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RESPONSES TO THE GROWTH OF CRIME IN THE UNITED STATES AND WEST GERMANY: A COMPARISON OF CHANGES IN CRIMINAL LAW AND SOCIETAL ATTITUDES

Gunther Arzt†

The United States is in many respects much more advanced than other societies. Yet not all of these advancements in American society are meritorious. The crime rate in the United States is higher and has risen faster than in many other countries. This Article will compare the American response to the growth of crime—particularly adaptations in the criminal law and in societal attitudes toward crime control policy—to that of West Germany. My aim is to consider the *consequences* of the growth of crime in the two countries, not merely the differences in substantive¹ or procedural² criminal law, or in crime statistics.³

A long-term increase in the crime rate in a society will presumably

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1. Most comparisons of German and American substantive criminal law concentrate on specific topics such as abortion, attempt, and the like. For more comprehensive comparative discussions, see H. SILVING, *CONSTITUENT ELEMENTS OF CRIME* (1967); O. LEE & T. ROBERTSON, "MORAL ORDER" AND THE CRIMINAL LAW: REFORM EFFORTS IN THE UNITED STATES AND WEST GERMANY (1973).

2. See Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 *YALE L.J.* 240 (1977); Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 *YALE L.J.* 1549 (1978); Goldstein & Marcus, *Comment on Continental Criminal Procedure*, 87 *YALE L.J.* 1570 (1978); Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 *BUFFALO L. REV.* 361 (1977). See also J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977).

3. Several attempts have been made to compare crime rates, mostly with the aim of uncovering the causes of crime or examining whether and why foreign crime prevention systems are more successful. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1968); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, *A NATIONAL STRATEGY TO REDUCE CRIME* 139, 141 (1973) (limits comparisons to the issue of gun control). See generally L. RADZINOWICZ & J. KING, *THE GROWTH OF CRIME* (1977).

produce many subtle changes, including legal changes, in that society. These changes do not usually appear to be dramatic if viewed from a short-term perspective. In fact, changes both in the criminal law and in societal attitudes may occur so slowly that they are not even perceived, let alone questioned, although their cumulative effect may be profound.

West Germany presently has a considerably lower level of crime than the United States, but its rate of crime is growing persistently. The American experience in adjusting to a high crime rate may be a portent of the German future; and the American present may represent a dramatic acceleration of the current slow changes now taking place in Germany. A comparison of the methods by which each country is adapting to increases in crime may further a recognition and understanding of the incremental changes Germany is currently undergoing. In addition, such a comparison may enable us to consider whether alternative legal responses and policies would be more desirable and practical.

I

COMPARISON OF CRIME RATES

The crime rate in America is considerably higher than the rate in Germany. In 1976 there were roughly 300% more rapes, 300% more burglaries, and 700% more robberies reported to the police in the United States per 100,000 inhabitants than were reported in Germany.⁴ Similar differences between American and West German crime rates exist with respect to other crimes. The first German victimization study, which was made of the city of Stuttgart, confirms that the risk of victimization is considerably lower in Stuttgart than in U.S. cities of comparable size.⁵

The rate at which particular crimes are increasing also varies between the two countries. Whereas burglaries are increasing at approximately the same rate in Germany and the United States, the gap between the robbery rate in the two countries is growing because the German rate is increasing more slowly than the American rate. The incidence of rape, which is perhaps a special case, has not increased significantly in Germany since 1963. In that year the German rate was higher than the American rate. Since then, the U.S. figure has tripled.⁶

4. The German figures for 1976 were 11.3 rapes and 31.6 robberies per 100,000 inhabitants. *BUNDESKRIMINALAMT, POLIZEILICHE KRIMINALSTATISTIK 10* (1976). The U.S. figures for 1976 were 26.4 rapes and 195.8 robberies per 100,000 inhabitants. *FEDERAL BUREAU OF INVESTIGATION, [1976] UNIFORM CRIME REPORTS 15, 18. See also G. ARZT, DER RUF NACH RECHT UND ORDNUNG 30-32* (1976) (detailed comparison of the period from 1963-73).

5. E. STEPHAN, *DIE STUTTGARTER OPFERBEFRAGUNG 327-34* (1976) (summary in English at 353-66).

6. G. ARZT, *supra* note 4, at 30.

A caveat is in order at this point: although comparisons of American and German crime statistics demonstrate in a general way the higher crime rate in America, they may not present a completely accurate picture for several reasons. A meaningful comparison requires that adjustments be made for differences in the reporting of criminal acts to authorities, as well as in the definitions of the crimes reported. Purse-snatching, for example, is not considered a robbery by the FBI's *Uniform Crime Reports*. In Germany, more than 15% of all reported robberies are incidents of purse-snatching.⁷ German and American crime statistics also differ with respect to age groups and population concentrations.

Furthermore, although substantive law definitions of crimes can be adjusted to facilitate comparisons, the statistics so obtained still exclude confrontations that fall short of conduct satisfying the substantive definition of an attempted or consummated crime. Even though such confrontations do not constitute a crime for crime statistics purposes, they contribute in a very real sense to the risk and fear of being victimized.⁸ Since crime statistics include only confrontations that actually develop into attempted or consummated crimes, they drastically understate the total victimization risk. There is no basis for arbitrarily assuming that the proportion of confrontations where the commission of a crime never occurred to confrontations where a crime was actually attempted or consummated is the same in all countries. In the absence of studies that reflect the total victimization risk and therefore the extent of societal fears of victimization, it is difficult to make a truly meaningful comparison of crime rates for the purpose of examining how different societies respond to an increasing crime rate.

II

RESPONSES OF THE CRIMINAL JUSTICE SYSTEM TO THE OVERLOAD CREATED BY INCREASING CRIME

A decade ago, when public concern over the crime issue first began to rise, the United States exhibited a tremendous reluctance to acknowledge that its high and rising crime rate might not abate in the foreseeable future.⁹

7. Compare [1976] UNIFORM CRIME REPORTS, *supra* note 4, at 18, 26 (purse-snatching is included in the definition of larceny but not in the definition of robbery) with POLIZEILICHE KRIMINALSTATISTIK, *supra* note 4, at 21 (18% of all German robberies reported in 1976 were incidents of purse-snatching).

8. See Arzt, *Ursachen und Folgen der Kriminalitätsfurcht*, 100 JURISTISCHE BLÄTTER (Aus.) 173, 175-76 (1978).

9. President Johnson declared war on crime in 1965, establishing the President's Commission on Law Enforcement and Administration of Justice. Exec. Order No. 11,236, 30 Fed. Reg. 9349 (1965). In announcing the appointment of the commission, the President stated: "All these [programs] are vital, but they are not enough. . . . We must arrest and reverse the trend toward lawlessness." President's Message to Congress on Law Enforcement and the

In the late 1960's, many prophecies of doom circulated based on the assumption that a democratic society could not adapt to such a high crime rate.¹⁰ In Germany today, there is a similar reluctance to accept the possibility that Germany could experience an increase in the crime rate so dramatic as to approach the current American level. But just as the United States is adjusting to rising crime, so will Germany have to adjust if its crime rate continues to rise. Germany, however, might face some special problems in adapting to higher crime rates because of the nature of its criminal law system. These potential problems are worth exploring.

A. THE GERMAN LEGALITY PRINCIPLE

It should be obvious that increases in crime lead to pressures within a criminal justice system. The American discretionary prosecution principle helps to reduce such pressures because it regulates input into the criminal justice system at the procedural level. The German system, however, differs from the American in a very important respect: the German *Legalitätsprinzip*, or legality principle,¹¹ calls for compulsory prosecution of all

Administration of Justice, [1965] 1 PUB. PAPERS 263, 264 (emphasis in original). See generally Finckenauer, *Crime as a National Political Issue: 1964-76*, 24 CRIME & DELINQUENCY 13, 16-22 (1978).

