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## JUVENILE JUSTICE IN GERMANY: THE TENSION BETWEEN PUBLIC OUTRAGE AND CRIMINOLOGICAL THEORY

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*Treatment of children, who are victims of the conditions in which they are living and children who have violated the law, is a reflection of a society's culture and value system.*

*Josine Junger-Tas*<sup>1</sup>

### INTRODUCTION

Until the U.S. Supreme Court's 2005 decision in *Roper v. Simmons*, it was still lawful to sentence a juvenile defendant to death in twenty American states.<sup>2</sup> In holding that the juvenile death penalty violates the Eighth Amendment, the Court questioned whether the main justifications that support the use of the death penalty in cases involving adult offenders, namely deterrence and retribution, can be achieved through the execution of juvenile offenders.<sup>3</sup> Specifically, Justice Kennedy argued that

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<sup>1</sup> Josine Junger-Tas, *Trends in International Juvenile Justice: What Conclusions Can be Drawn?*, in *INTERNATIONAL HANDBOOK OF JUVENILE JUSTICE* 505, 505 (J. Junger-Tas & S.H. Decker eds., 2006).

<sup>2</sup> 543 U.S. 551, 564 (2005) (noting that at the time of the decisions 30 states prohibited the use of the juvenile death penalty).

<sup>3</sup> *Id.* at 570–71.

the case for achieving the goal of retribution was weakened by the fact that their moral culpability was “diminished, to a substantial degree, by reason of youth and immaturity.”<sup>4</sup> With respect to the potential deterrent effect of the death penalty, the majority questioned whether juveniles would be “susceptible to deterrence” given juveniles’ diminished culpability and ability to think through the consequences of their actions.<sup>5</sup>

Despite the “progress” represented by the Roper decision, the United States continues to punish juvenile offenders more harshly than the rest of the world.<sup>6</sup> Following the Supreme Court’s decisions in *Graham v. Florida* and *Miller v. Alabama*, a number of states have abolished the sentence of life without parole for juvenile offenders.<sup>7</sup> Still the United States remains an outlier.

Although American courts impose juvenile sentences up to and including life imprisonment, according to research conducted by David A. Shapiro, at least forty countries around the world limit the maximum sentence imposed on juvenile offenders to ten years.<sup>8</sup> At the far end, twelve countries have a maximum juvenile sentence of twenty-years imprisonment.<sup>9</sup>

To explain the harsh treatment of juvenile offenders in the United States, scholars have typically identified a number of factors including: public support for punishment, cultural attitudes towards punishment, and rates of violent crime. Specifically, beginning in the 1990s, politicians substantially stiffened penal sanctions in juvenile cases riding a renewed wave of interest in the philosophy of individual responsibility and accountability. These changes paralleled a nearly 80% increase in violent crime related arrests of juveniles 17-years-old or younger that occurred between 1985 and 1995.<sup>10</sup> Consistent with this shift in sentencing philosophy, between 1992 and 1997, forty-seven states changed their sanctioning policies by expanding the sentencing options available to judges, increasing the severity of juvenile sanctions, and

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<sup>4</sup> *Id.* at 571.

<sup>5</sup> *Id.* at 571–72.

<sup>6</sup> See Barry Krisberg, *Rediscovering the Juvenile Justice Ideal in the United States*, in *COMPARATIVE YOUTH JUSTICE* 6 (John Muncie & Barry Goldson eds., 2006).

<sup>7</sup> Cara H. Drinan, *Juvenile Justice in America: We Can Do Better*, HUFFINGTON POST (June 13, 2015), [http://www.huffingtonpost.com/cara-h-drinan/juvenile-justice-in-ameri\\_b\\_7054254.html](http://www.huffingtonpost.com/cara-h-drinan/juvenile-justice-in-ameri_b_7054254.html) (stating that Delaware, Hawaii, Massachusetts, Texas, West Virginia and Wyoming have abolished the practice of juvenile life without parole, while other states have precluded the sentence for certain categories of juveniles).

<sup>8</sup> David A. Shapiro, *What’s Beneath the Graham Cracker?: The Potential Impact of Comparative Law on the Future of Juvenile Justice Reform After Graham v. Florida*, 24 *PACE INT’L L. REV.* 119, 139–40, 156 (2012).

<sup>9</sup> *Id.* at 140.

<sup>10</sup> Arrests for Violent Crimes by Age, 1970–2003, U.S. Dep’t of Justice (2004), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2028> (issuing FBI Uniform Crime Reports).

creating procedures to permit prosecutors to transfer juveniles to adult court.<sup>11</sup> Due to these changing political winds, juvenile incarceration rates rose dramatically during that same time period<sup>12</sup> and more juveniles were tried and sentenced as adults.<sup>13</sup> According to Jeffrey Butts' 1997 study, public fear of juvenile crime and distrust in juvenile justice led to a 71 percent increase between youths waived into adult court between 1985 and 1994.<sup>14</sup>

The most noticeable effect of that waiver is that, in many states, juvenile offenders may receive life without parole sentences.<sup>15</sup> Although the Supreme Court's decisions in *Graham v. Florida*<sup>16</sup> and *Miller v. Alabama*<sup>17</sup> led some states to eliminate that harsh sentencing option altogether,<sup>18</sup> juvenile offenders in Delaware, Iowa, Louisiana, Michigan, Nebraska and Washington may still receive a sentence of life without parole as a possible sentence for certain offenses.<sup>19</sup>

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<sup>11</sup> See e.g., Junger-Tas, *supra* note 1, at 511; PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT, AND CONTROL, JUVENILE CRIME, JUVENILE JUSTICE 5 (Joan McCord et al. eds., 2001).

<sup>12</sup> Malcolm W. Klein, *Thoughts on Juvenile Justice Systems and Research*, 9 EUR. J. CRIM. POL'Y & RES. 273, 275 (2001).

<sup>13</sup> Office of Juvenile Justice and Delinquency Prevention, *Young Offenders: What Happens and What Should Happen*, NATIONAL INSTITUTE OF JUSTICE 2 (2014), <https://www.ncjrs.gov/pdffiles1/nij/242653.pdf>.

<sup>14</sup> JEFFREY BUTTS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 1985–1994 (1997); see also Shelly S. Schaefer & Christopher Uggen, *Blended Sentencing Laws and the Punitive Turn in Juvenile Justice*, 41 LAW & SOC. INQUIRY 435, 436 (2016).

<sup>15</sup> *Juvenile Justice: Rethinking Punitive Approaches to Addressing Juvenile Crimes*, DEVELOPMENTS (UNIV. PITT. OFF. DEV.), Jan. 2009, 6, 7, <http://www.oed.pitt.edu/Files/PDF/dev2009-01.pdf>. In some states, waivers are no longer required for juveniles who commit certain types of offenses or have reached a certain age. Prosecutors may file these cases directly into adult criminal courts. See Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, OFF. JUV. & DELINQ. PREVENTION, Sept. 2011, 1, 9–10, <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf>.

<sup>16</sup> 560 U.S. 48, 82 (2010) (holding that it is unconstitutional to sentence someone to life in prison without the possibility of parole for a non-homicide crime committed under the age of 18).

<sup>17</sup> 565 S. Ct. 2455, 2468–69 (2012) (holding that judges must consider a number of factors before sentencing a juvenile to life without parole including the defendant's immaturity; family and home environment; family and peer pressures; an "inability to deal with police officers or prosecutors" or their own attorney; and "the possibility of rehabilitation").

<sup>18</sup> See Sarah Alice Brown, *Trends in Juvenile Justice: State Legislation 2011-2015*, NAT'L CONF. OF ST. LEGISLATURES 3 (2015), [http://www.ncsl.org/documents/cj/Juvenile\\_Justice\\_Trends\\_1.pdf](http://www.ncsl.org/documents/cj/Juvenile_Justice_Trends_1.pdf) (noting those states include: California, Hawaii, Massachusetts, Nevada, Texas, Utah, Vermont, West Virginia and Wyoming).

<sup>19</sup> *Id.*

The U.S. Supreme Court's acknowledgement that juvenile offenders are different from adults in their cognitive development, impressionability, lack of restraint, and imperviousness to deterrence<sup>20</sup> has begun to impact the decision-making of high-level state courts. In a recent decision of the Supreme Court of New Jersey, the Court unanimously held that state legislators should "consider enacting a scheme that provides for later review of juvenile sentences with lengthy periods of parole ineligibility."<sup>21</sup> Despite some evidence that sentencing practices at the state level have begun to reflect the fact that juvenile offenders are different from their adult counterparts,<sup>22</sup> the United States remains an outlier when it comes to the punishment of juvenile crime. While one could point to a number of cultural differences between the United States and comparable democratic regimes, two reasons stand out. First, in the United States, popular opinion, in particular media coverage of sensational crimes, sharply influences legislative efforts to shape sentencing practices.<sup>23</sup> Second, prosecutors in the United States possess an extraordinary amount of power, and have traditionally used that power to pursue retributive sentencing practices.<sup>24</sup>

The German criminal justice system has often been held up as the antithesis of the American system.<sup>25</sup> While popular opinion and public participation have made the American system responsive to the fluctuations in popular sentiment, an idealized portrait of the German criminal justice system emphasizes that the law is objective, impartial, and grounded in neutral legal standards which are impervious to political influence.<sup>26</sup> Rather than operate as political players, German prosecutors have been portrayed as faceless bureaucrats who operate as legal scientists objectively applying the law to the facts of a case.<sup>27</sup> Indeed, if we examine the German criminal justice system, the comparative leniency of juvenile sanctioning practices diverges starkly with American practice. In a system predominately oriented towards promoting child development and education, even when juvenile offenders commit violent crimes, almost 60

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<sup>20</sup> Katherine Hunt Federle, *The Right to Redemption: Juvenile Dispositions and Sentences*, 77 LA. L. REV. 47, 65–66 (2016).

