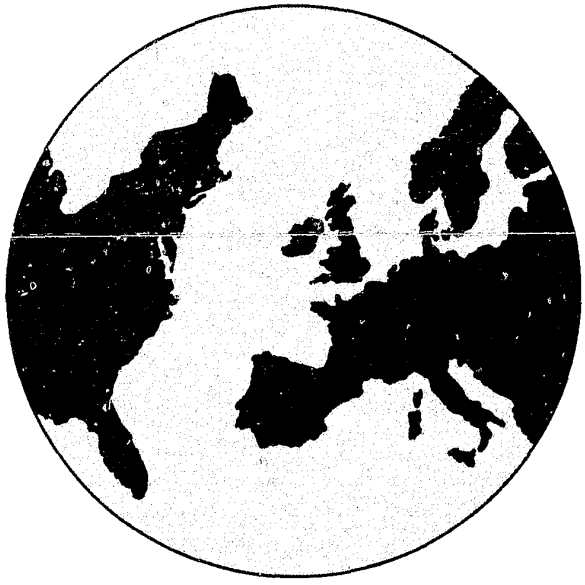
European Alternatives to Criminal Trials and Their Applicability in the United States



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European Alternatives to Criminal Trials and Their Applicability in the United States

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ABSTRACT

This report[1] examines the administration of criminal law in Europe, emphasizing practices that differ from those in the United States and reduce the number of cases tried in criminal courts. European practices which might be adapted to reduce the caseload in American courts are examined. These include: shifting trials outside the ordinary criminal courts, or outside the court system; and decriminalization of certain behaviors. Data are presented on many features of the European systems, and the applicability of European procedures to the American system is explored. The countries studied include West Germany, Sweden, England, Yugoslavia, Denmark, Norway, Belgium, Hungary, Austria, Poland, Switzerland, and France. In these countries interviews were conducted with academic lawyers, sociologists, Ministers of Justice and other ministers, policemen, prosecutors, judges, psychologists, and political scientists. One procedure which may be adaptable to the American system is the use of police and prosecutorial fines for victimless crimes. Police fines are similar to tickets and are used for petty crimes such as drunkenness and disorderly conduct as well as for traffic offenses. Prosecutorial fines are also used for petty crimes and may take the place of probation or conditional dismissal. The use of administrative law, lay courts, and lay judges in civil and petty criminal cases is examined. On the basis of European experience, a suggestion is made for decriminalization of shoplifting and employee theft. Several factors which should be taken into account before changes are made in the American system are the compatibility of European practice and American culture; the lack of empirical data on the success of the European system; and the need for experimentation on a small scale before introducing radical changes into the American system. References are provided in the report. Included in the appendixes are the results of mail surveys, the survey forms and questionnaires, a list of informants, and an English translation of a German article on the internal administration of justice in the workplace.

[1]This report is one of three of a project in "Comparative Assessment of Alternative Policy Options in Dispute Adjudication." The others are Johnson and Schwartz, *A Preliminary Analysis of Alternative Strategies for Processing Civil Disputes* and Bloch, Hansen, Johnson, and Sabagh, *A Comparative Analysis of the Statistical Dimensions of the Judicial Systems (and Related Institutions) of Seven Industrial Democracies.*

CHAPTER I. INTRODUCTION

Social reactions to criminal behavior are highly variable, even within a single society. In the United States, for example, we may ignore the behavior, we may punish the deviant informally, we may try to modify the behavior clinically, we may try to alter the behavior by changing the deviant's attitude, and we may make the government's criminal law apparatus responsible for reacting to the behavior.

In one sense, the history of criminal law administration for the past century in the U.S. is the history of efforts to introduce the same flexibility into government reaction to deviance as exists in private reactions. Separate treatment for juveniles, separate treatment for the criminally insane, plea bargaining, and the latest vogue, pre-trial diversion programs, are all attempts to provide responses to criminal and quasi-criminal behavior which are more sensitive to individual differences and to psychosocial reality than the old prescribed path of indictment, trial, and acquittal or sentence.

In an effort to expand the range of this flexibility, we conducted research in Europe to identify practices which are different from or variants of those used in the U.S. and which have the result, intended or not, of reducing the number of criminal cases tried by the ordinary criminal courts. There are a limited number of techniques available to reduce this caseload. Cases tried by such courts may be expedited. Trial of some of these cases may be shifted to non-ordinary criminal courts, to non-criminal courts or to non-courts. Or behavior previously sanctioned by the criminal courts may be redefined as socially acceptable. We explored instances of all of these strategies in Europe except that the decriminalizations we investigated did not involve approval or neutrality toward previously condemned behavior, but rather the substitution of civil for criminal sanctions. We did not study in Europe "radical" decriminalization such as changes in the status of abortion, pornography and homosexuality, since each has been adopted and been the object of intensive study within the U.S.

We investigated improved trial efficiency through the use of lay judges rather than juries. We looked at administrative penal systems as examples of non-ordinary criminal courts and at the behavior of police, prosecutors and conciliation committees as processing by non-courts. We studied decriminalization of shoplifting and of petty crimes committed on factory premises as shifts of cases from criminal to civil courts. With the exception of the use of lay judges, implementation of these strategies in the U.S. would relieve criminal courts of responsibility for certain cases and transfer them to other functionaries. No *transfer* was necessarily involved in the European context, since the distribution of responsibility may have been the result of an original allocation as well as a recent or ancient redistribution.

This report, then, is organized around the concept of transfer of responsibility. Description of the transfer of responsibility to the police is followed by discussion of such transfer to prosecutors, to administrative agencies, to lay courts and to civil courts. In each section we present the data we have gathered about the practice in the country in which we investigated it, and then explore the adaptability of such a transfer or reform to American conditions.

CHAPTER II. METHODOLOGY

Sequentially, data for this study were obtained from a literature review, a two-step mail survey, and 19 weeks of field interviews in Europe. The literature review, in addition to using the standard abstracts, included computerized searches from the NIMH Clearinghouse, the NILECJ Reference Service and the Smithsonian Scientific Information Exchange. We scanned position papers and reports of the proceedings of five U.N. International Congresses on Crime Prevention, as well as the research reports of ten American institutions working in the field of criminal justice. Jan Stepan, the Director of the Foreign Collection of the Harvard University Law Library, was the single best source of materials describing current developments in European criminal law administration. The slim pickings from this relatively extensive effort were heavily concentrated in the two areas of recent reforms in West Germany, especially modifications of the prosecutorial function, and lay participation of various kinds in criminal adjudication in eastern Europe.

The mail survey was intended to identify informants knowledgeable about specific practices, as well as providing information about the practices themselves.[1] The first mailing went to 98 people selected by means of the 1972 *Directory of Sociologists of Law* of the International Sociological Association, our study's advisory committee, the U.N. Social Defence Research Institute and Dr. Stepan. The questionnaire (a copy is included as Appendix 1) asked for brief descriptions of caseload-reducing techniques and information about other informants who might be able to provide more detailed data about them. The recipients of the questionnaire included academic lawyers, sociologists, political scientists, psychologists, judges, prosecutors, and ministry of justice officials in Denmark, England, France, West Germany, Hungary, Italy, the Netherlands, Norway, Poland, the U.S.S.R., Sweden and Yugoslavia. Fifty-eight responses were received (59%).

The second mailing was sent to informants proposed by responses to the first questionnaire. The second questionnaire (a copy is attached as Appendix 2) inquired about the objectives, operation, scope, location, history, effects (in terms of equity, accessibility, precision and costs), proponents, opponents and public views of the particular practice. This questionnaire also tried to elicit further names of people well acquainted with the practice, with whom the mailing continued. In the later stages of the second round of the survey for some alternatives we were referred to the same people repeatedly, suggesting that for these nominations we had identified a "correct" universe of respondents. The response from Italy and the U.S.S.R. was minimal, but alternatives in Austria, Belgium and Switzerland were added to those of the ten countries listed above. Interesting practices were described for Czechoslovakia and East Germany, but it was not possible to identify respondents knowledgeable about them. Ninety-seven second round questionnaires were distributed and 50 were completed. The 52% response rate is excellent considering the difficulties in an international mail survey.

Field interviews were conducted for those nominations which were not primarily concerned with juveniles and which did not replicate practices now or formerly in use in the U.S. We thus ruled out study of British lay magistrates and legislation concerning pornography in Denmark. The treatment of juveniles was omitted on the ground that, in one place or another in the U.S., just about every feasible reaction to juvenile criminality other than non-intervention has been tried. In all, 72 formal interviews were conducted: two in French, two in German, one via a translator in Poland, and the balance in English. No interview took less than one and one-half hours and several lasted as long as seven hours over a two-day period. The modal interview consumed about two hours. The following table lists the number of interviews by country and by the professional associations of the interviewees.

[1]The results of a similar mail survey conducted in non-European countries are recorded in Appendix 1.

Professional Association

Country	Academic Lawyer	Sociologist	Other Ministry	Policeman	Ministry of Justice	Prosecutor	Judge	Psychologist	Political Scientists	Total
W. Germany	12	3			2		1	1		19
Sweden			3	3		3	3			12
England	4	1	3							8
Yugoslavia	2	4								6
Denmark	1		1		1	1		1		5
Norway	2	2							1	5
Belgium		1		2		1				4
Hungary	1	1		1				1		4
Austria	2				1					3
Poland		2							1	3
Switzerland				1	1					2
France	1									1
Total	25	14	7	7	5	5	4	3	2	72

This research strategy had several weaknesses, imposed principally by a combination of the broad range of countries investigated and the limited time available for the investigation. We conducted research in 26 cities in 12 countries in 19 weeks. Taking into consideration travel time and official holidays, the pace of the research unavoidably averaged one and one-half cities per week. This inexorable schedule had two consequences: little time was available to develop leads beyond those produced by the survey, and heavy reliance was placed on single informants. The first limitation affected the number of practices identified, the second affected the reliability of the analysis of the practices we investigated. During the field work on West German prosecutorial practices informants with differing professional perspectives and political values were questioned about the same subjects. This cross checking established some confidence that the researcher's understanding was not slanted by informants speaking from a narrow data base or with an undetected professional or ideological bias. In the investigation of most other practices in most other countries, however, interviews about a particular subject were limited to one or two informants, and the findings ought to be understood as particularly tentative. The following excerpt from field notes of an interview conducted about three weeks after field work began may give some body to these observations.

> My misunderstanding of the status of penal orders in Denmark, generated by my interview with X, has been a signal to me of the extremely tentative nature of the information I am securing. Generally, language has not been a problem. Nor do I think that limitations in my understanding of Continental legal culture have caused significant misunderstandings. The problem comes, I think, from the accuracy, timeliness and range of information which my informants have about the subjects I discuss with them. Sometimes the subject is not a major interest of the informant, sometimes some of his data is wrong, slanted or incomplete. Although I can generally determine the first problem, finding a better person may take, generally does take, more time than the inexorable schedule permits. Frequently I will not know about the other problems which would become apparent on cross-checking with overlapping interviewees. But again the schedule obstructs. All this is simply by way of emphasizing the site visit rather than analytic nature of what I am doing.

A second limitation imposed by the schedule was the lack of an opportunity to investigate the identified practices from the consumer perspective. We learned, for instance, how lawyers and sociologists felt about expanded prosecutorial discretion or decriminalizing shoplifting, but we did not have time or resources to interview criminal defendants or storeowners to determine their views directly.

A further limitation was caused by European holiday schedules. Field work was conducted from April to August. As summer holidays approached, fewer and fewer informants were available. Although we were fortunate that our work in West Germany meshed well with staggered German school closings, we were, on the other hand, unable to complete any substantial research in the Netherlands and France.

CHAPTER III. THE TRANSFER TO POLICE

If petty illegal behavior is not only identified but also punished by the police, court resources can be devoted to more aggravated criminal conduct. We therefore investigated police fines in Switzerland, Denmark, Belgium and Sweden. These fines range from those literally paid on the spot to fines which, although experienced by the offender in a manner similar to ticketing in the U.S., are processed entirely without court involvement. Beyond reducing clerical costs and reallocating them from the courts to the police, police fines are significant where they are applied to offenses other than traffic infractions.

A. On-the-Spot Fines

On-the-spot fines for minor traffic offenses were discussed with police officials in Switzerland, where they are currently in use, in Belgium, where they have been abandoned, and in Sweden, where they have been proposed, but never employed. Such a fine was also levied on a field researcher in Hungary.

> I was driving through Budapest streets at about ten o'clock at night. There were a number of people on the sidewalks, but traffic was light. I made a left turn, and seconds later heard the loud scream of a siren. It was a police car and I was told to pull over to the side of the road. In pidgin German the officer told me courteously that I had disobeyed a 'No Left Turn' sign, and that I was to pay 100 forints fine then and there. This is about five dollars. I had in my pocketbook only 50 forints and an assortment of other currencies. The policeman suggested that I go to a big restaurant nearby and try to change enough money to pay my fine. In the restaurant I was told (a) that it would be illegal for them to change foreign money and (b) under no circumstances to pay any money to the policeman (no elaboration on this).
>
> Back in the street a crowd was gathering. The policeman said, 'Come to the station, then.' Three separate people came up to me and very matter-of-factly proffered 100-forint notes. The policeman finally said that I could pay 50 forints as a first installment, hand over my 'passport' (my international driver's license), and reclaim it when I came with the remaining 50 forints the next day. Meanwhile eight or ten people seemed to be remonstrating with the officer to have a heart. Abruptly, he said, 'All right. *Fifty* forints.' I gave him the fifty, he returned my license, and five identical printed slips, each apparently a receipt for ten forints for an unspecified traffic offense. He thanked me, and that was that. He never wrote my name down.

In Switzerland, on-the-spot fines, based on a fixed schedule, are exacted exclusively for minor traffic violations (a similar system, *l'amende forfortaire*, existed in France until 1972).[2] Authorized by statute in 1970, they have actually been used since 1973. Swiss federal officials estimate that about 50% of traffic offenses are cleared by on-the-spot fines. These fines are collected by the policeman immediately after he has observed a violation. The offender exchanges cash (to a maximum of about $25) for a numbered receipt. Each day an officer must account for cash equivalent to the value of the receipts he has distributed. The offender has the right to see the schedule and need not pay the fine at that juncture, in which case he can pay by mail within 10 days or go to court. If the fine is SF 50 ($20.00) or less and the offender pays it, the process is anonymous; no identifying information is recorded. Foreigners are obliged to pay these fines on-the-spot or provide surety. The Swiss police will issue a court citation rather than an on-the-spot fine to a repeated offender who appears to be using the fines as a license fee.

Records of on-the-spot fines are maintained by cantons in Switzerland and are not aggregated feder-

[2]According to this scheme, a policeman could give an on-the-spot fine for minor "contraventions" to an offender who, if he was unable or unwilling to pay it, would purchase a stamp of the same value and send it to the appropriate authorities within a fixed period. If he failed to pay the penalty, he either went to court or through summary proceedings, called *procedure simplifiée* (Sheehan, 1975: 77). The *amende forfortaire* was replaced by the penal order.

ally. In Bern canton the number of traffic cases increased by 20% from 36,768 in 1972 to 48,526 in 1973, the first year of on-the-spot fines. Sixty percent of these 1973 traffic offenses (29,148) were paid on-the-spot or within 10 days of the infraction. Country-wide, SF 24,334,000 ($9,733,600.00) were collected on-the-spot or within 10 days in 1973, mostly from on-the-spot fines. Swiss officials report that on-the-spot fines have increased absolutely and proportionately in each year since 1973.[3]

Senior Swiss police officials do not believe that police corruption arising out of access to cash is frequent. They allege that the consequences of corruption for the Swiss policeman are too serious to risk in exchange for a relatively small payoff. The political and social organization into small units, where police are strangers only to foreigners, and the eagerness of Swiss citizens to catch a policeman in a compromising act also are believed to inhibit petty dishonesty.

In contrast, on-the-spot fines which had been used for 24 minor traffic infractions were eliminated in Belgium in 1971 precisely because of the problems of accountability and corruption. Similarly, in Sweden the police union has continually opposed the introduction of on-the-spot fines on the grounds that cash collection poses an intolerable temptation to policemen.

In the U.S. minor traffic offenses are sanctioned by ticketing. Although there are many variations with respect to amounts and time limitations for responding to warning notices, the ABA has recommended procedures which have been adopted in many communities and may be considered typical (ABA, 1958).

- Uniform tickets are given to motorists at the site of the offense unless they evade apprehension.
- A ticket is an order to appear in court and sets bail by reference to a fixed schedule.
- The offender may then pay and forfeit the stipulated bail within a specific time period. If he fails to do so warning notices or notices of intent to issue warrants are sent, sometimes increasing the applicable bail. Eventually the offender must appear in court if the bail is not forfeited (the fine is not paid).

Some systems allocate less authority—and discretion—to the apprehending officer. For example, in Massachusetts, to insure uniform standards and prevent individual officers from conducting "vendettas" against personal enemies, books of registry tickets are issued only to local police chiefs who must account to the registry for the use made of each book and each ticket. Some chiefs pass the books on to other officers who may issue registry tickets directly to violators; usually they do not, and officers record the necessary information in a special notebook or departmental form. The registry ticket is then mailed from headquarters.

The amount of court clerical resources required to maintain any such system is unmeasured, but enormous. The tickets go from police officers to court officials. The court clerks must keep track of bail payments forfeited and tickets which remain outstanding. They must chase those outstanding through the mail and, eventually, issue warrants and force court appearances. If no more fines were paid on-the-spot than bail payments are now forfeited, the saving in clerical efforts would be significant. More fines might, however, be paid on-the-spot than bails are now forfeited because of the psychological advantage of clearing the negative experience immediately and because there would be no slippage through laziness or inadvertence. Such an increase would reduce clerical costs proportionately. In addition, the same level of clerical effort may be more easily expended by police than by court personnel (see page 6 *infra*).

But before serious consideration could be given to on-the-spot fines in the U.S., the issue of corruption would have to be faced directly. Police differ as widely as the societies they serve. Many European police forces are highly professional, comparatively highly paid and educated and are accorded a status position equivalent to civil servants and military personnel. The occupational mobility of European police is generally lower than that of officers in the U.S. All of these factors push toward relatively low levels of petty corruption. Nevertheless, on-the-spot fines are unacceptable as a technique to make traffic control more efficient in many European countries. Police ethics, on the other hand, are a major problem in the U.S. (Pres. Comm., 1967: Police 208–15). Fixing traffic tickets is already a common violation (Pres. Comm., 1967: Police 208). Without trying to imagine the mechanics of cheating, on-the-spot fines might be a dangerous experiment in large police forces in the U.S. where depersonalized activity is the core of a policeman's work; and because corruption may exist throughout a department such fines may not even be feasible in small forces unless they

[3]The French on-the-spot fine, for unexplained reasons, was frequently unacceptable to offenders: in 1968 less than 50% of drivers paid the *amende* when it was proposed (Vitu, 1975).

are effectively under civilian control. On the other hand, it is not entirely clear that substituting cash for tickets as the medium of exchange *increases* an officer's ability to extort additional payment nor why, if cash is the problem, on-the-spot fines cannot be limited to payment by credit card.

B. Other Police Fines

Police fines which are not paid on-the-spot are similar to American traffic tickets. In Belgium, for instance, a person who has committed a non-serious driving offense is given a notice with a fine fixed by schedule. If he does not wish to contest the matter, he takes the ticket to the post office and buys stamps in the appropriate amount. The stamps are fixed to the notice and the matter is closed by mailing the stamped notice to the police. In Denmark, police fines are used for traffic offenses and a few other petty crimes such as failing to secure a radio license (Bødetakster I Politisager, 1975). If the police believe that a person is guilty of such an offense, they send him a written notice describing the culpable behavior and setting a fine which is determined by schedule. The fine may be paid by mail. If it is not paid within 20 days, the case goes to court.

A police fine system has been in operation in Sweden since 1968. It was instituted both to reduce the work of an overloaded court system and to eliminate the stigma felt by people who became defendants in the criminal courts for minor offenses. When a Swedish policeman has decided to use a police fine, the accused has three choices. He can sign the charge acknowledging responsibility on the spot and pay the fine later in the post office, he can request up to four days to think it over and acknowledge responsibility by mail, or he can go to trial. In Malmo district (population 300,000), 5% of the 20,000 people against whom police fines were levied in 1975 did not accept the fine and chose a trial instead. In that same year, 192,000 police fines were levied throughout Sweden. Approximately 80% of Swedish police fines concern traffic offenses. Ninety-seven percent of the remainder are for drunkenness while an additional 2% arise out of disorderly conduct (see Statiska meddelanden, 1973).

In the U.S., if fines for minor traffic offenses (the offenses for which mandatory court appearance is not now required) were paid to the police rather than into court, more would be involved than shifting work from one group of clerks to another. Over the past 15 years it has proven easier for police than for judicial departments to obtain increased funding for their operations. Between 1960 and 1974, expenditures by American police departments increased 319% while court expenditures increased 201% (U.S. Dept. of Comm., 1975: 156). As a consequence a shift of traffic fines from the courts to the police might be a shift to an agency better able to meet any increasing costs of such operations.

The Scandinavian practice of using police fines for minor non-traffic offenses might be adaptable in the U.S. to essentially victimless crimes (e.g., prostitution, marijuana possession, animal control and fish and game violations) for which sanctions other than fines are rarely used. In addition, a significant proportion of offenders pleading guilty to similar offenses (drunkenness, breach of the peace) are only fined (about 30% of drunkenness arrests in the District of Columbia resulted in fines in 1965, see Pres. Comm., Drunkenness, 1967: 70). It might be possible to establish criteria which would permit the police to screen out of all arrestees for these crimes those who acknowledge guilt and would only be fined if the case went to court. If such criteria could be fixed, then those qualifying offenders could be treated like traffic offenders subject to police fines.

Unlike other suggestions in this report, the changes in fining practices suggested in this section do not involve difficult conceptual analysis nor much by way of cultural sensitivity. They do not really constitute major shifts in role between figures in criminal law administration. Nor do they reflect any abrupt changes in the way deviance is understood, created or managed. They are rather marginal adjustments in pedestrian bureaucratic mechanics which would be insignificant in the individual case but, because of the size of the criminal justice system, could be dramatic in the aggregate.

CHAPTER IV. THE TRANSFER TO PROSECUTORS

Prosecutors in European countries have powers which are not, or rarely are, granted to prosecutors in the U.S. Some European prosecutors can levy fines without judicial approval, some can convict defendants without trials, and some can initiate convictions and punishments by written orders instead of trials. Like American prosecutors, they can place defendants on probation and they can dismiss cases on various grounds, including the defendant's post-apprehension behavior. Since the grounds and conditions of dismissal and probation are sometimes more codified in Europe than in the U.S., they will also be described. In no single jurisdiction do prosecutors have all of these powers. In fact, some of them are empirically contradictory. For instance, countries which use penal orders do not employ prosecutorial fines and vice versa because each is generally limited to the same level of crime (serious misdemeanors). But different combinations of such powers exist and many combinations might be feasible in the U.S.

A. Prosecutorial Convictions

An extreme transfer of judicial responsibility identified in Europe is the power of a Norwegian prosecutor to levy a guilty judgment without any court involvement. The practice, called "patale unnlatelse", presupposes that the prosecutor is convinced that the defendant is guilty, at least on a technical level, but that the reasons for conducting a trial are not as persuasive as the reasons for not holding it (as, for instance, with a mercy killing). The patale unnlatelse is a judgment of guilt, but no imprisonment nor fine may be imposed as a result of it. When the patale unnlatelse is used for serious crimes like theft, burglary and homicide, a local prosecutor must obtain the approval of the Prosecutor General. A defendant can refuse to accept a patale unnlatelse, but few do, for going to trial may lead to a prison sentence or a substantial fine. Prosecutors do not propose a patale unnlatelse unless they have received a detailed confession, which Norwegian informants distinguish from a U.S. guilty plea by its specificity. Until recently, patale unnalatelse were not uncommon (several hundred per year). Now that suspended sentences have become commonplace in Norway, patale unnlatelse are used more sparingly. Prosecutors now prefer suspended sentences because suspended sentences enable them to initiate a process which does not necessarily lead to real sanctions without letting the offender escape punishment for the first offense if a second, similar offense is committed. Currently, patale unnlatelse are used for foreigners, occasional offenders and trifling crimes committed by habitual offenders (drunks stealing small items). There is apparently no bargaining about a patale unnlatelse since the defendant has nothing to bargain with. Although the device permits the prosecutor to avoid what might otherwise necessitate a trial, run-of-the-mill cases are tried for the state in Norway by private lawyers rather than by prosecutors, and the courts are not in any event overburdened with criminal cases.

