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Controlling Prosecutorial Discretion in Germany*

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Among the major western legal systems, the West German is unique in its concern with controlling prosecutorial discretion. The Germans have isolated the elements of the problem, and they have implemented legislation to limit prosecutorial discretion and, indeed, to exclude it altogether in the most important cases. The German and American systems of criminal procedure differ in fundamental matters of principle and structure, and these differences restrict the direct transferability of insights and practices between the two. Nevertheless, there are also important similarities, especially in the pretrial powers and responsibilities of the prosecutorial office. Americans in search of solu-

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tions for our own complex problem of prosecutorial discretion should be aware of the German model.

I. The Prosecutor's Monopoly

What we call prosecutorial discretion arises from the public prosecutor's power of nonprosecution. No society would tolerate a rule of compulsory prosecution so relentless that the prosecutor were required to institute criminal proceedings in every case, no matter how weak the incriminating evidence. The prosecutor, or the policeman who often stands in his shoes, must have the power to evaluate the evidence in advance of instituting trial. If he is convinced that a suspect's conduct did not violate the criminal law or that the evidence cannot persuade the court of the suspect's guilt, he serves the social interest by not wasting resources on a frivolous criminal trial and by not subjecting the defendant to its many discomforts. The prosecutor, being mortal, may err in his exercise of this power of nonprosecution. He may misinterpret the law, he may misevaluate the cogency of the evidence. That is a routine hazard of decision making. It does not call into doubt the wisdom of allowing the prosecutor to decide.

The prosecutor's power of nonprosecution becomes controversial when it extends beyond the power to discard hopeless cases. Prosecutorial discretion, as we shall be using the term, means the power to decline to prosecute in cases of provable criminal liability. It is the prosecutor's power to select among cases, indeed among like cases, those he shall press and those not. The public officer responsible for law enforcement is permitted to pick and choose which laws he will enforce and against which violators.

What makes this problem of prosecutorial discretion so acute in American practice is that our prosecutor has a monopoly over the criminal process. In cases of serious crime he alone procures the indictment or lays the information; and thereafter, his powers to dismiss, to compromise, or to insist on full trial are all but unlimited. No other officer and no private citizen, not even the victim, may come forward to prosecute when the public prosecutor will not. No one else may make good the prosecutor's neglect.

The omnipotence of the public prosecutor in American procedure is a sharp divergence from the common law model. In England private prosecution continues in theory to be the norm. Official prosecution is formally limited to the handful of cases brought by the Director of Public Prosecutions. "When 'the police' prosecute, the correct analysis is that some individual has instituted proceedings, and the fact that this individual is a police officer does not alter the nature of the prosecu-

tion."[1] Although public officials prosecute almost all cases, they do so in the guise of private citizens. It follows that private citizens not in uniform can (and do[2]) prosecute even cases of serious crime.

From a quite different starting point, the classical Continental criminal procedural system, the French, has also avoided creating a prosecutorial monopoly. Although the prosecutorial corps normally commands the formal public prosecution, *l'action publique*,[3] private prosecution under the rubric of *l'action civile* has acquired a significant sphere. The primary function of *l'action civile* is to permit the victim of a crime to constitute himself *partie civile* and to join a claim for civil damages to the public prosecutor's action for criminal sanctions.[4] If the public prosecutor does not initiate *l'action publique*, the *partie civile* may do it himself,[5] ostensibly in order to provide the necessary basis for his parasitic damages claim. What in fact results is akin to private prosecution. The use of this procedure has grown enormously in the present century on account of what Americans would call a relaxation of standing requirements. Trade unions, policemen's associations, and numerous other juristic persons have been allowed to deem them-

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1 R. JACKSON, THE MACHINERY OF JUSTICE AN ENGLAND 155 (6th ed. 1972). For historical background, see Kurland & Waters, *Public Prosecutions in England, 1854–79: An Essay in English Legislative History*, 1959 DUKE L.J. 493; Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313 (1973).

2 For example, the highly publicized prosecution by Francis Bennion against Peter Hain, chairman of the Young Liberals, who was convicted at jury trial on August 21, 1972, of conspiracy to hinder and disrupt a Davis Cup tennis match at Bristol in 1969. The case arose out of protest demonstrations against White South African teams appearing at sporting contests in Britain. After the verdict the Guardian editorialized:

> The private prosecution can be a useful procedure in that it allows the police to step out of a case involving minor assault between neighbours, for example, but still allow the aggrieved neighbours recourse to the law if they desire it. . . . There is a safeguard, but it failed to operate in the Hain trial. The DPP has the power to take over a private prosecution, and then to decide whether a case should proceed. Unfortunately he did not act in this way in the Hain case. It would seem desirable that where the Director has decided there is no cause for prosecution in a case as serious as conspiracy, he should exercise his power to take over the prosecution.

Guardian (London), Aug. 22, 1972, at 10. These suggestions that private prosecution be limited to petty domestic affrays and that the public prosecutor's decision not to prosecute in serious cases be final would bring the English practice close to the German. *See* text and notes at notes 57–66 *infra*. [I am grateful to David Fleming and Peter Wallington of the Law Faculty of Cambridge University for supplying me with newspaper clippings of the *Hain* proceedings.]

3 C. PRO. PÉN. art. 31: "The public prosecutor (*ministère public*) shall conduct public prosecutions (*l'action publique*) and procure the application of the law."

4 *Id.* art. 2: "Those who have personally suffered harm resulting directly from a [crime] are entitled to *l'action civile* to recover damages . . . ."

5 *Id.* art. 1: "*L'action publique* . . . may also be initiated by the injured party, under the conditions established in the present code." *Id.* art. 85: "Anyone claiming to be injured by a [crime] may constitute himself a *partie civile* by lodging a complaint with the competent [court]."

selves "victims" of crimes committed against their members.[6] Consequently, when the French prosecutor decides not to prosecute, he decides for himself and his office alone. Someone else may still invoke the criminal process against the culprit.

Although the Germans derived a good deal of their criminal procedure code in the nineteenth century from the French, they did not introduce a variant of *l'action civile* (known as the *Adhäsionsverfahren*) until the 1940s. The procedure is seldom used for civil damage claims proper,[7] and it cannot be used as in France to enable the victim (however defined) to institute the criminal case. If the German prosecutor has determined not to prosecute, the victim can bring his civil action only in tort. He is not entitled to launch a private prosecution. In Germany, with insignificant exceptions discussed below, the public prosecutor has a monopoly over the criminal process. The German law is a compelling object of comparative study for Americans, because the German prosecutor, like the American, is a monopolist.

The prosecutor's monopoly is explicitly created and protected by statute in Germany. The Code of Criminal Procedure[8] sets it forth in two consecutive sections:

> 151. The opening of a judicial investigation [meaning primarily the commencement of a "trial" (*Hauptverhandlung*)] is conditioned upon the preferring of a formal charge (*Klage*).
>
> 152(1). The public prosecutor is responsible for preferring the . . . formal charge.

These two code sections are regarded as expressing fundamental principles that have distinctive names in the literature. Section 151 is called the *Anklagegrundsatz*, roughly, the principle of the formal criminal charge. It was designed to constrain the inquisitorial judge of earlier centuries, who had been empowered to conduct the entire criminal process, from the gathering of first suspicions to final adjudication and sentencing. The *Anklagegrundsatz* bifurcates the criminal process and restricts the modern German court to the second stage. The court cannot take proofs and adjudicate until a preliminary investigation

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6 *See* A. Beth, Die Geltendmachung zivilrechtlicher Schadensersatzansprüche im französischen Strafverfahren 32–51 (dis., Freiburg 1972).

7 For a convenient explanation of the stillbirth of this device, see Jescheck, *Die Entschädigung des Verletzten nach deutschem Strafrecht*, 13 JURISTENUZEITUNG 591 (1958).