<sup>21</sup> State v. Zuber, No. A-54-15, N.J. 076806, at \*39 (N.J. Jan. 11, 2017).

<sup>22</sup> *Id.* at \*38, n.4.

<sup>23</sup> Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 474 (2006).

<sup>24</sup> Cara H. Drinan, *The Miller Revolution*, 101 IOWA L. REV. 1787, 1793–94 (2016).

<sup>25</sup> See James R. Maxeiner, *What American Can Learn from Germany's Justice System*, ATLANTIC (June 7, 2012), <https://www.theatlantic.com/national/archive/2012/06/what-am-erica-can-learn-from-germanys-justice-system/258208/>.

<sup>26</sup> Beale, *supra* note 23, at 477; Shawn Marie Boyne, *Uncertainty and the Search for Truth at Trial: Defining Prosecutorial "Objectivity" in German Sexual Assault Cases*, 67 WASH. & LEE L.J. 1287, 1288–89 (2010).

<sup>27</sup> See John H. Langbein, *Land without Plea Bargaining*, 78 MICH. L. REV. 204, 210–12 (1979).

percent of cases involving offenders between 18 and 21 “are settled in juvenile courts.”<sup>28</sup> Although reports of violent juvenile crime have called into question Germany’s lenient treatment of youthful offenders, the maximum sentence that juvenile offenders can receive is a ten year jail sentence.<sup>29</sup>

German policy continues to experiment with new programs consistent with those goals of rehabilitation and education. The fact that Germany’s juvenile justice policy advocates the twin aims of promoting welfare oriented objectives while achieving justice has created a wide-ranging spectrum of sanctioning practices. These practices offer broad opportunities for prosecutorial discretion. In this Article, I show how locally developed responses to community crime problems have played a determinative role in defining the scope and boundaries of prosecutorial decision-making. In fact, in the implementation of juvenile law, it has been local practice, rather than the federal law, that has made the most visible imprint on case handling procedures. Ironically, in the area of German juvenile law, changes in the federal law have merely confirmed, rather than triggered, changes in practice. Although the federal juvenile code seeks to loosely enforce uniform sentencing policies, in contrast to the narrative that courts uniformly apply German law, stark local and regional differences in practice have developed. The inherent flexibility in juvenile sanctions has allowed local stakeholders to design and tailor policies which attempt to address particular, locally-defined, juvenile crime problems.

This Article presents a snapshot of the specialized nature of juvenile prosecution practice as well as the role of prosecutorial discretion in juvenile practice. I trace the emergence of diverse models of practice and show how those models reflect local and regional attitudes towards the character of juvenile crime. The evolution of distinct local practices poses an intriguing challenge to the premise that prosecutorial decision-making is truly objective, impartial, and grounded in neutral legal standards which are impervious to political influence. To set the stage for this inquiry, I begin by laying out the basic framework of German juvenile law and the ambit of discretion which it permits. I then explore the actual patterns of juvenile criminality and punishment using published statistical reports. In the Article’s core, I delve into prosecutors’ perceptions of the purposes of juvenile crime and actual sanctioning practices. This includes a discussion of decision making norms. Finally, the Article details the aims and practices of newly

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<sup>28</sup> Sean Sinico, *In Germany, Focus on Preventing Not Punishing Youth Crime*, DEUTSCHE WELLE (June 10, 2007), <http://www.dw.com/en/in-germany-focus-on-preventing-not-punishing-youth-crime/a-2810444>.

<sup>29</sup> *Id.*

developed fast-track programs and innovative “repeat offender” units established in some German cities. In the framework of that discussion I show how the latitude inherent in the law as well as the structure of management controls and workload pressures empower prosecution offices with the discretion to tailor prosecution policies to respond to community and political pressures.

## I. THE SCOPE OF DISCRETION IN THE JUVENILE JUSTICE SYSTEM

### A. *Defining the Scope of Juvenile Crime*

In the area of juvenile crime, three factors have defined the expansive extent of prosecutorial discretion. As a starting point, in 1923, the German legislature suspended the applicability of the principle of mandatory prosecution to the prosecution of juvenile crime.<sup>30</sup> As a result, it was initially in the area of juvenile crime, rather than in low level crimes where prosecutors enjoyed the widest latitude in their case disposition practices.<sup>31</sup> Second, the sanctioning strategy present in the juvenile law reflects a preference for “minimum intervention” in the life and upbringing of the child.<sup>32</sup> This policy in part reflects a strong belief that children lack the cognitive capacity to possess criminal guilt. At the core of modern German juvenile justice policy lays two convictions. First, juveniles under the age of fourteen lack the capacity to commit crimes.<sup>33</sup> Second, there is a consensus that crimes such as shoplifting and vandalism are normal adolescent behavior that children will eventually outgrow.<sup>34</sup>

Although the crimes set forth in the Code of Criminal Law (StGB) form the basis for defining the elements of juvenile delinquent acts, the investigation, prosecution, and punishment of juvenile delinquency is governed by a separate federal code of criminal procedure known as the *Jugendgerichtsgesetz* (JGG) or the Act on Juvenile Courts.<sup>35</sup> This special

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<sup>30</sup> Frieder Dünkel, *Juvenile Justice in Germany*, in JUVENILE LAW VIOLATORS, HUMAN RIGHTS, AND THE DEVELOPMENT OF NEW JUVENILE JUSTICE SYSTEMS 116–17 (Eric L. Jensen & Jørgen Jepsen eds., 2006).

<sup>31</sup> *Id.* Dünkel defines the concept of minimum intervention as preference for education-oriented measures rather than detention. Consistent with this policy, the primary purpose of juvenile officials is to function as agents of support rather than as agents of intervention.

<sup>32</sup> *Id.* at 118.

<sup>33</sup> Thomas Crofts, *The Rise of the Principle of Education in the Juvenile Justice System*, 12 INT'L J. CHILD RTS. 401, 401 (2004).

<sup>34</sup> SHAWN MARIE BOYNE, THE GERMAN PROSECUTION SERVICE: GUARDIANS OF THE LAW? 192 (2014).

<sup>35</sup> STRAFGESETZBUCH [StGB] [CRIMINAL CODE], §§ 13–21, *translation at* [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p0007](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0007) (Ger.);

code of procedure specifies the basis for holding young persons accountable under the law in accord with a graduated system of punishment that is primarily based on the child's age and development level.<sup>36</sup> The Act on Juvenile Courts establishes a two-tiered system of sanctions which aims first to respond to delinquency through educative and disciplinary measures.<sup>37</sup> Secondly, the code permits courts to impose more serious sanctions such as probation and imprisonment.<sup>38</sup> One can construe this two-tiered system as a compromise between "justice" and "welfare" responses to juvenile crime.<sup>39</sup> These competing twin objectives open the door to widespread differences in local practices. In part, the differences in prosecutorial practices are the product of different relationships that prosecution offices enjoy with the local police and a particular community's Department of Youth Service (*Jugendgerichtshilfe*).<sup>40</sup>

Under German law, there are three legal categories relevant to juvenile crime. First, the law treats children under the age of 14 as lacking criminal responsibility for their actions.<sup>41</sup> Second, juvenile offenders aged 14 through 17 may be adjudicated in juvenile courts if, at the time they committed a punishable act, they possessed sufficient moral and intellectual maturity to appreciate the injustice of their

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JUGENDGERICHTSGESETZ [JGG] [YOUTH COURTS LAW], §§ 5, 43, 45, translation at [http://www.gesetze-im-internet.de/englisch\\_jgg/index.html](http://www.gesetze-im-internet.de/englisch_jgg/index.html) (Ger.). In addition, the police laws in each state and the Police Service Regulation (*Polizeidienstverordnung*) (PDV 382) dictate police procedures for handling juveniles. The legal provisions which regulate the provision of Child and Youth Services are contained in the *Kinder- und Jugendhilfegesetz* (Child and Youth Services Act, KJGH); see Gabriele Gabriel, *Fast Tracking and Co-operation Between Police, Justice and Social Services – Crime as a Cause for Looking if Support is Required*, in PREVENTION OF YOUTH CRIME IN GERMANY: EDUCATIONAL STRATEGIES 14 (Arbeitsstelle Kinder- und Jugendkriminalitätsprävention ed., 2004).

<sup>36</sup> See JGG, *supra* note 35, §§ 2(1), 3, 54(1).

<sup>37</sup> BOYNE, *supra* note 34, at 192–93.

<sup>38</sup> *Id.* at 193; see also Frieder Dünkel, *Youth Justice in Germany*, Oxford Handbooks Online (2016), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-68?print=pdf>.

<sup>39</sup> Crofts, *supra* note 33, at 401.

<sup>40</sup> Dünkel, *supra* note 38, at 8–9. The mandate of this agency, which was established in the *Kinder- und Jugendhilfegesetz* (Children and Youth Services Act, KJGH) enacted in 1990, is to "support[] and protect[] children and young people, provid[e] them with socio-educational help and positive[ly] influence their living conditions." Bernard Holthusen & Heiner Schäfer, *Strategies and Organization of Youth Crime Prevention in Germany—the Importance of the Educational Approach*, in PREVENTION OF YOUTH CRIME IN GERMANY: EDUCATIONAL STRATEGIES 14 (Arbeitsstelle Kinder- und Jugendkriminalitätsprävention ed., 2004).