The patale unnlatelse has no exact equivalent in American practice. It resembles a negotiated plea in that guilt is acknowledged, a conviction is recorded and the decision on sanction (or, with the patale unnlatelse, on no sanction) generally reflects a probation officer's report. But the absence of a judge and the formalities associated with his presence obviously differentiates it from a guilty plea. The patale unnlatelse is like an American prosecutorial dismissal in that it may be based on the prosecutor's decision that orthodox prosecution would not serve the need of society or the offender. It is, however, unlike an American dismissal, since it is a conviction, and may have the same effect as any other conviction in case of later offenses or by way of informal social disabilities. The patale unnlatelse is similar to an American conviction where the penalty is time already served. In both instances there is a conviction and no further penalty is attached to it.

But, of course, the patale unnlatelse has no counterpart when the defendant has been released on bail and, in any event, the American version requires judicial action. The patale unnlatelse poses an ideological problem for American jurisprudence which considers decisions on sanctions to be a judicial monopoly occasionally shared with the jury (see Pres. Comm., Courts, 1967: 14–27). But the problem is ideological only. In practice, that monopoly is substantially eroded in favor of prosecutors who frequently, perhaps generally, determine the level of punishment in individual cases (Rosett and Cressey, 1976: 107).

The reason why we have described the many ways in which the patale unnlatelse resembles but never quite matches American practice is to demonstrate that it is not an alien, distasteful device. It is rather a variant of current American conduct which has substantial advantages over American practice. If it is a substitute for a guilty plea where no punishment is warranted, it relieves the judge and judicial process of a function which, under the circumstances, is likely to be only perfunctory and ceremonial. As an alternative to a dismissal granted because no punishment is warranted, it permits the prosecutor to close a case without further proceedings, but without official behavior which can be confused with a determination that no violation occurred or can be proved.

It is difficult to predict whether overt recognition of the prosecutor's power to convict a defendant willing to be convicted to avoid punishment would threaten any legitimate interests of defendants somehow now protected by American practice. The defendants who would have negotiated a plea for time served or a suspended sentence would be either no worse, or better, off, having avoided jail awaiting trial or on account of subsequent misbehavior. Substituting a prosecutorial conviction for a dismissal would be regrettable only in those cases in which action by a prosecutor is determined by the weakness of his case or in which he is tempted to convict a defendant, despite a belief that the defendant's future behavior will be socially more acceptable if he has no recorded conviction. Where a prosecutorial conviction replaces a dismissal which would have been granted simply because the prosecutor believes that no punishment is warranted, then the defendant is better off with the dismissal, but does not deserve to be. Whether prosecutorial convictions would be used in the two categories of cases now dismissed which ought to be dismissed under any regime—insufficient evidence and no function to a conviction—is an empirical question which can only be answered if such prosecutorial power is given a trial in an American jurisdiction.

B. Prosecutorial Fines

Fines levied by prosecutors without court approval are an important method of criminal case disposition in several European countries, and were studied in Sweden, Denmark and Belgium. In Sweden, prosecutors can propose to defendants to dispose of any case in which the relevant maximum penalty is a fine or up to 6 months' imprisonment. The prosecutorial fine cannot exceed a 60 day fine. (Day fines roughly reflect the defendant's ability to pay. They are based on reported income and possession of certain assets and are used in Scandinavia, West Germany and Austria. In Sweden, for instance, day fines range between $.50 and $125.) Several Swedish prosecutors indicated that prosecutorial fines were used in preference to trials in almost every eligible case in which the accused admitted that he had engaged in the prohibited behavior or would in any event accept the fine. The Swedish prosecutor has no discretion about the amount of the fines: they are set by schedule. Prosecutors will fine even repeated offenders rather than take them to trial until they lose patience and decide that the accused is incorrigible.

Senior Swedish law enforcement officials do not believe that prosecutorial fines are negotiated. Until recently, these fines could not be used for crimes for which jail sentences were possible. (Such crimes may be more serious than "fines only" crimes in the U.S. since Swedes, like many Europeans, have lost faith in the utility of short jail sentences.) Since only a fine was possible and the level of fine was set by schedule, all that the prosecutor had to bargain with was his power to redefine the offense as one with a higher schedule value. And that power was frequently limited by the nature of the file turned over to the prosecutor by the police. Now that prosecutors can set fines for some offenses that might have led to jail sentences, the probability of bargaining may be increased. But negotiating fines is not expected by Swedish prosecutors even in cases in which jail sentences are possible, because a judge would not impose a jail sentence in any case in which a prosecutorial fine is tolerable. Whether such logic is persuasive or not, bargaining over fines is unlikely in Sweden since it does not occur in the case of serious crimes in which the possibilities are much greater and the stakes much higher.

To determine the types of offenses for which prosecutorial fines are used in Sweden we reviewed the most recently available national disposition data (Statistiska meddelanden, 1976).

These data show the following breakdown by type of offense in 1973:

Crime	Number of Prosecutorial Fines
Ordinary Crimes	
Assault	317
Causing bad injury	3
Breach of peace	41
Intrusion	105
Breach of peace with intrusion	5
Molestation	173
Petty theft	3,496
Car theft	47
Arbitrary conduct	1,753
Self-help	6
Fraudulent conduct	480
Receiving stolen goods	1
Withholding property	7
Unlawful use	42
Failure to return lost property	20
Bookkeeping crime	11
Inflicting damage	299
Trespass	172
Taking unlawful path	14
Gambling	25
Drunkenness	24,707
Disorderly conduct	2,059
Violent resistance	346
Insulting public servant	182
Obstructing official function	43
Public officials, improper conduct	1
Drunkenness (by public official)	6
Disorderly conduct (by public official)	5
Breach of official duty	4
Total	34,370
Traffic Crimes	
Carelessness	11,476
Impediment in traffic	26
Unlawful driving	5,716
Total	17,218
Narcotics Crimes	
Non-serious narcotics offenses	244
Smuggling Crimes	
Product smuggling	14,696
Unlawful dealing	10
Misleading at customs trial	42
Total	14,748
Various Specific Ordinances (1000 cases plus)	
1922: 260 Motor Vehicle Tax	1,559
1929: 77 Traffic Insurance	4,912
1951: 648 Road Traffic Act	96,134
1956: 617 Public Order Regs.	1,179
1960: 134 Ord. Concerning Mopeds	1,130
1972: 592 Driving Licenses	2,019
1972: 595 Ord. on Vehicles	3,968
1972: 599 Registration on Cars	2,035
1972: 603 Road Traffic Act	16,643
Total	129,579
Other Specific Ordinances (fewer than 1000 cases)	6,268
Total	202,427

Prosecutorial fines in Sweden, then, appear to be used for traffic offenses, smuggling cases, petty theft, drunkenness, disorderly conduct and arbitrary conduct, and rarely for other crimes. Traffic and motor vehicle related cases account for 76% of the total and smuggling cases are another 7%. Of the 17% of the total attributable to ordinary crimes, drunkenness (soon to be decriminalized) constitutes 72% and all but 7% of the remainder are cases involving petty theft, disorderly conduct and arbitrary conduct. The limited range of Swedish prosecutorial fines should not be understood as reflecting their insignificance; they constituted 49% of all the non-parking criminal sanctions in 1973.

In Denmark, prosecutorial fines are an adjunct to police fines. The combined system has been in operation since 1916. Serious crimes are prosecuted by the General Attorney or by District Attorneys. The remainder of infractions are called police cases. Police cases are of two sorts. The less serious are processed by the police without the intervention of a lawyer. The more serious violations demand the attention of a lawyer called a police advocate. The fines levied by police advocates are prosecutorial fines. The Danes might not call them that, but police advocates are functionally equivalent—in training and in their relationship to the police, to the dossier and to offenders—to prosecutors setting fines in Sweden or Belgium. Prosecutorial fines are used in Denmark primarily for violations of consumer protection, military draft, price control, seamens' and weapons control laws, building and health codes, narcotics possession and sale for consumption statutes and for automobile theft and embezzlement of less than DKR 1500 ($250). When the police investigation identifies someone who has probably committed one of these offenses, the file is turned over to the police advocate. If the advocate requires more information, the police are asked to obtain it. Police advocates will drop the case if they believe that the suspect is

not guilty or if the evidence appears insufficient to convince a judge. Otherwise they set a fine and notify the accused by mail of his alleged culpable behavior and of the fine. The fine can be paid by mail and if it is, the case is closed. If the fine is not paid within 20 days, the case is set for trial. For many of the offenses subject to fines by police advocates, the amount is fixed by schedule. Where an offense is unscheduled, police advocates refer to the level of fines levied by judges for such behavior in instances where the accused has gone to trial rather than pay a prosecutorial fine. Although there are apparently no published statistical series on police or prosecutorial fines in Denmark, informants indicate that in Copenhagen in 1975 there were:

Police cases	
Police fines	26,000
Police advocate	2,000
Total	28,000
Serious Cases to General Or District Attorney	12,000
Total Police Identification of Criminal Violators	40,000

In 6,000 instances (21%), people to whom police or prosecutorial fines were proposed failed to pay such fines and went to court. Less than 170 (3%) were acquitted, but none of those convicted were sent to prison.

In Belgium, prosecutorial fines are authorized by article 180 of the Code of Criminal Procedure. This statute provides:

> For all infractions within his jurisdiction where the punishment is a fine or imprisonment of no more than one month and where the act has not caused compensable harm to others, the prosecutor may, if he believes that only a fine (or a fine and confiscation) is required, invite the delinquent to pay a sum which the prosecutor shall determine within the time and in the manner which he shall stipulate.
>
> When before the infraction the delinquent has never been condemned to a criminal penalty or to an unconditional prison sentence (presumably a juvenile incarceration), the prosecutor can exercise this power to fine for all infractions where the maximum penalty does not exceed 3 months imprisonment.

The statute prevents the use of prosecutorial fines in Belgium for ordinary crimes against property or the person, because compensation is possible for such crimes. Its use is most widespread for economic crimes like price control violations (especially serious in Belgium if the price gouging involves potatoes, and therefore the price of "pommes frites") and illegal pollution. It is, however, sometimes used for traffic infractions and for breach of the peace type violations. These prosecutorial fines, called transactions in Belgium, are not equivalent to a conviction and do not become a part of the accused's criminal dossier. The amounts of the fine vary from $25–$250 for traffic offenses to $25,000 for serious price control violations. Although Belgium does not have a day fine system, the fines reflect the ability of the accused to pay and income tax returns may be inspected to fix that ability. In 1974, 5,621 transactions were proposed in Brussels, 4,717 (84%) were paid and $458,083 was collected (Parquet, 1975: 4).

Prosecutorial fines have been an accepted practice in Belgium since the end of World War I. Their legitimacy may rest on the role definition of Belgian prosecutors. Belgians are apparently undisturbed that through their use of transactions prosecutors are judging guilt and determining penalties. Of course, such penalties need not be accepted, but in Brussels no objection was made to 79% of such fines from 1972 through 1975. There is little comment about this prosecutorial activity because in Belgium prosecutors are magistrates; to most people they are judges, so why should they not judge. Prosecutors, according to this view, are differentiated from lawyers, who are recognized to be advocates; they are known to be different from the police; they are a type of judge, a person in the middle. They receive the same training and compensation as judges. They keep their distance from the police. And in later life, when they desire a more passive role, many prosecutors become ordinary judges. Prosecutors may have the same status in Scandinavia. But in Belgium, where prosecutors set fines uninhibited by schedules and where the amount of a fine may be thousands of dollars, the appearance of a quasi-judicial role may be more important.

We can tentatively predict that the introduction of prosecutorial fines in the U.S. would reduce court caseload and would reduce the number of cases dismissed by prosecutors. It would not in any predictable way affect sentencing parity. Cases initiated by prosecutors can either be dropped, tried, or terminated by negotiated or non-negotiated pleas. Cases which are tried or in which guilty pleas are tendered generally require judicial action and contri-

bute to court caseload. In California, for instance, the only non-traffic cases in which guilty pleas are accepted without a court appearance arise from violations of animal control, fish and game, marijuana possession and, occasionally, public intoxication statutes. Even cases which are dropped may contribute to caseload if they are dismissed after an arraignment, further bail hearings or a preliminary hearing. If prosecutors had the power to accept guilty pleas for some offenses and to levy fines with respect to those pleas, then some unknown number of cases which now require judicial efforts either in trials or, more probably, in the ceremonies of accepting pleas and in sentencing would be processed without those efforts. On the other hand, if prosecutors could fine offenders without court involvement, they might seek to do so in marginal cases which, did they not possess the power to fine, they would have dismissed.

We can predict with some confidence that the number of court pleas avoided would be much larger than the reduction in dismissals. A prosecutor would be tempted to fine an accused directly in any qualifying case in which he believed punishment appropriate, but in which he did not seek an imposed or suspended jail sentence. How large a class such cases would constitute would depend primarily on the kinds of cases in which prosecutorial fines would be permitted. Whatever the class, in a small proportion of cases a prosecutor might seek only a fine, but not impose it himself either because he did not want to take the responsibility for the action (because the judge could secure better information before acting or because such action might prove politically vulnerable) or because he believed that the deterrent effect of the fine would be greater if it came from a judge. But whatever the class of cases, and whatever the exceptions, the number of cases in which fines only are thought appropriate by prosecutors is large, and the number of cases which would no longer require judicial scrutiny if prosecutors could levy fines would be significant. To the contrary, it is unlikely that many cases are now dismissed by prosecutors in the face of a belief that a fine is the appropriate social response. A prosecutor may enter such a dismissal because he is lazy or overworked or corrupted. He may do so because he does not want to trouble a judge or burden a probation officer. He may do so when he is equivocal and has little confidence in his disposition to see the accused fined. But no studies of prosecutorial behavior of which we are aware suggest that any of these propositions are common.

So far only the scale of the shifts from court to prosecutor and from dismissal to prosecutor has been discussed. The qualitative aspects of these shifts are also crucial. With many minor crimes, prosecutors currently play no role. The accused shows up in court on the appointed day, pleads guilty, says a few words in mitigation, perhaps he apologizes, and is fined. Would substituting fines set by prosecutors for fines set by judges in these circumstances involve a change of labels only, so that we would end up saying that for these crimes the prosecutor is the judge? The answer is no, for if nothing else the judge at the time of plea does more than set the sentence. The judge also has the responsibility of assuring that the defendant in pleading guilty knows what he is doing and what rights the Constitution grants to him. This judicial function provides in theory both a gain and a loss. The gain is that we avoid victimizing the ignorant, the loss is that these formalities, in the aggregate, take up a lot of court time. If, however, the formalities are a charade, a ritual acted out for a defendant who cares only about his sentence and hardly at all about the Constitution, then we have lost the gain but we are still stuck with the loss. In this sense, prosecutorial fines are different from, and an improvement over, judicial fines.

A second qualitative aspect of a shift to prosecutorial fines is in sentencing. Two values are important in sentencing: sensitivity to the circumstances of particular offenders and equity between offenders. These values are not necessarily inconsistent. A sentencing system can theoretically be thorough and sensitive enough to be able to distinguish relevant differences between offenders, and then fair enough to treat the members of each subset similarly. But in practice the task is much more difficult. Different kinds of information are available about different offenders, information about offenders presents thousands of different patterns, judges receive different recommendations from different probation officers, different bargains are struck by different prosecutors with different defense lawyers with cases of varying strengths, judges are influenced by public, academic and high court attitudes which are continually in flux, and, most important, different judges approach the sentencing task differently. The result is an aggravated disparity of sentences (see Rosett and Cressey, 1976: 206, collecting studies) produced by judges who are highly influenced by notions of average sentences as well as by those who are determined that each sentence reflect an offender's particular situation.

Unfortunately, all of the sentencing studies which we have found measure variation in length of jail sentence or variation in proportions of jail sentences imposed to jail sentences suspended to fines (see Pope, 1975; Johnson, 1972; Texas Law Rev., 1967; Green, 1961 and studies cited therein; Somit, Tanenhaus and Wilke, 1960). None investigate variation in level of fines. There is, in any event, a sense in which variation in fines is meaningless since, unlike jail time or probation, the effect of a fine in the U.S. varies radically with ability to pay. The upshot of not knowing the degree of disparity in fines and knowing that even apparent non-variation would be misleading is that it is not possible to predict what the effect of transferring some fining power from judge to prosecutor would be on parity in sentencing.

If the Scandinavian pattern of controlling prosecutorial discretion by using fine schedules were adopted in the U.S., the same degree of parity would still not be achieved, since variation in wealth is greater in America. But the logic behind the use of schedules is not so much parity as it is to routinize the government reaction to routine deviance and to locate the routine at that level of criminal law administration where it is not likely to be abused, but where the processing of petty crimes would not be encumbered with the procedures appropriate for serious felonies. In concrete terms, we may not wish to permit unsupervised police sanctioning of shoplifting, but we may also not wish to devote judicial resources to accepting guilty pleas from shoplifters. And if we assign that function to prosecutors, we may wish to do so in a way which permits them to fulfill it expeditiously.

The remaining question is whether formal transfer of such a limited judicial function to prosecutors would be culturally tolerable in the U.S. The American prosecutor, in myth and in fact, is different from his Belgian and Scandinavian counterparts. He is not a magistrate; he is not a member of a career service; he is closely tied to the police and frequently identified by them; he is considered an advocate rather than an intermediate, and his ethical responsibility to secure justice rather than convictions is thought to be slighted in trial situations at least. The argument against the notion that a prosecutor with the power to fine would be a cultural misfit in the U.S. is that prosecutors already possess, and are generally known to possess, an important role in sentencing. Plea bargaining is far from a secret. It occurs in serious cases which involve heavy sentences. In this context, prosecutorial fines in minor, routine cases might be easily digestible. The cultural barriers would be especially low if prosecutorial fines were chiefly determined by schedule; in that event, the fine would seem more a matter of administrative regulation than prosecutorial discretion. In the last analysis, the question is empirical rather than logical. Would Americans believe that they have been deprived of an important political value by prosecutorial fines, not whether they should or should not have that belief.

C. Prosecutorial Probation and Conditional Dismissal

Prosecutors in several European countries have the recognized power to dismiss some criminal proceedings on account of the accused's behavior, or expected behavior, since the commission of the criminal act. American prosecutors also have such power; its exercise is diversion. But, in Europe, the reasons for and the conditions of such discretion tend to be codified on a national basis, and to be somewhat different from those of the U.S. diversion programs.

Prosecutorial probation and conditional dismissal are used extensively in Poland, less so in West Germany and Belgium, and only for narcotics users in Austria. In Poland, the prosecutor is authorized by the criminal code to dismiss cases conditionally in case of a first offense for which the maximum penalty is three years in prison, and when the prognosis for the defendant's future behavior is positive. The dismissal will not be granted unless it is recommended by the economic organization to which the accused belongs (factory, office or cooperative). In both 1971 and 1972, conditional dismissals were used about 40,000 times, or in about 30% of the cases where the first offense-maximum penalty conditions were met. This form of dismissal is employed in a high proportion of traffic accident cases where no life has been endangered, minor property offenses such as petty theft, and non-support cases. Minor crimes against the person are excluded because they are either hooliganism, which is specifically exempted, or because they have too severe a maximum sentence. Polish criminologists have advocated, so far unsuccessfully, that conditional dismissals be permitted for assault within the family.

In Poland, conditional dismissals are always contingent on an apology to the victim and full reimbursement for damages. In addition, the accused is generally required either to pay money ($50 to $100) for a social need (to the Red Cross) or to do work to

fill a social need (up to 20 hours work cleaning the streets). Once set, the conditions cannot be modified. They are overseen by the prosecutor; he seeks a report of their successful completion. If the accused fails to fulfill the prosecutorial conditions, the case begins again and the presumption of innocence is in theory reinstated.

The theory of Polish conditional dismissal is not that the behavior induced by the conditions is rehabilitative, but that the circumstances indicate temporary deviance which will not become habitual if the offender is forced to face the consequences of his unacceptable behavior and if his job milieu will take responsibility for him. It thus differs from most American diversion in which rehabilitation is expected from the required activities, and in which an important part of the deviant's problem may be his chronic unemployment, to the curing of which the diversion is directed (see Aaronson, et al., 1975: Vol. 3, App. 1).

In West Germany, conditional dismissal is a controversial practice. Its legislative warrant is recent, its use is unstudied, and its origins are suspect. West Germany criminal theory is dominated by the legality principle, which compels the prosecutor to pursue all cases in which he has adequate incriminating evidence. Traditional relief from this rule of compulsory prosecution has come from code provisions which authorize prosecutors to dismiss petty cases in which guilt is slight and in which public interest in prosecution is minimal. On an informal basis, German prosecutors sometimes took the offender's conduct after the offense into consideration in determining the level of guilt (Langbein, 1974: 460). The post-crime behavior which was taken to indicate slight guilt was either compensation to the victim or charitable contributions. Such behavior was considered exculpating in traffic and other relatively trivial misdemeanors, and the payments involved were often nominal (Herrmann, 1974: 489–93). But such dismissals sometimes have involved more serious transgressions and more significant contributions. The most notorious instance is the Bilov case. Bilov, a prosecutor in Hamburg, dismissed a case against a butcher who had sold adulterated meat. The butcher, in turn, promised to contribute $160,000 to the Prisoner's Aid Association. Unfortunately, Bilov and other prosecutors and a few judges had in the past delivered lectures paid for by the Prisoners' Aid Society. Bilov, in fact, had been paid to deliver the same lecture 120 times. Despite the resulting scandal, the questionable constitutionality of conditional dismissal and the opposition of many respected legal scholars, the new (1975) German code of criminal procedure has explicitly authorized the prosecutor to refrain from bringing a misdemeanor charge if within a specified period the accused makes restitution, contributes to a charity or the public treasury, or performs some other act in the public interest.

The statutory warrant for conditional dismissal in West Germany is section 153a of the Code of Criminal Procedure. The first systematic study of its use focuses on the cities of Munich and Augsburg in Bavaria, but scheduled for completion in mid-1977. In the meantime, impressionistic evidence gathered from law professors in several German cities is that use of 153a is infrequent. The section was apparently invoked only between 200 and 300 times by a prosecutor's office in Munich that includes about 4,000,000 people within its jurisdiction. Perhaps the cautious use of 153a by German prosecutors is due to the fierce academic criticism which preceded its adoption. Schmidhauser (1973) attacked 153a from three different angles. He alleged that it would transform the prosecutor from a figure who dealt with all suspects on the merits of their cases into a merchant selling dismissals to high bidders, that it is an irreversible step from compulsory prosecution to the caprice of Anglo-American bargain justice, and that it would tempt the innocent accused to make large payments to avoid prosecution. On the basis of his experience with longstanding prosecutorial discretion to compromise tax cases, Bauman (1972) predicted that 153a would undercut the integrity of the way prosecutors prepared cases. He feared that prosecutors would secure only enough evidence to be able to make a deal with an accused, rather than complete the thorough investigation which had been their practice. Jescheck (1975), whose extensive acquaintance with comparative criminal procedure may have liberated him from rigid preference for German models, was nevertheless skeptical about the effect of 153a which, if widely used, would threaten to overburden the prosecutor unless additional staff were provided.

