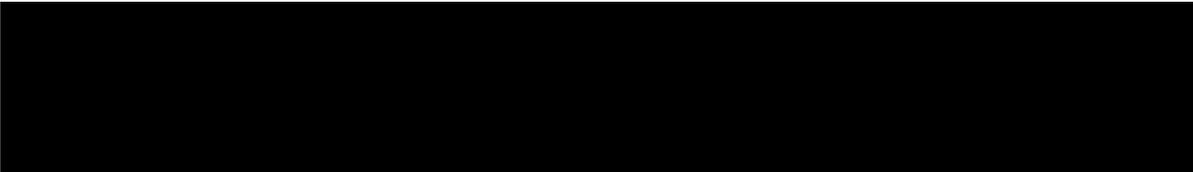


U.S. Department of Justice
Office of Justice Programs

Bureau of Justice Statistics

**German and
American
Prosecutions:
An Approach to
Statistical
Comparison**

A BJS Discussion Paper



German and American Prosecutions: An Approach to Statistical Comparison

Floyd Feeney

*University of California at Davis
School of Law
Davis, California*

February 1998, NCJ-166610

German and American Prosecutions

German and American Prosecutions: An Approach to Statistical Comparison

Much that we know about crime and criminal justice has come from comparisons between different countries and systems. Particularly fruitful have been comparisons between the world's two great legal families — the Anglo-American common law system and the continental civil law system.

Over hundreds of years, comparisons between these two great systems have led to many major, and countless smaller, improvements in both systems and many countries. American criminal justice has benefitted immensely from this interchange. Penal codes, codes of criminal procedure, minimum and maximum sentences, and organized police forces are just a few of the ideas that have come from the continent.

Even the concept of a public prosecutor may be a product of this interchange. England had no public prosecutor in colonial times. It made its first small beginning in 1869 and did not fully adopt the idea until 1985. There have been public prosecutors in the United States, however,

since early colonial days. While the evidence is far from conclusive, the first American public prosecutor was probably Dutch. Having long had a public prosecutor in their home country, it was natural that the Dutch should bring this institution with them to the New World. When New Amsterdam became New York in 1664, the Dutch system of prosecution seems to have been continued.¹

I. The United States and Germany

With a population of over 80 million people, Germany is the largest West European country and the economic leader of the European Economic Community. Like the United States, it is a federal system. This system includes 16 states — eleven from the former West Germany and five from

¹Van Alstyne (1952); Reiss (1974) suggesting that both Scotland and America were influenced by the Dutch institution. Other scholars argue that the American prosecutor was an American adaptation from the English system. See, e.g., Hammonds (1939); Langbein (1994). It is possible that both groups of scholars are correct and that the system had different origins in the different colonies. Compare Goebel and Naughton (1970).

The American colonists were also clearly familiar with the French system of public prosecution, the earliest continental system. Montesquieu, whose writings greatly influenced the development of American constitutional thought and who was generally critical of continental criminal procedure, praised the French system of prosecution (p. 81). The prosecutor seems to have been established in a number of colonies, however, before Montesquieu's work appeared.

Esmein (1913) discusses the history of prosecution in France. Although Andre Fournier's suggestion (1893) that the New York prosecutor is copied from the old style French system seems clearly incorrect, his observations support the view that the New York model of prosecution is copied from a European model.

2 German and American Prosecutions

what was previously East Germany. Although the overall level of crime is markedly lower than that in the United States, there is increasing concern about crime, particularly about problems with drugs and organized crime.

German criminal justice contrasts sharply with the American system in a number of important ways. As in the United States, the states in Germany are responsible for the administration of criminal justice. Germany, however, has a single national criminal code, a single national code of criminal procedure, and a much more unified court system. The police and the prosecution are state-level rather than local agencies. The prosecutor is not an elected official, but a civil servant operating within a hierarchical system. There is no death penalty, and sentences for all crimes — both major and minor — are considerably lower than in the United States.

In both countries cases are investigated by the police, sent to the prosecutor, and then taken to court. The formal structures in the two countries look quite similar (figure 1). Germany does not use a jury, however, and the trial process is very different from that in the United States. The judge, rather than the lawyers, organizes the evidence and asks most of the questions. The prosecutor and the defense counsel are allowed to ask questions only after the judges have finished. The prosecutor and the defense counsel may ask the judge to call additional witnesses. The decision as to whether the additional witnesses will be called, however, is up to the judge. Disclosure of the prosecution case to the defense in advance of trial is virtually automatic. The judge receives a written file with all the evidence when charges are filed. Upon request (almost always made), the defense counsel also receives access to the written file.

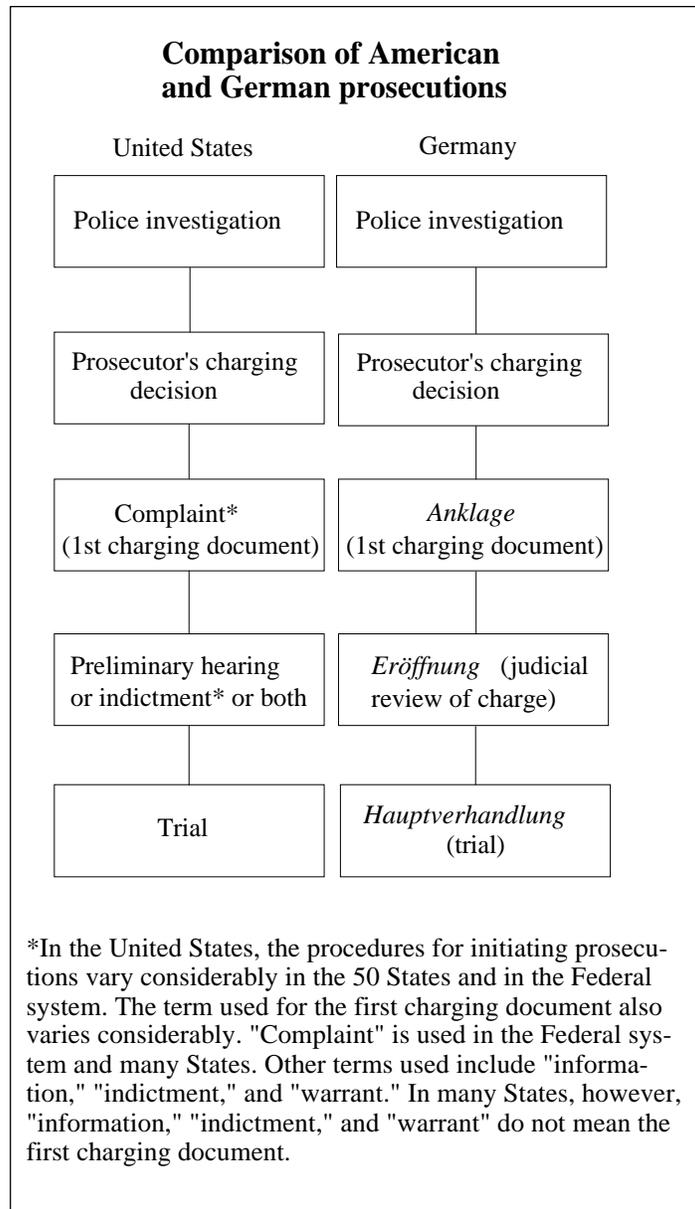


Figure 1

4 German and American Prosecutions

Guilt or innocence is decided by the judge in minor cases, by a judge and two lay members in more serious cases, by a panel that normally consists of 2 judges and 2 lay members at the next level and by a panel of 3 judges and 2 lay members in the most serious cases. When a panel is involved, conviction requires at least two-thirds vote (3 of 4-person panels and 4 of 5-person panels). Sentences also require a two thirds vote.

German law, like American law, divides offenses into three levels. *Verbrechen* (the German equivalent of felonies) are those crimes for which the minimum penalty is 1 year or more. In Germany this includes murder, manslaughter, forcible rape, and robbery but does not include burglary and many other crimes that would be felonies in the United States. *Vergehen* are the German equivalent of misdemeanors. *Ordnungswidrigkeiten* are the German equivalent of the American infraction category.

There are also major differences between German and American concepts of police and prosecution. The American prosecutor has little control over police investigations, but almost unlimited discretion as to whether a particular crime should be charged and prosecuted. German law is almost the exact reverse. The German prosecutor has formal responsibility for investigation, and the police are considered to be a subordinate helping agency.

German law has traditionally taken a strong stand against prosecutorial discretion, considering such discretion to be inconsistent with the rule of law and a violation of the principles of equal justice. Even today German law gives the prosecutor no discretion in the most serious cases and explicitly requires the prosecutor (and therefore the police as well) to investigate and prosecute every crime that is committed. German legal writers contrast the German

"legality" principle with the American "opportunity" principle. In the last 25 years German law has been changed to allow the use of discretion in the more minor crimes. The use of discretion now appears to be expanding to medium level crimes.

Rates of crime. The number of serious crimes reported to the police per 100,000 persons is much higher in the United States than in Germany. Five murders and forcible rapes and three or four robberies and felony assaults are reported in the United States per 100,000 population for every one in Germany (table 1).

For property crimes, the difference is smaller but still staggering. One and a half times as many burglaries, two and a half times as many auto thefts and arsons, and twice as many drug offenses are reported in the United States. Only for serious theft is the German rate per 100,000 population higher. Even if some allowance is made for differences in crime definition, the quantity differences remain huge.²

²See Appendix A, *Offense comparisons*, page 42.

Table 1
Crimes reported to the police, 1992

	Number per 100,000 inhabitants	
	U.S.	Germany
Willful homicide	9	2
Forcible rape	43	8
Robbery	264	71
Aggravated assault	442	120
Burglary	1,168	747
Other serious theft	1,747	2,175
Motor vehicle theft	632	235
Arson	42	17
Drug offenses	418	187

Note: For differences in the definition of individual crimes, see Appendix A, *Offense comparisons*. "Serious theft" in this table includes motor vehicle theft but excludes burglary.

Sources: United States: Federal Bureau of Investigation, *Crime in the United States, 1992*, tables 2, 7 (serious theft), 12 (arson), 29 (drugs) (based on arrests). See Appendix A, *Offense comparisons*.

Germany: Bundeskriminalamt, *Polizeiliche Kriminalstatistik, 1992*, table 1 (unpublished data for the former West Germany and the whole of Berlin — population 65,765,900). These data do not include the remainder of the former East Germany. The 1992 population for all of Germany was 80,274,564.

Police clearances. When a crime is reported to the police, the police attempt to identify the offender responsible for the crime. When such an offender is identified, the crime is said to be "cleared" or "solved." One measure of the effectiveness of a criminal justice system is the extent to which the police are able to "solve" the crimes that are reported. The German clearance rates are substantially higher for all crimes on the FBI index of major crimes (table 2). Impressionistic evidence suggests that clearance rates are viewed

Table 2
Clearance rates, 1992

	U.S.	Germany
Willful homicide	65%	91%
Forcible rape	52	71
Robbery	24	41
Aggravated assault	56	81
Burglary	13	17
Motor vehicle theft	14	23
Theft	20	31
Arson	15	32
Drug offenses	--	96

-- Not applicable.

Sources:

United States: Federal Bureau of Investigation, *Crime in the United States, 1992*, table 25. As no separate rate is calculated for serious theft, the overall clearance rate for theft has been used. This rate does not include motor vehicles. The *Uniform Crime Reports* do not include a clearance rate for drug offenses.

Germany: Bundeskriminalamt, *Polizeiliche Kriminalstatistik, 1992*, table 1 (unpublished data for the former West Germany and the whole of Berlin — population 65,765,900). These data do not include the remainder of the former East Germany. The 1992 population for all of Germany was 80,274,564. The rate for theft excludes both burglary and motor vehicle theft.

as a more important indicator of system performance in Germany than in the United States.

Juvenile and young adult suspects. German and American prosecutions differ greatly in their handling of juvenile and young adult suspects. Like the United States, Germany has a juvenile court with special procedures, and like many U.S. states, Germany uses age 18 as the dividing line

8 *German and American Prosecutions*

between juveniles and adults. German juveniles are never tried as adults, however, even for the most serious crimes, and German procedures for handling 18 to 20-year olds deviate even more from the American norm. Most suspects in this age range are tried in the juvenile court. (See Appendix tables C1-3.)

II. Suspects arrested or referred for prosecution

Even within the United States the great variety of laws and procedures makes it difficult to compare prosecutorial practices among the different states. International comparisons are even more difficult, but have considerable value nonetheless. There are many different ways of comparing prosecutions: the percentage of convictions for suspects arrested, the percentage of convictions for suspects charged, the percentage of convictions for suspects tried, and many others. Because a comparison that begins with persons arrested or referred by the police to the prosecution presents a fuller and less distorted picture than other methods of comparison, this report uses suspects arrested or referred to the prosecution as the basis for comparison.

American police have wide discretion in investigating crimes and may investigate a suspect without any proof whatsoever that the suspect has committed a crime. American law requires, however, that there be probable cause before the police arrest a suspect. The amount of proof required for the filing of a charge by the prosecution or an indictment by the grand jury is formally the same as for arrests — probable cause. The quantum of proof required as a practical matter, however, varies considerably from locality to locality. Many district attorneys require a likelihood of conviction before filing charges, and some states require more proof for preliminary hearings or indictments

than for arrests. For conviction all states require proof beyond a reasonable doubt.

German law is more restrictive on the police. German police must have "suspicion" in order to investigate, and the prosecutor must have "sufficient suspicion" in order to file a charge. Arrest (*vorläufige Festnahme*³) requires both "suspicion" and either a risk of flight or a problem in identifying the suspect. Longer term detention (*Untersuchungshaft*) requires both a very high level of proof ("urgent suspicion") and strong reason for detention (risk of flight, or other reason). Longer term detention also requires a court order unless there is a need for immediate action.

Because most persons identified as suspects in felony crimes in the United States are arrested, the principal statistic concerning suspects identified is the number of persons arrested. Because Germany uses arrest much less than the United States, it uses a different statistic. This statistic is the number of persons referred by name by the police for prosecution.⁴

The number of persons arrested or referred for prosecution per 100,000 population is much higher in the United States than in Germany (table 3).

³*Vorläufige Festnahme* is frequently translated as "temporary detention" and *Untersuchungshaft* as "arrest." This translation is highly misleading, however, as the "temporary detention" involved in a *vorläufige Festnahme* would be considered an arrest in every American State. *Untersuchungshaft*, which is detention for the purpose of investigation, is better translated as "pretrial detention," and *Haftbefehl* is better translated as "arrest warrant" or "detention order," depending upon the circumstances.

⁴See Appendix B, *Finding a common starting point for statistical comparison*, page 66.

Table 3
Adults arrested or referred for prosecution, 1992

	Number per 100,000 population	
	U.S.	Germany
Willful homicide	8	2
Forcible rape	13	6
Robbery	53	27
Aggravated assault	174	104
Burglary	112	79
Other serious theft	195	60
Drug offenses	398	131

Sources:

United States: *Crime in the United States, 1992*, table 41. See Appendix C, *Methodology*, for the method used to calculate the rate for serious theft.

Germany: Bundeskriminalamt, *Polizeiliche Kriminalstatistik, 1992*, table 20 (unpublished data for the former West Germany and the whole of Berlin — population 65,765,900). These data do not include the remainder of the former East Germany. The 1992 population for all of Germany was 80,274,564.

III. Cases charged by the prosecution

Although German prosecutors lack formal discretion in the most serious cases and are legally obligated to prosecute all cases where they lack discretion, they may refuse to charge even these cases when there is insufficient evidence. Just as the 2,000-plus U.S. prosecutors differ greatly from one another in their charging practices, so do the 116 German prosecutorial offices. The range of variation is perhaps not as extreme as in the United States, but is still quite wide.

In the United States the actual amount of proof required for charge by the prosecution is often greater than the amount of

proof legally required for arrest. The formal standard for charge by the prosecution in most states, however, is the same as that the formal standard for arrest by the police: "probable cause." In Germany the formal standard for charge by the prosecution requires more proof ("sufficient suspicion") than that necessary for formal identification of a suspect by the police "suspicion." Another important difference in German and American prosecutorial practice concerns when charges are filed. In the United States, prosecutors generally file charges within a few days of arrest by the police. Prosecutors generally require that the police investigation be complete enough to provide the level of proof they need to file the charge, but it is not at all uncommon that the investigation is not fully completed. In Germany, prosecutors generally wait until the police investigation is fully completed before filing charges.

Neither country has good prosecutorial statistics. The estimates available, however, indicate that despite the differences in legal philosophy, there is no great difference in the percentage of referrals charged by the prosecutor in the two countries. The percentage of cases charged in Germany appears to be similar to that in the United States (table 4).⁵ (See Appendix C for data limits and methods of calculation.)

⁵The American estimates include felony charges that are later reduced to misdemeanors but do not include offenses charged originally as misdemeanors. If these misdemeanor charges were included the percentage charged would be higher. If the number of persons who are dead, have absconded, or have been turned over to other countries were removed from the number referred from prosecution, the German estimates would also be higher. See Appendix C, *Methodology*, page 81.

