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ARREST, PROSECUTION AND POLICE POWER IN
THE FEDERAL REPUBLIC OF GERMANY

CYRIL D. ROBINSON*

INTRODUCTION

During the past few years numerous articles have examined arrest and prosecution procedures in the United States. Two aspects, in particular, have been criticized—the injustice of the bail system to the lesser offender and the attempted resolution of important social problems by penal legislation. Somewhat similar criticism concerning the frequency of arrest and the length of detention has been leveled at German criminal procedure. In order to correct these deficiencies, substantial amendments were made to the German Code of Criminal Procedure in December, 1964, effective April 1, 1965.

This article studies the process of arrest and prosecution in the Federal Republic of Germany with emphasis on procedures which allow nonarrest and nonprosecution of lesser offenders. Part I deals with legal structure, court organization, and important conceptual differences between the German and American law of arrest, followed by an analysis of the legal foundations of German arrest law; Part II considers the recent amendments;¹ Part III discusses prosecution principles and practices; Part IV treats police organization and power and Part V, the role of the police officer, prosecutor and judge in German society.

Except for the introductory section and most of the portion dedicated to the law of arrest, the article describes practice.² There has been no

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Editor's note: This is the third of a four part Criminal Law Symposium which is dedicated by its authors to the memory of the late Professor Paul W. Tappan, whom the world of criminology lost too soon. The remaining article, which will appear in the next issue, is The Principle of Harm in the Concept of Crime by Albin Eser.

1. This legislation took effect after the original article was written. The part describing these changes, taken together with the main study, permits a double comparison. The original article contrasts the former law and the former practice. The supplementary part allows the reader to see and appreciate the German reaction to the divergence between law and practice found in the first part. To the extent that changes in practice are already apparent at the time of writing (August, 1965), these are described and may also be contrasted with the expectations.

2. Research for the article was effected principally through tape recorded interviews with lawyers, judges, prosecutors and police officials. No person or locality is identified in the quotations. However, following each quotation the profession of the person quoted is indicated. To gather material for the article, six cities in various parts of Germany were visited. The writer neither speaks nor reads German. Therefore, except for the few articles
effort to systematically compare or to criticize the German in relation to the Anglo-Saxon system of prosecution. Some attempt has been made, however, to elicit opinions and attitudes of Germans toward their institutions.  

**Governmental Structure**

The Western Republic of Germany is a federal republic in which each state has its own legislature, which may pass laws relating to police powers not inconsistent with nor preempted by federal law. Federal criminal law consists of the Constitution, the Penal Code (adopted 1871) and the Code of Criminal Procedure (adopted 1877). The codes may be modified by the federal legislature and are substantially similar in structure, function and content to those found in various jurisdictions of the United States.

There are no criminal offenses other than those defined by the penal code. Nonetheless, this does not preempt all police functions. Following the federal-state bifurcation of power, police duties are divided into repressive and preventive actions. The first involves the detection and investigation of offenses defined by the penal code, and the second, entirely governed by state law, concerns the prevention of crime, sometimes regarded as an administrative rather than a criminal law function.

Cited and the translated codes, all information was obtained through interviews with English-speaking Germans or through interpreters. About fifty persons were interviewed. Verification was obtained by going over the same ground with people in various parts of Germany and in different professions. In addition, the paper has been read by certain of the persons interviewed.

The procedure described does not represent procedures which are to be found everywhere in Western Germany and because of the varied sources consulted may not portray the exact procedure used in any one place, although German procedure differs from city to city much less than does criminal procedure in the United States.

Special thanks is due to Professor Gerhard O. W. Mueller, Director of the New York University Comparative Criminal Law Project, who arranged for many of the interviews and provided certain translations before their publication.

3. Quotations from interviews have been liberally used to show attitudes as well as to supply information. Frequently, the quotation goes beyond the subject at hand in order to show what is logically related in the mind of the speaker.


5. Unless otherwise indicated, all citations to the code of criminal procedure are from **Niebler, The German Code of Criminal Procedure (1965)**. Sections of the code of criminal procedure will be cited following the text to which it applies as: (127-I), that is, section 127, paragraph 1. If the number of the section has been changed by the amendments, the new number will follow the old in brackets. (117) [116]. An asterisk following the old section number indicates that it has been subject to an important change and is treated in Part II. The penal code is cited as PC, followed by the section (PC 120).
West Germany's state-federal court structure is simpler than that of the United States. There are no municipal courts at all and federal courts are not found at the trial level. All courts are state courts, staffed by state-appointed prosecutors and judges, with the exception of the High Federal Court (Bundesgerichtshof). The lowest court is the Magistrate's Court (Amtsgericht). Such courts are grouped in circuits under State District Courts (Landgerichte), which in turn are grouped under High State Courts (Oberlandesgerichte). Matters tried in the Magistrate's Court may first be appealed to the State District Court and then to the High State Court. The defendant is therefore entitled to two appeals, going two steps up the judicial ladder from where he started. The first appeal, which may be skipped (Berufung), involves a retrial of the case or of all points about which complaint is made. It is open to questions of law and of fact as well as degree of punishment. The second appeal (Revision), in the High State Court, must be based solely on legal issues. Matters tried in the State District Court may be appealed once (Revision) to the High Federal Court.

Classification of Offenses

Section 1 of the penal code divides offenses into "felonies" (Verbrechen), "an act punishable by confinement in a penitentiary, or by incarceration for more than five years"; "gross misdemeanors" (Vergehen), "any act punishable by incarceration up to five years, by imprisonment,

6. Reference is made only to ordinary courts and not to special tribunals for constitutional, labor or administrative matters. For a description of court organization and jurisdiction, see Harris and Schwarz, Comparative Law: Important Contrasts in the Administration of Justice in the United States and Western Germany, 30 Tex. L. Rev. 463, 465-472 (1952).

7. However, the High Federal Court is competent as a trial court in cases of high treason and certain other cases with political portent. (COL 134) COL refers to Court Organization Law; references may be found in the volume containing the code of criminal procedure. See note 5 supra.

8. The English designations for the German courts are those employed by the translation of the German code of criminal procedure. See note 5 supra. However, "Magistrate's Court" has many questionable allusions for the English or American reader and seems less advisable than some functional, colorless appellation such as "lower court," which the writer is informed is used by United States attorneys in Germany. Moreover, as has been mentioned, no such thing as a city court exists in Germany and it is with such a court that a magistrate is usually associated.

9. There may be several regional High State Courts in one state.

10. See note 5 supra. For a detailed description of substantially similar civil procedures of appeal see Kaplan, von Mehren and Schaefer, Phases of German Civil Procedure 1, 71 Harv. L. Rev. 1193, 1443-1461 (1958).
by a fine of more than five hundred German marks,11 or by any fine"; and "petty misdemeanors" (Übertretungen),12 "any act punishable by confinement in a jail or by a fine of no more than five hundred German marks."

Corresponding with these three types of offenses are three categories of penalties, namely the penitentiary (Zuchthaus), imprisonment (Gefängnis)13 and "simple imprisonment" or "simple detention" (Haft).14 The penitentiary and "imprisonment" (Jail) are theoretically different places and the treatment of the inmates in the penitentiary is harsher and their rights are more restricted than for those in the jail.15

Jurisdiction of the Courts

The relationship of the infraction to the court in which it is tried is much less clear-cut in Germany than it is in, for example, France.16

11. The fine was recently raised from 150 marks. Zweites Gesetz zur Sicherung des Strassenverkehrs, Nov. 26, 1964 (BGBI.1, p. 921).

12. The lack of uniformity in the translation of the German terms for the tri-partite division of offenses is regrettable. United Nations documents examined and Germans interviewed frequently used the French derived terms of crime, offense (délit) and contravention. U.N. Comm'n on Human Rights, Comm. on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, Conf. Room paper No. 19 at 7, note 1 (Jan. 1960), hereafter cited as "UN 1." Such translation has its logic in that the German division of offenses follows the categories of the French penal code. However, such terminology is unfamiliar to the English language reader and has the additional disadvantage of implying misleading similarities between French and German court jurisdiction with reference to such offenses. The translation of the penal code, MUELLER & BUERGENTHAL, op. cit. supra note 4, employs felony, gross misdemeanor and petty misdemeanor, probably most easily understood by the American reader and an accurate translation of the German terms. The translation of the CCP, NIEBLER, op. cit. supra note 5, uses major crime, minor crime and petty offense. Because such translation suggests no ties with other systems, it is attractive. However, such terms are employed in normal conversation to describe the subjective gravity of an offense rather than to designate a legal category. Nevertheless, because there are so many references to the procedural code, the terms that appear therein are used in the article and when "major crime," "minor crime" or "petty offense" are employed in text or in the quotations they are used only in the technical sense.

13. This is a general term best translated as "imprisonment" but in usage would be "jail" as distinguished from "penitentiary." Thus, the words defining "minor crime" as "or by imprisonment" take on the precise meaning of imprisonment in jail and not in the penitentiary.

14. UN 1, supra note 12, at 7. The maximum time for confinement in a jail is six weeks. (PC 18)

15. Persons confined in a penitentiary may be employed in any work which is carried on in the penitentiary (PC 15) whereas "persons sentenced to imprisonment may be employed in the prison in a manner suitable to their abilities and conditions." (PC 16) Section 15 allows work outside the penitentiary whereas section 16 permits such outside work only with the consent of the prisoner, the idea being that the inmate when seen by his friends and people of his class loses public reputation when he is seen in jail attire.

16. In France, the charge determines the court in which the trial will be held. CODE DE PROCÉDURE PÉNALE arts. 231, 381, 521 (Fr. 50th ed. Dalloz 1964).
Generally, one may say that major crimes are tried before the State District Court and minor crimes and petty offenses before the Magistrate's Court. This may, however, vary because in certain cases the Court Organization Law requires that a minor crime be tried in the State District Court; in other matters, the prosecutor has a certain discretion in choosing whether he will bring a case in one court or the other; and certain minor crimes become major crimes by virtue of recidivism, but are nevertheless brought in the Magistrate's Court. In addition, major crimes may be brought in that court when the penalty is not expected to be over two year's imprisonment in a penitentiary.

The Magistrate's Court may sit in two chambers or divisions, with the professional judge either sitting alone or with two lay judges. The lay judges are not jurors but judges in the true sense. They decide, together with the professional judge, all questions of law and fact and together deliberate the verdict and penalty.

The professional judge alone is assigned matters where the anticipated penalty will be no more than one year of jail. If the court may be expected to render a judgment for more than a maximum of two years of penitentiary or five years of jail, the case will be assigned to a two lay judge court. In difficult matters, a second professional judge may be added.

The State District Court is competent to hear all major crimes not heard by the Magistrate's Court or not reserved to the High Federal Court or Jury Court (COL 74).

The combined effect of the federal codes and the state laws, practically identical from state to state, is to produce a uniform set of rules governing the prevention, repression and prosecution of offenses throughout the Federal Republic. When this structure is combined with German notions of service of process and venue, the state courts take on a national character.

**Concept of Arrest**

German and American concepts of arrest are dramatically different. Arrest in the United States is usually defined as the taking of a person

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17. "Because of the special importance of the case the prosecution prefers the charge in the State District Court." (COL 2412).

18. A judge sitting alone has the same competence as a tribunal with two lay judges. Thus, if during a trial the facts indicate the need of a more severe penalty than anticipated, the single judge may impose it, to the extent of the court's power. (COL 24, 25, 28) It is the prosecutor who selects the type of court based on his estimate of the penalty to be expected.

19. The Jury Court is for the most part limited to hearing offenses in which death has resulted. It is part of the State District Court and is composed of three judges and six jurors. Such "jurors," however, are really lay judges who decide jointly with the judges guilt and punishment.

into custody with the intention of charging him with a criminal offense. Arrest has sometimes been described as the legal consequence of any intentional interference with the movement of a person by a police officer. In the United States arrest may legally result where the police (1) stop a man in the street because the police officer suspects that the person may have committed or is about to commit some unspecified criminal act; (2) have sufficient legal grounds to suspect the person of having committed a criminal offense; or (3) take a person into custody on the authority of a warrant issued by a judge.

The first category, stopping for “investigation,” in the absence of authorizing legislation, is illegal detention. But in Germany, it may come under the preventive police function for the protection of public order and safety and is covered by vague and comprehensive state laws. The person is not considered to have been taken into custody unless he resists.

Into the second category fall almost all legitimate arrests in the United States. But once such legal grounds are present, there is often a duty to arrest. Arrest is tied to prosecution. In most instances, there is no means to prosecute without commencing the procedure by arrest and no means of dropping the prosecution after arrest, except by court decision. In Germany, prosecution and arrest are independent decisions. A man is frequently prosecuted without having been arrested and may be apprehended without thereafter being prosecuted.

Arrest is related to prosecution of the offense only on the most practical grounds. Will the man flee, or is apprehension necessary in order to ascertain his identity, or if placed at liberty, will he impede or interfere with the investigation? If the answer to these questions is negative, he may not be arrested, or as it is termed in German Law—provisionally apprehended. The apprehension is provisional because the Constitution and the code restrict the time that the police may hold the man to the day following the apprehension, at which time he must be brought before a judge who will decide upon his arrest or release.

The third category is the order to arrest issued by the judge, the only recognized form of “arrest” known to German law. It represents a judge’s decision that a man to be apprehended or already in police custody should be kept in custody (prettrial detention) because it is feared that if released he will attempt to escape or will interfere with the investigation.

21. You cannot prosecute a man whose identity is unknown. “You in the United States always approach these problems looking, can this man be arrested? The first question is to get hold of this man to obtain identification; to know who he is and where he stays in order to know that I will find him when I start to prosecute.” (Doctor of law—researcher)

22. “In order to arrest somebody, there has to be not only the strong suspicion that he has committed a crime but what is even more important there has to be strong suspicion...
The following colloquy illustrates the contrast between the two concepts of arrest:

Q. Suppose you caught a man fighting in the street; would the police arrest the man and bring him to the station?
A. It is not arrested; he is invited to the station; let’s put it that way.

Q. But if he will not come?
A. Then we will detain him. It is not an arrest.

Q. The arrest, you call it an arrest only when the judge . . .
A. When there is an order to arrest. (Police Official)

The judge makes his decision of release or detention unhampered by notions of habeas corpus or right to bail. A decision that a prisoner remain in custody results in detention either until trial, which in a complicated case may last two years, until the judge’s decision is reversed on appeal or until modified by the court. Conversely, since the criteria for detention are whether the court believes the defendant will appear for trial or would interfere with the prosecution while at liberty, once the authorities are assured as to these matters, he may be released without security. That such release did not occur as often as desired is amply demonstrated by the recent amendments considered in Part II.

In describing the law of arrest in detail, we will first study those sections of the law relevant to the repression of offenses found in the penal code and thereafter study those sources of police power drawn from state law, employed to prevent criminal acts and to maintain public order.

PART I

THE GERMAN LAW OF ARREST

Two code provisions, 112 and 127 of the CCP, dominate the German law of arrest. Section 127 deals with provisional apprehension while 112 that he will flee or that he will hide or destroy evidence and these two points are much discussed in German criminal procedure. In practice, this has two meanings. The first means taking a person into custody in order to find out where and who he is; to look whether he has a record or whether he is wanted by other police or whether he has escaped prison and when they have found out that he has committed the offense but that he is not a wanted person and there is no danger he will flee or destroy evidence and the offense is not too heavy, then they will let him go without bail. This is a procedure very different from America because we have a different situation here. In Germany everything is very close. It is almost impossible to escape. This city may be different because the French and Swiss borders are very close, but even taking this into consideration, the danger of flight will not be taken seriously. There must be real evidence. For instance, this man has no place where he stays; he sits around hotels, restaurants. There is no problem of extradition in Germany. The police of Hamburg calls the police here: ‘Hello, come get this fellow,’ and he will do it. It is an informal procedure. The person has no right to object to being moved from one German state to another. And because of this we don’t need the strong system of arresting a person awaiting trial and the bail bond.” (Doctor of law—researcher) But see pp. 254-255 infra.
concerns the standards to be applied by a court in issuing an order to arrest. Because the standards of section 112 are incorporated by reference into section 127-II, the nature of section 112 will be considered first.

The Order To Arrest—Section 112*23

Section 112, which contains the criteria for the issuance of the order to arrest by the judge, applies equally (1) to the case where the person has already been provisionally apprehended by the police and the police or prosecutor wish the man remanded in custody, or (2) where prior to apprehension, the police desire an order to arrest enabling them to apprehend and keep the man in detention.24 The section does not refer to arrest at all in the American sense.25 It deals rather with pretrial detention—whether the suspect should be held beyond the statutory period allowed within which the police must bring the suspect before a magistrate. The crux of the judge's decision in either of the above situations is not that the suspect should be apprehended but that having been apprehended that he shall not be released until the reasons for which he has been detained have disappeared.

The order to arrest is usually issued after the man is brought in, not before. When the judge issues an order to arrest before the man is arrested, what is meant by that is not that you go out and get him but that after you get him you keep him. You may search for him without immediately finding him and why should the judge wait until they have him? He may be caught in the backwoods of Bavaria and it takes two days to bring him back. Since he must be brought before a judge within 24

23. "I. Pre-trial detention may be ordered against the person charged only if he is strongly suspected of the act, and if

1. he has fled or is in hiding, or if, considering the circumstances of the individual case, particularly the situation of the person charged and the circumstances opposing flight, fear is justified that the person charged will avoid the criminal proceeding, or

2. there are definite facts, constituting a danger that the person charged will render more difficult the ascertainment of the truth by destroying traces of the act or other evidence or by influencing witnesses or co-perpetrators.

II. The facts constituting a basis for suspicion of flight or for the danger of obscuring the proofs shall be recorded. Suspicion of flight requires no further recording of reasons, if

1. a major crime constitutes the subject matter of the investigation or

2. the person charged has no permanent domicile or place of abode, where this federal law is in force, particularly if he is a vagrant or if he cannot identify himself."

This is former section 112. See note 1 supra.

24. If they did not wish to have him retained in custody beyond the statutory period of police detention they would not seek an order to arrest.

25. The only time the word "arrest" is used in the CCP is in referring to an order to arrest issued by a judge.
hours, that judge would have to issue an order to arrest or let him go. Now this judge need only call the original judge and have the order to arrest sent by teletype and then there need not be a new hearing but the order to arrest is allowed to stand.

(Doctor of law, assistant to professor)

The use of the order to arrest approaches that of the warrant in American practice\textsuperscript{26} in that it is frequently employed when either the police or the prosecutor desires to shift the responsibility for apprehension to the judge issuing the order. This may be true either because the case has special political import or because it is not clear that there is a basis for arrest.\textsuperscript{27}

Literally, the section applies only to the "person charged." Section 125 concerns orders to arrest issued "before the public charge has been preferred" and allows such issuance "if there is a reason justifying the issuance of such order," that is, a reason under section 112. Therefore, in practice, no one ever looks to section 125 since the standards for issuance of such orders are spelled out in section 112.\textsuperscript{28}

Pretrial detention may be ordered under the section only against a person "strongly suspected of the act."\textsuperscript{29} "Strongly suspected" has the approximate meaning of "reasonable cause to believe" that the suspect has committed a criminal act.\textsuperscript{30} An "act" for which one may be provisionally apprehended refers to any act prohibited by the penal code.\textsuperscript{31}

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\textsuperscript{26} This has a certain irony because from a comparative standpoint the two forms of process have entirely different functions in their respective systems. To avoid the error of assuming the two are the same, the translator of the German code of criminal procedure uses the term "order to arrest" in preference to "warrant" which "would carry certain connotations which the German 'Haftbefehl' does not have." (114-n. 1).

\textsuperscript{27} Compare with SOWLE, POLICE POWER AND INDIVIDUAL FREEDOM 13 (1962), where Professor Remington states that the issuance of a warrant has become largely a ministerial function, its main use being relegated to special tasks such as out of state arrests or for use in difficult cases where police want the arrest decision to be made by a prosecutor who requests the warrant to be issued. It is generally used where the decision to prosecute precedes the apprehension, exactly the position of the order to arrest.

\textsuperscript{28} This anomaly was corrected in the amendments by terming the suspected person, the "accused" in both sections. Section 125 now merely recites which judge shall issue the order to arrest before and after the public charge is filed. The rationale for the original construction is that it was anticipated that the arrest would ordinarily take place after the public charge had been filed. Section 125 represented an extraordinary procedure of arrest without a judge's order. But in practice it was the reverse because the public charge is not filed until weeks or months after the initiation of the case.

