of criminal punishment for *fraud* therefore lowers transaction costs by curbing the natural tendency of agents in commerce to pursue, by all available means, their selfish goals to the detriment of their business partners.

The threat of criminal liability may, on the other hand, sometimes do more harm than good: German scholars have long debated whether criminal liability for fraud should be limited to cases in which the victim is unable to protect himself by reasonable circumspection.<sup>\*22</sup> Just think of ads promising the loss of 40 pounds of body weight within a few weeks if only you buy the compound the seller offers you at a bargain price. The proposed restriction of the criminal law against fraud would mean that misrepresentations whose falsehood is very easy to detect are exempted from criminal liability. On the other hand, fraudsters who seek to profit from the intellectual deficiencies of their fellow citizens deserve and receive little sympathy.

Turning to the crime of libel, German penal law is quite extensive in its coverage of the endangerment of another person's honour and reputation.<sup>\*23</sup> According to §187 of the PC, it is a criminal offence to knowingly (*wider besseres Wissen*) assert or disseminate, with relation to another person, an untrue fact apt to harm his credit, to make him appear despicable, or to harm his reputation in the domain of public opinion. But even a person who in good faith communicates information detrimental to another person's reputation can be guilty of a crime: According to §186 of the PC, he can be convicted of calumny (*üble Nachrede*) if the truth of the alleged fact cannot be proved in court. The law thus shifts the risk of proof to the declarant. Today, many scholars claim that this provision over-extends the protection of personal honour and disproportionately limits the freedom of speech.<sup>\*24</sup>

Recently, a new form of fraud has been discussed in several countries, including Germany: sexual fraud. Since 2016, German law has defined the crime of sexual abuse as performing sexual acts with or in front of a person against that person's recognisable will. It is not clear whether this definition is met when a person has given his or her consent to sexual acts on the basis of a fraudulent representation. Section 76 (2) of the Sexual Offences Act (2003) for England and Wales provides that consent is invalid if '(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act; or (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant'. The Penal Code of Israel goes even further, negating consent if the defendant misled the complainant about a significant characteristic of his or her person (Art. 345 of the Penal Code).

German law does not have any such definition of consent and its limits. One may well argue, however, that true consent is missing if A's consent to sexual acts was induced by B's misrepresentation of facts that were determinative for A's decision. However, not every mistaken assumption on B's part can in fairness lead to A's criminal responsibility for sexual abuse. Otherwise, any false claim about one's financial

<sup>20</sup> See § 209, Sec. 1 of the Estonian Penal Code, defining fraud as causing proprietary damage to another person 'by knowingly causing a misconception of the existing facts'.

<sup>21</sup> For an explanation of the relevance of a 'right to truth' for the crime of fraud, see I. Puppe, *Das Recht auf Wahrheit im Strafrecht*, *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* 130 (2018), 649, 669-671. – DOI: <https://doi.org/10.1515/zstw-2018-0026>.

<sup>22</sup> For differing positions in this debate, see V. Erb, *Gängige Formen suggestiver Irrtuserregungen als betrugsrelevante Täuschungen*, *Zeitschrift für internationale Strafrechtsdogmatik (ZIS)* 2011, 368, 372-375; T. Hillenkamp, *Was macht eigentlich die Viktimodogmatik? Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* 129 (2017), 596. – DOI: <https://doi.org/10.1515/zstw-2017-0032>; R. Hefendehl, §263, notes 27-30, in: R. Hefendehl and O. Hohmann (eds), *Münchener Kommentar zum Strafgesetzbuch*, Vol. 5, 3rd ed. 2019.

<sup>23</sup> Several other jurisdictions treat libel not as a criminal offence but only as a civil tort.