Table 4
Adults charged by the prosecution

Crime	Percent of 1992 arrests or referrals for prosecution	
	U.S.	Germany
Willful homicide	(63%)	(71%)
Forcible rape	(54)	(45)
Robbery	(73)	(57)
Aggravated assault	(34)	(27)*
Burglary	(53)	(73)
Other serious theft**	(32)	(55)
Drug offenses	(37)***	(73)

Sources: See tables 7-13.

Data Limitations:

Parentheses () indicate an estimate.

United States estimates do not include misdemeanor complaints or charges on other felonies.

*This is a minimum figure, but there is no good estimate of the actual figure.

**Includes auto theft; a small number of auto thefts (11-12%), treated as non-serious thefts under German law, are not included.

***U.S. drug arrests include misdemeanors as well as

Crimes of violence. American prosecutors file charges against adults arrested for forcible rape, robbery, and aggravated assault more often than their German counterparts do for persons referred for prosecution. German rates for willful homicide are higher.

Property crimes. German prosecutors file charges against a higher percentage of the adults referred for burglary and serious theft than do their American counterparts. The comparison for serious theft, however, is not very exact. German law, like American law, considers some kinds of thefts to be more serious than others. The aggravating factors used, however, are much different from those used in the United States, and the percentage of thefts that are

considered to be aggravated is much smaller. Ordinarily neither theft from the person nor high value is sufficient to change the category from ordinary to "more serious" theft. A high percentage of the German serious thefts are thefts from motor vehicles that were locked.

Drug crimes. Despite the existence of a single national law, drug enforcement policies in Germany vary considerably from state to state. States in northern Germany, particularly those with social democratic governments, prosecute fewer cases than other German states. Because many drug cases in the United States are initially filed as misdemeanors (and therefore not included in the available statistics), it is particularly difficult to compare United States and German prosecutorial filing rates for drug offenses. The indications, however, suggest that German prosecution rates for the most serious drug violations are lower than those in the United States.

IV. Convictions

Preliminary hearing and indictment. In most American States prosecutorial charges are reviewed by a court or a grand jury before the defendant is placed on trial. In States where prosecutors review the police charges carefully, courts and grand juries approve 90% or more of the prosecutorial charges. In States where prosecutors uncritically adopt the police charges, the approval rate is often much lower. Germany has no grand jury, and there is no evidentiary hearing to review prosecutorial charges. Before a defendant is placed on trial, however, a judge must approve the opening of the trial proceeding (*Eröffnung des Hauptverfahrens*). The judge's review is based on looking at the case file rather than a hearing, and results in approval of the filing in roughly 99% of the cases.⁶

Convictions. Conviction in the United States requires proof beyond a reasonable doubt. Although the verbal formulas do not appear to be as strong, German law also has doctrines requiring uncertainties to be resolved in favor of the defendant. Conviction requires that the judge or judges be personally convinced of guilt. In case of doubt, judges are instructed to acquit. Whether the actual standards of proof are similar or different cannot be determined by summary statistics such as those used in this study. It is interesting nonetheless to compare the results in the two countries.

⁶ Statistisches Bundesamt, *Rechtspflege*, Reihe 2, 1992, p. 56. The figures do not include cases tried in the upper court (*Landgericht*), but the number tried in the upper court is so small that it would probably not change the percentage. Although the German system once required an evidentiary proceeding similar to the preliminary hearing, the process was simplified in 1974. Judges now simply review the case file to determine whether there is sufficient evidence to send the case to trial.

Table 5
Adults convicted on offense charged

Offense charged	Percent of 1992 arrests or referrals for prosecution	
	U.S.	Germany
Willful homicide	34%	46%
Forcible rape	23	26
Robbery	34	30
Aggravated assault	12	17
Burglary	33	39
Other serious theft*	18	13
Drug offenses	23**	32

Sources: See tables 7-13.

Notes:

Percentages do *not* include convictions on lesser charges.

*Includes auto theft; a small number of auto thefts (11-12%), treated as non-serious thefts under German law, are not included.

**U.S. drug arrests include misdemeanors as well as

For most offenses, the difference between the two systems in the percentage of defendants convicted on the most serious offense charged are not great (table 5). If convictions on lesser charges are taken into account, the differences in the conviction rates for the two systems are generally even smaller (table 6).

Table 6
Adults convicted on any charge

Crime	Percent of 1992 arrests or referrals for prosecution	
	U.S.	Germany
Willful homicide	46%	(48%)
Forcible rape	34	(33)
Robbery	46	(38)
Aggravated assault	18	--
Burglary	41	(41)
Other serious theft*	22	--
Drug offenses	27**	--

-- Not applicable.

Sources: See tables 7-13.

Data limitations:

Parentheses () indicate an estimate.

U.S. figures include all convictions in cases in which the prosecution filed a felony charge. The U.S. figures, however, do not include convictions for felony arrests in which the initial court charge was a misdemeanor.

*Includes auto theft; a small number of auto thefts (11-12%), treated as non-serious thefts under German law are not included.

**U.S. drug arrests include misdemeanors as well as felonies.

Method of processing. Although the conviction rates between the two systems do not differ greatly, there are substantial differences in the way these conviction rates come about. The United States has a large number of dismissed cases, a low number of acquittals at trial, and most convictions result from pleas or plea bargaining. Germany has fewer dismissals, many more trials, and for most offenses more acquittals (tables 7-13). In both countries the rate of acquittal is higher for willful homicide and forcible rape than for other violent crimes.

Table 7
Dispositions — Willful homicide
Adults arrested or referred for prosecution in 1992

	U.S.	Germany
Number of arrests or referrals	19,994	1,080
Complaints filed	(63%)*	(71%)
Dismissed after filing	14%	2%
Acquitted	3%	4%
Convicted of		
— Any charge	46%*	(48%)
— Willful homicide	34%	46%

*Does not include misdemeanor complaints.

Parentheses () indicate an estimate.

Sources:

United States: *Crime in the United States, 1992; Felony Defendants in Large Urban Counties, 1992*. The number of willful homicide complaints is estimated to be 12,624.

Germany: Bundeskriminalamt, *Polizeiliche Kriminalstatistik, 1992*, table 20 (unpublished data for former West Germany plus all of Berlin); Klaus Sessar, "Die Umgehung der lebenslangen Freiheitsstrafe," *Monatsschrift für Kriminologie und Strafrechtsreform* 63: 193, 199 (1980)(percent charged); Statistisches Bundesamt, *Strafverfolgung 1993*,

Table 8
Dispositions — Forcible rape
Adults arrested or referred for prosecution in 1992

	U.S.	Germany
Number of arrests or referrals	33,619	3,754
Diverted	1%	(1%)
Complaints filed	(54%)*	(45%)
Dismissed after filing	16%	2%
Acquitted	2%	5%
Convicted of		
— Any charge	34%*	(33%)
— Forcible rape	23%	26%

*Does not include misdemeanor complaints.

Parentheses () indicate an estimate.

Sources:

United States: *Crime in the United States, 1992*;

Felony Defendants in Large Urban Counties, 1992. The number of complaints is estimated to be 18,048.

In addition to complaints for forcible rape, complaints filed include complaints for other forcible sex acts.

Germany: Bundeskriminalamt, *Polizeiliche Kriminalstatistik, 1992*, table 20 (unpublished data for former West Germany plus all of Berlin); Dieter Dölling, *Polizeiliche Ermittlungstätigkeit und Legalitätsprinzip* (Wiesbaden: Bundeskriminalamt, 1987), vol. 2, p. 313 (percent charged, individuals), p.315 (convictions); Statistisches Bundesamt, *Strafverfolgung 1993*, tables 2.1 and 2.2.

Table 9
Dispositions — Robbery
Adults arrested or referred for prosecution in 1992

	U.S.	Germany
Number of arrests or referrals	135,626	18,012
Diverted	1%	(1%)
Complaints filed	(73%)*	(57%)
Dismissed after filing	24%	4%
Acquitted	1%	3%
Convicted of		
— Any charge	46%*	(38%)
— Robbery	34%	30%

*Does not include misdemeanor complaints.
 Parentheses () indicate an estimate.

Sources:

United States: *Crime in the United States, 1992*;
Felony Defendants in Large Urban Counties, 1992. The
 number of robbery complaints is estimated to be 98,376.

Germany: Bundeskriminalamt, *Polizeiliche Kriminalstatistik, 1992*, table 20 (unpublished data for former West Germany plus all of Berlin); Dieter Dölling, *Polizeiliche Ermittlungstätigkeit und Legalitätsprinzip* (Wiesbaden: Bundeskriminalamt, 1987), vol. 2, p. 235 (percent charged, individuals), p. 237 (convictions); Statistisches Bundesamt, *Strafverfolgung 1993*, tables 2.1 and 2.2.

Table 10
Dispositions — Aggravated assault
Adults arrested or referred for prosecution in 1992

	U.S.	Germany
Number of arrests or referrals	445,369	68,182
Diverted	2%	(2%)
Complaints filed	(34%)*	(27%)**
Dismissed after filing	14%	9%
Acquitted	1%	1%
Convicted of		
— Any charge	18%*	--
— Aggravated assault	12%	17%

-- Not applicable.

Parentheses () indicate an estimate.

*Does not include misdemeanor complaints.

**Minimum figure. Does not include cases charged with lesser crimes or cases charged with aggravated assault but convicted of lesser crimes.

Sources:

United States: *Crime in the United States, 1992; Felony Defendants in Large Urban Counties, 1992*. The number of felony assault complaints is estimated to be 152,928.

Germany: Bundeskriminalamt, *Polizeiliche Kriminalstatistik, 1992*, table 20 (unpublished data for former West Germany plus all of Berlin); Statistisches Bundesamt, *Strafverfolgung 1993*, tables 2.1 and 2.2. Police data include attempted murder and attempted manslaughter. See Appendix C, *Methodology* for estimation procedure used for cases charged.

Table 11
Dispositions — Burglary
Adults arrested or referred for prosecution in 1992

	U.S.	Germany
Number of arrests or referrals	284,558	51,898
Diverted	1%	(2%)
Complaints filed	(53%)*	(73%)
Dismissed after filing	11%	6%
Acquitted	0.4%	2%
Convicted of		
— Any charge	41%*	(41%)
— Burglary	33%	39%

Parentheses () indicate an estimate.

*Does not include misdemeanor complaints.

Sources:

United States: *Crime in the United States, 1992*; *Felony Defendants in Large Urban Counties, 1992*. The number of burglary complaints is estimated to be 150,576.

Germany: Bundeskriminalamt, *Polizeiliche Kriminalstatistik, 1992*, table 20 (unpublished data for former West Germany plus all of Berlin); Dieter Dölling, *Polizeiliche Ermittlungs- tätigkeit und Legalitätsprinzip* (Wiesbaden: Bundeskriminalamt, 1987), vol. 2, p. 153 (percent charged, individuals), p. 155 (convictions); Statistisches Bundesamt, *Strafverfolgung 1993*, tables 2.1 and 2.2.

Table 12
Dispositions — Serious theft
Adults arrested or referred for prosecution in 1992

	U.S.	Germany
Number of arrests or referrals	498,366	39,493
Diverted	2%	(8%)
Complaints filed	(32%)*	(55%)
Dismissed after filing	7%	2%
Acquitted	0.4%	0.7%
Convicted of		
— Any charge	22%*	--
— Serious theft	18%	13%

-- Not applicable.

Parentheses () indicate an estimate.

*Does not include misdemeanor complaints.

Sources:

United States: *Crime in the United States, 1992*;
Felony Defendants in Large Urban Counties, 1992. The estimated number of complaints is 157,608.

Germany: Bundeskriminalamt, *Polizeiliche Kriminalstatistik, 1992*, table 20 (unpublished data for former West Germany plus all of Berlin); Wiebke Steffen, *Analyse polizeilicher Ermittlungstätigkeit aus der Sicht des späteren Strafverfahrens* (Wiesbaden: Bundeskriminalamt, 1976), p. 327 (percent charged); Statistisches Bundesamt, *Strafverfolgung*

Table 13
Dispositions — Drug offenses
Adults arrested or referred for prosecution in 1992

	U.S.	Germany
Number of arrests or referrals	1,015,732	86,195
Diverted	3%	(1%)
Charges filed	(37%)*	(73%)
Dismissed after filing	7%	5%
Acquitted	0.3%	1%
Convicted of		
— Any charge	27%*	--
— Drug charge	23%	32%

-- Not applicable

Parentheses () indicate an estimate.

*Misdemeanor filings not included. Drug arrests include misdemeanors as well as felonies.

Sources:

United States: *Crime in the United States, 1992; Felony Defendants in Large Urban Counties, 1992*. The number of felony drug complaints is estimated to be 379,560. There are no statistics for arrests made by federal officers. The 30,547 suspects handled by U.S. attorneys in 1992 (including 15,596 drug complaints filed in federal court) are not included in the above figures. *Sourcebook of Criminal Justice Statistics, 1992*, (NCJ-143496), p. 477.

Germany: Bundeskriminalamt, *Polizeiliche Kriminalstatistik, 1992*, table 20 (unpublished data for former West Germany plus all of Berlin); Johannes Hellebrand, *Bekämpfung der Rauschgiftkriminalität durch sinnvollen Einsatz des Strafrechtes* (Wiesbaden: Bundeskriminalamt, 1993), p.41 (percent charged), Statistisches Bundesamt, *Strafverfolgung 1993*, tables 2.1 and 2.2.

German defendants are not asked to plead whether they are innocent or guilty, and there is some kind of trial in most serious cases (table 14). If the defendant admits guilt, the trial is sometimes truncated, and prosecutors sometimes offer concessions on the sentence to be recommended in exchange for admissions of guilt. Even in these cases, however, there is a trial. Bargaining takes place, but is the exception rather than the rule, and the overall amount of bargaining is not great by American standards.⁷ The only

Table 14
Trials in adult cases

	Percent of cases charged	
	U.S.	Germany
Willful homicide	21%	88%
Forcible rape	4	93
Robbery	6	88
Aggravated assault	4	70
Burglary	6	87
Other serious theft	6	87
Arson	--	86
Drug offenses	5	87

--Not applicable.

Sources:

United States: *Felony Defendants in Large Urban Counties, 1992*.

Germany: Statistisches Bundesamt, *Strafverfolgung 1993*, tables 2.1 and 2.2.

No attempt has been made to reduce the percentage of German cases going to trial because of penal orders, a non-trial procedure available in the German system. There are no national data available in Germany that count penal orders by offense. Ad hoc studies indicate that the percentage of penal orders for willful homicide, forcible rape, robbery, and burglary are very low — 1% or less of all charges.

⁷One German writer estimates that some bargaining takes place in 30% of the cases. Joachim Herrmann, "Bargaining Justice — A Bargain for German Criminal Justice, 53 *U. Pittsburgh L. Rev.* 755, 756 (1992).

instance in which there is no trial in the German system is when a "penal order" (*Strafbefehl*) is entered. In cases of lesser seriousness, German prosecutors may dismiss the case on condition that the defendant voluntarily accepts a lesser penalty. If the defendant and the judge accept the prosecutor's proposal, there is no trial.

At least 6% of all German homicide suspects are found not responsible by reason of insanity. This is a smaller percentage than was the case in Germany 30 years ago, but this percentage still appears to be higher than the percentage in the United States.⁸ Germany also appears to make greater use than the United States of concepts such as diminished capacity that reduce the level of the crime even when the defendant is convicted. Around 40% of the homicide suspects who are convicted, for example, appear to be convicted at a lower level of seriousness because of mental health problems.

⁸Statistisches Bundesamt, *Strafverfolgung 1993*, table 5, shows the number of defendants excused by reason of insanity after charges are filed in court. For the trend in Germany, compare the current figures with earlier years. See also Rasch (1986), pp. 62, 64, 79. There are no national U.S. figures, but California figures show that only 3 of the 2,017 homicide arrestees whose cases were included in the 1992 dispositions were acquitted by

V. Sentencing

The German penal code gives judges considerable sentencing discretion. On the whole, however, both the sentencing structure contained in the German penal code and the actual sentences imposed by German judges are lower than those for similar offenses in the United States.

Sentences for violent crimes. Because the German constitution forbids use of the death penalty, none of the defendants arrested or referred for willful homicide (homicide that is not accidental) in Germany was sentenced to death, as compared with 1% of those arrested and 5% of those sentenced for willful homicide in the United States (see Appendix A, *Offense comparisons*). Six percent of those referred for willful homicide were sentenced to life imprisonment in Germany as compared with 3% of the U.S. arrestees. Forty-two percent of the adults sentenced for willful homicide were sentenced to 1 year or more in prison in Germany, as compared with only 31% in the United States (table 15).

Table 15
Sentences — Willful homicide
Adults arrested or referred for prosecution in 1992

	U.S.	Germany
Number of arrests or referrals	19,994	1,080
Willful homicide complaints filed	(63%)*	(71%)
Convicted	46%*	(48%)
— Willful homicide	34%	46%
— Other charges	12%*	(2%)
Sentenced to prison (1 year or more)	37%*	--
— Willful homicide	31%	42%
— Other charges	6%*	--
Sentenced to life imprisonment (willful homicide)	3%	6%
Sentenced to death (willful homicide)	1%	0%
Percent of all persons convicted of willful homicide and given a sentence —		
— of 1 year or more	91%	93%
— of life imprisonment	7%	14%
— of death	5%	0%

-- Not applicable.