\textsuperscript{29} For a search to be made of a person or dwelling, all that is required is that he be "suspected," (102) while for opening the main proceeding, he must be "suspected sufficiently." (203)

\textsuperscript{30} It has also been said to mean "a high degree of suspicion or a considerable probability—it is stronger than in America."

\textsuperscript{31} It was explained that although the text nowhere says "criminal" act, that it could not signify, for instance, "sexual" act. An act's penal nature is evidenced by being in the
But while in most parts of the United States, to be strongly suspected of having committed a criminal offense means that you will without more be prosecuted and arrested, in Germany such a finding legally leads only to prosecution. The German police officer does not have an unlimited right to provisionally apprehend. This is equally true of the criterion for issuing the order to arrest. Once the man is strongly suspected of the act, there is a duty to prosecute, subject to the exceptions noted in Part III concerning principles of prosecution. The question of custody pending trial is distinct. There is no mandatory arrest known to German law. An order to arrest may issue if either of two conditions are present: (1) there is danger of flight or (2) danger of collusion.

Danger of Flight

The standard of proof necessary where fear of flight (or collusion) is in question does not require a conclusive showing. Evidence sufficient to raise a “strong suspicion” of a danger of escape is adequate. As a practical matter, it appears to be a problem of the burden of proof. Where a major crime is involved, in practice, the burden is on the prisoner and where it is a minor crime, the burden is on the police. The section mentions as concrete situations, if “he has fled” or “is in hiding.” Otherwise, the judge must consider “the circumstances of the individual case, particularly the situation of the person charged and the circumstances opposing flight.” What is required is a justifiable fear that the person “will avoid the criminal proceeding.”

There are two important exceptions to the consideration of individual circumstances: (1) when a major crime constitutes the subject matter of the investigation, and (2) when the person has no permanent domicile or place of abode in the Federal Republic of Germany. Mentioned, also, is the case of the person who is a vagrant or who cannot identify himself, but these are variations of the lack of a permanent abode.

That these circumstances are exceptions to the usual burden of proof is not explicit but is implied from the following language: “The facts constituting a basis for suspicion of flight or for the danger of obscuring the proofs shall be recorded. Suspicion of flight requires no further recording of reasons if the circumstances mentioned in the prior paragraph exist.” This has given rise to a lively discussion embodying two theories of interpretation as to whether:

penal code. Alluding to means of interpreting words in German codes it was said, “The German PC and CCP are written down in a different way than American codes. Codes here don’t have highly technical language. You always have to think in the United States when you read a word; how do you use it? In German codes, words have a very limited meaning, and when this word is used in this way it is always used in this way so when you read the word, *Verbrechen* [major crime] in any of the German codes it means *Verbrechen* in the limited sense.” (Doctor of law—assistant to professor)
... there is automatically suspicion of flight if one of the facts mentioned in this section is present. The majority opinion, almost unanimous, is that when one of these circumstances is present then there is a kind of fiction which gives this presumption. The other theory is that as a judge, although I need not give reasons in writing, I must have reasons in my mind; I must say, there's a major crime, etc., but by these points alone, I'm not allowed to presume suspicion of flight. I must find whether in this case there is evidence of flight but the record does not have to show my thoughts. But the first view is more practical. (Doctor of law, assistant to professor)

The result of this presumption is that for these two cases, provisional apprehension is almost automatically utilized with the burden on the accused at the arrest hearing to demonstrate that he is a safe risk. This is a near impossible task.32

It would be rare, where any of these circumstances are present, for a release to be granted. In the case of a major crime, one would expect the accused to flee to avoid a heavy penalty, and in the case of the person without a permanent abode in Germany, it might be near impossible to find him if once released he fled.

To a limited extent, questions involving escape can be solved by the judge who may prescribe restrictions on the subject's movements or take other measures to limit escape possibilities. (117) [116] Collusion, on the other hand, although not controllable to the same degree, is thought of as being limited in time, usually during the continuation of the investigation. If the judge finds danger of collusion, he may not release the man until the danger subsides.33

**Collusion**

Tampering with the evidence or contracting witnesses are usually lumped together as collusion. It is collusion which concerns the police because they want to complete their investigation unhindered. The court, according to the section, may consider two situations to determine the

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32. "Even the fact that an offense is punishable by imprisonment for more than one year does not always justify detention on suspicion of an attempt to escape. In such a case there is only a refutable presumption. . . . [I]n connexion with the provision that no further grounds are needed for suspicion of escape under certain circumstances, those circumstances must be thoroughly studied; the statute does not imply a superficial approach." (Statement of Western Republic of Germany to U.N.) UN 1 supra note 12, at 14. An assistant on a law school faculty indicated that it was often sufficient to convince a judge if the prosecutor personally expressed the fear that the accused would flee or would interfere with the investigation.

33. "If the reason for the arrest stated therein has ceased to exist," the order to arrest "shall be revoked." (1231)
presence of collusion—the possibility that the suspect, if free, will destroy “traces of the act or other evidence,” or that he will affect the case by “influencing witnesses or co-perpetrators.” However, to obtain detention for collusion more must be shown than that the investigation has not been completed. Mere suspicion of such conduct does not suffice; “definite facts” must be shown.

In the simplest case, an officer sees the perpetrator talking with a witness; letters and all other means of agreements are enough evidence of collusion, or if there are confederates at large, this will be sufficient. In most instances, collusion deals with supposed circumstances but facts must be presented to support such supposition. In a few cases, as in certain large swindles, it is known that the offenses cannot be committed without prior agreement and in such cases the judge may accept this as sufficient evidence of collusion.

But what constitutes collusion and what evidence is actually necessary to prove it may vary from judge to judge. This makes it one of the most disturbing and frequently discussed points in German criminal procedure. The police often ask that a man be held until their investigation is completed and some judges agree. There is no right to hold a man for this reason, but until the investigation is finished there is always a possibility of collusion, hiding evidence and seeking to have witnesses give favorable statements. This danger diminishes only with the end of the investigation. Because of the elusive nature of evidence of collusion, one may even find arguments saying, in effect, that the very absence of evidence of collusion is the result of a collusive agreement to hide such evidence.

Nonarrest for Petty Offenses—Section 113*

For less serious offenses, specifically those punishable by a fine of 150 marks or a jail term of no more than six weeks, detention pending trial may be ordered only if one of several grounds is present, the principles of which are (1) danger of flight, or (2) if the accused is one of

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34. An example given was that of a swindle in which businessmen falsified egg production figures in order to obtain state funds paid to encourage production. “In such intellectual offenses the agreement made at the beginning of the offense between the accomplices is that as little evidence as possible is to be left behind during the offense itself and that after the offense has become known no participation whatever is to be admitted. It is correct that according to 112AI(2) there must be certain facts which motivate a forthcoming camouflage of the issue. Here, such facts can be seen in the pre-planned commission of the offense, which is to be camouflaged from the beginning. The prosecutor or the police officer in his capacity as an auxiliary officer of the public prosecution will, in the case of a desired arrest, have to prove to the detention judge, in detail, that the ‘concise facts’ demanded by 112AI(2) lie in the particular type of cooperation between the offenders which necessarily leads to camouflaging the issue of the offense after the same has been found out.” (Police official) A further argument given is that “one knows by experience that such an offense cannot be committed without collusion and agreement.”
the persons listed in section 112-II (no permanent abode in Germany or cannot identify himself). The main import of this article is to eliminate the question of collusion as a ground for custody in petty offenses.

**Provisional Apprehension—Section 127**

Paragraph I authorizes provisional apprehension by both private persons and police when the person is "caught or pursued immediately subsequent to the act." Paragraph II authorizes the "prosecution and the police officials" to provisionally apprehend without a court order to arrest if there is "danger in delay" and the "conditions for the issuance of an order to arrest . . . exist," that is, where the conditions of section 112 are satisfied. The police may exercise their right to apprehend until the public charge is filed (which may take weeks or months, depending on the complexity of the case), at which time all right to apprehend passes to the judge who may exercise it only by order to arrest.

**Apprehension in Flagrante Delicto—Section 127-I**

One may distinguish section 112 from section 127-I. In section 112 either the man is already in custody or his identity has been ascertained. However, with section 127-I there is the preliminary step of establishing that identity.

The idea expressed in section 127-I is that of the offense committed in flagrante delicto, set forth in the words "caught or pursued immediately subsequent to the act." The essence of this concept is not catching this person in the physical sense of holding him. It is rather in "seeing" him commit the act. Having seen him commit the act and thus being sure that it was committed and that it was he who committed it, you may thereafter take certain actions in regard to him that would otherwise be unauthorized. Obviously he is strongly suspected of the act which you have seen him commit.

35. "I. In the event a person is caught in the act or pursued immediately subsequent to the act, anyone is authorized to apprehend him provisionally even without judicial order, if there is reason to suspect flight or if his identity cannot be immediately ascertained.

II. Furthermore if there is danger in delay, the prosecution and the police officials are authorized to make a provisional apprehension, if the conditions for the issuance of an order to arrest or of a commitment order exist.

III. In the case of punishable acts, which are prosecuted upon motion only, provisional apprehension is not dependent upon the filing of such motion." UN 1, supra note 12, at 41-46. The "commitment order," paragraph II, refers to detention of persons of unsound mind, drug addicts, alcoholics or persons who may spread infectious diseases.

36. Apprehension is "authorized" and not directed.

37. If we think of "caught" as referring to the physical act of stopping, then there is no language to cover the situation where there is no necessity to "catch" because the suspect remains in place. A person standing still cannot be "caught." The "catching in the act" is used in its idiomatic sense; it is the act of the viewer seeing or obtaining knowledge of these illegal activities as they take place, while the provisional apprehension is the physical act of holding the person in place until he is identified. As hereafter discussed, this right is given only when certain other facts appear in addition to the "catching in the act."
The same is true for one who is pursued immediately after the act or for one who is observed holding a smoking weapon while standing over a dead body. But because you have seen him commit the act or even if he is leaving the scene, that does not, without more, give the right to apprehend.

The word *betroffen* [translated in section 127 as 'caught'] means 'met' in the act. Before you may apprehend him, you must ask who he is. You can see him stealing but that gives you no reason to hold him if you know him—unless there is a reason to suspect flight. (Police official)

It is possible that one in provisional apprehension, because he was "caught" in the act, may not be "arrested" at all—that is, no order to arrest will be issued. The investigation may not produce enough evidence to make him strongly suspected of the offense. Consequently, such person would be released without ever having been "arrested."

In order to have either a private person or a police officer provisionally apprehend under section 127-I, it is not only necessary to find the suspect *in flagrante delicto*, which would satisfy most American jurisdictions, it is also indispensable that there either be "reason to suspect flight or if his identity cannot be immediately ascertained." There is here a clear distinction between the concept of arrest as used in the United States and as used in Germany. One may apprehend, that is exercise physical control over the body of another, only in circumstances where otherwise the possibility of prosecution would be seriously jeopardized or prevented by danger of flight or the inability to identify the suspect without such apprehension.

Moreover, the apprehension is provisional. Its purpose is to obtain enough information about the person in order that the police officer may make the decision to hold or to release. He must be released when his identity has been ascertained and there is no reason to suspect flight.

That the person is "pursued" is separately stated from "reason to suspect flight." Trying to flee would only be a factor to be considered

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38. Another suggestion for the translation of *betroffen* is encountered in the act. The official uses the word "reason" rather than "right." The basic idea is that of a reasonable action under the circumstances, a sense of proportion, and this idea permeates all German thinking. You do all that is necessary but not more than is necessary. See Part II, *Principle of Proportion*, pp. 252-254 infra.

39. As with a customer running from the scene of a bank robbery or with a person strongly suspected of the offense and subject to prosecution, but whom it is not thought necessary to retain in custody.

40. 127AI gives as one of the reasons for apprehension—"if his identity cannot be immediately ascertained," while the language of 112AII(1) is "if he cannot identify himself" but these differences are without significance. Basically, it remains a question of whether the police officer or judge is satisfied that he knows who this person is.
in determining if the individual should be released for later appearance in court.

In order to determine whether there is danger of flight, one looks to the real circumstances of the case. Circumstances such as a lack of permanent abode in Germany, seriousness of the offense and its penalty are considered. It is said that these are taken into account not because they are found in section 112 but because they carry with them a "natural presumption" that with their presence flight might be expected.

Pursuit "immediately" subsequent to the act covers the period while the man is still running from the criminal act or is covering his tracks. It probably could not be stretched to more than 10 or 15 hours. But this is of little import because in all cases where the person is in flight there would be danger in delay and hence section 127-II would apply.

**Provisional Apprehension Where There Is Danger in Delay— Section 127-II**

Even though the offender is not caught in the act, there is no necessity for a court order to arrest where there is "danger in delay" and "the conditions for the issuance of an order to arrest . . . exist." This right is limited to "prosecution and police officials," as distinguished from private persons.

Danger in delay is present where the time taken to obtain the order from the court brings with it the danger of bungling the case. In other words, there is not enough time to go to the judge, relate the facts and ask for the order.41

The "danger" which is to be avoided by apprehension also refers to matters in section 112 such as danger of flight or collusion.42 "However, collusion is not enough if despite this danger there is sufficient time to see the judge and get the order from him. In most cases the danger of delay and danger of collusion will go together but legally there is a difference." (Police official)

Existence of "the conditions for the issuance of an order to arrest" are those listed in section 112. Thus, there will be danger in delay, almost automatically, when a major crime is involved, or when the person has no permanent abode in Germany. Such "exceptions" in reality constitute an explanation of "danger in delay" and are apparently read by  

41. It would encompass the case where the police decide to prosecute a man they are interrogating. They do not release him and ask for an order to arrest but apprehend him under 127All. The danger in delay is built into the system, for "going to the judge" means sending a report to the prosecution who in turn sends the file to the judge requesting the order to be issued.

42. The police are to "take all measures which present of no delay in order to prevent the matter from being obscured." (163).
the police as a direction as to when provisional apprehension may be made without a court order. However, as with section 127-I, the completion of the meaning of “danger in delay” by the conditions mentioned in section 112 is said to follow only because such circumstances lead to fear of flight and not because there is a legal necessity therefore.

As a result of these presumptions, there will not be many situations, outside of the special cases mentioned, where the order to arrest will be employed before apprehension. In major offenses there nearly always will be “danger in delay” while in minor ones there probably will not be apprehension at all. One may most accurately state the rule in the negative. An order from a judge is obtained only for the reasons cited or where there is no danger in delay so that one may take the time to go to a judge.38

Section 127-III

This section has no practical interest but was inserted to solve what would otherwise have been a knotty legal problem. As is discussed under Principles of Prosecution, Part III, there are certain minor crimes called Antragsdelikte which may normally be prosecuted only on the request of the party injured. If it were not for this section, there might be considerable doubt whether a person could be provisionally apprehended where there was no request for prosecution—that is, whether he could be apprehended even if he could not be prosecuted. Such apprehension “is not dependent upon the filing of such” request, according to the section.

Release—Section 128-I

There is no specific provision of the CCP authorizing the police or the prosecutor to release the suspect before he appears before the judge, although section 128-I directs that the suspect be brought before a magistrate “at the latest on the day after the apprehension, unless he be earlier released.” Release may apply either to a case where the police or prosecutor decides not to bring any charge or where, although a charge is to be brought, the authorities do not desire the man in custody. Release is said to be based not on section 128-I but on the general principle that once the original reason which justified apprehension disappears, there is no more reason or right to keep a man in custody.44 This would parallel

43. This does not mean that few such orders are issued. See infra note 76. The attorney there quoted believed there are about 50,000 such orders to arrest outstanding at any one time. The officer carries a book in which appear the names of those wanted.

44. There is no doctrinal problem for release in German law as there is for most United States jurisdictions. 128AI “is not the basis of release. If you would base it on 128AI, we would call it a positivistic way of thinking—to find a word in the code for everything—not the real reasons but a word in the code. You have to find words for arresting a man, for taking his liberty, but for giving it back, you don’t have to find any.” (Doctor of law—assistant to professor) See Shartel and Wolff, Civil Justice in Germany, 42 Mich. L. Rev.
the code provision directing the judge to release the suspect when the reasons for the issuance of the original order to arrest have ceased to exist. (123-I)

Notification of Relatives—Section 114a-b

"A relative . . . or a trusted person shall be notified without delay of the arrest." (114a-I) This refers to the order to arrest issued by the judge and not the apprehension by the police. Nevertheless, the police, as a rule, go through a similar procedure although they are not required to do so by law.45 The notification of section 114a-I is the official notification by the court of a person designated by the suspect. It is compulsory and may not be waived by the prisoner. In addition, the suspect has the right to "notify a relative or a trusted person of the arrest provided that the purpose of the examination is not endangered thereby." (114a-II)46

The official notification under Part I of the section may not be withheld on the ground that notification may interfere with the needs of the investigation. Even if the suspect makes his own notification, the official notification must be made.

In practice, at the time of the issuance of the order to arrest, the judge informs the suspect of his right of notification and asks the subject whom he wants notified. This may be done either by letter, by telephone or other means selected by the court, including the dispatch of a police officer to the person to be notified.

Provisional Release—Section 117* [116]

The release decision of the judge is based on practical considerations involving the likelihood of flight or collusion. Provisional release is authorized on the sole ground of suspicion of flight, thus excluding release when there is danger of collusion.

863, 866 (1944). With reference to the American tendency to "shift from the essence of words toward their literal meaning," see WEYRAUTH, op. cit. supra note 4, at 64-65. But see, WEYRAUTH, op. cit. supra note 4, at 100, and note 31 supra. "You have to do all that is necessary but not more than is necessary and if it is not necessary to keep the man you have to turn him loose." Referring to CCP 163, he continued: "They cannot hold him because the police have only the right to clear up the case and to avoid collusion and not permission to do more if the case is cleared for them by evidence and confession." (Police) There is, however, authority for citing 128AI for release. UN 1, supra note 12, at 19.

45. In many cases the arrested person does not wish to have his relatives informed because he expects to be free the next day and can appear at home without anyone knowing what happened. But in some situations the police have orders to inform relatives even without the consent of the individual so that the relatives will not go to another station and report the man missing.

46. UN 1, supra note 12, at 24. The right to notification is based on Art. 104(4) of the Constitution: "A relative of the person detained or a person enjoying his confidence must be notified without delay of any judicial decision ordering or continuing a deprivation of liberty."
Instead of ordering pretrial detention, the court may require "measures which tend to considerably lessen the danger of flight, particularly by furnishing security." (117) Acceptable security may be given by "depositing cash or bonds, by pledging property or by furnishing suitable persons as sureties. The amount and the type of the security to be furnished is determined by the judge in his free discretion." (118) Security may include the "surrender of identity papers, restrictions of freedom of movement, or the obligation to report to the authorities." (47) The test has been stated to be: "the danger of escape . . . must be so substantially reduced by taking the security as to justify . . . the acceptance of the slight risk that remains." (48) A mere oath to appear at the trial is not considered suitable security. (49)

When provisional release is allowed, the order to arrest remains outstanding. Therefore, the suspect may be rearrested if there is again danger of flight or violation of any of the obligations of his release. (120) Such conditions may include a danger of collusion which arose after the release. (120)

But as a matter of practice, bail is rarely employed in Germany except for economic crimes involving large sums of money. One magistrate interviewed said he had never had a case in which bail had been accepted. Bail is ordinarily not requested or set by the court. It is offered by the defendant as an inducement to the court to allow his release. (50)

One magistrate, when questioned as to whether bail would be taken in a case of armed robbery, stated:

I am afraid not. If the accusation is very severe you would suspect from the beginning that this man will try to escape because of the severe punishment he has to expect so there is no means to prevent the danger of escape but to have him arrested. So in a severe crime I would not let him out on bail because I would always think, the bail—you wouldn't mind losing the bail if only you could escape the whole trial.