<sup>41</sup> StGB § 19 states that "[p]ersons who have not attained the age of fourteen at the time of the commission of the offence shall be deemed to act without guilt." StGB, *supra* note 35, § 19.

actions and to comprehend their behavior.<sup>42</sup> Finally, the law places young adults aged 18 through 20 in a separate category which allows courts to treat young adults as juvenile offenders if their offense was of a juvenile nature<sup>43</sup> or their development lags behind their peers.<sup>44</sup> The significance of this final category is that in cases where the court determines that an individual's personal development lags behind their peers, the court may adjudicate the young adult under the provisions of the juvenile legal code.<sup>45</sup> From a practical standpoint, because neither the criminal law nor the field of adolescent psychiatry can identify uniform eligibility criteria to support this categorization scheme, courts possess substantial discretion in making these assessments.<sup>46</sup> In an attempt to rectify this problem, Germany's highest federal civil and criminal court, the Federal Court of Justice or (*Bundesgerichtshof*), has attempted to clarify the statutory standard that makes young adult offenders eligible for adjudication in juvenile court. According to the Court, a young adult possesses the maturity of a juvenile if evidence demonstrates that "a considerable development of the personality is still to be seen."<sup>47</sup>

Because the juvenile justice system attempts to tailor sanctioning practices to the disparate development levels of young people, the law has enhanced the discretionary power of judges and prosecutors. The inherent ambiguity present in the assessment of the "juvenile" character of a crime as well as in a child's level of development has permitted wide ranging differences in whether or not courts apply the juvenile code to young people.<sup>48</sup> The fact that there are extensive differences in practice in how Section 105 of the JGG is interpreted raises the issue as to whether or not the statute's application satisfies constitutional requirements.<sup>49</sup>

The malleability of these subjective standards has led to some

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<sup>42</sup> See JGG, *supra* note 35, § 3.

<sup>43</sup> *Id.* § 105(1)–(2).

<sup>44</sup> JÖRG-MARTIN JEHL, CRIMINAL JUSTICE IN GERMANY 39–40 (6th ed. 2015), [https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Criminal\\_Justice\\_Germany\\_en.pdf?\\_\\_blob=publicationFile](https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Criminal_Justice_Germany_en.pdf?__blob=publicationFile). Section 105(1) of the JJA states that the juvenile law may be applied if: the overall assessment of the perpetrator's personality, taking account of his living environment, demonstrates at the time of the act he was still equivalent to a youth in terms of his moral and intellectual development. JGG, *supra* note 35, § 105(1).

<sup>45</sup> JGG, *supra* note 35, § 105, para. 1.

<sup>46</sup> Frieder Dünkel, *Juvenile Justice in Germany: Between Welfare and Justice*, in THE INTERNATIONAL HANDBOOK OF JUVENILE JUSTICE 225, 247–49 (Josine Junger-Tas & Scott H. Decker eds., 2006).

<sup>47</sup> Dünkel, *supra* note 31, at 138.

<sup>48</sup> Dünkel, *supra* note 46, at 249.

<sup>49</sup> *Id.*; see also CHRISTIAN BAREINSKE, SANKTION UND LEGALBEWÄHRUNG IM JUGENDSTRAFVERFAHREN IN BADEN-WÜRTTEMBERG 28–29 (2004).



interesting distortions of the law's intent. First, prosecutors are most likely to steer cases involving young adult offenders away from juvenile courts, not when the offense at issue involves a violent crime, but rather when it involves a traffic offense.<sup>50</sup> According to German statistics, 59% of young adult offenders who violate traffic offenses are prosecuted according to the standard "adult" rules of criminal procedure. The reason for this result is simple efficiency. As I discussed in the prior chapter, the Code of Criminal Procedure provides prosecutors with the opportunity to dismiss cases using the penal order procedure available under Section 153 StPO.<sup>51</sup> In these cases, prosecutors impose a fine without the necessity of an oral hearing.<sup>52</sup> Thus, when prosecutors want to simply impose a fine in a case involving a young offender, the most expeditious way to achieve that objective is to treat the youth as an adult.

Conversely, when a young offender commits a serious offense such as murder, rape, or robbery, over 95% of the time, courts will elect to invoke the juvenile procedural code.<sup>53</sup> Courts prefer using this option in serious cases because it increases their discretion in the sentencing process. The juvenile code grants prosecutors and courts the flexibility to impose more lenient penalties than those mandated in adult court.<sup>54</sup> For example, in the case of murder, under the juvenile law, judges are not bound by the mandatory life sentence required for murder.<sup>55</sup> In a case involving armed robbery, by using the adult code, judges would have to impose a minimum sentence of five years imprisonment.<sup>56</sup> Thus, the fact that the juvenile justice system grants prosecutors and judges more discretion in sentencing than the adult code with regard to serious offenses increases the likelihood that the young adults will be prosecuted according to juvenile procedural law when they are suspected of committing a serious offense.<sup>57</sup>

Finally, although the Act on Juvenile Courts is federal law applicable to all of the German states, local practice has shaped the implementation

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<sup>50</sup> See Frieder Dünkel, *Youth Violence and Juvenile Justice in Germany*, in *YOUTH VIOLENCE: NEW PATTERNS AND LOCAL RESPONSES – EXPERIENCES IN EAST AND WEST* 123 (Frieder Dünkel & Kirstin Drenkhahn eds., 2003).

<sup>51</sup> STRAFPROZEBORDNUNG [StPO] [CRIMINAL PROCEDURE], § 153(1) *translation at* [http://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html#p1230](http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1230).

<sup>52</sup> Dünkel, *supra* note 50, at 123.

<sup>53</sup> *Id.*

<sup>54</sup> *See id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* In some cases however, young adult offenders may suffer a disadvantage under the juvenile rules of procedure as the minimum period of incarceration permitted under the juvenile code is six months while the adult code allows a 1 month term of imprisonment in certain circumstances. *See* Dünkel, *supra* note 30, at 140 n.9.

of the law to a larger extent. Since unique ways of dealing with juveniles originally developed in Germany's lower courts rather than through legislative fiat, local juvenile practices have enjoyed a strong tradition of strongly shaping juvenile crime policy.<sup>58</sup> The first specialized juvenile courts were created in the cities of Berlin, Frankfurt, and Cologne in the early 1900s.<sup>59</sup> This tradition of reform through practice has continued in modern times as the law has permitted disparate local practices to develop at the community level.<sup>60</sup> For example, during the 1970s social workers, prosecutors, and judges assigned to local juvenile courts revolutionized juvenile sanctioning practices by introducing community based sanctions that were designed to reduce the use of more repressive sanctions.<sup>61</sup> The legislature in effect endorsed the direction of these local reform efforts when it when reformed the JGG in 1990. The reforms made in the code at that time stressed the importance of educational and disciplinary responses.<sup>62</sup> In addition, the changes emphasized the role that prosecutors, as well as judges, play in determining the appropriateness of diversionary measures in identifying appropriate disposition alternatives.<sup>63</sup> Moreover, according to new provisions in the law, in cases where juvenile offenders participated in mediation or paid restitution, courts could find that those efforts warranted a finding of a reduced level of culpability. Consequently, when this reduced standard of culpability is met, a court may dismiss a case under Section 45(1) JGG.<sup>64</sup>

These changes underscored the principal that more stringent detention-oriented sanctions should only be used as a last resort. Most importantly, the reform of the JGG expanded the ambit of prosecutorial discretion allowing prosecutors to defer prosecution of juvenile cases where the offense is petty in nature or because educational and social measures are being employed. Unlike the law applicable to adult cases, in some cases juveniles may avoid punishment even if the alleged crime qualifies as a *Verbrechen* (major crime).<sup>65</sup> As a result, prosecutors in juvenile cases possess a wide range of options. They may either dismiss cases outright or condition a case's dismissal on a number of options which include the child receiving a warning, requiring that the child to participate in educational, training or mediation

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<sup>58</sup> BOYNE, *supra* note 34, at 194; *see also* Dünkel, *supra* note 46, at 226.

<sup>59</sup> Dünkel, *supra* note 46, at 226.

<sup>60</sup> *See* Dünkel, *supra* note 50, at 126.

<sup>61</sup> *Id.*

<sup>62</sup> *See id.* at 126–27.

<sup>63</sup> Tas, *supra* note 1, at 516.

<sup>64</sup> JGG, *supra* note 35, § 45; *see also* StPO, *supra* note 51, § 153.

<sup>65</sup> Richard S. Frase, *Sentencing in Germany and the United States: Comparing Äpfel with Apples*, FORSCHUNG AKTUELL, July 2001, at 22.

programs, paying a fine, or performing community service.<sup>66</sup> The fact that social workers from the social welfare department participate in juvenile proceedings facilitates this process of finding an appropriate alternative sanction.<sup>67</sup>

In those cases where the child must perform an affirmative obligation, German law permits a prosecutor to dismiss a case with the judge's consent after the child completes their obligation.<sup>68</sup> Under certain circumstances, the public prosecution office may dismiss the charges without the court's approval.<sup>69</sup> The range of more severe sanctions applied to juveniles include: a fine and detention on weekends, probation, detention up to four weeks in a juvenile detention center (*Jugendarrest*) and youth prison sentences.<sup>70</sup> Juveniles aged fourteen through seventeen may, as a last resort, receive a sentence ranging between six months and five years.<sup>71</sup> Where juveniles up to twenty years of age commit serious crimes, the maximum length of imprisonment available to courts is a ten year sentence.<sup>72</sup> In order to impose a sentence of that length, the court must find that a child's "dangerous tendencies" preclude the imposition of community sanctions or that the juvenile's degree of culpability is severe—for example, the crime involved is extremely serious.<sup>73</sup>

### B. Juvenile Crime Rates and Trends

There has been little change in Germany's overall juvenile crime rate during the past two decades.<sup>74</sup> However, the combination of heightened media attention on a handful of brutal crimes and an increase in crimes of violence stoked cries for sentencing reforms and the toughening of sanctioning practices in the middle of the decade.<sup>75</sup> While public and political attention given to a handful of extremely violent crimes may overestimate the problem of juvenile crime in Germany today, a number

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<sup>66</sup> StPO, *supra* note 51, § 153a.