Parentheses () indicate an estimate.

*Does not include misdemeanor complaints.

Sources: See table 7.

United States: *Felony Defendants in Large Urban Counties, 1992*; *Sourcebook of Criminal Justice Statistics, 1994*, p. 590.

Germany: Statistisches Bundesamt, *Strafverfolgung 1993*, tables 3.1, 4.1. Suspended sentences of 1 year or more are not included.

Table 16
Sentences — Forcible rape
Adults arrested or referred for prosecution in 1992

	U.S.	Germany
Number of arrests or referrals	33,619	3,754
Forcible rape complaints filed	(54%)*	(45%)
Convicted	34%*	(33%)
— Forcible rape	23%	26%
— Other charges	11%	(7%)
Sentenced to prison (1 year or more)	19%	--
— Forcible rape	15%	15%
— Other charges	4%	--
Percent of all persons convicted of forcible rape and given a sentence of 1 year or more	66%	57%

-- Not applicable.

Parentheses () indicate an estimate.

*Does not include misdemeanor complaints.

Sources: See table 8.

United States: *Felony Defendants in Large Urban Counties, 1992*. In addition to complaints for forcible rape, complaints filed include complaints for other forcible sex acts.

Germany: Statistisches Bundesamt, *Strafverfolgung 1993*, tables 3.1, 4.1. Suspended sentences of 1 year or more are not included.

The percentage of adult offenders arrested or referred for forcible rape who receive 1 year or more in prison is similar in Germany and the United States (table 16). Sentences for robbery and aggravated assault, however, are noticeably lower in Germany (tables 17 and 18).

Table 17
Sentences — Robbery
Adults arrested or referred for prosecution in 1992

	U.S.	Germany
Number of arrests or referrals	135,626	18,012
Robbery complaints filed	(73%)*	(57%)
Convicted	46%*	(38%)
— Robbery	34%	30%
— Other charges	12%*	(8%)
Sentenced to prison (1 year or more)	27%*	--
— Robbery	24%	14%
— Other charges	3%*	--
Percent of all persons convicted of robbery and given a sentence (1 year or more)	70%	47%

-- Not applicable.

Parentheses () indicate an estimate.

*Does not include misdemeanor complaints.

Sources: See table 9.

United States: *Felony Defendants in Large Urban Counties, 1992.*

Germany: Statistisches Bundesamt, *Strafverfolgung 1993*, tables 3.1, 4.1. Suspended sentences of 1 year or more are not included.

Table 18
Sentences — Aggravated assault
Adults arrested or referred for prosecution in 1992

	U.S.	Germany
Number of arrests or referrals	445,369	68,182
Aggravated assault complaints filed	(34%)*	(27%)**
Convicted	18%*	--
— Aggravated assault	12%	17%
— Other charges	6%*	--
Sentenced to prison (1 year or more)	4%*	--
— Aggravated assault	4%	1%
— Other charges	0%*	--
Percent of all persons convicted of aggravated assault and given a sentence (1 year or more)	32%	6%

-- Not applicable.

Parentheses () indicate an estimate.

*Does not include misdemeanor complaints.

**Minimum figure. Does not include cases charged with lesser crimes or cases charged with aggravated assault but convicted of lesser crimes.

Sources: See table 10.

United States: *Felony Defendants in Large Urban Counties, 1992.*

Germany: Statistisches Bundesamt, *Strafverfolgung 1993*, tables 3.1, 4.1. Suspended sentences of 1 year or more are not included.

Theft crimes. German sentences for theft crimes are in general much lower than those in the United States. Although the percentage of defendants convicted of burglary as opposed to some lesser crime is higher in Germany than in the United States, the percentage given a sentence of 1 year or more in prison is much lower (table 19). German sentences for serious theft are also considerably lower than those in the United States (table 20). (There are significant differences in the definition of serious theft in the two countries.) Many German defendants receive fines, using the German day fine system.

Table 19
Sentences — Burglary
Adults arrested or referred for prosecution in 1992

	U.S.	Germany
Number of arrests or referrals	284,558	51,898
Burglary complaints filed	(53%)*	(73%)
Convicted	41%*	(41%)
— Burglary	33%	39%
— Other charges	8%*	(2%)
Sentenced to prison (1 year or more)	16%*	--
— Burglary	14%	5%
— Other charges	2%*	--
Percent of all persons convicted of burglary and given a sentence (1 year or more)	44%	13%

-- Not applicable.

Parentheses () indicate an estimate.

*Does not include misdemeanor complaints.

Sources: See table 11.

United States: *Felony Defendants in Large Urban Counties, 1992.*

Germany: Statistisches Bundesamt, *Strafverfolgung 1993*, tables 3.1, 4.1. Suspended sentences of 1 year or more are not included.

Table 20
Sentences — Serious theft
Adults arrested or referred for prosecution in 1992

	<u>U.S.</u>	<u>Germany</u>
Number of arrests or referrals	498,366	39,493
Serious theft complaints filed	(32%)*	(55%)
Convicted	22%*	--
— Serious theft	18%	13%
— Other charges	4%*	--
Sentenced to prison (1 year or more)	7%*	--
— Serious theft	7%	1%
— Other charges	0%*	--
Percent of all persons convicted of serious theft and given a sentence (1 year or more)	39%	9%

-- Not applicable.

Parentheses () indicate an estimate.

*Does not include misdemeanor complaints.

Sources: See table 12.

United States: *Felony Defendants in Large Urban Counties, 1992*.

Germany: Statistisches Bundesamt, *Strafverfolgung 1993*, tables 3.1, 4.1. Suspended sentences of 1 year or more are not included.

Drug crimes. German law, like American law, punishes drug dealers more severely than casual users. The overall conviction rate for drug offenses is somewhat higher (table 21). As with other offenses, the number of dismissals is lower and the number of acquittals higher. Penalties for drug violations, however, are in general much lower in Germany than in the United States. German sentences for drug crimes are as a consequence considerably lower than in the United States. (Again there are differences in the way crimes are defined in the two countries.)

Table 21
Sentences — Drug offenses
Adults arrested or referred for prosecution in 1992

	U.S.	Germany
Number of arrests or referrals	1,015,732	86,195
Drug offenses complaints filed	(37%)*	(73%)
Convicted	27%*	--
— Drug offenses	23%	32%
— Other charges	4%*	--
Sentenced to prison (1 year or more)	9%*	--
— Drug offenses	9%	4%
— Other charges	0%*	--
Percent of all persons convicted of drug offenses and given a sentence (1 year or more)	38%	12%

-- Not applicable.

Parentheses () indicate an estimate.

*Does not include misdemeanor complaints. Drug arrests include misdemeanors as well as felonies.

Sources: See table 13.

United States: *Felony Defendants in Large Urban Counties, 1992.*

Germany: Statistisches Bundesamt, *Strafverfolgung 1993*, tables 3.1, 4.1. Suspended sentences of 1 year or more are not included.

VI. Arrest and pretrial detention

Most felony cases in the United States begin with arrest of the suspect. The police make the vast majority of these arrests without a warrant. The suspect is then brought before a court that decides whether the suspect is to be released on bail or on the defendant's own recognizance. The German law is quite different. The German police are not allowed to arrest a suspect simply because they have probable cause to believe that the suspect has committed an offense. They are permitted to arrest without a warrant only when the suspect is caught in the act or when there is a risk of flight or a problem in identifying the suspect (*vorläufige Festnahme*). Detention for longer than 1 day requires a warrant issued by a court (*Haftbefehl*). Courts are allowed to issue warrants only when there is "urgent suspicion" of guilt (a standard higher than that required for filing charges) and a risk of flight or some other grounds for holding the suspect.

The consequence of these tight German laws is that far more cases begin without arrest — even for serious offenses — than in the United States. Although there are no national statistics, studies of German practice indicate that only 40 to 50% of the forcible rape, robbery, and burglary suspects are arrested without a warrant.⁹ When arrests with a warrant are taken into account, it is clear that the German system uses pretrial detention considerably less than the American system. Table 22 compares the number of suspects who are arrested at some time during the process. Table 23 compares the number of suspects who are detained until the close of the proceedings in the trial court.

⁹*Vorläufige Festnahme*. Steffen (1976), p. 170; Dölling (1987), pp. 112, 202, 360.

Table 22
Percent of persons charged who are arrested

	U.S.	Germany
Willful homicide	100%	71%
Forcible rape	100	46
Robbery	100	39
Aggravated assault	100	5
Burglary	100	19
Other serious theft	100	17
Drug offenses	100	19

Sources:

United States: Estimated. Although a few persons who are charged for the offenses listed are not arrested, the percentage is too small to be included in this table. This table also does not include suspects who are arrested but not charged. See Appendix C, *Methodology*.

Germany: Based on figures for *Untersuchungshaft*. No national figures are available for *vorläufige Festnahme*. Statistisches Bundesamt, *Strafverfolgung 1993*, table 6.1. This table includes both adults and juveniles (and it is not possible to separate them). If a case is filed by the prosecution as a particular charge (for example, robbery), but disposed of at a lower charge (for example, theft), the case is not included in the figures for the higher offense. This method of recordkeeping overstates the amount of detention.

Table 23
Pretrial release — cases charged

	Percent released before final case disposition	
	U.S.	Germany
Willful homicide	27%	29%
Forcible rape	50	54
Robbery	48	61
Aggravated assault	68	95
Burglary	51	81
Other serious theft	67	83
Drug offenses	69	8

Sources:

United States: *Felony Defendants in Large Urban Counties, 1992* (unpublished data).

Germany: Statistisches Bundesamt, *Strafverfolgung 1993*, table 6.1. This table includes both adults and juveniles (and it is not possible to separate them). Because the German figures are based on tables that show whether the defendant was "ever detained" rather than "detained until disposition," they understate the number released before final case disposition. Because the German figures also omit all offenses that are disposed of on lesser charges, they further understate the number released before final

VII. Lesser crimes

Both the United States and Germany have developed procedures for handling minor crimes on an expedited basis. In the United States these procedures include guilty pleas, diversion, and prosecutorial dismissals. For infractions and some very minor crimes, fixed payment schedules (often called "the forfeiture of bail") are also widely used.

Germany makes no formal use of the guilty plea. Germany makes extensive use of fines, however, instead of jail for minor offenses. The fines imposed are day fines that attempt to establish punishments related to the defendant's ability to pay. Frequently the fines involve installment payments. Germany also uses fixed payment schedules but only for administrative offenses that are not considered criminal (*Ordnungswidrigkeit*). Germany has developed a prosecutorial diversion procedure that is widely used for minor crimes. Under this procedure prosecutors do not formally prosecute defendants who make specified payments to specified charities or other good causes. Although quite differently administered, this scheme, like fixed payment schedules, allows large numbers of cases to be handled administratively.

Definitions

Arrested or referred for prosecution — Processing for most cases of serious crime in the United States begins with an arrest. Because German law does not allow arrest to be routinely used, even for serious offenses, this report uses the German statistics for persons referred by the police to the prosecutor for prosecution. See Appendix B, *Finding a common starting point for statistical comparison*, page 66.

Complaints filed — In the United States, most persons arrested for a crime are referred to the prosecutor. If the prosecutor believes that the evidence is sufficient to warrant a charge, the prosecutor typically files a formal charge in court. In the federal system and in many states, this formal charge is called a complaint. Similarly, in Germany if the prosecutor believes that the evidence indicates guilt, the prosecutor files a charge in court. This charge is called the *Anklage*.

In the tables the number of complaints filed is given as a percentage of the number of persons arrested or referred for prosecution. For the United States, this percentage includes felony charges that are later reduced to misdemeanors, but does not include offenses that are originally charged as misdemeanors. The German figures include both kinds of charges.

Dismissed after filing — After the prosecutor has filed charges, many things can happen to a case. The prosecutor may later decide that the evidence does not warrant prosecution or that the case should be dropped for other reasons. If the charges are dropped either on the initiative of the prosecutor or on the initiative of the court or with the

approval of the court, the decision is identified in the tables as "Dismissed after filing." The German figures include *Einstellung ohne Massregeln* for adults and *Verfahrenseinstellung zusammen* for 18 to 20-year-olds handled as juveniles.

Acquitted — The U.S. figures include both acquittals by a jury and acquittals by a judge sitting without a jury. The German figures include *Freispruch, aber Massregeln* and *Freispruch ohne Massregeln* for adults and *Freispruch* for 18 to 20-year-olds handled as juveniles.

Convictions — The U.S. figures include pleas of guilty, convictions by a jury, and convictions by a judge sitting without a jury. The German figures are based on convictions by a judge sitting alone or a judge sitting with other professional or lay judges (*die verurteilt wurden*). These figures also include penal orders that are agreed to by all parties (*Strafbefehle*).

In the tables the number of convictions is given as a percentage of the persons arrested or referred for prosecution for the table offense (that is, the offense discussed by the table). Two percentages are given for each table. The first is the percentage of persons arrested or referred for prosecution for the table offense who are convicted of any charge. For example, in the case of robbery (table 9) this percentage would be that proportion of the persons referred for prosecution for robbery who have been convicted of robbery or any other charge. The second percentage given concerns those defendants who are convicted of the table offense itself. For the robbery table, this second percentage would be that proportion of the persons referred for prosecution for robbery who have been convicted of the crime of robbery itself. Because some persons charged with robbery will be convicted of lesser or other offenses, this

percentage is necessarily lower than the percentage given for those convicted of any offense.

Sentences — The tables on sentencing show the percentage of defendants arrested or referred for prosecution for the table offense (i.e., the offense discussed by the table) who have received a prison sentence of 1 year or more.

The percent of those charged who receive a prison sentence of 1 year or more is shown separately for: (1) those convicted of the table offense (robbery, for example); (2) those convicted of some other offense; and (3) both combined. The table also includes the percentage having a prison sentence of 1 year or more as a percentage of those sentenced for the table charge.

Diverted — In both Germany and the United States some persons accused of crime are handled without full prosecution. Generally the accused is offered some alternative to full prosecution, such as participation in a drug treatment program, restitution, or payment of a small fine. In the United States prosecution in such cases is often suspended until successful completion of the alternative measure. In the German system, the law allows the alternative measure to be substituted for full prosecution.

In both systems diversion may take place prior to the filing of a charge or after a charge has already been filed. The table figures for the United States include only those diversions occurring after the filing of a felony charge by the prosecution. They do not include diversions taking place before a felony charge has been placed. If these were included, it is likely that at least for some offenses the percentage diverted would be higher. Because the German estimates include diversions both before and after the filing of an *Anklage*, the comparisons are not exact.

Appendix A

Offense comparisons

Willful homicide

United States: The *Uniform Crime Reports* define "murder and nonnegligent manslaughter" as: "the willful (nonnegligent) killing of one human being by another. Deaths caused by negligence, attempts to kill, assaults to kill, suicides, accidental deaths and justifiable homicides are excluded. Justifiable homicides are limited to: (1) the killing of a felon by a law enforcement officer in the line of duty; and (2) the killing of a felon by a private citizen." Attempts are not included in this category. Manslaughter by negligence is a Part I crime but not part of the index. It includes the killing of another person through gross negligence. Traffic fatalities are excluded.

The 1992 Bureau of Justice Statistics report *Felony Defendants in Large Urban Counties* defines "murder" to include "homicide, nonnegligent manslaughter, and voluntary homicide." The category "does not include attempted murder (classified as felony assault), negligent homicide, involuntary homicide, or vehicular manslaughter."

Neither the *Uniform Crime Reports* nor the BJS data include attempts.

Germany: The German police statistics (*Polizeiliche Kriminalstatistik*) contain data for crimes reported to the police (*Erfasste Fälle*) and for persons referred to the prosecution (*Tatverdächtige*). These statistics have a category for murder (*Mord*) and a separate category for manslaughter (*Totschlag*). The murder statistics include special subcategories for robbery murders and rape murders (*Raubmord* and *Sexualmord*). Killing at the request of the victim, which includes mercy killings, is not

considered to be murder or manslaughter, but is a separate, less serious category (*Tötung auf Verlangen*), as is the killing by the mother during or shortly after birth of a child born out of wedlock (*Kindestötung*). As both would be considered either murder or manslaughter in the United States, both are included in the comparison.

Mord and *Totschlag* in German law require intentional killing. German law, however, does not contain anything like the felony murder doctrine. If a robbery or a rape results in an unintended death, the death is punished not as murder or manslaughter, but as a separate lesser crime. This separate lesser crime is not considered part of the law of homicide, but rather as part of the law of robbery or rape. The crime is called robbery with death as a consequence or rape with death as a consequence (*Raub mit Todesfolge* or *Vergewaltigung mit Todesfolge*). Most crimes in these categories would be considered felony murder in many states in the United States. In those U.S. States in which felony murder requires causation but no negligence or intention, felony murder is broader than *Raub mit Todesfolge* and *Vergewaltigung mit Todesfolge*, because the two German crimes require gross negligence. Although these crimes are not listed with homicides in the German statistics, they are included in the homicide category in the comparison.