* * * *

It seldom happens. That depends on the monetary means of himself, his acquaintances and friends. Most of the people

47. UN 1, supra note 12, at 31.
48. Id. at 32.
49. Ibid.
50. "A person would be denied release and then his attorney or he would say, 'Will you release me on condition I put down ten thousand dollars or certain securities?' In economic trials it happens often that a certain sum will be offered by the accused. The amount of bail depends exclusively upon the opinion of the judge. It is not the procedure of the judge on his own to require bail. The accused has to offer it. It is a favor for the accused to be permitted to make application for release against bail." (Lawyer) However, a judge said that "in a rare number of cases, the judge may require bail."
that are suspected of a crime have no means so that they can't make application for bail, so it's useless to require it. (Lawyer)\textsuperscript{61}

However, there are other methods whereby the court may insure some control over the suspect between the time of his release and his appearance in court. The practice has developed to require that the defendant's passport be deposited with the court and that he be obliged to report to the police station regularly.\textsuperscript{62}

You can make any condition to prevent the person from escaping such as having him deliver his passport or telling the court immediately if he wants to leave town. However, if the person is ready to escape, these conditions will not prevent him. If he must report to the police station twice a week he will report for instance on Monday and then escape and you won't find out before Thursday; so this may help to make escape a little harder for the person but if he really wants to escape he will find the possibility despite all the different orders. (Magistrate)

It is also permissible to "furnish suitable persons for sureties," but again this same magistrate had never had a case where this had occurred.

\textit{Period of Detention Allowable to Police—Section 128}

The Constitution, article 104(2),\textsuperscript{53} provides that the police on their own authority may not hold the suspect in custody longer than "the day after the arrest." "A judicial decision must be obtained without delay" where the arrest is not by court order—that is, an arrest under sections 127-I or -II. These two requirements are spelled out in more detail in article 104(3) of the Constitution and are clearly defined in CCP, section 128. In addition, such legislation is part of the general legislation governing police powers in each state.\textsuperscript{64}

\textsuperscript{51} A police official observed that white collar criminals usually have sufficient means.

\textsuperscript{52} The police have no right to demand security or to take the passport.

\textsuperscript{53} Constitutional provisions relevant to detention are as follows: "Art. 104. (1) The freedom of the individual may be restricted only on the basis of a formal law and only with due regard to the forms prescribed therein. Detained persons may be subjected neither to mental nor to physical ill-treatment.

(2) Only judges may decide on the admissibility or continuation of a deprivation of liberty. Where such deprivation is not based on the order of a judge, a judicial decision must be obtained without delay. The police may hold no one on their own authority in their own custody longer than the end of the day after the arrest. Details shall be regulated by legislation.

(3) Any person provisionally detained on suspicion of having committed a punishable offence must be brought before a judge at the latest on the day following the arrest; the judge shall inform him of the reasons for the detention, examine him, and give him an opportunity to raise objections. The judge must, without delay, either issue an order of arrest setting forth the reasons therefor or order the release from detention." The requirement of a "formal law" for deprivations of liberty is satisfied by either a federal or state law. UN 1, \textit{supra} note 12, at 5.

\textsuperscript{54} See UN 1, \textit{supra} note 12, at 56-57, where the individual acts are cited.
In the case of apprehension without court order, the suspect must be "brought before the magistrate of the district in which he was arrested, at the latest on the day after the apprehension, unless he be earlier released." (128-I) The fact that the magistrate of the district may be unavailable is not an excuse. Upon demand, the suspect must be taken before the magistrate of the nearest district on the day after apprehension. (114c)

The law does not permit the police to hold the suspect beyond the legal limit even with his consent. Because the police are an arm of the prosecuting authorities, the prosecutor is likewise bound to this time period in cases where the man is brought to him.

Although in theory the police have a maximum of 48 hours to detain the man, this is cut off on the one hand by the time he is arrested during the day of apprehension, and on the other hand by the time during the same or the next day when a judge is available to hear the case.

The magistrate before whom the suspect is brought must make a prompt decision on detention or release. Article 104(3) requires a decision "without delay." This means on the day following apprehension when the suspect is brought before the judge for examination.

Where the suspect has been arrested pursuant to an order to arrest, the same legal requirement is stipulated in the code—that the man must be brought before a judge "without delay, not later than on the day following the apprehension." (114b-I) Although the wording of sections 114b and 128 relevant to production of the suspect before the magistrate are practically identical, section 114b has been interpreted as precluding the police from delaying the production of the person for the purpose of interrogation as they are acting under the order of the court to bring the suspect before it.

Section 114b requires that the person apprehended on an order to arrest be brought before the competent judge to be examined not later than the day following his arrest. However, there is no time limit for "decision" because the custody decision has already been made at the time the order to arrest was issued. (114b) The purpose of the examination is to give to the suspect the "opportunity to remove grounds for suspicion and to present facts favorable to him." Since it takes place after the order to arrest has been issued, it is in the nature of an "appeal" of this decision.

55. Id. at 23; Clemens, Police Interrogation Privileges and Limitations, Germany, 52 J. CRIM. L., C. & P.S. 59, 61 (1961).
56. That is, if he is arrested one minute after midnight one day, he may be detained by the police until the day following until one minute to midnight.
57. For the police view see pp. 285-286 infra.
Review of the Detention Order

There are two methods of reviewing an order to arrest: (1) complaint (Beschwerde), also called at times “formal request” or “application”; (2) oral hearing. In addition, the code provides for periodic review by the court.

Review may be taken both of orders to arrest and of orders setting security under section 117. Review does not have the effect of staying the order whether it is taken by the prosecutor from the refusal or revocation of an order to arrest or by the prisoner from the order itself. However, the appealed decision may be stayed either by the lower or higher court. (307)

Complaint—Sections 304-311

All decisions resulting in orders to arrest, regardless of the severity of the offense, are appealable by complaint. Complaints are ordinarily filed with the court which has issued the order, although in an urgent case it may go directly to the court which will hear the appeal. (306-I) If the lower court does not rescind its order, it must automatically forward the complaint to the higher court within three days. Thus, the complaint has the combined effect of an appeal and a motion to the court to reverse the order. If the court issuing the original order was a Magistrate’s Court, the complaint would first go to the State District Court and then it may be further appealed to the High State Court. In more serious crimes, it might start at the State District Court level.

At the time of the order, the suspect must be informed of his right to complaint. (35a) Such instruction includes the mode and method of review and the time limitation. The procedure for making the complaint is simple. During the hearing at which the order is issued, he can say: “I appeal against this.” He may make the complaint orally or in writing—the suspect stating in his own language why the decision of the court is not correct. There is no time limit for filing the complaint.

The court hearing the appeal is the same court that would hear the appeal if made after trial. The case will be decided on the basis of the file and the written statement of the suspect although the court may hear the suspect. He ordinarily will be notified of the decision within a few days.

Oral Hearing—Sections 114d [117]*

The oral hearing is applicable only to major and minor crimes but in practice this means almost all offenses for which an order to arrest is likely to be issued. (114d) (117) Commencement of the oral hearing

58. UN 1, supra note 12, at 32.
precludes or terminates the right to bring the complaint.\textsuperscript{59} (115c-II) (118) However, an adverse decision on an oral hearing may be appealed by way of complaint.

The oral hearing is not formally an appeal at all but it is an additional or rehearing before the same detention judge who originally heard the case. New or additional facts may be brought to the attention of the judge who hopefully will change his decision. Its main value is that at the oral hearing the defendant may be represented by an attorney, while at the examination for the order to arrest he may not. (169) (192)* However, the advantage is reduced because the attorney cannot see the file until after the public charge is filed. (147)* Therefore, he does not know on what facts the order to arrest is based.

The date of the hearing may not be more than one week after the request for the hearing unless the accused consents to a longer period. The court may deny further oral hearings after the decision on the first. (114d-III) The prisoner is to be present at the hearing unless circumstances prevent this. (115d) For the purposes of the review, if the suspect has already been detained for more than three months and he remains unrepresented, counsel shall be appointed to represent him. (140-I)*

The decision on the oral review is to be announced at the end of the hearing; but if this is not possible, no more than one week later. (115d-VI)

\textit{Periodic Review—Sections 115a-III,* [120-122]}

The court, normally the detention magistrate, must periodically re-examine the case to determine whether detention should continue. When the judge makes the original detention decision, he also decides when the man should be brought before him again. (115a-III) This may vary from three weeks to three months after the original order. (115a-III) Thereafter, the court must continue to review the case no less than three weeks nor more than three months after the last such review. From each decision both the prosecutor and the suspect have a right of appeal, either by complaint or oral hearing subject to the rules applicable to each.

The prosecutor, having charge of the investigation, at the time set by the court for a reappraisal of order of detention, will send the judge his file. If he desires the man to be held, the prosecutor will indicate this. He will state that it is because the investigation is still going on and that there is still danger of collusion or that the suspect would contact the witness or would leave the country. Normally, the judge will go along with the prosecutor. The interviewed prosecutor hypothesized, however, that if he had not filed a formal charge when the case after one month came up for

\textsuperscript{59} The person must be advised at the time the order to arrest is issued that he may institute either a complaint or an oral hearing (115).
review, and the person was one who had committed some minor offense such as nonpayment of a hotel bill, the judge would probably release him. This would be true even if he was a non-resident and there is some danger he would leave the country.

Other Relief

The writ of habeas corpus or its equivalent is unknown to German law. There is no procedure to require the police to produce the individual before a judge prior to the time required by the code. If the police do not yield the man within that time, there is no specific procedure set forth in the code by which the accused could require that he be brought before the court or by which the court could demand his appearance. The sole response of German law is that in holding the man beyond the legal limit the police have committed a criminal offense and thereby the courts can take action. However, the fact that such an eventuality seems to be equally unthinkable for the police, the prosecutors and defense lawyers is perhaps the best guarantee of this right.\(^{60}\)

PREVENTIVE MEASURES OF THE POLICE

The Public Order and Safety

The police, in addition to the powers rigidly set forth in the penal code and the code of criminal procedure, are given very broad and general powers in cases where no crime has yet been committed, or may even be contemplated, but where the "public order or safety" (or security) is in jeopardy.

Laws giving such authority are all state laws and, with one exception, originate from, and are similar to, the Prussian Police Administration Act of 1931, which itself dates from the late 18th century.\(^{61}\) The exception is the Bavarian State Law, which by German legislative standards uses language more specific than the Prussian derived laws.\(^{62}\)

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\(^{60}\) But see, Wolff, Criminal Justice in Germany, 42 Mich. L. Rev. 1067, 1082 (1944), and pp. 295-296 infra.

\(^{61}\) The pertinent provisions are: "Section 14. (i) The police authorities shall, within the limits of the existing laws, take the necessary action to ward off, from the public or the individual, dangers threatening public security and order. Section 15. (i) The police are authorized to take persons into police custody only if such measure is necessary (a) for the protection of such persons; (b) to remove a disturbance of public safety or order which has already occurred, or to avoid an imminent danger subject to public action if the removal of such disturbance or the avoidability of such danger is not otherwise possible. (ii) The persons taken into police custody must, except in cases of publicly dangerous mentally disordered individuals, be released from police custody during the course of the following day at the latest." Clemens, Police Detention and Arrest Privileges Under Foreign Law, 51 J. Crim. L., C. & P.S. 409, 425, n.13 (1960).

\(^{62}\) The relevant portion reads: "Art. 5(2). The police is only authorized to take measures against any person or object against the will of the person . . . in order to 1. prevent acts which are liable to punishment, 2. prevent acts which are punishable or
Public order and safety covers a wide range of police activities which may functionally be divided into three categories:

1. Administrative offenses (discussed hereafter under Principles of Prosecution).
2. Police activity not involving investigation or discovery of incipient criminal conduct.
3. Powers relating to the prevention of criminal conduct which, if it matured, would be specifically prohibited by the penal code.

Public Order and Safety Involving Noncriminal Activity

What public order is you can only say from the circumstances. We have in the police law an explanation that public order is the belief of an honest, moderate citizen with regard to a certain behavior. It can differ. It was absolutely impossible to take a bath in public in a bikini in 1900. Every policeman would have arrested this girl. But the meaning has changed and now it belongs to the public order. Another example, a girl clad in a bikini in a church. The church is open to everyone but it is against the opinion and the morality of other people who go to church; a policeman can say, get out. It is not against the law but it is against the order. If a girl went around with a bikini topless, it is first against the order and then against the law. The law does not say she may not go into the church with a bikini. There is no such law. The terms are just public order and safety. It depends on the meaning at the time. (Police)

Under state law there are cases where there has been no offense committed or reason for apprehension but for instance for his safety, or for the safety of other people, to prevent a crime some action is necessary. If someone wants to kill himself and he is caught in the act, he can be prevented. Suicide is not punishable in Germany and if there was not this law there would not be a reason to keep the man and he would go out and try to do it again. According to this law it is possible to keep him for his own safety and if he says as soon as I am released I will do it again, the police take him to a mental hospital and they decide whether to keep him from a medical point of view. (Police)

which are liable to a fine because they violate the public order, 3. a) prevent acts against the constitution; b) prevent danger endangering human life; c) prevent danger or to remove disturbances which are endangering the integrity of a person, the freedom or the property and this appears to be necessary within the public interest." Bayerisches, Polizeiaufgabengesetz und Polizeiorganisationsgesetz, at 7 (Munich 1963). [Hereinafter cited as PAG.]
**Measures To Prevent Incipient Criminal Conduct**

State laws give the right to stop, question and identify persons either in the general terms of the Prussian Police Law or in the more specific terms found in Bavarian law.\textsuperscript{63}

When combined with the federal law that requires the stopped person to give identifying information to a duly authorized official under pain of a criminal penalty,\textsuperscript{64} the German police officer is equipped with a formidable array of powers.

The personal and identifying information required is referred to as his "personality" as distinguished from information about the offense he has allegedly committed. Refusal to give the information demanded or the giving of "erroneous information" constitutes the offense. As to facts about the offense, he has a right to keep silent, a privilege against self-incrimination.\textsuperscript{65} Such federal statute applies to the case not only where he refuses to say anything but where he gives incomplete information. For instance, he doesn't give his profession or only part of his name or he gives the town

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\textsuperscript{63} Art. 14 of the PAG, at 11, states: "(1) The police may stop a person 1. to establish his identity if this is required to investigate or clarify any act which is liable to punishment or is an offense against public order or is liable to a fine; 2. to investigate or clarify an act which is against the constitution; 3. to repress venereal diseases because this person is strongly suspected of suffering from a venereal disease and because he is suspected of spreading venereal diseases; 4. to insure a sufficiently proved legal claim of a person which that person is entitled to make against the person to be stopped, if the otherwise provided official help, especially the assistance of the court, cannot be claimed or demanded in time. (2) The person stopped may be taken to the police station when it is not possible to establish his identity right at the spot or if there is suspicion that his statements are not correct."

\textsuperscript{64} "A fine not exceeding 150 German marks or confinement in a jail shall be imposed upon: ... anybody who gives erroneous information or refuses to give information concerning his name, status, occupation, trade, place of residence, abode or nationality, to a competent authority, official or soldier of the Federal Armed forces." (PC 360(8)) The maximum time for confinement in a jail is six weeks (PC 18).

\textsuperscript{65} Clemens, supra note 61, at 423. Theoretically, the privilege against self-incrimination in Germany is more extensive than that of the Fifth Amendment of the United States Constitution. A "witness may refuse to give information in regard to questions the answers to which would place him" or certain designated relatives "in danger of criminal prosecution." (55) Relatives include the fiancé, the spouse and the ex-spouse of the accused as well as persons related by blood to the third degree and by marriage to the second degree. (52) Moreover, the accused is not sworn during his trial, and thus if he testifies, as he almost always does in criminal proceedings, he cannot be subject to a further perjury indictment. (60(3)) He can nevertheless be charged with making false statements in an official proceeding but as a matter of practice, such prosecutions never occur. (PC 153) It is said to be expected that a defendant will lie in his own defense. The idea of the oath for defendants as used in the United States for criminal matters is considered naïve. See Kaplan, von Mehren and Schaefer supra note 10, at 1234-1242, 1244. The same concept is
and not the street number. In that case he can be arrested and brought to the station. He is arrested under 127-I. It is not the fight [the substantive offense which was under discussion] for which he is arrested. He is arrested because he did not give the policeman the information. (Police)

There is a strong interplay between the state law giving the right to stop and the federal law requiring the giving of identifying information. If the person has inadequate identification, the officer may have a strong suspicion that what the suspect has said is untrue. But since he may be held for the same time limit under either law, it is academic for which reason he is held.

The period of detention allowed under these laws is governed by the same constitutional provisions that require the man to be produced before a judge on the day after he is taken into custody. More precisely, the police must release him "as soon as the identity has been established." Aside from the right of the police under such laws to stop individuals, the broad provisions of the law as well as the general concept of "public order and safety" allow group identity checks. The police handbook containing the Bavarian State law contains this caution:

Art. 14 of the PAG which provides the legal basis for individual and collective control (roundups) is not permissible when presumably it will cover for the greater part people against whom this roundup is not directed. It is not permissible to conduct a roundup with the assumption that by the unforeseen checking of a large number of people any criminal act or offenders may be discovered. There must be certain clues which show that by the unforeseen collective checking certain offenders or certain acts will probably be discovered. The principle of proportion must be considered.

This practice has been criticized:

[T]he dividing line between a preventive action of the police on the strength of these provisions, and a repressive action under the provisions of the CCP is blurred . . . especially in the case of raids . . . not only strongly suspected persons but also law-abiding and unsuspected individuals, who under the CCP are not subject to arrest and searching, are subjected to arrest and

present in civil procedure. It is unusual for the party to testify because his testimony is seen as self-serving. Silving, Testing the Unconscious, 69 Harv. L. Rev. 683, 696, n.54 (1956).

66. That is, "apprehended." The police frequently employ the term "arrested" even though, strictly speaking, there can be no arrest without a court order.

frisking. Nevertheless, it is the common belief in Germany that on the strength of [these state laws] such round-ups are permitted as a preventive police measure. 68

Although for the purpose of clarity the public order “offenses” have been divided into three categories, German officials in discussing offenses against public order or safety do not separately designate them. Such acts are also sometimes referred to as “administrative” offenses and the police, when performing such tasks, are referred to as the “administrative part of the police.” This method of lumping all categories together is illustrated in the statement of a police official discussing the rights of the police in Bavaria:

In Bavaria, the police can take action only in certain cases, for example to stop a person to ask for his personality, or in fighting against venereal disease, to take someone into custody to protect himself, to avoid suicide, and they can put someone in jail who has announced he will burn down a barn. They can take away items that endanger public order or security. If someone left a rake lying on the road; the police can come and confiscate it; they can kill a dog if he is a danger for the public. Besides the reasons given in the CCP, they can search a man for just police reasons to find dangerous items in his clothing; to prevent crimes the police can enter rooms; the police have no intention to search the room but to take action to protect the public safety and order.

Thus, the terms public order and safety and the accompanying legislation covers a whole gamut of police operations.

PART II

RECENT REFORMS IN THE GERMAN LAW OF ARREST

After twelve years in a German drafting commission, a law finally made its debut in December, 1964, which “amended, replaced, added or otherwise affected 95 sections of the Code of Criminal Procedure and several sections of the Court Organization Law.” 69 The most important of these amendments substantially modified the law of arrest and rights relating thereto.

This legislation has been greeted by certain American observers as having Americanized German procedure. It is said to have relaxed the

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68. Clemens, supra note 61, at 425.
69. Niebler, op. cit. supra note 5, at § XIV. The amended sections will be considered in the same order as in Part I of the article. For the original text of the amendments, see OFFICIAL GAZETTE OF THE GERMAN FEDERAL REPUBLIC, Dec. 31, 1964, law of Dec. 19, 1964, STPAC, BGB1 I 1067-1082.
"rigid rules ... with a view to enlarging the rights, and thus, to improving the position of the accused in German criminal proceedings. They are a decisive step in the direction of Anglo-American legal concepts."  

The law went into effect April 1, 1965, and at the time this article was written (August, 1965) it was still too early to assess its practical effect. Nonetheless, certain police and prosecution officials have described it as a bill of rights for criminals and as completely tying their hands in the struggle against crime. Defense attorneys have said that the changes are for the most part formal and are unlikely to result in basic changes of police or judicial practices except in selected areas. The following brief account of these changes will include the view of some of these attorneys and officials.

Section 112

This section, embodying the heart of the German law of arrest, has been radically altered. Two additional grounds for the issuance of an order to arrest are authorized; also, a well-known rule of German civil and criminal law has been written into the section—the principle of proportion. Its insertion constitutes an effort to make explicit and imperative a rule of interpretation which was considered to have been present all along.

The Principle of Proportion—Section 112-I

Arrest (of a person who is strongly suspected of the act) is authorized when there is danger of flight, or if there is evidence of collusion (112-II),

70. Memorandum, Richard S. Schubert, Senior Civilian Attorney, United States Air Forces in Europe, Wiesbaden, Germany, April 1, 1965. See also Niebler, op. cit. supra note 5, at 2.