10. See, e.g., J. SKOLNICK, THE POLITICS OF PROTEST 346 (1969) (Report of the Task Force on Violent Aspects of Protest and Confrontation, National Commission on the Causes and Prevention of Violence). The Skolnick Report concludes with the following warning:

This nation cannot have it both ways: either it will carry through a firm commitment to massive and widespread political and social reform, or it will develop into a society of garrison cities where order is enforced without due process of law and without the consent of the governed.

For another prediction of the demise of society, see R. ARDREY, THE SOCIAL CONTRACT (1970).

The rise in crime also touched off heated political dialogue. Many political candidates made campaign issues out of high crime, promising to reduce it if elected. See Finckenauer, *supra* note 9, at 16-19.

11. STRAFPROZEßORDNUNG [StPO] (Code of Criminal Procedure) §§ 152, 163 (W. Ger.). STPO § 152, as translated in J. LANGBEIN, *supra* note 2, at 158, provides:

I. The public prosecutor is responsible for preferring the official charge.

II. Except as otherwise provided by law he is required to take action against all prosecutable offenses, to the extent that there is a sufficient factual basis.

STPO § 163, as translated in 10 AMERICAN SERIES OF FOREIGN PENAL CODES, THE GERMAN CODE OF CRIMINAL PROCEDURE 93 (H. Niebler trans. 1965), provides in part:

I. Police agencies and officials shall investigate punishable acts and shall take all measures which permit of no delay in order to prevent the matter from being obscured.

II. Police agencies and officials [shall] transmit to the prosecution without delay all evidence collected by them.

The German legality principle has come under much discussion recently. See Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508 (1970); Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974); Schram, *The Obligation to Prosecute in West Germany*, 17 AM. J. COMP. L. 627 (1969); note 2 *supra*. For discussions of the extent to which the legality principle is adhered to in

serious crimes. Under the legality principle, the substantive definitions of serious crimes, not prosecutorial discretion, determine input into the criminal justice system. Any increase in serious crime creates a corresponding increase in input into the system. Since the resources of the system, such as prosecutors, judges, and prison personnel, tend to remain constant or increase much more slowly than does the crime rate, mandatory prosecution in a period of rising crime tends to overload the system to the point of collapse.

Some writers have claimed that, under a system of compulsory prosecution, only in theory do the substantive definitions of crimes determine input into the system. In practice, informal procedures arise under which selective prosecution occurs.¹² Although the manpower of the criminal court system is flexible enough to cope with an overload of up to ten or twenty percent, the final stage of criminal procedure—prison sentencing—is very inflexible. Prison capacity cannot be exceeded, at least not without violating prisoners' rights to a minimum of living space and humane treatment.¹³ Therefore, according to the argument, a compulsory prosecution system must in practice allow some prosecutorial discretion in order to adjust to the bottleneck created by the capacity of its prisons.¹⁴

Although a plausible hypothesis, the above argument does not reflect reality. In fact, Germany has increased the use of fines and suspended sentences while drastically reducing actual imprisonment.¹⁵ This trend away from imprisonment is attributable less to adjustments to the increase in crime than to an unrelated trend toward employing a rehabilitative approach to punishment.¹⁶ The decrease in punishment by imprisonment

actual practice, see Darby, *Discussion of Petty Offenses*, 24 AM. J. COMP. L. 768, 778 (1976); Goldstein & Marcus, *supra* note 2; Herrmann, *The Role of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468 (1974).

12. See, e.g., Goldstein & Marcus, *supra* note 2; Darby, *supra* note 11, at 778 n.43. Goldstein and Marcus state:

The principle of compulsory prosecution, which formally permeates the German and Italian systems, and informally the French, demands the impossible: full enforcement of the law in a time of rising crime and fierce competition for resources. Inevitably, adjustments must be made in the way in which the principle is to be applied; where formal law or ideology does not permit these adjustments, informal processes are created that do.

Goldstein & Marcus, *supra* note 2, at 280.

13. There is a constitutional guarantee of rehabilitative treatment in Germany. See Judgment of June 5, 1973 ("Lebach"), 35 BVerfGE 202, 235-38.

14. Goldstein and Marcus suggest that the Italian practice of periodically granting amnesty may be attributable to an overload of its criminal justice system. Goldstein & Marcus, *supra* note 2, at 282 n.95.

15. Although the total number of crimes known to the police in Germany jumped from 1,678,840 in 1963 to 3,063,271 in 1976 and the total number of sentences during this period rose from 309,268 to 388,767, the total prison population declined from 43,453 to 35,085. See G. ARZT, *supra* note 4, at 154.

16. This reduction in the prison population is traceable to two distinct views toward reha-

should come as no surprise to American observers, since the growth of crime in the United States has not been accompanied by a corresponding increase in the prison population.¹⁷

Prison capacity is thus not a bottleneck that will cause a breakdown of the German principle of compulsory prosecution. Growing crime nevertheless puts a heavy strain on the resources earmarked for rehabilitative purposes¹⁸ and leaves unresolved the basic problem—overloading of the criminal justice system as a whole.

B. DECRIMINALIZATION

Seemingly the most logical method of reducing the burden placed on a compulsory prosecution system by the growth of crime would be to decriminalize less serious offenses, or “marginal crime.” Law enforcement officials in a compulsory prosecution system often favor decriminalization because they see it as the only method of reducing their workload. The alternative—far-reaching criminal laws but selective enforcement—is not available under the German system.

bilitation—one optimistic, the other pessimistic. The optimistic view is that rehabilitation protects society against potential future criminal acts. For an official statement of the goals of rehabilitation, see STRAFVOLLZUGSGESETZ [STVG] (Federal Code of Imposition of Punishment) § 2 (W. Ger.). See also 21 AMERICAN SERIES OF FOREIGN PENAL CODES, ALTERNATIVE DRAFT OF A PENAL CODE FOR THE FEDERAL REPUBLIC OF GERMANY §§ 2, 37, 38 (J. Darby trans. 1977); Baumann, *The Alternative Draft Prepared by the Criminal-Law Teachers to the Code of Criminal Law and Execution of Punishment*, 1 LAW & STATE 52 (1970); Eser, *Criminal Law Reform: Germany*, 21 AM. J. COMP. L. 245, 252-57 (1973). Under the optimistic view, rehabilitation is possible only if prisons are uncrowded, prison personnel is well trained, and prisoners are institutionalized for a significant amount of time. Therefore, criminals who have committed only minor to medium offenses, and perhaps even criminals who have committed very serious offenses but who are not in need of rehabilitation, should be diverted from the prison system. Sanctions for these offenders should include fines, suspended sentences, or obligations of restitution. As a result, prisons are available for those who are in need of rehabilitation.

The pessimistic view is that imprisonment for rehabilitative purposes is a dismal failure. Pessimists see imprisonment not as a cure for crime but as a cause or “factory” of future crime. See R. CLARK, *CRIME IN AMERICA* 212-38 (1970); Walker, *Reexamining the President's Crime Commission*, 24 CRIME & DELINQUENCY 1, 8 (1978) (“Today, the commission's optimism is regarded by those in criminal justice as almost a bad joke.”). They therefore encourage diverting as many offenders as possible from the prison system. For those offenders who cannot be diverted, the pessimists would urge institutionalization to protect society against their criminal activities. Paradoxically, the result under the pessimistic view is the same as that under the optimistic view: the prison population declines, at least in relation to the arrest rate.

17. Even though the U.S. attitude toward imprisonment is similar to that of Germany—a curious blend of rehabilitative optimism and pessimism—there is a basic difference. The United States has two alternative methods by which to divert offenders from the prison system: by meting out milder sanctions after conviction at trial or by procedural devices such as selective prosecution and plea bargaining. Under the legality principle, however, only the former method is available in Germany.