If bargaining about the disposition of criminal cases is bad, 153a is dangerous. Most German observers believe that such dismissals are negotiated (if I donate DM 10,000 to the Red Cross, will you dismiss the charge?), rather than speculative (I have donated, now is it not appropriate to dismiss the charge?). It certainly would seem prudent to make sure of the prosecutor's response if a substantial contribution were contemplated. But even if bargains were not explicit—and perhaps they would not need to be if 153a were used for routine cases where

small payments could be taken as evidence of repentance—sufficient experience might develop so that lawyers could predict when a client payment would and would not be likely to lead to use of 153a. The problem that German commentators then fear is that 153a will become a middle class property. Middle class defendants accused of serious misdemeanors will be represented by lawyers who will know how to manipulate 153a. Working class defendants will not hire lawyers and will accept the non-jail term conviction (and fine) of a penal order.

There is also a respectable body of opinion in Germany to the effect that 153a has substantial roots in German jurisprudence, and that its use can be adequately controlled. Charitable payments have long constituted a regular sanction in Germany administered by a judge as a *poena* in addition to a fine or jail sentence. These contributions have traditionally been made to organizations concerned with rehabilitation efforts or crime victims, and such groups are sometimes completely financed by *poena*. At the same time, prosecutorial discretion not to prosecute misdemeanor offenders under certain conditions has existed since the 1920's (Herrmann, 1974: 483). Section 153a can then be viewed as the simple combination of these traditional elements. The fact that 153a is only to be invoked when the same formal conditions are present as have always been a condition of non-conditional prosecutorial dismissal reinforces this view.

But from an American perspective, the important issue is not whether 153a is an innovation or a development in Germany, it is rather the adequacy of the means taken to control the discretion granted by 153a. Uncontrolled prosecutorial discretion is a major issue in criminal law administration in the U.S. (see e.g., Davis, 1976: 60–74; Abrams, 1971: 3). The German experience is relevant to four crucial aspects of the American absence of control—the lack of statutory standards about decisions to prosecute or not, the absence of rule-making to provide such standards, the lack of a requirement for comparison between cases, and the non-reviewability of prosecutorial discretion.

Perhaps it should come as no surprise that American critics see more hope in German solutions than do German observers. In most reform efforts, the closer you are to the details, the less sanguine you are about the effects. Nevertheless, the differences between the countries are substantial. The German statutory standards are vague, but they are not empty. They provide that the prosecutor can refrain from prosecuting if "the guilt of the actor would be regarded as minor, and there is no public interest in prosecuting." (Code of Criminal Procedure, sec. 153). The latter proviso, especially, has content; it means that if the crime committed by the accused is a significant social problem (like shoplifting), then the prosecutors must prosecute without regard to the accused's level of involvement. Davis (1976: 67) suggests that whatever the value of the statutory standards by themselves, rule-making by the states has provided workable criteria. Herrmann (1974: 485), on the other hand, believes that the rules "do not provide much guidance." In any event, what the rules do say is that in assessing the guilt of the offender, the prosecutor should compare his culpability to that of others charged with the same crime to see whether his behavior has been less serious than the average. This rule makes the norm of cross-offender comparison mandatory, and the combination of hierarchical review and the need for judicial approval may make it empirically active. Judicial approval, however, is merely a formal restraint. The judge is thought to interfere only when he has superior local knowledge to the prosecutor or sees connections to other cases that the prosecutor is not aware of. But as an anticipatory matter, a prosecutor is unlikely to dismiss a case which falls completely outside the statutory scheme for fear that such a corrupt decision may be detected by a reviewing judge. In the American context, the question would be whether the prosecutor's need to justify dismissals to the police officers pressing the case or, perhaps, to fellow prosecutors would provide an equivalent disincentive to illegitimate dismissals.

In any event, German control over prosecutorial discretion is asserted more from the hierarchical structure of prosecutorial staffs than from supervision by the judiciary. German analysts believe that the discretion of individual prosecutors is effectively channeled by the system's bureaucratic organization. Comparable treatment for comparable offenders is achieved at least at the local level through the need to secure vertical approval for decisions not to prosecute, as well as through frequent conferences in which particular prosecutorial decisions are reviewed and evaluated in detail. Whether there are lessons to be learned in the U.S. from the German experience with control of prosecutorial discretion depends, in major part, on how the current American practice is evaluated.

The question of how uncontrolled prosecutorial discretion is in the U.S. is far from settled. A few large prosecutor's offices have tried to establish guidelines to assure regularity in prosecutorial

decision-making, notably the Borough of Manhattan, New York (Kuh, 1974), Harris County, Texas (which includes Houston) and the anti-trust division of the federal Justice Department (Davis, 1976: 65). The criminal division of the Justice Department has made sporadic and rudimentary attempts to standardize U.S. Attorney decision-making (Abrams, 1971: 8–9). The California District Attorney Association has issued a significant number of careful, if cryptic, crime charging standards (CDDA, 1974), but their implementation on a local level is entirely optional. These efforts to apply explicit norms to the exercise of discretion are, however, extremely rare. The general verdict of academic lawyers is that the prosecutor's discretion is unchecked, uneven, illogical, and occasionally corrupt. Abrams points to the "unevenness of application inherent in a multiple decision-maker system operating without articulated criteria" (1971: 51). LaFave alleges that there are no effective "checks upon [the prosecutor's] discretionary judgement of whether or not to prosecute one against whom sufficient evidence exists" (1970: 538). Packer fears that, with respect to some offenses, discretion may be used "in an abusive way: to pay off a score, to provide a basis for extortion, to stigmatize an otherwise deviant or unpopular figure" (1968: 291; see also, Yale Law Journal, 1955: 210). Davis identifies 12 ways in which American prosecution employes "needless" uncontrolled discretion (1976: 65). There is some published empirical support for the proposition that the exercise of discretion varies substantially across prosecutors within a single office (see Southern California Law Review, 1969: 520). But this academic portrait of the American prosecutor may well be sociologically naive. Prosecutorial discretion was a low priority interest of legal scholars and reformers until the mid-1960's. At the very beginning of its rise to a subject of national importance and sustained academic interest, John Kaplan reviewed his experiences as a federal prosecutor in San Francisco in a modest comment in the Northwestern Law Review (1965). These reminiscences focused, for the main part, on the substantive considerations which guided the exercise of discretion, and reveal a pattern of decision-making which is highly complicated, but not at all arbitrary, uneven, illogical or corrupt (unless a careful eye kept toward the effects of one's behavior on one's career is corrupt). Much more important, however, are the few paragraphs in which Kaplan suggested why prosecutorial discretion is neither uncontrolled nor erratic. He argued that prosecutors within a single, large office maintained a consensus about which cases to prosecute and which to drop because they shared a common indoctrination and a common view of their role, because they frequently consulted with each other about specific cases, and because they divided responsibility for individual cases. The division of responsibility, especially, foreclosed idiosyncratic authorizations to prosecute. Most cases were tried by an assistant other than the one who made the decision to prosecute and the lawyer who made the decision had to justify it to the one who tried the case (1965: 177–78).

Kaplan's theme of a subculture at work imposing explicit, if informal, standards on prosecutorial decision-making has been expanded by Rosett and Cressey (1976: 90-95). They suggest that norms controlling the exercise of prosecutorial decisions to reduce charges as well as to drop cases are a product, not only of the community of prosecutors, but also of other influences within and external to the courthouse. Internally, the subculture norms are developed by constant interaction of prosecutors with defense lawyers, judges, and experienced offenders. Externally, satisfactory working rules must be negotiated with the special interest groups who are occupationally concerned with criminal justice—politicians who must contend both with public perceptions of crime and the costs of crime control, the police, social workers and probation officers, and professional associations of lawyers and judges. Because the objectives of these external groups vary from community to community, the norms of prosecution also vary by locality. But because the internal personnel change incrementally, the continual socialization of new recruits means that local norms are fairly stable.

If the subculture view of prosecutorial discretion is more nearly accurate than the legal academic perspective of uncontrolled erratic behavior, then the reality of prosecutorial decision-making may be close to the German model of general standards buttressed by continual communication. In fact, Rosett and Cressey (1976: 102-03) suggest that formal consultation between prosecutors about cases is as much a recognized routine in the American context as our informants indicate that it is in Germany. Of course, to say that prosecutorial discretion is controlled in the U.S. roughly as it is in Germany does not necessarily settle anything. The important question is whether this mode of control is preferable to a model of control which relies principally on detailed, explicit rules of decision formulated in some form of legislative-like process. The criteria of

choice in addition to cost should reflect consistency across similar cases, sensitivity to relevant differences between cases and responsiveness to changes in community priorities.

The subculture phenomenon which Rosett and Cressey believe controls behavior in the courthouse also has a dark side. Blumberg (1967) suggests that professional behavior in the criminal court responds primarily to the demands of bureaucratic efficiency and the careerist priorities of participants and that these goals require abandoning ideological and professional commitments to criminal defendants (see also Skolnick, 1972). Rosett and Cressey (1965: 1972-73) recognize that large organizations have a strong inclination to serve themselves and to routinize their work on the way to doing so. They recommend that changes be initiated which would interfere with efficient, and therefore dehumanizing, bureaucratic administration. But they also point out correctly that to formalize the rules of discretionary decision-making and to require public, external sanction for such decisions appears to have two unavoidable consequences, both of them bad. One result is that decision-making by discretion will go on anyway at some earlier stage, while the level of sham in the formal ceremonies will be increased (1965: 171). The second unfortunate consequence is that, to the extent discretion is in fact curbed, the subculture's capacity for self-adjustment will be diminished (1976: 95). Current subculture reaction to changes in social organization and perspective is no slower than the changes in the experience and perspectives of the members of the subculture. Since membership in the justice subculture is continually augmented by recruitment of new assistant prosecutors and defense counsel, the center of gravity of subculture views is continually in some kind of alignment with the views of young, recently-educated lawyers. Unlike the predicament of an articulated rule system, a change in the attitudes and behavior of a subculture is not dependent on a periodic, cumbersome re-evaluation. Even if it is difficult to revolutionize, a subculture self-corrects for social drift. British efforts in 19th century India to enforce local custom by recording it prior to applying it in court failed because the British failed to understand the differences between unwritten and written norms (Rudolph and Rudolph, 1967); to memorialize a standard which is both highly responsive to particular circumstances and eventually responsive to changes in social context is to change both that standard's meaning and its life expectancy. American despair about plea bargaining is generated by its supposed erratic and coercive content. Control discretion, we are told, by emulating German practice (Davis, 1976: 70). The subculture hypothesis suggests that we may already incorporate much of the German control technique without losing the sensitivity to changes in community attitude which are worked into the prosecution system by the gradual replacement of system personnel.

In Poland and Germany, contingent prosecutorial dismissals are completed if the accused fulfills short term obligations. In Belgium, such dismissals are dependent upon compliance by the accused with long term commitments. Belgian prosecutorial probation is thus a closer analog to American diversion. Unfortunately, its origins and its influence are better documented than its accomplishments or its current operation. Its influence is undoubted. Prosecutorial probation preceded judicial probation in Belgium, and its early apparent successes in Brussels prompted the institutionalization of probation as a judicial response throughout the country and played a part in the adoption of section 153a in Germany (Jescheck, 1975: 90).

The first six years of prosecutorial probation in Brussels, 1951–57, have been analyzed by Marchand and Massion-Verniory (1958). Viewed two decades later, the program seems paternalistic, romantic, small in direct effect, and so particularized by offense as to be trivial. The program concentrated on young males charged with morals offenses, principally homosexuality or exhibitionism, and petty theft. In lieu of trial, offenders were offered medical therapy (chiefly estrogen for sex deviants), psychotherapy, or social work for working out family or social difficulties. Probation was only used 148 times in the six years, although Brussels then had a population of one million people.

It would be comforting to report that from such modest origins a grand scheme of diversion has since taken root. In fact, however, prosecutorial probation in Brussels seems unchanged in scope, focus or technique. It continues to be restricted to minor sex crimes and minor theft, except that minor narcotics offenders (non-selling users) have been added. The terms of probation remain long-term consultation with medical doctors, psychotherapists, and social workers. Detailed statistical series maintained by the prosecutor's office do not reflect the use of probation, and one gets the impression that this prosecutorial response in Belgium is a matter of individual disposition rather than bureaucratic program.

Austria uses similar techniques for narcotics offenders, but perhaps more as a political response than as an attempt to change deviant behavior. Posses-

sion, as distinguished from consumption, of illicit narcotics is a crime in Austria. If, however, the amount at issue is for personal use only (one week's supply equivalent either to an "average" amount or what the suspect can demonstrate he uses in a week), the prosecution must be conditionally dismissed unless the prosecutor believes that the accused requires treatment. In such a case, the accused must agree to the treatment to abort the prosecution. Treatment consists of consultation with a medical doctor or a psychotherapist. Treatment may be a farce in that neither the accused nor the doctor or therapist believe that it is required or will help, but the prosecutor may insist on it. Even if a user is continually charged with possession, he cannot be prosecuted if he continues to meet the conditions of treatment set up by the prosecutor. The substitution of treatment is a response to a drug "wave" in Austria in 1968–70. It was structured to provide something for both hardline and permissive reformers. Possession is still a crime, but it leads to treatment rather than to prosecution. The symbol of illegality is untarnished, but the occasional user is undisturbed. The changes have reduced the convictions for possession from 352 in 1970 to 95 in 1974.

D. Unconditional Prosecutorial Dismissal

Although the criteria and frequency of unconditional dismissal by prosecutors vary significantly from one European country to another, the criteria are more restricted and the frequency is lower in all instances than in the U.S. The use of unconditional prosecutorial dismissals was investigated in Denmark, Sweden, West Germany, Austria, and Yugoslavia. It is most restricted and infrequent in Denmark where prosecutors in 1975 decided not to proceed with only 155 serious cases in which they believed they had sufficient evidence to convict. In these cases, either the accused appeared mentally incompetent, or his behavior did little harm to others while it caused serious harm to himself (drunken driving where the accused was badly injured), or the accused's behavior had otherwise already affected him substantially (the victims of the accused's drunken driving were members of his own family). In Sweden, on the other hand, prosecutorial dismissals are common: there is one for every five trials (28,000 dismissals and 140,000 trials in 1973). The grounds for these dismissals are that the only penalty is a fine and the prosecutor believes that the offense will not be repeated, that prosecution would be senseless (euthanasia), that the accused is mentally disturbed, or that the accused is believed to have committed multiple offenses and prosecution for all of them would be redundant.

West Germany and Austria have a bifurcated system of government social control. Many petty offenses, especially against administrative regulations such as traffic, health, safety, housing, and environmental protection codes, are not criminal acts and do not involve prosecutors in their disposition. In a wide range of more serious cases (larceny, embezzlement, fraud, receiving stolen goods, negligent homicide, and abortion, for instance), prosecutors have the power to dismiss the matter if the offender's guilt is minor and the public interest does not require prosecution. Lack of public interest generally means that the transgression is not common. If it were common then the supposed deterrent effect of prosecution would be required by the public interest (see Herrmann, 1974: 487). The inadequate data available indicate that prosecutorial dismissals are unusual in Germany and Austria and are generally used in trivial instances of fairly serious offenses. Herrmann (1974: 485–87), for instance, notes the dismissal of cases against children driving tractors on farm roads, against fathers who had skipped support payments, and against doctors who had performed abortions for women who had been raped. Blankenburg (1973) found that less than four percent of cases theoretically eligible were dismissed in Baden-Wurttemberg in 1971. An unpublished study of case disposition in eight Provincial Courts in Germany by Sessar and Steffen indicates that 10–15% of larceny and embezzlement cases are unconditionally dismissed by prosecutors. And Ministry of Justice officials in Vienna report that 1–3% of district court cases in Austria are disposed of by prosecutorial dismissal. (The regional variation is high and unexplained in Austria—in 1975, 80% of cases were dismissed in a court in Vorarlberg).

Prosecutorial dismissal requires judicial approval in both Germany and Austria. In Germany, judicial scrutiny of such decisions is perfunctory (Langbein, 1974: 459; Herrmann, 1974: 488). In Austria, the requirement of judicial approval was a significant issue prior to the adoption of a new code of criminal procedure in 1974. The original government bill did not call for court approval. The government wanted to legitimize the existing dismissal practices or prosecutors which, without statutory warrant, would contradict the principle of compulsory prosecution.

But it did not wish to complicate the dismissal procedure. Fears were expressed, however, that without court control prosecutors would be tempted to dismiss cases in response to political influence. Probably more important in the eventual decision to require court approval was the realization that lower court prosecutors in Austria are not lawyers, but are generally retired civil servants who have taken a short course in prosecution. In these courts, judges were thought to oversee all of the prosecutor's activities and should continue to do so. After its adoption, the court approval provision has been defended on the ground that dismissal is a form of decision on sentencing and that sentencing is a judicial function. Zipf, who has written a short treatise on the code section authorizing prosecutorial dismissal in Austria (1975), believes that lower court judges take the initiative in identifying the occasions when prosecutors should dismiss cases rather than receiving prosecutor-initiated applications.

In Yugoslavia, prosecutors are authorized to choose not to prosecute behavior otherwise a crime if it does not represent any significant danger to society. This statutory warrant applies to behavior which is technically serious (euthanasia) as well as to minor matters (negotiating checks backed by insufficient funds, property crimes involving less than 50 dinars ($2.75), traffic offenses where no one was injured). Yugoslav prosecutors exercise the same kind of discretion one step earlier in the process by instructing the police not to charge anybody involved in domestic quarrels. No empirical studies of prosecutorial dismissals have been conducted in Yugoslavia.

The same themes run through the different criteria of dismissal, from one European country to the next. Cases are dismissed by the prosecutor because there is no social need for prosecution, and there is no benefit to the accused in prosecution. Society does not need to punish the mentally incompetent; the injured drunken driver will learn no more from incarceration than he has from hospitalization; if the prosecutor does not believe that the trivial offense will be repeated, why should he act as if he does? The same logic lies behind prosecutorial dismissals in the U.S. The difference between European and American practice is that most European dismissals by prosecutors are directly supervised by judges while only if charges have already been filed by a prosecutor is judicial approval generally required in the U.S. (Breitel, 1960: 433). Should a judge become involved in the dismissal decision if it is made by the prosecutor before formal charges are filed? An answer depends on whether one believes that judicial involvement will either improve the quality of honest decisions or frustrate the occurrence of dishonest ones. Advocates of judicial involvement assert, but do not analyze, its positive effect. Breitel (1960: 433), for instance, calls it the "best device," but explains "best" only in that it is "the familiar idea of checks and balances." There are, on the other hand, several reasons to be wary of requiring judicial approval of prosecutorial dismissals. In the first place, judicial sentencing frequently appears to be erratic (see McGuire and Holtzoff, 1940: 426–33; Ploscowe, 1951: 56; Warner and Cabot, 1936: 165–68; Gaudet, 1949: 449–61). One cannot automatically attribute variation in judicial sentencing to differences in the personalities of judges. Many studies of judicial sentencing are not sufficiently sensitive to the influence of the distribution of offenses or rates of recidivism within the population served by various judges (Green, 1961: 1–28) or of relationships between judges and other personnel such as probation officers and prosecutors (Johnson, 1972: 994). Nevertheless, the role of judges and the social context in which they work suggests that they may be less likely to reflect a subculture consensus about disposition of cases than are prosecutors. Judges may be more likely to indulge idiosyncratic predilections because, unlike prosecutors and probation officers, they are not forced to discuss and justify their views with regard to particular dispositions with any peers or superiors. They listen, they may be persuaded, but they are not required to test their own opinions in the crucible of reasoned argument.

If judges are more apt than prosecutors to indulge some special vision of reality in deciding whether or not to drop charges against an accused, they would ironically themselves be the chief victims of a change which required their approval of all unconditional prosecutorial dismissals. One of the tragedies of the American court system is the minor amount of judging done by trial judges. Judges spend a small proportion of working time presiding over trials or considering the merits of contested cases. Their time is, rather, consumed with the boring supervision of stereotyped administration (see Rosett and Cressey, 1976: 69–71; Friedman and Percival, 1976: 301; Galanter, 1976: 13). Any proposal which would add a new category of routine window dressing to their function exacerbates the diminishing challenges in the judges' role in America and compounds the difficulties faced in recruiting adequate personnel for a position of symbolic, and sporadic practical, importance.

It is possible that the requirement of judicial approval would from time to time prevent a corrupt prosecutor from dismissing a charge in a grossly inappropriate case. But blatant corruption is rare, and the information about cases shared with other prosecutors, and especially with the police, already minimizes the danger of such behavior. In sum, judicializing dismissals should at least await evidence either that current prosecutorial practices are unfair or corrupt or that judicial involvement in dropping charges which have already been filed has proved to be a demonstrably worthwhile practice. One way to compare judicial and prosecutorial dismissals would be to compare the consistency and quality of releasing decisions made by screening judges in Illinois, where dismissals are a judicial rather than a prosecutorial function (see McIntyre, 1968), to those made by prosecutors acting alone in neighboring jurisdictions.

E. The Substitution of Written Orders for Trial

Penal orders are the West German (strafbefehl) and Austrian[4] equivalents of American negotiated pleas. A penal order is a court order prepared by the prosecutor and approved by a judge. It describes the criminal event, the behavior of the defendant, and the evidence which connects the defendant to the crime. It specifies the punishment to be imposed on the defendant. If the defendant does not object to a penal order within a short period, the order becomes final and has the same status as a conviction after a trial. If the defendant does object, the order is nullified and the case goes to trial: no second round of a penal order with a less severe sanction will occur.

Penal orders may only be used in Germany for misdemeanors and may not, since 1975, impose jail sentences. Although the formal dividing line in Germany between misdemeanors and felonies is the same as in the U.S. (a possible prison sentence of one year or more), German confidence in the utility of jail sentences is such that many American felonies are German misdemeanors. Thus the crimes for which penal orders are used in Germany tend to be what Americans would consider to be violations involving serious misuse of automobiles or serious threats to property—forgery, embezzlement, fraud, receiving stolen property and shoplifting. Prosecutors tend to restrict penal orders to cases where the evidence against a defendant is strong. Frequently the accused will have admitted committing the crime. The information available to a German prosecutor when he is considering a penal order is contained in the police file. It includes detailed information about the behavior for which the accused is being prosecuted and about his type of work, his income, and his family situation in demographic terms. The prosecutor will not be able to learn anything about the accused as a personality. There is no life history, except for any prior police record, no investigation through neighbors or work associates, no data from medical or clerical personnel, no psychological profile. The penal order is adapted to the defendant's criminal behavior, not to him as a person.

Two important empirical questions about penal orders are unanswered in Germany—whether the judge plays an active role and whether bargaining takes place between prosecutors and defendants before an order is formulated. Langbein believes that judicial review of penal orders is cursory (1974: 456). Our informants indicated that the extent of judicial consideration tends to vary with the judge's experience with specific prosecutors. When a judge has worked with a prosecutor for a long time and comes to trust his judgment, judicial review will be perfunctory. When the association is new or the judge and prosecutor have differed in the past, the judge tends to subject a penal order to an exacting review. Federal Ministry of Justice officials told us that negotiations frequently take place between judge and prosecutor about the propriety of a penal order or the size of a fine. The judge cannot, however, force a prosecutor to accept what the prosecutor believes to be an unsatisfactory penal order. If the prosecutor is not willing to accept judicial suggestions, the case will go to trial.

German ideology is adamantly opposed to plea bargaining. Langbein alleges that it "is all but incomprehensible to the Germans" (1974: 457). Nevertheless, several government officials, legal academics, and legal sociologists whom we interviewed believe that defendants frequently bargained over penal orders. Their suspicions are based on the high proportion of penal orders in white collar offenses; their observation of cases where suspension of a driver's license is a possibility; and the implication in Dass' *Handbook for Lawyers*, a widely-used practical text, that discussion of a penal order can be initiated by a defendant's lawyer.