71. Section 112, Permissibility of Preliminary Detention. "I. Preliminary detention may be ordered against the accused if he is strongly suspected of the act and if there exists a ground of arrest (subss. II and III). It may not be ordered if it is disproportionate to the significance of the case or to the punishment or measure of prevention and reform likely to be imposed.

II. A ground of arrest exists if, on the basis of definite facts, 1. it is established that the accused has fled or is in hiding, 2. considering the circumstances of the individual case, especially the situation of the accused and the factors speaking against a flight, there is danger that the accused will avoid the proceedings against him (danger of flight), or 3. the accused's intention is discernible a. to destroy, alter, remove, suppress or falsify evidence, b. to improperly influence co-defendants, witnesses or experts, or c. to cause others to do so, and if therefore, there exists the danger that the ascertainment of the truth will be impeded (danger of obscuring the proofs).

III. As against accused persons strongly suspected of a major crime against morality and decency, in accordance with section 173, subs. I, or sections 174, 175a, 176 or 177 of the Criminal Code, there also exists a ground of arrest when definite facts support the danger that the accused, before final conviction, will commit a further major crime of the designated kind, and that the preliminary detention is necessary to avert the threatening danger.

IV. As against accused persons strongly suspected of a major crime against life, in accordance with sections 211, 212 or 220a, subs. 1, no. 1, of the Criminal Code, preliminary detention may be ordered even if there is no ground of arrest under subs. II and III."
or if there is danger that the accused, if at liberty, will repeat certain sexual offenses. (112-III)\textsuperscript{72} In these cases, issuance of the order to arrest is not justified if the arrest would be "disproportionate" (1) to the significance of the case, (2) to the punishment to be expected, or (3) to the measure of prevention and reform likely to be imposed.

This familiar principle\textsuperscript{73} had been universally accepted as being implicitly incorporated in the section. It had been applied repeatedly by the High State Courts in adjudicating appeals from orders to arrest and numerous orders were reversed in citing this principle. But in practice, lower court judges frequently applied the formula of section 112-II-1 in a near mechanical way so that the accusation of a major crime resulted in an order to arrest. It is at this practice that the legislation is aimed.

In Germany you have many sort of common law principles, which are applied although not written down in the code. The principle of proportion is one of the rules which was supposed to be applied by the judges even under the old law but which was not often put in practice by the Magistrate's Court. Now, these lower court judges will not be able to get around this rule. (Judge, formerly of the High State Court)

The insertion of this principle is viewed by all parties as a clear restriction of the judge's discretion to order arrest. And although the concept of proportion itself appears vague, it is made precise not only by its wide use in German law, but because it is tied to the significance of the case and the penalty or measure of surety likely to be imposed. All of these reduce themselves to the common denominator of the importance of the matter in relation to the harm likely to be done to the accused by the arrest—a balance of the interests of society and of the individual. "Significance of the case" takes on added interest when it is recalled that "significance" is now considered on two succeeding levels: (1) whether the infraction is significant enough to be prosecuted by the State;\textsuperscript{74} and (2) if prosecuted, whether it is significant enough to require detention of the suspect, even if flight or collusion is probable. The new criterion is the punishment likely to be imposed rather than the statutory penalty that is authorized.\textsuperscript{75}

\textsuperscript{72} Arrest is also authorized in cases of crimes against life (112-IV), but whether the principle of proportion is applicable is less clear. A decision of the High State Court, Hamburg, emphasizes that arrest is at discretion of the Court, implying that the principle is pertinent. Neue Juristische Wochenschrift, at 1496 (July 7, 1965).

\textsuperscript{73} See discussion of German police laws, p. 247 supra and of nonprosecution of insignificant offenses, pp. 265-266 infra and pp. 250-251 supra.

\textsuperscript{74} See pp. 265-266 infra.

\textsuperscript{75} A German professorial assistant writes: "There is much argument among courts and authors whether expectation of a major penalty, per se, gives sufficient evidence of danger of flight." While an opinion by a prominent judge (Frankfurt, OLG, NJW 1965 at 1342, April 7, 1965) denied this, a High State Court of Berlin (NJW 1965 at 1390, May 5, 1965) held the expectation of high penalty justifies the application of 112AII-1 or 2.
Under former section 112-II-1, a man with a family, steadily employed and a first offender, who had committed a major crime under press of circumstances and who would likely obtain probation or a short prison term, stood on equal statutory footing with a homeless recidivist who could expect maximum treatment. The principle of proportion means that individual circumstances are to be considered rather than presumptions applicable to a class of persons.

Section 112-II

Specificity and focus on the personal characteristics of the suspected person is also present in the section dealing with the grounds for arrest. Several changes were made to solidify the section and to emphasize the intention of the legislator that the language be taken seriously. The requirement that the order to arrest be based on “definite facts” has been moved forward so that the words are now applicable to both danger of flight and collusion. Moreover, in order to underscore the necessity for objectivity of findings, the legislature has employed the apparent tautology of authorizing the order only if on definite facts it is established that there is a danger of flight or if on definite facts the accused’s intention to collude is discernible.

In contrast with section 112-II-3, which calls for the intention to be discernible, the change in section 112-II-2 is from justifiable fear to that of “danger” that the accused will avoid the proceeding. This may also be compared with the language of section 112-I which requires that it be established that the accused has fled or is in hiding.

It seems paradoxical that such confining language should be utilized for the apparently objective circumstances of section 112-II-1 while leaving substantially unchanged the wording relating to the subjective considerations of section 112-II-2. It is not entirely clear, therefore, to what extent the section is altered.

Be that as it may, there is little doubt that from the standpoint of the police and the prosecution, the changes appear formidable.

The Federal Republic of Germany is a small strip of country which goes between the Rhine and the Elbe and the borders are open to transit traffic. You can go to France, Switzerland, Italy without a passport and it is even easier to get to the Eastern Zone of Germany and so the danger of flight is great.

“Nobody knows which opinion will have the most followers; I think the Frankfurt High State Court because its decision received many acclaiming notes.”

76. The obligation to establish the flight may be a response to the type of complaint made by one attorney that the police would often visit a man's house to question him and not finding him at home would obtain an order to arrest on the ground that he had fled or was in hiding.
I will cite one case that is typical. A peasant’s son sets fire to the house of someone against whom he has a grudge. He is caught and he confesses. Under the old law, you could get an order of arrest, whereas now it will be nearly impossible. There is a general danger of flight because everyone who commits arson must expect two or three years of penitentiary. But if he has a family or if he is the owner or the son of the owner of his own house, there will be no concrete evidence to prove he intends to flee. So the prosecution depends on his benevolence. If he flees, the prosecution is almost at an end. Formerly, there was a rule of thumb that where more than one year of prison was to be expected, this was enough to establish suspicion of flight. (Prosecutor)

Possibly the change in section 112 which is most deceiving is the elimination of the presumption of flight in the case of the four categories listed in former sections 112-II-1, 2—(1) major crime; (2) persons who have no permanent abode; (3) vagrants; or (4) those unable to identify themselves. Query whether such categories will reappear as the “definite facts” acceptable to establish a danger of flight?

It seems probable that the “major crime,” as such, will be given less weight and it will certainly lose its automatic effect. But as to the other three categories, there is expected to be little change.

Where he has no abode, I think it is sufficient to conclude that there is danger of flight. If he has no certain abode, where will he go? And as to inability to identify oneself, if someone is not able to prove he is Mr. Meyer in two or three hours, well, even I as a lawyer say he is a suspicious man. (Defense attorney)

Section 112-II-3

A significant modification is the changed criterion for a finding of collusion. The necessity that the accused’s intention to collude be discernible has modified the section from one which rested on subjective considerations to one which must now be objectively determined.

You will have to give concrete facts of the danger of collusion which generally will be established only if there has been an attempt to collude. For example, a man living in the same house with young children is accused of making indecent sexual advances to them. The fact that he lives in the same house is no longer considered sufficient. It is necessary to prove not only that he might go downstairs but that he has gone down and tried to talk to the children. (Professor of law)

Even where the intention to destroy evidence is discerned, it is not sufficient to order arrest unless, as a result of such conduct, the danger
exists that the ascertainment of the truth will be impeded. A police official who read the last quoted passage stated that in order to charge collusion, the accused, in addition to speaking with the witness, must try to influence him "in an undue way. It is precisely this which endangers the ascertainment of truth."

Nevertheless, as with sections 112-II-1, 2, an interpretation is possible which may substantially weaken the import of the section.

Perhaps the judges will say that it is a definite fact if the defendant refuses to talk to the police and from this fact they conclude that he intends to do the things that are set forth in the section. I doubt that the High State Court would uphold that interpretation but most cases do not go beyond the lower courts.

(Defense attorney)

Section 112-III

Sections 112-III and 112-IV replace the general presumption of the old section which authorized an order to arrest in the case of all major crimes with provisions permitting arrest in the case of specified major crimes which the legislature supposed were likely to disturb public security.

An order to arrest may issue when "definite facts" indicate that there is a danger that the accused will commit another sexual crime of the kind mentioned in the statute, "and that the preliminary detention is necessary to prevent that danger." Section 112-IV gives an absolute right to arrest where the accusation involves a crime against life. This legislation represents a partial return to laws of the Third Reich which authorized arrest when there was a danger that the accused might commit further offenses or that public excitement was such that the accused's remaining free appears "intolerable."

However, the very comparison with the former very general law stresses the attempt of the legislator to limit its application to offenses which appear to hold a danger to persons as opposed to offenders against property. Moreover, the change confirms a practice rather than establishing a new one. More often than not, where there was evidence that

77. The major crimes listed are incest between relatives in ascending line (PC 173AI); abuse of confidential relation for lewd purposes (PC 174); serious sodomy between men (PC 175a); requiring lewd acts by force or the misuse of a woman in extra-marital intercourse, who lacks the will power to resist (PC 176); rape (PC 177). According to its terms, the section may be applied not only when there is fear that the accused will repeat the offense of which he stands accused, but for any offense named in the section. However, because each named infraction is so distinct, such breadth of construction has little significance.

78. Wolff, supra note 60, at 1081-82. These grounds were abolished by the Unification Act of 1950, UN 1, supra note 12, at 12.
another major crime might be committed while the accused was at liberty, an order to arrest was issued on the ground that flight was feared.\textsuperscript{79}

One source suggested that although "definite facts" must support the supposition that the accused, if released, will commit the sexual crimes condemned by section 112-III, one who has committed such an offense may be thought to be acting under an "irresistible impulse" which makes recurrence probable. The problem of foreseeability in such cases is so delicate that some judges will surely take the prudent course of issuing orders to arrest until a more definite standard is established by higher courts.\textsuperscript{80} Certainly recidivism will be a sufficient reason for arrest.\textsuperscript{81} One judge expressed the view, however, that where there is no prior record of such offenses, there will normally be no facts on which to base an order to arrest. Because the order to arrest is ordinarily issued within 24 hours after the accused is taken into custody, it will be impractical to obtain a psychiatric workup on the case. However, this may be resorted to upon review of the order.

\textit{Section 112-IV}

In the major crimes of murder (PC211), manslaughter (PC212) and genocide (PC220a-1(1)), arrest may be ordered even if there is no fear of escape or collusion. The apparent reason for this clear departure from the spirit of the reform is that in crimes against life public excitement is likely to be great;\textsuperscript{82} that to release a man charged with such a crime who could expect a long prison term would be unthinkable and would not be understood by the populace. The severity of the treatment is emphasized by the exclusion of such accused from provisional release. (116) Thus, the section practically amounts to a direction to arrest.

\textsuperscript{79} If any moral can be drawn from this legislative history, it is that practices or laws once found shocking, will frequently be introduced successfully at a later period, restrictively phrased in order to protect against "abuses." Apparently, the first period of enactment under "extreme conditions" accustoms society to such practices and removes them from the "intolerable" for that society.

\textsuperscript{80} The following factor may also be of importance: "If under the new regime there are some cases that go bad, the judge will say to himself: 'Suppose I let the man in liberty and then he runs away or repeats his crime.' If there are some such cases that become public at the start of the reform, then there is the danger that the judges say to themselves that the reform is not going well and it is better to be conservative. This is especially true of the sexual crimes because these always make a large public commotion." (Professor of law)

\textsuperscript{81} Although this statement will most likely be the law, an extraordinary opinion has been rendered by the High State Court of Frankfurt (NJW 1965 at 1432, April 7, 1965). The arrested, twice convicted on similar charges, was released provisionally and the prosecutor appealed. Pointing to the fact that the accused had not committed a sexual offense from the date of the act to the date of the court's opinion (some months), the court concluded that he had suppressed his inclinations to commit such crimes.

\textsuperscript{82} See note 78 \textit{supra}.  
Release may nevertheless occur where public excitement against the accused would be diminished as where a husband kills his wife's lover. The practical effect of the section is minimal; orders to arrest would be issued anyway for danger of flight.

**Relation of Sections 112 and 127**

The inclusion by reference in section 127 of the standards of arrest set forth in section 112 poses the question to what extent police practices of arrest will be affected. Theoretically, by the section, the police are as restricted as the judge. According to a prosecutor, there will be a substantial reduction in the number of arrests because arrest for the police makes sense only if they can obtain an order to arrest. But a defense attorney is more cynical:

There will be no change in the use of 127. The police will arrest under the same conditions as before. When by law they must bring him to the judge, they will free him without consulting the judge. After twenty-three and one-half hours they say—as a special act of mercy, we will let you go. It was always like that. There is no possibility of opposing it. I, as a lawyer, must show that the policeman acted with bad intent. You can never prove that. The policeman will say that he was arrested for one of the reasons of section 112, and after twenty-three and one-half hours the light came to me and I let him go. This will not happen in all cases. Only where there is a major crime or a case in which the police are much interested. If it eventually results in a charge of a major crime is another matter. But if the police want to investigate without the accused at liberty they will find a reason to use this twenty-four hours and you can do nothing about it. (Although twenty-four hours is specified, the police have until the day after the arrest to produce the man before the judge. But in usage, the twenty-four hour limit is frequently mentioned.)

**Section 113**

Although the wording of this provision is substantially modified, in practice, it is doubtful if the change will be noticeable. Arrest has always

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83. Section 113. *Limitation of Preliminary Detention.* “I. If the act is punishable only by imprisonment up to six months, by confinement in a jail or by fine, cumulatively or alternatively, preliminary detention may not be imposed by reason of danger of obscuring the proofs.

II. In such cases preliminary detention may be imposed by reason of danger of flight only, if the accused 1. has previously avoided the proceedings against him or has made preparations for flight, 2. has no fixed place of residence or abode, or 3. cannot identify himself.

III. The limitations of subs. II are not applicable if the accused is being suspected of an act which may lead to the imposition of confinement in a workhouse.”
been rare in cases in which the penalty is no more than six months. What is significant is that the principle of nonarrest has been enlarged to include minor crimes where the penalty does not exceed six months.

Paragraph two emphasizes that the concern with minor offenses is appearance at the trial (flight) rather than interference with the investigation. In both paragraphs one and two, collusion is excluded as a ground for arrest. As did the old section, the second paragraph presumes that certain described groups establish danger of flight—(1) those who have previously avoided a proceeding or have made preparations for flight; (2) those having no fixed abode, or (3) those being unable to identify themselves. Thus, although the latter two categories have been eliminated from the language in section 112, they reappear in section 113 (where they had previously been included by reference to section 112). Section 113-II, in part, requires specific evidence of intention to flee or evidence of having avoided a prior proceeding (that is, "definite facts") and, in part, concerns itself with those persons who the police might have difficulty in finding if they do not voluntarily present themselves. As a result, the hypothesis that these same categories will be accepted in situations involving section 112 as the "definite facts" required, is given added support.

If the charge may subject the accused to confinement in a workhouse (113-III), (beggars, vagrants and prostitutes) they may be detained even if they are not subject to the deficiencies of section 113-II.

The latter two paragraphs of the section seem in contradiction with the direction of change—to permit issuance of an order to arrest only where the circumstances specific to an individual indicate the likelihood that he will flee. In this section (except for 113-II-1), the state of the individual is the concern—a general supposition that one in the named group will have a tendency to flee or that they will not know where to look for him. Therefore, as to these classes, the treatment is likely to remain about the same.

Provisional Release—Section 116

The object of the reform is clearly illustrated by the changes in this section. Where an order to arrest is properly issued under section 112, the judge is now obliged to suspend the execution of that order if some other security measure would accomplish the purpose that detention was designed to serve. Four alternatives are mentioned: (1) an order to report at intervals to a designated place, usually the police station;

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84. Prostitution as such is not a criminal offense in Germany. "Lewd acts" or "practices" are banned under defined conditions such as active soliciting. (PC 361-6)

85. For a similar approach in American law, see Robinson, Alternatives to Arrest of Lesser Offenders, II Crime and Delinquency 18-21 (1965).
(2) an order not to leave the place of residence or a certain area except by order of the court or the prosecution; (3) an order not to leave the residence unless under the surveillance of a designated person, and (4) the furnishing of security by the accused or by another. Only the second and third possibilities are new. (116-I)

All cases are subject to this provision except for crimes against life (112-IV). Cases under section 113-III are within its competence but as a practical matter, it is unlikely to be used in such minor matters. Those accused of certain sexual crimes (112-III) are included "under condition that the accused follow certain instructions."

In matters where the order was issued to prevent collusion, it may be suspended if other measures, such as an order not to contact interested persons, would substantially decrease the danger. One attorney feared that this type of order represented a threat to the rights of the defense. An order could issue forbidding the accused to speak to witnesses or to other defendants.

As usual, the prediction of the section's effect on law enforcement depends on whose views are sought. Police and prosecution officials felt that the provisions providing for restriction to residence, virtual house arrest, would be useless because there would be insufficient personnel to insure control. A defense attorney commented:

Suppose the accused is seen by one of his friends outside the house. That friend will go to the police and say that he has seen him. You don't need personnel to enforce it. His friend does not go to the police to hurt the other man but to see that the law is enforced. We are a people obedient to the police. If the police order something, you find enough people to comply with it.

Probably the most important change that this provision will make in practice will be the increased use of bail by deposit of money or security. By the terms of the law, the judge must actively seek to substitute some form of security other than custody of the body of the accused. This is in marked contrast to the passive role played by the judge under former procedure.

Review of the Order of Arrest—Sections 117, 118, 120, 121

The former oral hearing and periodic review have been combined in section 117 to shape an integrated means of reviewing detention each three months, either on the initiative of the person detained or by the

86. One State District Court has decided provisional release is permissible even in 112AIV cases. (Dortmund NJW 1964 at 1391, June 8, 1965). Basing the order to arrest on 112AII (danger of flight or collusion) rather than 112AIV, is another means to avoid the effect of 112AIV.
court. A detained person may, at any time, move for a judicial hearing.\(^8\) (117) In default of this, the court must, each three months, conduct its own review of the order unless the person has defense counsel (117-V) in which case the initiative to review the order is left to him.

Detention is still unlimited as to time. But at the end of six months, in the absence of action by the prosecutor or by the court to extend the detention, the order to arrest is vacated by the High State Court. (121-II) If extension is desired by the court or by the prosecutor, the file must be sent to the High State Court which will then decide “if the peculiar difficulty or the peculiar extent of the investigations or some other important reason stand in the way of imposition of judgment and justify continued detention.” (121-I) After this six months review, each three months the case is to be re-examined by the High State Court. (122-IV) This is in addition to the similar surveillance each three months by the lower court. (117-V) However, the High State Court surveillance is obligatory whether or not the accused has counsel.

Taking sections 117, 118 and 121 together, the detained person may make a motion to review at any time after the issuance of the order to arrest. (117-I) If within the three following months the accused, without a defense counsel, does not move for such review or has not filed a complaint against such order, the court must itself review the order. (117-V) At the end of three months, he is to be instructed of his right to defense counsel. A defense counsel must be appointed at his request. (117-IV)

If the order to arrest is sustained at the hearing, the detained person may seek another judicial hearing after he has been in detention three months and at least two months have elapsed since his last judicial hearing on the order. (118-III)

Consequently, for a period up to six months, the review is within the competence of the issuing court. Thereafter, it is to be supervised by the High State Court. As before, the detained person, at any time, may complain against the decision. This is more meaningful when one learns the great confidence defense attorneys express in the judges of the High State Court. It was stated that seven of ten complaints made to the High State Court in cases of orders to arrest were successful, reflecting the divergence of lower court practices from the criterion employed by the High State Court. This led one attorney to predict:

The prosecutors will speed up their investigations. Up to now, they knew that no one would free the accused. Even the courts

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\(^8\) Even under former law, this has been said to be Germany’s answer to the Habeas Corpus. See Wolff *supra* note 60, at 1082.
would take their time to start the trial. There was a wait of eight to twelve months. The second thing is that one of the good things in German law is the High State Court. They have been the forerunner of this reform. I do not think they will allow detention for an ordinary crime to go for more than six months. They will pressure the prosecutor to quicken his investigation.