<sup>67</sup> JGG, *supra* note 35, § 38(2).

<sup>68</sup> *Id.* § 45(3).

<sup>69</sup> *Id.* § 45(1).

<sup>70</sup> Hans-Jörg Albrecht, *Youth Justice in Germany*, 31 *Crime & Just.* 443, 459 (2004).

<sup>71</sup> *Id.* at 473.

<sup>72</sup> JGG, *supra* note 35, § 18(1).

<sup>73</sup> *Id.* § 17(2); Claire Sands, *Growing Up, Moving On: The International Treatment of Childhood Criminal Records*, Standing Committee for Youth Justice 44 (2016), <http://scyj.org.uk/wp-content/uploads/2016/04/ICRFINAL.pdf>.

<sup>74</sup> See Alexander Lorenz, *Juvenile Delinquency in Germany*, STATMAGAZIN (Jan. 24, 2008), [https://www.destatis.de/EN/Publications/STATmagazin/Justice/2008\\_1/2008\\_1\\_YouthCustody.html](https://www.destatis.de/EN/Publications/STATmagazin/Justice/2008_1/2008_1_YouthCustody.html).

<sup>75</sup> BOYNE, *supra* note 34, at 196.

of developing trends in reported rates of juvenile crime indicate that Germany faces a juvenile crime problem which has been largely fueled by a small proportion of repeat offenders. Although the reported rate of simple assaults committed by juveniles<sup>76</sup> increased by 2.7% and the rate committed by adolescents<sup>77</sup> rose 4.6% in 2006,<sup>78</sup> between 2007 and 2013, the rate of violent juvenile crime decreased.<sup>79</sup>

More recent statistics shown below in Table 1.0 show that the overall number of adjudicated juveniles decreased between 2007 and 2013.<sup>80</sup> If you combine the two age groupings, the 2013 figures are 33% lower than the figures in 2007.

**Table 1.0: Juvenile Convictions 2007-2013**

Year	Ages 14-17	Ages 18-20
2007	63,826	91,411
2008	62,216	86,163
2009	60,900	85,891
2010	55,388	80,091
2011	51,325	76,428
2012	44,984	69,809
2013	39,518	64,049

A particularly contentious issue is the rate of violent crime committed by immigrant children who face hurdles integrating into German society and enjoy fewer economic opportunities.<sup>81</sup> While Germany adopted a more restrictive immigration policy in 1993, Germany's criminal justice system still faces challenges from young immigrants and ethnic minorities.<sup>82</sup> In urban environments in particular, the rates of violent crime committed by immigrant youths far outpace the rate reported among the total population. For example, in 2006, the German news source, *Deutsche Welle* reported that young male

<sup>76</sup> Defined as offenders aged 14 to 17. Albrecht, *supra* note 70, at 451.

<sup>77</sup> Adolescents or young adults are defined here as offenders aged 18 to 20. *Id.* at 445.

<sup>78</sup> *Kriminalität sinkt, Gewalt nimmt zu*, SPIEGEL ONLINE (May 8, 2007, 12:26 PM), <http://www.spiegel.de/panorama/justiz/polizeistatistik-kriminalitaet-sinkt-gewalt-nimmt-zu-a-481693.html>.

<sup>79</sup> JEHLE, *supra* note 44, at 12.

<sup>80</sup> Press Release, *Zahl der Verurteilten Im Jahr 2013 weiter rückläufig*, STATISTISCHES BUNDESAMT [Federal Statistical Office] (2015), [https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2015/01/PD15\\_015\\_243.html](https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2015/01/PD15_015_243.html).

<sup>81</sup> Christian Pfeiffer & Peter Wetzels, *The Structure and Development of Juvenile Violence in Germany* 8 (Fors Chungsberrichte, Proposition Paper No. 76, 1999).

<sup>82</sup> Dünkel, *supra* note 46, at 235.

immigrants in Berlin were three times more likely to commit violent crimes as their German peers.<sup>83</sup> The problem is particularly acute in large German cities such as Berlin, Hamburg, Munich, Cologne, and Frankfurt.<sup>84</sup> In 2006, 80% of the violent crimes committed by juvenile offenders in Berlin were committed by youths belonging to immigrant families.<sup>85</sup> One statistic, in particular, which has alarmed politicians in the nation's capital, is the number of juvenile crimes committed with weapons. During the first three quarters of 2006, that figure rose by nearly 30 percent in Berlin.<sup>86</sup>

The trend is not unique to Germany. It mirrors a similar trend reported within ten member states of the European Union.<sup>87</sup> In particular, rates of violent juvenile crime committed by young people with lower levels of education and fewer integration prospects have been rising.<sup>88</sup> Several scholars have argued that the roots of juvenile violence can be attributed to differences in social class variables such as educational levels, income, and dependency on social welfare.<sup>89</sup>

The increase in the rate of violent crime among juveniles has attracted the attention of the public as well as politicians.<sup>90</sup> The heightened media attention given to juvenile crime is a relatively new phenomenon in Germany as, in general, politicians have left the design of criminal justice policy to practitioners and experts who have long favored treating juvenile offenders as youngsters requiring individualized and, in most cases, lenient treatment.<sup>91</sup> The increasing

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<sup>83</sup> See Panagiotis Kouparanis, *Identifying the Roots of Immigrant Crime*, DEUTSCHE WELLE (Apr. 8, 2006), <http://www.dw-world.de/dw/article/0,2144,1953916,00.html>.

<sup>84</sup> *Munich Safest, Frankfurt Most Dangerous City in Crime Survey*, DEUTSCHE WELLE (Apr. 13, 2007), <http://www.dw.com/en/munich-safest-frankfurt-most-dangerous-city-in-crime-survey/a-2441670>.

<sup>85</sup> *Jugendkriminalität in Berlin: Mehr Gewalt, weniger Haftbefehle*, SPIEGEL ONLINE (Feb. 22, 2007), <http://www.spiegel.de/politik/deutschland/jugendkriminalitaet-in-berlin-mehr-gewalt-weniger-haftbefehle-a-467955.html>.

<sup>86</sup> *Id.*

<sup>87</sup> See Christian Pfeiffer, *Juvenile Crime and Violence in Europe*, 23 CRIME & JUST. 255, 257–58 (1998).

<sup>88</sup> *Id.* at 304–05.

<sup>89</sup> OLIVER JAMES, *JUVENILE VIOLENCE IN A WINNER-LOSER-CULTURE* 2, 7 (1995); see also Christian Pfeiffer & Katrin Brettfeld und Ingo Delzer, *Kriminalität in Niedersachsen: Eine Analyse auf der Basis der Polizeilichen Kriminalstatistik 1988–1995* (Forschungsberichte, Proposition Paper No. 56, 1996. *But see* Kouparanis, *supra* note 83 (“As a rule, criminal or violent careers usually begin at an age when jobs and the job market do not yet play a role, which is between 14 and 17 . . . Access to criminal groups is a key factor. If a person grows up in an area where there are lots of criminal gangs ready to welcome him into the fold, then the risk that he gravitates towards crime is significantly greater than in would be in other areas. In this respect, ethnic considerations play no role at all.”).

<sup>90</sup> Albrecht, *supra* note 70, at 465.

<sup>91</sup> See JOHN PRATT, *PENAL POPULISM* 159 (2007).

politicization of juvenile crime is reflected in a statement issued by traditionally conservative Christian Democratic Party (CDU) in 2005 after a 16-year-old male beat his neighbor and a child to death in 2005:

The soft touch era is finally over. The justice system should react more swiftly to the first cases and signs of a criminal career, and be quicker to sentence violent young criminals to imprisonment.<sup>92</sup>

The media attention devoted to violent crime as well as to crimes committed by non-German citizens has helped to fuel the debate concerning the juvenile justice system's traditional education-oriented focus. Compounding the perceptions created by the media's apparent fascination with immigrant crime, Albrecht reports that German criminological research on immigrant populations has been preoccupied with the topic of crime.<sup>93</sup> The recent heightened attention on this problem is not wholly disconnected to the reality of crime trends. Although Germany has experienced high waves of immigration since after the Second World War, in the initial decades after the war, the correlation between immigrant status and crime rates was a negative one.<sup>94</sup> This relationship reversed in the 1970s and, by 1993, the percentage of foreigners arrested for criminal activity was more than three times the rate for the general population.<sup>95</sup> Data suggests that this disparity is more pronounced in the area of juvenile and young adult crimes. For example, in Frankfurt in 1993, almost 75% of 18 to 21 year old suspects were members of minorities.<sup>96</sup>

In many cases, integration problems lie at the root of higher crime rates among young immigrants. According to the Organization for Economic Co-operation and Development (OECD), young immigrants in some city neighborhoods often attend schools with a high percentage of foreign students, making integration more difficult.<sup>97</sup> This "closed educational and cultural circuit" helps to perpetuate assimilation problems.<sup>98</sup> Lacking sufficient language skills, young immigrants have a difficult time completing training programs and gaining meaningful

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<sup>92</sup> See Tamsin Walker, *The Lot of Young German Offenders*, DEUTSCHE WELLE (Sept. 12, 2005), <http://www.dw.com/en/the-lot-of-young-german-offenders/a-1705805>.