Another lesser crime concerns assault with death as a consequence (*Körperverletzung mit Todesfolge*). Some or all of these crimes are crimes committed with the intent to inflict serious bodily injury, an intent that suffices for murder in many States in the United States. The less serious instances of this crime are hard to classify. Although some might be considered involuntary manslaughter (a form of negligence) in the United States, most would probably be classified as murder or manslaughter. German law also has a negligent homicide category, and the fact that these

crimes have been classified as *Körperverletzung mit Todesfolge* instead of negligent manslaughter under German law seems determinative. All have therefore been included in the comparison.

Weier (1989), pp. 34-36, discusses the difference between *Totschlag* and *Körperverletzung mit Todesfolge*. He says it is possible to make a doctrinal distinction, but that in practice there are a lot of problems in distinguishing the two crimes. He includes both *Körperverletzung mit Todesfolge* and *Tötung auf Verlangen* in his study.

There is also a separate crime for negligently causing death by giving or administering drugs to another [BtM §30(3)].¹⁰ In some U.S. States, crimes in this category would be felony murder; in others, involuntary manslaughter or some other lesser crime. It is not included in the comparison.

Mord is clearly a narrower crime than murder under American law. The various German homicide crimes taken together, however, approximate the American categories.

Mord (StGB §211)¹¹ is committed by "anyone who kills a human being: from a lust to kill, to satisfy his sex drive, from covetousness or other base motives; treacherously or cruelly or by means endangering the community or for the purpose of making possible or concealing the commission of another crime."

Totschlag (StGB §212) is the German version of manslaughter. It is defined as the killing of "a human being

¹⁰German Drug Law (*Betäubungsmittelgesetz*).

¹¹German Penal Code (*Strafgesetzbuch*).

under circumstances not constituting murder" If the person committing *Totschlag* "through no fault of his own, had been aroused to anger by the abuse of his person or of a relative of his or by the grossly insulting behavior of the victim, and committed the homicide while in a state of passion, or the circumstances otherwise indicate the existence of a less serious case," the *Totschlag* is punished less severely. (StGB §213).

Tötung auf Verlangen (StGB §216) is defined as "anyone who kills another person at the express and genuine request of that person."

Kindestötung (a separate offense, StGB §217) is committed when "a mother ... kills her illegitimate child during or immediately after birth."

Raub mit Todesfolge (StGB §251) is defined as "recklessly" causing "the death of another person...in committing the robbery."

Vergewaltigung mit Todesfolge (StGB §177(3)) is defined as "recklessly" causing "the death of the victim" in committing the act of forcible rape.

Körperverletzung mit Todesfolge (StGB §226) is defined as inflicting "bodily harm" causing "the death of the victim."

The drug counterpart [(BtMG §30(3))] is defined as "negligently causing the death of another by administering drugs or allowing the other directly to consume drugs."

There are two kinds of arson that involve homicide. One kind (StGB §307) punishes arson that causes "the death of a person who was present at the time of the offense in one of the spaces which was set on fire." This would be considered felony murder in many States in the United States. It

is excluded from the comparison, however, because there are no separate statistics for it. All the indications are that the number of offenses in this category are very small.

The second kind (StGB §309) punishes an action that "negligently causes a fire ... [that causes] the death of a person." This crime would not be considered arson in most U.S. States and the death would not be considered felony murder. In most States it would be classified as involuntary manslaughter or as not falling within the criminal law. This category of arson is also excluded from the comparison.

Statistics: Because the German statistics concerning homicide include attempts and the American statistics do not, some adjustment is necessary in order to make comparisons. This report removes attempts from the German statistics.

It is possible to separate completed crimes for *Mord*, *Totschlag*, *Kindestötung*, and *Körperverletzung mit Todesfolge* in the police statistics. These are all included in the analysis. *Vergewaltigung mit Todesfolge* and *Raub mit Todesfolge* are not given separately in the police statistics. The counts from the court statistics have been added for these categories.

It is also possible to make this separation in the court statistics (*Strafverfolgung*) for *Mord*, as this category is separated into *Mord* and *Versuchter Mord*. It is more difficult to make the separation in the court statistics for *Totschlag*, *Tötung auf Verlangen*, and *Kindestötung*. These categories include attempts, and many tables do not separate the attempts from the completed crimes. Table 2.4 does make the distinction, but only for sentenced offenders. Data for the years 1990-1993 show that, except for *Totschlag*, virtually all cases are completed crimes. It shows 10 *Tötung auf*

Verlangen (all completed) and 22 *Kindestötungen* (19 completed). For *Totschlag*, the data show 1,521 cases (880 completed). The 58% completed proportion for sentenced offenders contrasts dramatically with the under 30% completed proportion in the police statistics. This suggests that most attempted *Totschlag* cases are charged as a lower level crime rather than as attempted *Totschlag*.

Because the *Todesfolge* categories of cases exist only where the victim has died, one would expect most cases in these categories to be completed crimes. This is what Table 2.4 shows for 1990-1993. During these years there were 48 *Raub mit Todesfolge* (42 completed), 6 *Vergewaltigung mit Todesfolge* (3 completed), and 198 *Körperverletzung mit Todesfolge* (all completed). The few attempts indicated in the statistics are most likely instances where the victim died, but the underlying robbery or rape was not completed.

Forcible rape

United States: The *Uniform Crime Reports* through 1992 are limited to forcible crimes involving sexual intercourse. The definition is "the carnal knowledge of a female forcibly and against her will. Included are rapes by force and attempts or assaults to rape. Statutory offenses (no force used — victim under age of consent) are excluded."

The 1992 BJS report *Felony Defendants in Large Urban Counties* defines rape as including "forcible intercourse, sodomy, or penetration with a foreign object. It does not include statutory rape or nonforcible acts with a minor or someone unable to give legal consent, nonviolent sexual offenses, or commercialized sex offenses," page 38.

Germany: The German crime of *Vergewaltigung* is similar to the classic American definition of rape. It is limited to violence or threats of violence against females and applies only to normal intercourse. Rape within marriage became a crime in 1996. Other forcible sexual acts are included in *sexuelle Nötigung* (sexual coercion). *Sexuelle Nötigung* is not limited to female victims.

Both the police statistics and the court statistics give figures separately for *Vergewaltigung* and *sexuelle Nötigung*.

Vergewaltigung (StGB 177) is committed when a person "compels a woman to have extramarital intercourse with him, or with a third person, by force or the threat of present danger to life or limb" *Sexuelle Nötigung* (StGB 178) is committed when a person "by force or the threat of present danger to life or limb, coerces another to submit to extramarital sex acts committed by the perpetrator or by a third person, or to commit extramarital sex acts on the perpetrator or on a third person" Sexual abuse of those incapable of offering resistance (*sexueller Missbrauch Widerstandunfähiger*) is covered in section 179.

Statistics: Although there are minor definitional differences in the two systems for such things as rape within the marriage, taking sexual advantage of persons who are mentally unable to resist, and the like, the German *Vergewaltigung* data are generally comparable with the American data for forcible rape. The German data for *Vergewaltigung* and *sexuelle Nötigung* combined are also generally comparable with the American data for forcible sexual crimes. The principal problem for this report is that in 1992 the UCR gives data only for forcible rape and the 1992 BJS report gives data only for forcible sex crimes combined. As the new National Incident-Based Reporting System for the UCR includes data items that allow the separation of

arrests for forcible rape and those for other forcible sex crimes, it would in theory be possible to estimate the proportion of the BJS complaints that are attributable to forcible sex crimes other than rape. The FBI does not have such data at this time, however, and no published report was found that included this kind of breakout. Bureau of Justice Statistics, *Using NIBRS Data to Analyze Violent Crime* (October 1993) contains some data using the new system but not these data elements. As a consequence, no adjustment has been made in the forcible rape data in this report.

Robbery

United States: The *Uniform Crime Reports* define robbery as: "The taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear."

The 1992 BJS report *Felony Defendants in Large Urban Counties* defines robbery as including "the unlawful taking of anything of value by force or threat of force."

Germany: The German police statistics have a general *Raub* category that includes *Raub*, *schwerer Raub*, *Raub mit Todesfolge*, *räuberische Diebstahl*, *räuberische Erpressung*, and *räuberische Angriff auf Kraftfahrer* (StGB §§249-252, 255, and 316A). This general category has a number of subcategories, but these are mostly by type of victim rather than by code section. Only the *räuberische Angriff auf Kraftfahrer* subcategory follows the penal code definition.

All of these categories would probably be included within robbery in the United States except *Raub mit Todesfolge* (robbery with death as a consequence). There does not

appear to be any easy way, however, to exclude *Raub mit Todesfolge* from the police statistics. As the court statistics do have separate data for *Raub mit Todesfolge*, the court figures were subtracted from the police totals for *Raub*. As any police cases of *Raub mit Todesfolge* that were not charged or that were charged as some lesser crime would not be included in the court statistics, the subtraction procedure is probably not a perfect correction. The whole category is small (9 cases in 1992), however, and any errors should be very small.

The court statistics have separate categories for *Raub* (§249), *schwerer Raub* (§250), *Raub mit Todesfolge* (§251), *räuberische Diebstahl* (§252), *Erpressung* (§253), *räuberische Erpressung* (§255), and *räuberische Angriff auf Kraftfahrer* (§316a). The court statistics also have a general category for *Raub*. This is similar to the police *Raub* category except that it also includes *Erpressung* (extortion).

Raub (StGB §249) is committed when a person "by force or the use of threats of present danger to life or limb, takes another's moveable property away from him with the intention of unlawfully appropriating it to himself" Overall *Raub* appears to be narrower than robbery in the United States (see *Räuberische Diebstahl* and *Räuberische Erpressung* below). In one respect, however, *Raub* is slightly broader, as it may be committed against a victim who is sleeping or passed out.

Schwerer Raub or more severe robbery (StGB §250) is committed when (1) a firearm is carried, (2) a weapon or other instrument is used to prevent or overcome resistance, (3) the offender or an accomplice placed another in danger of death or severe bodily harm, or (4) the offender acted as a member of a gang.

Raub mit Todesfolge (StGB §251) is committed when the offender "in committing the robbery ... recklessly caused the death of another person" In many U.S. States this category would be felony murder, and in all it would be considered in the homicide rather than the robbery category.

Räuberische Diebstahl (StGB §252) is committed when an offender who is "caught in the act of theft, uses force against a person, or threatens a present danger to life or limb, in order to retain possession of the stolen property" Although this kind of force was not included in common law robbery, it is almost universally considered robbery in the United States today.

Erpressung (StGB §253) is committed by a person who "by force or the threat of perpetrating a grievous wrong, unlawfully compels another to an action, acquiescence or forbearance which causes detriment to the property of the victim or another, in order to unlawfully enrich himself or a third person" This crime is very similar to extortion in American law and is not included in the comparison.

Räuberische Erpressung (StGB §255) is committed when the *Erpressung* is "committed by the use of force against a person, or by threats of present danger to life or limb" At first glance this crime appears to be closer to extortion than to robbery in American law. *Raub* is a narrower category in German law, however, than robbery in American law. *Raub* requires an actual taking by the offender. If the property is handed over — even as a result of a loaded pistol held to the victim's head — the crime is *räuberische Erpressung*. Most, and perhaps all, cases in the *räuberische Erpressung* category would be considered robberies in the

United States. This crime has therefore been included in the comparison.

Räuberische Angriff auf Kraftfahrer or robbery of a motor vehicle driver (StGB §316a) is committed by a person who "for the purpose of committing a robbery ..., a theft followed by violence ..., or extortion accompanied by violence ..., undertakes to physically assault or to restrict the freedom of decision of the operator or passenger of a motor vehicle by taking advantage of traffic conditions" Virtually all of this category would be classified as robbery in the United States. It includes robbery of taxi drivers and has been included in the comparison.

Aggravated assault

United States: The *Uniform Crime Reports* define assault as: "an unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm." The explanation indicates that this category includes assaults or attempts to kill or murder, poisoning, assault with a dangerous or deadly weapon, maiming, mayhem, assault with explosives, and attempts to commit these crimes. It is not necessary that injury result when a gun, knife, or other weapon is used which could and probably would result in serious personal injury if the crime were successfully completed.

The 1992 BJS *Felony Defendants in Large Urban Counties* definition is: "Includes aggravated assault, aggravated battery, attempted murder, assault with a deadly weapon, felony assault or battery on a law enforcement officer, and other felony assaults. Does not include extortion, coercion, or intimidation."

Germany: The German police statistics combine attempted murder with murder and attempted manslaughter with manslaughter, but it is possible to break these totals apart. The German police statistics also contain a category for *Gefährliche Körperverletzung*, a crime similar to aggravated assault. *Schwere Verletzung* is similar to mayhem. There is also a separate category for poisoning (*Vergiftung*) and for participating in a brawl (*Beteiligung an einer Schlägerei*).

The police statistics include the following categories: (1) *Körperverletzung mit tödlichem Ausgang* — StGB §§226, 227, 229(2); (2) *Gefährliche und schwere Körperverletzung* (together) — StGB §§223a, 224, 225, 227, 229; (3) *Misshandlung von Schutzbefohlenen* (StGB §§223b). A fourth category (*vorsätzliche Körperverletzung*) (StGB §§223) appears to be more like simple assault.

The police statistical categories (*Schlüssel*) for these crimes are: 2210 — *Mit tödlichem Ausgang*, 2220 — *gefährliche und schwere*, 2230 — *Misshandlung von Schutzbefohlenen*, 2240 — *vorsätzliche, leicht*.

In addition to simple *Körperverletzung*, the court statistics have six other categories: (1) *Gefährliche*, (2) *Misshandlung von Schutzbefohlenen*, (3) *Körperverletzung mit Todesfolge*, (4) *Beteiligung an einer Schlägerei*, (5) *Vergiftung*, and (6) *Fahrlässige*. Categories (1), (4) and (5) are all included in the police category for *Gefährliche und schwere Körperverletzung*.

Gefährliche Körperverletzung or dangerous bodily harm (StGB §223a) is defined as "bodily harm ... committed by means of a weapon, in particular a knife or other dangerous instrumentality, or by means of a sneak attack, or

by several people acting in concert, or by a life endangering act"

Schwere Körperverletzung or severe bodily harm (StGB §224) is defined as "bodily harm committed on the victim [which] results in loss of an important part of his body, sight in one or both eyes, hearing, speech or his procreative capacity, or in a serious permanent deformity, or deteriorates into invalidity, paralysis or mental illness" This crime is similar to mayhem under American law. It is included in the comparison.

Körperverletzung mit tödlichem Ausgang or bodily harm followed by death (StGB §226) is committed when "the bodily harm causes the death of the victim" This crime would generally be considered murder or manslaughter under American law.

Misshandlung von Schutzbefohlenen or abuse of those in a dependent position (StGB §223b) is committed when a person "torments or brutally mistreats persons less than eighteen years of age, or persons who are defenseless because of infirmity or illness, and who are under his protection or care, or belong to his household, or who have been placed under his authority by the person charged with their welfare, or are dependent on him by virtue of a work or employment relationship; or ... impairs their health by maliciously neglecting his duty to care for them" Three fourths of the crimes in this category would probably be classified as some form of child abuse in the United States. A portion of the remainder would probably be classified as aggravated assault and a portion as some form of elder abuse. Because this category is both small and the classifications involved are uncertain under U.S. law, it has been omitted from the comparison.

Beteiligung an einer Schlägerei or participation in a brawl (StGB §227) is committed when "as a result of a brawl or an attack perpetrated by several people, death is caused, or aggravated bodily harm (§224) is committed" Although this category can include homicides, there is no way to separate the homicides from the assaults in the statistics. In this report the offenses in this category are classified as aggravated assaults.

Vorsätzliche Körperverletzung or bodily harm (StGB §223) is committed when a person "physically abuses another, or causes impairment to his health" This crime is more like simple assault in American law and is not included in the comparison.

Jurisdictions within the United States vary enormously in the extent and the manner of determining whether a particular assault is "aggravated" or not. There is reason to believe that similar locality-to-locality variation occurs in Germany.

Burglary

United States: The *Uniform Crime Reports* define burglary as: "The unlawful entry of a structure to commit a felony or a theft. Attempted forcible entry is included."

The 1992 BJS report on *Felony Defendants in Large Urban Counties* defines burglary as including "any type of entry into a residence, industry, or business with or without the use of force with the intent to commit a felony or theft, such as forcible entry and breaking and entering." The classification "does not include possession of burglary tools, trespassing, or unlawful entry for which the intent is not known."

Germany: German law has no separate burglary category. What is burglary in the United States is basically an aggravated form of theft (*Diebstahl*) in Germany. The published German police statistics also have no separate burglary category. The German police statistics do, however, separate theft into ordinary theft (*Diebstahl*) and aggravated theft (*schwere Diebstahl*). The German police statistics also include very detailed breakouts describing the circumstances of the theft. Using these breakouts, German researchers have been able to create a category that closely approximates burglary (*Einbruchdiebstahl*). The police statistical (*Schlüssel*) categories used by German researchers for this purpose are Schlüssel numbers 4100-4450 and 4600. See, for example, Steffen (1982), vol. III, p. 13.