The standard to be used by the High State Court in judging the legality of the order to arrest is perhaps exaggerated by the use in the translation of the words, "peculiar difficulty." It has been described as being more a question of a reasonable ground for the extension—a balance on one side of the hardship likely to be caused to the individual by the detention and on the other side, the gravity of the charge and the difficulties of investigation. The criterion for the lower and appellate courts is not to be "disproportionate to the significance of the case or to the punishment or measure of prevention and reform likely to be imposed" (120-I) which reproduces the words of the principle of proportion found in section 112-I.

Observance of these changes by the Magistrates is made more probable by the requirement that the court record the facts supporting its finding of a strong suspicion that the accused committed the act and that a ground for arrest exists. Prior practice of stating the ground of arrest in the words of the applicable code provision is to be replaced by a recitation of the individual circumstances motivating the order. Whether this will reduce itself to four or five formulas, as in the past, will have to be seen.

Other Important Areas of Reform

Consistent with the inquisitorial nature of pretrial procedure, neither the attorney for the defense nor the prosecution had been permitted to attend the first examination at which the magistrate determined whether an order of arrest would issue. The attorney's first opportunity to contest the order came through a request for an oral hearing to review that order. But at this stage he did not have access to the police and prosecution documents on which the order presumably had been based. His effectiveness was therefore often limited to producing evidence of his client's good character.

The reform permits counsel to attend the first examination. (169) (192-II) Moreover, he may inspect any file "before the court as well as to view officially secured evidentiary items." (147-I) Such inspection, however, may be refused if the investigation is not concluded and where such inspection "could endanger the purpose of the investigation." (147-II) A decision by a prosecutor to withhold his file may be appealed to
the chief prosecutor and then by way of complaint to the State District Court.88

Counsel must be advised of the first examination if this may "be done without delaying the proceedings." (192-II) Taken together with the practice of the German lawyer to be much less a participant in pretrial investigation than his American counterpart, it may be that this reform will have little practical effect. Nevertheless, the right is there and no doubt in individual cases where the need for representation at this stage is evident, it will be exercised.

Two further modifications are particularly striking because they parallel developments in American law. There is now the broadened requirement that counsel be appointed in any case involving an accusation of a major crime. (140-I-2) This is likewise necessary where the accused, on whatever charge, has been in preliminary detention for at least three months. (140-I-5) The other development is that the accused, at the moment of the commencement of the police investigation as well as at the beginning of the first examination by the judge, must be informed of the act with which he is charged, that he has a right to consult a lawyer and that he need not answer to the charge.89 136-I) 163a-IV) (115-III)

This reform has been greeted with cries of horror from police and prosecution officials.90 Nonetheless, the authorities have taken it seriously.91 A written form has been distributed to be signed by each suspect, notifying him of his rights.

Supposing that the right to counsel and silence are utilized by the accused, the reform could have a profound effect on German criminal procedure. Continental procedure relies on careful and extensive police investigation, including the accused's version of the incident from which the charges arose. Trials, particularly in matters below the level of major crimes, often become more of a search for motivations and attenuating circumstances to determine the severity of the penalty to be imposed rather than a search for culpability. If the declaration of the accused

88. See p. 245 supra.

89. It is not entirely clear whether the law gives him the right to remain completely silent or only the right to refrain from responding to the accusation. He may still be under an obligation to give information as to his personality. See notes 64, 65 supra.

90. A police official reacted as follows on reading this passage: "I was very amused at your mentioning the 'cries of horror' from the police. They were not heard at this office; on the contrary, the reform of the Code has been calmly accepted and strictly adhered to."

91. A German professorial assistant writes: "A friend who had caused an accident which led to the death of another driver was clearly and impartially informed of his rights. He felt that this has changed compared to former police custom. Therefore, I think that these new provisions are not only on paper but are really put into practice."
becomes less frequent and the lawyer enters the scene at an early stage, the whole system will feel the effects.

However, because German lawyers are unfamiliar with such pretrial counseling and because defendants may continue to think that they will be "better off" if they say "something," revolutionary changes, as a result of these measures, seem unlikely.92

Nevertheless, the evolution in two such different systems of the obligation to instruct defendants of their right to counsel and of their right to remain silent will be fascinating to watch.

PART III

PRINCIPLES OF GERMAN PROSECUTION

Certain principles of German prosecution give the public prosecutor (Staatsanwalt) leeway in proceeding with prosecutions of minor offenses.

As a general rule the prosecutor has an affirmative duty to proceed with all code violations which are "capable of prosecution"—the principle of legality or mandatory prosecution.93 (152-II) The exception to this principle94 is the discretionary or opportunity principle that no prosecution shall take place where the "guilt of the actor is minor and the consequences of the act are insignificant."95

This special regime for the minor offense is set forth in a network of interlocking provisions in the penal code and the code of criminal procedure. There is a descending ladder of participation by the State in the process of prosecution in accordance with the concept that certain acts, though designated criminal by the penal code, may not be serious enough to set in motion the State machinery without some special aggravating feature which arouses a public interest in the prosecution of this particular offense or offender. Implicit in the idea of "public" interest is the presence of certain areas of private concern, best left to personal initiative.96 This concept moves from a general controlled dis-

92. One experienced defense lawyer reported more people now ask to speak to a lawyer before making a statement to police.
93. This should not be confused with the principle of legality, Nullum crimen, nulla poena sine lege—that there can be no criminality in the absence of a law which makes criminal and punishes the act in question. See Peters, Le Ministère public, 34 Rev. Inter. de Droit Pénal 3, 9-10 [sic] (1963).
94. "Except as otherwise provided by law," all violations must be prosecuted. (152AII).
95. Auld, The Comparative Jurisprudence of Criminal Process, 1 U. Toronto L.J. 82, 94 (1935). Sections 153 and 154, giving this discretion to the prosecution, were enacted in 1924. See Wolff, supra note 60, at 1078. There may be a failure to prosecute where the man has no previous record, if there is a small amount involved, the item taken has been returned or the accused has paid for the damage caused.
96. A matter of public interest is, for instance, a minor bodily injury caused by a
cretion in the prosecutor not to prosecute minor offenses to the prohibition of prosecution in another class of offenses unless the party injured requests prosecution. In addition, certain offenses are set aside as likely to be of least concern to the State, but of some concern to the individuals involved; for these a system of "private prosecution" by the injured party is provided. 87

Considering first the case where the prosecutor has a controlled discretion. In matters of minor crimes, he may refrain from prosecuting after first obtaining the consent of the judge of the Magistrate's Court. (153-II) Petty offenses are not to be prosecuted at all 88 "unless there is a public interest in obtaining a judicial decision." 99 (153-I)

According to the discretionary principle, the prosecutor, in the case of minor crimes, may determine if it is in the public interest to pursue a prosecution. 100 No such right of inaction is given in the case of major crimes.

Formerly, for both the petty offense and the minor crime, the consideration had been whether the "guilt of the actor is minor and . . . the consequences of the act are insignificant." (153-II) The 1964 amendments modified that section. If "the guilt of the actor is insignificant and if the public interest does not require enforcement," the prosecution may be terminated. Thus, for the prosecutor to exercise his discretion the guilt of the person committing a minor crime must be less than for

stranger rather than a dispute growing out of a personal relationship. In such case there is a public interest because the attack is unmotivated by the personal relationship and therefore could involve anyone. In addition, there is no personal relationship between the parties to create a private interest. Compare with the "zone of privacy" concept expressed in Griswold v. Connecticut, 381 U.S. 479, 484-486 (1965).

97. An idea of the minor importance attached to these as criminal offenses may be gained from the period of limitations. Any act which is punishable only upon request of a private party must be prosecuted within a three-month period, or prosecution, public or private, is barred. (PC 61) This is the same period as for petty offenses and may be contrasted with the usual period for minor crimes of at least three years. (PC 67(2)) For an excellent treatment of this problem in the non-statutory American framework, see Kaplan, The Prosecutorial Discretion—A Comment, 60 Nw. U.L. Rev. 174, 188-193 (1965).

98. There is a possibility that the petty offense will disappear from the penal code. "In view of the fact that, on the whole, in the case of these petty misdemeanors [petty offenses] we are not dealing with true criminality but only with more or less minor and non-stigmatizing violations of the external order of a community, there have been repeated demands for their entire removal from the code and for restriction of the penal code to true criminality in form of the felonies [major crimes] and gross misdemeanors [minor crimes]. The new draft code which has just been prepared by lawyers from all branches of the profession does exactly that." Mueller & Buergenthal, op. cit. supra note 4, at 3.

99. Traffic violations usually contain that element of public interest and are therefore almost always prosecuted.

100. Even after the public charge (indictment) has been preferred, the judge, with the consent of the prosecution and the defendant, may discontinue the proceeding. (153a-II).
one committing a petty offense. Lack of a public interest to enforce the law must also be present.

That the discretion may be exercised even though the consequences of the act are grave is important. In Germany, as in Europe generally, negligence resulting in bodily injury is a minor crime. A case often arises where guilt is small but the injury is serious; it is to this situation that the change is directed.

Where, by the above provisions, the initiative for inaction rests with the prosecution, there are certain petty offenses and minor crimes which the prosecutor is by law precluded from pursuing in the absence of a request from the party injured. Such offenses (Antragsdelikte) are individually designated throughout the penal code by words stating, "the prosecution shall be commenced only by petition," or similar language. It is only when the prosecutor receives such a request that he is called upon to make a decision to prosecute. But once the request is made the offense is placed on a par with other offenses and the principles of legality and of discretion apply. The criterion remains: Is there a public interest in proceeding with the prosecution?

Antragsdelikte include: adultery, inducing extra-marital sexual intercourse, seduction of a chaste girl under 16, and abduction. Many of these offenses are related directly or indirectly to family matters. This approach is ap-

101. "Normally, the State as a representative of the public, has an interest that violations of the criminal law be pursued and the wrongdoer prosecuted. However, it is felt that there are certain types of violations which should not be prosecuted except when the victim so wants. These are the Antragsdelikte. There is no public interest that certain criminal acts, not of a severe nature, be prosecuted. If the victim doesn't care, then there is no interest of the public because he has not acted against the public." (Lawyer)

102. The translation of the German penal code employs the term "petition" and the translation of the code of criminal procedure uses the term "motion." But because this implies a formal written or oral presentation when all that is required is an informal request. Antrag is a general term which may be employed as well for a formal petition or motion as an informal request. See English translation of the written form for the request (Strafantrag) used by one police force, pp. 269-270 infra. The term is translated variously as "declaration" and "application." The translation used here is "request."

103. Adultery is not a criminal offense unless the marriage is dissolved as a result thereof and this ground is stated in the judgment dissolving the marriage.

104. Others are: acts against a foreign state or its officials (PC 102-104a); procuring marriage by deceit (PC 170); squandering family property (PC 170a); fraud out of need (PC 264a); frustrating a writ of execution (PC 288); disregard of security arrangements (PC 289); exploitation of minors (PC 301).

105. "It may have been felt that there was no public interest in such family disputes but also that things are so intimate in the family that against the desire of the victim there should be no prosecution. The interest of the State for prosecution, which may exist, has to be secondary." (Lawyer)
parent. In certain cases the code allows the public prosecution, once started, to be withdrawn by the complainant when the complaint is against a relative; or it may not be instituted at all when it is committed against a relative of the descending line or a spouse; or it may be initiated only on request when a relative is involved.

Privatklage—Sections 374-394

Finally, there is a group of offenses (Privatklagen) in which public prosecution is not permitted unless a public charge is “in the public interest.”

Eight categories of minor crimes are listed in CCP, section 374: trespass (PC 123-82), insult, damaging a person’s reputation (PC 186), defamation (PC 187), defamation for political reasons (PC 187a), disparaging the memory of a decedent (PC 189), light voluntary and negligent bodily injury (PC 223, 230), impairing the secrecy of the mails by opening a sealed document (PC 299), causing petty property damage (PC 303), threatening to commit a felony against someone (PC 241), use of a dangerous weapon (PC 223a), unfair competition and violations of literary, artistic and commercial copyright where they are designated as minor crimes.

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106. Larceny or embezzlement against relatives, guardians or teachers (PC 247(1)); light voluntary and negligent bodily injury (PC 232); petty property damage (PC 303). Ordinarily, it is not possible to withdraw the public charge once the “preliminary judicial investigation or the main proceeding has been opened.”

107. Larceny or embezzlement (PC 247(2)); petty larceny of consumables (PC 370(5)); fraud out of need (PC 264a).

108. Game poaching (PC 292(1)); fish poaching (PC 293(1)); petty fraud (PC 263); breach of public trust (PC 266(3)) when against relations, guardians or teachers.

109. With the exception of the last two offenses hereafter listed, to which a special procedure has been made applicable, the Privatklagen are found in the penal code. The first four listed are Antragsdelikte.

110. “Insult” is used both generally as the caption of the penal code chapter and as a specific offense. (PC 185) It includes statements directed against a person, not of a factual nature, as calling him a “pig.” “Defamation” (PC 187) is a factual accusation as calling one a “thief.” Insults may include light bodily contact, not involving actual injury, occurring together with the spoken insult.

111. No public prosecution is to be begun “unless for special policy reasons” the prosecutor deems “official intervention necessary to obtain the punishment.” (PC 232(1)). A case mentioned where “special policy reasons” would be present for the prosecution of a minor physical injury is that of an old Negro being struck by a Ku Klux Klancer. “You see there is something behind it and the public interest demands that the man be prosecuted. In such a case we would take it over even if the party injured did not complain.”

112. This section applies also to instances where the attack is made jointly with another person or where certain other aggravating circumstances are present, although the injury remains light. As with PC 241, no request is necessary for public prosecution because of the serious threat of these offenses to public order.
From the standpoint of the prosecutor, in the Antragsdelikte he may not proceed unless he first receives a request. But for the Privatklage no public charge may be preferred unless the prosecution finds a public interest. (PC 376)

Looking at the matter from the viewpoint of the party injured, such person has several alternatives. If it is a Privatklage he may begin a private prosecution without any need to request a public prosecution or even to notify the prosecution of his intention to privately prosecute. (PC 374) He may also request a public prosecution. Once begun, he may intervene (Nebenklage) in the public action. If such public prosecution is denied, he may nevertheless pursue his private action. On the other hand, the prosecutor may intervene and assume control of the private action once started (377-II), although as a matter of practice, this is seldom done.

With regard to Privatklage, the code of criminal procedure makes the prosecutor's decision absolute and specifically denies the right of appeal. (172-II) This is understandable because the injured party still has a private action. For all other offenses, including Antragsdelikte, no alternative remedy is provided for failure to allow the request for prosecution. Appeal of the prosecutor's decision is therefore permitted unless the prosecutor bases his decision on section 153—the insignificance of the act and its consequences. (172-II) This right of appeal emphasizes the importance given such decisions not to prosecute in the German scheme.

Making the Request for Prosecution—Sections 158-69

The request must be "made in writing or orally to be recorded" if it is made to a court or to the prosecution; if the motion is made to any

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113. Although there is no special code provision stating this as to Antragsdelikte, the same criterion of public interest is applied so that one may say that both Privatklage and Antragsdelikte are equated with the petty offense in this regard. (153(1)).

114. However, if the Privatklagen is also an Antragsdelikte, as four of them are (see note 109 supra) the request must be made; but the filing in court of the Privatklage, being a clear indication of the intention to prosecute, satisfies this requirement. See note 118.

115. The effect of intervention by the public prosecutor is that the private prosecutor then becomes the "intervenor" and the procedure is governed by the provisions relating to Nebenklage. See p. 275 infra.

116. Anyone may make a request or motion for prosecution in any criminal matter but only in the Antragsdelikte is such a request necessary in order to begin the prosecution. Thus, any denial of public prosecution may be appealed except when it is a Privatklage or when the decision not to prosecute is grounded on section 153. Appeal is first to the prosecutor's superior and then to the High State Court. The question on appeal is whether the public interest is sufficient to require a public prosecution.

117. "The person desiring to make a motion for prosecution states his desire to an official of the court or the prosecution who records such statement. The record so made must be signed by the official, but need not be signed by the person making the motion." (158AII, note 2 of translation). NIEBLER, op. cit. supra note 5. The request may be made
other governmental agency, it shall be in writing." Customarily, the request for prosecution is made to the uniformed police who are initially engaged in the investigation of such offenses. The police, being auxiliaries of the prosecution, qualify as the "prosecution" and therefore may orally accept the request. Requests are almost never made to the court directly. If someone went to the court, he would be told to report to the police station. Likewise, it is seldom that a person goes to the prosecutor, even to make a request for public prosecution. His attorney may, however, direct a letter to the prosecutor embodying the request in order to protect his client against the three months limitation period.

At the police level, there is some difference in the handling of these offenses compared with those offenses which may be prosecuted without a request. In general, the investigation is limited to statements taken from the parties. Even this will depend on whether the victim wishes to make a request. If no one desires to pursue the case, the police take only the name and address of the parties. No report is sent to the prosecutor in such cases because without the request he cannot proceed. An exception is the case of the minor physical injury. (PC 223) There, the prosecutor may find "special policy reasons" to prosecute even without a request having been made.

The police ask the person to sign a form giving three choices. As translated, the form in one German state appears as follows:

Declaration concerning application for infliction of punishment because of ________________________________

1. As injured party/legal representative of ____________________________
   I file the
   Application for infliction of punishment against ________________

2. After having been expressly consulted I abandon the filing
   of an application for infliction of punishment against ________________

by a legal representative or in certain cases by the heirs unless the applicable penal code provision specifically limits it to the person injured. "Insult" (PC 185) is restricted to the "person insulted."

118. It must be made within three months of the time the "person authorized to press charges" obtains "knowledge of the act and the identity of the perpetrator." (PC 61). Because the Privatklagen, which in practice occur most often (e.g., insults and minor bodily injury) are ordinarily also Antragsdelikte, the attorney in filing the Privatklage in court will usually include the request for prosecution in his complaint.

119. However, as indicated below, it is usually taken in written form.

120. Except under the circumstances described in note 118 supra.

121. A state law permits the police to establish the identity of involved individuals even in civil claims, note 63 supra, subsec. 4 of Bavarian Police Law.
3. I reserve the right of filing an application for infliction of punishment against

It is known to me that the time allowed for application has to be observed by me independently. I am well informed/have been notified about the filing of an application for infliction of punishment and particularly about the time for filing the application.

Such signed form is sent to the prosecutor if the person has reserved or wishes to pursue the case but is kept with the police if the person wishes to drop the case. In the report that goes to the prosecution, the police indicate whether they believe it a case for public prosecution. If it is a matter which will not likely be subject to public prosecution, but may be privately prosecuted, the police will inform the complainant of that fact and will tell him what he must do to proceed with the claim.

The Public Interest

On the basis of the file sent to him by the police, the prosecutor decides whether there is enough public interest to proceed with the charge. An ordinary fight between two men known to each other is an example of a case without public interest. The following factors have been mentioned as giving the case a public interest: an older man being assaulted by a younger man without good reason, attack by a stranger, where it involves a person continually engaged in fights, or an accused who has struck several persons in one affray, or if the person attacked or insulted is a public figure, and possibly if it takes place in a public area. Traffic offenses are generally considered to have a public interest. Domestic disputes with the same qualifications are left to private prosecution.

Thus, where the petty offense or minor crime grows out of the personal relationship of the parties and the result is not too serious, public interest

122. The law applicable to the request is analogous to that of the American release in that the complainant is bound by his choice unless he can show he was incapable of making a rational decision at the time. However, he may withdraw the request at any time. (391AI).

123. The participation of the police in dispensing such information may vary considerably according to locality. In another state the writer was told that the police merely take information.

124. If the police recommendation of a public interest is supported by the facts, the prosecutor will usually go along with it.