Bargained over or not, penal orders are the

[4]Penal orders are used in several other European countries, but were studied only in Germany and Austria.

backbone of criminal law administration for misdemeanors in Germany. Loewe-Rosenberg (1972: 2141) reports that in Hesse in 1969, prosecutors tried 32,904 misdemeanors and disposed of 30,836 cases by penal order. Jescheck (1970: 516) states that 70% of all criminal matters for which charges are filed are closed by penal orders. Kern (1959: 312) reports a similar order of magnitude.

In Austria, however, penal orders are less important, probably because of the fierce Austrian antagonism to property crimes. Austrian Ministry of Justice officials report that their countrymen tend to believe that levying fines for property crimes is like selling a license to commit them. Penal orders were not allowed for property offenses before 1975, and judges are thought to continue to prefer short, suspended prison sentences as a more credible deterrent. Stepan (1976) reports that from 1970–72, there was only one penal order in Austria for every 3.5 trials. Penal orders are also basically a judicial function in Austria, particularly in the lower courts where prosecutors are laymen. At that court level, the file is transferred from the police to the judge. If the judge believes that a penal order is appropriate, he will transmit the file to the prosecutor with a notation equivalent to "po?". In a high percentage of cases, prosecutors will follow these "directions."

There is general agreement that in the U.S. a defendant who is convicted after a trial is likely to be sentenced more severely than a similar defendant who had negotiated a guilty plea (Rosett and Cressey, 1976: 156; Davis, 1969: 170; Yale Law Journal, 1956: 221–22). A more severe sentence as a cost of insisting on a trial appears not to be the case in either Germany or Austria. A German prosecutor may not seek a more severe penalty after a trial than he has previously recommended in a penal order without being required to persuade a judge that the case is more serious than he had reason to believe at the time of the penal order. In fact, increases in the original recommended penalty are rare (Langbein, 1974: 457). In Austria before 1975 a penal order could only theoretically be used when the accused had confessed to the police or a public official had witnessed the criminal behavior. In practice the rule had been extended to cover situations where guilt was clear even though there was no confession or official observation of the crime. This extension of the use of penal orders was legalized in 1974. The general view in Austria now appears to be that if the evidence of the defendant's complicity was so clear that the penal order was appropriate, and the defendant's behavior was such that a fine was thought to be proper, then no surprises at a trial are likely and no jail sentence, other than a suspended one, whould be imposed.

The differences between German and Austrian penal orders and American plea bargaining are striking. Plea bargaining is considerably more coercive because the consequence of not making a bargain may be a significantly more severe penalty including a lengthy prison term. Part of the greater coercion comes from the seriousness of the defendant's behavior: plea bargains are struck for even capital crimes while penal orders reach only misdemeanors, many of which would be classified as petty crimes in the U.S. as well. But part of the possibility of a harsh sentence arises from the generally greater severity of American than European criminal law (see Rosett and Cressey, 1976: 182) and the prosecutorial practice of bringing felony charges where only misdemeanor convictions are sought or sustainable (see Alschuler, 1968: 85–86). Plea bargains frequently involve sham ceremonies and needless anxieties about ultimate dispositions, while in fact all participants, except the defendant, are confident that the prosecutor's contract will be fulfilled by the judge. There is, on the other hand, no sham or uncertainty about a penal order.

Plea bargaining and penal orders also reflect different biases in the conduct of criminal prosecutions. Penal orders are an ingredient of a legal tradition which depends heavily on proceedings in writing. At the heart of a Continental criminal case as it passes from police to prosecutor or investigating magistrate and on to judges is the dossier, the file. The penal order, then, can be viewed as the last chapter in this written history, summing up the remainder and recording the denouement. Plea bargains, on the other hand, reflect the common law preference for deciding matters on the basis of oral evidence. Grand juries hear witnesses, preliminary hearings consist of the examination of witnesses, and neither judge nor jury begins to try a case already educated by study of a substantial dossier. It is not surprising, then, that plea bargains are made at oral negotiating sessions (even where the defendant is Vice-President of the United States, see Cohen and Witcover, 1974: 302–28) rather than by the exchange of written memoranda between prosecutors and defense counsel.

Do these differences in level of coercion, level of crime, degree of sham, and legal culture mean that the penal order ought not to be seriously considered as a substitute for negotiating pleas? It would not make sense to restrict penal orders to mis-

demeanors. One of the keys to American plea bargaining is the ambiguity of suspect behavior; invariant conduct can be characterized as a serious felony or a trivial misdemeanor, depending on such unobservable phenomena as intent [note Mather's "dead bang" case (1973: 203–05), where it was difficult to tell whether the defendant was a professional burglar or an old drunk]. If prosecutors believe that the most efficient way to produce guilty pleas to misdemeanors is to charge defendants with felonies, then penal orders restricted to misdemeanors will not frequently be used even in cases in which the prosecutor believes that a misdemeanor conviction is appropriate. Europeans are reluctant to use penal orders for felonies. They do not believe that a defendant can fairly reach conclusions about his own guilt or innocence, so they will not permit him to do so in serious cases. Although confessions make felony trials somewhat perfunctory, felony cases are tried in Germany and Austria. American jurisprudence is not afflicted with such ideological reservations. If penal orders make any sense on the American scene, they make sense across the board.

No decision-making procedure can consistently rise above the information available to it. But it is doubtful that the penal order depends upon a level of data about the context and content of the defendant's behavior that would be difficult to duplicate under American conditions. A German prosecutor considering a penal order has available the police file about the criminal incident, but only skeleton details about the accused as a person. American prosecutors have about the same information—a police report, a record of prior arrests, a transcript of a preliminary hearing, the rudimentary SES data (Rosett and Cressey, 1976: 129). As has frequently been asserted, that amount of information may not be enough (see Pres. Comm., Challenge 1967: 133; NDAA, 1973: 14). But its insufficiency is unrelated to the difference between penal orders and plea negotiation. And if better information can be provided to prosecutors using one device it can be provided to prosecutors using the other.

Coercion is the flaw in plea bargaining; it mocks the notion of volition which is prerequisite to the believable confession. How much the use of penal orders instead of plea bargains would reduce coercion is problematic. Plea bargains are coercive because refusing them may lead to a more severe sentence, or may mean the loss of an opportunity to secure immediate release from jail. To insist on a trial may lead to undesired notoriety, the loss of emotional support from counsel, family, and friends or the loss of liberation from anxieties provoked by the uncertainty of one's fate. It may occasionally mean the loss of an opportunity to acknowledge guilt publicly. The psychological coercion in plea bargaining is not likely to be reduced by a switch to use of penal orders. It arises from concern about a decision to trade relative anonymity, certainty, and expiation for high uncertainty, visibility, and a stance of moral rectitude which may be uncongenial. The same trade is offered by a penal order, and the psychological consequences of turning it down are identically coercive. If bail practices remain unchanged, the offer of a penal order which does not contain a jail sentence more severe than time served is as compelling as the same result offered in a plea bargain.

As a consequence, penal orders would be less coercive than plea bargains only if turning them down is thought to be less likely to lead to a more severe sentence. The German and Austrian experience with penal orders, which denies the existence of this form of coercion, is probably irrelevant to American conditions. Four major contextual features are different. Jail time is not involved, negotiations have probably not occurred, judicial approval has been obtained, and the crime charged is not affected. Sentencing can be more severe after a guilty finding at trial than after a plea because the plea was offered to a less serious crime than would have been alleged at trial, because judges "reward" repentance and cooperation in efficient administration (Yale Law Journal, 1956: 209–11, 219–20) and because the details presented in a full trial may make the defendant look worse than the story at a perfunctory hearing on a guilty plea.

In Germany and Austria, the trial cannot be on a more severe charge than was the basis for a penal order, because the prosecutor is bound to his characterization of the crime as a misdemeanor by his decision to propose a penal order. A German or an Austrian judge's inclination to penalize a defendant for insisting on a trial is probably inhibited by the previous judicial approval of a lesser sentence incorporated in a penal order. Jail time is probably not at issue, both because the prior offer of a penal order means that a prosecutor and a judge thought that jail was inappropriate and because misdemeanors in Germany are unlikely to provide for jail terms in the first place. And last, bargaining with defendants over penal orders may or may not be uncommon, but certainly it is not the modal case. When it has not occurred, the fine proposed by the prosectuor is more likely to be the sanction he considered appropriate than the sanction which he thought would

be acceptable to the defendant. If the prosecutor genuinely believes the penal order sanction to be appropriate before trial, the chances are better that he will adhere to that belief after trial than if the original penalty had been explicitly negotiated or adopted with an eye to what might be acceptable to the defendant. If such a commitment to the earlier sentence is less likely when penal orders have been negotiated, then it becomes important to predict whether bargaining is likely in the American context. Two factors will push penal orders in that direction beyond the forces already at work in the German situation. First, the increased stakes involved for the defendant will fuel his desire to assert some control over his fate (see Herrmann, 1975: 526–27). And second, prosecutors, defendants, and defense counsel will be inclined to adapt the new forms to their existing action and value system.

That penal orders are unlikely, in the U.S., to eliminate coercion from alternatives to trials is a mixed sin. Coercion may be the flaw in the process, but it is also the engine which drives the system. If there were truly nothing to lose by going to trial, who would not insist upon it? A balance may exist in German and Austrian use of penal orders. Sufficient psychological coercion exists so that the defendant has something substantial to gain by not insisting upon a trial. But the heavy coercion of a more severe sentence does not exist and does not inhibit those who have a serious claim to an acquittal from demanding a trial. In the U.S., unfortunately, the need for a substitute for plea bargaining for felonies as well as misdemeanors, the consequent threat of prison terms, and the probability that penal orders would be as much a subject of bargaining as oral pleas are now, suggests that the introduction of penal orders would not by itself correct a coercion imbalance that now is tipped too far in the direction of illegitimate compulsion.

CHAPTER V. THE TRANSFER TO ADMINISTRATIVE LAW

In many European countries, the responsibility for identifying, prosecuting, and punishing a significant proportion of what would be criminal behavior in the U.S. is assigned to the police and administrative agencies rather than to the police, prosecutors, and courts. This system, sometimes called administrative penal law, was investigated in West Germany, Austria, Hungary, and Poland.[5] Administrative penal law varies in important respects from country to country, but, except for Hungary, the system presents two salient characteristics: it is thought to avoid the stigmatizing effect of criminal prosecution, and the bulk of its cases concern traffic, health, safety, consumer protection, environmental control, zoning, and pricing activities.

The transformation of petty criminal infractions into administrative wrongs in Germany took place in 1968, and was prompted by the case overload perceived by judges and prosecutors. The only significant oppositon came from local prosecutors who feared that the transfer of petty cases out of the prosecutor's office would jeopardize their jobs. The government had actually intended to abolish some prosecutorial posts. In fact, as one might predict from American experience with job reduction plans in government bureaucracies, it did not do so. At the most, it postponed creating new prosecutorial positions.

Langbein (1974: 452) has described succinctly the operation of the Germany system:

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

This process is administrative rather than accusatory: the defendant has limited opportunities to confront the evidence against him. A defendant without a lawyer may generally do no more in defense of his behavior than present his version of events to the police or the administrative body conducting the investigation. If a defendant hires counsel, the lawyer can secure full disclosure of the file, which primarily guides his advice with respect to an appeal. Langbein states that an appeal is processed like any criminal case. Our informants indicated that a judge would normally decide an appeal on the basis of the dossier only. The facts, as presented by the administrative body, would not be questioned; neither the prosecutor nor the defendant need appear.

The transgressions covered by German administrative penal law, in addition to traffic, health and safety, and environmental protection regulations, are minor infractions of traditional crimes—trespass against government property, unlawful assembly, loud noises (motorcycles), minor exhibitionism, illegal prostitution (near churches), harboring dangerous animals (snakes), failing to cooperate with the police, and unlawful contact with prisoners. Obviously, control of such behavior is a marginal activity,

[5] An important facet of administrative penal law is police adjudication of administrative violations. Such police activity is no different from the police fines discussed on pages 6–8. We have chosen to discuss police fines separately where they are not part of a general administrative penal law system (Sweden, Denmark, Switzerland). Denmark actually presents an intermediate case. In Denmark, fines are levied not only by the police but also by government fiscal authorities in cases of unpaid taxes or customs duties. The Danish process is discussed in the police fine section.

and the contribution of administrative penal law lies in its traffic, health, safety, and environment-related activities.

The effect on caseload of the transfer in Germany is not entirely clear; it may have been a step backward as well as a step forward. Before the creation of administrative wrongs, traffic offenses were heard by special judges, generally without prosecutors. The new system not only saves judicial time, but is thought to be more efficient and more fair. Currently, if one commits a traffic offense, the computer says whether one is a repeater, and the table of penalties says what the fine will be. Before 1968, all health, safety, housing, planning, and tax regulations were enforced by the relevant administrative authorities without any court reference. Now, however, the administrative agencies process the petty infractions, but for the first time serious administrative violations are enforced by the criminal process.

Creation of administrative wrongs was intended in Germany to eliminate the criminal stigma from behavior which is not flagrantly unethical, as well as to reduce caseload. As a consequence, administrative fines are not recorded as criminal violations, the method of collecting fines is like that employed for civil damages, no specific intent need be demonstrated, and the rule of compulsory prosecution does not apply.

In Austria, administrative penal law represents a traditional, rather than a recent, allocation of social control responsibility. The Austrian administrative system does not reach many orthodox crimes against person or property. Rather it is concerned with consumer fraud, environmental protection, licensing, health, safety, and traffic cases. There are historical accidents categorizing behavior as either a criminal violation or a violation of administrative penal law, but the basic division appears to be between activity which is specifically controlled by a specialized administrative agency and activity which is not. Administrative penal law in Austria is run by district administrative authorities except that in cities, police authorities also administer these less than criminal sanctions. In cities, especially in Vienna, the volume of administrative penal cases is large enough to require specialization within specific agencies so that some officials do nothing except adjudicate administrative cases. This adjudication is conducted in writing. An accused may be assisted by a lawyer in his submission to the agency or police, although most matters are too minor to make legal representation economically feasible. The Austrian constitution prohibits appeals from an administrative tribunal to a regular court, and the Supreme Administrative Court will hear only appeals on matters of law.

Administrative penal law is not intended to be a stigmatizing process in Austria. Convictions are not crimes, and no central records are maintained. But jail sentences of two to four weeks are common, and there is an accumulation principle: it is possible to sentence someone for up to one year by varying the characterization of a single set of events—the same behavior may constitute offensive action toward a policeman, disturbing the public order, resisting arrest, etc. Administrative penal law in Austria is controversial in several respects. The police and administrators appear to be generally harsher than judges applying criminal sanctions to behavior of roughly equal culpability. Other police abuses are alleged to be common. The police, for instance, are said to use administrative law to skirt limitations on the period during which they can question suspects. When the period expires, they convict the suspect of an administrative violation and sentence him to jail, where the questioning continues. Administrative penal law is also sometimes ineffective where it is most significant. An important goal of Austrian administrative penal law is regulation of pollution and health and safety standards. Yet administrators are empowered to fine only individuals, and therefore have difficulty controlling corporate behavior. And last, Austrians suspect that political interference is more common with administrative officials than it is in the regular courts.

In Poland, administrative penal law is governed by a code of petty offenses. This code is intermediate between the German-Austrian model—which is not concerned with classic crimes—and the Hungarian pattern, in which petty instances of classic crimes predominate. Petty offenses in Poland, then, encompass violations of hunting, fishing, health and traffic regulations, small crimes like petty theft, and behavior for which no criminal counterpart exists, such as singing too loudly in the street or failing to keep the sidewalk in front of one's house clean. Culpability is determined by a petty offenses board (POB) which may fine those found guilty or send them to jail for periods up to three months. Proceedings are initiated by the police or by the administrative authority whose regulations have been violated. The panel is composed of one person representing the authority and two lay people elected to that role. Membership on a petty offenses board is never a full-time job. The authority representative is generally a lawyer and acts as Chairman. The Chairman

has the power to fine defendants if the petty offense is minor and the evidence is clear. Such fines may be appealed. If reversed, the defendant is not acquitted, but will receive a hearing from the full board. The board is supposed to hear all serious petty offenses. Hearings are oral, and lawyers rarely appear. If a jail sentence is levied, the defendant may appeal to a regular court.

The petty offenses boards are important and may become controversial in Poland. Waltos (1976) presents the following comparison to offenses under the regular criminal law.

Year	Criminal Defendants Sentenced by Courts	Administrative Offenders Sentenced by POB's
1970	172,800	575,600
1971	204,300	623,300
1972	177,400	672,200
1973	159,000	730,000
TOTAL	713,500	2,601,100
% of TOTAL	22	78

As in Austria, petty offense boards are thought to be more severe than regular courts. The penalties levied by the petty offense boards for petty theft, for instance, tend to be stiffer than those set by the courts for grand theft, probably because courts and prosecutors frequently clear cases by conditional dismissal (see page 13, *supra*). The lesson: if you must steal in Poland, the more the better. If further empirical research confirms this disparity across a wide range of offenses, Polish informants predict that serious consideration will be given to reform of administrative penal law.

In Hungary, administrative penal law is more penal and less administrative than in Germany, Austria, and Poland. It is concerned primarily with the petty form of classical crimes and, in this respect, closely resembles the Yugoslavian misdemeanor system and the operation of many American trial courts with limited jurisdiction. Thus, common offenses tried by the Hungarian administrative authorities are petty larceny, breach of the peace, prostitution, customs offenses, hooliganism, and indecent attitudes. On the other hand, these petty offenses are administrative, since they are processed by departments of national councils rather than by courts.

When the police or another administrative authority learn about a petty offense in Hungary, they turn the information over to the local district council, the basic formal state unit. If the accused admits the offending behavior or if the evidence is clear, and if the offense is minor, the council levies a fine. If the issues are disputed or the offense is more serious, the council holds a hearing. Jail sentences ("limitations of liberty") are reserved for repeat violators. District council decisions may be appealed to officials of the national councils. The decisions of local councils are reviewed every six months by a state prosecutor. No information seems to have been collected concerning the relative use of local councils and the regular courts, but informants believe that the councils were more active and important than the courts at the village level.

It is not possible at this juncture to evaluate the utility of administrative penal law under American conditions. Not enough is now known about the actual operation of European administrative systems—their cost, their efficiency, their fairness, nor their effects on the attitudes and behavior of those they sanction. Even less is known about current American practices: the number of cases which are comparable to those processed administratively in Europe, their effect on caseload, their reliance on jail sentences, the operational effect of constitutional restraints, or the costs of current practice. The leading analysis of the New York Traffic Administrative Adjudication System—the most promising American substitution of administrative adjudication for criminal process—is dominated by concern with the system's structure, its constitutional status, and the formal qualifications of its adjudicators (see Carrow and Reese, 1976). Given the traditional focus on constitutional doctrine in the U.S., such a beginning is perhaps to be expected. But the quality and type of information required to learn what large New York cities (the scheme is only available for cities whose population exceeds 275,000) may have achieved by way of less dollar cost, less emotional cost, and more or less equity is entirely different. What is required is empirical data which would permit us to approximate the costs of both systems derived from physical investment, operating expenses, and personnel opportunity costs; the attitudes and detailed experiences of defendants under both systems; and, if possible, quasi-experimental determinations of the impact of the change on driver behavior. The ABA's Center for Administrative Law has organized an investigation directed by Professor Norman Abrams of UCLA entitled "Administrative Process Alternatives to the Criminal Process System." This project, which is trying to identify areas of criminal law beyond traffic control which may be appropriate for administrative treatment, may again be a necessary

first step. But it also is not organized, nor funded at a level which would enable it to produce the basic data on which decisions about transforming criminal into administrative process ought to be founded.

Despite the desperate need for better information in the U.S. and abroad, the European experience does suggest that some gains and losses from the substitution are to be found in the effects of eliminating jail sentences, in switching the locus of expertise, and in altering the burden of proof. In the U.S., the difference between criminal and any other form of process (civil, administrative, private) is that only criminal process can lead to a jail sentence (except, of course, for civil contempt proceedings). Any other sanction is tolerable for non-criminal matters—fines, damages, prohibitions, mandatory orders, loss of privileges, loss of licenses, change of status, etc. The criminal law process, because it is the process which uses incarceration as a sanction, is the process which is saturated with rights to jury trial, rights to counsel, rights to withhold information, and rights to transcripts and appeal. If jail is not a necessary sanction to affect whatever type of behavior one is trying to control, then, in America, to control that behavior by criminal process is to control it with a set of prerequisites which needlessly consume time and other resources. The focus of the inquiry, consequently, ought to be on the extent to which Europeans control the behavior in which one is interested without the threat of jail sentences, and the extent to which jail sentences are actually levied in the U.S. in case of deviation from such behavior. Information from both sources suggests in a tentative way that the threat of jail is not necessary, even if it may be marginally useful, in controlling the behavior subject to administative regulation in Europe. Jail sentences are regularly used in administrative penal law in Austria and Poland and not in Hungary and Germany. Not only do the German and Hungarian systems seem to have spawned less controversy, but the controversies, in Austria and Poland center around the use of jail as a sanction. In the U.S., we have criminalized the failure to meet a wide range of administrative standards. It is a misdemeanor, or worse, to violate zoning, housing, health, price control, pollution control, fire, animal control, and similar regulations. Information secured from prosecutor's offices in Los Angeles and Santa Barbara Counties in California indicates that jail sentences are almost never levied even for gross violations of such regulations. Of course, the threat of a jail sentence, if under the circumstances it is a credible threat, may lead to some behavioral restraint. Even the threat of a "criminal" prosecution without the possibility of a jail sentence may have some effect. But the German ability to control such behavior without criminal process, and our own failure to use jail sentences, at least suggest that we may pay a high price for the marginal level of conformity induced by the criminal process.

A switch from criminal to administrative process also probably implies a change in the locus of expertise. If one uses the criminal process to control behavior, the administrative officers charged with supervising that behavior tend to become advocates of the position of non-compliance. They identify the behavior, they bring it to the attention of the prosecutor, and they are the chief witnesses for the prosecution. To one degree or another, expertise from a different source is provided by the defendant, and the matter is decided by a criminal court judge—that is, by a non-specialist in the field of behavior being regulated. If the same behavior were controlled by non-criminal administrative process, the administrative officers might play the same role. But the disputed issues would be decided by some other officer or officers of the regulatory body. It might or might not be possible to control for their bias in favor of the regulating agency by specialization or professionalization or even by judicial review, but it is clear that such adjudicators would be specialists in the regulatory field. Their expertise presumably would promote the quality of decision while reducing the need for defendants to employ specialists as a part of their defense.

Whether jurors have an operational understanding of the differences between criminal and civil standards of proof is problematic (Felstiner and Peterson, 1975). To the extent that they do, the substitution of administrative for criminal process control would result in a higher proportion of "correct" adjudications. Under a criminal standard of proof, all defendants whose complicity is evaluated by a judge or jurors as in between "more probable than not" and "beyond a reasonable doubt" will not be subject to sanction. Under an administrative standard, that same behavior will be found culpable. And, if we accept the assumptions underlying any positivistic system of control, we want such behavior to be found culpable.

CHAPTER VI. THE TRANSFER TO LAY COURTS

In industrial societies, lay courts have been primarily a socialist phenomenon. An example of Marxist self-management, they also are said to reflect the predicted withering away of the state. An extensive literature in English describes and evaluates the Russian and Chinese experiences. Reports are also available about lay tribunals in Cuba, Tanzania, Sri Lanka, Burma, India, Pakistan, and Chile under Allende. Tiruchelvam (1973) may be considered an annotated bibliography to this literature. A parallel literature consists of ethnographic accounts of lay tribunals which have preceded, rather than followed, organization of the modern state (see Nader, 1965). Perhaps ironically, suggested American adaptations of lay tribunals have been based on African, non-industrial rather than industrial, socialist models (see Danzig, 1973: 47–48). Lay tribunals in non-Soviet eastern Europe are less well known, and were studied by this project in Yugoslavia and Poland. In both countries lay courts process primarily civil disputes. In the Yugoslavian state of Serbia, for instance, 21,195 civil and 5,251 criminal cases were heard by lay tribunals in 1973. These courts are nevertheless discussed in this section because they do hear some criminal cases, because the dividing line between criminal and civil cases becomes especially fuzzy when the state appears neither as prosecutor nor judge and when generally no involuntary sanctions are employed, and because most suggested and actual U.S. derivatives of lay courts are concerned with criminal cases.