18. See R. CLARK, *supra* note 16, at 212-38.

But there are problems with decriminalization in Germany. First, the increase in Germany's crime rate has not been limited to an increase in marginal crime. Decriminalization of marginal crimes would do nothing to ease the burdens created by the upsurge in serious crime. Second, Germany has already decriminalized so many marginally criminal offenses that any further decriminalization would have to be done not in the name of liberalization but out of desperation. I do not want to imply that the possibilities for decriminalization are completely exhausted in Germany. I have repeatedly urged the decriminalization of such minor property offenses as shoplifting.¹⁹ The effect of further decriminalization, however, would be very limited, unless decriminalization were extended to hard core crimes.

C. BREAKDOWN OF COMPULSORY PROSECUTION

A more realistic alternative for reducing the overload in the German criminal justice system is the abandonment of the principle of compulsory prosecution. The breakdown of this principle is clearly not far away.²⁰ The advent of discretionary prosecution, although it would provide superior repressive capacity,²¹ would also impair the liberty and due process

19. The Fifty-first Congress of German Jurists, held in Stuttgart in 1976, discussed proposals to decriminalize petty offenses. See Naucke, *Sanktionen für Kleinkriminalität (Strafrechtliches Teilgutachten)*, 51 VERHANDLUNGEN DES EINUNDFÜNFZIGSTEN DEUTSCHEN JURISTENTAGES [DJT] at D1 (vol. 1 1976); Deutsch, *Sanktionen für Kleinkriminalität (Zivilrechtliches Teilgutachten)*, 51 DJT at E1 (vol. 1 1976); Stoll, 51 DJT at N7 (vol. 2 1976) (Zivilrechtliches Referat); Arzt, 51 DJT at N43 (vol. 2 1976) (Strafrechtliches Referat). The Congress ultimately rejected the proposals. 51 DJT at N178-81 (vol. 2 1976).

Other commentators have also considered the decriminalization issue. See, e.g., Vogler, *Möglichkeiten und Wege einer Entkriminalisierung*, 90 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 132 (1978); Darby, *supra* note 11.

20. De facto deviations from the principle of compulsory prosecution are already becoming a problem. See authorities cited in note 11 *supra*. Efforts to expand de jure exceptions to compulsory prosecution have had success both for minor and serious crimes. Recent "reform" legislation has given the prosecutor the power to bargain with those accused of minor property crimes. Law of Jan. 1, 1975, [1974] Bundesgesetzblatt [BGB1] I 469 (W. Ger.) (codified at StPO § 153). Under StPO § 153, the prosecutor can decline to prosecute the accused if the accused agrees to meet the prosecutor's demands. The statute, however, narrowly prescribes the demands the prosecutor may make. Such demands range from restitution to payments in the nature of a fine. See Herrmann, *supra* note 11, at 483; Jescheck, *supra* note 11, at 513-14. Although information is as yet incomplete, it appears that prosecutors are using their new authority sparingly. For a first empirical analysis, see W. AHRENS, *DIE EINSTELLUNG IN DER HAUPTVERHANDLUNG GEM. §§ 153 II, 153 a II StPO*, at 76-78 (1978).

As for serious crimes, Germany is in the midst of a heated controversy over whether to introduce the concept of witness immunity into German law. See H. JUNG, *STRAFFREIHEIT FÜR DEN KRONZEUGEN?* (1974). Proposed legislation on witness immunity would allow the government to promise immunity to cooperative witnesses in terrorist cases. Although the legislation has been voted down several times, the margins are getting narrower. See Meyer, *Brauchen wir den Kronzeugen?*, 9 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 25, 25-27 (1976).

21. See note 29 *infra*.

rights of suspected criminals.

1. Compulsory Prosecution Prevents Overcriminalization

Under a compulsory prosecution system, the substantive criminal law makes criminal only those acts that will always be subject to punishment. Compulsory prosecution thereby prevents overcriminalization,²² which arises under discretionary prosecution. Overcriminalization involves making certain relatively minor offenses criminal and then selectively enforcing them by prosecuting only the most egregious violators. Thus, as a general rule violations of these offenses do not subject the offender to criminal sanctions; but there is no guarantee that any individual offender will not be prosecuted.

2. Discretionary Prosecution is Subject to Inadequate Checks on Administrative Power

Administrative discretion is a common characteristic of German law—from the revocation of a driver's license or the issuance of a license under a building ordinance to the distribution of welfare benefits. But exercises of administrative discretion are subject to clear limitations and court supervision. Any alleged abuse of discretion within the administrative hierarchy is subject to judicial scrutiny. German university students can even obtain judicial review of their instructors' discretion in grading examination papers.

Wherever the principle of discretionary prosecution has made inroads in Germany, however, efforts to limit the discretion of the prosecutor have been unsuccessful in all but the most outrageous cases of abuse. Similar efforts have been equally unavailing in the United States. Several hundred thousand discretionary prosecution decisions are made there every year. Applying realistic standards to the wisdom and motives of the typical prosecutor, at least several hundred of these discretionary decisions are unfair either to the alleged perpetrator or to the crime victim.²³ Yet few checks and balances have been successfully developed in the American system to curb these inevitable abuses of discretion in deciding whether to prosecute.²⁴

22. "Overcriminalization" refers to criminal laws that enforce society's moral values (*e.g.*, prostitution, abortion, gambling) or that criminalize activity as means of providing a social service (*e.g.*, bad check laws, family support laws). Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157, 157 (1967).

23. Decisions might be unfair for a variety of reasons, among them inconsistency with decisions made in similar cases and improper motivation.

24. There have been numerous attempts to bring about more consistency. *See, e.g.*, J. JACOBY, *THE PROSECUTOR'S CHARGING DECISION: A POLICY PERSPECTIVE* (1977) (discussion of evaluation procedures). The absence of adequate checks on exercises of discretion extends

3. *Discretionary Prosecution Distorts Procedural Safeguards*

When coupled with plea bargaining, discretionary prosecution denies the accused the procedural safeguards that would accompany a full trial. Discretionary prosecution allows the prosecutor to agree to reduce the charge against an accused to a less serious offense in return for a guilty plea. Consequently, where a risk of conviction after full trial exists, the prosecutor can coerce the accused to waive his right to a full trial and to a determination of guilt beyond a reasonable doubt.

In the Middle Ages, the sanction of *poena ordinaria* applied to offenses that could be proven beyond reasonable doubt. The *poena ordinaria* was supplemented by a lesser sanction, the *poena extraordinaria*. If the community strongly suspected that the accused had committed a crime but had insufficient evidence to satisfy the standard of the *poena ordinaria*, the accused was charged under the *poena extraordinaria*. Discretionary prosecution coupled with plea bargaining perpetuates the ancient doctrine of the *poena extraordinaria*, even though basic constitutional protections are thereby sacrificed.²⁵

4. *Discretionary Prosecution Distorts Substantive Law Sanctions*

Another effect of discretionary prosecution operating together with plea bargaining is that an accused, by pleading guilty to a less serious offense than he allegedly committed, can obtain a milder sanction than that which the substantive law specifies for the offense actually committed. Of course, the willingness of the accused to plea bargain is dependent upon the risk of conviction at full trial. Most defendants prefer the certainty of a reduced sanction to the possibility of an acquittal coupled with a high probability of a harsh sanction. The normal substantive law sanction for an offense thus becomes the exception, thereby penalizing those who insist on their constitutional right to a full trial and are subsequently convicted.