125. See note 96 supra.

126. But "very often we drop the case and say the public interest does not demand the prosecution of a person. A woman was driving on an unpopulated and very small road and a little girl came from the driveway and rushed into her car so even if she had driven entirely correctly she could not have avoided the accident. She could have been prosecuted for not keeping to the right. However, this is a road not used much and so it is not worthwhile to prosecute her for deviating from the right to the middle, and so we dropped the case." (Prosecutor)
is normally denied. There must be some special circumstances which takes
the case out of the ordinary run of Antragsdelikte for the prosecutor to
hold that the matter has a public interest. But once the prosecutor finds a
public interest, neither the court nor the accused may contest this.127

In the event the request for a public action is refused by the prosecutor,
the injured party must be notified of this decision and, at the same time,
informed of his right to appeal.128 (171) The accused is also notified of
the decision. (170-II)

Arrests in Cases of Private Prosecution

From the police standpoint, the question of private or public prosecu-
tion is at least theoretically irrelevant to their decision of whether to
apprehend. The same considerations are involved, but if the parties are in
possession of the requisite identification they will not be apprehended.
Orders to arrest are never issued in such cases.

Proceeding with a Private Prosecution

In the case of Privatklage, if public prosecution has been denied and
the person wishes, he may proceed with a private prosecution. There are
several good reasons for the injured party to choose public prosecution.
The case will be handled for him by the prosecutor and he need not
employ a lawyer (although such cases are occasionally handled without a
lawyer); he will not be thought of as a "trouble-maker"; he can testify
as a witness whereas in the case of a private prosecution, as a party, he
ordinarily does not take an oath (60, 62), and his testimony may be given
less weight.129 But perhaps the most important point is that he need not
be concerned that the costs of the defendant, including the award of
attorneys' fees, will be taxed against him if he fails to fully sustain his
allegations.130 (471, 472) If, on the other hand, the accusation is sus-

127. But see, note 116 supra, where the finding of no public interest may be appealed
in almost all cases other than Privatklage.

128. The prosecutor sends a registered letter to the complainant stating that public
interest will be denied, giving the reasons therefor: that he may personally proceed with
the case if it is a Privatklage or that he may appeal the prosecutor's decision in other cases
where a request for prosecution has been made and the person complaining is one of those
having the right to appeal. (171).

129. This is not because he has not taken the oath but because he is a party. In neither
private nor public prosecution of such an offense would he normally testify under oath.
Witnesses are frequently not heard under oath, the oath being given considerably less im-
portance (or perhaps more) than in the United States. See note 65, supra. Another reason
for preferring a public prosecution is that it takes considerably less time. The complainant
need not go to court unless he is summoned as a witness.

130. "Since the introduction of the CCP (in 1877), the number of minor crimes which
may be prosecuted by a private prosecution has been augmented. Each augmentation of
this group of minor crimes involves a diminution of public prosecutions. Many injured
persons renounce the private prosecution due to the difficulties which it involves: provision
of surety; advance of costs; payment of costs in case the accused is not found guilty;
tained, the accused is normally ordered to pay the costs of the complainant. The court may also equitably distribute the costs between the parties.131 (471)

When a public prosecution is allowed, the party injured often intervenes (Nebenklage). This gives him some rights of control during the trial and appeal.

The advice of the attorney to a client who enters his office with a Privatklage is to handle the matter as a public prosecution. If such request has not already been made by the client, the attorney sends a letter to the prosecutor in which he gives the facts of the case and perhaps argues its public interest if the point is in doubt. Ordinarily the letter will be signed by the client.

There are certain types of offenses which the injured party may wish to prosecute precisely because of a personal interest, for example, cases of insult or violations of literary, art or commercial copyright laws. Because the latter are of a highly technical nature, the victim would prefer to keep the matter in his own hands and to choose a lawyer who specializes in such cases. The question of cost may be of considerably less concern.

**Necessity for Effort at Conciliation**

Before a private prosecution may be commenced, an attempt at conciliation must be made in all Privatklagen except in the offenses concerning use of a dangerous weapon (PC 223a) and unfair competition and violations of copyright, that is, those offenses which are not Antragsdelikte. Any attempt at conciliation is to be administered by an “agency to be designated by the department of justice of the state.” (380) In smaller cities, such a conciliation service (Sühneamt) may be found in the office of the town mayor or in the home of a man appointed for the purpose. In large cities, the office is usually in the municipal building. The official who has charge of such matters (Schiedsmann) is not necessarily a jurist. In former times he had much more extensive powers but today his function is purely advisory.

During the hearing, the parties are heard informally, without witnesses.

131. The attorney fee in such cases, and in all criminal cases, is decided upon between client and attorney within a range determined by the law. The law of costs, Gerichtskostengesetz, and that of attorney fees, Rechtsanwaltsgebührenordnung, sets out these matters in great detail. In civil cases the law specifies a particular amount to be charged, but in criminal matters a minimum and maximum is stated and the exact sum to be charged will depend on how long and how difficult the case is. If the client is dissatisfied with the fee, he may ask the court to reduce it. For the disposition of costs in civil cases, see Kaplan, von Mehren and Schaefer, supra note 10, at 1461-62.
Neither the police nor the police file is present. If it is determined that one of the parties is guilty, he is asked to pay a certain sum, perhaps the equivalent of $10 or $15, to a charitable organization, not as punishment, but to appease the wronged party. Its effectiveness has been questioned.

The conciliation is largely theoretical. It was the intent of the lawmaker to prevent to the greatest extent possible the bringing to court of criminal cases. In a few percent of the cases the conciliator is able to settle the case. This is normally by the defendant admitting he did wrong, most usually in defamation of character cases. But often, they come with their complaint and they go away with it. If there is a real hatred which has developed over the years, the plaintiff goes to conciliation absolutely determined that he will not conciliate; he wants that man in criminal court and he won’t agree to anything. (Lawyer)

Nevertheless, in order to begin the legal action, the court must be presented with a statement, signed by the conciliator, certifying that the hearing has been held and that it was fruitless.\(^{132}\) (380)

The Trial

After the complaint is filed, a trial date is set of which the parties are notified by letter. If the defendant does not appear, another hearing will be scheduled. If the defendant ignores this letter, the judge can issue an order to arrest as in other cases.\(^{133}\) The hearing and the possible penalty is the same as in other criminal matters.

The prosecutor has no responsibility for private prosecutions (377) although the court may submit the file to him if it believes the case is one that he should handle.\(^{134}\) (377)

At any time during the course of the trial, the defendant may file a counter charge if the accusation is also subject to private prosecution and “is connected with” the matter under litigation. (388) The suit may thereafter be withdrawn by either party (391-I), but the withdrawal of one charge does not affect the other (388-IV) and once withdrawn, a charge may not be refiled. (392)

\(^{132}\) If the defendant does not appear for the hearing, the complainant is given a certificate to that effect. If the complainant does not appear, the matter is dropped. For a somewhat analogous requirement in civil litigation, see Shartel & Wolff, \textit{supra} note 44, at 881-882.

\(^{133}\) Appearance of the complainant may also be ordered. On his failure to appear, the case will be dismissed. (387AIII).

\(^{134}\) The court is permitted to stop the trial and render a judgment that the facts established constitute a “punishable act” other than that which may be prosecuted privately. The matter is then transmitted to the prosecutor for further action without the defense of \textit{res judicata} being available.
Right To Claim Compensation During Criminal Prosecutions—
Sections 403-406

Either the injured party or his heir can assert a civil claim for property rights or physical injury to the extent of the court's competence. In the case of the Magistrate's Court this is 1500 DM ($375). However, any amount may be demanded and may be heard by the court if the other party does not raise an objection and, "insofar as the amount of the claim has not been awarded, it may be asserted elsewhere." (406-III) The parties entitled to such claim must be notified of the action and of their rights. (403-II)

The motion setting forth the claim may be made at any time during the trial, orally or in writing, but must detail the basis of the demand. (404-I) The court may refuse to entertain the motion if the action for damages would interfere with the criminal proceeding. (405)

There are several reasons why it is rare for an attorney to bring a civil claim of any consequence in a criminal action. The court can decide the civil claim only if the decision is for the complainant. (405) If the case is appealed and the conviction reversed, the civil judgment is reversed automatically. (406a-III) In addition, there are several practical considerations. At the time the criminal trial is held, usually the extent of the injury is not clear; a more liberal award is likely in a civil court; the civil action is not the main concern of the criminal trial judge and the time that may be given to expert testimony concerning the civil claim would be limited. Thus, unless the claim is easy to determine, it would not ordinarily be brought in the criminal proceeding.

Effect of the Criminal Court Judgment on the Civil Claim

Although theoretically the criminal court judgment does not bind the judge of a later civil proceeding arising out of the same facts, as a matter of practice, the civil court will follow the criminal court judgment. The attorney for the civil claimant attaches a certified copy of the favorable criminal court judgment to his civil complaint and will claim that the question of responsibility has been settled. In many cases, the defending attorney will not contest this assertion as it would be useless. An important exception to this is the traffic case. In this case there is a good chance the judge will ignore the decision in the criminal case because what constitutes negligence in a particular situation is considered largely a matter of opinion. In terms of probability, it is much more likely that the criminal judgment will be followed in an assault case, for instance.

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135. The statements regarding the award of civil damages in criminal trials are applicable to all criminal actions and are not limited to private prosecutions.
136. One prosecutor with wide experience stated: "Under our system, civil claims are generally not settled in criminal trials despite the provisions of CCP 403; in all of my practice, I never experienced such a disposition of a claim."
where the facts and the fault are more easily determined than in a traffic case. If the judgment is in favor of the defendant, the same factors play in reverse.

**Nebenklage—Intervention in the Public Prosecution—Sections 395-402**

In any case where a person has the right to bring a private prosecution, he may apply for intervention in the public action at any stage of the proceeding, even for the purpose of appeal after judgment. (395-I) The prosecutor may be heard in opposition to such intervention (396), but once the intervenor is admitted he has the same rights as a private prosecutor.137 (397)

**Penal Orders—Sections 407-413**

The penal order is a “trial without a trial.” The procedure permits the prosecutor to recommend a specific punishment of fine or jail not to exceed three months for petty offenses and minor crimes, which recommendation is transmitted to the magistrate in writing. (407-I) The judge is to conform to the prosecutor’s wishes unless he believes the matter should not be disposed of by penal order, such order is not justified by the law or the facts, or he disagrees with the punishment. (408-I) In such a case, he may order a trial (408-II) or return the order to the prosecutor. If the prosecutor disagrees, he may appeal to the State District Court.

However, in practice, such disagreement is rare. If it arises, it is usually resolved by the judge calling the prosecutor by telephone. If the judge is in agreement with the recommendation, he issues a written order which is sent to the defendant who has one week to appeal, that is, to demand a trial on the matter. (409) The trial which follows is like any other trial and the court is not bound by the prior order that has been issued. (411-III)

In effect, the penal order is an administrative procedure whose purpose is to avoid trial on what appears to be a minor and clear case. This procedure is not used where it is apparent that the defendant will not admit his guilt and cannot be used where some special measure is desired such as revocation of a driver’s license. It is most often employed for traffic offenses and prosecution of beggars or vagrants, although in many of these types of cases, even this course is short circuited by the penal mandate.

**Penal Mandate—Section 413**

This section permits the police138 to employ approximately the same

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137. He may summon witnesses that the prosecutor may think are unnecessary and may file an appeal as of right if he feels the punishment is inappropriate. (401).

138. The term used in the CCP is “police agencies.” Originally, “police” referred not only to what we consider the “police force,” but to such regulatory agencies as housing,
procedure as is allowed in the prosecution for the penal order. But for the police, the mandate constitutes only a recommendation to the judge for a specific punishment. It is the only situation where the prosecution is in the hands of the police rather than the prosecution. Its effect is to skip the prosecutor as a procedural step and to send the file directly to the judge. The prosecution does not participate although the judge may transmit the file to him if he believes the case warrants it. A trial may be demanded by the defendant as in the case of the penal order. In practice, the judge, in the great majority of cases, follows the police recommendation.

The exact use of this procedure is regulated by state law. Such law authorizes the penal mandate for most petty offenses, never for more serious offenses. It is commonly utilized for minor traffic cases but it is possible to employ it even for minor thefts, violation of some city regulations, vagrancy, disturbing the peace—all depending upon what is authorized in the particular state law.

The police could propose a jail sentence under the law but do not. It is utilized only where fine is to be recommended. If the case is serious enough to require a jail sentence, it is important enough to be sent to the prosecutor.

Administrative Offenses

With the administrative offense, prosecution passes out of the hands of the prosecutor into that of various specialized administrative agencies. Such offenses are also referred to as offenses against the public order and safety and may be somewhat artificially divided into those created by:

1. a) State laws which are promulgated pursuant to chapter 29 of the PC and which therefore carry criminal sanctions.
   b) State laws (Ordnungswidrigkeiten) which provide only for a special type of money penalty called a Geldbusse.
2. City regulations issued pursuant to state authority.

3. State law as violations of Public Order and Safety ordinarily dealt with by the regular police force and which are covered by state laws with general rather than specific prohibitions.

Those regulations issued pursuant to chapter 29 of the CCP are petty offenses, subject to the same principles of arrest and prosecution as any like offense. However, an order to arrest is never resorted to in such matters. A typical violation is the requirement that a plan for a proposed structure be submitted to the building administration police. If either no plan is submitted or the approved plan is disregarded in building, the violator is subject to the penalties of the law.

The specific regulations of how a house is to be built come from state law and as indicated may provide either a criminal penalty or a Geldbusse. States in turn give to the cities the right to "regulate their face"—to provide for zoning, street cleaning and removal of abandoned cars.

Since the chapter 29 offenses are governed by penal law, they are not properly called administrative or public order offenses. However, in practice, they are handled by the administrative rather than the uniformed police. The actual public order offenses, on the other hand, are sharply distinguished from those found in the penal code. Public order offenses are said to be

... important to the authorities in the interests of the smooth performance of their duties, but whose non-observance does not constitute a violation of fundamental social or ethical demands... [They] are tantamount to disobedience to the authorities...

The distinction between a violation of public order and a penal offense lies in their consequences. The... Law provides only for pecuniary amends for such offenses and not for imprisonment.... Pecuniary amends imposed in accordance with this are designated either by the use of that word in the statute or by the penalty of Geldbusse rather than jail or fine. The difference between a Busse and a fine is that if the Busse is paid by a violator, but the requirements of the administrative authority are not thereafter satisfied, a new Busse may be assessed for the continuing violation. Its purpose is to encourage performance rather than to punish.

143. See pp. 247-251 supra and pp. 287-290 infra. "During the night there is a storm that turns over a fence or tree; there is a danger of public safety and so the police go to the owner of the tree and demand that it be removed, or if not, he gets a Busse—not as a punishment but to bring him to orderly behavior, to restore public safety—to prevent the danger that someone could run into it." (Police Official). "The Administrative crime consists of the omission to support the policy of the state, which is directed towards the well-being of the state." Schwenk, The Administrative Crime, Its Creation and Punishment by Administrative Agencies, 42 Mich. L. Rev. 51, 85, n.160 (1951).
Law are not entered in the Penal Register, in contrast to sentences inflicting fines. . . .

Because violations of true public order and safety offenses (administrative offenses) are not criminal, sections 112, 127 and 113 of the CCP are inapplicable and neither provisional apprehension nor pretrial detention is allowable to the administrative authorities.

Regardless of the source of the law or regulation, the above types of violations are normally enforced by city administrative authorities charged with the function, although this may vary from state to state. A violation notice is sent to the alleged offender citing the amount of the busse. He may either pay it and make the repairs demanded or he may appeal, first within the agency and then to the Administrative Court.

If he does not pay the busse, it may be increased by the agency and it is a practice to augment the busse several times before actual enforcement takes place. There is an alternative method of warning the person that if he does not make the necessary change voluntarily, the authority will do it and charge him for the service. Once the busse has been levied, it cannot be compromised.

The order of the agency has the effect of a judgment and upon failure to pay, immediate execution may be made upon the violator’s property either by the agency itself or through court bailiffs. Detention is possible only where the violator refuses to divulge his assets in a discovery proceeding in which he is under oath. In such a case, the Magistrate’s Court may place him in custody for up to six weeks. (70(2))

PART IV

POLICE ORGANIZATION AND POWER*

As in the United States, the police are functionally divided into uniformed police and the Kriminalpolizei, which investigates major offenses and has an equivalent task to our detectives.

In some German states, all of the police, including those in large cities, are state employees; in other states, such as Hesse and Baden-

144. UN 1, supra note 12, at 39.
145. However, see pp. 247-251 supra and pp. 287-290 infra, for the extensive powers of the uniformed police with reference to such offenses when related to preventive measures.
146. The Busse may also be levied if the repairs are not completed by a certain date.
147. One public order offense cited involved the owner of a bombed out residence who had gathered on his property various odd second-hand building materials which had an unsightly appearance and which had remained there for years.
* This Part describes the practice before the amendments described in Part II. Except for changes noted here and in Part II, the practice remains the same.
Wurtemburg, there are city police in cities with more than 100,000 population. In Bavaria, there are city police in each city with more than 10,000 inhabitants. The city police form an independent administrative unit while remaining under state control. State laws define the organization and duties of the police and are relatively uniform throughout Germany.

The federal police, roughly equivalent to our FBI, handle interstate and international police problems and place special record-keeping and scientific crime detection laboratories at the disposal of the state police.

In considering the powers of the police in detail, first those powers used to repress offenses proscribed by the penal code will be examined, followed by a study of the powers of the police to prevent crime and to maintain public order which are regulated by state legislation.

REPRESSIVE MEASURES OF THE POLICE

Measures of repression concern the investigation of offenses and the apprehension of suspects. Such suspect may be "caught in the act or pursued immediately subsequent to the act" (127); also the offense may be reported to the police or may be detected by them at a later time.

Procedure in the Case of Apprehension in Flagrante Delicto

In the United States, because in almost all criminal matters the individual is arrested and brought to the police station, personal information concerning identity is not of great consequence to the police officer, except for the purpose of filling out the report form. In Germany, because initially it is the police officer who must make the decision whether the man is to go free or not, that decision is partially based on the man’s identity; the officer must have sufficient facts to act upon.

Place of Detention. After the person is apprehended pursuant to section 127-I, whether he will be taken to the police station and there identified or whether this will be done in the street will depend upon (1) the nature (the "pettiness") of the offense, (2) whether on the spot conditions allow interrogation, and (3) particularly on whether the suspect has sufficient proof of identity with him; in sum, on the

148. Except in quite complicated or political cases, the decision to provisionally apprehend is in the hands of the individual policeman or the police administration. In the more complicated case, the police may call the prosecutor. Rarely, the prosecution makes an independent investigation and asks the police to arrest. It is well to distinguish between the apprehension and the decision to ask the judge for an order to arrest. The first is usually in the hands of the police; the second almost always the decision of the prosecutor.

149. The person with proper identification, usually the government issued identity card, will be released at the scene, while another without satisfactory identification will be taken to the station so that his identity may be established. Where there is doubt, he is always brought to the station for an identity check.
general administrative convenience at the moment of doing one thing or another.

In a simple case, the police officer might ask the suspect to sit with him in the patrol car while the information is collected; it would be an exception for the officer to bring the man to the station if all identifying information is satisfactory. Referring to a fight in the streets between two men, an officer said:

It might be different were it to happen in a part of the city where many criminals live—such as a harbor. Then you would take him to the police station because there are people who are known to be violent or wanted for some other offense. Let's say it happened in some place where it happens every day and every hour. They wouldn't pay any attention to that. They would say, OK, you can go this way and you go that way and everything is OK. (Police official)

Generally, it is handled in the police station because you can do nothing on the street. The conditions are not right—but it is possible. It would be a rare occasion when it is handled on the street. It is to a certain extent up to the individual policeman because he is the man on the spot. In those petty cases he may decide that he will only take the name of the persons involved. (Police)

If the officer decides not to take the man to the station, he would ask him to come to the police station at a later time to give a statement. In certain offenses, as in all forms of larceny, the suspect is invariably brought to the station in order to be checked out for other offenses and to be questioned by the detective division.