<sup>93</sup> Hans-Jörg Albrecht, *Ethnic Minorities, Crime, and Criminal Justice in Germany*, 21 CRIME & JUST. 31, 45–46 (1997).

<sup>94</sup> Wesley D. Chapin, *Ausländer raus? The Empirical Relationship Between Immigration and Crime in Germany*, 78 SOC. SCI. Q. 543, 546 (1997).

<sup>95</sup> *Id.*

<sup>96</sup> Albrecht, *supra* note 93, at 68.

<sup>97</sup> Johanna Möhring, *Creating Opportunities for Young People in Berlin: Support for Self-Employment*, ORG. FOR ECON. COOPERATION & DEV. LOC. ECON. EMP. DEV. PROGRAMME (Dec. 12, 2002), [www.oecd.org/regional/regional-policy/2503293.ppt](http://www.oecd.org/regional/regional-policy/2503293.ppt).

<sup>98</sup> *Id.*

employment.<sup>99</sup>

In evaluating the statistics related to crime committed by “foreigners,” it is important to remember that, because German citizenship is not automatically awarded to the children of immigrants born in Germany, many members of ethnic minorities who have been born in Germany do not possess German citizenship.<sup>100</sup> Thus, the simple fact that an individual is classified as a “foreigner” does not necessarily mean that they have only recently arrived on German soil.<sup>101</sup> Moreover, the possession of a German passport does not by itself guarantee that an individual is well-integrated into German society. The end of the Cold War brought a wave of immigrants into Germany of so-called ethnic German “resettlers” from the former Soviet Union and its satellite states.<sup>102</sup> Lured to Germany with the promise of generous benefits packages, this group of immigrants has posed a particular challenge to the justice system.<sup>103</sup> Particularly problematic have been the rates of crime among the younger generation of resettlers. Attracted by the promise of a better life, Russian-German juveniles who came to Germany became quickly frustrated with the German language and their limited job prospects.<sup>104</sup> Police agencies as well as prosecutors complain that a large percentage of Russian-German juveniles are active

<sup>99</sup> *Id.*

<sup>100</sup> STAATSANGEHÖRIGKEITSGESETZ [StAG] [NATIONALITY ACT], § 40b, [https://www.gesetze-im-internet.de/englisch\\_rustag/englisch\\_rustag.html#p0235](https://www.gesetze-im-internet.de/englisch_rustag/englisch_rustag.html#p0235). Until 1993, first generation foreigners had to reside in Germany for a period of 15 years before applying for citizenship. *Ciro Avitabile et al., The Effect of Birthright Citizenship on Parental Integration Outcomes*, 56 J. L. & ECON. 777, 782–83 (2013), <http://www.journals.uchicago.edu/doi/pdfplus/10.1086/673266>. In addition, an individual had to forfeit their original nationality, have a clean criminal record, not depend on social welfare and identify with the German culture to receive citizenship. *Id.* After 1993, the requirements were slightly relaxed. *Id.* In contrast, immigrants who claim Germany ancestry (*Aussiedler*) are automatically awarded citizenship upon entry. THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 63 (James P. Smith & Barry Edmonston eds., 1997).

<sup>101</sup> Otto Schilly, *Reform of the Citizenship Law*, 10 ONE GER. IN EUR., 1989–2009 (1999), <http://germanhistorydocs.ghi-dc.org/pdf/eng/Ch.7,Doc.12FIN.pdf>. To qualify for German citizenship, children born after December 31, 1999 to foreign parents in Germany must be born to at least one parent who has been a legal resident in Germany for at least eight years at the time of their birth. *Id.* In addition, at least one parent of the child must possess a unlimited residence permit (“*unbefristete Aufenthaltsterlaubnis*”) or a residence entitlement (“*Aufenthaltsberechtigung*”) at the time of their birth. *See id.*; BOYNE, *supra* note 34, at 199 n.16; *German Nationality Acquired Through Notification of Birth Occurring Abroad (After 1999)*, GERMAN MISSIONS IN THE UNITED STATES, [http://www.germany.info/Vertretung/usa/en/05\\_Legal/02\\_Directory\\_Services/02\\_Citizenship/Birth\\_Citizenship.html](http://www.germany.info/Vertretung/usa/en/05_Legal/02_Directory_Services/02_Citizenship/Birth_Citizenship.html) (last visited February 12, 2017).

<sup>102</sup> GERMANY IN TRANSIT 14 (Deniz Göktürk et al. eds., 2007).

<sup>103</sup> Uwe Ewald & Thomas Feltes, *Multicultural Context, Crime and Policing and Germany: Challenges After Unification*, 7 J. POLICE & SOC’Y 165, 171–73 (2003).

<sup>104</sup> *Id.* at 172–73.

in gangs involved in organized crime and drug-trafficking.<sup>105</sup>

*C. A Changing Landscape: The Politicization of Juvenile  
Delinquency*

The rapid increase in rates of juvenile crime in large cities has been accompanied by a chorus of criticism of juvenile sentencing policies which has led some of the politicians who lead Ministries of Justice on the state level to implement special policies which target repeat offenders.<sup>106</sup> Current statistics indicate that while these repeat offenders comprise only 10% of the juvenile offender population, they are responsible for over 30% of juvenile criminality.<sup>107</sup> The media has played a pivotal role in instigating the creation of these special units. In Berlin, for example, the police department reorganized their juvenile crime units to focus on repeat offenders beginning in 1994.<sup>108</sup> Prior to that time, police investigators often had to start from scratch to familiarize themselves about the background of a particular juvenile because police units were organized on the precinct level that hampered the exchange of background information.<sup>109</sup> This system prevented police officers from compiling a comprehensive picture of juvenile's background and personality.<sup>110</sup> Despite the fact that the police department reorganized its juvenile units to focus on repeat offenders, Berlin's justice officials resisted creating a special repeat offender unit at that time because the creation of yet another specialized prosecution unit would divert personnel away from the general crimes units.<sup>111</sup> This impasse continued until early 2003 when the Berlin press began publicizing reports that highlighted the lax and ineffective punishment that repeat juvenile offenders received.<sup>112</sup> In response, Berlin's Justice Senator instructed the prosecution office to create a special prosecution unit to target repeat offenders.<sup>113</sup> Since that time, the concept has been adopted by several other major cities in Germany.<sup>114</sup>

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<sup>105</sup> *Id.* at 173.

<sup>106</sup> BOYNE, *supra* note 34, at 199.

<sup>107</sup> Dünkel, *supra* note 46, at 242.

<sup>108</sup> BOYNE, *supra* note 34, at 199.

<sup>109</sup> *Id.*

<sup>110</sup> See Wiebke Steffan, *Junge Intensivtäter – kriminologische Befunde, JUGENDKRIMINALITÄT UND REFORM DES JUGENDSTRAFRECHTS*, DVJJ (2003).

<sup>111</sup> Roman Reusch, *Intensivtäter in Berlin: Rechtstatsächliche und kriminologische Aspekte*, ZEITSCHRIFT FÜR JUGENDKRIMINALRECHT UND JUGENDHILFE2 (2007) <http://www.glueckliche-familie-ev.de/wp-content/uploads/2011/05/Artikel-Intensivt%C3%A4ter-Reusch-2007-Internet.pdf>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> BOYNE, *supra* note 34, at 200.



However, the acceptance of these programs has not been uniform as the programs have been criticized on the grounds that they ignore the competence and input of experts in juvenile development.<sup>115</sup> A major organization which advocates on the behalf of juvenile rights, the German Association for Juvenile Court and Juvenile Offenders (DVJJ), has staunchly criticized any movement to simply stiffen juvenile sanctions.<sup>116</sup> While the majority of German judges and prosecutors remain committed to the system's preference for non-punitive measures, there are signs that that support is equivocating. The members of the German Jurist's Assembly, the *Deutscher Juristentag*, sharply debated the efficacy of the system's preference for educational measures at their 2002 meeting.<sup>117</sup> In 2004, the German Association for Juvenile Court and Juvenile Offenders (DVJJ) presented a series of proposals which, if adopted, would broaden and stiffen the range of sentencing alternatives.<sup>118</sup> The chief proposals included: 1) increasing the maximum term of imprisonment from ten to fifteen years, 2) introducing summary written procedures for minor traffic and property offenses, and 3) abolishing the possibility that courts could imprison juveniles simply on the basis of their alleged "dangerous tendencies."<sup>119</sup> In their recommendations, the organization also moved beyond proposing specific, minor changes in the juvenile law and sharply criticized the fact that ambiguous nature of juvenile law itself. In particular the organization asserted that the law's lack of clarity as to what constitutes an "educational measure" has led to juvenile judgments which often to promote inconsistent and unclear objectives.<sup>120</sup>

The existence of this ongoing debate has impacted the implementation of juvenile justice policy on the state and local level. Critically, during the past thirty years, although the content of the

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<sup>115</sup> See, e.g., *Kriminalität sinkt, Gewalt nimmt zu*, supra note 78 (citing the criticism of the special prosecution unit by a spokesman for the Berlin BDK (Confederation of German Criminal Officers)).

<sup>116</sup> Jennifer Abramsohn, *Torture Death in Juvenile Jail Sparks Round of Soul Searching*, DEUTSCHE WELLE (Nov. 24, 2006), <http://www.dw-world.de/dw/article/0,2144,2246874,00.html>.