I should point out that in the United States the Supreme Court has endeavored to erect some constitutional protections for criminal defendants engaged in plea bargaining.²⁶ Also, some benefits may accrue to defend-

in the United States to police decisions on whether to investigate criminal activities in order to prevent crime. *But cf.* *Riss v. City of New York*, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968)(victim sued city for failure to provide police protection after she complained that her boyfriend had threatened her with bodily harm).

25. J. LANGBEIN, *TORTURE AND THE LAW OF PROOF* 47-63 (1977). Langbein emphasizes the correlation between sanctions, evidentiary standards, and methods of obtaining evidence. As to such correlations in present German law, see G. ARZT, *DELIKTE GEGEN DIE PERSON*, in *STRAFRECHT BESONDERER TEIL* 1, 9-10 (1977).

26. Plea bargaining appeared to be out of favor after *United States v. Jackson*, 390 U.S. 570 (1968), *McCarthy v. United States*, 394 U.S. 459 (1969), and *Boykin v. Alabama*, 395 U.S. 238 (1969). Now it appears that the subsequent cases of *Brady v. United States*, 397 U.S. 742

ants who plea bargain.²⁷ I will not attempt to evaluate the merits of these points. My thesis is simply that discretionary prosecution coupled with plea bargaining creates a double standard of substantive criminal law sanctions. Defendants willing to plea bargain are less likely to face sanctions as harsh as those meted out to defendants who are unwilling to plea bargain.

5. *Discretionary Prosecution Undermines the Purpose of the Substantive Law*

Discretionary prosecution allows the state to prosecute violators not for the sake of enforcing the law violated, but in order to inflict punishment for other, more serious violations for which insufficient proof exists to convict. A familiar example of this type of distortion of the criminal law is the conviction of Al Capone for income tax evasion because of insufficient evidence to establish murder.²⁸

This brief review of several of the weaknesses of discretionary prosecution is not necessarily an attack on the American system. Rather, it is a reminder that, despite the drawbacks of discretionary prosecution, the growth of crime in Germany will inevitably lead to the use of discretionary prosecution because of its superior repressive capacity. This superiority results from the fact that, given equal resources, a discretionary prosecution system enforces a broader substantive law and thus represses a broader scope of behavior than does a compulsory prosecution system.²⁹

(1970), *McMann v. Richardson*, 397 U.S. 759 (1970), and *Parker v. North Carolina*, 397 U.S. 790 (1970), have rescued plea bargaining. But the doubts whether the plea bargaining system is good or even tolerable, *see Brady v. United States*, 397 U.S. at 751-53; *id.* at 775 (Brennan, J., dissenting), have vanished with remarkable rapidity, *see Santobello v. New York*, 404 U.S. 257 (1971). In *Santobello*, plea bargaining was deemed "an essential component of the administration of justice." *Id.* at 260. More recently, the Court refused to strike down a life sentence obtained by a prosecutor in a forgery case against a defendant after the defendant refused to bargain. *Bordenkircher v. Hayes*, 98 S. Ct. 663 (1978).

27. Most defendants who plea bargain get the benefit of a milder sentence. Perhaps, however, the more than 90% of all criminal defendants who plea bargain end up receiving just and fair sentences while the few who do not plea bargain (and are later convicted) receive unduly harsh sentences. If this is the case, then plea bargaining does not confer a benefit. Instead, it forces defendants to sacrifice their constitutional rights to avoid receiving an unduly harsh sentence. *Cf. Bordenkircher v. Hayes*, 98 S. Ct. 663 (1978) (convicted forger received life sentence after he refused to plea bargain).

28. *See R. HAMMER, ORGANIZED CRIME 149-50 (1975)*. *See also* note 62 *infra* and accompanying text.

29. Repressive capacity as used in this Article means the capacity to enforce substantive law provisions by threat of criminal law sanctions, or deterrence *potential*. Still assuming equal resources, there is no difference between the discretionary and compulsory prosecution models in their *actual* repression in terms of convictions obtained, sanctions meted out, and persons imprisoned. The greater repressive capacity of discretionary prosecution is demonstrated by the effect of decriminalization under each system. Under compulsory prosecution, decriminalization means a reduction in the scope of behavior that the government must repress

Nonetheless, I favor retention of a compulsory prosecution system. The superiority of this system in ensuring the protection of individual liberty and due process far outweighs any shortcomings in terms of weaker repressive capacity.

III

EXPANSION OF POLICE POWERS TO FIGHT RISING CRIME

Another potential consequence of an increasing crime rate is a disruption of the balance between individual rights and police power to combat crime. In virtually all of its decisions concerning criminal procedure, the United States Supreme Court has considered the likely effect of the decision on police efficiency. In *Terry v. Ohio*,³⁰ the Court considered the argument that "the police are in need of an escalating set of flexible responses."³¹ In *Miranda v. Arizona*,³² the Court noted that "while protecting individual rights, [we have] always given ample latitude to law enforcement agencies in the legitimate exercise of their duties."³³ Public sentiment differs as to whether the Court is molding the optimum balance between citizens' rights and the powers of the police.³⁴ Viewed from a distance and with the benefit of hindsight, the Warren Court seems to have achieved an unlikely result: it strengthened the rights of the criminal defendant during a period of rising crime and growing public concern over crime control.³⁵ The Burger Court, however, seems to have started a reversal of this trend.

In Germany, members of Parliament are most directly susceptible to public pressure to reduce crime, to get tough with criminals, and to strengthen police power. Expansion of the powers of the German police to

by criminal sanctions *and* a reduction in the output in the form of convictions, sanctions, and imprisonment. Under discretionary prosecution, decriminalization results in a reduction in the scope of behavior subject to repression by criminal sanctions. It does not, however, affect the output in the form of convictions, sanctions, and imprisonment, because the repressive capacity no longer needed for crimes that have been decriminalized can be used to repress more vigorously other behavior that previously had been de facto tolerated as a result of limited resources within the criminal justice system.

30. 392 U.S. 1 (1968).

31. *Id.* at 10.

32. 384 U.S. 436 (1966).

33. *Id.* at 481. A dissent in *Miranda* attacked the decision of the Court as undermining crime prevention and police performance. *Id.* at 537-42 (White, J., dissenting).

34. This balance is generally characterized as between individual liberty and public security. But the Supreme Court has repeatedly rejected this characterization as misleading. *See, e.g., United States v. Harris*, 403 U.S. 573, 599 (1971) ("the Fourth Amendment . . . surely was never intended as a hindrance to fair, vigorous law enforcement.").

35. The Court, of course, had many critics, especially from the law enforcement personnel whose actions were so frequently under scrutiny. This led Mr. Justice Fortas to complain of "foot-dragging" by the police. *Desist v. United States*, 394 U.S. 244, 276 (1969) (dissenting opinion).

fight crime is therefore more likely to occur by code amendment than by case law.³⁶

Electronic surveillance³⁷ and centralization of the police are two important issues over which public pressure is mounting in Germany. The pressure for increased use of electronic surveillance has been spurred at least in part by American experiences.³⁸ The Schleyer kidnapping³⁹ in autumn 1977 has heightened interest in both issues, especially police centralization. Police investigations in Germany are presently within the control of the prosecutor, and the police are at his command. But the police are becoming resentful of the prosecutor's right to control investigations.⁴⁰ As

36. In the past few years, Germany has enacted several amendments to the Code of Criminal Procedure in response to terrorism. Law of Dec. 9, 1974, [1974] BGBI I 3393; Law of Dec. 20, 1974, [1974] BGBI I 3686; Law of Aug. 18, 1976, [1976] BGBI I 2181; Law of Sept. 30, 1977, [1977] BGBI 1877; Law of Apr. 14, 1978, [1978] BGBI 497.