The specific categories included are —

- (410*) service rooms, offices, factories, workshops, and storerooms
- (415*) restaurants, canteens, hotels and pensions
- (420*) kiosks
- (425*) warehouses, sales rooms, self service stores
- (430*) store windows, show cases, glass cabinets
- (4350) dwellings
- (440*) basements
- (445*) new, largely unoccupied structures
- (4600) churches

These same *Schlüssel* categories were used to create the *Einbruchdiebstahl* category in Steffen (1976) and in Blankenburg and others (1978). (Interview with Dr. Steffen.)

Schwere Diebstahl (StGB §243) is the German crime of aggravated theft. This crime is defined as theft plus the presence of one or more aggravating factors. One of the aggravating factors is that "in committing the crime," the

offender "breaks or climbs into a building, dwelling house, work or business space, or any other enclosed area, or obtains entry into any of the above with a skeleton key or by any other implement not regularly used to gain entry, or conceals himself in the place."

Using this definition, the German court statistics (*Strafverfolgung*) include an *Einbruchdiebstahl* category. Because it requires that the theft actually be completed and because it is limited to crimes involving theft, this aggravating factor is narrower than burglary in American law. The burglary-*Einbruchdiebstahl* comparison is nonetheless included in this report. Since both the German and the American statistics include attempts, the definitional differences are not as great as they might appear.

Motor vehicle theft

United States: The *Uniform Crime Reports* define motor vehicle theft as "The theft or attempted theft of a motor vehicle. A motor vehicle is self-propelled and runs on the surface and not on rails. Specifically excluded are motorboats, construction equipment, airplanes, and farming equipment." Included are automobiles, trucks, buses, motorcycles, motorscooters and snowmobiles. The definition excludes the taking of a motor vehicle for temporary use by those persons having lawful access.

The 1992 BJS report on *Felony Defendants in Large Urban Counties* lumps motor vehicle theft with other felony theft. It is not possible to make a separation.

Germany: There are no legally separate categories for motor vehicle theft [although there is a separate category for unauthorized use (StGB §248b)]. Motor vehicle theft is not a felony. Although as a practical matter high monetary loss often results in increased punishment, it does not alone

suffice to make the crime automatically into an aggravated theft.

The police statistics include categories for both ordinary and aggravated theft of (1) motor vehicles including unauthorized use (*Von Kraftwagen einschl. unbefugte Ingebrauchnahme*) and (2) mopeds and motorbikes (Mopeds, *Krafträdern*). The Schlüssel numbers for *von Kfz* are 3001, 4001, 3002, 4002. See Steffen (1976, 1982). It is possible therefore to identify the number of persons suspected *Tatverdächtige* for motor vehicle theft.

The court statistics have no such categories. There is only a general theft (*Diebstahl*) category and an other (*Sonstiger*) category for aggravated theft, (*schwerer Diebstahl*). Some data are available from special studies, but these are limited.

Other serious theft

United States: The *Uniform Crime Reports* define "theft" as "the unlawful taking, carrying, leading, or riding away of property from the possession or constructive possession of another. Examples are thefts of bicycles or automobile accessories, shoplifting, pocket-picking, or the stealing of any property or article which is not taken by force and violence or by fraud. Attempted larcenies are included. Embezzlement, 'con' games, forgery, and worthless checks. are excluded." This category obviously includes both felonies and misdemeanors.

The 1992 BJS report *Felony Defendants in Large Urban Counties* defines "theft" as including "grand theft, grand larceny, motor vehicle theft, and any other felony theft." The category does not include "receiving or buying stolen property, fraud, forgery, or deceit."

Germany: Both the German police statistics and the court statistics have a category for aggravated theft (*schwerer Diebstahl*). This category includes both burglary and some motor vehicle theft. In fact burglary (*Einbruchdiebstahl*) makes up about half this category and motor vehicle theft another 25-30%. As explained above, it is possible to separate the figures for burglary in both the police and the court statistics and for the motor vehicle cases in the police statistics. It is not possible, however, to separate the figures for motor vehicle theft in the court statistics. *Schwerer Diebstahl* is not a felony (*Verbrechen*) and the factors that aggravate theft in German law are considerably different from those that aggravate theft in U.S. law. Fraud and embezzlement (*Betrug* and *Unterschlagung*) are separate categories in Germany and are not included in *schwerer Diebstahl*. Credit card theft and the like are also not included in *schwerer Diebstahl*.

Schwerer Diebstahl (StGB §243) defines the aggravating factors for theft. These exist when someone —

- commits a crime similar to burglary — see earlier discussion
- steals something which is specially secured against removal by being kept in a closed container or other protective device
- steals as a business
- steals something which is used for religious services or veneration from a church or from any other building or place used for religious observance
- steals something of importance for science, art, history or technological progress which is located in a collection open to the public or publicly exhibited

- steals by taking advantage of the helplessness of another, or of an opportunity stemming from a disaster or common danger.

Aggravated theft does not exist if "the value of the property involved in the offense is minimal."

Statistics: Although the *Uniform Crime Reports* do not divide theft into felonies and misdemeanors, it is possible to make some estimate of the more severe thefts on the basis of the tables given. Table 7, p. 107 (1992) shows the distribution by value of the theft, indicating that 36% of all larcenies reported are over \$200. Since most States make theft over a certain amount (often when over \$200) into felony theft, the comparison uses an estimate based on the proportion given in table 7. Since thefts from the person and various other kinds of theft are considered felonies irrespective of the amount taken, this estimate clearly understates the amount of serious theft in the United States. Because motor vehicle thefts are included in the BJS figures for "theft," they are included in the U.S. arrests and referrals in the appropriate tables, including tables 12 and 20.

The German figures used in the comparison are those for aggravated theft minus the figures for burglary. Because the principles used by German law to distinguish ordinary theft from aggravated theft differ considerably from the aggravating factors used in the United States, the comparison for serious theft is not a comparison of like categories. Even though the types of theft involved differ, however, the comparison nonetheless indicates how the two systems deal with what each regards as the more serious thefts.

Drug offenses

United States: The *Uniform Crime Reports* contain no crimes reported to the police for drugs. It reports drug crimes only as arrests. Included in its arrest data are arrests for narcotics, marijuana, synthetic narcotics, and dangerous non-narcotics (barbiturates, benzedrine). In most arrest tables these categories are all lumped together. Table 4.1, p. 216 (1992), gives a breakout showing the percentage of all drug arrests attributable to each type of drug and each type of activity by the arrestee:

	Sale/ Manufacture	Possession	Total
Heroin	20.6	32.4	53.0
Marijuana	6.6	25.5	32.1
Synthetic or manufactured	0.7	1.2	1.9
Other dangerous	3.9	9.2	13.1

The UCR arrest totals include both felony and misdemeanor arrests. As the UCR totals do not include Federal arrests or charges, consideration was given to adding these to the UCR totals. Ultimately, however, they were not included. See Appendix C, *Methodology*.

The 1992 BJS report *Felony Defendants in Large Urban Counties* includes two separate drug categories: "drug sales/trafficking" and "other drug offenses." "Drug sales/trafficking" includes "trafficking, sales, distribution, possession with intent to distribute or sell, manufacturing, and smuggling of controlled substances." This category does not include possession of controlled substances. "Other drug offenses" includes "possession of controlled substances, prescription violations, possession of drug paraphernalia, and other drug law violations."

Germany: The police statistics have a total for drug offenses. They also have separate breakouts for heroin and for cocaine. Marijuana (Cannabis) is also a separate category although this is lumped together with "preparation" (*Zubereitungen*). There is also an "other" (*Sonstige*) category.

The court statistics use a different set of categories. These are: (1) illegal delivery and manufacture (*unerlaubtes Abgeben, Herstellen von Handelstreiben*); (2) professional sale (*gewerbsmassige Abgabe*); (3) with death as a consequence (*mit Todesfolge*); (4) importing in not small amounts (*Einfuhr in nicht geringer Menge*); (5) other professional acts (*andere gewerbsmassig begangene*); (6) endangering the health of several people (*Gefahrung der Gesundheit mehrer Menschen*); (7) passing through adults to juveniles (*Abgabe durch Erwachsene an Jugendliche*); (8) dealing, possession, or passing in not small amounts (*Handel mit, Besitz, oder Abgabe in nicht geringer menge*); (9) other intentional (*andere vorsatzliche*); and (10) negligent (*Fahrlassige*). These categories are geared to the German drug law (*Betäubungsmittel Gesetz*), a law that is separate from the penal code.

In addition to the court statistics, there is a separate set of drug statistics, *Betäubung*. The subcategories in these statistics also track the drug statute, making divisions primarily between handlers and possessors.

Statistics: It is impractical in both countries to track the prosecutorial handling of drug offenses by drug type (heroin, cocaine, and so forth). It is also impractical to track by type of handler (dealer, possessor, and so on). The comparison therefore uses only the overall category of drug offenses. Because the German law does not have the same distinction between felony and misdemeanor as the U.S.

law, the comparison uses all drug offenses in both countries. This means that the U.S. figures include both felonies and misdemeanors.

Arson

United States: The *Uniform Crime Reports* define arson as: "Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, and so forth."

The 1992 BJS report *Felony Defendants in Large Urban Counties* lumps arson into "other property crimes." Separating arson from the "other property crimes" would require total reassembling of a complicated data set.

Germany: The police statistics include two categories of *Brandstiftung*, the German counterpart of arson. These are: (1) intentional (*vorsätzliche*) and (2) negligent (*fahrlässige*).

The court statistics use the same two categories: (1) *vorsätzliche* (StGB §§306-308) and (2) *fahrlässige* (StGB §309).

Brandstiftung (StGB §308) is committed by one "who sets fire to buildings, ships, cabins, mines, depots, stockpiles of goods which are being kept in designated public places, supplies of agricultural products or of construction material or fuel, crops in the field, forests or peat bogs, if these objects belong either to someone else or, in case they belong to the offender, are likely, because of their nature and location, to spread the fire to one of the places mentioned in § 306 numbers 1 to 3, or to one of the things belonging to another which are mentioned above"

Schwere Brandstiftung (StGB §306) is an aggravated form of arson that involves "setting fire to a building used for religious observances; a building, a ship or a cabin serving as a place of human habitation; or a space which is sometimes used as a place for a visit."

Besonders schwere Brandstiftung (StGB §307) is an even more serious form of arson in which "the fire caused the death of a person who was present at the time of the offense in one of the spaces which was set on fire," or if "the offender acted with the intention of using the arson to commit murder, robbery, theft followed by violence, or extortion accompanied with violence," or if the "offender in order to prevent or impede efforts to put out the fire, removed or rendered inoperative fire-fighting equipment."

Fahrlässige Brandstiftung is committed when a person "negligently causes a fire of the type described in §§ 306 and 308"

Statistics: Because the BJS statistics do not include any separate figures for arson, it is not feasible to make a full comparison for the crime of arson. Some limited comparisons are attempted nonetheless.

Both the German police and the German court statistics include a separate category for creating a risk of burning. As this category is not considered to be *Brandstiftung* in Germany and would not be arson in the United States, it is not included in the comparison.

Because the U.S. definition of arson typically does not include negligent burning (*fahrlässige Brandstiftung*), this category has also been omitted from the comparison.

Appendix B

Finding a common starting point for statistical comparison

It is widely acknowledged both in the United States and on the continent that the decision to begin a prosecution is one of the most important in the criminal justice system. There is an enormous difference, however, in the way that the United States and continental countries such as Germany approach this problem.

The historical antecedents of the differences between the accusatorial English system and the inquisitorial continental system are well known (for instance, Langbein 1974). There is also a substantial literature comparing various aspects of the two criminal justice systems today (for example, Damaska 1986). English language works discussing German prosecutors generally focus on the German concept of obligatory prosecution ("legality principle"), a principle that contrasts sharply with the American emphasis on prosecutorial discretion (described by the Germans as the "opportunity principle").

A few very sophisticated works get beyond these quite abstract comparisons. They acknowledge the importance of the broad doctrinal differences but correctly find that they are not the whole story. They point out that German criminal justice, like most systems of criminal justice, must deal with problems such as scarcity of resources and the unavailability of evidence, and that this necessarily blurs the legality principle (Herrmann 1974).

While the best of the prior literature points the way to a general understanding of how the two systems compare, even it leaves many basic questions unanswered. If the highly profitable two-way interchange between the

common law and the European worlds that has taken place in the past is to continue, the comparisons must become much more precise. Through the development of a better method for comparing German and American prosecutorial statistics, this report seeks to advance this goal.

There have been a number of previous attempts to compare German and American prosecutorial statistics. At the national level the most important attempt to compare German and American prosecutorial statistics was a 1987 publication by the Bureau of Justice Statistics entitled *Imprisonment in Four Countries*. Although the principal focus of this report was imprisonment rather than prosecution, the comparisons attempted required a comparison of prosecutorial statistics for the two countries.

A major problem encountered by this report (and by other efforts to compare prosecution in the two countries) is that criminal cases in Germany generally do not begin with an arrest as in the United States. It is not possible therefore to make direct comparisons between the German prosecution data and the best American prosecution data, because the best American prosecution data come from transaction statistics that are arrest based.

The BJS project recognized the problem and sought to solve it by giving calculations for two different kinds of German data. The first was data about *Tatverdächtige*, that is, persons suspected by the police. The second was data about *Anklage*, a term translated in the report as "persons actually charged in an official proceeding." The methodological appendix for the 1987 BJS imprisonment study indicated that the *Tatverdächtige* figure was looser than the

arrest figure in the United States and that the *Anklage* figure was tighter.¹²

A. *Tatverdächtige* and arrestees: How similar?

This report seeks to identify a single, common starting point for comparisons of prosecutorial activity in the United States and Germany. It concludes that for serious crimes the most appropriate comparison is between cases transmitted by the German police to the German prosecutor as suspects worthy of prosecution (*Tatverdächtige*) and cases arrested in the United States.¹³

In both Germany and the United States most criminal investigations are conducted by the police and most prosecutions begin when the police give the prosecutor information indicating that they suspect a named individual of committing a particular offense. In the United States, when the crime involved is a serious one, the police usually arrest the individual involved before they transmit their information to the prosecutor. Arrest often facilitates the investigation, making it easier to question the defendant, to collect fingerprints, to place the suspect in a lineup, and in many instances assisting with other investigative steps such as searches and seizures.

Of course there are rules about whom the police may and may not arrest. They may not arrest an individual just because they suspect that person of committing a crime. In the United States, the police must be able to establish that there is a reasonable probability that a crime was committed and that the person they have identified is the culprit. This proof requirement called "probable cause," is less than the proof required to convict in criminal cases ("beyond a reasonable doubt"). It is more, however, than a "mere

suspicion" or even the "reasonable suspicion" required for the police to stop a suspect on the street.

Under German law police may not take a suspect into custody simply because the suspect is strongly believed to have committed a crime. Police are authorized to take a suspect into custody without a court order (*vorläufige Festnahme*) only if they cannot identify the suspect, there is a risk of flight, or there is no time to get a court order.¹⁴ As a practical matter (and presumably as a result of the law), the German police take a much smaller percentage of suspects of serious crimes into custody than do their U.S. counterparts. Thus it is not possible to use the taking of a suspect into custody as a beginning point for comparisons between the American and the German system of prosecution.¹⁵ There are indications that German police officers often "invite" suspects to the police station at the beginning of a case and that suspects routinely comply with these invitations on a "voluntary" basis. If this practice were widespread enough, it could amount to an informal counterpart of the American arrest system. Although there is little research about this practice, many German experts believe that there is no uniform informal practice. Even if such a practice did exist, the activity is not recorded, and it could therefore not provide a basis for international comparisons.

In the United States there is considerable variation in the way the police transmit information about a serious criminal case to the prosecutor. In many jurisdictions the arresting officer or a police detective talks personally with a

¹²Methodological Appendix (unpublished), p. 5.

¹³Operationally there are obviously significant differences between *Tatverdächtige* and arrestees. Arrestees are by definition persons who have been taken into custody, while this is not a requirement for *Tatverdächtige*.

prosecutor about the case, generally giving the prosecutor both an oral and a written report about it. In other jurisdictions the police simply give the prosecutor a file. In a smaller number of jurisdictions the police file the charges themselves and then turn reports over to the prosecutor.

Although there is undoubtedly variation in Germany as well, the process is more standardized. The police compile a case file (called an *Akte*) and transmit this to the prosecutor. The case file typically contains much more information than its U.S. counterpart.

In the United States the prosecutor has no legal responsibility for the investigation, and no supervisory powers over the police. Although the prosecutor has the legal authority to investigate if he or she chooses to do so, there is no legal requirement that the prosecutor do so, and as a practical matter the prosecutor's office rarely investigates a case wholly on its own. Prosecutors frequently seek more information about cases on which they have filed charges, but

¹⁴Criminal Procedure Code (StPO) § 127.

¹⁵The German term *vorläufige Festnahme*, "temporary detention," corresponds fairly closely in terms of custodial status to "arrest" as that term is used in American law. The German term *Untersuchungshaft* means a detention ordered by the court for the purpose of investigation. There is no exact U.S. counterpart. In practice the term is closer to detention under an arrest warrant or pending bail than to arrest. *Vorläufige Festnahme* is much more restricted than arrest in the United States, and is not a suitable starting point for comparisons. This is perhaps fortunate as there are no on-going German criminal statistics concerning *vorläufige Festnahme*. There are on-going German statistics concerning *Untersuchungshaft*, but as indicated above these correspond more closely with bail statistics in the United States than with arrest statistics.

generally do not investigate ordinary crimes, even serious ordinary crimes, themselves. Both in theory and in fact, the American prosecutor has great discretion — not only about whether to investigate but also about whether and how to file charges.