8 STRAFPROZESSORDNUNG [hereinafter cited as Code of Criminal Procedure]. The Code sections governing prosecutorial discretion were recently discussed in Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508 (1970). For a concise but now somewhat outdated English language account of the German procedure, see Wolff, *Criminal Justice in Germany*, 42 MICH. L. REV. 1067 (1944), 43 MICH. L. REV. 155 (1944).

procedure (*Vorverfahren*) has been completed, culminating in a formal, written criminal charge (variously: *Klage, Anklage* or *Anklageschrift*) setting forth a prima facie case against the accused.[9]

According to section 152(1), the preferring of this formal charge is the responsibility of the public prosecutor. German writers speak of his *Anklagemonopol,* his monopoly over the preferring of the charge. Criminal sanctions are imposed for public purposes. German law takes the position that only the state, through a specially constituted officer, should have the power to institute the process leading to those sanctions.

What the Germans have largely done, and the Americans largely not done, is to devise means to regulate the prosecutor's monopoly. The kernel of the German scheme is set out, in immediate juxtaposition to the prosecutor's *Anklagemonopol,* as the second half of section 152 of the Code of Criminal Procedure:

> 152(2). [The public prosecutor] is required . . . to take action against all judicially punishable . . . acts, to the extent that there is a sufficient factual basis.

This is the celebrated *Legalitätsprinzip* of German law (literally, the legality principle; better, the rule of compulsory prosecution). The Germans have undertaken to forbid their monopolist prosecutor the discretion to refuse to prosecute in cases where adequate incriminating evidence is at hand. This rule, together with its limitations and exceptions and the citizen's remedies to enforce it, is the subject of this study.

II. The Origins of Prosecutorial Discretion

The contrast between the American and German law of prosecutorial discretion is sharp and invites the question of how it has come about. American law received and developed a great common law tradition of hostility to monopoly in the marketplace, and it has characteristically insisted upon limiting and checking governmental powers of every kind. How is it that Americans have managed to place one of the most dangerous of all governmental powers beyond review or control, in the hands of a nearly omnipotent prosecutor? And how is it that the Germans, whose record of controlling governmental powers has not always been distinguished, have been so alert to controlling the prosecutor?

The common law's concept of the prosecutorial function formed over centuries of predominantly private or citizen prosecution. Official or

[9] *See* Code of Criminal Procedure § 200.

public prosecution initially developed as an adjunct to private prosecution and was steeped in the forms of private prosecution, as it continues to be in England today. Those forms helped conceal the development of the professional public prosecutor in America. By the time the American prosecutor's monopoly could be perceived, new factors were operating that seemed to require expansive prosecutorial discretion—the changes in the law of criminal procedure and evidence that brought about the need for plea bargaining.

The office of the public prosecutor at common law developed within an inherited system of citizen prosecution. Throughout the Middle Ages prosecution had been left to the victim, kin, or others, who would get their story to the juries of accusation and of trial. In the fifteenth and sixteenth centuries, the local justices of the peace (JPs) were given some organizational responsibilities over citizen prosecution. When cases of serious crime were reported to the JPs, they were empowered to order pretrial detention of the suspect and to "bind over" the victim and other witnesses to prosecute—to require them to appear before the two juries on penalty of a fine for nonappearance. Lawyers were not then regularly employed in the conduct of the criminal trial, either for the crown or the defense. The trial judge called the witnesses, and the proceeding transpired as a relatively unstructured "altercation"[10] between the witnesses and the accused. The JP's prosecutorial role was mainly passive, binding over citizen prosecutors to trial. In a difficult case, however, it began to be expected that the JP would investigate on his own to discover and bind over witnesses. More exceptionally, he might continue on to exercise some forensic prosecutorial role at the trial itself—interrogating witnesses and arguing the case to the jurors.[11]

The public prosecutor at common law thus grew up in the shoes of the old citizen prosecutor, occasionally displacing or supplementing him, but more usually deferring to him. Absent professional police and professional lawyer-prosecutors, the decision whether to prosecute was still in the main left to the initiative of the victim. Hence, when professional police and their criminal counsel developed in the nineteenth century, they acceded to a role that the English still characterize as that of the private citizen.

Professional prosecution by lawyer-officers developed earlier in America than in England.[12] However, American colonial and state practice

10 Sir Thomas Smith, De Republica Anglorum 80 (1583 ed.) (bk. 2, ch. 23).

11 For detailed discussion of the English history, see J. Langbein, Prosecuting Crime in the Renaissance: England, Germany, France 34–54 (1974); Langbein, *supra* note 1.

12 *See* National Comm'n on Law Observance and Enforcement, Report on Prosecution 6–7 (1968) [Wickersham Comm'n Rept. No. 4]; Comment, *The District Attorney—A Historical Puzzle*, 1952 Wisc. L. Rev. 125.

took from the English JP system the notion that public prosecution was a local function, not hierarchically subordinated to the direction of the attorney general. American populism then transformed the prosecutor (along with some judges and various other local officers) into an elective officer. This reinforced the inherited pattern of discretionary prosecution. The prosecutor acquired the elective officeholder's authority to conduct the affairs of his office so as to win electoral approval.

Further, the survival of the grand jury in many American jurisdictions, including the federal system where the elective principle was not admitted, has ever worked to conceal the extent of prosecutorial discretion. The formal criminal charge is made to issue in the name of a panel of citizen accusers, but this grand jury is in truth the prosecutor's rubber stamp. It seldom refuses to indict when he insists, and still less does it exercise its theoretical power to present or indict on its own initiative. The grand jury only appears to interpose a discretion of its own. Yet the appearance has surely helped to isolate arbitrary prosecutorial practices from public resentment and reform.

More than any other factor, however, what has brought about and sustained prosecutorial discretion in America in its present dimension has been the steady accretion of evidentiary and procedural safeguards for the accused which has transformed jury trial and made the system of plea bargaining essential.

Jury trial in early modern times was a summary proceeding. A single assize judge could process dozens of felony trials in a single day. In the seventeenth century a criminal trial jury would be impaneled and hear evidence in six or seven unrelated cases before retiring to formulate verdicts in all.[13] The law of criminal evidence was primitive into the eighteenth century, the right to representation by counsel was not generalized to all felonies until the nineteenth century, and appellate review was very restricted into the twentieth century.[14] The practices that so protract modern American jury trial—extended voir dire, exclusionary rules and other evidentiary barriers, motions designed to preserve appellate issues, maneuvers and speeches of counsel—all are late

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[13] The mechanics of multiple trials to the same jury are described in THE OFFICE OF CLERK OF ASSIZE 12–16 (1676 ed.). The clerk should make a list of prisoners and their offenses; then "when the Jury is ready to go from the Bar, he delivereth it unto them for their better direction and help of their memory to know who they have in charge." *Id.* at 15.

[14] *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 213, 434–35 (5th ed. 1956); 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 308–18 (1883); Wigmore, *A General Survey of the History of the Rules of Evidence*, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 691, 692–97 (1908). The sixth amendment guaranteed the right to counsel half a century before the English statute of 6 & 7 Wil. IV, c. 114 (1837).

growths in the long history of common law criminal procedure. They have, however, made jury trial unworkable as a routine procedure for our burgeoning criminality and have led to the system of nontrial disposition that exists in well over 90 percent of felony cases. The system as now practiced depends on the prosecutor's exclusive authority to grant concessions in order to induce waivers of the right to jury trial.

Thus it came about that the American prosecutor fell heir to his unregulated monopoly. He stands in the shoes of an ancient citizen prosecutor. His power is often concealed by the archaic grand jury. Outside the federal system he is an elective local potentate, liberated from hierarchical control on account of being subject to theoretical review by ballot. And in our century the transformation of jury trial has forced him to erect a new procedural system, plea bargaining, on the basis of his power of nonprosecution.