37. Presently there is no authority in Germany for interception of oral communications. StPO § 100 allows wire interception only. In 1977, in order to intercept verbal messages of Dr. Traube, a nuclear scientist suspected of involvement with terrorists, the police had to rely on STRAFGESETZBUCH [StGB] (Penal Code) § 34 (W. Ger.). This section deals with those rare situations where two legally protected interests conflict. The *citizen* may resolve this conflict by violating the lesser interest, relying on the broadly defined grant of authority in StGB § 34. The Traube case first drew attention to the now highly controversial issue of whether the government may invoke StGB § 34 in general and specifically in wiretapping cases. See Amelung, *Erweitern allgemeine Rechtfertigungsgründe, insbesondere § 34 StGB, hehliche Eingriffsbefugnisse des Staates?*, 30 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 833 (1977).

38. The U.S. Congress enacted wiretapping authority in 1968, Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, §§ 801-802, 82 Stat. 197 (1968)(codified at 18 U.S.C. §§ 2510-2520 (1976)), despite skepticism on the part of the administration. See J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE 21-33 (1977). President Johnson later called the legislation a "major disappointment" and "a grave danger to our constitutional rights." L. JOHNSON, THE VANTAGE POINT 335 (1971).

39. See N.Y. Times, Oct. 20, 1977, at 1, col. 2.

40. Police investigative power is a complex issue. The StPO establishes the legal duties and authority of both police and prosecutors. See notes 2 & 11 *supra*. The StPO regulates criminal detection, investigations, apprehension, and prosecution, placing prosecutors in charge of these procedures. The police are placed at the disposal of the prosecutors and are under their command.

Nevertheless, in practice the police operate independently of the prosecutors until they believe the case is solved. They then submit the file to the prosecutor. The prosecutor normally exerts his influence only in very serious cases, or in cases in which the police want to employ investigative techniques requiring judicial approval—for which only the prosecutor can apply. When prosecutors do get involved in investigations, the police resent such participation as "meddling" because the police normally have the better resources to deal with crime. Although the conflict has rarely surfaced publicly, a few years ago a public controversy developed between the Munich Police Chief, Manfred Schreiber, and a leading Munich prosecutor, Erich Sechser, over the handling of the Luhmer kidnapping case. See Schreiber, *Kindesentführungen*, 25 KRIMINALISTIK 225 (1971) (attacking the "legal fiction" that the prosecutor "dominates" police investigations); Sechser, *Staatsanwaltschaft und Polizei*, 25 KRIMINALISTIK 349 (1971) (bitter reply to Schreiber).

Schreiber and Sechser later disagreed over the handling of the Rammelmayr case. The police wanted to allow Rammelmayr, who had taken hostages in an attempted bank robbery in downtown Munich, to leave the bank with his hostages. The police would have waited to attempt a rescue operation. The prosecutor wanted Rammelmayr arrested on the spot.

German police budgets increase, the police may become even more hostile to a system that gives prosecutors the legal right to take charge of police investigations.

Should police disregard of defendants' rights become a problem,⁴¹ Germany may have to reconsider whether the heretofore relaxed approach to formal requirements taken by the federal Code of Criminal Procedure and state police statutes is appropriate. Perhaps Germany will have to control the power to search, seize, and arrest as the United States currently does. On the surface, the search and seizure laws of the two countries are already quite similar.⁴² The major difference is the particularity requirement of U.S. law. StPO section 103 requires particularity, but only for searches of persons or homes of nonsuspects. For suspects, the law does not demand particularity with respect to the objects acquired by search or the places to be searched.⁴³ Finally, searches and seizures in violation of the law do not lead to the exclusion of evidence so obtained.⁴⁴

The probability of Germany abandoning these rules to adopt an approach more similar to that of the United States is not very high. After all, even in the United States there is considerable disenchantment with, for example, the exclusionary rule.⁴⁵ Furthermore, the necessity for adopting

Sechser ordered a shootout which resulted in the death of a hostage. For a detailed account of the Rammelmayer case and of the controversy between Schreiber and Sechser, see DER SPIEGEL, Aug. 9, 1971, at 25, 25-28.

41. There is no clear indication of why police lawlessness has not become a pressing problem in Germany. I suggest that the following three factors contribute at least in part to keeping police corruption low: (1) the police force is organized on a statewide level and the promotion incentive makes internal controls very effective; (2) since there is less incidence of violent crime, especially against the policemen, the police can deal with suspects in a more detached manner; and (3) gambling and prostitution, major sources of police corruption in the United States, are almost completely decriminalized.

42. Warrantless searches in both countries are permissible only if there is danger in delay. StPO § 105; *Chimel v. California*, 395 U.S. 752, 761-62 (1969). Moreover the German substantive requirement of suspicion or *Verdacht*, StPO § 102, is roughly equivalent to the probable cause requirement of the fourth amendment. T. KLEINKNECHT, KOMMENTAR ZUR STRAFPROZESSORDNUNG § 102 (W. Ger.), annot. No. 6 (30th ed. 1971) (suspicion must be based on facts, past criminal experience, or rational deductions, not merely surmise or hunch). *But see* note 43 *infra*.

43. StPO § 102. The less stringent German particularity requirement may have the practical effect of lessening the degree of suspicion necessary to obtain a search warrant to a level below that required in the United States.

44. Very few German cases have arisen involving illegal searches or seizures. The German Constitutional Court has, however, considered searches of press archives. Judgment of Aug. 5, 1966 ("Spiegel"), 20 BVerfGE 162. The court demanded a balancing of the two interests involved: freedom of the press and effective administration of justice. As to whether the search of the Spiegel archives was justified, the court split evenly and consequently upheld the search warrant. This decision led to an amendment to the StPO limiting these searches and conferring special witness immunity on members of the news media. StPO §§ 53 (1)(5), 97 (1)(5), 98 (1).

45. *See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 411-27 (Burger, C.J., dissenting). *See also Finckenauer, supra* note 9, at 35-37 (discussion of

the American approach has not yet arisen in Germany; there is little evidence of increased police corruption in response to heightened public outcry for more efficient law enforcement.

IV

EROSION OF THE ELEMENTS OF A CRIMINAL OFFENSE

A. EROSION OF THE INTENT REQUIREMENT

Although the public pressure for crime control has not visibly increased police corruption, it certainly has contributed to a slow erosion of the substantive elements of a criminal offense under German law. Despite the importance modern criminal theorists place on the state of mind or mens rea of an offender,⁴⁶ in practice the role of subjective components such as intent is being downplayed. Where only a strong suspicion of intent exists, German prosecutors are increasingly charging offenders with crimes of negligence rather than risking acquittal of the accused for lack of proof of intent.

This approach to prosecution seriously confuses evidentiary problems with issues of substantive law. An important scholarly achievement of the 19th century was the sharp separation of the law of evidence from substantive law.⁴⁷ The concept of negligence did not develop as a lesser state of mind requirement for use when there was insufficient evidence to establish intent. Rather, it evolved as an independent standard to determine whether a defendant should be held more responsible for his acts than if the acts had occurred by mere chance or accident. As crimes requiring proof of intent are reduced to crimes of negligence because of evidentiary problems, the important separation is lost.

Not all legal systems attach the same procedural consequences to the

the current political trend toward eliminating procedural technicalities that hamper law enforcement).