The German law is different. Legally the German prosecutor is in charge of the investigation, and obligated both to investigate and prosecute the case. The police are legally subordinate to the prosecutor, at least in their criminal investigation functions. Because of the "legality" principle, neither the prosecutor nor the police have any discretion in carrying out these functions.

As a consequence of this legal situation, the German police submit reports to the prosecutor not only on persons suspected of committing crimes but also on cases for which they have no suspects.

Probable cause: One concern about the hypothesis that *Tatverdächtige* are the equivalent for statistical purposes of arrestees in serious criminal cases is whether the quantum of probable cause required to categorize a suspect as a *Tatverdächtige* in Germany is less than that required for arrest in the United States.¹⁶

The "probable cause" required for arrest in the United States cannot be easily quantified or defined. It is clear that probable cause requires more proof than reasonable suspicion and less than proof beyond a reasonable doubt. Some older authorities suggest that it normally requires a preponderance of the evidence, but the U.S. Supreme Court has not endorsed this standard and its most recent pronouncements speaks only of a "fair probability" of guilt [(*Illinois v. Gates* (1983); LaFare and Israel (1992)].

When German police identify a particular individual as the person who committed a crime, they "clear" the crime and classify the person identified as a *Tatverdächtige*. They then submit a report to the prosecutor about the case indicating that this person is suspected of committing the crime. German law does not seek to regulate reports sent from the police to the prosecutor. There is thus no legal requirement that the German police establish the equivalent of "probable cause" before transmitting information about that individual to the prosecutor. No law would therefore be violated if the police identified persons as suspects even if the level of proof available was extremely low. As a practical matter, however, there would be little advantage to the police for such a course of action. The police not only are very conscious of the limits of their own resources, but also they know that the prosecutor will file charges only on those cases where there is sufficient proof.

For statistical purposes *Tatverdächtiger* is defined as "one who is suspected *with sufficient cause*, on the basis of the police investigation, of committing a crime." (Italics added.)¹⁷ A review of the German literature, discussions with German police, prosecutorial, and statistical officials, and the personal observations of the author suggest that

¹⁶The Methodological Appendix to *Imprisonment in Four Countries* (Bureau of Justice Statistics, 1987), NCJ-168951, p. 5, indicates that the standard of probable cause required to make someone a suspect [in Germany] is considerably less than that necessary for arrest."

this standard in practice is roughly the equivalent of the American probable cause standard.¹⁸

Clearances: One method for comparing arrests and *Tatverdächtige* is to examine the similarity of the relationship between police clearances and arrest in the United States with that between police clearances and *Tatverdächtige* in Germany.

In the United States the instructions for the Uniform Crime Reports indicate that the police may "clear" a crime whenever an offender is arrested, charged with commission of the offense, and turned over to the court for prosecution. Even if such a clearance is not possible, crimes may nonetheless be cleared "exceptionally" if the investigation has definitely established the identity of the offender and there is enough information to support an arrest, charge, and turning over to the court for prosecution.¹⁹

In Germany police clearances (*aufgeklärt*) and *Tatverdächtige* are identical. When the police clear up a crime,

¹⁷The police term for sufficient cause for suspicion is *hinreichend Tatverdächtig*.

they automatically categorize the person identified as a "*Tatverdächtige*."²⁰

The German instructions indicate: "A case which has been cleared up is an offense for which, in the course of the police investigations, either a suspect known at least by name was traced or a suspect was caught in the act."²¹

Although the German police formally have no "exceptional" clearance category, they are allowed to "clear" a case even if the offender identified is underage, deceased, or insane. The exact number of clearances of this type is not known, as no distinction is made in the type of clearance reported. The limited data available in ad hoc studies suggest that such cases are few, and not greatly different from the number of exceptional clearances in the U.S.²²

The limited information available suggests that 90% or more of the *Tatverdächtige* are cases that would be arrests in the United States. The remainder are cases in which the suspect is out of the country, has died, or is otherwise not

¹⁸A letter from Hans-Jörg Albrecht, Max Planck Institute for Foreign and International Criminal Law, to Steven R. Schlesinger, Director, Bureau of Justice States, U.S. Department of Justice, January 8, 1987, concerning the Methodological Appendix to *Imprisonment in Four Countries* (Bureau of Justice Statistics, 1987) addresses the legal requirements for arrest in Germany but does not appear to discuss the practical question as to whether German *Tatverdächtige* are similar to U.S. arrestees.

¹⁹Federal Bureau of Investigation, *Uniform Crime Reporting Handbook* (Washington, D.C.: 1984), p. 42.

available for processing. There is no easy way, however, to remove these non-arrest cases from the German statistics. (See section C.)

The fact that German clearance rates are substantially higher than U.S. clearance rates for the same offense could be interpreted as evidence that Germany requires a lower standard of proof for clearance and thus a lower standard of proof for referral to prosecution. The examples of cleared cases in the German legal and empirical literature, however, suggest no systematic difference in German and U.S. standards. A better explanation for the higher German clearance rates is the lower level of crime in Germany. When the U.S. crime rate was more like that in Germany today (in the late 1950s and early 1960s), the U.S. clearance rates were similar to those in Germany today.

Empirical studies: There are many American cases and studies that help to flesh out the meaning of "probable cause" to arrest. LaFave and Israel (1992) summarize the case law. An earlier study by LaFave (1965) gives an enormous number of short factual summaries of arrests in which probable cause is present. Feeney, Dill, and Weir (1983) attempt to quantify the evidentiary factors that correlate with arrests, prosecutorial charges, and convictions.

²⁰Interview with Reinfried Pailer, Statistischen Landesamt Baden-Württemberg (the office responsible for technical supervision of the *Strafverfolgung* throughout Germany); interview with Professor Wolfgang Heinz, University of Constance, a leading authority on German criminal statistics.

²¹*Polizeiliche Kriminalstatistik 1992*, p. 231.

²²No distinction is made in clearances reported to the Federal Bureau of Investigation between normal and exceptional clearances. The examples given in the *Uniform Crime Reporting Handbook*, p. 42, of permissible "exceptional" clearances are similar to the instances when a German clearance would not be an arrest in the U.S. system.

The most relevant German study is a 1987 analysis conducted by Professor Dieter Dölling for the Bundeskriminalamt, the German equivalent of the FBI. This study examined in great detail the case records for over 1,400 cases of burglary, robbery, forcible rape, and fraud. The study drew its data from three different cities located in two different states. Roughly half the cases for each of the four crime types studied were solved cases and the other half unsolved cases. Some 793 items of information, covering every aspect of the crime, the offender, the history of the case, and the circumstances leading to apprehension, were coded for each of the 1,400 cases.

The purpose of the Dölling study was to examine both the legal and practical feasibility of using "solvability scales" to assist the German police in separating those cases warranting careful investigation from those that do not. Such scales are widely used by the police in the United States, but because of the obligatory prosecution principle were not being used in Germany at the time of the Dölling study. The items of information included in the study were examined in both tabular and multivariate analyses. Among the multivariate analyses performed was a discriminant analysis for each crime type. This analysis sought to identify the factors most predictive of clearance, charging, and conviction.

Because the information items coded by Dölling were not identical with those in American studies of the same type, it is not possible to make exact comparisons. It is possible to say, however, that the factors that predict clearance in Germany appear to be similar to those that predict clearance or arrest in the United States. There is also considerable similarity in the factors that predict charge and conviction. These similarities suggest that the standards are similar.

B. *Anklage* data as an alternate starting point

Because of concerns about the comparability of the *Tatverdächtige* data, the 1987 BJS imprisonment study used data about cases in which German prosecutors had filed charges (*Anklage*) as an alternate starting point for its comparisons. As indicated above, the present report takes the position that *Tatverdächtige* and arrest data are comparable and that there is therefore no need for an alternate starting point.

If there were a need for an alternate starting point, using *Anklage* data would certainly be one approach that should be considered. An *Anklage* in German law has some similarity to a initial prosecutorial charge in American law. The term omits, however, a large category of minor misdemeanors which the German prosecutor can discretionarily decline to prosecute.²³

A more serious problem is that the *Strafverfolgung*, the German court statistics series from which the 1987 BJS imprisonment study drew its data, is not a good source for data about *Anklage*. The term actually used in the *Strafverfolgung* is *Abgeurteilte*. This term is defined as follows:

Abgeurteilte are *Angeklagte*, against whom penal orders have been issued or in which after the opening of the chief proceeding, there has been a final decision to dismiss or convict. The number includes those convicted and those in which there was some other decision. Where the decision concerns a person charged with more than one offense, the count includes only the offense with the greatest penalty. When the same person is charged in more than one proceeding, a separate count is made for each separate proceeding.²⁴

As this definition indicates, *Abgeurteilte* includes all persons charged (all *Angeklagte*). Unfortunately, however, *Abgeurteilte* data cannot be used to obtain accurate *Anklage* data for specific offenses. Discussions with the German officials responsible for the *Strafverfolgung* and other experts indicate that the *Abgeurteilte* for a specific offense (such as robbery) include all those persons convicted of that offense plus all those charged with that offense whose cases are dismissed after the chief proceeding has begun. The *Abgeurteilte* for a specific offense do not include, however, those persons for whom the judge has found insufficient evidence to justify going into the full trial. Overall, the term corresponds more closely to "informations" or "indictments" in the U.S. system than to cases charged.²⁵

The *Abgeurteilte* statistics also do not include either those persons charged with a lesser offense or those convicted of a lesser offense. The research available indicates that both of these are large categories. The *Abgeurteilte* data can be used to develop a minimum figure for cases charged for a specific offense, but cannot be used to produce an accurate overall figure.

C. Should the *Tatverdächtige* statistics be adjusted?

Because the German prosecutor is technically responsible for all investigations, all cases are referred to the prosecutor whether a suspect has been identified or not. Cases in which a suspect has not been identified are not considered to be *Tatverdächtige*. All cases in which an individual has been identified by name are, however, considered to be

²³German Criminal Procedure Code (StPO) section 153.

²⁴*Strafverfolgung 1993*, p. 6.

Tatverdächtige. The figures therefore include minors below the age of majority, absent defendants, suicides, and deaths. Defendants also sometimes die or become absent at a later time. This section discusses the need for and feasibility of adjusting the *Tatverdächtige* figures to make them more comparable with the American arrest figures.

Defendants below the age of competency (age 14): Minors below the age of competency are included in the police *Tatverdächtige* statistics but not in the court statistics (*Strafverfolgung*). As this report concerns only adult cases, there is no problem about minors below the age of competency. They are not included in the data for either country.

Absent defendants: Persons who have already fled at the time of referral by the police and persons who flee during processing by the prosecutor are not included in the German court statistics unless the prosecutor files a complaint (*Anklage*). If the prosecutor files a complaint, three things can happen: (1) the defendant can be tried in absentia; (2) the prosecutor can simply wait for the defendant to appear; or (3) the prosecutor can terminate the case (*Einstellung*). Options (1) and (3) go into the court statistics. Option (2) goes into the court statistics only when the prosecutor takes some final action.

Absent suspects do present some problems for the comparison. A suspect whose identity is known but whose whereabouts are not known cannot be arrested and is generally

²⁵Before a full trial proceeding can be instituted, a German judge must formally decide to "open" the trial proceeding. This requires the judge to determine that there is enough probable cause to warrant a trial on the charge. The function of this determination is thus roughly the same as the preliminary hearing or the grand jury proceeding in the United States.

not included in the U.S. arrest statistics. In Germany, however, such a suspect will be included in the *Tatverdächtige* statistics.

Once a suspect has gone to court, the American and German statistical systems operate more similarly. Many U.S. suspects who are arrested are released on bail or some other form of pretrial release. A small percentage of those released will seek to flee rather than appear in court. As reported in *Felony Defendants in Large Urban Counties, 1992*, 63% of the persons charged with felony crimes were given pretrial release at some time and 51% of those released had at least one failure to appear in court. Eight percent remained fugitive at the end of the data collection period. These cases appear in the BJS statistics as charged cases.

In Germany most suspects are either not arrested or held for a very short time. A small percentage of these suspects will seek to flee rather than appear in court. If charges have been filed against the suspect, they will be counted in the court statistics.

Deaths: Suspects who die also present some problems for the comparison. In the U.S. suspects who die before being arrested are never arrested or charged and do not appear in the statistics. In Germany, however, suspects who die before having been referred to the prosecution by the police are referred nonetheless. They are therefore included in the *Tatverdächtige* statistics.

Persons who are dead at the time of referral by the police or who die before an *Anklage* is filed are not included in the court statistics (*Strafverfolgung*). Persons who die after an *Anklage* is filed may or may not be included. If the case is dismissed (*eingestellt*) after the person dies, it will in

theory be included in the court statistics. German statistical experts indicate, however, that it is possible that these cases never come into the statistics (because counts are made only after a case is completed).

Appendix C

Methodology

Basic approach

There are no regular national prosecutorial statistics in either the United States or Germany that can be used as a basis for comparison. Germany does have national prosecution statistics (*Staatsanwaltschaften*). These statistics contain no offense data, however, and are not suitable for sophisticated comparisons.

The basic approach for this report was to combine the available police and court statistics in each country and to use these combined figures as the basis of comparison.

The first requirement for the comparison was to find a year for which suitable statistics were available in both countries. The year 1992 was chosen because that was the latest year for which extensive U.S. prosecutorial and court statistics were available.

Police data for the United States were taken from the FBI publication *Crime in the United States, 1992*. Prosecutorial and court statistics were taken from the data used in the BJS publication *Felony Defendants in Large Urban Counties, 1992*. This data base included cases filed in 1992 and disposed of in 1992 and 1993.

Police data for Germany were taken from Bundeskriminalamt, *Polizeiliche Kriminalstatistik, 1992*. Prosecutorial and court statistics were taken from Statistisches Bundesamt, *Strafverfolgung 1993*. Because the German court statistics for 1993 did not yet include the former East Germany, the Bundeskriminalamt made available police data for the former West Germany plus all of Berlin.

Estimating arrests

United States

Adult arrests were taken from *Crime in the United States, 1992*, table 41. These were multiplied by 1.2 to adjust the factor necessary to increase the population covered in the table to the 1992 national total.

As the German statistics are national totals rather than the sum of the totals of the individual states, consideration was given to adding Federal arrests or Federal cases filed to the U.S. totals. There are no statistics covering Federal arrests. Available data indicate, however, that U.S. attorneys disposed of 30,547 drug suspects and filed 15,596 drug charges in Federal court in 1992, about 3% of all U.S. drug arrests and 4% of all U.S. drug charges. Because the Federal statistics are so different from the State statistics, these figures were not added to the tables. The percentage of Federal crimes for other offenses is much smaller than that for drugs, and data for other Federal crimes were also not included in the comparison. BJS, *Sourcebook of Criminal Justice Statistics — 1992*, p. 477.

Germany

Adult cases referred by the police to the prosecution were taken from Bundeskriminalamt, *Polizeiliche Kriminalstatistik, 1992*, table 20 (unpublished data for the former West Germany and the whole of Berlin — population 65,765,900). These data do not include the remainder of the former East Germany. The 1992 population for all of Germany was 80,274,564.

Estimating cases charged

United States

The number of U.S. cases charged is based on the data used for *Felony Defendants in Large Urban Counties, 1992*. This data base includes all the felony filings for 1 month in a group of large counties. This group of counties was selected and weighted to represent jurisdictions containing 37% of population and 50% of the crimes.

The total number of U.S. cases charged was estimated by multiplying the BJS study totals for each offense by 12 to get a yearly total and by 2 to get a U.S. total.

There are obvious problems in estimating a total figure for cases charged in the United States on the basis of what happens in large urban counties. The method used appeared superior, however, to any of the other procedures that might have been used.

In order to estimate the extent of bias in this method, an analysis was made of the charging and conviction rates of the 58 California counties using data contained in the California Department of Justice, *California Criminal Justice Profile 1992* (1993), table 28. The 58 counties were divided into 5 large, 10 medium-sized counties, and 43 small counties. The five large counties accounted for 58%, the medium-sized counties 23%, and the small counties 19% of the felony dispositions. The median charging rates were as follows: large counties (81.2%), medium (88.4%), and small (95.8%). The median conviction rates were: large counties (70.5%), medium (71.1%), and small (75.0%). These figures compare with a statewide charging rate of 84.4% and a statewide conviction rate of 70.2%.

This analysis suggests that there is very little bias in the conviction rates shown in the tables but that true national totals might show a charging rate and dismissal rate that is somewhat higher than that in the tables. Some of the differences in the figures given are probably due to differences in the offense mix in the smaller jurisdictions.

As about 4% of the offenders in the BJS data base were under 18 years of age, it was necessary to remove data for these offenders before carrying out the estimating procedure.