III. The German Prosecutor

The modern German rule of compulsory prosecution is also a creature of history, born in the middle of the nineteenth century together with the office of the public prosecutor. Prior to that time, the prosecutorial function had been merged in the all-encompassing work of the inquisitorial judge, who both investigated alleged or suspected crime and then adjudicated on the basis of his own investigation. By the early nineteenth century the view had become widespread that this combination of functions prejudiced the accused. "Only a judge equipped with superhuman capabilities could keep himself in his decisional function free from the suggestive influences of his own instigating and investigating activity."[15]

The prosecutorial office (*Staatsanwaltschaft*) was established as a reform, to improve the procedural lot of the accused. The responsibility for investigation on report or suspicion of crime was split from the judicial office and made the job of the public prosecutor.

A. Criminal Procedure

The preliminary procedure (*Vorverfahren*) conducted by the prosecutor culminates with his decision either to drop the case for want of adequate factual basis or to prefer the formal criminal charge. This written charge summarizes the prima facie case against the accused and names the witnesses and any other evidence by which the charge may be substantiated. According to the *Anklagegrundsatz* of section

15 E. Schmidt, Lehrkommentar zur Strafprozessordnung und Gerichtsverfassungsgesetz (Teil I) 197 (2d ed. 1964).

151, only after the charge is filed may the court proceed to judicial investigation and adjudication.

Criminal procedure is still "inquisitorial" in the sense that the court[16] is itself responsible for establishing the true facts, once the prosecutor has seised it of the case by preferring the formal charge.[17] Although the prosecutor and defense lawyer may ask questions at the trial, the procedure is fundamentally nonadversarial. It is the presiding judge who interrogates the witnesses and the accused. The proofs offered by the prosecution and the defense do not bind the court, which may call additional witnesses. (The official file built up by the police and the prosecutor goes over to the court when the charge is preferred, giving the court a basis for arranging the sequence of witnesses at trial and ordering additional proofs.) The court is not bound by a defendant's confession; it interrogates the accusing witnesses in order to satisfy itself of the man's guilt, despite the confession. The prosecutor loses control over the case once he has preferred the formal charge. He is not free to drop the case without judicial consent. Nor is the court bound by the prosecutor's theory of the case; if the prosecutor's charge characterizes the events as burglary, the court may still convict the accused of armed robbery.[18]

German courts are composed of professional judges and laymen who sit and decide together.[19] The Germans do not have to contend with guiding and controlling our panel of lay jurors who formulate a verdict without the participation of professional jurists and who render it without stating reasons. Consequently, the German law of evidence is relaxed; standards of admissibility are broad, and most of the common law exclusionary rules, such as the prohibition of hearsay, are unknown. The Germans have also felt no urge to devise exclusionary rules of evidence[20] to deter abuse of powers by the police and the prosecutorial corps. German police and prosecutors are professionals, hierarchically organized and controlled from the state level and subject

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16 For the purposes of this article, it is not necessary to distinguish among the half dozen criminal trial courts in which the number of judges varies according to the gravity of the offense. For a description of these courts, see Casper & Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUDIES 135, 141–43 (1972).

17 Code of Criminal Procedure § 244(2); *cf. id.* § 155(2).

18 *Id.* § 155. The accused must be notified of the court's reformulation of the criminal liability, and he must be given an opportunity to respond in his defense. *Id.* § 265(1).

19 Except the lowest court, the *Amtsgericht*, in which a single professional judge sits alone in petty matters.

20 Except, of course, for tortured and similarly coerced confessions. Code of Criminal Procedure § 136a; *cf. id.* §§ 250–52. *See generally* Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973).

to effective administrative and judicial review and discipline upon citizen complaint.

Because the law of evidence is uncomplicated and the proof-taking is largely conducted by the presiding judge, the prosecutor cuts a peripheral figure at trial. He interposes occasional questions and he makes a concluding statement to the court following the proof-taking in which he comments on the evidence and proposes a sentence should the court find the accused guilty. (Defense counsel usually does a little more questioning of witnesses at trial, but he too is customarily a relatively passive forensic performer.) In my own experience observing German trials I have never seen the legendary sleeping prosecutor, but I have seen a prosecutor reading a novel while the court conducted the proofs.

Although in his trial role the German prosecutor bears little resemblance to the forensic combatant of Anglo-American procedure, his pretrial functions are similar. He investigates (when the police have not given him a completed case) and he decides whether to prefer charges. It is this phase of his work which the *Legalitätsprinzip* regulates by insisting that he prefer charges whenever the pretrial investigation furnishes sufficient factual basis.

B. The Logic of Compulsory Prosecution

The rule of compulsory prosecution has been operating as long as the prosecutor himself. The prosecutor was called into existence in a unique act of creation in the middle of the nineteenth century in order to remove the work of pretrial investigation from the hands of the formerly all-powerful inquisitorial judge. Some of the best minds of a great juristic age, including Savigny, as Prussian minister of justice, participated in constructing and defining the prosecutorial office. In contrast to the unplanned parentage of the Anglo-American prosecutor, the German prosecutor was conceived with considerable forethought about his duties and powers.

German writers investigated the English pattern of private prosecution, but feared that it might invite an even greater abuse than the prosecutorial bias of the procedure they were trying to reform.[21] The partisanship of a contest between private hunter and hunted seemed to them scant improvement. Their solution, therefore, was to retain and entrench the public monopoly over the criminal process, but to divide it between two main officials. The prosecutor would investigate and charge, the judge would conduct the proofs and adjudicate.

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21 K. Elling, Die Einführung der Staatsanwaltschaft in Deutschland 30 ff. (1911).

The German prosecutor's office was being created to relieve the German courts of responsibility for the preliminary investigation, in order to enhance the impartiality of the courts' adjudicative work. Yet it was feared that this separation might actually worsen the position of the accused by subjecting him to the excessive zeal of a professional prosecutor. Savigny sought to prevent the prosecutor's office from acquiring such a cast by vesting it with a continuing judicial character. The prosecutor was, after all, receiving duties and powers detached from the former office of judge. To retain a judge-like impartiality for the prosecutor, the Code of Criminal Procedure has from the outset required him to gather "not only inculpating but also exculpating evidence. . . ."[22] Further, if the prosecutor believes that the trial court has erred to the detriment of the accused, for example, by setting too severe a sentence, he may appeal to a higher court on behalf of the accused.[23] Hence, in his role as leader of the pretrial investigation and in his role as public litigant to enforce the law, he is invested with the duty and the power to be impartial. In Savigny's famous phrase, the prosecutor is to be the "watchman of the law,"[24] as evenhanded an officer of enforcement as could be devised.

Savigny's conception of the prosecutorial office gave it a curious "double character"[25] as both an executive and a judicial office. The Germans were led to articulate the *Legalitätsprinzip*, the rule of compulsory prosecution, in the course of designing this hybrid. They wanted a hierarchically organized prosecutorial corps, with a chief prosecutor for each judicial district in charge of allocating and reviewing the work of his subordinates, and himself subject to review and direction by a prosecutor general and by the state minister of justice.[26] This system allows an orderly meritocratic career pattern for members of the prosecutorial corps. It permits a unitary interpretation of the law to be propounded for the whole state; and, in cases in which the

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22 Code of Criminal Procedure § 160(2).

23 *Id.* § 296(2).

24 *Quoted in* E. SCHMIDT, EINFÜHRUNG IN DIE GESCHICHTE DER DEUTSCHEN STRAFRECHTSPFLEGE 331 (3d ed. 1965).

25 K. PETERS, STRAFPROZESS 139 (2d ed. 1966).

26 GERICHTSVERFASSUNGSGESTZ §§ 143–47. Although West Germany has a unitary national code of criminal procedure, law enforcement and the administration of justice are organized at the state level. Bavaria, Hessee, and so forth each has a ministry of justice directing the prosecutorial corps, and an interior ministry responsible for the police. However, those of the police who are put at the disposal of the prosecutor for investigatorial work are by statute made subject to his control. *Id.* § 152. There is a federal prosecutorial office, the *Bundesanwaltschaft*, but with very limited subject matter jurisdiction. *See* E. KERN & C. ROXIN, STRAFVERFAHRENSRECHT 41–42 (11th ed. 1972).