46. On the refinement of the mens rea doctrine, see the recent monographs by M. BURGSTALLER, *DAS FAHRLÄSSIGKEITSDELIKT IM STRAFRECHT* (1974); P. FRISCH, *DAS FAHRLÄSSIGKEITSDELIKT UND DAS VERHALTEN DES VERLETZTEN* (1973); G. JAKOBS, *STUDIEN ZUM FAHRLÄSSIGEN ERFOLGSDELIKT* (1972); A. KAUFMANN, *DAS SCHULDPRINZIP* (1977). See also Grassberger, *Aufbau, Schuldgehalt und Grenzen der Fahrlässigkeit, unter besonderer Berücksichtigung des Verkehrsstrafrechts in Österreich*, 5 *ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG [ZFRV]* 18 (1964); Cornil, *Die Fahrlässigkeit im französisch-belgischen Strafrecht*, 5 *ZFRV* 30 (1964); Kaufmann, *Das fahrlässige Delikt*, 5 *ZFRV* 41 (1964); Jakobs, *Das Fahrlässigkeitsdelikt*, in *DEUTSCHE STRAFRECHTLICHE LANDESREFERATE ZUM IX. INTERNATIONALEN KONGRESS FÜR RECHTSVERGLEICHUNG* 6, 30-33 (1974). On the mistake of law doctrine, see Arzt, *Ignorance or Mistake of Law*, 24 *AM. J. COMP. L.* 646 (1976).

47. See generally E. DEUTSCH, *FAHRLÄSSIGKEIT UND ERFORDERLICHE SORGFALT* 154 (1963); J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 129 (2d ed. 1960); Mueller, *Eine amerikanische Stellungnahme zum Entwurf eines Strafgesetzbuches E 1960*, 73 *ZStW* 297, 314 (1961).

fundamental substantive differences between the state of mind standards of intent, recklessness, and negligence. In the United States, it appears that negligence and recklessness are presumed to exist whenever intent exists. Negligence is a lesser offense "included" in both recklessness and intent, and recklessness is a lesser offense "included" in intent.⁴⁸ In Germany, however, the High Federal Court of Appeals has ruled that negligence does not automatically exist whenever intent exists but is something different.⁴⁹ Consequently, mere suspicion of intent should, at least in theory, not only lead to an acquittal of a crime of intent but also to acquittal of the related crime of negligence; neither intent nor negligence has been proven beyond a reasonable doubt. Nonetheless, the court in the case before it rejected this outcome and treated the case as if the defendant's negligence had been proven beyond doubt. The court therefore let the conviction stand.⁵⁰

The erosion of the intent requirement has occurred even for crimes that traditionally have mandated a showing of intent because they were not susceptible to being reduced to crimes of negligence. Larceny and fraud are good examples. American law reflects an erosion of the common law doctrine that larceny is a crime requiring intent.⁵¹ Similarly, the traditional German definition of fraud requires an intent to inflict an economic loss.⁵² If, for instance, the defendant issues a bad check, someone suffers an economic loss. But the defendant's denial of intent is very difficult to overcome, and proof that the defendant was reckless or negligent in expecting the check to clear is not sufficient to convict.

For decades German courts reluctantly acquitted defendants who denied having an intent to inflict economic loss. But recently a theory has been developed and employed frequently that effectively circumvents the intent requirement. The theory calls for determination of the defendant's intent not at the time the check bounces but at the time the defendant wrote the check. Any possibility that the check might bounce creates a risk at the time the check is written that an economic loss will occur—that the check will not cover the value of services rendered or goods received. Unless the defendant *knew* the check would be honored at the time he wrote it, then he had to know the risk of loss at that moment. The modification of the definition of loss from a completed loss to the possibility of loss has had the

48. *See, e.g.*, *People v. Stamfield*, 36 N.Y.2d 467, 330 N.E.2d 72, 369 N.Y.S.2d 400 (1976)(court rejected the argument that criminal recklessness and criminal negligence are mutually exclusive).

49. Judgment of Apr. 17, 1962, 17 BGHSt 210.

50. *Id.* at 212-13. For a criticism of this decision, see J. BAUMANN, *STRAFRECHT ALLGEMEINER TEIL* 168 (8th ed. 1977).

51. *See, e.g.*, N.Y. PENAL LAW § 165.00 (McKinney 1975)(misapplication of property)(recklessness resulting in permanent loss infers intent to create risk of such a loss).

52. StGB § 263; *see* G. ARZT, *VERMÖGENSDELIKTE (KERNBEREICH)*, in *STRAFRECHT BESONDERER TEIL* 147, 163-69 (1978).

effect of making recklessness in connection with the completed loss sufficient to convict bad check writers.

Inroads on the traditional intent requirement such as the one detailed above have made it possible for Parliament openly to consider amending the intent doctrine. A newly enacted and novel section of the German Penal Code, for example, changes the definition of fraud on the government to include false or incomplete statements to officials charged with the distribution of public subsidies—including statements *recklessly* made—if the person making such statements thereby gains an advantage for himself or another.⁵³ A long and bitter debate preceded the enactment of this section. But the recklessness standard ultimately won approval because a mere suspicion of intent to defraud, although it will not prove intent beyond a reasonable doubt, will often be sufficient to establish recklessness beyond a reasonable doubt.⁵⁴

B. ENFORCEMENT OF ADMINISTRATIVE REGULATIONS

A downgrading of mens rea is also occurring in the area of enforcement of administrative regulations. In the United States, the strict liability doctrine permits abolition of a mens rea element altogether.⁵⁵ Furthermore, the use of criminal sanctions to enforce these often highly technical regulations is widespread. One of innumerable examples is section 5 of the New York Insurance Law, which makes any violation of the insurance laws or regulations a misdemeanor, unless the violation constitutes a felony.⁵⁶

In Germany it is generally accepted that strict liability, even for violations of administrative regulations, is unconstitutional.⁵⁷ In addition, the use of criminal sanctions for violations of more or less technical regulations

53. Law of July 29, 1976, [1976] BGBI I 2034 (codified at StGB § 264 (I), (III)).

54. See the discussion in 49 DJT at M1 (1972), especially the exchange between Professors Gruenwald and Tiedemann, 49 DJT at M113-14. See also Hünerfeld, *Die Diskussions Beiträge der Strafrechtslehrertagung 1972 in Kiel*, 85 ZStW 450 (1973). A similar controversy occurred a few years ago in America. Compare Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963) with Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197 (1965).

55. See *United States v. United States Gypsum Co.*, 98 S. Ct. 2864 (1978) ("strict liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements"). One of the circumstances in which the strict liability standard is employed is suspicion of guilt that cannot be proved beyond a reasonable doubt. J. HALL, *supra* note 47, at 247-55 (questioning the use of strict liability under such circumstances). Cf. *United States v. Park*, 421 U.S. 658 (1975) (unclear whether the conviction was based on proven liability, on a presumption of guilt that the accused could not overcome, or on strict liability). Mr. Justice Stewart in dissent seems to have taken the latter view. He criticized the Court for upholding the defendant's conviction without proof "that he engaged in wrongful conduct amounting at least to common law negligence". *Id.* at 683 (Stewart, J., dissenting).

56. N.Y. INS. LAW § 5(1) (McKinney Supp. 1977).

57. Judgment of Oct. 25, 1966, 20 BVerfGE 323, 334-36.

has long been considered inappropriate. Increasingly, however, such violations are subject to criminal sanctions. The German Data Protection Act⁵⁸ enacted in 1977 is a good example.

As long as the regulations that incorporate criminal sanctions are enforced per se, they are tolerable. But selective prosecution of violations of these regulations on the basis of whether the violations caused "real harm" is a perversion of the criminal law. Increasingly, tax laws, safety rules and the like have pervaded our lives to the point where everyone violates them at one time or another. Recent experience has demonstrated that even the President of the United States is not immune from violation of the tax laws.⁵⁹

Inherent in this net of regulations in which everyone is an offender is the potential for abuse in making discretionary decisions to prosecute.⁶⁰ The use of the IRS against political enemies of the Nixon administration⁶¹ is a good example: given a searching examination, violations of the tax laws are sure to turn up. Aside from the danger of politically motivated prosecutions, there is also a danger of selective enforcement against only those suspected of having committed "real" substantive crimes, when the real crimes committed cannot be proved or are too costly to prove.⁶² Although the penalty is less severe than for a real crime, the risk that the offender will be acquitted practically disappears and the procedure is much simpler and less time-consuming. This method of selective enforcement of administrative regulations produces results very similar to those of plea bargaining.