Germany

German law allows the prosecutor to file a complaint (*Anklage*) in much the same way that an American prosecutor files a complaint. The German prosecutor is also allowed, however, to follow an alternative procedure. He may propose a penal order (*Strafbefehl*) with a lesser penalty. If the defendant (and the court) accept the penal order, there is no trial. *Abgeurteilte* in the court statistics include cases in which there is a complaint and those in which there is a penal order.²⁶

Three methods for estimating the percentage of German cases charged were considered in preparing this report —

- using a ratio based on *Abgeurteilte* in the court statistics and *Tatverdächtige* in the police statistics,
- relying on ad hoc attrition studies,

²⁶All cases in which a penal order (*Strafbefehl*) becomes final are included in the court statistics (*Strafverfolgung*). Cases in which the defendant successfully objects to a penal order (*Strafbefehl*) are not included unless the prosecutor later files a complaint (*Anklage*).

- and using the *Abgeurteilte/Tatverdächtige* ratio modified to include an estimate for the number of cases charged with a lesser offense and the number of convictions for a lesser offense.

When the study began, it appeared possible to obtain figures on the number of suspects by offense and the number of prosecutorial charges (*Anklage*) by offense. As the study progressed, it became apparent that good data on the number of suspects were available but that it was not possible to get good *Anklage* data by offense.

The court statistics (*Strafverfolgung*) contain a category (*Abgeurteilte*) that at first glance appears to contain good charge data. This category contains data on cases that are charged and convicted and on cases that are charged but not convicted. The cases that are charged but not convicted are listed by the *Anklage* (charge) offense. The cases that are charged and convicted are, however, listed only by the conviction offense. This means that the listing for a particular offense contains the cases charged for that offense and not convicted but not the cases charged for that offense and then convicted of a lesser offense. The listing for a particular offense also does not include persons referred to the prosecution for that offense and charged with a lesser offense. Because both these are large categories, the court statistics are a fairly weak indicator of cases charged. (It is known that the prosecuting authorities in Germany, like those in the United States, charge many cases at a lower level than the police definition.)²⁷

The basic method used in this report has been to rely on ad hoc studies. This method has a number of disadvantages.

²⁷See Appendix B, *Finding a common starting point for statistical comparison*, page 66.

Although there are good German attrition studies for many of the offenses included in the analysis, most of these rely on data from the 1970s or the early 1980s. Some of the studies are based on as many as 8 of the 116 German prosecutorial districts, but others are based on a single district. This has importance as it is known that there is considerable variation from district to district. The geographic coverage of the studies is also not uniform from offense to offense.

Despite these drawbacks the ad hoc studies produce more plausible results than simply comparing the police and the court statistics. Using a ratio based on *Abgeurteilte* in the court statistics and *Tatverdächtige* in the police statistics is not totally invalid, as every case which it includes is in fact a case charged. This method is, however, a clear underestimate by an unknown amount.

The third method of comparison would in essence combine features of the first two methods. It starts with the court/police comparison, but uses the ad hoc studies to add an estimated number for cases charged with lesser offenses and for cases convicted of lesser offenses. A major drawback to this method is the limited data available on charges and convictions involving lesser offenses.

As a practical matter, the best ad hoc study that could be found was used to make the basic figure for cases charged. This was then compared with other ad hoc studies and the court/police ratio. This comparison showed that court/police ratio almost always substantially undercounted the rate of charging:

Crime	Ad Hoc Study	Abgeurteilte/ Tatverdächtige
Willful homicide	71%	56%
Forcible rape	45	33
Robbery	57	36
Aggravated assault	--	27
Burglary	73	47
Serious theft	55	16
Drugs	73	39
-- Not applicable		

The procedures used for estimating cases charged for specific offenses follow.

Willful homicide. The best known German attrition type study of willful homicide is Sessar (1981). This study is based on all 1970 and 1971 Baden-Württemberg cases of *Mord, Totschlag, Kindestötung, and Körperverletzung mit Todesfolge*. Like many German homicide studies, however, the study combines homicide and attempted homicide data in such a confusing way that no good attrition table can be made either for homicide or for attempted homicide. The tables on pages 63, 103, 134-135, 168-169, and 266 contain most or all of the categories necessary for an attrition analysis of the homicide cases but lack the necessary breakdowns separating the homicide and attempted homicides. Blankenburg and others (1978), pp. 261-267, analyze the extent of prosecution participation in the investigation in these cases. Sessar (1980) is based on the

same data as the better known 1981 study but is presented much more clearly.

Weiher (1989) analyzes cases cleared up in Hamburg during 1980-1984. Steitz (1993) reviews the available studies and discusses a 1971 data set from Nordrhein-Westfalen. Both the Sessar and the Weiher data suggest that there are no attempts in the *Körperverletzung mit Todesfolge* data and that all cases in this category should be included in the analysis.

Sessar (1980), p. 199, finds that 71% of the cases referred by the police are charged; Weiher (1989), p. 95, 91%; and Steitz (1993), p. 113, 74%. This report uses the Sessar data because it contains more extensive and better *Anklage* (charge) data.

Forcible rape. Most German studies that analyze case attrition (*Fallschwund*) for forcible sexual crimes focus on forcible rape (*Vergewaltigung*) and do not include other forcible sex crimes (such as *sexuelle Nötigung*). Studies by Blankenburg and others (1978), Brusten (1974), Fehrmann and others (1986), Weis (1982), and Dölling (1987) all focus on *Vergewaltigung*, while a study by Steinhilper (1986) covers both *Vergewaltigung* and *sexuelle Nötigung*.

Blankenburg's data are 1973-1974 cases from eight widely scattered areas (Hamburg, Darmstadt, Duisburg, Regensburg, Arnsburg, Itzehoe, Hechingen, and Coburg). Dölling uses 1978 cases from Hanover, Göttingen, and Kassel, and Steinhilper 1977-79 cases from Detmold (Nordrhein-Westfalen).

Most of these studies find that a high percentage of the cases referred by the police to the prosecutor are not charged: Blankenburg, p. 70 (60% not charged); Brusten,

p. 133 n.7 (63% not charged); Fehrmann, p. 233 (57% not charged); Weis, p. 203 (53% not charged); and Dölling, p. 313 (table 174) (55% not charged). Only Steinhilper, pp. 125, 77, finds a substantially smaller percentage not charged (29% of rapes and attempted rapes; 39% of the combined category). This report uses the Dölling figures because his study is one of the most recent and best of the studies and because he has comparable data for robbery and burglary.

If the 1993 *Abgeurteilte* figures were adjusted to take account of the Dölling charges (*Anklage*) that are for lesser offenses, the total approaches the number produced by applying the Dölling charged percentage to the 1992 police figures. This reinforces the view that the Dölling figures have substantial validity.

If *sexuelle Nötigung* were included in the analysis, the number of adult *Tatverdächtige* in the police statistics would be increased by 54% and the number of *Abgeurteilte* in the court statistics by 56%.

Robbery. German studies analyzing case attrition in robbery cases include Blankenburg and others (1978), Dölling (1987), and Förster (1986). The Blankenburg and Dölling samples are the same as those discussed in the section on *Forcible rape*. Förster examines 1978-1980 robberies in Lübeck.

All three of these studies find that a high percentage of the cases referred by the police to the prosecution are charged: Blankenburg and others, p. 70 (55% charged); Dölling, vol. 2, p. 235 (57% charged); Förster (62% charged). This report uses the Dölling data.

Aggravated assault. As indicated in Appendix A, *Offense comparisons*, aggravated assault in Germany includes attempted murder, attempted manslaughter, and *gefährliche Körperverletzung*. There do not appear to be any German attrition studies that cover all these categories.

Sessar (1980, 1981), Volmer (1989), and Steitz (1993) discuss attempted murder and attempted manslaughter cases. The Sessar sample is the same as that discussed in the section on *Willful Homicide*. Steitz's sample comes from 1971 cases in six large cities. Attempted manslaughter data are missing, however, from three of the six cities.

Of the attempted murder and attempted manslaughter cases in Sessar (1980), pp. 62-63, 88-90% were charged, but only 27% were charged as attempted murder or attempted manslaughter. Most were radically downgraded by the prosecutor. About half appear to be charged as aggravated assault. Of the attempted murder and attempted manslaughter cases in Volmer, pp. 262-278, 75% were charged but only 43% as attempted murder or attempted manslaughter.

Sessar (1979) indicates that big city police departments use tighter definitions for attempted murder and attempted manslaughter than smaller departments.

Steffen and Polz (1991) and Theerkorn (date unknown) analyze violence within the family. Only a small percentage of the Steffen-Polz offenses were aggravated assaults (*gefährliche Körperverletzung*), but 78% of these were not charged. P. 117. Simple assaults were the most frequent offense. Eighty-four percent of all offenses were not charged. Schaubild 7. Simple assaults were also the most frequent offense in the Theerkorn study, pp. 117 and 127. About 80% of his cases were not charged.

Kotz (1983) analyzed negligent assault cases, finding that only 54% were charged or given a penal order. Most of these were given a penal order (44%) rather than charged (10%).

One method for estimating the cases charged for aggravated assault would be to use the Sessar (1980) figures (88%) to project the attempted murder and attempted manslaughter cases and the Steffen-Polz (1991) figures (22%) to project the remainder of the cases. This method of estimating produces a number of charges filed, however, that is even smaller than the number of *Abgeurteilte* given in the court statistics. As the number of cases charged cannot be less than the number of *Abgeurteilte* and as the number of *Abgeurteilte* is known to be a significant underestimate of the charges filed, this method is obviously defective. This report uses the number of *Abgeurteilte* as the basis for estimating the number of charges. Although this is clearly an underestimate, it is the best estimate available.

One reason that the not charged figures are so high in the assault category is that the principle of obligatory prosecution (*Legalitätsprinzip*) applies in a restricted way. Simple assault and negligent assault cases [*Körperverletzung* (StGB §223) and *fahrlässige Körperverletzung* (StGB §230)] can be prosecuted by the state only if the victim files a petition. Simple assault cases are not included in the sample for this report, but many cases that are classified as *Gefährliche Körperverletzung* by the police are downgraded to simple assault or some other category requiring a petition (*Antrag*) by the prosecutor. Filing a petition is a relatively simple procedure, but requires initiative on the part of the complainant. Only if there is "a special public interest" (*besonderen Öffentlichen Interesse*) in prosecuting is the prosecutor allowed to prosecute simple assault cases without a petition from the victim.

German law, like American law, generally does not allow private parties to file criminal prosecutions. Private parties are, however, allowed to file criminal prosecutions in certain limited situations. Cases involving assault (StGB §223), certain kinds of aggravated assault (StGB §223a), and certain kinds of threats (StGB §240) are among the cases for which this is allowed.²⁸ Private prosecutions are not easy, however. The complainant must first go to a conciliator and give advance security for costs (StPO §§379, 379a) and then go through a conciliation process (§380). The prosecutor may take the case over if there is a public interest in the proceeding. This is seldom done, however.

The lowest level of aggravated assault [*gefährliche Körperverletzung* (StGB §223a)] does not require a petition but can be prosecuted privately. It is thus in an ambiguous position insofar as the obligatory prosecution principle (*Legalitätsprinzip*) is concerned. See, for example, Schneider (1986), pp. 170-173; Heinrich (1993). More serious aggravated assaults (*schwere Körperverletzung, versuchter Mord*) are much more clearly governed by the obligatory prosecution principle.

Burglary. The German studies that analyze case attrition in burglary cases include Dölling (1987) and Steffen (1976). The Dölling data are the same as that discussed in the sections on *Forcible rape* and *Robbery* above. The Steffen data are the same as that used by Blankenburg and others (1978). These two studies show somewhat different charging rates: Dölling, vol. 2., p. 153 (73% charged); Steffen, pp. 178-79, 327 (51% charged). The Steffen figures are an interpretation based on figures indicating that 40% of the

²⁸In cases where a German prosecutor's office finds no special public interest in prosecuting, the office will frequently inform the victim of his or her right to prosecute privately.

cases are convicted and 11% acquitted.²⁹ The report uses the Dölling figures as they are more detailed and more recent.

Motor Vehicle Theft. Steffen (1976) contains data on motor vehicle theft. Her study, pp. 178-79, 327, suggests that 55% of the motor vehicle cases are charged. This is an interpretation based on figures indicating that 45% of the cases are convicted and 10% acquitted.²⁹

Serious Theft. Blankenburg and others (1978), pp. 70, 84, include data on serious theft (*schwerer Diebstahl*). This category includes burglary and motor vehicle cases, but is not limited to them. Because of problems with the totals given for the number of cases included in the tables, it is not possible to separate the various categories, and there are problems in figuring out what the actual dispositions are. The fact that Blankenburg's cases are from 1973-74 is also a problem because of changes in German criminal procedure. A code section added in 1974 (StPO §153) allows German prosecutors to dispose of minor cases through the voluntary payment of small fines and other similar methods. This report uses the figure from Steffen (1976), pp. 178-179, for auto theft because her table is clearer and because auto theft is a big part of serious theft in Germany. Her data are from the same data set as the Blankenburg data, but auto thefts would be much less affected by the change in law than general theft.

Drugs. Hellebrand (1993), p. 41, reports that 27% of the drug cases referred by the police are not charged. His figures are based on the Datenbank BIFOS. He indicates that the percentage not charged varies enormously from state to

²⁹The tables also contain data on diversions and dismissals in the *Hauptverhandlung* but these are hard to interpret.

state — from 5.9% in Bavaria, for example, to 75.6% in Berlin.

Arson. This category presented too many problems and was omitted from the U.S./Germany prosecutorial comparison.

Convictions

United States

About 10% of the cases in the BJS data base for *Felony Defendants in Large Urban Counties, 1992* had not reached final adjudication at the time the data was collected. In the present report these pending cases were treated as if they had the same distribution as the cases for which adjudication was complete. Convictions on the charged offense were estimated in two stages. In stage one the number of sentences in which the charged offense was the adjudication offense was divided by the number of sentences for all cases charged with this offense. In stage two, the resulting percentage was multiplied by the conviction rate for this offense. The U.S. figures include pleas of guilty, convictions by a jury, and convictions by a judge sitting without a jury.

Germany

The German figures are based on convictions by a judge sitting alone or a judge sitting with other professional or lay judges. They also include cases with penal orders (*Strafbefehle*). The figures are taken from Statistisches Bundesamt, *Strafverfolgung 1993*, table 2.2 (*die verurteilt wurden*) for adults and from table 2.1 for 18 to 20-year olds handled as juveniles.

In the tables the number of convictions is given as a percentage of the persons arrested or referred for prosecution for the offense discussed in each table. Two percentages are given for each table. The first is the percentage of persons arrested or referred for prosecution for the table offense who are convicted of any charge. For the robbery table, for example, this percentage would be that proportion of the persons referred for prosecution for robbery who have been convicted of robbery or any other charge. The second percentage given concerns those defendants who are convicted of the table offense itself. For the robbery table, this second percentage would be that proportion of the persons referred for prosecution for robbery who have been convicted of the crime of robbery itself. Because some persons charged with robbery will be convicted of lesser or other offenses, this percentage is necessarily lower than the percentage given for those convicted of any offense.

Sentences

United States

In addition to the charged cases that were still pending at the time the data collection for the BJS study *Felony Defendants in Large Urban Counties, 1992* was completed, there were also some persons convicted who had not been sentenced. In the present report these pending cases are treated as if they had the same distribution as the cases that had already been sentenced. Sentences for the charged offense were estimated by multiplying the prison/total ratio by the conviction rate for the charged offense. Although a small percentage of those sentenced for prison received sentences of less than 12 months, all those receiving prison sentences were included in the tables. Similarly, although a small number of those receiving jail sentences received

sentences of 12 months or more, all these persons were excluded from the tables.

Germany

The figures are taken from Statistisches Bundesamt, *Strafverfolgung 1993*, table 3.1 for adults and table 4.1 for 18 to 20-year olds handled as juveniles. Suspended sentences are treated as non-prison sentences in the figures.

The tables on sentencing show the percentage of defendants arrested or referred for prosecution for the table offense who have received a prison sentence of 1 year or more.

The percent of those charged who receive a prison sentence of 1 year or more is shown separately for: (1) those convicted of the table offense (robbery, for example); (2) those convicted of some other offense; and (3) both combined. The table also includes the percentage having a prison sentence of 1 year or more as a percentage of those sentenced for the table charge.

Juvenile cases

United States

About 4% of the felonies filed involved persons younger than 18 years old. Although these juveniles were prosecuted as adults, they were excluded from this report.

Germany

Tatverdächtige statistics in Germany are generally given for both juveniles and adults together. In the German police statistics there is no trouble separating the statistics for

Tatverdächtige under 18 years of age from the *Tatverdächtige* who are 18 and over.

The court statistics are more complicated because some 18 to 20-year-olds are handled as adults but many are handled as juveniles. Some tables in the *Strafverfolgung* give details on the 18 to 20-year-olds but some do not. The table that explains what happens to defendants who are not sentenced (table 2.2) is one of those that does not contain clear breaks. The juvenile court data in this table have been apportioned on the basis of data from table 2.1. Because table 2.1 gives the number of 18 to 20-year-olds who are charged and the number who are sentenced in the juvenile court, no apportionment of these figures was necessary. The other figures in table 2.2 (dismissed, acquitted, etc.) were apportioned on the basis of the figures for the cases charged (*Abgeurteilte*). (The actual procedure is somewhat complicated. *Verurteilte* figures were subtracted from *Abgeurteilte* figures and then apportioned on the basis of the *Abgeurteilte* ratios.)