<sup>24</sup> E.g., see R. Maurach, F.-C. Schroeder, and M. Maiwald, *Strafrecht Besonderer Teil, Teilband 1*, 9th ed. 2003, § 25, notes 20-21; E. Hilgendorf, § 186, note 4, in: H.W. Laufhütte, R. Rissing-van Saan, and K. Tiedemann (eds), *Strafgesetzbuch. Leipziger Kommentar*, Vol. 6, 12th ed. 2010; I. Puppe, *Das Recht auf Wahrheit im Strafrecht*, *ZStW* 130 (2018), 649, 659. – DOI: <https://doi.org/10.1515/zstw-2018-0026>.

situation or emotional involvement ('I am madly in love with you') could make the declarant criminally liable for rape. The risk of believing any such claim and building one's consent to sexual acts on it fairly lies with the consenting partner – life is full of potential disappointments, and it is not the task of the law to prevent them by imposing criminal punishment. But English law correctly delineates two exceptions to this rule: if, for example, a doctor pretends that manipulation of his patient's sexual organ is part of a necessary therapy, or an actor falsely claims to a woman to be her regular sexual partner, consent should be regarded as invalid.<sup>\*25</sup> That said, at least the second situation probably is not a frequent occurrence.

## 4. Criminal laws against 'fake news'?

Until the last part of the 20th century, whoever wished to harm others by spreading lies had to overcome significant obstacles: He needed to orally tell these lies to a large number of people or to circulate them by a series of letters. If the person wished to disseminate the false information by using print media or the radio, he needed to persuade the relevant editors to include the false information in their newspapers or programmes – which was not easy, because editors feared civil liability for libel. Because the means of spreading false information were so limited, there was only a low risk that someone could do harm simultaneously to many people's honour and dignity, or to their financial interests.

The advent of the internet all of a sudden changed this state of affairs. The internet provides every person with the opportunity to convey information, with a few clicks, to literally billions of users, without any external control as to the contents of the information. And a growing number of people worldwide rely on internet sources for information, some even trusting the internet more than conventional media. In consequence, the potential for doing harm by spreading false information has increased exponentially.

This leads to the question of whether criminal law can and should do something about it. There can be no doubt that the dissemination of false information that is apt to incite people to hatred or to violate a person's dignity has reached a new dimension since the internet has assumed a dominant role in many people's lives. And it is easy to imagine the great potential harm emanating from disinformation campaigns conducted over the internet, even to world peace and foreign relations. This consideration primarily indicates that the existing laws against spreading lies that affect the public domain – and, to some extent, the private domain as well – should be fully enforced even if the relevant offences are committed by using the internet. The anonymity of the Net, however, decreases the chances of successfully prosecuting such offences. More importantly, the existing criminal laws are, as we have seen, limited to a few particular instances of 'fake news'. They by no means cover all such misinformation, which may nevertheless cause confusion or serious conflict among users, or have potential of influencing their voting in political elections.<sup>\*26</sup> It is therefore a tempting idea to create a comprehensive criminal law provision against spreading fake news via the internet.

In some countries, there have been longstanding laws against the spreading of false news. For example, under Article 656 of the Italian Penal Code it is a criminal offence to publish or spread false, exaggerated, or tendentious information if that information may have the effect of disturbing the public peace.<sup>\*27</sup> In a similar vein, Article 27 of the French Law on the Press, originally dating from 1881, declares punishable by a fine of up to 45,000 euros the publication, distribution, or reproduction, by any means, of false news and of articles that are fabricated, falsified, or wrongly attributed to another person, if the act was carried out in bad faith and disturbed the public peace or had potential to do so. Undeniably, such broad criminal provisions significantly restrict public debate.

Austria has passed a much narrower law, focused on the risk of elections being influenced by fake news. Article 264 of the Austrian Penal Code makes it a crime to publish false news about a circumstance that has potential of influencing voters' decisions to take part in elections or to vote in a certain way, if the

<sup>25</sup> See E. Hoven and T. Weigend, *Zur Strafbarkeit von Täuschungen im Sexualstrafrecht*, *Kriminalpolitische Zeitschrift (KriPoZ)* 2018, 156 at 160-161.