<sup>117</sup> Michael Kilchling, *Victim-Offender Mediation with Juvenile Offenders in Germany*, in VICTIM-OFFENDER MEDIATION WITH YOUTH OFFENDERS IN EUR. 229, 229 n.2 (Anna Mestitz & Simona Ghetti eds., 2005).

<sup>118</sup> Bernd-Rüdeger Sonnen, *Stellungnahme zum "Entwurf eines Gesetzes zur Stärkung des Jugendstrafrechts und zur Verbesserung und Beschleunigung des Jugendstrafverfahrens"* [Opinion on the draft law on the strengthening of juvenile justice and the improvement and acceleration of the juvenile offender's procedure], DEUTSCHE VEREINIGUNG FÜR JUGENDGERICHTE UND JUGENDGERICHTSCHILFEN E.V. [DVJJ] (2004) (Ger.).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

juvenile law itself has not changed radically, the interpretation and implementation of the law has reflected the political realities of both the particular period as well as the particular community. As a senior prosecutor in a large German city explained:

So we have developed a very modern, very liberal law to deal with young criminals. . . . It was believed that in many cases [juvenile crime] is just a short phase of normal development. It comes and goes. . . . In the years after, the cultural revolution of 1968, this was the official point of view . . . . The jurisdiction was harsher before [that period]. For example, until the 1970s, it was absolutely normal that people between the ages of 18 and 21 were under the jurisdiction of adult law. So our law allows the court to decide whether to treat them under adult rules or juvenile rules. Up until the 1970s, it was normal to use adult law . . . . You have criminologists who influenced the public opinion, not the public opinion [of] the people on the street, but the public opinion in lawyer's circles [to believe] that imprisonment causes the severest harms.

At the same time, we had increasing numbers of these crimes committed by young people and so public opinion, this time, of the real public. They pressured the politicians. Newspapers were full of examples of young guys who committed dozens of severe crimes. It was written [in the newspaper] that nothing happen[ed]-[that there were] no [legal consequences.] This is not true, but okay. And this caused the Minister of Justice to order that our office . . . do something about it. So this special department was founded.<sup>121</sup>

Throughout the remainder of this Article, I will lay out in broad terms the assumptions and nature of traditional juvenile crimes practice as well as introduce the reader to the newer practices which are continuing to evolve.<sup>122</sup> This section will demonstrate how changes in practice which were motivated by local conditions have reshaped the nature of prosecutorial discretion.

#### *D. The Specialized Nature of Juvenile Crime Units*

While general crimes departments are dominated by prosecutors at

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<sup>121</sup> Interview with 9LJ, Senior Prosecutor (June 12, 2006).

<sup>122</sup> I use "traditional practice" as a moniker for the diversion and education oriented focused juvenile crime departments which are organized according to the offender's last name. In these units, a prosecutor will only receive a new, open case when a juvenile commits a crime. In contrast, in "repeat offender" departments, a prosecutor monitors a smaller ongoing caseload of juveniles who have already violated the juvenile law several times.

the early stages of their careers, the prosecutors who staff juvenile crime departments possess a range of experience levels.<sup>123</sup> Although German law stipulates that juvenile crimes prosecutors should possess specialized training and have experience in socio-educational affairs related to juvenile development,<sup>124</sup> in practice many departments substitute a prosecutor's own experience as a parent as a proxy for the attainment of this specialized knowledge.<sup>125</sup> Because the law requires that prosecutors possess special competencies in juvenile development, typically a prosecutor will not begin his or her career in a juvenile crimes department.<sup>126</sup> However, one senior prosecutor complained to me that there has been a recent trend towards assigning younger prosecutors to juvenile crimes departments.<sup>127</sup> Because many young prosecutors possess little life experience, they have difficulty putting a crime in proper perspective.<sup>128</sup> Frequently, offices will pair responsibility for juvenile crime cases with crimes committed against juveniles since it can be too stressful for a prosecutor to concentrate only on cases involving the physical or sexual abuse of children.<sup>129</sup> Even when the department is comprised in this split manner, the majority of the individuals whom I interviewed in the juvenile crimes departments were women.<sup>130</sup> The pattern of frequent consultation among colleagues that I observed in the general crimes departments was also present in the juvenile departments.

One must work diligently so that one has a good reputation. You can be creative and determine for yourself how you will handle your work and develop your own methods. One must be sociable and not appear across as elitist or be a deadbeat. There is nothing as bad when a person projects themselves as a know-it-all when in reality they do not have all the answers.<sup>131</sup>

#### *E. Prosecutorial Discretion and Informal Dispositions*

The wide range of informal sanctions in the juvenile system, coupled with the system's strong emphasis on education and rehabilitation,

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<sup>123</sup> See Albrecht, *supra* note 70, at 452.

<sup>124</sup> JGG, *supra* note 35, § 37.

<sup>125</sup> Interview with 5CK, Senior Prosecutor (Jan. 22, 2006).

<sup>126</sup> Albrecht, *supra* note 70, at 452.

<sup>127</sup> Interview with 13EU, Senior Prosecutor (Dec. 6, 2005).

<sup>128</sup> *Id.*

<sup>129</sup> This would include violations of JGG §§ 174, 177 (rape), 180, and 182 (sexual abuse of a child aged 14-16).

<sup>130</sup> Seventy-five percent of the prosecutors I interviewed in this department were female (n=8). This slightly exceeds a larger sample comprised of all of the prosecutors who worked on juvenile crime cases in three of the offices I visited (Jauer, Guttentag, Rosenberg). Among this larger sample of 18 prosecutors, almost 67.5% of the prosecutors were women.

<sup>131</sup> Interview with 13EU, Senior Prosecutor (Dec. 6, 2005).

accords both judges and prosecutors substantial leeway in determining whether and how juvenile offenders are sanctioned. When we examine actual sentencing statistics, a strong pattern emerges. While juvenile crime rates remained flat during the 1980s and increased during the 1990s, during the past twenty years judges and prosecutors have increasingly relied on diversionary measures to dispose of juvenile cases.<sup>132</sup> Although the United States began to experiment with the use of diversionary programs in the 1960s, the German use of the term is not quite identical to the American term. It is perhaps easiest to understand these differences if we keep in mind that although the effect of diversion is that it often reduces the burden on the judicial system, from a criminological perspective, the purpose of diversion is to: 1) Reduce the stigmatization of the juvenile, 2) Implement a swifter response to the delinquent act, and to 3) Increase the options available for prosecutors and judges to address whatever problems the juvenile may be facing.<sup>133</sup> The principle diversion measures are prescribed by law under Section 45 JGG and Section 47 JGG summarized in Table 2.0.<sup>134</sup>

**Table 2.0: Juvenile Law Provisions Relevant to Diversion**

Section	Conditions (in Summary Form)
45 (1)	A prosecutor may, without judicial agreement, terminate a proceeding if the preconditions stated in Sect. 153 are satisfied.
45 (2)	A prosecutor may discontinue a proceeding if: 1) The prosecutor believes that an educational or instructional program is sufficient and 2) the child is participating in this program. A judge's participation pursuant to paragraph 3 is not necessary and a juvenile proceeding pursuant to Section 76 JGG is also not necessary under this paragraph
45 (3)	A proceeding may be terminated by a judge if a child has completed their participation in an education or instructional program.
47	After charges have been filed in a juvenile case, a judge may dismiss the charges if: 1) The preconditions stated in Sect. 153 are satisfied; 2) The developmental measures included within Sect. 45 (2) have been satisfied or implemented and

<sup>132</sup> Dünkel, *supra* note 46, at 237.

<sup>133</sup> Bareinske, *supra* note 49, at 33.

<sup>134</sup> JGG, *supra* note 35, §§ 45, 47.

	<p>it is not necessary for the court to reach a decision based on the evidence;</p> <p>3) The court has reached a judgment against the child and has ordered that the child complete an educational or instructional program consistent with 45 (3); or</p> <p>4) The child cannot be held criminally liable because of a lack of maturity.</p> <p>In the case of paragraphs (2) and (3) a judge may, with the agreement of the prosecutor temporarily suspend the proceedings and give the juvenile a deadline of, at the most of six months, to comply with the court's instructions, orders or educational/instructional measures. If the juvenile complies with the court's conditions, the court may dispose of the case through Sections 11 (3) and 15 (3)<sup>2</sup>. In the event of new criminal acts or evidence, new charges may be filed.</p>
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The fact that a prosecutor elects to file charges in a case does not preclude the court from sending the case to diversion. As can be seen in Diagram 1.0 below, the percentage of cases which resulted in a dismissal comprised 33% of the total cases in 2013.<sup>135</sup> That figure of almost 40,000 cases includes cases dismissed by prosecutors with the court's approval pursuant to Section 45 (3) JGG or by the court itself according to Section 47 JGG.<sup>136</sup> It is important to note however, that the figures in Diagram 1.0 do not include the cases that prosecutors directly dismiss under Section 45 (1) and (2) JGG.<sup>137</sup> In 37% of the cases that reach the court, the court imposes other sanctions which may include the imposition of restitution, an apology to the victim, payment of money to charitable organizations or the state, or work.<sup>138</sup> Only 4% of cases that reach the court result in a sentence to be served at a youth prison.<sup>139</sup> The 12% of cases that result in detention include sentences that range from a weekend to a period of up to four weeks.<sup>140</sup> The category of educational measures, which only totaled 8% of the sanctions imposed in 2013, includes court orders that direct the juvenile to notify the court of their whereabouts, perform community service, participate in victim-offender mediation, or attend social training courses.<sup>141</sup>

<sup>135</sup> JEHL, *supra* note 4479, at 41.