Table C-1
Juvenile arrests and referrals in 1992

	Percent of all arrests and referrals	
	U.S.	Germany
Willful homicide	15%	6%
Forcible rape	16	7
Robbery	26	25
Aggravated assault	15	16
Burglary	34	25
Other serious theft	31	30
Arson	49	27
Drug offenses	8	7

Sources:

United States: *Crime in the United States, 1992*, table 41.

Germany: Statistisches Bundesamt, *Strafverfolgung*

Table C-2
Juveniles handled in adult court

	Percent of all under 18 cases		Percent of all adult court cases	
	U.S.	Germany	U.S.	Germany
Willful homicide	41%	0%	11%	0%
Forcible rape	11	0	4	0
Robbery	20	0	10	0
Aggravated assault	8	0	4	0
Burglary	3	0	3	0
Other serious theft	2	0	4	0
Drug offenses	13	0	3	0

Sources:

United States: *Felony Defendants in Large Urban Counties, 1992*, tables 7-13.

Germany: Statistisches Bundesamt, *Strafverfolgung 1993*, tables 2.1, 2.2.

Table C-3
18 to 20 year-olds handled in juvenile court

	Percent of all cases for 18 to 20-year-olds charged	
	U.S.	Germany
Willful homicide	0%	90%
Forcible rape	0	85
Robbery	0	92
Aggravated assault	0	77
Burglary	0	89
Other serious theft	0	85
Arson	0	80
Drug offenses	0	81

Sources:

United States: *Felony Defendants in Large Urban Counties, 1992*.

Germany: Statistisches Bundesamt, *Strafverfolgung 1993*, table 2.1.

Issues requiring further study

Some issues concerning the German system that were not fully analyzed are discussed below.

Non-German Defendants. A sizeable proportion of German defendants are non-Germans. Defendants who are in the country illegally are subject to deportation. As in the United States, prosecutors sometimes prefer to deport rather than prosecute. The decision about deportation is made by the administrative agency rather than the prosecutor, but these two agencies seem to work together a great deal.

Deportation is not an option for asylum applicants or for aliens who are in the country legally. Asylum applicants may be deported, but only under certain very restrictive conditions.

The court statistics contain data on non-German defendants, but no data about the number of defendants who are deported (*Abschiebung*).

The prison statistics (*Strafvollzug*) contain data on persons held in *Abschiebungshaft*. This is a form of detention for persons arrested for crime but subject to deportation. These statistics do not disclose, however, how many of those who are held in detention are ultimately deported.

Neither the court nor the prison statistics contain information about the number of defendants deported. Such information is available only from the Ministry of the Interior (*Innenministerium*).

Insanity and Mental Illness. Persons who are insane (*Schuldunfähig*) are not considered guilty. If the evidence of insanity is clear, the prosecution may choose not to bring charges. If the prosecution does bring charges but the court finds that the defendant is insane, the defendant will be found not guilty (*freispruch*). If the defendant is considered dangerous, the defendant will be placed in a mental institution. (StGB §63). The court statistics contain data on the number of defendants found not guilty in court and placed in a mental institution. These data are less clear, however, than might be wished. (*Strafverfolgung 1993*, tables 2.2, 5.) The court statistics do not show the number of defendants who are never charged.

Diversion. In both Germany and the United States some persons accused of crime are handled without full prosecution. Generally the accused is offered some alternative to full prosecution, such as participation in a drug treatment program, restitution, or payment of a small fine. In the United States, prosecution in such cases is often suspended until successful completion of the alternative measure. In the German system, the law allows the alternative measure to be substituted for full prosecution.

In both systems diversion may take place prior to the filing of a charge or after a charge has already been filed. The table figures for the United States include only those diversions occurring after the filing of a felony charge by the prosecution. They do not include diversions taking place before a felony charge has been placed. If these were included, it is likely that at least for some offenses the percentage diverted would be higher.

In Germany diversion breaches the mandatory prosecution principle. A 1974 statute authorizes this breach in order to make it easier to dispose of minor cases (technically "cases

in which there is no official interest"). The German prosecutorial statistics (*Staatsanwaltschaften*) contain data about diversions but do not contain breakouts by offense.

The German figures in this report are estimates based on von Schlieben (1994). This study is based on cases from Nürnberg-Fürth in 1983. The study shows that section 153a, the most frequently used diversion procedure, is used primarily for minor theft and traffic offenses. Only 3.5 % of the section 153a cases studied were crimes against persons. For most offenses the estimation procedure used was to multiply the percent of section 153a used for a particular offense (page 21) by the total number of section 153a cases reported in the *Staatsanwaltschaft 1992*, table 2.2.1.

Aggravated assault (*Gefährliche Körperverletzung*) is not one of the offenses listed on p.21, but was included in the test sample for the study. It made up 0.6% of the cases in the test sample. As the percentages for particular offenses in the test sample are close to those that appear in the full study, this report assumed that they were the same and used the test sample figure for projecting diversions for aggravated assault.

Appendix D

German criminal justice statistical series

Polizeiliche Kriminalstatistik. These are police statistics similar to the Uniform Crime Reports. They are published by the Bundeskriminalamt, the German counterpart of the FBI. This report includes data from the former East German States as well as the West German States. Because the older East German data are not comparable with the West German data, most trend data are only for West Germany.

Strafverfolgung. This series gives sentencing data in some detail for both adults and juveniles. It also includes some data on unconvicted cases, including some pretrial release data. The series is published by the Statistisches Bundesamt, which has some similarity to the U.S. Bureau of the Census. The data are mostly based on the offense of conviction. This series is always several years behind in its publication. Through 1993, these statistics include only West Germany.

Rechtspflege. This series gives organizational and output data for all justice agencies and activities except the police. It is published by the Statistisches Bundesamt. The different volumes included in this series are published at different times.

Strafgerichte. This series concerns the activities of the criminal courts. This series does *not* include offense data. It is published by the Statistisches Bundesamt. In the early 1990s, this series did not include East German data.

Staatsanwaltschaften. This series concerns prosecution. It is published by the Statistisches Bundesamt. It does not include offense data. In the early 1990s, it did not include East German data.

Bibliography

W. Scott Van Alstyne, "Comment: The District Attorney — A Historical Puzzle," 1952 *Wisconsin L. Rev.* 125.

Erhard Blankenburg, Klaus Sessar, and Wiebke Steffen, *Die Staatsanwaltschaft in Prozess strafrechtlicher Sozialkontrolle* (Berlin: Duncker & Humblot, 1978).

Manfred Brusten, "Polizei-Staatsanwaltschaft-Gericht. Empirische Daten und Thesen zur Produktion von Kriminalstatistiken," *Monatschrift für Kriminologie und Strafrechtsreform* 57 (1974): 129.

Mirjan Damaska, *The Faces of Justice and Authority* (New Haven: Yale University Press, 1986).

Dieter Dölling, *Polizeiliche Ermittlungstätigkeit und Legalitätsprinzip* (Wiesbaden: Bundeskriminalamt, 1987).

Frieder Dünkel, "Germany," in Frieder Dünkel and Jon Vagg, *Untersuchungshaft und Untersuchungshaftvollzug* (Freiburg, Germany: Max-Planck-Institut für ausländisches und internationales Strafrecht, 1994).

Adhemar Esmein, *A History of Continental Criminal Procedure* (Boston: Little, Brown, 1913; reprinted Rothman, 1968).

Floyd Feeney, Forrest Dill and Adrienne Weir, *U.S. Department of Justice, Arrests Without Conviction: How Often They Occur and Why* (Washington, D.C.: U.S. Government Printing Office, 1983).

- Hans Fehrmann, Michael Baurmann, and others, *Das Misstraun gegen vergewaltigte Fraun: Erfahrungen von Vergewaltigungsopfern* (Bremen: H. Schafer, 3d ed., 1986).
- Hans-Jürgen Förster, *Der Täterschwund zwischen der Polizeilichen Kriminalstatistik und der Strafverfolgungsstatistik* (diss. Kiel, 1986)
- Andre Fournier, *Code de procedure criminelle de l'Etat de New-York* (Larosse, 1893), quoted in Esmein, p. 594, n.2.
- Richard Frase and Thomas Weigand, "German Criminal Justice as Guide to American Law Reform: Similar Problems, Better Solutions?," 18 *Boston College International & Comparative L. Rev.* 317 (1995).
- Gary Friedman, "The West German Day-Fine System: A Possibility for the United States?," 50 *U. Chicago L. Rev.* 281 (1983).
- R.W. Gillespie, "Fines as an Alternative to Incarceration," 44 *Federal Probation* 20-26 (1980).
- Julius Goebel, Jr. and Raymond Naughton, *Felony and Misdemeanor* (New York: Commonwealth Fund, 1944) (Patterson Smith reprint, 1970).
- Oliver W. Hammonds, "The Attorney General in the American Colonies," 1 *Anglo-American Legal History Series* 1 (1939) (New York University).
- Johannes Hellebrand, *Bekämpfung der Rauschgiftkriminalität durch sinnvollen Einsatz des Strafrechtes* (Wiesbaden: Bundeskriminalamt, 1993).

Joachim Herrmann, "The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany," 41 *U. Chicago L. Rev.* 468 (1974).

Joachim Herrmann, "Bargaining Justice--A Bargain for German Criminal Justice?," 53 *U. Pittsburgh L. Rev.* 755 (1992).

Peter Kotz, *Die Wahl der Verfahrensart durch den Staatsanwalt* (diss., Augsburg, 1983).

Wayne LaFave, *Arrest: The Decision to Take a Suspect into Custody* (Little Brown, 1965).

Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure* (St. Paul: West, 2d. ed., 1992).

John Langbein, "Controlling Prosecutorial Discretion in Germany," 41 *U. Chicago L. Rev.* 439 (1974).

John Langbein, *Prosecution in the Renaissance: England, France and Germany* (Cambridge: Harvard University Press, 1974).

John Langbein, *Comparative Criminal Procedure: Germany* 87-118 (1977).

John Langbein, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law," 92 *Michigan L. Rev.* 1047 (1994).

James P. Lynch, "A Comparison of Prison Use in England, Canada, West Germany and the United States: A Limited Test of the Punitive Hypothesis," 79 *Journal of Criminal Law & Criminology* 180 (1988).

- Montesquieu, *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989) (Cohler, Miller, Stone, trans.).
- William Pizzi, "Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform," 54 *Ohio State L. J.* 1325-1373 (1993).
- Albert J. Reiss, Jr., "Public Prosecutors and Criminal Prosecution in the United States of America," 20 *Juridical Review* 1, 3-8 (1974).
- Eike von Schlieben, *Legalbewährung Nach Einstellung des Strafverfahrens Gemäss s.153a I StPO* (diss., Erlangen-Nürnberg, 1994).
- Ursula Schneider, *Körperliche Gewaltanwendung in der Familie* (diss., Munster, 1986).
- Klaus Sessar, "Der zweifelhafte Aussagewert der Polizeilichen Kriminalstatistik bei den versuchten Tötungen," *Kriminalistik* 33: 167 (1979).
- Klaus Sessar, "Die Umgehung der lebenslangen Freiheitsstrafe," *Monatsschrift für Kriminologie und Strafrechtsreform* 63: 193, 199 (1980).
- Klaus Sessar, *Rechtliche und soziale Prozesse einer Definition der Tötungskriminalität* (Freiburg: Max Planck Institut, 1981).
- Wiebke Steffen, *Analyse polizeilicher Ermittlungstätigkeit aus der Sicht des späteren Strafverfahrens* (Wiesbaden: Bundeskriminalamt, 1976).

- Wiebke Steffen, *Inhalte und Ergebnisse Polizeilicher Ermittlungen* (Munich: Bavarian Landeskriminalamt, 1982).
- Wiebke Steffen and Siegfried Polz, *Familienstreitigkeiten und Polizei* (Munich: Bavarian Landeskriminalamt, 1991).
- Wilfried Rasch, *Forensische Psychiatrie* (Stuttgart: Kohlhammer, 1986).
- Udo Steinhilper, *Definitions- und Entscheidungsprozesse bei sexuell motivierten Gewaltdelikten: Eine empirische Untersuchung der Strafverfolgung bei Vergewaltigung und sexueller Nötigung* (diss., Konstanz, 1986).
- Dieter Steitz, *Probleme der Verlaufstatistik: Verdeutlichung anhand einer Erhebung zu Tötungsdelikten* (diss., Tübingen, 1993).
- Raymond H. C. Teske, Jr., "Comparison of the Criminal Statistics of the United States and the Federal Republic of Germany," 10 *Journal of Criminal Justice* 359 (1982).
- Gerd Theerkorn, *Gewalt im sozialen Nahraum* (date unknown).
- Walter Volmer, "Kriminalistik/Kriminologie der Tötungsdelikte — Auswertung von Akten des Polizeipräsidenten Köln der Jahre 1976-1985," in *Schriftenreihe der Fachhochschule für Öffentliche Verwaltung NW*, Band 20/1989, pp. 262-278.

Thomas Weigand, "Prosecution: Comparative Aspects," in Sanford Kadish, ed., *Encyclopedia of Crime and Justice* (New York: Free Press, 1983), vol. 3, pp. 1296-1304.

Thomas Weigand, "Sentencing in West Germany," 42 *Maryland L. Rev.* 37 (1983).

Ralf Weiher, *Vollendete Tötungsdelikte: Eine interdisziplinäre Studie unter besonderer Berücksichtigung soziologischer, viktimologischer und kriminalpädagogischer Aspekte* (diss., Bochum, 1989).

Kurt Weis, *Die Vergewaltigung und ihre Opfer: Eine viktimologische Untersuchung zur gesellschaftlichen Bewertung und individuellen Betroffenheit* (diss., Stuttgart, 1982).

Acknowledgments

It is not possible to mention all of the many people and organizations who contributed to this study. I would like to express my special thanks, however, to the Bureau of Justice Statistics for its support and to Jan Chaiken and Carol Kalish for their advice and encouragement. Special thanks are also due to the J. William Fulbright Foreign Scholarship Board and the Commission for Educational Exchange between the United States of America and the Federal Republic of Germany, both of which provided crucial financial support, and to the law faculty at the University of Augsburg, which kindly served as my home institution in Germany during the study.

Professor Joachim Herrmann, my friend and host at the University of Augsburg, spent countless hours educating me about the German criminal justice system, arranging contacts with police and prosecutors, and helping with the comparisons. Without his extensive knowledge of both the German and American systems, the project could not have been completed. Professor Wolfgang Heinz, University of Constance, also gave generously of his time and was a sure-footed and invaluable guide to German criminology and the secrets of the German criminal statistics.

Uwe Dörmann, Scientific Director, Bundeskriminalamt, provided important advice and assistance as did Quint Hegner, Division of Law Enforcement, California Department of Justice; James Lynch, American University; Reinfried Pailer, State Office of Statistics, Baden-Württemberg; Wiebke Steffen and Karl Wunderle, Criminological Research Group, Bavarian Landeskriminalamt; and Egon Weber, Landeskriminalamt, Hamburg. Herman Eder, Chief Director, Swabian Division, Bavarian Police, made it possible to observe the everyday work of the Augsburg police,

and the officers of the Augsburg police made that an illuminating and valuable experience. Hans Jochen Wagner, Chief Prosecutor, Muenster, Nordrhein Westfalen, helped greatly in explaining and clarifying the work of the prosecutor's office. H. Nikolaus Bosch, Joachim Kaetzler, and Dierck Schindler, University of Augsburg, assisted in the literature search and patiently explained many things about the German system. Susan Wilcox assisted with the calculations for the United States data. Needless to say the views expressed are those of the author and not those of the many people who kindly provided advice and assistance.

U.S. Department of Justice
Office of Justice Programs

Bureau of Justice Statistics
Jan Chaiken, Ph. D.
Director

This document was prepared under contract for the Bureau of Justice Statistics as part of its International Statistics Program. The author assumes sole responsibility for the contents including statistical assumptions and estimating procedures.

BJIS Discussion Papers promote the exchange of information analysis, and ideas on issues related to justice statistics and to the operations of the justice system.

The author may be contacted at —

School of Law
University of California, Davis
Davis, CA 95615

Phone: 916-752-2893
Fax: 916-752-4704

Contents

The United States and Germany	2
Suspects arrested or referred for prosecution	9
Cases charged by the prosecution	11
Convictions	15
Sentencing	27
Arrest and pretrial detention	35
Lesser crimes	38
Definitions	39

Appendixes

A: Offense comparisons	42
Willful homicide	42
Forcible rape	47
Robbery	49
Aggravated assault	52
Burglary	55
Motor vehicle theft	57
Other serious theft	58
Drug offenses	61
Arson	63
B: Finding a common starting point for statistical comparison	66
<i>Tatverdächtige</i> and arrestees: How similar?	68
<i>Anklage</i> data as an alternate starting point	76
Should the <i>Tatverdächtige</i> statistics be adjusted?	78
C: Methodology	81
Basic approach	81
Estimating arrests	82
Estimating cases charged	83
Convictions	94
Sentences	95

Juvenile cases 96
Issues requiring further study 99

D: German criminal justice statistics series 102

Bibliography 103

Acknowledgments 109