Lay tribunals in Yugoslavia are called Reconciliation Boards. Systematic empirical investigation of their activities has been carried out in Slovenia (Pecar, Vodopivec, Uderman, and Kroflic, 1963) and is underway in Serbia (by Vukadinovic). Members of Reconciliation Boards are elected. They tend to be middle-aged married men who are industrial workers in the towns or peasants in the countryside. Almost all have lived in the locality of the tribunal for more than five years. Election carries high prestige, and members of the court tend to be people of influence. Board-Chairmen are better educated, better employed, know the disputants better, have greater competing obligations, and are more aggressive and less patient than the other members. Formally, Reconciliation Boards conciliate; they do not use the traditional state techniques of enforcement by intimidation. Proceedings may be initiated by the parties to a dispute, by the tribunal itself ("here, we can solve this"), and occasionally by a state court ("this is not a big problem, why not go to the Reconciliation Board?"). The Board sometimes investigates a quarrel before holding a hearing, and frequently Board members know something about the problem anyway. Public opinion tends to force the parties to attend the hearing. Hearings generally consist of free narrative recitals by the parties followed by a general discussion. The proceedings are public unless sexual behavior is at issue, but there is no general venting of opinion as in African moots; the public plays a direct role only as witnesses. Vukadinovic believes that the intrinsic merit of Board suggestions are not as important as the impression the parties receive that the Board as a representative of a tight community thinks that this is what they should do. If a Board hearing appears to end with a resolution of the dispute, the agreement is generally written down in the form of a contract. Such formal reconciliation occurs 60-80% of the time. The Slovenian study indicates that about one half of these formal reconciliations lead to real improvement in the relations between the disputants. Reconciliation Boards are used by people who are in contact with each other every day. The most common sources of quarrels are land in rural areas and housing in towns. Controversies are most frequent between people of the same age, who have the same level of education, between manual workers and between parties having the same income source. There are about four times as many property as criminal cases, and many criminal cases have their origins in property disputes. Reconciliation Boards are preferred to courts primarily because there is no cost for the parties and because complainants over-estimate the power of the

Boards; they may believe that the Boards actually are courts without fees and lawyers.

The caseload of Yugoslavian lay courts appears to be decreasing. The Slovenian study reports:

Year	Caseload
1960	20,305
1961	18,721
1962	14,642
1963	12,061
1964	9,415
1965	8,148

Vukadinovic agrees that this is the trend, but his Serbian figures suggest a stable pattern (26,446 cases in 1973, compared to 26,414 in 1972). Lay courts in Yugoslavia are in many respects a rural phenomenon. There are proportionately more tribunals in the countryside, and the rural Boards hear more cases than the city tribunals. Some of the decrease in use of the Boards may then result from increasing urbanization. Yugoslavian researchers suggest that lay tribunals are more frequently used and are more effective in villages than cities because:

- The alternative of resort to a court involves proportionately greater inconvenience.
- Urban residents are less likely to know members of the Board and, therefore, are less willing to trust the judgment of tribunal members.
- Urban residents are more likely to define their quarrels as criminal matters (assault, defamation) and are, therefore, more likely to involve the police.
- A Board's ability to produce acceptable accommodations depends upon mobilizing public opinion: the Board convinces the disputants of the propriety of a particular resolution of the dispute by persuading them that the community believes in that particular solution. This dynamic depends upon the existence of a relevant community, and such a community is less likely to exist in an urban context.

Social conciliation committees, the lay tribunals of Poland, developed informally from 1953 to 1965, and have been regulated by government statute for the last 11 years. Kurczewski and Frieske (1975) conducted a case study of conciliation committees in two small towns in Wagram district in northeast Poland, and Borucka-Arctowa (1976) has synthesized several other fragmentary investigations. From these sources and from interviews in Cracow, the following picture can be formulated.

First, in aggregate terms:

Table 1 (Poland)

Year	# of SCC's	# in cities	# in countryside	# of new cases	cases per SCC
1965	1800	n.d.	n.d.	n.d.	n.d.
1966	3296	n.d.	n.d.	n.d.	n.d.
1967	4180	2154	2026	26,343	6.3
1968	n.d.	n.d.	n.d.	36,471	n.d.
1969	4766	n.d.	n.d.	40,093	8.4
1970	5271	n.d.	n.d.	54,033	10.2
1971	6460	2453	4007	66,144	10.2
1972	6447	n.d.	n.d.	72,002	11.1
1973	6161	n.d.	n.d.	86,000 plus	14.0

Table 2 (Poland)

Nature of Cases (1967)	Urban SCC's	Rural SCC's
Re-rented premises, cotenancy	5784	624
Re-ownership/possession of land	—	5465
Insults and defamation	2605	897
Family conflicts	2495	2502
Other	4595	1370
TOTAL	15,479	10,858

The small decrease between 1967 and 1971 and in the number of conciliation committees in the cities and the large increase in the same period of committees in rural areas may correspond to the gradual relative decay of urban lay tribunals observed in Yugoslavia. Or, as Kurczewski and Frieske suggest (1975: 60–62), it may reflect greater consolidation of committees in urban areas. The average of eight to fourteen cases per committee is not likely to represent a case flow of only one case per month per committee. Informants indicate that it is more probable that some committees are virtually defunct, and that those committees which hear any cases at all hear quite a few. Approximately one-half of the cases in 1972 were brought to the committees by the disputants. Twenty percent were initiated by the committees themselves and by other social organizations (factories, offices, collective farms). The remaining 30% were begun by prosecutors, courts, the militia, and administrative authorities.[6] From 1967 to 1973, somewhere between 60 to 71% of cases brought to conciliation committees led to some type of formal reconciliation. Borucka-Arctowa (1976: 295) believes that these settlements are durable. But the basis for such a belief seems fragile, and accounts of

[6]The vitality of conciliation committees in Poland is in contrast to the declining use of workers' courts in factories. These courts are discussed in the section of this report concerning decriminalizing petty crimes on company premises.

similar reconciliations in the literature of legal anthropology would not substantiate such a view (Felstiner,1974: 63). Polish informants deny that party members have disproportionate influence when serving on conciliation committees. Party members may be influential because they tend to be socially active, well informed, or viewed as one of a class of people of "possibilities" whose favor is to be courted, but not solely on account of party affiliation. In fact, membership may backfire, especially in villages, where party members may be viewed as government-connected and, therefore, not to be trusted. Borucka-Arctowa believes that in Poland type of neighborhood affects committee effectiveness (1976: 295). The relevant ingredients of neighborhood type are the level of interdependence, the degree of sense of affiliation, and the extent of residential stability.

Kurczewski and Frieske's case study (1975) is frequently discounted in Poland because it is what it is—an intensive study of conciliation committees in two small towns. Polish skepticism about the study may be related to the comparative vitality of its sociological, rather than anthropological, experience; that is, to Polish preference for survey research rather than field work by observation. But whatever the Polish view, Kurczewski and Frieske's study contains insights that would be difficult to achieve by other research techniques.

Their interviews with participants in conciliation committee cases suggest that the cognitive orientation of disputants toward all dispute processing is dominated by a court model. The product of conciliation is thus frequently described as a "verdict" and as the imposition or not of "punishment." They believe that actual conciliation may be frustrated by people for whom "the very idea of justice and settlement based upon principles other than those of the official procedure and the enforceable verdict of the courts is unthinkable" (1975: 228).

Kruczewski and Frieske describe the complexity of the notion of a successful reconciliation. The outcome of committee intervention is likely to occur at three levels: a formal agreement about disposition of the quarrel; variation in restored normalcy or positive interaction in the relations between the disputants; and variation in feelings of discontent, grief or aggression which, although sometimes hidden, may lead to a new outbreak of controversy. They suggest (1975: 218–19) that the modal disposition may be a formal reconciliation, a restoration or temporary peace, but a failure to produce a change in attitudes which will lead to long-term cooperation. Success at all three levels depends upon a change in feelings from the time of the disputed behavior to that of the committee disposition. Kurczewski and Frieske link attitude changes to guilt feelings and suggest (1975: 229) that such feelings precede the hearing, simply enabling the committee to capitalize on, but not to create, the conditions of a successful reconciliation. Where attitude changes are not likely, they believe that dispute may be better left to courts where at least a definitive normative evaluation is feasible.

Kurczewski and Frieske also quote disputants who allege that the comparative advantage of conciliation committees to courts is that committee members "have the best knowledge of interpersonal relations in the community" (1975: 220). The utility of local knowledge lies in the aid it provides to third parties who want to produce attitude changes and must therefore appreciate feelings which may not be articulated during formal hearings (see Felstiner, 1974: 73–75). And last, Kruczewski and Frieske's data (1975: 152) is consistent with the finding of Yugoslavian researchers that lay courts tend to be more effective in rural than in urban settings.

Diversion of minor criminal cases from regular courts to some form of neighborhood institutions has frequently been advocated in the U.S. (see Danzig and Lowy, 1975: 685–91; Statsky, 1974; Danzig, 1973: 41–48; Hager, 1972; Cahn and Cahn, 1970: 1019). A few such services are in operation—the Columbus, Ohio, Night Prosecutor Program; the East Palo Alto, California, Neighborhood Court; the Bronx, New York, Community Court; the mediation service of the Los Angeles City Attorney's Office; the Rochester, New York, IV A Program. Each of these programs has been described in detail, but none has been systematically evaluated. The unfortunate consequence is that the battle over their suitability under U.S. conditions is waged in abstract and comparative terms, but in a virtual empirical vacuum.

The controversy has followed these lines. Use of the regular courts is slow, degrading, expensive, unfairly selective, and ineffective. Some informal, generally mediative, community-oriented, lay-operated, foreign-inspired substitute is proposed. Reservations about the cultural adaptability of the foreign model are expressed. The original proposal is modified to account for the reservations. New problems are identified. The upshot of this dialectic (which may be followed in Danzig, 1973; Felstiner, 1974; Danzig and Lowy, 1975; Felstiner, 1975) is a set of generally untested propositions:

- Mediation of disputes arising from "criminal" behavior may be oriented toward producing outcomes acceptable to the parties or toward developing a process through which the parties will themselves construct an acceptable outcome.
- Outcome-oriented mediation is likely to work only if mediators share the cultural and social experience of the disputants, and works most effectively if mediators have preexisting knowledge of the bases of disputes.
- Process-oriented mediation, on the other hand, depends upon the ability of the mediator to develop a commitment by the parties to formulating an acceptable accommodation by themselves.
- Outcome and process-oriented mediation are different.
- Outcome and process-oriented mediation are not different.
- Compromises in disputes over values or over perceptions of reality derived from values are difficult to produce.
- Many disputes arising from "criminal" behavior cut across racial, generational, ethnic, religious, and attitudinal lines. They thus frequently involve disputes over values or over perceptions of reality.
- The notion of mediating quarrels arising from "criminal" behavior between strangers is nonsense; the victimizing stranger cannot be expected to compromise anything further.
- A major flaw in current processing of disputes arising from "criminal" behavior is depriving the victim of any direct role in shaping society's reaction to the "criminal."

One could undoubtedly add many propositions to this list. They will remain merely interesting propositions as long as we do not provide adequate, long-term evaluation of the reforms which we do adopt. LEAA's "Citizen Dispute Settlement" (1974), as an example, describes the Columbus, Ohio, Night Prosecutor Program in great detail for replication. It contains a well-organized program for evaluating such an activity, but the only evaluation of that program publicly available consists of conclusions without operational meaning. For instance, "Approximately 1,000 hearings were held and all but 20 disputes were resolved without resorting to formal criminal procedures" (LEAA, 1974: 7). But what is a dispute, what is a resolution, and how do we know that 980 disputes were resolved? If 980 of 1,000 disputes were actually resolved, what produced that result? We cannot reproduce Columbus, Ohio, programs wholesale and franchise them like taco stands. In each instance, the reasons for adopting the program vary, the type and intensity of local support and opposition vary, the available personnel vary, the disputants, their social situation, their cultural experience and their economic needs vary, the alternatives to mediation vary, and so forth. If we knew the ingredients of a successful program, then we could orient duplication efforts to those ingredients. But the measures of success currently employed are not discrete enough to be useful. Legal anthropologists have long realized that determining the product of a dispute processing institution is a complex and long-term research problem. Legal reformers have an obligation to those who staff, pay for, and are the objects of their reforms to develop the same appreciation.

The Polish and Yugoslavian research we have described should provide some important, if fragmentary, direction to American evaluation efforts. The foremost lesson is to be sensitive to the effect of community, of social interdependence, on the success of lay mediation. The eastern European experience appears to be consistent with Felstiner's reservations (1974: 86–87) about the utility of mediation in atomistic social contexts. Felstiner is concerned about the manner in which mediators acquire sufficient insight into the actual bases of a dispute to aid in its resolution. The Yugoslavian data indicate that community is not necessary as an efficient source of information, but it is important, because disputants' attitudes may be changed by awareness that their community believes that they should change their attitude. Community is a necessary resource, not because of its contribution to any chain of logic, but because it acts as an authority which will be followed without any demonstration of logic.

The Polish experience with lay mediation suggests that high social cohesion and the consequent possibility of identifying and articulating public opinion may not be effective with disputants whose cognitive set is highly legalistic. Kruczewski and Frieske imply that for many people any dispute processing institution which does not include normative evaluation and punishment of deviance is illegitimate. For such people mediation cannot work: mediators are impotent judges and their efforts debase legitimate expectations. The second lesson, then, is to try to discriminate between potential referrals to a mediation system on a dimension of cognitive orientation.

Eastern European lay mediation of "criminal" behavior is concerned only with quarrels between people whose interaction is at least semi-continuous. These mediation panels do not process disputes between strangers. Their involvement is with kitchen, garden, and bedroom crime, not with street crime. Although Polish and Yugoslavian informants did not appear to believe that lay courts were an appropriate response to street crime committed by a stranger, just such an institution has been suggested in Norway (see Christie, n.d.). The Norwegian proposal would use community dispute processing as a means of debating and setting boundaries for acceptable activity, for forcing the deviant to become aware of the consequences of his behavior, and for permitting the victim to participate in the construction of society's reaction to the behavior which has victimized him. Oddly enough, this model of a lay court reintroduces the relevance of community, but now into controversies between strangers. Who is it who is going to argue about boundaries, rub the criminal's nose in his crime, and debate his fate with the victim? If the ghetto adolescent steals the suburban silverplate, are the local hausfraus going to constitute an encounter session with a selected group of welfare Moms? Perhaps it is bad taste to be flip about important social problems which afflict many real people. But it is worse than bad taste to use scarce resources to initiate social programs which are not based on the most complete data and analysis available, and which are not self-conscious enough to be able to add much to that data base or analysis.

CHAPTER VII. THE TRANSFER TO CIVIL COURTS (DECRIMINALIZATION)

One of the major goals of contemporary criminal law reform in many countries is to restrict the definition of crime to behavior which is a significant threat to important social or individual values. As a result, decriminalization of a wide range of sex-related and drug-related behavior has been considered or adopted in many European countries and American states. Rather than duplicate research results already available in English, we investigated two forms of decriminalization widely discussed in Europe, but rarely considered in the U.S.—shoplifting from self-service stores and petty crimes committed on company premises.[7]

A. Shoplifting

Shoplifting from self-service stores has been decriminalized only in East Germany (see Kaiser, 1976: 197), and information about the East German experience is difficult to obtain. Such a reform has, however, been extensively considered in West Germany.[8] An account of the West German debate may be useful in prompting and focusing such discussion in the U.S.

Before 1975, crimes in Germany were divided into felonies, misdemeanors, and infractions. Theft of food and other objects for immediate consumption was only an infraction. The stigma attached to conviction of an infraction was minimal and, in any event, the rule of compulsory prosecution did not extend to such violations. The 1975 Code lumped many infractions together with violations of administrative regulations to make *ordnungswidrigkeiten* (administrative wrongs, see pages 23–24, *supra*). Other infractions, including all forms of shoplifting, became misdemeanors; that is, some forms of shoplifting became more serious transgressions than they had been in the past. As a consequence, the issue of decriminalization may have become more critical than before reform of the Code.

Academic attention to shoplifting, however, came from another source. Before 1970, shoplifting from self-service stores had prompted several different local reactions. Some stores would not report shoplifting by juveniles, or women, or old people, or by anyone who was willing to pay for the goods. Some stores tried to assure that apprehended shoplifters as a group paid for the store's security arrangements and therefore levied an indemnity, frequently DM 50 ($20) against shoplifters in lieu of prosecution. Some stores awarded a bonus to clerks who caught a shoplifter, and then tried to force the shoplifter to pay the bonus. And a few stores turned all shoplifters over to the police. In the early 1970's, these informal systems became unstuck. Stores began to make collective decisions to take criminal action against all shoplifters. These decisions led to a wave of prosecutions, then to a refusal by some police departments, particularly Berlin, to prosecute any shoplifters. The pendulum swings were to a degree responsible for the inclusion of Section 153(a) in the new Code of Criminal Procedure (prosecutorial conditional dismissal, see pages 13–14, *supra*). At the same time, newspaper reports of these developments and of the prior practices questioned the legality of not informing the police of shoplifting and of "extorting" the indemnity and bonus payments. Some people who had paid the indemnity sued to recover it, and the courts were divided about the payment's propriety.

Because of this split in court decisions, shoplifting crept onto the agenda of the Alternative group (for a description of this group, its history, and political orientation see Eser, 1973: 247–49). The result of their consideration was a proposal to decriminalize theft from self-service stores of goods worth less than

[7]Krantz, et al., 1976: 589–92, discusses shoplifting and advocates its decriminalization. However, it presents no new empirical data and ignores Hingelang's research (1974) which questions some of Cameron's (1964) most important findings.

[8]For a short description of a parallel movement in Sweden, see Nelson, 1973: 274–75.

DM 500 ($200). In lieu of prosecution, a store would have a civil right to the goods and for damages equal to the value of the goods. The damages, if not paid voluntarily, were to be collected by the ordinary no-objection (presumed since the shoplifter would have been caught red-handed), no-hearing civil process. The key to the Alternative proposal is central registration of all offenders. Because of erratic reporting to the police under current conditions, no one knows about multiple offenders, except for thefts from the same store. Central registration would facilitate identification and prosecution of habitual shoplifters, and perhaps provide some deterrence to repeated thefts. Effective apprehension would not be any more difficult in Germany after decriminalization: if a private law claim is about to be lost—if the shoplifter will not stay put—the victim can take the offender into custody.

The arguments for decriminalization are remarkably like the general indictment of criminal law by the "radical criminology." The general case is that crime is distributed rather evenly throughout the population, and that prosecution for crime thus results more from accident and social biases than from identification of aggravated deviance. With respect to shoplifting, the reasoning is that a substantial portion of the population engages in it. If all shoplifters were apprehended and prosecuted, West Germany would become a nation of convicts. If shoplifting is this widespread, then whatever prosecutions actually do take place are an unfair "choice."

The second line of argument is that shoplifting from self-service stores is not really theft. Before the introduction of self-service merchandising, shoplifting required some special deliberation and cunning. The clerk's attention had to wander or be diverted in order for the thief to get access to the goods. Now goods are forced on the customer. The shopowner does not resent the "taking"; in fact, he tries to seduce it (see Osborough, 1964: 299). He is contributorily negligent. The wrong, moreover, is not paying, rather than taking; and not paying is more like a tort (failing to pay for something purchased on credit) than a crime.

If the wrong is not paying the price, then it is a wrong only if the price has some integrity—is a just price. To most consumers, however, prices are arbitrary. They rise with inflation, but frequently in big spurts. They fall with specials and general sales. They do not appear to be a quid pro quo related to the intrinsic worth of the goods, but an erratic figure designed to maximize consumer cost. Shoplifting, then, which accounts for only a small proportion of anybody's needs, is not stealing, but legitimate self-help engaged in to discount unjust prices. However absurd this argument may be in legal terms, the proponents of decriminalization allege that it is experientially accurate. Like price-tag switching in the U.S., shoplifting is viewed as a "righteous rip-off" (Stix, 1976).

There are also two subsidiary arguments: that criminalization is ineffective and that it produces negative secondary effects. The evidence that prosecution of shoplifters has no important deterrent effect is naive. Professor Deutsch of Gottingen, for instance, assumes that enforcement efforts and reporting practices have been relatively stable for the past 15 years. Yet 36,000 people were convicted for shoplifting in West Germany in 1963, compared to 200,000 in 1975. More people are caught and prosecuted, then, because more people are shoplifting. And if more shoplifting occurs, criminalization is ineffective to suppress it. Even if the assumption about stable enforcement is reliable (to the contrary see Blankenberg, 1969), this reasoning is flawed; the effect of criminalization must be determined by reference to the rate of shoplifting, not to its absolute incidence. Self-service merchandising only began in earnest in Germany about 15 years ago. The proportion of goods sold by food and department stores via self-service has increased significantly during that period. As a consequence, the number of opportunities for this form of shoplifting has also increased. If criminalization deters only 99 of every 100 opportunities for shoplifting from self-service stores, but there is an annual 10% growth in the number of items sold in such stores, then there will be an annual 10% growth in shoplifting. If with this selling pattern, the *increase* in shoplifting is only 8%, then it is quite possible that the deterrent effect has, in fact, *increased*. If, as Deutsch assumes, there was 5.5 times as much shoplifting in 1975 as in 1963, it may be because 5.5 times as many items were sold by self-service in 1975 than in 1963.

Assuming widespread shoplifting and infrequent detection, reporting, and prosecution, advocates of decriminalization allege that continued criminalization prejudices other operations of criminal law. A phenomenon they cite is the large number of student revolutionaries of the 1960's who have since been killed in traffic accidents. The explanation is that disvaluation of rules as a cast of mind and as a habit produces disregard even of rules which are politically-neutral and highly-functional. Lawlessness learned in one context will spread to others. The other negative, secondary effect concerns juveniles

and the consequences of their detection in shoplifting. The positive criminal law leads to a disproportionately high rate of prosecution of juveniles for shoplifting: section 248(a) of the Criminal Code directs prosecutors to prosecute in case of theft of items of minor value only if the victim complains or if there is a special interest, for instance, a juvenile is involved. Many criminologists in Europe and the U.S. believe, and a large body of empirical work tends to confirm, that the less intervention by public authorities in the lives of juveniles, the less likelihood that juveniles will label themselves as deviant and act out that deviance (see, e.g., Schur, 1973). If one accepts this rationale, then the fewer juveniles who are prosecuted for shoplifting, the better. And if first-offense shoplifting is decriminalized, then fewer juveniles will be prosecuted.

The arguments against decriminalization in West Germany are moral (theft is theft), empirical (criminalization provides some, even if unknown, level of deterrence), and emotional (decriminalization is an attack on the social order leading to terrorism and anarchy). Professor Nancke of Frankfurt University, in a paper delivered at the 1976 meeting of the *Deutscher Juristentag* (German Bar Association), attacked the sectoral nature of this decriminalization. To criminalize theft from gardens and not from food stores weakens the integrity of criminal law doctrine. It is almost an argument from aesthetics rather than from life. And it probably is not fair, since Professor Arzt of Erlangen, the leading proponent of decriminalization in West Germany today, believes that the self-service store proposal is simply an example of a general category of behavior which should be decriminalized. Arzt argues that consideration ought to be given to decriminalizing all property offenses where reasonably effective private sanctions are available, where the burden of private investigation can be shifted to offenders, and where the victim is "contributorily negligent" by way of choosing to do business in a manner which facilitates the offender's behavior.