On the Street Search. In a minor offense or where the person is taken to the station to establish his identity, he is not usually searched unless he is placed in a cell. A street search is made only where there is suspicion that the suspect is dangerous or that he may be carrying a weapon which creates a danger for the officer or the public. It is said that in only about one in 500 apprehensions would a man be searched on the street. "Even if it does endanger the policeman—you never know when you pick up a man for a minor offense, he may be a dangerous criminal—well, it just can't be done. The public would criticize us." (Police)

Type of Information Taken. The officer customarily takes statements from all parties and witnesses together with information about their personalities. Exceptions are made in those cases where the officer de-

150. A more exact idea of when a suspect is taken to the police station may be obtained by examining the cases collected from station day books. See pp. 290-293 infra.
cides to take only names and addresses and postpone the taking of statements to another day.

**Establishing Identity of the Suspect.** In Germany, every person, citizen or foreigner, who remains in the country beyond a certain period, must register his address and other personal information with some authority. In Hamburg, this is the building authority, although normally the place of registration and the records are found in the same building as police headquarters. Upon registration, the person is issued an identity card with his photo attached. This authority must be notified if there is a change of address.

For purposes of establishing identity, such a card is sufficient from the police standpoint. A person is not legally required to carry the card and in its absence, other papers sufficiently identifying him might be acceptable. Even if he came from another city in Germany, he might be released on the basis of such identification.

It seldom happens that a person refuses to give identifying information. What does occur is that he has no satisfactory identification in his possession in which case he would be taken to the station.

**Release.** If the police determine from the identifying information, either at the scene or at the station, that there is no danger of collusion or of flight, they take his statement and then release the suspect without his having to sign anything, post security or appear before a judge.

**Procedure at the Police Station.** Where the man has been released without being taken to the station, the police officer files his report, a copy of which is sent to the office of the prosecutor. Depending on the seriousness of the case, the prosecutor may also be phoned to inform him that the man is in custody.

The suspect is brought to the station either because the police expect to ask for an order to arrest, because they wish to ask more questions about the offense, or to establish his identity satisfactorily.

It is routine to check and find out if he is wanted for something else even in those cases where he is taken in as a drunk. You never know; and we have already had some cases where we picked up in this way someone who is wanted. Ordinarily, if they check his personality at all on the street, they call the registration office, and if he is not in it, that's all right; they

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151. One police official stated that if you were not registered, the police did not consider that you had a permanent abode under former section 112-II(1).

152. There is no particular standard set forth but it is said that “the policeman must be convinced that the man has given his right name.”

153. Identifying papers issued by the man's employer were mentioned.

154. "If they refuse to give such information, they know that they will get into more trouble because they do not tell who they are." (Police)
check up where he lives and then let him go. Even in Privatklagen, the police may take the trouble to call up. It costs nothing and the more we check up, the more we pick up the wanted. I would say it is routine since we have these radio patrol cars. It is no trouble to radio in. He gets his information in a couple of minutes and it's no trouble to the suspect. You never know, some slight case or some slight reason may lead to somebody who is wanted for a serious offense. We had a case lately; it was only some trouble with a car; it wasn’t properly licensed or something like that and they checked up on the man and he was wanted by several judges around Germany.¹⁵⁵ (Police)

In any case of major crime, it is required that fingerprints and a photo be taken. In less serious cases, it is often optional and it is done only where there is some reason to suspect that the man has been involved in other more serious matters.

When they take him to the station because there is a problem of identification, they have to investigate his real personality. They take fingerprints and a photo even in minor cases in such a situation because they are suspicious that he refuses information for a special reason and they have to find out who this man really is. (Police)

If he does not have adequate identification with him, the police telephone to the central registration bureau and check out the information given. If all is verified, he may be released within a half-hour of his arriving at the station. If it is a case where it takes some time to verify the man’s version of the matter being investigated, the police first establish his personality. If, for instance, there is a question involving the title to some property which may have been stolen but which cannot then be checked, after verifying his identity, they would ordinarily release him.¹⁵⁶ On the other hand, if there was a report that the item in his possession had been stolen, if he does not have a fixed abode or if he is a recidivist, he will usually be taken before a judge to secure an order to arrest.

Search. A search is conducted of every person who is placed in a cell, including drunks. The search is made in a private room where at least two men are present, in case the searched man is armed. All items are

¹⁵⁵ For comparison with similar American attitudes, see Robinson, A Proposed Study of Chicago Police Department Arrest Procedures to Determine the Proper Use of Summons and Notice to Appear, XLV CHI. BAR RECORD 434, 435-440, note 10 (1964).

¹⁵⁶ There is a regulation in at least one major police department that the detective division investigates and closes all cases except petty offenses and Antragsdelikte. The uniform branch, in cases of the more serious offenses, merely furnishes a report to the detective division, which carries on from there. Therefore, in any case to be handled by the detective division, it is they who make the release decision.
removed which could prove dangerous to himself or to others. If he is being held for a criminal case, all possible evidentiary matter is taken away. Where it involves a drunk taken in to sober up, only his dentures are removed. The police have no right to take his money or papers. For the protection of the police, his money is counted in the presence of witnesses.

Where the offense is such that a search of the suspect’s residence or other premises is appropriate, such search is accomplished while the man is held at the station. Thus, the period of detention is tied to the time necessary to complete the search. He would be held in such a case under section 127-II. There is “danger of delay” if the police must seek a search warrant in that he might hide the evidence in the meantime.

**Interrogation.** Although legally required to give information only about his personality and not about the offense itself, in practice this right to remain silent is rarely taken advantage of. “It seldom happens in our country that a person arrested will refuse to answer the police. He usually has the feeling that it will improve his situation if he answers.” (Attorney) The procedure itself is conducive to the giving of statements.

If someone is seriously hurt and the man refuses to give information about the act he could be taken before the judge. He need not give this information to the police but he must give it to the judge. They would say, if you don’t want to say anything before the police officer, then we will have to bring you before the judge. You have a choice. There’s always a judge in charge but if it’s nighttime then he must stay at the police station because there is a danger that he will interfere with the investigation by speaking to witnesses or hiding evidence. But this procedure is seldom used. (Police)

This view of the law, of course, is inaccurate. But the practice will naturally have its effect on the right. Even the normal procedure will make the advantages of giving a statement overwhelming.

We call the judge and say we are bringing around a man in our car; he is not apprehended; he refused to talk to us but he is willing to talk to you. Or maybe, you should try to hear him; maybe he talks to you. If the man refuses to come along, then they would have to apprehend him in order to bring him before the judge or they have to let him go and get a summons from the judge for another day. Often you bring him before

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157. A search of the suspect’s residence is made in all cases of larceny; even in the case of a minor theft from a street vendor.
a judge and the judge asks what happened. And then he can talk or he can refuse to talk.\textsuperscript{158} (Police)

If he is called up before the police department, we can take care of his working time; if he says I work up to 5 o'clock; please, can you make it at 6 o'clock in the evening—that can be arranged. If he is called up by a judge, it will be in the morning, and that way he loses work. It's more trouble to go before a judge. The big percentage of people who make a statement before the police is largely due to the fact that they are not informed enough that they don't have to make a statement. If you arrest an attorney or a student of law, he usually says I don't want to make a statement. There were a number of articles in the press saying that nobody is obliged to make a statement before the police and still the biggest percentage make a statement. If he refuses to make a statement it throws a certain light on the case; the judge might think he has something to hide. We have no complaints that they are badly handled by the police and I would say that if the police handle a man good, he says, all right, they handled me good; I will give them a statement. In criminal cases, people make a statement in 99\% of all cases. (Detective official)

Formerly, during the interrogation by the police, attorneys were not permitted to be present or to be in communication with the subject.\textsuperscript{159} A police captain, when asked what was done if the accused asked for an attorney during the investigation, responded: "He has no right to one but we do not oppose him. He pays for the telephone call. We go on asking questions until the lawyer comes. If he answers them, that is his problem." (Police) The officer is speaking only about the less serious offenses about which the uniformed branch may interrogate.

Investigation of a Complaint

The general principles outlined for the case \textit{in flagrante delicto} are applicable as well to the case where an offense is brought to the attention of the police some time after it is alleged to have occurred.

Where the offense is minor and there is insufficient evidence to form the requisite suspicion or the situation is unclear, several informal means are used to question the suspect. The police may go to his home or they

\begin{footnotes}
\item[158] A complicated fact situation resulting in conflicting statements will not mean that the person will be taken before a judge. The contradictions are included in the statements and left to be cleared up at the trial.
\item[159] At the time of this interview, the reform requiring a caution was still in the proposition stage. One police official remarked: "It depends on the way and the form in which you say it. You could, by saying it, make him talk." It was to counter such circumvention that the German authorities wisely required the caution be printed.
\end{footnotes}
may telephone to ask that he come to the station. There is also a common practice to send a "little summons," a special form requesting him to appear at the police station. Such a note is sent by ordinary mail and may say: in the matter of so and so, you are requested to appear at such and such a station at a stated hour on a certain date. If he does not respond, the police officer is sent out to see him. If he does not come in after one or two letters, the police may look into the matter more closely to determine if there is reason to arrest.

If no reason to arrest is found, they will have exhausted their power and they will send the file to the prosecutor who will ordinarily apply to the judge for a summons.\textsuperscript{160} (162) Such a summons states that if the person does not respond voluntarily, he can be brought in, by a police officer, to appear before the judge.\textsuperscript{161} What has been said, as to procedure for the defendant, applies equally to a witness except that although a witness need not give a statement to the police or prosecution, subject to certain immunities, he must give evidence before a judge.

Where the investigation by the police reveals that a charge should be preferred, but no apprehension is considered necessary, the file is sent to the prosecution which will handle the matter thereafter. There is no formal charge signed or prepared by the police and no person formally presses the charge.\textsuperscript{162}

Where the conditions for arrest defined by CCP, section 112 are believed by the police to be present, they apprehend the man and proceed to interrogate him as previously described.\textsuperscript{163} If they wish the man held beyond the day following the arrest, they request an order to arrest through the office of the prosecutor. There are some circumstances where the police may wish an order to arrest prior to the apprehension.

\textbf{Order to Arrest.} It is the detective division rather than the uniformed force which will seek the order to arrest.

The uniformed officer usually arrests [apprehends] the man because when he takes up a case it is either a case which makes

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160. A police official stated that no such procedure was used for defendants. "It is no use because the defendant is always free to lie to the judge if he wants to because nobody expects him to incriminate himself. No one can expect a person to say, 'Yes, I killed the man.'"

161. If he does not appear in response to the summons, the judge can issue an order to appear; but this is not an order to arrest, which may be issued only pursuant to CCP 112.

162. Nevertheless, the police officer who activated the accusation remains legally responsible for it.

163. Apprehension may occur even after the original release, and for reasons other than those attaching to the offense to be charged. A man accused of a stabbing confesses and after two hours of questioning is released. Two or three days later the police are informed that some weeks before the crime was committed, he told another person that he intends to join the foreign legion. He is then apprehended.
\end{flushleft}
it unnecessary to take the man into custody or if it is necessary, it must be done at once. We, as uniformed officers, hardly get any orders to arrest because if that is necessary the case goes to the criminal investigation department and they get the order. Where there is time to get the order, there is also time to take the case to the criminal investigation department. (Police)

Orders to arrest are ordinarily requested

... to investigate a big fraud case when we feel that we can only continue our investigation if we have the man in jail. We give our findings to the judge and advise him to issue the order to arrest because the suspect can talk to witnesses or he can destroy some evidence. The case arose not from his being caught in the act but through investigation. There is no danger in delay because he was always free and we say it is better to go to the judge for an order. Sure we can arrest the man and bring him before a judge and leave it to him to decide whether he will issue the order. It doesn’t happen often in terms of all the cases. Mostly, the orders are issued afterwards. Most of the people taken into custody are caught in the act or just after the act. (Police official)

Some detectives pick up the man and others say, I will give it to the judge and he can decide whether he will issue the order to arrest. Mostly, the handling is a tactical matter. Before we do anything in such cases we have a conversation with the prosecutor that must prosecute the case and ask should we pick the man up or ask for an order to arrest because it is this prosecutor that must prosecute the case so we want to work with him so he has the best opportunity for a good prosecution. (Chief of detectives)

When the police act under an order to arrest, they continue to investigate the case and to interrogate the accused just as if he were apprehended under CCP, section 127. They must bring him before the judge within the same period of time, that is, within one day following the execution of the order to arrest. (114b(1)) The police, however, report to the judge as soon as the accused is in custody and the judge will indicate when he wishes the man to appear before him. Necessary interrogation is continued until this point.164

However, even under former law where an order to arrest existed

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164. It was indicated in another quarter that when the police act pursuant to an order to arrest, they are acting on an order to bring the man directly to the judge and therefore there is no right to hold him for interrogation. The procedure described in the text seems closer to practice.
before the apprehension, the accused had a right to see his lawyer from the moment of his arrest under that order, whereas no such right existed where the apprehension was under CCP, section 127.\textsuperscript{165} Thus, the right to counsel began with the issuance of the order to arrest.

**PREVENTIVE MEASURES OF THE POLICE**

The power of the police to take preventive measures to avoid the commission of crime is extensive.\textsuperscript{166} The overriding concept is that of public order and safety.\textsuperscript{167} Here, we will examine the actual use the police make of certain of these powers, specifically those to do with the right to stop and identify a suspicious person.

The state law giving the power to stop\textsuperscript{168} is

\[\ldots\text{very frequently used. It is one of the main duties of the police, their daily duty. This law is applied only if no other law is applicable. If 127 doesn't entitle the officer to stop the man, then he is entitled to do it under this law as a preventive measure. (Police official)}\]

Even though the degree of suspicion does not approach a strong suspicion, the police may act under the "police" or state laws. What are "dangers threatening public order and safety" is pretty much for the individual policeman to determine.\textsuperscript{169}

One police manual lists certain matters for which identification may be required.

To control a suspicious looking person or tramps, or to secure civil claims later on. If there is a special section of the city where criminals are known to congregate, vagrants, girls around military barracks, identification may be required. (Police official)

The officer must have a reason to ask for his personality. If he looks like a tramp or a person described in a police rogue's gallery, that is enough. (Police official)\textsuperscript{170}

An example was given to a police official of a man poorly dressed seen

\begin{itemize}
  \item \textsuperscript{165} Such access to counsel in the case of the order to arrest may have played some role in the police decision to utilize the order.
  \item \textsuperscript{166} See pp. 247-251 \textit{supra}.
  \item \textsuperscript{167} See p. 248 \textit{supra}.
  \item \textsuperscript{168} See note 63 \textit{supra}.
  \item \textsuperscript{169} See p. 248 \textit{supra}.
  \item \textsuperscript{170} An example, out of personal experience as a patrolman, involved a person unknown to the officer, with dyed hair and walking around without having any obvious business in the area. "You must have enough to raise your curiosity. That would be enough but that is the least. You cannot go further." Other officers when given this example felt it was not sufficient reason to stop the man.
\end{itemize}
running from an unlighted alley at 3:00 AM in a region which had a history of burglaries.

If a man acts suspiciously, then they would take him to the station for identification. The police are entitled as a protective measure to identify such a person if there is enough reason to be suspicious. First, because the region is such that burglaries have taken place and there is no reason why such a person at this time is running around there. There are three different points—it's not an arrest; it's only to take him to the station for investigation; there is the look of the man; then his behavior; then what he carried with him, a sack or something like that. (Police official)

Whether the man is released at the scene after being stopped or is taken to the station will depend on the case. For the above example, it was said:

They bring him to the station to find out whether he is sought for some offense. Even if he identifies all the way on the street the policeman tries to find out if there is anything for which to hold this man . . . because he was the only man on the street. (Police official)

In a simple matter, the man is checked by car radio from the spot. During the day the registration office is open and this takes only a few minutes. If there is any doubt that the suspect has given his correct name and address, they may place him in a patrol car and take him to his supposed residence in order to obtain his identity card or to find someone to identify him. In some instances a patrol car, in that area of the city where the residence is to be found, is sent to investigate.

The period of detention may vary according to the difficulty of identification. For a local person, it may take from a half hour to two hours and even for someone from another city in Western Germany it should not take more than two or three hours. If identification cannot be made within a reasonable time and there is no charge, he is released. If it appears that he has given false or incorrect information, he can be called in or apprehended under PC, section 360(8), making it a federal offense to give "erroneous information" to a police officer. Unless some charge develops out of the investigation into his identity, he is released without being brought before a judge.

171. Because this office is often in the same building as the main police station, even at night, when the office personnel are not there, the apprehending police may call the main station, which sends a man to the office to check the suspect's file.

172. If it is a person from outside the city they will bring him to the station because a teletype report must be requested from the city.

173. See note 64, supra.

174. Each person who is taken to the police station and not charged with a criminal
To preserve the public order and safety, the police are also called upon to deal with certain classes of persons whose conduct is not essentially criminal but who, by their state, represent some disturbance to the social order.

Vagrancy, Drunkenness and Venereal Disease

Regulation of the problems of vagrancy, drunkenness and venereal disease reflects the mixed repressive and preventive function of the police. Such problems are substantially handled as offenses against the public order and safety rather than as criminal offenses.

Procedure as to Vagrants. To “move about as a vagrant” is a petty offense. (PC 361(3)) A vagrant is a man “without a residence, who lives in cellars and sleeps on park benches and goes from house to house begging.” (Police) If the police suspect vagrancy, they ask for the man’s residence. If he is unable to give one, then he is taken to the detective division which issues an order stating that he must find a home and work within a certain time—one or two weeks. After receiving the order, he is released. If he is picked up again after the time specified and the order has run, he will be apprehended and taken before a judge who will immediately try him and will probably fine him. If he is brought before a court for vagrancy several times, he may be sent to the workhouse. One police official stated that the results under this system are not effective in changing the way of life of these men.

Procedure with Those Found in State of Drunkenness. Public drunkenness is not an offense, but the police may act either under the penal code, if the person is found committing some petty offense such as endangering traffic while in the state of drunkenness, or he may be taken in for his own safety as an offender against public order. In the latter case there is no apprehension; it amounts, nevertheless, to a detention against his will on the assumption he no longer has a will at his disposal.

offense is given a form setting forth his right to file a complaint against the police for illegal detention.

175. This power has been delegated to the police by an official of the municipality.
176. If he was released for later trial, it is said that they would not be able to find him again.
177. Though drunkenness is not an offense: "Anybody who succumbs to gaming, drunkenness or idleness to such an extent that he falls into a state in which he requires the intervention of the authorities in order to obtain the assistance of others to support him or those for whom he has a duty to care" is guilty of a petty offense. (PC 361(5)). Any person sentenced to a jail term as a result of committing such offense is: “to be confined in a work house, in addition to punishment, if necessary to make him work and to condition him for a lawful and orderly way of life.” (PC 42d(1)).
178. In the State of Hesse, the law provides: “The police is authorized to detain a person a) in order to save him from a present danger of life or limb provided that the person is in a condition excluding his full command of will.” Para. 17a, law of Nov. 10, 1954, Federal Law Book at 203. Cf. with statute, note 62 supra.
If he has some relatives, you bring him home and don't take him to the station. If he can't talk at all or is unconscious, he is taken to a hospital so the doctors may look at him to find out if he is not even drunk. If the doctor determines he can be put in jail, he writes out a statement and then we take him in police custody. He stays here till he is sober again. That may be a couple of hours and then he is released. That's the end of it as far as he is concerned. Unless he has committed some other offense, he would not be brought to court.179 (Police)

He is usually kept in custody until the taverns are closed. A report is sent to the health department rather than to the prosecutor. Even if there is a charge to be preferred growing out of the drunkenness (such as endangering traffic), he is not taken to court because the matter is handled by penal mandate.

Venereal Disease. A somewhat similar system is used in detection of venereal disease.180 A suspected person may be called in for a physical examination; if the person does not go voluntarily, he or she can be brought in by the police, usually at the direction of the health authorities.

Individual Cases181

1. Upon failure to pay for food purchased in a restaurant (PC 370 (5)), the suspect was kept in custody by the owner. He refused to give his name to the police and he was taken to the station. There he gave his name but refused to make a statement and he was released. The time of the release is not recorded.182 The offense is an Antragdelikt but the case continues because, at first, it is treated like any other case and if later on the culprit can convince a judge that he was in need of a meal, then the judge will release him.

2. A man suspected of going hunting without a license (he had been caught several times before) was found driving on a private approach to the hunting grounds. Information was taken at the scene. This is a petty offense which is handled as a penal mandate.