<sup>136</sup> *Id.*

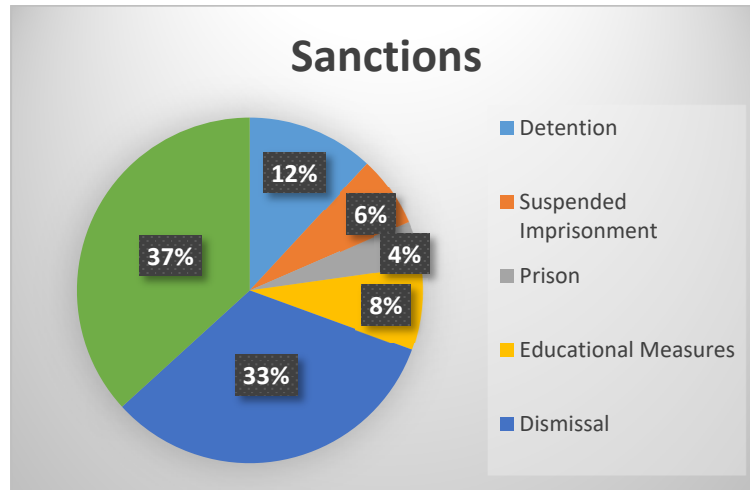
<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 41, 45.

<sup>139</sup> *Id.* at 41.

<sup>140</sup> *Id.* at 40–41.

<sup>141</sup> *Id.*

**Diagram 1.0: Juvenile Court Sanctions 2014**

In assessing both the severity of the sanctioning scheme as well as the degree of discretion which it injects into the juvenile justice system, it is important to recognize that according to the German principle of “subsidiarity,” courts may only impose the more formal sanctions of disciplinary measures or youth imprisonment if educational sanctions prove to be insufficient.<sup>142</sup> While the disciplinary measures which courts may employ include the more severe sanction of detaining juveniles in a youth detention center,<sup>143</sup> the disciplinary measures also include merely cautioning a youth,<sup>144</sup> or imposing conditions which, in part, mimic the directives included under the range of educational measures.<sup>145</sup> The pattern of this sanctioning is duplicated under the code sections that authorize youth imprisonment as courts possess step-down options short of imprisonment such as suspending a sentence of imprisonment or imposing probation.<sup>146</sup> Sentencing statistics at the beginning of the prior decade indicate that courts elected to suspend custodial sentences between 6 and 12 months over 60% of the time and more severe custodial sentences ranging from 12–24 months

<sup>142</sup> JGG, *supra* note 35, § 5(2).

<sup>143</sup> *Id.* § 16.

<sup>144</sup> *Id.* §§ 10, 60.

<sup>145</sup> *See id.* §15. These “conditions” qualifying as disciplinary measures include making reparations, issuing an apology, performing community service, and paying a fine. *Id.*

<sup>146</sup> *Id.* §§ 5(2), 17.

approximately 50% of the time.<sup>147</sup> At the end of the scale are custodial sentences, which under the Youth Court Act, range between 6 months and 10 years.<sup>148</sup>

## II. THE MINDSET OF PROSECUTORS IN JUVENILE PROSECUTION UNITS

### A. *Traditional Units*

How does the juvenile law's emphasis on education-oriented measures play out in practice? To begin with, because the purpose of the juvenile code stresses diversion and education-oriented measures, diversion-related sanctioning processes predominate. As noted previously, courts impose sanctions which include youth imprisonment only as a last resort when informal and formal community sanctions or probation fail.<sup>149</sup> The nature of prosecution practice, defined in terms of the flow and nature of decision-making, reflects this philosophy. A juvenile crimes prosecutor will typically handle 120 to 150 new cases per month.<sup>150</sup> Although this number far exceeds the typical incoming caseload of even the general crimes departments, prosecutors typically process the cases more quickly than a comparable adult case.<sup>151</sup> Moreover, there is a special provision in the juvenile law which permits prosecutors to combine several pending cases against a particular juvenile together to facilitate a speedier resolution.<sup>152</sup> Despite the fact that juvenile cases are often easier to resolve than adult cases, the reality of juvenile practice is that prosecutors must learn to quickly process an extraordinary number of files. In one office I visited, an experienced prosecutor told me that he had decided to retire early because the juvenile case load had become so heavy that he no longer had enough time to adequately read through the case files.<sup>153</sup> High case loads place a premium on efficient decision-making routines:

The normal prosecutor in this department must handle approximately 120 new cases . . . . That means that, since there are 22 working days in a month, one must dispense with

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<sup>147</sup> Bernd Holthusen, *Ultima Ration? Deprivation of Liberty Measures for Children and Young People: Findings and Need for Research*, in PREVENTION OF YOUTH CRIME IN GERMANY: EDUCATIONAL STRATEGIES 136 (Centre for the Prevention of Youth Crime ed., 2004).

<sup>148</sup> JGG, *supra* note 35, § 18.

<sup>149</sup> Frieder Dünkel, *Migration and Ethnic Minorities in Germany: Impacts on Youth Crime, Juvenile Justice and Youth Imprisonment*, [http://www.uni-greifswald.de/~Is3/Dokumente/German\\_YoungMig.pdf](http://www.uni-greifswald.de/~Is3/Dokumente/German_YoungMig.pdf) (last visited on Feb. 9, 2017).

<sup>150</sup> BOYNE, *supra* note 34, at 205.

<sup>151</sup> *Id.*

<sup>152</sup> JGG, *supra* note 35, § 31.

<sup>153</sup> Interview with 5LY, Prosecutor (Jan. 19, 2006).

5 to 6 cases per day. [On average] every day you will receive 5 to 6 new cases and you must close those cases by filing charges or dismissing the case. Some of the cases can be dispensed with easily. For example, if the police conduct an investigation on a child under the age of fourteen. Children under fourteen cannot be criminally punished, so we have a special form [that the prosecutor can fill out] to dismiss the case. That is one reason for the high caseloads. We also handle simple cases like shoplifting, traffic cases, and so on. But [we also have] a certain number of complicated case[s] that we must devote a substantial amount of time to . . . . When I began my career in 1977, each prosecutor handled half the caseload that we handle now. This is a [significant] problem and the cases have also become more complicated . . . . The stress of the job has vastly increased . . . . My shoulders must carry a heavier load. To keep up with the workload I often work weekends as do many of my colleagues . . . . [As a result] we can no longer devote as much time to complicated cases.<sup>154</sup>

In order to deal with heavy caseloads, prosecutors must develop systems which prioritize cases by the time deadlines and sort out the cases which involve non-routine nature of the decision-making. The dozens of case files which cross a prosecutor's desk each day require prosecutors to make a variety of routine decisions. For example, one experienced prosecutor I interviewed related to me that when a new stack of files appears in her office, she will immediately tackle the cases that deal with detention decisions and questions relating to specific proceedings that possess an impending time deadline.<sup>155</sup> After she clears those files from her desk, she will review the *new case files* which have just arrived from the police to determine whether or not the case will require further investigation.<sup>156</sup> If further investigation is required, most often she will send the file back to the police with a written instruction.<sup>157</sup> However, rather surprisingly, this particular prosecutor told me that she will often complete the investigation herself.<sup>158</sup> The next order of business is the *quick decision files* which are files which require a simple signature or the inscription of a new follow-up date in the file. For example, a file which fits in this category might be a case where she has proposed that

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<sup>154</sup> Interview with 5CK, Senior Prosecutor (Jan. 22, 2006).

<sup>155</sup> Interview with 6SB, Prosecutor (Jan. 23, 2006). The department's secretarial staff will place the files requiring immediate attention in a yellow jacket and/or make a notation on the outside file cover which indicates that the file requires immediate attention. *Id.*

<sup>156</sup> Interview with 6SB, Prosecutor (Jan. 23, 2006).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*



the case be disposed of with a fine, and she has sent the file to the juvenile authorities to solicit their approval, but the file has not yet returned.<sup>159</sup> She will handle the file at this juncture simply by writing a new follow-up date in the file. Finally, as she is going through her stack of files, she will place all of the files which require a longer and deliberate review on the bookcase behind her.<sup>160</sup> On the particular day I interviewed this prosecutor; the file stacked on top of her back bookcase was actually a case that was assigned to another prosecutor. Because that prosecutor was out sick, the department leader had assigned the case to her for follow-up.<sup>161</sup>

The case processing nature of juvenile practice may lead prosecutors to focus on simply getting their work done. Despite this pressure to focus on case completions, closing cases is seldom cited by prosecutors as a source of job satisfaction. Over 85% of the juvenile crimes prosecutors whom I interviewed stated that their primary source of job satisfaction was not related to merely processing cases or imposing punishment.<sup>162</sup> The diverse nature of the sources of job satisfaction as well as the work in this department itself is reflected in the range of interview responses detailed below. These prosecutors paint a picture of practice that is both unpredictable and that offers opportunities for prosecutors to approach their jobs creatively.