<sup>26</sup> F. Rostalski, "Fake News" und die "Lügenpresse" – ein (neuer) Fall für das Straf- und Ordnungswidrigkeitenrecht? *Rechtswissenschaft* 2017, 436, 449-453. – DOI: <https://doi.org/10.5771/1868-8098-2017-4-436>. Plausibly recommends the introduction of a new provision criminalising the spreading of false information that has potential of causing severe harm to internal security.

<sup>27</sup> A draft law from 2017 (Senato della Repubblica, Disegno di Legge no. 2688, of 7 Feb. 2017) intended to introduce a new Art. 656-bis to the Penal Code, which would have rendered criminal spreading false, exaggerated, or tendentious information through electronic media, even in the absence of any disturbance of the public peace.

information is published so late that it cannot effectively be responded to by contrary information. France has long had a similar clause in its election code. Article 97 of the French *Code électoral* makes it a crime punishable by up to one year of imprisonment to divert a vote or to cause a voter to abstain from voting with the help of false information, slanderous rumours, or other fraudulent manoeuvres. In 2018, the French legislature passed a controversial law specifically directed against the influencing of political voting through the use of electronic media. Since the authors of fake news on the internet are difficult to identify and punish, the new legislation addresses the owners of internet platforms. For a period of three months in advance of any national or regional election, they must disclose to the public any significant amount paid by a third party in exchange for the promotion of certain content with relevance to the election (Art. 163-1 of the *Code électoral*), and omitting to do so is punishable by imprisonment of up to one year or a fine (Art. 112 of the *Code électoral*). More importantly, any candidate, party, or political group can request a judge to take all measures necessary to make the platform provider remove any manifestly erroneous or incorrect factual allegations that may impair the integrity of the impending election (Art. 163-2 of the *Code électoral*). The French legislature has taken this path in spite of allegations that it would undermine freedom of opinion and of the press and introduce state censorship.

Given the undeniable dangerousness of fake news for democratic elections, criminal laws drafted narrowly to cover bad-faith spreading of relevant false information are certainly worth considering, especially since the accuracy of news is often not easy to determine for an ordinary internet user.<sup>\*28</sup> Such laws could supplement the longstanding criminal provisions protecting public interests against false information.<sup>\*29</sup> However, it is questionable whether voters need (and can expect) the state to filter the available information for them; in a democratic state, the better course may be to rely on the sound judgement and healthy skepticism of internet users when they are called upon to make up their minds about candidates and parties.<sup>\*30</sup>

It is another question, however, whether it is the task of criminal law to *generally* prevent or at least restrict the (intentional or negligent) spreading of false information over the internet. Three arguments militate against introducing criminal laws aimed at comprehensively combating the spreading of fake news.<sup>\*31</sup>

First, if we go beyond the existing laws covering false information that endangers important interests of the state and of individuals, we enter an immensely large field of potentially false information tying in with all areas of life and knowledge. This field extends from clearly ridiculous pretensions far removed from any semblance of reality to claims that can seriously be debated, and further to statements of fact that have a realistic core but may be exaggerated or formulated in a one-sided or misleading way. At least with regard to the last two instances, courts are likely to face great difficulties if they attempt to establish the ‘true’ truth – consider how difficult it is for courts to find the truth even about simple occurrences in daily life. It may well overtax the capacity of criminal courts if they were to be the arbiters of what is truth in all areas of life and science.