Several of the assumptions made by advocates of decriminalization in West Germany are supported by Blankenburg's elegant empirical study (1969) of shoplifting in Freiburg in Baden. Blankenburg's data indicates that only a small proportion of shoplifting is detected. None of the 39 thefts which he "commissioned" were exposed. Only 4% of self-reported juvenile shoplifting had been related to the police. Other shoplifting studies in Germany had indicated a detection rate of between 3 to 6% (Meyer, 1941: 83; Stepheni, 1968), a level generally considered high (see Sellin, 1951). Blankenburg's research indicated that 50% of detected shoplifting was reported to the police. The police dropped 20% of these cases and thus 40% of those detected were sanctioned. Combining these figures suggests that 1 to 3% of instances of shoplifting lead to some form of criminal sanction. This 1 to 3% is not evenly distributed over the population of shoplifters. Disproportionately high rates of sanction await those who steal from large stores in cities in the middle of the day, who are blue rather than white collar, who are between ages 18 and 65, who are foreign rather than German,[9] and, surprisingly, whose income is substantial. Moreover, radical shifts in shoplifting as a criminal statistic are produced by abrupt changes in store reporting policies.

Despite the prestige and influence of the Alternative group,[10] the force of its logic and the empirical support of some of its premises, formal decriminalization of shoplifting is unlikely in West Germany. Although the police may be indifferent, store owners wish to retain their rights to indemnity and use of prosecution as a threat to coerce it. Public opinion is probably set against decriminalization, and the Bar Association, which represents both lawyers and judges, is overwhelmingly opposed. Some *de facto* decriminalization may, however, take place through use of section 153 and 153(a), prosecutorial discretion. Senior prosecutors are allegedly influenced by currents in the legal literature in Germany. If persuaded that decriminalization of shoplifting is fair or prudent or both, state general prosecutors may be inclined to direct local prosecutors to dismiss most shoplifting charges.

Empirical studies of shoplifting in the U.S. indicate a lower proportion of prosecution to apprehension than in Germany (see Hingelang, 1974: 583) and raise the possibility that there are disturbing biases in the selection of who is prosecuted. Explanations of the rate of non-prosecution of shoplifters are: the desire of store personnel to avoid attending court (LaFave, 1966: 116); the conventional (Brakel, 1961: 221), if inaccurate (Gibbens and Prince, 1963: 128), view that shoplifters are stereotypically middle-aged women experiencing a menopausal syndrome; public tolerance of shoplifters because they do not

[9]For the same propensity in England, see Gibbens and Prince, 1963: 124.

[10]Members of this small (25) group of legal academics are now the federal ministers of justice and local ministers of justice in West Berlin and Hamburg.

exhibit the qualities of "otherness" and "malevolence" characteristic of the popular conception of "criminal" (Robin, 1967: 685); and store vulnerability to suits for false arrest in case of acquittal after prosecution (Hindelang, 1974: 493; Cameron, 1964).

Cameron's classic study of department store shoplifting in Chicago (1964) indicates that, among the universe of shoplifters, those people will be prosecuted who shop in stores which employ detectives, have apparent low status (dress, grooming), are either black or an unaccompanied adolescent, and shop in "mass" rather than "class" stores. The racial discrimination is most striking. Blacks are proportionately more likely to be watched by store detectives, are more likely to be prosecuted, are more likely to be convicted, and are more likely to receive a harsh sentence than whites, *after controlling for prior record and value of the goods allegedly stolen*. Cameron's data were produced between 1943–50. Hindelang's study (1974) of store decisions to prosecute penny-ante shoplifters in southern California between 1963 and 1968, does not show any significant difference between the treatment of whites and non-whites. His research suggests that the decision to prosecute is geared to the value of the item stolen, the nature of the item stolen (for resale or not) and the method of concealment used (intent to steal in doubt or not). Whether the differences between Cameron's and Hindelang's data reflect the kind of shoplifting studied, regional differences, or real changes in social values over the 20 years from the mid-1940's to the mid-1960's is difficult to say.

The shoplifting problem may be viewed from two levels. First, what ought to be done about shoplifting if only a small proportion of shoplifters are detected? Reaction to this question will depend substantially on whether the selectivity in apprehension is thought to be erratic or consistent and whether any pattern of consistency is considered desirable or illegitimate. Second, what ought to be done about shoplifting if only a fraction of detected shoplifters are prosecuted? Reaction to this question will also depend on the mode of selectivity and the legitimacy of any discernable patterns. The relevant research findings have not been produced, but could be by replication of studies such as Blankenburg's, Cameron's and Hindelang's.

In the meantime, let us assume the worst: that those who are apprehended and those who are prosecuted are erratically selected or methodically selected pursuant to illegitimate criteria. Such a social pathology could be corrected by trying to apprehend and prosecute a much higher proportion of shoplifters or by only prosecuting repeated shoplifting, that is by decriminalization. Whether to follow strategies of supercontrol or civil control depends upon evaluation of sensitive symbolic, economic, social, and political factors. Which strategy would produce the lowest summed cost of shoplifting and shoplifting prevention? Which policy is more likely to jeopardize the legitimacy and power of important social institutions (positive law, criminal justice administration) or important social values (equality, private property). Existing information and analysis do not point toward either conclusion, nor toward a preference for the equally unintelligible present. But they do point toward the importance of making decriminalization a debatable issue which would both demand and incorporate the necessary basic empirical investigations.

B. Company Justice (betriebsjustiz)

Decriminalization may be directed, as with abortion or shoplifting, toward a particular form of behavior. Or it may be directed toward a specific group of actors, such as juveniles. And it may also be geared to a wide range of lawbreaking which occurs at a particular place, especially on company premises. In Germany, the private response to criminal behavior which takes place on factory premises is known as *betriebsjustiz* and it has drawn significant political, legal, and empirical attention. Twenty-five years ago the German criminologist Hellmuth von Weber began to organize research on the full range of criminality of the members of a particular group. The group most often selected was the employees of a single firm. These studies produced substantial information about offenders and offending behavior, but very few data about company responses to such behavior (Feest, 1961: 6). In the mid-1960's, a series of newspaper articles alleged that most criminal behavior which occurred on company premises was not reported to the police. Instead, companies investigated and sanctioned such behavior without government permission or assistance. The German trade unions were at first embarrassed by the amount of behavior handled privately by management, but they were apparently persuaded by employers that internal justice was better for their members than reference to the state criminal apparatus.

Public discussion waned, but legal academics became concerned with the ideological dimensions of company justice. The Alternative group resolved that

company justice, if adequately organized, was a desirable allocation of responsibility and resources. They believed that it was, nevertheless, illegal unless sanctioned by statute. They, therefore, propose to decriminalize petty crime committed on company premises and, simultaneously, to require that the administration of company punishment meet stipulated procedural standards. The major reform is to require that any company justice panel include employee and neutral outside representation. For constitutional reasons they also suggest that the loser (company or employee) at a company hearing could appeal to a court, but the court could apply only company, not criminal law, sanctions.

The reception accorded to the Alternative proposal has been cool. Employers are opposed to it because they believe that the proposal would permit outsiders to take control of their disciplinary processes. The unions are against it because they believe that the panels will seriously compete with the traditional union-management councils. Many government officials oppose decriminalization because it involves too much private action in criminal law enforcement. Bauman, now the Minister of Justice in West Berlin and an original member of the Alternative group, is upset by the prospect of wholesale low criminality escaping government attention (1975). But the most serious attack on the Alternative proposal has come from the research group at the Max Planck Institute in Freiburg which has just completed an extensive empirical investigation of company justice.

The Freiburg group, headed by Metzger-Pregizer, interviewed management and employees at every tenth industrialized firm in Baden-Wurttemberg employing less than 50,000 employees. An English summary of their research findings is included as Appendix 3. Here, we will report only those data which are relevant to the Alternative proposal and which suggest the amount of criminal behavior which occurs at the workplace. Neither company officers nor employees wish to invoke the criminal law. The Freiburg group, moreover, believes that the parties cannot be forced to use a court-like process such as the one incorporated in the Alternative proposal. They will simply avoid it by defining most of the behavior with which they are concerned as non-criminal violations of company regulations. More important, however, are the indications in the Freiburg research that the procedural inadequacies which the Alternative process is designed to correct are infrequent in the first instance. In 90% of situations, the Freiburg research suggests that employee representation on existing company justice panels is adequate. Thus, the Alternative process imports the procedural protections of the criminal law, most of which are not needed, and then carries with it the negative side of criminal process, especially the stigmatization by trial.

In about 10% of cases, the Freiburg study indicates that either comparatively severe sanctions[11] were meted out or norms were selectively enforced, especially against unskilled, short-term, young and foreign workers. As an antidote, Metzger-Pregizer advocates that the labor code promulgate a minimum model of procedure which would permit appeal by a worker in a case which had criminal aspects if he thought that the process or the sanction were unfair. This appeal, rather than the initial hearing, would be to a tripartite body, such as that suggested by the Alternative group as the trial forum.

If the selectivity embedded in the prosecution of shoplifters argues in favor of decriminalization, a similar phenomenon can be asserted for petty crime on company premises. The Freiburg research indicates that employees know about 74 cases of crime occurring on company property for every one that gets reported to management. Management knows about six cases for every one which it reports to the police. And the police are informed about two such cases for every one which is eventually prosecuted. In other words, there is an indication that the ratio of crimes of this category committed in West Germany to crimes prosecuted is 888:1.

Ironically, our field work indicates that experience with workers' courts in eastern Europe, especially Poland, is not as well accepted by employees as is *betriebsjustiz* in West Germany. Workers' courts are optional in Polish industry. In contrast to neighborhood conciliation committees, the number of such tribunals and the number of cases which they hear have been decreasing (Borucka-Arctowa, 1976). Polish workers are apparently shy of these courts because they resent having their misbehavior described and analyzed in detail by their fellow workers: they prefer the less public process of the criminal law authorities. Perhaps the difference is simply a matter of relative publicity, the workers in each country preferring the less public process.

[11]The sanctions employed by the companies studied included dismissal, threat of dismissal, reprimands, fines, demotions, exclusions from social benefit schemes, and reduced chances of promotion.

In the U.S., private sanctioning of criminal behavior does not pose the ideological and constitutional problems which are so difficult in Germany. Adequate due process, the chief concern of German reformers, may be insured by collective bargaining agreements for unionized sectors of industry. In the U.S., therefore, the issue of decriminalizing minor crimes committed on company premises will depend upon value judgments about the adequacy of private process and the difficulties of reforming inadequate private process and on empirical determination of whether such crimes are now reported to the police and prosecuted. The relevant empirical work is extremely thin. Robin (1967) investigated the response of department stores to employee theft (dismissal, but no prosecution). Bensman and Gerver (1963) studied the social organization of company rule violations which jeopardize the integrity of aircraft construction. Horning's unpublished thesis (1963) looks at employee thefts, but does not analyze employer reaction to such thefts. If it should appear that such crime, when it involves small amounts of money or small harm to other employees, is not reported to public authorities in the U.S., then decriminalizing it will not produce any decrease in caseload, and the reform would not have any practical effect.

CHAPTER VIII. SUBSTITUTING LAY JUDGES FOR JURIES

Use of lay judges in criminal trials is common throughout Europe (see Bedford, 1961). In this project, we focused on lay judges where they have been the subject of recent empirical investigation—in Hungary and Poland. Until very recently all criminal trials in Hungary were conducted by one professional and two lay judges. The lay judges were expected to perform the same functions as the professional judge—run the trial, hear the evidence, apply the rules, decide upon the sanction. The ostensible purpose of lay judging was to incorporate the opinions and values of ordinary people in judicial decision-making. Research conducted by Kalman Kulcsar examined the selection of lay judges, their actual participation in trials, and public attitudes toward that participation.

In many respects Kulcsar's research is an analysis of the ways in which the incorporation objective is frustrated. Lay participation in the administration of justice is traditional in Hungary, but it has never been organized to produce judges who in the aggregate represent the general population. Lay judges are now selected by local councils upon the nomination of factories, offices, and farms, rather than directly by the citizenry. As a result, the nominees tend to be people who can easily be spared from the workplace. Not all of those nominated actually serve as judges: the professional President of the local court selects lay judges on the advice of the other professional judges. Participation is skewed toward those nominees known personally by the professional judges. Kulcsar found that during a three year term some nominees were never called to judge while others served for 18–27 months. The selection process results in a distortion in favor of retired persons [30% of nominees are retired (over 60) and the percentage actually serving as judges is even higher] and, in the judge-selection phase, toward people of higher "intelligence." Kulcsar investigated the attitudes of lay and professional judges toward various social problems. Probably in part because of the age difference, lay judges appeared to be more conservative than their professional counterparts.

The notion that lay judges are to fill the same role as professionals proved, as might be expected, to be a fiction. Lay judges believe that they are not as well qualified to judge as a professional judge. Most importantly, they do not know the rules, and Hungarians realize that it is unrealistic to think that they can be taught the law in a short training course. Law judges also find difficulty in participating fully in trials because they are generally not given enough time to study the dossier in advance: most of their pre-trial information about a case is derived second-hand from the professional judge. The importance of preparation is supported by Kulcsar's finding that the greater the access of lay judges to the dossier, the more active their participation in the trial. Both lay and professional judges believe that the most active phase of lay participation in a trial comes during the collegial discussion of the facts of the case: what the defendant's behavior has, in fact, been. Kulcsar's research does not confirm this belief. His observation of trials suggests that lay judges are most active in the process of determining punishment. Kulcsar also concluded that both criminal defendants and parties to civil cases trusted professional more than lay judges; they know their lay judges, who they are, and how they were selected.

Kulcsar's work is a nice example of congruence between applied research and reform. His investigation has been financed by the Hungarian Ministry of Justice, and he has made a preliminary report to the Ministry. There has been no attempt to alter the selection process or organization of lay participation in trials, but apparently impressed by Kulcsar's negative findings, the Ministry has curtailed the use of lay judges. They are now compulsory only in serious criminal trials and in family and divorce cases.

Lay judges in Poland[12] participate in about one-half of criminal trials. In petty cases, there is one professional judge only; in serious cases there are three. Two lay judges join with one professional to

[12]For an excellent summary in English of Polish research on lay participation in the administration of justice see Borucka-Arctowa (1976).

hear cases in the middle. This practice has been in effect since the early 1950's and involves about 50,000 laymen at a time. By statute, lay and professional judges have identical duties and powers, except that only professional judges may preside over trials. Nevertheless, even official dogma recognizes some division of roles. Lay judges are not only supposed to make public opinion more salient in trials, but they are expected to reduce the routinization which would otherwise be produced by professional habits and to act as an antidote to autocratic or lazy behavior by professionals. Polish researchers emphasize this latent function of lay judges: the lay judges' presence as well as their participation, is a form of social control (Borucka-Arctowa, 1976: 289).

Extensive observation of trials in Poland indicates that lay judges participate fully in pre-verdict deliberations about 40% of the time. In 8% of observed trials, the professional judge tried unsuccessfully to involve lay colleagues. In the remaining one-half of cases, the professional judge dominated the proceedings and appeared to be uninfluenced by the lay judges and whatever efforts they made to participate (Borucka-Arctowa, Kubicki, Turska and Zawadszki, 1970). Professional and lay judges rarely disagreed about guilt or innocence, but they frequently had different ideas about sanctions. Lay judges were reportedly more sensitive to the offender's subjective circumstances, more interested in minimizing the trouble produced for the families of offenders, and more convinced than professional judges that prison does not re-educate anyone. Although lay judges tended to be more lenient than professionals, they were tougher on a few crimes, such as hooliganism, grand theft of socialized property, and personal violence. Their overt leniency masks an interesting attitudinal phenomenon. In questionnaire responses to concrete situations, lay judges appear at both ends of the severity continuum. Thus, in actual practice, lay judges presumably express their deviant attitude when it is more lenient than the professional's view, but they apparently suppress their views when to express them would make the offender's situation worse. Disagreement on sanction occurs in about 55% of cases, and in 80% of those cases lay judges believe that their views influenced the eventual decision.

Some of the problems in Hungary's use of lay judges also occur in Poland. Lay judges rarely are adequately briefed before start of a trial, and when they are informed about particular cases, the professional judge's own judgment of the evidence, the merits and the appropriate sanction are too often included. In the early years of lay judging, the selection process in Poland also tended toward picking expendable and superannuated citizens.[13] Professor Borucka-Arctowa believes that government pressure succeeded in forcing changes in selection so that lay judges are now reasonably representative of the population.

In America, the trial jury may be as crucial to the legal culture as it is firmly embedded in the Constitution. But the intricate procedures which govern jury selection and participation account for a significant proportion of the time consumed by American trials. Without juries, the same resource allocation could provide more trials or a lesser allocation could provide the same number of trials. Simplification of the rules of evidence might even produce better, as well as quicker, trials. Because the potential gains are so large, it is worth considering whether the substitution of lay judges for juries might also secure most of the values which we believe that juries preserve.

Let us assume that the objectives of jury trials rather than trials by judges sitting without juries are the introduction of popular values into trial decisions, protecting citizens against government (police, prosecutor, and judge) conspiracies, providing collective judgments and providing citizen participation in government, thereby increasing citizen respect for its legitimacy. In general, the degree to which these values may be achieved through lay judges rather than juries are empirical questions which cannot be answered, even tentatively, on the strength of the data available. With respect to sentencing, it is certain that popular values achieve greater expression through lay judges since they traditionally participate in this phase of trials, while American juries generally do not. But all the other questions are open. Would we provide equal scope for popular values in decisions about culpability if we used lay judges?[14] Are 12 jurors a greater shield against government conspiracy than a court composed two-thirds of laymen?[15] Would citizen satisfaction in participation, and trust, in legal institu-

[13]The same problem is alleged to exist in Sweden (see Molin, 1975: 88), while in West Germany an opposite bias toward elitism and political activism has been noted (see Casper and Zeisl, 1972: 182–83). In Czechoslovakia, selection is alleged to be controlled by the Communist Party (Krystufek, 1976: 303).

[14]Casper and Zeisl (1972: 191) tentatively conclude that American juries deviate from professional judges on the question of guilt more frequently than German lay assessors.

[15]Hanly (1975: 67) implies that a judge may be more likely to sway a jury than to influence lay judges because his unassisted power to pronounce sentence in the jury mode means that he is more likely to be perceived by jurors as an auxiliary superego.

tions be increased or diminished if fewer lay persons participated more actively in trials? Is collective fact finding, role implementation, and result determination superior when the collectivity is 12 + 1, rather than 2 + 1?

Lay judges may provide positive, if latent, functions which are not, or are only weakly, provided by juries. Professional judges operating on their own in sentencing may tend to routinize that work. The participation of lay judges may force the professional judge out of standardized reactions to problems which are only superficially routine. The continual, informed interaction of lay and professional judges may tend to abort any professional tendency toward bad manners, overt bias or laziness. Many other important questions are difficult to answer with any confidence. Nevertheless, if we do not begin a program of research directed toward consideration of these questions, we will persist with the jury not because it is necessarily the best available technique to achieve our goals in criminal trials, but because, like the weather, it is here.

CHAPTER IX. CONCLUSION

The report of our studies in criminal law administration has a simple organization. We investigated a series of European practices and proposed reforms which were different from American attempts to grapple with the same problems in managing deviance. We then explored, generally in a tentative and suggestive manner, what the consequences of adopting such practices in the U.S. might be and what specific impediments would have to be faced if any transplants were to be attempted. Several threads run through many of the specific evaluations: the problematic nature of the compatibility of a European practice and American culture; the dependence of many evaluations on empirical data which have not been developed; and the need for experimentation with innovations in a few settings before major reforms can prudently be undertaken.

European cultures differ from each other. But in legal affairs, where they share in varying degree the civil law tradition, their differences are minor compared to the gulf that separates American legal culture from any continental system. Prosecutors in America and in Europe have a different career orientation, a different career development, a different relationship to defendants and judges, a different public image, a different style, a different reward schedule, and they work under different pressures. Take prosecutorial convictions or fines as examples. The notion that American prosecutors should have the power—without court participation—to convict and punish an accused may be at odds with the symbol of the prosecutor as a policeman with graduate training, with American notions of the prosecutor as an adversary in combative process, with American beliefs that only juries and judges should be permitted to determine criminal guilt and levy sanctions. The actual practices of American prosecutors may in fact fly in the face of such cultural tenets. But it is difficult to predict with any confidence the consequences of openly flouting the traditional role allocation and explicitly conferring powers on prosecutors which the ideology says are to be restricted to others.

The same problem of cultural compatibility arises over differing preferences with respect to oral or written proceedings and with respect to the symbolic importance of the jury as a bulwark against government oppression. We may be able to reduce a comparison of penal orders and negotiated pleas, or of lay judges and juries, to functional ingredients. We may conclude that, functionally, these components are either not so very different or are adequate substitutes for each other. But it does not necessarily follow that a transplant which might be advisable for reasons of efficiency or fairness would be culturally acceptable. The jury as symbol, or oral process as a matter of style, may have significance beyond the sum of their parts. And that symbolic or stylistic significance may be so deep and pervasive that penal orders or lay judging, however rational in a sterile world, would be intolerable in a real context tainted with cultural preferences.

If cultural concerns ought to make us hesitate to apply European practices to American conditions, so should our empirical ignorance. We have noted the need, sometimes a desperate need, for better information about:

- Variation in level of fines between judges.
- The degree to which prosecutorial discretion is uncontrolled in the U.S.
- The involvement of German judges in the formulation of penal orders.
- The frequency of bargaining between German prosecutors and defense counsel about the terms of penal orders.
- The costs, efficiency, fairness, and effects on offenders of various European administrative penal law systems.
- The number of criminal cases in the U.S. which are comparable to those processed administratively in Europe, their effect on caseload, their reliance on jail sentences or the threat of jail sentences, and the operational effect of constitutional restraints.
- The detailed ingredients and consequences of American "neighborhood courts."
- The degree to which citizen satisfaction in participation, and trust, in legal institutions would

be increased or diminished if fewer lay persons participated more actively in trials.

- The degree to which collective fact finding is superior or inferior when the collectively is 12 + 1, rather than 2 + 1.
- The degree to which the apprehension, prosecution, conviction, and sentencing of shoplifters in the U.S. reflects racial biases.
- The degree to which petty crime committed on company premises in the U.S. is reported to the police.

We cannot predict the effect of culture on transplanted reforms. We are relatively ignorant both of the empirical context from which such reforms come and of the context in which they are to be applied. Thus we favor small-scale experimentation rather than wholesale innovation. But such a strategy is difficult to carry out. It is easier to create new institutions than to make meaningful changes in the practices of established institutions. A scan of the innovations reported in the exhaustive American University diversion report (Aaronson et al., 1975) confirms that the creation of new programs has been our tendency in the administration of criminal law. Yet many of the approaches identified in our research, especially the operations of European prosecutors, which probably ought to receive a trial in the U.S. would require radical changes in our existing practices. We do not recommend, for example, that California prosecutors experiment throughout the state with prosecutorial convictions, or that all U.S. attorneys supplement plea bargaining with penal orders. But we do believe that we will never be able to assess the systematic value of such innovations unless we give them a trial on a small scale and under experimentally-controlled conditions.

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APPENDIX 1

A two-step mail survey, similar to that conducted in Europe, was carried out in Egypt, Nigeria, the Sudan, Zambia, Tanzania, Australia, China, India, Israel, Sri Lanka, the U.S.S.R., and Canada, where several interviews were also conducted. Fifty-eight initial information requests were sent to these non-European countries, producing 20 responses. Forty follow-up questionnaires were sent, producing 21 responses. Most of the practices identified in that survey were either similar to institutions existing in the U.S. or were examined in a European context (Table I), have been described in papers available in the U.S. (Table II), or were incompatible with the American sociopolitical context (Table III).