Legalitätsprinzip does not apply,[27] it permits rulemaking to guide prosecutorial discretion.

A bureaucratic prosecutorial corps subordinated to the minister of justice (a political officer of the state government) could be subjected to political pressure to abuse its considerable powers of prosecution and nonprosecution. The German rule of compulsory prosecution was designed to prevent that pressure. The German prosecutor who, for example, is ordered by his minister not to prosecute in a case of political corruption must disobey the order. Section 152(2) requires him to prosecute, and failure to do so is itself criminal.[28] Hence, although the rule of compulsory prosecution limits the power of the prosecutor, it is also a fundamental protection for him. It is the basis of the judicial character of his office, the source of his freedom from improper interference from above.

This two-sided nature of *Legalitätsprinzip* is easy for Americans to overlook, because we are so accustomed to a non-hierarchical prosecutorial structure. Although our federal system does have some points of resemblance to the German organization, the state prosecutorial systems are balkanized. Elected county prosecutors are not subject to effective higher authority, and the United States Attorneys enjoy considerable autonomy. The German system, on the other hand, gives the prosecutor a real interest in seeing to it that the rule of compulsory prosecution is adhered to. For although the rule can be enforced against him, it also shields him.

To summarize: The German prosecutor's monopoly over the formal criminal process was intentionally built into his office. The rule of compulsory prosecution appeared simultaneously, both to rid the monopoly of its dangers for the citizen and to protect the prosecutor from political intervention. The dual function of the rule mirrors the dual character of the German prosecutor's office: he is obliged to perform an executive function according to judicial standards of conduct. The rule of compulsory prosecution frees him from demands for partiality from within the executive, while opening him to demands for impartiality from without.

IV. The Scope of Compulsory Prosecution

How can the Germans prosecute every jaywalker? They cannot and they do not. In fact, most punishable conduct falls outside the rule of compulsory prosecution and is selectively prosecuted. Nevertheless, for

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27 *See* text and notes at notes 48–58 *infra*.

28 *See* K. Peters, *supra* note 25, at 142.

serious crime the rule retains its full vigor. *Legalitätsprinzip* has been steadily eroded in the twentieth century, but only for lesser crimes and infractions. Consequently, the rule itself needs to be understood in light of its exceptions.

A. Petty Infractions

Prosecutorial discretion is largely a resource question. American plea bargaining occurs because we lack sufficient prosecutorial and judicial resources to provide a full jury trial for every defendant entitled to it. The criminal process does not seem to have a high claim on resources. Critics have long pointed out that these resource limitations have been aggravated by so-called overcriminalization. The available enforcement resources have to be spread over a wide variety of proscribed conduct, which creates pressures for selective enforcement. There is hardly a serious American writer on criminal law today who does not urge decriminalization of a number of acts, typically victimless crimes whose proscription merely reflects moral indignation instead of more substantial public interests.

The decision to decriminalize prostitution or pornography, for example, means that conduct previously punishable shall no longer be. Decriminalization has, however, a second and less fashionable meaning, exemplified in German criminal justice: removal from the criminal process of conduct that nevertheless continues to be proscribed and punished. Since World War II the law has undergone a series of major revisions designed to eliminate from the criminal process almost all traffic violations and the bulk of economic and other public regulatory activity. The offenses remain, but they are conceptualized differently and subjected to different procedures.

Petty infractions were formerly called *Übertretungen*, translatable as lesser misdemeanors. They have now been rechristened *Ordnungswidrigkeiten* (literally, violations of order; better, petty infractions), and are regulated under a separate procedural code.[29] The procedure for processing petty infractions has four important characteristics: (1) administrative officers, primarily the police, handle these cases without the participation of the public prosecutor or the criminal courts; (2) the process is conducted wholly in writing, and there is no trial unless the citizen elects to contest the case in the criminal court; (3) the sanctions as well as the infractions are both narrowed and relabelled to avoid criminal stigma; and (4) the rule of compulsory prosecution does not apply.

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29 The code is the 1968 GESETZ ÜBER ORDNUNGSWIDRIGKEITEN [hereinafter cited as Petty Infractions Code], which replaced the 1952 code of the same name.

The traffic police, board of public health, or other relevant enforcement agency carries out the procedure without calling on the public prosecutor. The agency conducts a preliminary investigation, which usually amounts to no more than the policeman's observation of the speeding car, but which can involve formal questioning of a suspected violator and witnesses.[30] When the agency is persuaded that its investigation has established a violation, it issues a *Bussgeldbescheid,* a "penance money" decree. The decree orders the citizen to pay a certain sum, between 5 and 1,000 marks, unless a higher sum is prescribed by the substantive law being enforced.[31] (In traffic cases the state ministries have worked out by rule a tariff for the various infractions and aggravating factors.) The decree instructs the citizen that it becomes final unless he files an objection with the local criminal court within one week. If he does object, the administrative agency gives the file to the public prosecutor, a trial is set, and the case is processed according to the ordinary course, that is, under the Code of Criminal Procedure.

The decision to criminalize is, therefore, made by the citizen. If he does not contest the decree he must pay up, but he will not be put through the criminal process. It needs to be emphasized that this alternative procedure is no mere labelling trick, *Etikettenschwindel.*[32] To be sure, there is an element of simple relabelling in insisting on calling the penalty "penance money" rather than "fine" (*Geldstrafe*). However, important consequences differ depending on whether conduct is characterized as a crime or a petty infraction. First, penance money is not reckoned as a criminal sanction for purposes of criminal record-keeping. Second, in the event of nonpayment, the penance money decree may not be enforced by means of imprisonment. If the citizen refuses to pay, the authorities proceed by "administrative execution,"[33] which can be described in Anglo-American terminology as a set of summary modes of civil execution.

Finally, section 47 of the Petty Infractions Code provides: "The prosecution of petty infractions is remitted to the duty-bound discretion of the prosecuting authorities." The administrators who "prosecute" such cases are not bound by the rule of compulsory prosecution applicable to the offenses still labelled "criminal" and prosecuted by the public prosecutor.

This exclusion is thought to follow from the underlying theory of separating crimes from petty infractions. German writers have at-

30 *Id.* § 55.

31 *Id.* § 13. (The mark is currently worth about 40 American cents.)

32 E. KERN & C. ROXIN, *supra* note 26, at 338.

33 Petty Infractions Code § 90.

tempted to find both qualitative and quantitative distinctions between the categories. In the qualitative sense, it has been argued that petty infractions are generally morally colorless, *mala prohibita*. They "have no social-ethical content or [they] may in any event be placed outside social-ethical consideration."[34] This notion reflects the view[35] that the essence of the criminal process is the moral condemnation attaching to its formal sanctions and its procedures. As government regulation has multiplied the number of petty prohibitions, it has cheapened the moral force of the criminal sanction. The *Ordnungswidrigkeit* procedure, by decriminalizing the morally neutral, enhances the distinctiveness of what is genuinely criminal. It rehabilitates the criminal sanction.

This attempt to distinguish *Ordnungswidrigkeiten* on qualitative grounds has not been universally accepted.[36] At least when the violations are intentional, offenses ranging from homicide to jaywalking in one sense can be regarded as ethically indistinguishable. All are proscribed for social purposes. Any willful violator may be said to offend substantially identical social interests. The only difference, it is argued, is quantitative.

The quantitative element is palpable: petty infractions are petty. They inflict a lesser quantum of social harm, and they are more lightly punished in all legal systems. When the penalty is minor in the absolute sense, and when it has been desigued to avoid criminal stigma, the meticulous fact-finding and other safeguards of ordinary criminal procedure are excessive to the purpose. A short-form procedure will suffice.