A further possible consequence of selective enforcement of a growing number of regulations is an erosion of the stability of the political system. Consider, for instance, an administration that is hostile to the concept of private enterprise. This administration's ability to enact significant reform legislation would be hampered by the checks and balances imposed upon it.⁶³ But perhaps the administration would not find any need to enact legislation to further its ideology. It might well be able to make the desired

58. Bundesdatenschutzgesetz [BDSG], Law of Jan. 27, 1977, [1978] BGBI I 201. See note 78 *infra* and accompanying text.

59. See N.Y. Times, Dec. 13, 1973, at 1, col. 5.

60. See notes 22-28 *supra* and accompanying text.

61. See H. HALDEMAN, THE ENDS OF POWER 169-70 (1977).

62. See Judgment of Apr. 17, 1959, BGH, 13 MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR] 675 (1959)(unclear case of negligent homicide but clear health code violations in causing a typhus epidemic).

63. For example, in Germany the lower house of Parliament is "checked" by the upper house. Grundgesetz [GG] art. 77. Both the U.S. and German constitutions require more than a simple majority vote of the federal legislature for constitutional amendments, U.S. CONST. art. V (three-fourths); GG art. 79 (II)(two-thirds). In addition, both countries provide for participation of state governments in the amendment procedure. U.S. CONST. art. V; GG art. 79 (III).

fundamental changes in society simply by selectively enforcing existing laws. This scenario may perhaps be unrealistic in the United States, where radical changes in basic policy rarely occur. But in many European countries such policy changes are not unthinkable. The potential for intensified repression through discretionary law enforcement may be more troublesome from the European perspective than from the American one.

V

CHANGES IN SOCIETAL ATTITUDES TOWARD CRIME CONTROL

A. SOCIALIZATION OF CRIME LOSSES

Although they are significant, the changes in substantive and procedural criminal law may not be as important as changes in the attitudes of society in response to rising crime. The United States is much further along than Germany in the areas of socialization of crime losses and privatization of crime prevention. The socialization of crime losses can be illustrated with a simple example. A businessman who perceives the odds to be five to one in favor of his never being robbed or burglarized in his lifetime will probably not buy theft insurance. Insurance may not even be available when the risks of being victimized by theft are so low. If the businessman is robbed he will have to bear the loss himself. If the businessman's expectation of being robbed or burglarized rises to once a year,⁶⁴ he will either take out insurance or he will have to raise his prices to cover the expected loss. Thus, the loss due to robbery when the probability of being robbed is high is borne by an insurance company or by customers: it is socialized.

This socialization process occurs in many different and sometimes intricate ways.⁶⁵ Victim compensation statutes, for example, are another method of socializing crime losses. The socialization process can itself become a source of crime. Socialization of crime losses certainly makes the commission of criminal acts easier, at least in a psychological way. It is not the salesman of the liquor store who suffers the loss, but the company that runs the store or its insurance company or perhaps not even this insurance

64. According to victimization studies, the actual risk of robbery or burglary is not quite that high. In the five largest cities of the United States in 1972, the average risk of commercial burglary was 392.2 and the average risk of robbery was 104.4 per 1000 businesses. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, CRIME IN THE NATION'S FIVE LARGEST CITIES 23-27 (1974). Another more recent victimization study shows that the risk of burglary is 441.5 and the risk of robbery is 98.9 per 1000 businesses per year. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION SURVEYS IN EIGHT AMERICAN CITIES 23, 39, 55, 71, 87, 103, 119, 135 (1976). These figures indicate an average risk of one robbery every ten years and one burglary every two or three years.

65. See G. ARZT, *supra* note 4, at chs. 2-3.

company but the customers and so on. The concept of inflicting economic harm on a person, traditionally inherent in a robbery, evaporates. Of course, the socialization of property losses does not extend to the threat of bodily injury to the victim. But the victim's risk of injury may decrease as a result of the refusal of the victim to defend his property since his loss will be borne by others rather than himself.

B. PRIVATIZATION OF CRIME PREVENTION

1. *Crime Prevention by Avoidance of Victimization*

Societal attitudes are also changing with alarming rapidity with respect to the privatization of crime prevention.⁶⁶ In the wake of persistent increases in crime, crime prevention is increasingly becoming focused on protecting the citizenry from being victimized by crimes. The reasons for this development include lack of police success in apprehending criminals and greater satisfaction in counseling victims than in dealing with criminals.

At present, however, the new science of victimology is in an incredibly primitive state.⁶⁷ In the United States, the President's Commission on Law Enforcement and Administration of Justice deplored the lack of data on crime victims.⁶⁸ Nonetheless, the greater attention given to crime victims is influencing legal policy and societal attitudes.

The protective measures that the police urge on potential crime victims amount in large measure to one thing: isolation.⁶⁹ Citizens are instructed

66. A study of the growth of the U.S. private police industry, consisting of five reports, has been made for the U.S. Department of Justice. See J. KAKALIK & S. WILDHORN, *PRIVATE POLICE IN THE UNITED STATES* (5 vol. 1972). The study states that "there are anywhere from 1 to 2 private security workers for every regular public policeman in this country. . . . [E]stimates of the total number of private officers (guards, investigators, etc.) vary between 350,000 and 800,000." J. KAKALIK & S. WILDHORN, *THE PRIVATE POLICE INDUSTRY: ITS NATURE AND EXTENT* 4 (*PRIVATE POLICE IN THE UNITED STATES* vol. 4, 1972). The study speculates on the future trend of public police protection, concluding that "[t]he issue of what level and type of police services are to be provided, at public expense, to which segments of the population, is extremely complex and sensitive." *Id.* at 105. Another study predicts that, "lacking effective public action," a dramatic growth of private police protection and a corresponding decrease in public policing will occur, especially in inner city areas at night. NATIONAL COMMISSION ON THE CAUSE AND PREVENTION OF VIOLENCE, *TO ESTABLISH JUSTICE, TO ENSURE DOMESTIC TRANQUILITY* 44-45 (1969).

67. For a discussion of the inadequacy of current prevention programs and police slogans, see Arzt, *Kriminalitätsbekämpfung durch vorbeugende Sicherung—Ausweg oder Sackgasse?*, 30 *KRIMINALISTIK* 433 (1976).

68. *THE CHALLENGE OF CRIME IN A FREE SOCIETY*, *supra* note 3, at 135-36.

69. Isolation is a high price to pay, perhaps too high, to avoid victimization. See note 70 *infra*. Even if isolation does reduce the risk of victimization by strangers, it certainly does little to avoid victimization by an offender who was previously acquainted with or is a relative of the victim. Evidence shows that crimes involving a prior relationship are not prosecuted as vigorously as those that do not. In New York City, the statistics are astounding: the conviction rate in assault cases involving a prior relationship is 46% as compared to 71% in non-prior relationship cases. The conviction rate in robbery cases is 37% where there was a prior relationship;

to wall themselves into fortresses that the forces of crime cannot penetrate. By encouraging this isolation, and by instilling in people a fear and distrust of strangers, society suffers greatly in terms of the quality of life.⁷⁰ The tradeoff between the creation of a security mentality and the quality of life is well stated in a 1977 *Newsweek* story on crime on the farm.⁷¹ The article concludes: "The rate of crime will not recede until more farmers become as security-conscious as city dwellers. But if they do, something will have gone out of their way of life."⁷²

Furthermore, crime control is rapidly becoming a battle of wits and economic means between criminals and potential victims. As a result, private prevention efforts have the effect of merely redistributing crime, not preventing it. Those who are able to afford the price of security and thus to protect themselves are less likely to be victimized than those who cannot. American victimization statistics document this effect;⁷³ they demonstrate that the lower the income of a family, the higher is their rate of victimization.