3. A man was found driving a truck taken from his employer without authority. The truck was not licensed to drive on public highways and

179. The police try to get the equivalent of $1.25 from him for the use of the cell for the night.
180. See PAG 14(3), supra note 63.
181. The first 11 cases have been collected from police station day books in one city and the balance of cases from another city. Except for the brief recital of facts at the beginning of each case, accompanying statements are those of the police officer who translated the material. These cases appeared in consecutive order in the respective day books.
182. Unless time of release is specifically given in the text, it did not appear in the day books, which perhaps reflects a lack of concern with time of detention as a problem. See pp. 295-296 infra.
the man did not have a driver's license. The information was taken on the spot. They are not taken in, in all cases—only if really necessary. A statement was taken from a witness and from the accused who admitted the above facts. He probably had some identifying papers on him; otherwise we would have had to bring him in. Whatever calls are necessary are made from the scene. It is not difficult with a radio to call in.

4. A store detective apprehended two Italian workers who had taken merchandise worth about $1.50. The statements of the witnesses were taken and the suspects were brought to the station. They could not speak German so an officer who could speak Italian was called and their statements were taken and the information about their personalities checked. They were foreign workers registered here and they were then released.

5. A drunk is placed in custody until he sobers up. He refused to tell anything about his family, his occupation or what he earns. He is not obliged to. He is obliged to tell his name, date of birth, his address and if married, but nothing else. Such information is actually not necessary to keep the case going because if you know who he is, it can go on. We need the other information because the judge, even if it isn't a trial [this case will be dealt with by penal mandate], wants to know how much the man earns. If it is a poor man, he will not fine him as much as a well-to-do person.

6. A drunk was picked up at 11:30 PM and was released at 4:40 AM when he was sober. He is usually kept long enough so all the taverns are closed. They usually close at 1:00 AM, but some have extensions to 2:00 or 3:00 AM. In noncriminal cases like this one, the man gets a form which informs him of his right to protest against his being taken in. They sign this form. One copy remains in the station and the man keeps one copy. If he does not sign it, a notice is placed on it, "refused to sign." Getting the form doesn't alter any of the measures because it is already finished then, but they have the legal means to protest against it.

7. A fight between a man and wife in which she received a minor injury did not result in any action. She did not wish to sign an Antrag and therefore the police could do no more. They just made a report. They mentioned in the report that according to their point of view there is no public interest in pursuing the case. This goes to the public prosecutor. We are not entitled in Vergehen [minor crimes] to finish it ourselves. It has to go to the prosecutor and he decides.

8. A party disturbed the peace at 4:40 PM by crying out. The person involved was a vagrant who had been given an order with which he had not complied. But the time limit was not yet up. The police made
out a report about disturbing the peace and interrogated him. He told
about a woman who had sexual intercourse with her son. This report
goes to the detective department. He was not released because he could
not show a place where he lived. He was taken to the police jail and
from there he goes before a judge for disturbing the peace. It is minor,
but still if he does not have a home where he lives, we will have to hold
him. In this case the report must be finished because it must go along
with him. In other cases there is no time pressure. The officer takes his
time to finish the report. The judge usually makes his decision at once
because if he decides to sentence the man, the man will not be found
if he is released between the time he is taken into custody and the trial.

9. A man is found lying in an entrance to a building smelling of alcohol
and unable to answer questions. The officer thought he was drunk but
took him to the hospital.

10. A very complicated story of a fight between two men concerning
a girl, in which one man is alleged to have attacked the other with a
knife. The man allegedly attacked had a hand injury but it was not
clear if it was from the knife. The injured man was taken to the hospital
where a statement was taken from him and his girlfriend. The other
man was found and searched but no knife was found on him. He was
instructed to come to the station in four days to give a statement. He
was not immediately taken to the station, apparently because the police
doubted that he had used a knife. If he were found with a knife on him,
he would be taken to the hospital for a blood test to determine if he
had been drinking. It is necessary, in serious cases, to find out about
his responsibility at the time of the deed. Often they claim to be drunk
and didn’t know anything about it. The blood test shows whether they
were drunk. The CCP permits the blood test to be given. (81a-II) If the
test is against the suspect’s will, the officer that authorizes it must be
in the service for at least seven years. But there is no trouble when there
is a team working because there is always one member of the team with
that much service. Also, only police of a certain rank may authorize it.
When he is too high up, he is not entitled to authorize the test. In this
case there should be a public interest because it was at night and the
man was not known to the couple before the fight.

11. There was a fist fight between two men in a tavern. By the time
the police arrived, the men had gone. Since the police were able to as-
certain their identity from witnesses, there was no need to pursue them.

From Another Jurisdiction

12. A fist fight in a restaurant between two men resulted in minor
bodily injuries to one of them. The man without an identity card in his
possession was taken to the station and the other was released at the scene. The record doesn't show how long he stayed at the station, but the man lives near so it didn't take long. There are special police lines to a few cities but to other cities a long distance call is required.

13. A man damaged an automobile slightly by leaning against it. He was taken to the station because he did not have his identity card with him. He was checked out and released. If he had the identity card with him, they could still check by radio, although it depends on the circumstances. It was a minor crime. I don't think they would check by radio in this case.

14. A man was found drunk and walking the streets without a shirt. He was brought to the station and after checking his identity he was taken home by the police without charging him with an offense.

15. Two men were fighting with a third. The reasons for the fight could not be determined. Two men could not identify themselves and were taken to the station. The other was the victim of the assault and if he is the victim, you can figure he tells you the truth about his name and everything but people always have to show their identity cards. Probably the victim was not taken to the station because he had his card. Those taken to the station were later released. They live here.

16. An automobile was maliciously damaged and two persons near the scene were stopped because they were in proximity and were strangers. It could be possible that they did it, but there was no evidence. They were stopped under CCP, section 127 under suspicion of having committed the offense.

17. A father claimed his daughter tried to break into his house. The door was slightly damaged but the daughter was no longer there when the police arrived. They wrote up the case and told the father to see the criminal police.

18. An American soldier struck a waitress. The victim refused to sign an Antrag. The man was released to the American military police. If the victim doesn't sign the request, it doesn't make any difference at the moment. You still have to get the names and everything.

19. After a fight between two men in a restaurant, both were released at the scene because they had identity cards.

20. The police apprehended a man trying to escape from a restaurant he had broken into. A screwdriver and other breaking and entering tools were found on his person. They discovered that he had stolen money from the music box. He was brought to the station and turned over to the detectives. The police don't even take statements in cases like that.
In the course of interviewing nearly fifty persons consulted in this study, interviewees often expressed attitudes and opinions on the subject-matter discussed. Many of these comments gave valuable insight into the procedure and were utilized at the appropriate place. But some persons alluded to what they considered to be a characteristic of a group. A number of such expressions have been collected. These sketch the role and attitudes of and towards the police, the prosecutor and the judge. Quotations selected are representative of other similar statements but should not be taken as what "people" think.\footnote{For a much more detailed treatment of the German judge see \textit{Weyrauth, op. cit. supra} note 4.}

\textbf{The Police in German Society}

Attitudes of Germans toward their police is striking.

The police have no discretionary power. (Prosecutor)

The discretionary power of the policeman is so small, so narrow that you cannot compare it to the United States. It is not generally possible for the policeman to make any decision in these cases. [Referring to on the street arrests—127.] He is just as we say, the long arm of the prosecution. The policeman has the choice of arresting the man only if there are the reasons of 112; he believes the man will flee. (Doctor of law—researcher)

The police need only state the facts; the decision to arrest or release is made by the judge. The police have no power of discretion. In matters of criminal procedure the German police are strictly under the control of the prosecutor and the judge. Crimes in the criminal law are so narrowly defined that no change of classification, made by the police or the judge, is possible. (Judge)

The German idea of a policeman narrowly bound by the law and without discretion does not, at first, appear to square with the American concept of discretion. A German police officer, who can apprehend or not, seems to have more discretion than his American counterpart, who often has the legal duty to arrest in all cases where there is reason to believe an offense has been committed. Whether the German policeman may provisionally apprehend is determined by the presence of "conditions for the issuance of an order to arrest." Before apprehending, he has a duty to determine if conditions listed in section 112 actually exist. Unless they exist, he cannot apprehend.
This point of view is no doubt colored by the emphasis placed on the role of the judge who actually issues the order to arrest. The police officer is the conduit through which this decision is obtained. Though the police officer, out of necessity, often acts independently of the prosecutor in provisional apprehension situations, he is thought of as the "arm of the prosecution." One police official stated, however, that this was incorrect and that the police were, according to law, the "assisting authority" of the public prosecutor. The term actually used in the law is "auxiliary officials." (COL 152) He is therefore said to lack discretion.\(^\text{184}\)

The German policeman is also thought of as incorruptible and very conscientious in carrying out his duty. Bribery of police officers is equally unknown and unthinkable to a German citizen.\(^\text{185}\)

Although there was no profound attempt to determine to what extent the police adhere to constitutional guarantees, all interviewees agreed that the suspect was always delivered to the judge within the legal time limit.

The restriction of the 'following day' is absolutely observed. Police or guards of the prison would be accused of deprivation of liberty if the suspect is held longer than the following day. I never heard of any case where this restriction was not followed. (Judge)

Only once was this questioned. A young legal scholar said he was "suspicious" that the police will

... say that we tried to contact the judge as soon as possible but they didn't have time. They will not hold the person for days. But they will perhaps go one extra day to help investigate the

\(^{184}\) The example suggested of actual discretionary power is a police officer who sees an automobile going five miles over the speed limit, and who is legally competent to decide not to charge the violator. Compare this with the definition of discretion in Remington & Rosenblum, *The Criminal Law & The Legislative Process*, ILL. L. FORUM 481, 485 (Winter, 1960). "Where the substantive law is ambiguous there is an opportunity, indeed a necessity, for the exercise of discretion by enforcement agencies and courts as to what conduct ought to be subjected to the criminal process." This is especially applicable to hazy concepts in procedural provisions such "reasonable grounds to believe" and "strongly suspected of the act." But see the United Nations statement: "Mandatory arrest and detention are unknown. . . . Whether a suspect is to be deprived of his liberty . . . is always a matter of discretion for the judge. In the case of preliminary apprehension, the discretion lies with the arresting person." UN-1, *supra* note 12, at 15. See also WEXRAUTH, *op. cit. supra* note 4, at 240.

\(^{185}\) A lawyer in training stated that if he were stopped for a traffic offense he would not even offer a cigaret to a German policeman. Such behavior might be seen as an attempt to curry favor. One very famous case of bribery involved a prison guard who each night allowed a prisoner out so that he might visit a girl friend. The compensation was favors from the girl friend's girl friend. With reference to judges, a current joke has it that an attorney wishing to influence the decision of a judge sent a gift in the name of his opponent.
case. Judges are rather busy in this country because they have to bother with too many minor problems and reading all these big files. You can ask a policeman but he will surely tell you that never happens. This is not even an opinion; it's only a suspicion because I know the behavior of German policemen—they get into this psychological feeling that they know the law and what they are allowed to do. They still handle cases just on the borderline of what is allowed sometimes but you cannot compare it at all to the old Prussian style of l'Etat, c'est moi and the State comes first.

However, when the question was posed whether the police might change the records to indicate a time later than when the man actually was brought in, he firmly stated that the police would never falsify records.

On reading the above statements a police official commented:

It is absolutely true what the judge says. No policeman will detain any person longer than necessary or longer than permitted because if he keeps him in his jail cell for more than the necessary time he commits a heavy crime and will be fired immediately and get a jail sentence of at least three months—not less. (PC 341) I know of no case of such a prosecution because they don't have to. What that man says [the prior quotation] is absolutely nonsense.

If made in the United States, the statement concerning prosecution of police who hold a prisoner beyond the time permitted by the law as being an effective deterrent to such action would be considered naive. In Germany, it is taken seriously. The role of the prosecutor is to supervise such matters; it seems unquestioned that he does so conscientiously.

The police do not think of themselves as solely an agency for crime detection. "Our job is to protect the people, to warrant the safety of the city. That means we work not only on criminal cases but we try to prevent any danger to the people and to maintain the public order. That's our first job."

It was constantly emphasized that the function of the police was to seek the truth. "The police duty is to find out everything against and for the charged man. That is most important because in the States you have only to charge him, and here you have to find all facts even if they are for him." (Police)

The police seem to be particularly sensitive to and responsive to public opinion. When asked about street search in minor offenses, it was said that they do not search on the street "... because you can't molest a man too much in public; we would be criticized very much if we did it on the
street. People wouldn’t go along with that. It just can’t be done.” (Police) There was also some resentment shown concerning criticism of the police for using violence to disperse a rioting crowd:

Nobody says what they should have done. Now what about the police in other countries, even in America? We see it on television or on the films. They are not very soft and nobody bothers about it; but if we do it, well, it’s all wrong.186

The Prosecutor and Judge in German Society

The position of the prosecutor in the German system has been well described as being “a body without a head. They don’t even have feet. They have to borrow the feet of the police.” The prosecutor has no investigative staff. His job is solely to prosecute. When he needs information to do this, he must call on the police.

Prosecutors are appointed under a civil service system as state employees and as one subject stated, they remain state employees all their lives unless they are caught stealing silver spoons. The same system applies to judges.

A German attorney was asked if the effect of the civil service system was to lower the prestige of the German judge in comparison with an American judge (as a German judge had suggested).

The prestige of the German judge is much lower than that of the American judge but I do not concur that this is the effect of the civil service system. This results from our legal system which calls for too many judges. We open all the appeals and all the possibilities for the citizen. We need so many judges that we cannot have an elite. An elite is necessarily small. The large number does not permit judgeships to be given only to top people. It also prevents them from being paid accordingly. A tremendous army of judges has the inherent weakness that only average lawyers are appointed, average from a professional viewpoint, knowledge of the law and so on. But, likewise, what we call courage to say ‘no’ to a superior where it is deemed necessary. A majority of judges have it. But if there are say 5 or 10% appointed who do not, that decreases the prestige of the entire group. Yet 60 years ago they had high prestige. There were not so many and at that time only the top 5% of the young lawyers who had just completed their approximately 8 years of legal education could be selected for judgeships. So it is really a loss of prestige rather than a lack.

186. Complaints of this sort are not typically German. Almost the same words were used by police interviewed in England and in the United States.
The lack of resistance by the judges to the Nazis has also to do with it. The usual judge carried on his normal duties without protesting—and even if he protested it was a protest which in all likelihood could not lead to severe consequences for his own person. They said, what can you do? And they talked with their colleagues but they didn't take any action.

Had we had a small number of judges, a really elite group, who would have dared to stick their necks out, regardless of the consequences, things might have been different. But in the large number it is inherent, there are a certain number of opportunists.

Pay is also a factor. A municipal and state district court judge are paid the same, 1200 DM per month ($300). A highly qualified worker earns about 800 DM ($200).

In one part of Germany, the careers of judge and prosecutor are mixed. Every prosecutor was a judge for a certain time or vice-versa. It was said, elsewhere, that out of every twenty assistant prosecutors eight or ten have served as a judge, while the others have always been prosecutors and of one hundred judges, only ten or fifteen may have served as prosecutors.

There is little, if any, difference in the prestige of a prosecutor and judge.

The prosecutor is not someone who is supposed to obtain a sentence. He, together with the court, is the arm of the State to establish justice; if from the trial and the testimony of the witnesses, he gets the impression that the defendant is not guilty or that the proof is not sufficient, then he asks that the defendant be found not guilty. If he asked for a guilty verdict even though he was not quite convinced that the proof was sufficient, that would be a very bad thing; he would be subject to disciplinary action. That is the German system. That is why he has practically the same prestige as a judge.

The role of the prosecutor as an arbiter, who, not being an advocate of either side, is a seeker of the truth, was challenged by one defense attorney.

In American law, these enemies, these adversaries are on equal terms. Here they are unequal. Go to the court in ___ and ask to be shown where the public prosecutor and where the lawyer sits. This room has been made in the last five years. You will find that the prosecutor has a seat two and one-half inches higher than the lawyer and in most cities he sits at the same table as the judge.
The prosecutors try to do their best. If they find a point that will prove a man is innocent, they will go after this point, but they don’t look for it. They don’t do it with bad intention. They work on 200 cases per year so they cannot follow up the points for the defense with the same eagerness as the points for the accusation.

I would not say they are always on one side. As a lawyer I am not always on one side. Sometimes I have a duty to tell my own client that you are a bad man and the State has a right to put you in prison. I sometimes tell people after accidents on the road that I would not like to meet you on the highway. And I tell them that if they would like a lawyer that would like to meet them on the highway, to please take him. If you do agree, I can say that you are a bad man but you intend to be better and your wife is bad and made you bad or you have five children and that’s the reason why you stole. It is better to bring a man to the judge who sees that he has done injustice.

Likewise, the prosecutor sometimes comes to the fantastic idea that the man they have accused could be innocent. I don’t like to see a man who really has done wrong acquitted and I don’t know any prosecutor who likes to see a man condemned who he feels is innocent.

They try to do their best but it is asking too much. You cannot ask the prosecutor to find out if all people are innocent. Also, he has worked on one side and does not see the problems of the other side. The other thing is that the prosecutor can only make his judgment on the basis of the police file. You won’t find a policeman making files to prove that a man is innocent. He wouldn’t start if he thought the suspect innocent. Once he has started he wants to bring out that the man is guilty. It is very convincing how it is written down in the files.

CONCLUSION

Orderliness and systematization have often been observed as being characteristic of German law and society. Arrest and prosecution are no exception. The traditional role of German courts and prosecuting authorities has been one of paternalism, reasonableness and thoroughness. On the whole, these are considered more important in protecting the rights of the accused than are the competing adversary interests of lawyer and prosecutor.

Nevertheless, as the German lawyer’s comments (at pp. 298-299) on the

role of the prosecutor makes clear, while there is perhaps more comprehension of that role and more expectation of fairness on the part of the prosecutor than would be acknowledged in the United States, there is likewise a healthy distrust. Such statements should put the comparatist on notice that he must not be fooled by system denominations like "accusatory" and "inquisitorial" which may mask actual adversary combat.

Even so, the study reveals important differences in outlook. The necessity to register personal information with an administrative agency, the right of the police to stop and detain in order to check identity, here considered as civil liberty problems of great moment, are not thought of as such in Germany. On the other hand, Germans are shocked by a bail system in which release depends less on the gravity of the charge than on the size of the pocketbook. To allow a petty thief to remain in jail while a man accused of armed robbery walks the streets seems irrational.

German law has found practical solutions for problems of arrest and prosecution. A requirement that prosecutions be started by physical custody of the accused is a peculiarly American institution. Only a small percentage of German accuseds are hauled into court by the scruff of the neck. Many are prosecuted without being apprehended. Others, although provisionally apprehended, are either released after brief detention on the street for purposes of obtaining identifying information or after a few hours at the police station. Similarly, vagrants and drunks are not often brought to court unless they have committed some other offense. In another instance (Privatklage and Antragsdelikte), the State has carved out an area of private conflict in which it has declined to interest itself. Included are most petty fights between neighbors and spouses that fill our municipal courts. The State will, however, provide a forum if the injured party feels strongly enough to initiate a criminal proceeding.

The monitoring factor throughout is the principle of proportion—a societal reaction proportional to the hurt received and the danger created by the offender. In the words of one respondent, the police have a right to do what is necessary, but not more than what is necessary.

That neither the German nor American system has functioned with complete satisfaction for the society it was designed to protect is evident from the changes simultaneously taking place in each. While it has been observed that the Germans are moving in the direction of Anglo-American

188. "The requirement that all persons register with the administrative authority has nothing to do with criminal procedure and nothing to do with civil liberties. It is only a duty of administration." (Judge) This approach is not limited to Germans. A Belgian friend who had a legal claim against an American was aghast at the difficulties in locating him. No agency could tell her to where he had moved.
concepts of criminal procedure, continental notions, particularly in the arrest and detention area, are equally relevant in our search for criminal justice.189

189. Certain steps have already been taken in that direction. Two bills which reflect European influences are now pending in Congress. One bill, as an alternative to bail, allows judges to release accuseds on their own recognizance, in custody of a probation officer or other person, during weekends or daylight hours. Credit would also be given for time spent in pretrial detention. Another bill would "deny pretrial release to persons who might endanger the public welfare by committing further crimes, intimidating witnesses or destroying evidence." It is said that "a rash of crimes committed by persons out on bail has caused widespread interest in preventive detention here." New York Times, Sept. 16, 1965, p. 30, col. 3.