The discretion of the enforcement authorities in such cases may then be subsumed under general administrative discretion. Although the authorities exercise a prosecutorial role, they are not judicial officers in the same sense that the public prosecutor is. The public prosecutor who avenges murders and robberies lacks discretion because every murder and robbery needs to be prosecuted. The community is entitled to retribution, the offender requires reformation, and maximum prosecution promotes maximum deterrence. Those imperatives are thought not to carry over to petty infractions, which are prosecuted merely when expedient, as a means of keeping order. The legislature is relatively indifferent to the details of how the administration keeps order, the precise mix of disciplinary and other steps. Highway safety is promoted not only by disciplining speeders, but by redesigning roadways.

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34 K. PETERS, *supra* note 25, at 31.

35 Also contended in the best common law thinking. *See* Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

36 *See* J. KRÜMPELMANN, DIE BAGATELLDELIKTE (1966).

The water supply is protected both by improving drainage canals and by punishing the owners of defective septic tanks.

The drawback in allowing the administrative authorities this discretion to enforce petty infractions according to their convenience is the danger that they will use the power capriciously or for improper ends. In Germany this prospect has troubled hardly anyone. The police and most other authorities are hierarchically organized from the state level. Not only are they well led and controlled, they are liable to serious departmental and judicial review for abuse of authority.

Nevertheless, there are aspects of the *Ordnungswidrigkeit* procedure that remind an American of plea bargaining. There is an inducement to the citizen not to contest the penance money decree, because if he does contest, he will be assessed costs if he loses at the subsequent trial. Yet this incentive inheres in any procedural system, civil or criminal, that both permits default judgments and charges the costs of nondefault proceedings to the loser. The crucial point in the German system is that the sanction itself—the amount of the penance money—is not systematically increased when the citizen demands a trial. It is true that the public prosecutor who then takes the case to trial is not bound by the precise sum proposed by the administrators in the rejected penance money decree. But this is because the Germans think it fundamental that the judge-like prosecutor ought never to propose a sentence to the court until he has heard all the evidence at trial. Like the court, the prosecutor must not prejudge the case. Systematically recommending a higher penalty in order to deter citizens from claiming their right to trial in petty infraction cases would be improper, and has not in fact occurred.

The inducement of a lesser penalty in exchange for waiver of defensive rights does exist, however, in the so-called warning procedure, which is a short-form version of this already short-form *Ordnungswidrigkeit* procedure. Section 56 of the Petty Infractions Code provides:

> (1) In cases of minor (*geringfügig*) petty infractions, the administrative authorities can issue a warning to the person involved and exact a warning payment (*Verwarnungsgeld*) from 2 to 20 Marks. They should impose such a warning [i.e., require payment] when a warning without warning payment is insufficient.
>
> (2) The warning according to the first sentence of subparagraph (1) is operative only if the person agrees to it after being instructed of his right to refuse [and then pays promptly] . . . .
>
> (4) When the warning . . . is operative, the act may no longer be prosecuted as a petty infraction.

The practical importance of this procedure is for the most minor

traffic violations. Parking tickets and citations for lesser moving violations are generally styled as "warnings" coupled with a demand for a "warning payment." The state ministries have promulgated tariffs for warning payments, fixing the amounts by rule, a practice that the Code expressly authorizes them to undertake.[37] The warning payment is smaller than the penance money would be for the same infraction. The citizen is therefore invited to pay a lesser sum and have the infraction characterized by a still less opprobrious label, in exchange for conceding the liability and paying the penalty within a short time. The procedure can be oral and immediate: a traffic policeman may exact a payment on the spot (for which he must issue an official receipt). The administration is thereby spared the paperwork even of the regular petty infraction procedure.

The warning procedure does invite the citizen to waive defensive rights in exchange for a lesser penalty—it might be said that he is asked to "cop a plea." The procedure, however, applies only to the pettiest of petty infractions, cases where the penalties are insignificant and the stigma from suffering public discipline is least.

B. *Strafbefehl*: The German Guilty Plea

For the remainder of this paper we shall be examining the ways the Germans process offenses that they do regard as "criminal." These offenses were formerly divided into three categories—*Verbrechen, Vergehen,* and *Übertretungen,*[38] translatable for present purposes as felonies, misdemeanors, and petty misdemeanors. The last category is now being abolished; most of these offenses are being turned into petty infractions or abolished outright; a few are being upgraded into misdemeanors. By 1975 German law will recognize only two categories—felonies and those misdemeanors that survive decriminalization. Section 1 of the Penal Code defines a felony as any crime for which the Code stipulates a minimum sentence of one year's imprisonment. In this paper we shall be speaking as though the 1975 law were now in force, in order to avoid discussing the disappearing *Übertretungen.*

The procedure we have discussed above that invites default or consent to pay penance money for petty infractions was created in imitation of the so-called *Strafbefehl* ("penal order") procedure of the Code of Criminal Procedure.[39] This too is an entirely written procedure, without trial or other appearance of the accused before a court or an

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[37] Petty Infractions Code § 58.

[38] Corresponding generally to the French *crimes, délits,* and *contraventions.*

[39] Code of Criminal Procedure §§ 407–12. For the text of a model *Strafbefhl,* see K. MARQUARDT, STRAFPROZESS 114 (2d ed. 1970).

officer. It applies solely to *Vergehen*, the surviving misdemeanors. It is conducted by the public prosecutor and is a mode of prosecution. For example, in a shoplifting case, when the police transmit the file to the prosecutor, he may elect to prosecute the case through the penal order procedure, instead of moving for formal trial. He is likely to do so when the facts appear to be uncontested or uncontestable, for example, when the shoplifter was apprehended in the act and thereafter confessed to the police.

The prosecutor moves in the local criminal court for the issuance of the penal order. The prosecutor drafts the proposed order, and in theory the judge reviews the file and the order before propounding the order as his own. In practice this review is generally cursory, and the order customarily contains what the prosecutor has proposed. The order has the form of a provisional judgment issued by the court: "Unless you object by such-and-such date, you are hereby sentenced to such-and-such criminal sanction(s) on account of such-and-such conduct which offends such-and-such criminal proscription(s)." The document instructs the accused that if he makes timely objection (within one week) he is entitled to a criminal trial. If he objects, the penal order is nugatory and an ordinary criminal trial will take place as though the penal order had never been issued.

The penal order procedure is normally used when the prosecutor seeks a sanction less severe than imprisonment, typically a fine. Under present law, however, he may propose by penal order a sentence of up to three months imprisonment. This provision has been criticized on the ground that imprisonment is so serious that it should not be imposed unless the court faces the man it sentences and hears whatever he has to say.[40] A statutory revision of the penal order procedure expected to come into effect in 1975 or 1976 will limit it principally to cases in which the prosecutor demands a fine or a suspension of driver's license, and will exclude imprisonment.[41] Unlike the penance money of the petty infraction procedure, however, these penalties are criminal sanctions and are entered on the citizen's criminal record.

The similarity between the German penal order and the Anglo-American guilty plea is manifest: the prosecution invites the accused to waive any defenses and consent to the punishment propounded by the prosecution.[42] There are, however, important differences.

40 K. PETERS, *supra* note 25, at 491.

41 ENTWURF EINES EINFÜHRUNGSGESETZES ZUM STRAFGESETZBUCH (April 1972) [hereinafter EGStGB] Code of Criminal Procedure] § 407.

42 *See* Jescheck, *supra* note 8, at 515–16. The analogy to the distinctively American nolo contendere plea is even more apt. The prosecutor induces the waiver of jury trial by permitting the defendant to concede criminal liability under a less opprobrious label.