Table I
Geographical Location of Non-European Alternatives

Institution	Country
Summary Orders	Egypt, Japan
Diversion of Target Group Offenders	Australia and South Africa (public drunkenness); Egypt (drug addicts)
Juvenile and Family Courts	Canada, Japan
Administrative Fines	Canada, India, Israel, Japan, Nigeria, South Africa, Tanzania
Tax Evasion Notification Schemes	Japan, India
Compounding Offenses	India
Circuit Courts	India
On-the-Spot Fines	Nigeria
Juvenile Restitution Project	Canada
Neighborhood Mediation by Legal Aid Lawyers	India

Table II
Literature on Non-European Alternatives

Institution	Country	Literature
Tanu Cell Leader/ Arbitration Councils	Tanzania	J. H. Proctor, (ed.) *The Cell System of the Tanganyeka African National Union,* Tanzania Publishing House, 1971; Fred DuBow, "Tanu cell-leaders as para-legal agents," unpublished paper presented at the Annual Conference of the African Studies Association, on November 10, 1971; Fred DuBow, *Justice for People,* Ph.D. dissertation; Joel Samoff, "Agents of Change? Cell Leaders in an Urban Setting," unpublished paper, presented at the Annual Conference of the African Studies Association, on November 10, 1971; J. Samoff and J. O'Barr, *Cell Leaders: Agents of Change? A Collection of Original Essays,* Tanzania Publishing House, in press
Customary and Area Court	Sudan	Francis M. Deng, *Tradition and Modernization,* Yale University Press, New Haven, 1971.
Conciliation Boards	Sri Lanka	N. Tiruchelvam, "The Popular Tribunals of Sri Lanka: A Socio-Legal Inquiry," unpublished J.S.D. dissertation, Harvard University, 1973.
Panchayats	India	John T. Hitchcock, "Surat Singh, Head Judge," in Joseph B. Casagrande (ed.), *In the Company of Man,* Harper & Bros., New York, 1960.

Table III
Institutions Incompatible with the American Sociopolitical Context

Institution	Country
Bantu Aid Centers	South Africa
Village Headman	Sri Lanka

APPENDIX 2

INFORMATION SHEET

1. Please describe briefly on this information sheet *one* program, procedure or other approach involved in the handling of criminal complaints in your country which has the net effect of reducing the number of cases which must be formally adjudicated in the court system.

2. Please provide us with the name, address and telephone number of the person or persons whom you consider to be most knowledgeable about the program, procedure or other approach nominated above—someone we can contact for additional, more specific information and to make arrangements for an on-site interview in spring 1976.

Name	Address	Telephone

3. If you know of any specific reports, articles or other information available about this nomination, please list them below. (If possible include citation or the location where such material can be obtained.)

APPENDIX 3

QUESTIONNAIRE

(Before filling out the questionaire, please read the enclosed guidelines carefully and be sure to answer each question with reference to the one specific "alternative" named in Question I.)

1. Please name *one* program, procedure or other approach ("alternative") involved in the handling of criminal complaints in your country which has the net effect of reducing the number of cases which must be formally adjudicated in the court system. _____

2. This question is intended to define the basic components of the "alternative." Please answer each item very *briefly* if possible. If an item does not apply to the "alternative," *briefly* explain why it does not apply.

   (a) What are the general goals and objectives of this "alternative?" We are interested in its rationale; how it came about and what it hoped to achieve. _____

   (b) Under what authority does this "alternative" operate (e.g., statute, court rule, informal practice, etc.)? _____

   (c) What types of defendants are diverted by the "alternative" (e.g., juveniles, alcoholics, etc.)? _____

   (d) What types of criminal complaints are diverted by the "alternative" (e.g., drug offenses, automobile driving violations, etc.)? _____

   (e) At what point in the judicial process does the "alternative" intervene (e.g., after formal charge)? _____

(f) What is the primary *means* by which diversion takes place in this alternative (e.g., referral, supervision, counseling, mediation)? _____

(g) Who makes and carries out the actual decision to divert in this "alternative" (e.g., judge, prosecution, police, etc.)? _____

(h) *To what* type of service or program, if any, is a person diverted in this "alternative" (e.g., job training, treatment, etc.)? _____

3. Would you describe this alternative as operative *exclusively* within the formal court system, *in part* within the formal court system or *totally independently* of the formal court system?

(a) Exclusively within the formal court system _____

(b) In part within the formal court system (specify what kinds of forums/individuals outside the formal court system are involved) _____

(c) Totally independently of the court system (specify what kinds of forums/individuals outside the formal court system are involved) _____

4. Please describe *briefly* now this "alternative" "works"; for example, what *procedures* and *services* does it entail, beginning with the first point of intervention (identified in 2e above)? _____

5. Roughly, for how many years has the "alternative" been in existence? _____ years.

6. Please describe briefly changes or modifications, if any, in the operation or application of the "alternative" since it came into existence. _____

7. How extensively is the "alternative" you named *available* throughout your country's jurisdictions (e.g., everywhere?, in only one jurisdiction?, in only one city?). Also, how extensively is the alternative *actually applied*, do you think? _____

8. Roughly, how many cases do you think are successfully diverted from the formal judicial system per year as a result of this "alternative"? ___ Cases Per Year

9. What other effects do you think this "alternative" has had on the criminal justice system, in terms of enhanced or reduced *equity, accessibility, precision, costs, efficiency* or *any other factor* you care to mention.

10. As part of planning our field work we are interested in knowing how much and what kinds of information you think might be available to us about this "alternative." For example:

    (a) What kinds of data do you think are available on the cost implications of the mechanism, its operational procedures, evaluation efforts and types of defendants and crimes it diverts, etc.? _____

    (b) Do you know of any specific reports or articles about the "alternative" and, if so, would you tell us where they may be obtained, with as complete citations as possible? _____

    (c) We are interested in learning something about how widely accepted in your country the "alternative" is, for example:

        (1) Do YOU personally think the alternative is promising, of likely interest to other countries and important for us to study or not? Please briefly explain your views. _____

(2) Do you think MOST knowledgeable people are supportive or opposed in their attitude toward this "alternative?"

Supportive _____ Opposed _____

(3) If possible, please give us the name and address of someone who you think is particularly supportive of the "alternative" and the name and address of someone who you think is particularly opposed to it.

	Name	Address	Telephone
Supportive:	_____	_____	_____
Opposed:	_____	_____	_____

(d) Please list the names and addresses of any other knowledgeable experts from whom you think we might learn more about this "alternative."

Name	Address
_____	_____
_____	_____
_____	_____

11. If you have any additional comments you would like to make about the "alternative" please do so in the space below.

GUIDELINES FOR RESPONDING TO THE INFORMATION SHEET

For the purposes of this information request, we are interested in PROGRAMS, PROCEDURES OR OTHER APPROACHES USED SOMEWHERE IN YOUR COUNTRY'S HANDLING OF CRIMINAL PROBLEMS WHICH, ENTIRELY OR IN PART, SUBSTITUTE FOR THE CRIMINAL JUSTICE SYSTEM OR WHICH SCREEN CERTAIN OFFENDERS AWAY FROM THE CRIMINAL JUSTICE SYSTEM *AT SOME POINT PRIOR TO CONVICTION* OR WHICH OTHERWISE REDUCE THE NUMBER OF CRIMINAL CASES FOR WHICH THE DEFENDANT'S GUILT MUST BE DECIDED BY THE COURT. (This substitution or screening may occur exclusively within the formal judicial system or it may involve the utilization of devices outside the formal judiciary. It may be instigated by a variety of sources, such as the police, the prosecutor, the court, an administrative board, etc. It may be a recent innovation or an ancient practice. It may be in general use throughout your country or be an experiment confined to a single city or neighborhood. It may be operated pursuant to a statute, a court rule, an administrative regulation, or even without specific governmental authority. It should *not* be something which is employed *after* conviction since that generally will not reduce the volume of cases which must be litigated in the courts.)

A few examples of possible nominations in the United States follow.

- The Cook County (Illinois) Boy's Court Supervision Program screens out some juveniles by allowing them to avoid a trial or finding of guilt if they agree to submit to the supervision of the Court's probation department. They are obligated to receive counseling and assistance for one year in exchange for dismissal of charges if there is no new arrest and periodic appointments with the probation department are kept. (*This example takes place exclusively within the formal court system.*)
- One alternative consists of policemen referring people arrested for drug possession, drug addiction, etc. directly to local drug treatment and rehabilitation programs rather than arresting them. (*This example takes place entirely outside the formal judiciary.*)
- In "Operation DeNovo," an employment program in Henneppin County, Minnesota, judges refer defendants charged with small crimes to local jobs or job-training programs, where they are supervised by both the judiciary and the employer or job trainer. (*This example incorporates both judicial and nonjudicial elements.*)
- Several jurisidctions have shifted the adjudication of most automobile traffic offenses from the criminal courts to an administrative tribunal with the penalties for infraction limited to a monetary fine or suspension of the driver's license to operate a motor vehicle. Thus, no imprisonment or other loss of freedom can be imposed. (*This example involves a redefinition of certain conduct which formerly was considered a violation of the criminal law to treat it as something less than criminal as well as transferring its adjudication to a non-judicial forum.*)

The above are merely illustrations from the American experience and you should *not* confine your responses to analogous features in your own country. We anticipate that most countries will have programs, procedures or other approaches implementing basic solutions which are very different from anything used in the United States.

APPENDIX 4

SUMMARY AND CONSEQUENCES FOR CRIMINAL POLICY*

by Gerhard Metzger-Pregizer

The aim of the research was to obtain greater and deeper knowledge of *Betriebsjustiz* (the internal administration of justice at the place of work), particularly with regard to its extent, its systematic structure, and the people handled by such a system. We wished to examine the reactions of industrial firms to violations of norms by their members; what their intentions were, what they did, and what results this had. We expected, by studying these reactions, to obtain results on the norm-structure, offender-structure, nature and extent of norm-violation at the place of work, and on the "dark figure" as it applied to the work-place. Further we wished to examine and analyse the attitude of the employees concerned to the social control system of their company.

We can regard these aims as having been achieved. We have been able to clarify the concept and the reality of *Betriebsjustiz*. In particular, our research has brought new knowledge of its organization and procedures, the frequency and nature of violations, the "dark figure," sanctioning practices and attitudes of employees.

These results are summarized briefly below, set out by topic. They have implications for legal and criminal policy, which we then describe.

13.1. Summary of Results

13.1.1 Organization and procedures

1. The organization within a company that deals with violations is clearly related to the size of the company. One cannot speak of *Betriebsjustiz* in the singular, but must make distinctions along a continuum ranging from relatively undeveloped to relatively developed forms of organization.

   While the literature mainly refers to regularly established systems within the company which parallel the state's justice system (factory courts, factory police, etc.) in reality these are exceptions. The same is true for the collaboration of workers' representatives (*Betriebsrat*†) in the "prosecution" and sanctioning of violators. Parallel to the development of distinct and specialized controlling and sanctioning organs we can point to a formalization of the company's reaction (work regulations, rules of procedure, maintenance of records). The establishment and formalization of the company's reaction is accompanied by increased official registration of violations.

*English translation by P. Macnaughton-Smith.

†The *Betriebsrat* is a joint council of workers and management that in West Germany handles many day-to-day problems which in England would probably be handled by shop stewards or other trades union representatives. (P.M.-S.)

2. In the great majority of firms *control organs* are only set up to deal with crime as a secondary duty. Special organs primarily concerned with this are as a rule only to be found in very large firms. 69% of the companies studied employ staff for security duties, 38% employ gate-keepers with no control-authority, while only 15% had an independent security force, and only 12% had special gate-controllers.
3. *Betriebsjustiz* has a wide range of possible methods of control at its disposal, which are used with varying frequencies. Patrolling the building is the commonest, followed by gate-control, control of cars and lorries, and checking of store-cupboards. These forms of control are supplemented by routine examinations and a large number of other measures.
4. The most frequently used measure is patrolling the building ("going the rounds"), followed by vehicle and gate control. Checking of store-cupboards was very rarely found.
5. The so-called *preventive measures* can be categorized as follows: technical preventive measures, appeals, deterrence, reduction of stimuli and preventive measures related to the structure of the company.
6. *Betriebsjustiz* has no single style of control. Rather can we distinguish three types: repressive, preventive, and informal. Nor can any single type of control system be identified, for there are differences between companies resulting from their different sizes, levels of organization and nature of the work. The aim of the control system can generally be described as to maintain or restore order within the company.
7. For the *discovery of violations* the company management named the offender's immediate superiors and the head of the department as the most important sources of information. On the other hand workers' representatives saw the management and the worker's own colleagues as the most important sources of information. The control organs metioned above only possess a part of the information about deviant behaviour. For the management the employee's own colleagues do not rate as an important source of information. Yet it was later established that they possess considerably more information on violations. It can thus be taken as established that even at the level of the discovery of violations a quantitatively important selection-process occurs, which determines which and how many violations shall become known to the management.
8. We were able to establish the further point that in roughly nine firms out of ten a certain *room for discretion*, which varied in extent, was given to employees in subordinate positions, so that inevitably the phenomenon of a "dark figure" arises.
9. As a rule, both the management and the workers' representative are involved (the latter with extremely variable levels of power of decision) in the *investigation of an incident* and in *decisions over a culprit*. Discrepancies could be seen between the estimates made by management and by the workers' representatives of their relative involvement in sanctioning: the workers' representatives estimated their participation higher than the management. However, in most firms the decision was jointly made as a rule.
10. Granting a *hearing* to a *suspected offender* is an accepted procedure both in principle and in practice.
11. No generally valid principle appears to govern the provision of "defence counsel." The workers' representatives take over this task in two thirds of the companies.
12. The possibility of *challenging the accusation within the company* was not always given. However, here the workers' representatives play an important role. The labour courts, as a natural possibility of challenge outside the

company, were only mentioned in one company out of two, and the ordinary courts only in approximately 7% of the companies. However, it seems that the suspected employee seldom makes use of the possibilities of appeal that exist.

13. In 9 out of 10 companies *sanctions* are *recorded* in the *personnel files*. The removal of such a record is handled in various ways.
14. *Regularly established organs of Betriebsjustiz* were rarely found in the firms we examined. This is for economic reasons. For these firms it is cheaper to let the personnel department handle internal violations, or else to play them down or pay no regard to them, rather than to set up and maintain money-consuming regular organs for prevention, discovery, investigation and punishment. In our enquiry into the firms it appeared that the size of the company is an important variable here: the larger the company, the more likely it is to have such regularly established organs.
15. The following hypothesis was set up concerning *formalization*: the more highly developed the *Betriebsjustiz*-system (the higher its level of organization), the more will be found formal work-regulations, recording of violations in the personnel files and the formal removal of such records, and the more will there be written codes of *Betriebsjustiz*. In the case of work-regulations this hypothesis was statistically supported, but not in the case of records in the personnel files.
16. Our data indicted a tendency for the *workers' representatives* to be more fully *involved* in the sanctioning process in firms with a high level of organization than in less organized ones. In spite of the generally limited involvement of the employees we must emphasize the possibilities for the protection of justice that the workers' representatives constitute for the accused employee.

13.1.2 Frequency of norm-violations within the company and the "dark figure"

1. Both absolutely and relatively a considerable quantity of norm-violations come to the knowledge of the company's control-organs. According to our data for the province of Baden-Württemberg, roughly 700 violations per 1,000 employees per year became known. Admittedly this includes only 19 violations of the criminal law, but in comparison with state-recorded crime even this is a considerable figure.
2. 84% of these violations were property-offences, 10% were insults, 5% were causing bodily injury, and about 1% were sexual offences. This indicates, for crime within the company, just as elsewhere, the preponderating importance of property-offences.
3. Among the 19 criminal offences per 1,000 employees only approximately one in six was reported to the state prosecuting authorities; this makes a contribution to the "dark figure," especially of property offences.
4. The average rate of laying charges, weighted for the frequency of offence, is roughly 30% in the case of unknown offenders. When the offender is known, especially in the case of property offences, this rate sinks even lower. The tendency could be discerned for the charge-laying rate to be lower in firms with a higher level of organization. We could also establish a relationship, although this was somewhat weaker, between rate of laying charges and charge-laying behaviour. Companies with a high tendency to lay charges obviously charge more offences, but not nearly to the extent that they estimate that they do.
5. The "dark figure" suggested by the management tends to follow the same outlines as statements of employees; the higher the "dark figure" proposed by

the management, the lower the readiness of employees to inform on a colleague.

6. Employees from firms said by the management to have a high number of offences in general make statements about property-offences. This effect could not be established for level of organization.
7. 240 employees that we questioned mentioned 121 thefts which they themselves had observed or experienced within one year. Taken together with the average of 19 offences per 1,000 employees per year given by the management, this means that there is a discrepancy between these figures of 585 offences per 1,000 employees per year, even though the employees statements only referred to property-offences.
8. We find a "dark figure" of one recorded theft from a colleague to 74 not recorded.
9. Employees' readiness to report offences rises with the damage or loss involved; there is a tendency for women, foreigners, unskilled workers and trainees to be reported more often. Thus employees share the responsibility for the selective perception and/or recording of offenders by the management.
10. If to our material we join the sentencing-rate of 50% found in a new study of the follow-up practice of state prosecutors offices in the case of "theft from employer" we find the following selection process: from more than 460 thefts known to colleagues roughly 13 thieves come to the knowledge of the management; the management notify the police and lay charges in 2 cases, of which one is finally sentenced.

13.1.3 Profile of offenders

1. *Women* in firms are proportionately underrepresented as offenders in comparison with men, although their offences are relatively more often reported by other employees. This underrepresentation is not as strong as in the case of the state's criminal justice system.
2. The peak rate of violations, both for offences and for breaches of internal rules, is for the 20–40 year old *age-group*, while the proportion of recorded offenders falls with increasing age from this point onwards. In comparison with indices which express the relationship between the size of the relevant section of the population we find the same tendency for *Betriebsjustiz* (in terms of numbers of offences) as for the state's justice-system: the number of offenders (per thousand population) sinks with increasing age. However, the indices for the two lowest age-groups (up to 20 years, and 20–25 years) are distinctly higher for the state system than for *Betriebsjustiz*. In the field of violations of internal orders young employees (up to 20 years) and older ones (40 years and over) were underrepresented, while employees between 20 and 40 years old were more often recorded than their proportion in the employee population would suggest.

   There is a tendency for recorded property-offences to decline with increasing age; for offences against the person this tendency is reversed.

   A further tendency is for offences by older employees to involve greater damage or loss.

   Older employees (over 50 years) who are recorded as offenders are much more frequently found already to have negative records, and also include a higher proportion previously sanctioned. We take it that in the case of these employees, workmates and the company react more to their average behaviour and less to single deviant acts.

3. While management and workers' representatives predominantly agreed in their estimate that crime by *foreign workers* was not disproportionately high in comparison with that by German workers, recorded violations showed a difference: foreign workers were significantly more often recorded, both for offences and for violations of orders, than their numbers would warrant. However, employees contribute to this overrepresentation by their greater readiness to report foreign workers. The higher levels of offences against the person for foreign workers confirms the results of recent research in the area of prosecutions. This higher level for offences against the person has the result that the recorded offences of these foreign workers predominantly involved low damage or loss (up to DM 100.—).
4. In the case of the variable "*length of time already with company*" the results justified the following hypothesis: the longer a worker has been with a firm, the less often will he be recorded as an offender.

   There was no difference in length of time already with the company between violators of works-orders and those who committed offences.

   Further, the number of employees who had been with tbe company for a year or less and who were recorded as having committed offences corresponds exactly to the proportion that they form of the total work force. For violations of works orders the number of offenders in this group is slightly larger than we should expect.

   An analysis of this variable with respect to damage or loss involved gave the following result: offenders who had already been with the company a long time (more than five years) were recorded for offences with a higher level of damage or loss than other workers.
5. For the variable "Work-status of employee" we obtained the following different distributions for offences and violations of works-orders:

   Trainees were recorded more often for violations of works-orders than for offences, salaried staff (including senior salaried staff) more often for offences than for violating works-orders. For apprentices, unskilled and skilled workers the distribution is roughly the same for both types of violation.

   If we compare the distributions of work-status for the two types of violation (breaches of works-orders and offences) with its distribution over the firm's whole work-force, the results obtained may be summarized as follows:

   For offences, unskilled workers, specialists, and senior salaried staff are overrepresented. For violations of works-orders, wage-paid workers are generally more frequently recorded than their numbers would lead us to expect; for salaried staff this tendency is reversed.

   While separate analyses of property offences and offences against the person showed no specific differences in the distribution of work-status, such a difference was revealed on examining the variable "extent of damage or loss" which increases as the work-status of the offender rises. We hold the influence of variable opportunities for certain types of offence to be partly responsible for this effect. Furthermore we take it that in the process of defining an action as a violation, either by work-colleagues or by the management, similar actions will be differently evaluated in ways specifically related to work-status.
6. In spite of methodological limitations we can state important results for the variable "*Replaceability of the employee*": employees recorded as offenders by the *Betriebsjustiz*-system tend to be estimated as easily replaceable. Our data also show that youths under 18 years, employees aged from 18 to 20 years, foreigners and women are more often estimated as easily replaceable than their numbers in the offender population would warrant.
7. Among those recorded as having committed offences we find fewer *Trades*

Union members than among violators of works-orders. Altogether trades union members are less often recorded as violators than their numbers would lead us to expect.

8. *Previous court sentences* were known to the firm in the case of 6% of the recorded offenders and 3% of the recorded violators. If one compares these figures with those for the criminal justice system, where one third of the total male population have been prosecuted at least once by the end of their 24th year, we can establish that previous criminal prosecution does not appear to be a selection-criterion for *Betriebsjustiz*.
9. On the other hand, a previously existing *bad reputation with the management* seems to be an important variable: one third of all offenders and two thirds of all violators of regulations had already acquired such reputations before their recorded violation.
10. An analysis by *type of bad reputation* gave the following results: for 34% of all offenders this was for the same offence on a previous occasion, for 44% it was for personal qualities and for 16% for bad work. In the case of violators of work-rules, 73% had reputations for having already done this on a previous occasion, 14% for personal qualities and only 8% for bad work. Within offences a clear distinction exists between property offences and offences against the person: property offenders are less often recidivist than offenders against the per , but much oftener have a reputation for bad work.

    Altogether there is a clear tendency for offenders handled by *Betriebsjustiz* to be less likely to have previous "sentences" than offenders dealt with by the criminal justice system.
11. In 80% of all offences and 75% of violations of regulations, the violator admitted his guilt.
12. "*Serious repentance*" for the violations was believed by our informants to exist in the cases of 44% of all registered violators, while they expressly denied believing this in 42% of the cases. "*Active repentance*" by paying *partial or total compensation* was found in 70% of the cases.
13. The *extent of damage or loss* showed itself as an important criterion-variable for several of the offender-variables described above.

    The analysis of this variable by type of offence showed that material damage or loss was asserted in nearly all (96%) property offences, but only in 12% of offences against the person.

    If we divide property offences into three classes, theft from the firm, theft from other employees, and fraud and embezzlement, then the greatest damage or loss is recorded in the case of fraud or embezzlement. In our study all thefts from other employees were recorded as involving damage or loss of between DM 10.—and DM 1,000.—, but predominantly at the lower level (between DM 10.—and DM 100.—). Thefts from the company lay mainly between DM 100.—and DM 1,000—. The extreme values ranged from less than DM 10.—to more than DM 10,000.—.

    Thus property offences with damage or loss of less than DM 10. were very rarely defined as deviant behaviour; as a rule they lie below the threshold-level for toleration by the company and by fellow-workers.

    In this connection we must not overlook the fact that the level of damage or loss is determined in accordance with very variable criteria.
14. As we have stated, nationality and level of damage or loss operate as selection-criteria. Work-status cannot be so simply established as a criterion. Certainly the variations in the employees' readiness to report offences appear to be offset by the management's tendency to record less often cases involving employees from the over-represented groups. On the other side, our data do not

support this conclusion in the case of salaried staff. The selective effect of the offender's sex is clearly modified in this way: although employees more frequently report women, these are strongly underrepresented at the recording stage.