2. *Exercise of Police Power by Private Citizens*

Another facet of the privatization of crime prevention is the exercise of police power by private citizens. In the United States ordinances that prescribe security standards with which businesses must comply are, as far as I can tell, commonplace.⁷⁴ The exercise of police power by private citizens—for instance, the wholesale deputizing of airline personnel to carry out searches—is also widespread. In contrast, German legal thinking has been dominated by a sharp distinction between crime control, which comes

where no prior relationship existed, the conviction rate is 88%. VERA INSTITUTE OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS 28, 68 (1977). These figures indicate that there is less sympathy for victims who have not taken adequate "withdrawal" methods to protect themselves.

70. Consider, for example, the following German police slogan directed at preventing sexual abuse of children: "Kids simply must know that they should not trust strangers!" See ARZT, *supra* note 67, at 433.

71. NEWSWEEK, Oct. 3, 1977, at 101.

72. *Id.*

73. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES 1973, at 21 (1976). This report shows that the victimization risk of robbery with injury in 1973 was 5 per 1000 population for those with family incomes of less than \$3000. For those with family incomes of between \$15,000 and \$25,000, the risk dropped to 2. *Id.* at 73, Table 12. The risks of robbery without injury at these two income levels were 7 and 3, respectively; for rape, 2 and 1; for burglary, 111 and 93. *Id.* at 73, 76, Tables 12, 17. See also G. ARZT, *supra* note 4, at 41.

74. See J. KAKALIK & S. WILDHORN, FINDINGS AND RECOMMENDATIONS (PRIVATE POLICE IN THE UNITED STATES vol. 1, 1972); LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, POLICE BURGLARY PREVENTION PROGRAMS (1975); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME 92-95 (1973).

under the state's police power, and private emergency measures, which are permissible but of course not required under the self-defense doctrine.

Attempts to move away from this distinction have met with varied success. In 1966, the government promulgated a regulation to force taxicabs to install a window pane separating the rear passenger seat from the driver in order to discourage robberies.⁷⁵ The public outcry was so strong that the responsible minister was almost forced to resign. Taxi drivers attacked the regulation by claiming a constitutional right to risk their lives as they saw fit. Even though the Supreme Constitutional Court declined to void the regulation,⁷⁶ the government prudently decided to repeal it. Only a few years after the idea to force taxis to take precautionary measures against robberies had been abandoned, a ranking member of the Federal Department of Justice suggested the following solution to shoplifting: issue regulations forcing department stores to take security measures—for instance, prescribe a ratio of square meters of sales space to the number of store detectives.⁷⁷ In addition, in 1977 the German Data Protection Act created a scheme under which a company engaged in electronic data processing must employ a special data protection “ombudsman.”⁷⁸ The ombudsman is responsible for detecting violations of the Act committed by the company and reporting such violations to the government.

This shifting of the burden of crime prevention from the government to the private individual destroys society's sense that apprehension of suspects, fact-finding, guilt determination, and sentencing should be prerogatives of the judiciary. If the privatization of crime prevention becomes prevalent, privatization of guilt determination and sentencing may well follow. It was no accident that in the days of the American frontier, when the government could grant only limited protection against crime, the people—who had to assume the burden of prevention—were also inclined to challenge the judiciary's monopoly of guilt determination and sentencing.⁷⁹

Modern examples of direct citizen action against “criminals” can be observed in cases of shoplifting, disorderly conduct, and especially traffic offenses.⁸⁰ Moreover, private armed bodyguards have recently appeared in

75. Law of Jan. 6, 1966, [1966] BGBI I 61.

76. Judgment of Dec. 21, 1966, 21 BVerfGE 72 (1966).

77. Schoreit, *Der in Zusammenhang mit dem Alternativentwurf eines Strafgesetzbuches vorgelegte Entwurf eines Gesetzes gegen Ladendiebstahl (AE-GLD) im Lichte der Kriminalstatistik 1974 und moderner Opferforschung*, 31 JURISTENZEITUNG [JZ] 49 (1976).

78. BDSG §§ 28, 29, 38.

79. For a more complete discussion of such topics as vigilantism and lynching, see L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 253, 505 (1973). See also R. POUND, *CRIMINAL JUSTICE IN AMERICA* 64 (1930) (attributing such private law enforcement activity to “naive political theories of popular sovereignty” that have substantial roots in American history).

80. See U.S. NEWS & WORLD REPORT, Feb. 4, 1974, at 40 (“More and More Vigilants—Legal and Illegal”); KLEINES KRIMINOLOGISCHES WÖRTERBUCH 385 (G. Kaiser, F.

response to the terrorist threat. The government is concerned about this trend and the BKA, the German equivalent of the FBI, has begun to question the wisdom of a private prevention policy.⁸¹ A possible legal response to the growth of private police is a partial denial of the right of self defense.⁸² The broad German concept of self defense assumes a private individual faced with unexpected attack.⁸³ This rationale does not, however, extend to self defense in an organized form where such attacks are anticipated. If these challenges to the state's monopoly to control crime continue or increase, they may become one of the most frightening consequences of the growth of crime.

CONCLUSION

Rising crime rates in the United States and Germany have produced many changes in their respective criminal laws and societal attitudes. Pressures on the criminal justice system caused by increasing crime can be relieved only by resorting increasingly to discretionary prosecution strategies with their many disadvantages.

Many other changes are occurring or may soon occur as a consequence of increasing crime. Police power to combat crime may increase significantly and thereby infringe upon the rights of those accused of crimes. The state of mind element of the commission of a crime is slowly eroding. Finally, high crime rates are causing the socialization of crime losses and the privatization of crime prevention. Each of these adaptations to the higher incidence of crime is generally more fully developed in the United States than in Germany, but Germany is now beginning to experience them. By placing these two countries in a comparative perspective, this Article may contribute to a heightened awareness of the gradual changes now occurring in response to the growth of crime and to the development of more carefully reasoned responses to the increasing crime rate.

Sack, H. Schellhoss eds. 1974)(emphasizing the relationship between private vigilante crime control and the failure of official crime control); H. SCHNEIDER, *VIKTIMOLOGIE* 228 (1975) (social conformists as victims because of lack of rule enforcement). For recent examples of German vigilante activities see Judgment of Apr. 15, 1975, 64 BGHZ 178, 28 NJW 1161 (1975) (court rejected with difficulty defendants' argument that they acted in defense of their right of privacy in smashing a bookstore window where obscene books were on display); *Die Zeit*, Sept. 16, 1977, at 4 (editorial by Bucerius on the kidnapping of the industrialist Schleyer by terrorists, regretting that department stores are not permitted to display publicly the names of those caught shoplifting). See also Arzt, *Notwehr, Selbsthilfe, Bürgerwehr*, in *FESTSCHRIFT FÜR FRIEDRICH SCHAFFSTEIN* 77, 87-88 (1975) (examples of vigilantism in cases of traffic offenses and loitering).

81. At last a critical discussion of the issue "police and prevention" is underway. See *BUNDESKRIMINALAMT WIESBADEN, POLIZEI UND PRÄVENTION* (1976) (summaries in English).

82. Such a restriction has been proposed. Hoffmann-Riem, *Übergang der Polizeigewalt auf Private?*, 10 ZRP 277, 282-84 (1977).

83. See generally Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367 (1973); Arzt, Book Review, 24 AM. J. COMP. L. 554 (1976).

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