First, the penal order procedure applies only to misdemeanors, and even there only when relatively light sanction are proposed. The really troubling arena of the American guilty plea is the plea bargaining in felony cases, where the accused barters his right to jury trial for a lighter sanction. Because our right to jury trial does not extend to petty crimes,[43] plea bargaining in those cases is scant—the accused has no chips. The real parallel to the German penal order procedure is the short-form American citation practice for traffic offenses: "Pay this fine or appear in court" (variant: "Post bond and forfeit it for default on nonappearance").

Second, the German penal order might be said to invite a plea, but not a bargain. The prosecutor evaluates the case, persuades himself of the accused's guilt, and recommends a sentence. The judge passes upon the recommendation and issues the provisional judgment. The accused is not represented and does not participate in this process. He is offered the sentence on take-it-or-leave-it terms. The procedure lacks the horse-trading quality of American plea bargaining (which so offends German notions of how criminal sanctions ought to be determined).[44]

Third and most important, the penal order does not offer a lesser sanction in exchange for the guilty plea. The accused who objects to the order, demands trial, and loses is not likely to receive a stiffer sentence. Technically, a stiffer sentence could follow because the provisional sentence in the penal order does not estop the prosecutor from urging, or the court from imposing a higher sentence.[45] It is a fundamental rule of German criminal procedure[46] that the prosecutor may not formulate his demand for sentence until he has heard all the evidence. It is open to the prosecutor to take the position that the case appears more serious after trial than when he proposed the rejected penal order, and accordingly urge a higher sentence. He would, however, have to substantiate that view in order to persuade the court. In practice an increase in the recommended penalty does not seem to happen with any regularity. Hence, what the accused primarily risks in rejecting the penal order is not a greater sentence, but court costs and the notoriety of public trial. Such inducements to waive defenses,

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43 Baldwin v. New York, 399 U.S. 66 (1970).

44 Plea bargaining is all but incomprehensible to the Germans, whose ordinary dispositive procedure is workable without such evasions. In the German press the judicial procedure surrounding the resignation of Vice President Agnew was viewed with the sort of wonder normally inspired by reports of the customs of primitive tribes. "The resignation occurred as part of a 'cow-trade,' as it can only in the United States be imagined." Badische Zeitung, Oct. 12, 1973, at 3, col. 2.

45 Code of Criminal Procedure § 411(3).

46 Already noted with regard to the petty infraction procedure. *See* text at p. 454 *supra*.

while not inconsiderable, are not comparable to the lesser sentence that the American prosecutor offers in his plea bargaining.

We need to emphasize that the penal order procedure is fully consistent with the rule of compulsory prosecution. The procedure is simply a mode of prosecution. It spares everyone the inconvenience of a trial for open-and-shut cases. An enormous proportion of German criminal prosecutions take place in the penal order format.[47] For the same reasons that most Americans do not care to go to court to contest speeding tickets, most Germans caught shoplifting do not want to go to court to contest that either.

C. *Opportunitätsprinzip*: Explicit Prosecutorial Discretion

The German rule of compulsory prosecution, section 152(2) of the Code of Criminal Procedure, is sharply limited by the counterprinciple, discretionary nonprosecution, set forth in sections 153–154. The counterprinciple is known as *Opportunitätsprinzip*, the principle of expediency or advisability. Save for a few exceptions of no quantitative significance,[48] the scheme of discretionary prosecution applies only to misdemeanors. It has steadily expanded during this century. The basic provision is section 153 of the Code of Criminal Procedure, set out here in the slightly revised version expected to come into force in 1975 or 1976. In a case of misdemeanor

> the public prosecutor may refrain from prosecuting with the con-

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47 Earlier statistics suggest figures as high as 70 percent. *See, e.g.*, Jescheck, *supra* note 8, at 516. *See also* J. HERRMANN, DIE REFORM DER DEUTSCHEN HAUPTVERHANDLUNG NACH DEM VORBILD DES ANGLO-AMERIKANISCHEN STRAFVERFAHRENS 164 n.77 (1971). These figures include traffic offenses that are now being decriminalized as *Ordnungswidrigkeiten*; hence the present proportion of offenses handled by penal order is probably lower. (I owe this point to Professor Mirjan Damaska, University of Pennsylvania Law School.)

48 A few discretionary provisions do extend to felonies:

(1) Cases of treason, espionage and the like are exempt from the rules of compulsory prosecution, mainly to allow spy-swapping and other political settlements. Code of Criminal Procedure §§ 153b, 153c, 153d, 154b; renumbered in EGStGB as §§ 153c, 153d, 153e, 154b. *See* Schram, *The Obligation to Prosecute in West Germany*, 17 AM. J. COMP. L. 627 (1969).

(2) The prosecutor may decline (with judicial approval) to prosecute at all in certain cases in which the court could, on account of the strength of mitigating factors, impose no penalty whatever on the felony offender after convicting him. Code of Criminal Procedure § 153a; renumbered in EGStGB as § 153b.

(3) When an offender has committed a series of offenses, the prosecutor need not prosecute the minor ones. Code of Criminal Procedure § 154. For example, property damage incident to a bank robbery need not be prosecuted, but the robbery itself must be.

(4) When an offender is blackmailed because of a past crime and reports the blackmail, the prosecutor is authorized to decline to prosecute him for his crime. Code of Criminal Procedure § 154c.

The justifications for discretion in these few situations are obvions: Case 1 arises out of international political necessity. Cases 2 and 3 conserve prosecutorial resources from manifest waste. Case 4 permits the prosecutor to excuse the small fry in order to induce him to turn in a more serious offender.

> sent of the court competent [to try the case], if the guilt of the actor would be regarded as minor (*gering*), and there is no public interest in prosecuting.[49]

The legislature thus authorizes nonprosecution, but subject to express standards. The prosecutor may decline to prosecute only when he is persuaded that the suspect's guilt is minor and the public interest would not be served by prosecuting. His determination requires judicial approval. Although theoretically the court can prevent the prosecutor from contravening conventional standards of interpretation of minor guilt and absence of public interest, in practice judicial approval is a mere formality. The court has no better information than the prosecutor (the official police and prosecutor's file).

In the literature this system of discretionary nonprosecution of misdemeanors is regarded as arising out of the same policies that led to decriminalization and discretionary nonprosecution of petty infractions. If the rule of compulsory prosecution were strictly applied, the growth of new categories of minor crime in the statutes and the increase of reported crimes of all types would submerge the prosecution of serious crime in a sea of less important cases.[50] In effect, section 153 provides criteria of selection in a situation where the resources to prosecute every crime are not at hand. The system: prosecute virtually every felony, and prosecute the more important misdemeanors according to the standards of gravity in section 153.

Through their rule-making authority, the ministries of justice of all the German states have propounded a code of Uniform Rules of Criminal Procedure.[51] Rule 83 attempts some further particularization of the standards of section 153. For example, to evaluate the degree of guilt of an offender, the prosecutor should compare the particular offense with other cases of the same crime in order to see whether the conduct ranks among the less serious of the genre. In addition, the public interest requires prosecution for frequently committed offenses, which show a stronger need for deterrence [shoplifting, for example]; nonprosecution of some such offenders, says the regulation, would appear to be arbitrary. Further, if the offender has been previously warned or punished for similar conduct, there is a public interest that he now be prosecuted.[52]

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49 EGStGB: Code of Criminal Procedure § 153.

50 *See* E. Schmidt, *supra* note 15, at 219–21.

51 *Richtlinien für das Strafverfahren* (1970) [hereinafter, Uniform Rules of Criminal Procedure]. For text see T. Kleinknecht, Strafprozessordung 1525 ff. (31st. ed. 1974).