Secondly, criminal laws against telling lies on the internet, enforced by heavy sanctions, would certainly have a deterrent effect. But that may be precisely the problem. Such laws would have a severe chilling effect on free speech and the exchange of views in cyberspace. The content and style of communication in some social media is certainly far removed from the high level to be desired (and not always attained) in parliamentary debate and often offends good taste to the extent of causing nausea. But even new criminal laws will not turn participants in cyber-discourse into more civilised and more empathic human beings. Besides, it would be the serious and well-intentioned debates on politically relevant questions that would suffer most from the threat of anti-‘fake news’ legislation.<sup>\*32</sup>

<sup>28</sup> The German Penal Code contains a long list of provisions criminalising certain acts intended to manipulate political elections or to falsify their results (§§ 107-108b PC). But these provisions do not cover the spreading of false information before an election takes place; see F. Rostalski, “Fake News” und die “Lügenpresse” – ein (neuer) Fall für das Straf- und Ordnungswidrigkeitenrecht? *Rechtswissenschaft* 2017, 436, 443-444. – DOI: <https://doi.org/10.5771/1868-8098-2017-4-436>.

<sup>29</sup> E. Hoven, Zur Strafbarkeit von Fake News – de lege lata und de lege ferenda, *Zeitschrift für die gesamte Strafrechtswissenschaft* 129 (2017), 718, 719-727, 741. – DOI: <https://doi.org/10.1515/zstw-2017-0036>.

<sup>30</sup> See F. Rostalski, “Fake News” und die “Lügenpresse” – ein (neuer) Fall für das Straf- und Ordnungswidrigkeitenrecht? *Rechtswissenschaft* 2017, 436, 446-447. – DOI: <https://doi.org/10.5771/1868-8098-2017-4-436>; B. Valerius, Wahlstrafrecht und soziale Medien, in: M. Böse (ed.), *Festschrift für Urs Kindhäuser*, 2019, pp. 825, 835.

<sup>31</sup> For similar argument against overall prohibition of spreading untruth, see E. Hoven, Zur Strafbarkeit von Fake News – de lege lata und de lege ferenda, *Zeitschrift für die gesamte Strafrechtswissenschaft* 129 (2017), 718, 739-740. – DOI: <https://doi.org/10.1515/zstw-2017-0036>.

<sup>32</sup> For a similar argument, see B. Valerius, Wahlstrafrecht und soziale Medien, in: M. Böse (ed.), *Festschrift für Urs Kindhäuser*, 2019, pp. 825, 836.



Thirdly, truthfulness and honesty still are important values in ‘analogous’ human relations, especially among people who have come to know each other personally and intend to pursue their relations in the future. There certainly exist areas of online communication where the mutual trust existing in the analogous world is carried over into digitalised communication – for example, online banking and online trade. In these instances, the internet provides a means of communication among institutions and individuals who have recourse to other forms of communication with ‘real’ persons if misunderstandings or problems arise. But for these areas of the internet world there is no need for new laws to curb the intentional spreading of untruths.

Many other, genuinely virtual channels of communication, however, hardly can claim truthfulness and honesty as their hallmark. In internet social media, many users intentionally remain anonymous by using fake identities; hence, there are no ‘real’ human beings to back up any claims that are made online. Whoever reads statements disseminated via social media or in private blogs is well aware that there is no tangible person who vouches for the truthfulness of these statements. Users therefore cannot have any reasonable expectation that the posts reflect the honest belief of any living person, much less that they represent reality. A person who relies on such information for important personal decisions only has himself to blame. The internet is a virtual and anonymous space that offers neither certainties nor relationships built on personal trust. One may well regret the decay of the open communication network that the internet was once meant to be. But criminal laws are not able to turn back the clock and establish the kind of trust in the internet that is typical of long-term human relations.

## 5. Conclusions

1. The subjectively honest search for truth still is an indispensable basis for the legitimisation of certain decisions. This applies to many areas of public administration and to judicial decisions, including the criminal process. Economic and business decisions likewise need to be built on an approximation of the true facts; hence, criminal law must and does lend its help, in encouraging market participants to remain honest through anti-fraud laws.

2. The anonymous, virtual world of cyberspace, by contrast, is largely not characterised by honesty and a search for truth. This leads to undeniable dangers, especially if users – unreasonably – trust in what the internet tells them. But criminal law will not be able to change, single-handedly, the un-real character of communication in cyberspace, and hence it should not attempt to do so.