13.1.4 Sanctioning within the company

1. Companies have the following *means of internal sanctioning* at their disposal: Threat of dismissal, verbal reprimand, written reprimand, transfer or requests to resign are to be found in almost all firms. Reducing chances of promotion is found in barely half the firms, demotion and fines in one third, while exclusion from the company's social benefit schemes is only mentioned as a sanction in 4% of the companies. Large companies have a wider and more differentiated range of sanctions at their disposal.
2. The two *extremes of sanctioning within the company*. We did not ask questions about the possibility of applying *no* sanction, nor about dismissal, nor about the laying of criminal charges when appropriate, since these possibilities exist in all companies.
3. With regard to *sanctioning-practice within the company* it can be established that sanctions are usually applied for specific instances in the case of offences, while in the case of breaches of work-regulations the reaction is more often to a balance of behaviour (several violations).
4. A *survey of the three areas of dismissal, sanctions within the company, and non-sanctioning* gave the following distribution: both for offences and violations of regulations about one half of all recorded violators were dismissed. Sanctions within the company were applied to 39% of offenders and 45% of violators of regulations, while for 7% of the offenders and 5% of the violators of regulations no formal sanction was applied.
5. An *analysis of offences* brought the following results: dismissal followed property-offences significantly oftener than offences against the person, which were more often dealt with by sanctions within the company, and also more often received no official sanction.
6. For *sanctions within the company* the pattern was established that the three forms of possible sanction mentioned by nearly all firms (threat of dismissal, written or verbal reprimand) are also the three forms most commonly used. Transfers and fines were mentioned in 69% and 32% of the firms respectively, but used only in 14% and 9% of cases respectively. The sanctions "reduced chance of promotion" and "demotion" lost even more of their suggested importance in reality. The greatest discrepancy between theory and practice is found for "suggesting the employee's resignation," which was mentioned in 88% of the firms but used in only 5% of the cases. When a company sanctions a violation, as a rule they combine several measures.
7. *A very rough division of measures taken within the company* into "light" and "severe" showed that light sanctions were more often used against violations of work-regulations than against offences. For the latter, light and heavy sanctions were roughly equally common.
8. As *all single types of sanction* differed strongly in their intended (suggested) and actual level of seriousness, it was not possible to construct a *sanctioning index* which could show how severely companies sanctioned particular rule-violations or offences.

   For this reason we examined this question mainly with respect to the *rate of dismissal*, which we interpreted as generally the sharpest reaction by the company to deviant behaviour. We can summarize the results of this enquiry as follows:

9. There was a tendency for *women* to be more often dismissed than men for offences against the person and breaches of work regulations; for property-offences this tendency is reversed.
10. *Foreigners* were dismissed significantly more often than Germans for offences against the person and breaches of work regulations: for property offences there was no significant difference.
11. *Age of violator* was a significant variable only in the case of offences against the person; the younger the offender, the more likely was he to be dismissed.
12. Married violators and violators with children tended, in all types of violation, to be less often dismissed than single and childless violators.
13. *Employees who had been with the company a long time* were significantly less often dismissed than employees who had only been there a shorter time.
14. The effect of the *employee's work-status* is equivocal: skilled workers were less often dismissed for property offence than apprentices or unskilled workers. Salaried and senior salaried staff showed here the highest dismissal-rate. For other types of violation there were no significant differences.
15. *Ease of replaceability* appears only to play a role in the case of violators of work-regulations: of these, the easily replaced violators were dismissed significantly more often.
16. *Trades union members* were dismissed in cases of property offences only half as often as their unorganized fellow-employees. For offences against the person no significant difference could be found, but the figures tended in the same direction. For violations of work-regulations the trend was reversed, but did not reach significance.
17. The situation-specific offender-variables *previous court sentence* and *negative reputation with the management* showed no significant relationship to dismissal. Nevertheless a persistent trend was observable: dismissal-rates are in general higher for all types of violation for the two categories of violator "known previously to have been sentenced" and "already had bad reputation with the management" than for the others. Previous incrimination seems to lead to severer sanctions at the hands of *Betriebsjustiz*, at least in the case of offences.
18. When property-offenders are known in the company to be in *financial difficulties*, they are significantly more often dismissed than in cases where this is not known.

13.1.5 Attitudes of employees

1. There is a clear disinclination on the part of employees to evaluate behaviour contrary to norms as worth sanctioning or as criminal. In their judgements of cases the members of companies that we questioned moved on two levels of norms: the first demanded the strict condemnation of all types of deviation, while the second presupposed the balancing and interpretation of many interlinked circumstances and motives.
2. The second level predominated. For this reason the judgement of individual cases is found exceptionally difficult and presupposes a complex judgement-process from case to case.

   The judgement of undesirable practices is especially avoided, so as not to endanger the mutual confidence on which co-existence and daily life depend.
3. Because of this reporting is limited to serious cases. It comes about mostly through underprivileged members of the firm (e.g. foreign workers, women, etc.). Since reporting itself represents an undesired procedure, this seems also to contribute to the consolidation of the lower status of these groups.

4. The resistance to reporting cases exists equally on the part of the person or group of workers concerned, and on the part of the control institutions, including the workers' representatives.
5. Among the reasons mentioned by superiors for not reporting were: the burden of additional work and unpleasant circumstances, disturbance of the atmosphere in the firm, uselessness of reporting because of inefficient or no sanctioning, danger to oneself by triggering-off role-insecurity and conflict involving the control-institutions.
6. Among the reasons mentioned for the expected resistance to reporting by fellow-workers were: deterioration of the work-atmosphere, uncertainty or disunity in judging the legitimacy of particular forms of behaviour, making oneself ridiculous by representing utopian claims.
7. The unwritten demand to solve one's problems oneself is also aimed at self-regulating reactions by the people affected. Calling in the ruling control-institution to sanction illegitimate behaviour will be interpreted as a failure on the part of the group of people immediately affected.
8. Equally, crime within the firm which makes it necessary to call in the police will be interpreted as a weakness on the part of the leadership. The vigorous resistance against reporting crime in one's own firm, or having it reported, cannot be interpreted so much as an identification with the firm as an identification with the working society and free play in carrying out one's work.
9. Employees estimate the seriousness of particular types of violation differently from the management; as a measure of this we have used differences in readiness to report different types of offence.
10. The higher the level of organization in the firm, the lower the readiness of members of the firm to report theft.
11. There is a tendency for the occupants of lower social positions in the firm to show a greater readiness to report theft.
12. The older the employee questioned, the greater his readiness to report cases of theft from the firm and small thefts from fellow-workers.
13. Readiness to report cases of theft from the firm and thefts of less than DM 100.—from fellow-workers increases with the length of time the employee has already been with the firm.
14. Readiness to report is usually highest for thefts of over DM 100.—from fellow-workers. Here there is no relationship between this readiness and the variables just discussed.
15. It was established that employees are relatively well informed about actual sanctioning-decisions of the firm. However, this does not lead them to estimate the general sanctioning policy of the firm correctly. In hypothetical cases we find far more often clear differences between employees and management.
16. However, we found a great confidence among employees that the firm's decisions on sanctions were appropriate to the case in question.
17. The most important point of agreement when we compare the two studies is without doubt the estimation, found in both studies, of theft from a fellow-worker as the relatively most serious offence, and, connected with this, the relatively indulgent judgement of theft from the firm, where both studies emphasize the variables "extent of loss or damage" and "work-status of offender." It follows from this judgement, which is different from that of the management, that in this area of the quantitatively most important criminal offense occurring at the place of work, no unambiguous consensus exists between workers and management. This is easily understood in terms of the different primary interests and functions of the two groups.
18. The qualitative studies further supported the hypothesis in the quantitative

analyses, that workers have little information, and that little is imprecise, over the management's general policy on sanctions.

19. Both studies confirm that workers act as a strong selective filter for the officially registered quantity of crime at the place of work, so that they share decisively in the determination of the "dark figure" within the company.
20. In this connexion we find a discrepancy between the considerable readiness to report found in the quantitative study and the description of dealing with the matter oneself as the most important means of resolving conflicts, or the statement that reporting violations was undesirable, found in the qualitative study.
21. A further important dimension of the employees' attitudes, on which we only obtained information through the qualitative study, is the consideration of work-atmosphere and the ability of the work group to carry out its job as criteria for evaluating a particular form of behaviour as legitimate or otherwise.
22. Finally, the qualitative study furnished us with a number of aids to explaining the data from the main study. As examples we mention here the connexion between the length of time a man has been with a company and his amount of room for discretion; the necessity of considering interpretation in judging the legitimacy of behaviour; and the strategy of the workers' representatives in "taking no notice" of violations, thus obtaining a conflict-free relationship between management and workers.

13.1.6 Establishment of norms by *Betriebsjustiz* and the criminal justice system

1. *Betriebsjustiz* and the criminal justice system are concerned with different sets of norms. The already discussed norms of the criminal justice system classify situations which belong to the basic set of social events: they can become relevant at any time or place. Most members of society live almost continuously in norm-relevant situations of this sort. Briefly the norms of the criminal justice system may be described as 24-hour norms, while the norms of *Betriebsjustiz* can mostly be accurately described as 8-hour norms. They mainly control situations which only occur in working hours and at the place of work.
2. The "catalogue" of norms of the criminal justice system of interest to us here embraces exclusively general and reciprocal norms. In the various "catalogues" of *Betriebsjustiz* we find on the contrary within each company particular and non-reciprocal norms.
3. It follows from our analysis of the control of behaviour that these norms will be maintained in the *Betriebsjustiz*-system above all by unspecialized organs of control, and particularly by the leadership. The criminal justice system, on the other hand, principally establishes specialized organs, e.g. the police, to control those to whom the norms apply. It is precisely the specialist status of these organs that in most cases limits the social and physical contact between them and those that they supervise. The numerous connexions between the controllers and controlled are less, too, in society as a whole than in the area covered by *Betriebsjustiz*. This leads to less intense control in society at large than under *Betriebsjustiz*, even though the latter can vary greatly.
4. The behaviour of the organs of control in the two systems is differently regulated. While the police can only carry out many of their control-operations if certain legally specified conditions occur, the control-organs of *Betriebsjustiz* are less limited by normative regulations. In many companies, for example, searches of the person, car-checks, stock-room inspections etc. can be made at

any time. In the area of operation of *Betriebsjustiz* the legally protected private sphere of the controlled person and his rights with respect to his controllers are thus relatively severely limited.

5. The organs of the company which share in sanctioning can often be motivated by business considerations, which is not the case (in this sense) with the state's organs in a criminal trial. The company's organs will also consider themselves as victims of the deviant act which they are dealing with more often than the state's. Finally, the comparatively high duration and complexity of the relationship between the organs of *Betriebsjustiz* and the deviant lead on the one hand to a personalizing of their operations, on the other hand to an inclination to extend their reactions to a breach of the norms beyond the literal imposing of sanctions.
6. Proceedings in the realm of *Betriebsjustiz* are only structured by codified norms to a very limited degree, while in criminal proceedings such norms are often found. Thus the guarantees of justice are weaker in *Betriebsjustiz* than under the criminal law.
7. In *Betriebsjustiz*, just as with the criminal justice system, women and older people are less often found as offenders. Foreign workers, who are underrepresented in the criminal justice system, are overrepresented where *Betriebsjustiz* is concerned. With respect to the profile of offences it is found that property-offences under *Betriebsjustiz* are recorded as involving greater damage or loss than under the criminal justice system, and that the main business of *Betriebsjustiz* is dealing with offences against work-rules, which are not known (in this form) to the criminal law.
8. Our data show that sanctions under *Betriebsjustiz* are influenced by offender-characteristics, while this has not been established for property-offenders before the criminal courts. Further, correlations are found in *Betriebsjustiz* between the victim's situation and the recorded level of damage or loss in property offences, which have not been established for cases before the criminal courts.

13.2. Consequences for Criminal Policy

We have shown that in firms and companies a relatively autonomous system for reacting to deviant behaviour has been built up.

Under certain conditions this alternative to social control by means of the criminal law can be seen as legitimate and acceptable. Legal discussion will be needed to make it clear whether this system is to be reckoned as competing with criminal law operations, reducing their work-load, or replacing them.

If *Betriebsjustiz* works more economically (in terms of the means-ends relationship) than ordinary legal provisions, more effectively in terms of a cost-benefit analysis, and more democratically in terms of the participation of workers' representatives in the decision-process, then in our view it should be assured a place, at least in the area of relatively trivial deviant acts, as a duly instituted functional alternative to these ordinary legal measures.

In this way *Betriebsjustiz* would qualify as a programme of "diversion from the courts." By diversion we mean a strategy which seeks to avoid the possibly harmful consequences of the state's processes of crime-control by "filtering" delinquents out of these processes and directing them into other forms of treatment.

However, it must not be overlooked that selection-processes can be found in *Betriebsjustiz* as in criminal justice. However, the criteria for selection are not primarily to be found at the level of management or of the workers' representatives,

but among the workers themselves. To this extent the suspicion of arbitrariness that occurs in some extreme cases falls not only on the company but on the deviant's work-mates.

Showing the existence of selection-processes does not necessarily confirm labeling-theory; in *Betriebsjustiz* as in criminal justice definitions *and* behaviour, deviance *and* criminalisation by institutions and/or work-mates combine to produce the reality of "crime at the place of work." This would surely fit integration-theoretic ideas better than a pure labeling approach.

The value of *Betriebsjustiz* as a part of the total system of social control of deviant behaviour is certain, because of the importance of the place of work and of work-activities in our society. Social control of deviant behaviour in social subsystems (e.g. school, church, industry) may not depart too far from the state's system of social control, and does not wish to endanger the action or the worth of the latter (e.g. the criminal law). This would be endangered, for instance, if *Betriebsjustiz* defined theft as a non-punishable breach of regulations and only applied very light sanctions against it. The discussion of the implications of *Betriebsjustiz* for legal policy has been marked for a long time by two extreme positions; some demanded the eradication of this weed, while others defended its legality. Thus both sides argued legalistically, while important criminological arguments ("dark figure," selection-filters, stigmatization, criminal careers) remained shut out. This is not the place to try to take up the specifically legal argument again, nor to make suggestions as to the rules that should govern *Betriebsjustiz*. But from our study, and bearing in mind the present state of the criminological discussion, we should like to formulate a few criteria which new rules for *Betriebsjustiz* must meet.

The advantage of handling relatively trivial violations informally should be preserved. (Current consideration of the de-criminalization of trivial offences proclaims or justifies this from the state's point of view.)

Protection from arbitrary proceedings and penalties must be strengthened. But automatically importing the state's legal requirements into the work-place would bring the danger of "stigmatization by trial" on the one hand and a loss of efficiency through the over-organization of *Betriebsjustiz*. This would burden the state's system of justice with a large number of trivial cases once again.

The norms and penalties of the *Betriebsjustiz*-system must be known in advance. Here the use of work-regulations is primarily suggested; the company should abide by exact rules in these. One might also consider a model code, to be incorporated in basic industrial law or in labour laws.

Workers' representatives must have the right to take part in the proceedings. This implies a fully operative joint decision making system, which in turn implies that the *Betriebsrat* (worker-management council) and the trades unions must dedicate more attention to these matters than previously. The education of workers' representatives from the standpoint of legal policy is also in need of reform.

Finally, the responsibility of the firm for "its" delinquents needs to be taken into account more than at present.

If *Betriebsjustiz* abides by these criteria, it will be better placed to fulfill the conditions justly demanded of *all* systems of rule and of crime-control: humanity, rationality, appropriateness and efficiency.

13.3 Summary of Legal Aspects

An examination of the *legal basis* of *Betriebsjustiz* leads to the following conclusions:

At this point, there does not exist any safe and solid legal basis for *Betriebsjus-*

tiz. While the actual existence and typical ways of functioning of *Betriebsjustiz* have now been established, the legal aspects of that phenomenon remain rather vague.

The legal basis for *Betriebsjustiz* can be summarized as follows:

1. *Betriebsjustiz* is part of an existing system of private punishment. It does not have a firm or exclusive basis in law.
2. *Betriebsjustiz* can be legally justified only by means of a complex and indirect deduction. Crucial elements in the deductive process are general institutions of collective as well as individual labour law. There is no mutual exclusivity between collective and individual labour law.
3. The indirect justification obtained produces several breaches or conflicts in the system of laws.
4. As far as collective labour law is concerned, *Betriebsjustiz* could be founded on the autonomous power of collective bargaining; this possibility has, however, not yet gained much relevance in practice.
5. § 87 Abs. 1 Nr. 1 of the German Business Organization Code (*Betriebsverfassungsgesetz*) does not in itself provide a sound statutory basis for *Betriebsjustiz*, nor does the principle of the social autonomy of a business enterprise, which is also guaranteed by the Code; a statutory foundation can be reached only through the idea of an auxiliary rule-making power stemming from § 87 Abs. 1 Nr. 1 BetrVerfG.
6. As far as individual labour law is concerned, the legitimacy of *Betriebsjustiz* can be deduced in general from the terms of the contract of employment, and from general work rules when such rules exist. The appropriate legal construction would be that of a contractual penal obligation; the applicability of that legal instrument upon *Betriebsjustiz* would be, however, most restricted, as it was devised to cover very different situations.

There is only one conclusion that can be drawn from these findings: there is a strong need for immediate legislative decisions as to legitimation, foundation, and limitation of *Betriebsjustiz*. The contents of such legislation would have to be determined by the limits of *Betriebsjustiz* from the standpoints of constitutional law, labour law, penal law, and criminal procedure.

The limits set to *Betriebsjustiz* by labour law and constitutional law can be described as follows: the institution of *Betriebsjustiz* is fully in accord with the implementation and organization of Stage courts in Art. 92 GG. Constitutional considerations would, however, prevent *Betriebsjustiz* from taking over quasi-judicial functions with the effect of baring access to the regular courts. A corollary to this notion is the demand for a general possibility of appealing to the courts against any acts of *Betriebsjustiz*. In this connexion, it is essential to note that Art. 92 GG requires judicial control of any acts of *Betriebsjustiz* insofar as offenses against general penal law are prosecuted and punished. Furthermore, it should be emphasized that factory committees (*Betriebsräte*) have a right of co-determination in all matters of *Betriebsjustiz*. An interpretation of the factory committees' co-determination rights that would unduly restrict their powers in connexion with the introduction and exercise of *Betriebsjustiz* does not seem to be tenable. If *Betriebsjustiz* is founded on a collective agreement, the factory committees' co-determination rights, or the co-determination rights of the community of employees as a whole, respectively, should also be guarded and preserved to the extent described.

* * * * *

The inquiry into the relationship between *Betriebsjustiz* and *criminal justice* can be summarized as follows:

- *Betriebsjustiz* is an appropriate topic for consideration from the standpoint of penal law and criminal procedure law only insofar as it provides a system of sanctions beyond that which inheres in the contract of employment; *Betriebsjustiz* is, according to this definition, used as a means to enforce order and discipline within the company in cases where the company's general power to give directions appears to be insufficient or inappropriate.
- Principles limiting purely utilitarian considerations are just as indispensable in the domain of *Betriebsjustiz* as in the sphere of official criminal justice administration.
- The essential elements of the principles of due process in criminal justice must be guaranteed for *Betriebsjustiz*, which constitutes a procedure with a penalizing effect. This is true not only with regard to substantive law, but even more for procedure.
- One of the essential elements of due process which cannot be eliminated from *Betriebsjustiz* is the principle of the rule of law.
- Jurisdiction in matters of *Betriebsjustiz* is limited with regard to its temporal and personal aspect by its special purposes and objectives.
- Sanctions can be imposed only for particular prohibited acts which are contrary to the order of the factory and for which the offender can be held responsible. The principal requirements for the imposition of a sanction thus are in accordance with the doctrines of *actus reus* and *mens rea*.
- The relevance of the principles of due process to *Betriebsjustiz* is not restricted to the preconditions for imposing a sanction but extends to the consequences of an offence.
- The ideas of retribution and of official condemnation as well as the discriminating and discrediting effects of punishment play no role at all in *Betriebsjustiz*. The sanctions of *Betriebsjustiz* also constitute punishment and are to be imposed and to be felt as such, yet they should primarily be considered as an admonition; even insofar as they express disapproval they are to be seen as sanctions of the company seen as a community, which by their imposition seeks to enforce its order. Thus, the educative function of the sanction definitely plays the main part when punishment is threatened or actually imposed through *Betriebsjustiz*.
- The principle that punishment must be definite and foreseeable involves the limitation of sanctions to a few closely defined sentencing options.
- Because of the predominance of the idea of settlement of disputes in *Betriebsjustiz*, particular care should be taken over the rehabilitation of the offender; this would imply that questions of access to and deletion of *Betriebsjustiz* records would have to be dealt with differently from present practice in criminal cases.
- The borderline between illegal forms of "*Betriebsjustiz*" and the imposition of an informal but legitimate sanction is to a large extent determined by the organization of *Betriebsjustiz* procedure. It is, however, neither necessary nor feasible to institute tribunals which conform to the organizational principles of state courts; yet it must be guaranteed that private power of punishment is exercised through objective and neutral proceedings.
- Whether and inhowfar proof is required must, for practical reasons, be left to the discretion of the disciplinary committee; that body is responsible for ascertaining that incriminating as well as exonerating facts and circumstances are sufficiently investigated.
- It goes without saying that the accused's right to make statements on his

own behalf must be preserved. Beyond that, it should be provided that there be an oral trial. This ought however, not to be a public trial (publicity in this sense being limited to the factory) since publicity would rather tend to impair the purpose of the proceeding; because of close relations existing among colleagues it could impede a candid discussion of the offence and of its causes.

- While double jeopardy principles apply with respect to regular court proceedings they cannot be applied here, the prohibition against bringing the same charge twice should be fully respected as far as *Betriebsjustiz* procedure itself is concerned.
- A right to appeal to a higher tribunal within the *Betriebsjustiz* system should not be granted; firstly because a business enterprise must be regarded as an organisational unit, secondly because the right to take appeal to regular state courts would be unduly delayed. Any sanctions imposed through *Betriebsjustiz* are, however, reviewable by the labour courts.
- From the point of view of criminal policy, there is no reason to condemn *Betriebsjustiz* altogether. On the other hand, the pessimistic recommendation to leave the present unregulated "grey zone" as it is cannot be supported. It is necessary to find an appropriate middle position between those two extremes—a position which does not affect the legitimate interests of official criminal justice, but rather helps to achieve them by taking away the stigma of a criminal conviction from offenders in petty cases, and which, on the other hand, takes into account the interests of the accused by providing a fair trial while at the same time being in accord with the disciplinary objectives of the company. This goal can be more closely approached through a solution that relies on labour law than by the attempt to inflate *Betriebsjustiz* proceedings to a full-fledged criminal trial. The latter would not even be justified if the employee were accused of having committed a criminal offence. For according to the purpose of *Betriebsjustiz*, the event is regarded not so much under the aspect of a criminal offence, but rather as a disturbance of the peace and order of the factory. It must be the task and is at the same time the opportunity for well conceived *Betriebsjustiz* to dispose of that disturbance by means of a fair hearing in which due regard is paid to the procedural rights of the defendent as well as to his rehabilitation, by means of sanctions geared to the goal of educating the offender.

APPENDIX 5

Listed below, by country, are the names of those persons who participated as informants in the survey and field research activities. Included are: actual respondents to each of the two mail questionnaires who, in several instances, overlapped; recipients of the questionnaires who did not fill out the questionnaires but, rather, referred us to other experts who did respond; field interviewees, several of whom had not participated in the exploratory mail survey.

Australia:

Bob Bellear
David Biles
W. R. Blunden
Richard Chisholm
Paul Coe
Jeff Fitzgerald
G. Hawkins
Andrew P. Hopkins
Walter J. Lewer
Norval Morris
Garth Nettheim
William H. Newell
Des O'Connor
Peter Tobin
T. Vinson

Austria:

Egmont Foregger
Roland Miklau
Maria Reider
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