52 The operation in daily prosecutorial practice of section 153 and its regulatory gloss has been described for English speaking readers in Herrmann, *The Rule of Compulsory*

By far the most controversial of the ministerially approved standards for nonprosecution under section 153 has been a provision[53] authorizing prosecutors to treat the offender's conduct after the offense as relevant to the degree of his guilt, for example, when the offender restores property, compensates the victim, or volunteers to make a payment to a charitable organization in atonement for his conduct. Such conditional nonprosecution has been criticized in Germany,[54] because it does constitute a form of plea bargaining, and without any statutory basis. The offender or his lawyer haggles with the prosecutor, offering to waive judicial proceedings and accept a lesser "sanction" in exchange for lighter treatment (nonprosecution). Nevertheless, the revision statute expected to come into force in 1975 or 1976 expressly legitimates the use of such conditions, ostensibly to provide a basis for nonprosecution under the standards of section 153 (minor guilt, absence of public interest).[55] Professor Herrmann's study concludes that the scheme of conditional nonprosecution has until now been used mostly, although not exclusively, for traffic and other relatively trivial misdemeanors.[56] The revision legislation, however, does not limit the types of misdemeanor that may be handled in this way.

It is easy to see why this procedure appeals to both prosecutor and offender. As with the penal order mode of prosecution for misdemeanor, this mode of nonprosecution saves the prosecutor's and the court's time. The case does not go to trial. The offender saves the time and costs of trial. Much more important to him, he is spared the stigma of criminal conviction when he is allowed to settle the case by paying off the victim or making a charitable contribution. Similar arrangements have developed in American practice,[57] but without any articulated doctrinal standards like the minor guilt and lack-of-public-interest criteria of section 153.

The parallel between the short-form penal order prosecution and the conditional nonprosecution is worth stressing. Both are limited to misdemeanors—crimes of lesser social importance. Both reduce drastically the prosecutorial resources that must be devoted to such cases. These practices, by lightening the load of the prosecutor in cases of

Prosecution and the Scope of Prosecutorial Discretion in Germany, 41 U. CHI. L. REV. 468 (1974).

53 Uniform Rule of Criminal Procedure 83.

54 *See* 1 LÖWE-ROSENBERG, DIE STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ: GROSSKOMMENTAR § 153 Anm. 17 (22d ed. 1971); Schmidhäuser, *Freikaufverfahren mit Strafcharakter im Strafprozess?*, 28 JURISTENZEITUNG 529 (1973).

55 EGStGB: Code of Criminal Procedure § 153a.

56 Herrmann, *supra* note 52, at 489–93.

57 *See* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 260–80 (1969).

lesser crime, bring it about that the rule of compulsory prosecution in cases of serious crime is not frustrated for want of resources.

Finally, it should be mentioned that the ministries of justice have been able to regulate section 153 by rule precisely because section 153 is the counterprinciple to the rule of compulsory prosecution, the rule which protects the prosecutors from ministerial interference. Where that rule does not apply, the ministries can bind the prosecutorial corps to the ministerial interpretation.[58] On the other hand, the significance of the ministries' rules ought not to be exaggerated. They are few and dense, and have added little to the two concepts of the statute itself—minor guilt and lack of public interest. Perhaps the relativity of both concepts makes either inherently difficult to particularize further by rule.

V. Enforcing the Rule of Compulsory Prosecution

The public prosecutor is duty-bound to prosecute virtually all felonies and all misdemeanors that he cannot excuse under section 153 for minor guilt and lack of public interest. But what if he refuses to do his duty? What if, owing to corruption or to excess of compassion or to error, a member of the prosecutorial corps neglects to prosecute in a case in which the law demands it? And what if the case escapes the notice of his superiors in the normal course of intra-office review and discussion of cases, either through his deviousness or because it does not sufficiently stand out from the routine?

It is the prosecutorial monopoly that makes this such an extremely important question, because other officers or private citizens cannot come forward to take up the neglected prosecution. There are two ways to prevent the abuse of a monopoly—break it or regulate it. The prosecutor's monopoly would be broken if citizen prosecution were allowed as in England or France. But German law, we have seen, insists on the public monopoly of the criminal process for all but a handful of cases about to be discussed. The main German approach, therefore, has been to regulate the prosecutor's monopoly by giving citizens the right to departmental and judicial review of decisions not to prosecute.

A. Citizen Prosecution

For a narrow class of misdemeanors, mostly designed to protect private dignitary and property interests, German law does allow private prosecution. Section 374 of the Code of Criminal Procedure lists eight such misdemeanors: trespass to domestic premises, insult, inflicting

58 E. Schmidt, *supra* note 15, at 225.

minor bodily injury, threatening to commit a crime upon another, unauthorized opening of a sealed letter or document, inflicting property damage, patent and copyright violation, and crimes proscribed by the unfair competition statute.

If the prosecutor exercises his discretion under section 153 to refuse to prosecute one of these misdemeanors, the victim may still prosecute. Citizen prosecution is not conditioned upon the public prosecutor's refusal to act,[59] as it is in France. The citizen may prosecute without having first demanded public prosecution. However, the public prosecutor may decide at any time to prefer the public criminal charge, should he form the view that it is "in the public interest" to do so.[60] If the public prosecutor does act, he takes over the primary responsibility for the case. The private prosecutor becomes a *Nebenkläger*, what we might call an intervenor with a watching brief.[61] He still has the major rights of a party: to have witnesses called, to appear by counsel, to put questions at trial, to propose a judgment to the court, and to appeal against an unfavorable result.[62]

Predictably, German law frowns on private prosecution even in this peripheral sphere. The court may dismiss the case on what we would call the pleadings, either for legal insufficiency or when it deems the defendant's guilt minor (*gering*).[63] There is also a strike suit provision, requiring the private prosecutor to provide surety for the accused's costs, and to make advance payment of court costs which will be forfeit if he loses.[64] If the case concerns any of the dignitary, as opposed to the proprietary, misdemeanors, the private citizen may not prefer criminal charges before attempting out-of-court reconciliation in a proceeding conducted by a state agency.[65] Only the victim[66] can prosecute; and German law, unlike French, has kept this standing requirement narrowly defined.[67]

Despite these limitations, private prosecution does diminish the significance of the power of the public prosecutor under section 153 to decline to prosecute these misdemeanors. Even if the prosecutor finds the

59 Code of Criminal Procedure § 374(1).

60 *Id.* § 376.

61 *See id.* §§ 377, 395.

62 *Id.* §§ 374, 384, 386, 390.

63 *Id.* § 383(2). One of the standards that governs the public prosecutor's decision not to prosecute misdemeanors under section 153 may thus reappear to defeat private prosecution in these special cases. The other standard of section 153, public interest, is implicitly suspended by the legislature's decision to allow private suits.

64 *Id.* §§ 379, 379a.

65 *Id.* § 380.

66 *Id.* § 374(1).

67 1 LÖWE-ROSENBERG, *supra* note 54, § 172 Anm. 7–8.

requisite public interest to be lacking, the victim may still prosecute out of private interest.

We have been speaking of the victim's right to prosecute in these special cases either alone or as *Nebenkläger* alongside the public prosecutor. For most of these misdemeanors, and for a few others, the victim is also empowered to veto the public prosecutor's decision to prosecute. The misdemeanors subject to this right are called *Antragsdelikte,* literally, demand offenses, crimes that the prosecutor may not pursue without a formal demand from the victim. The offenses consist mainly of intra-family trespasses (excluding the very serious ones such as incest), where criminal sanctions may do more harm than good; and minor injuries to property, person, and dignity, where the public interest is comparatively slight and prosecution is warranted only if the victim is sufficiently disturbed to desire that criminal sanctions be invoked.[68]

These procedures for private prosecution and for private veto of public prosecution apply to only limited categories of lesser offenses. They therefore have not had a major place in the German system. In general, the Germans have retained the public prosecutor's monopoly of the criminal process and have given the victim procedural rights that regulate rather than break the monopoly.

B. Mandamusing the Prosecutor

German law provides citizens with rights to administrative and judicial review of prosecutorial decisions not to prosecute. Not all citizens may claim these rights, and not all nonprosecution decisions are subject to them. Where they do apply, however, these remedies constitute significant controls over and deterrents against abuse of prosecutorial authority.

The statutory procedure bears the name *Klageerzwingungsverfahren,* literally, the proceeding to compel the (preferring of the formal criminal) charge. We can render it in Anglo-American terminology as a mandamus action for a judicial decree to require the prosecutor to prosecute—an action that common law courts will not entertain.

Anyone is entitled to make a formal demand to the prosecutor, asking him to prosecute in a particular case.[69] If the prosecutor still declines to prosecute, he must notify the complainant of this decision, and explain the reasons. When the complainant was the victim of the crime and reported it, the prosecutor's notice must also instruct him of his right to seek departmental and judicial review.[70]

68 *See* Maiwald, *Die Beteiligung des Verletzten am Strafverfahren,* 1970 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 33, 34.

69 Code of Criminal Procedure § 158(1).

70 *Id.* § 171.

Only the victim may bring the mandamus action. He must first file a formal departmental complaint with the state prosecutor general. If it is rejected, he is entitled to sue. The complainant must be represented by counsel in bringing the mandamus action, but public aid may be available to defray these costs.[71] If he loses, he must pay costs, and he can be forced to post security. The state supreme court (*Oberlandesgericht*) has original jurisdiction in these cases, in which a mainly written procedure is prescribed. The victim's petition sets forth the facts that support his view and describes the putative proofs. The court may then demand to see the prosecutor's files; it may ask the accused to reply, indeed, it must do so before approving the petition; it may conduct its own proofs (for which purpose one of its members is constituted investigating magistrate). If persuaded that the prosecution is required, the court orders it to be brought.[72]

The scope of this citizen's remedy is sharply restricted by the proviso that it may not be used to contest nonprosecution when the prosecutor has invoked section 153 or the forthcoming section 153a—the statutory scheme of nonprosecution and conditional nonprosecution for misdemeanors.[73] This limitation is theoretically justified by the existence of judicial review in such cases, in that the prosecutor's decision under sections 153 and 153a requires (but routinely receives) judicial consent. The effect of the limitation, however, is to prevent development of effective judicial controls and standards for the most active area of nonprosecution. Doubtless the real justification is the same as for the statutory scheme of nonprosecution itself—conservation of prosecutorial resources, in this case sparing the prosecutor from having to litigate defensively misdemeanors that he did not think important enough to press offensively.

The mandamus remedy is thus only as broad as the rule of compulsory prosecution. It extends to virtually all felonies and to those misdemeanors that, according to settled departmental practice, the prosecutor would not include under the lack-of-public-interest rubric of section 153. The mandamus procedure permits judicial review of the prosecutor's evaluation under the rule of compulsory prosecution that he lacked "sufficient factual basis" for proceeding, that is, that there was no probable cause. "Successful *Klageerzwingungsverfahren* occur in practice with the most extreme rarity. Nevertheless, the possibility of a *Klageerzwingung* is of great importance, in that it imposes a flat

71 1 LÖWE-ROSENBERG, *supra* note 54, § 172 Anm. 12.

72 Code of Criminal Procedure §§ 172–77.

73 EGStGB: Code of Criminal Procedure § 172(2).

rule against improper and illegal considerations."[74] The rarity results not only from the somewhat limited range of cases subject to the mandamus action, but also from the exhaustion requirement. Departmental complaint precedes judicial review. Every complaint receives a careful review by the office of the state prosecutor general, and most erroneous decisions not to prosecute are corrected there rather than in the courts.

The Code provides that where the victim does succeed in mandamusing the prosecution, he is entitled to participate with the prosecutor as an accusing litigant (*Nebenkläger*) at the subsequent criminal trial.[75] This safeguard prevents the prosecutor from trying to sabotage at trial the case that he has been ordered against his will to conduct. The danger of sabotage, however, is not as great in the German system as it would be in ours for two reasons. First, we have seen that once the German prosecutor has preferred the formal criminal charge, he retains only a secondary responsibility for unearthing further evidence and presenting the case to the court. The charge seises the court of the official files of the case, and the active role in ordering further proofs is the court's. At trial the presiding judge leads the proceedings and interrogates the witnesses.[76] The court is not bound by the prosecutor's submissions; it may disregard his motion to dismiss or the sentence he proposes in his summation. Once the charge has been preferred, which is what the mandamus action achieves, the German prosecutor lacks the capacity for mischief that the common law prosecutor possesses on account of his forensic primacy at trial. Second, the hierarchical structure of the German prosecutorial corps must incline superiors to react to the rebuke of a mandamus against their underlings by transferring the case to other members of the office or otherwise directing and superintending diligent prosecution.

Any common law variant of judicial review of statutory standards for nonprosecution would probably have to provide for a special prosecutor on remand.

C. Departmental Complaint

Because the mandamus remedy is limited to cases (mostly felonies) in which the rule of compulsory prosecution applies, it is not available to the citizen who wishes to challenge the prosecutor's exercise of his statutory power of nonprosecution for misdemeanor under section 153. The citizen may, however, lodge a departmental complaint against the

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74 K. PETERS, *supra* note 25, at 464–65.

75 Code of Criminal Procedure § 395(2).

76 Including the accused and experts, whom the Germans do not label as witnesses.

prosecutor's decision. This so-called *Dienstaufsichtbeschwerde* is not provided for in the Code of Criminal Procedure. It derives from the principle of German administrative law that the citizen is entitled to file a complaint against a public employee's neglect of duty or abuse of power. The employee, in this case in the prosecutorial corps, will have to answer to his superior regarding the complaint, and the superior will have to pass upon the appropriateness of his conduct.

In practice, this nonstatutory complaint system is administered in the same manner as departmental review of the victim's complaint in cases in which the victim may thereafter resort to the statutory mandamus remedy. The state prosecutor general receives the complaint (it is forwarded to him even if lodged locally). The prosecutor's file on the case is sent up to the prosecutor general, together with the written response of the local office whose decision not to prosecute is being challenged. The prosecutor general decides whether to sustain or overrule the decision not to prosecute. He notifies the citizen of the disposition of the complaint, but does not state reasons. The citizen may appeal an unfavorable ruling to the state minister of justice, but not to the courts.

What makes this remedy effective is the hierarchical structure of the prosecutorial corps. Prosecuting is a lifetime career, or an integrated part of a lifetime career, for German prosecutors. They wish to rise within the prosecutorial hierarchy or, as is usual in most German states, to transfer to the judiciary. Where transfer between the prosecutorial and the judicial corps is usual, it is also encouraged: no judge can aspire to the highest judicial office without a period of service as a prosecutor. Promotion of judges and prosecutors is meritocratic, based on internal review of individual performance. Prosecutors do not want citizen complaints, particularly successful complaints, on their records. Hence, German legal academics tend to believe that the risk of a *Dienstaufsichtbeschwerde* is a greater deterrent to prosecutorial malpractice than the possibility of the mandamus action.

Conclusion

Major and indelible differences distinguish German and American criminal procedure. The fundamentally different trial procedure inevitably affects the pretrial process. The paternalistic notion of the bureaucratic German prosecutor as watchman of the accused's rights is still marked with overtones of the older, more authoritarian inquisitorial system that it displaced.[77] Because German trial procedure is

[77] *See* Roxin, *Rechtsstellung und Zukunftsaufgaben der Staatsanwaltschaft*, 47 Deutsche Richterzeitung 385 (1969).

more rapid and efficient than American procedure, and German crime rates lower, German law can insist on a full trial for virtually every felony case. The need for plea bargaining—for nontrial disposition—is not as urgent in German procedure.

Nevertheless, there are similarities between the German and American systems that make a comparison worthwhile. German procedure is not so efficient that every offense can be prosecuted. Resource insufficiency has led German law, like American, to admit the power of nonprosecution. Both systems have responded by empowering monopolist prosecutors to select which offenses they will prosecute. Unlike the Americans, however, the Germans have tried very hard to articulate and to enforce some criteria of selection that Americans ought to find at least suggestive.