*[Question: What part of your job do you enjoy the most?]*

I like it when I can work through the small cases quickly and then spend time on the larger cases where there will be a main proceeding. However, sometimes the satisfaction comes from finishing small cases. Besides earning money, what I derive satisfaction from on the job is when the court imposes an appropriate sentence. . . . Also, in juvenile cases, once in a while a juvenile will approach me and tell me that they had no chance of changing the circumstances of their life until the sentence was imposed on them.<sup>163</sup>

That is a difficult question. There are many dimensions of my work that I enjoy. In a special crimes department, one is not

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> This statistic is based on eight interviews of juvenile crimes prosecutors: 5CK, Senior Prosecutor (Jan. 26, 2006); 6SB, Prosecutor (Jan. 23, 2006); 12CJ, Prosecutor (Nov. 29, 2005); 13EU, Senior Prosecutor (Dec. 6, 2005); 5DK, Prosecutor (Jan. 19, 2006); (8AR); 9LJ, Senior Prosecutor (June 12, 2006); 9QL, Prosecutor (June 14, 2006); 5DK, Prosecutor (Jan. 19, 2006).

<sup>163</sup> Interview with 6SB, Prosecutor (Jan. 23, 2006).

bored. The work load is very diverse. In a juvenile proceeding one must often deliberate about what has happened. Sometimes one must go to the library and research a legal question—what has the Federal Criminal Court said about this issue? Not only must [I] clarify the facts with the police by telephone but also one must think about the circumstances that have influenced the child. The circumstances surrounding the case. It can also happen that the testimony during the trial differs from the facts which appear clearly in the file. This makes the proceedings interesting.<sup>164</sup>

The spectrum of cases that we deal with is very large and, in comparison with other departments that also work with social relationships between husbands and women, between children and parents and with these types of histories, I must genuinely say, that the juvenile crimes department is the most important and difficult area. Because the focus of our juvenile law is not punishment in the first instance but personal development, we work closely with the juvenile social workers, parents, schools, social insurance agencies, sports authorities and the like. As a result, as an individual, one can have a large impact. You have the opportunity to take the initiative.<sup>165</sup>

Here in the juvenile crime department, every prosecutor handles about 120 new cases per month. That is 1,440 cases in a year. Personally, I enjoy participating in court proceedings because the proceedings are simply more interesting [than working on files]. Many days of the week I must work at my desk and read files . . . . The desk work is very routine. I personally enjoy my work when it is a little more difficult. That is usually the case when I go to court. I think most of my colleagues feel the same way.<sup>166</sup>

### B. Repeat Offender Units

In contrast to normal juvenile case loads which are often assigned based on the suspect's last name, in the repeat offender unit which I visited, prosecutors are assigned a caseload of 50 to 60 specific juveniles. All of these individuals have a record of multiple offenses, which has earned them the distinction of being labeled an "*Intensivtäter*" or juvenile habitual offenders, as well as their own personal prosecutor.<sup>167</sup>

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<sup>164</sup> Interview with 12CJ, Prosecutor (Nov. 29, 2005).

<sup>165</sup> Interview with 5CK, Senior Prosecutor (Jan. 22, 2006).

<sup>166</sup> Interview with 5DK, Prosecutor (Jan. 19, 2006).

<sup>167</sup> BOYNE, *supra* note 34, at 207.

Under this system, a “new case” will come across a prosecutor’s desk only when a juvenile who is assigned to them is suspected of committing a new infraction.<sup>168</sup> The goal of these units is to not to target the most serious individual crimes per se, but rather to deter the criminal lifestyle of habitual offenders. With this group of offenders, the mindset of practice is no longer driven by the assumption that low-level juvenile delinquency is part of the experience of growing up. In essence, the children who have been identified as serial repeat offenders no longer comport with the archetype of a typical juvenile. While prosecutors in typical juvenile crimes units view of typical juvenile delinquency as part of the normal process of growing up, repeat juvenile offender units view their charges as having stepped beyond the bounds of normal juvenile behavior. While prosecutors in typical juvenile units regard low-level juvenile delinquency as posing little threat to the societal fabric, prosecutors in these units consider the lifestyle of serial repeat offenders as a threat to the social fabric of specific neighborhood communities.

In order to handle juveniles, we have created a habitual offender unit. The main purpose of the unit is to ensure that all of the information dealing with a particular person is centralized so that the judges and prosecutors know a juvenile’s full history before sentencing them. There have been many reports in the press advocating for higher sentences for juveniles. [However] the main purpose of the unit is not necessarily to increase the punishments.<sup>169</sup>

[W]ith these people, we have many, many problems . . . They control much of the illegal drug market. They are in every criminal branch you can imagine . . . [I]t developed as a crime among very young people, absolutely youngsters. It began with jackets, with shoes, fashion labels, etc. And nowadays, mobiles, money, necklaces, whatever is electronic, MP3 players, what the kids are carrying. So this is our main problem. In certain areas of *Frankenstein* where the concentration of these people is high up to a majority, it’s a daily risk for school children to become [a] victim of such a crime. And it’s not only robbery. They’re beating people. Rap[e] is a problem—at least sexual attacks. If they get a girl or young woman, they take what they want. That’s their point of view. “I am the king. I can do whatever I want to do.”<sup>170</sup>

As a result of this case assignment system, prosecutors become

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<sup>168</sup> *Id.*

<sup>169</sup> Interview with 9RR, Justice Ministry Official (June 30, 2006).

<sup>170</sup> Interview with 9AI, Senior Prosecutor (June 14, 2006).

well-acquainted with the social backgrounds and juvenile records of the offenders who fall within their area of responsibility. A consequence of this familiarity is that a prosecutor's sense of job satisfaction may become tied, not simply to disposing of cases, but rather to affecting change in a juvenile's development.

As a general rule, I know these people very well. [When I see a case], it usually is not the first time [that I have met the offender]. I know their life history. I know where they live. I know what is going on with their parents. I am familiar with their record. With what happened before. Most of the cases involve young adults between 18 and 21 and a lower number of juveniles above the age of 14. In a typical [juvenile crimes] case, the case will be dismissed or the juvenile will be sent to a special school. Those decisions are completely random. Here it is different because we are orientated to handle particular offenders and I really know them.

In this department, I feel satisfied when an offender stops committing delinquent acts. For example I had a case where I had the impression that the young person should be incarcerated in a detention center or youth facility. The sentence was severe. After he had served a 3.5 year sentence and was 19 years old, he came to see me. He told me that I had been right. I felt good about that. He said that he was now free and that he had completed his vocational training and would visit me again!<sup>171</sup>

This can be a tall order given the recidivism rates of the target offender populations of the repeat offender units. According to statistics released by the Worker's Welfare Organization (*Arbeiterwohlfahrt-ABO*) between eighty to ninety percent of juveniles reoffend after being released from confinement.<sup>172</sup> In an effort to make a strong impression on repeat offenders, the Berlin repeat offender unit frequently recommends that the court detain a repeat offender in investigative detention (*Untersuchungshaft*) prior to trial.<sup>173</sup> The group targeted for this treatment includes youthful offenders who, because of the nature of their offense, will be eligible for sentencing to a juvenile or an adult facility if they are convicted. The use of pre-trial detention with this

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<sup>171</sup> Interview with 9QL, Prosecutor (June 14, 2006).

<sup>172</sup> Christine Sommer-Guist, *Giving Young Convicts a Break*, Goethe-Institut (Nov. 2005), <https://web.archive.org/web/20071021211219/http://goethe.de/ges/soz/thm/hjs/en/955599.htm>.

<sup>173</sup> BOYNE, *supra* note 34, at 209.

small number of hard-core offenders appears to have a slightly positive effect.<sup>174</sup> While the reoffense rate among repeat offenders sentenced to probation is approximately 53%, the reoffense rate for the group of more serious offenders who have been held in some form of pre-trial detention is 56%.<sup>175</sup> The department leader in charge of the repeat offender unit, views this slight gap as success given the fact that the individuals held in pre-trial detention are typically extremely difficult offenders.<sup>176</sup> In interpreting the results obtained by the Berlin unit, one must also consider the costs of “expedited justice.” A key practice employed by the unit is to petition the court to incarcerate young offenders prior to trial as a form of deterrence. Although the prior offense records of repeat offenders are extensive, pre-trial detention not only serves to ensure that the suspect will be present for trial, but it is also conceived as a form of punishment itself. Viewed from this perspective, repeat offenders are, in essence, convicted and preliminarily punished on the basis of their past records. The harsh practices of the unit have been criticized in the press by defense attorneys who claim that the unit’s harsh tactics result in disproportionate punishments.<sup>177</sup>

According to a press release issued by the Ministry of Interior in the state of Nordrhein-Westfalen, the creation of a repeat offender unit in Mönchengladbach, a suburb of Düsseldorf, has had a positive effect in terms of reduced crime rates.<sup>178</sup> Notably, the crime rate among repeat offenders dropped almost 50% between 2003 and 2004.<sup>179</sup> While the Mönchengladbacher model aims to reduce the time between the initial offense and the date of adjudication by 50%, the core of the program is that as a result of close cooperation between the police, prosecution office, and youth workers, an offender is placed under intensive supervision before their adjudication date.<sup>180</sup> However, it is still too early to gauge whether the intensive interagency cooperation necessary to produce

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<sup>174</sup> Reusch, *supra* note 111, at 18.

<sup>175</sup> *Id.* at 17.

<sup>176</sup> *Id.* at 19.

<sup>177</sup> See Jens Anker, *Intensivtäter zeigt Rechtsstaat die Grenze [In the Case of Intensive Offenders, the State of the Law Shows the Border]*, WELT (Mar. 1, 2007), <https://www.welt.de/politik/article730948/In-der-Hauptstadt-der-Jugendgewalt.html> (quoting Attorney Nicolas Becker “For young repeat offenders it is important that they are handled justly. Justice means that the justice system should react quickly, but with a proportionate response.” (translation on file with author)).

<sup>178</sup> BOYNE, *supra* note 34, at 209; Press Release, Innenministerium Nordrhein-Westfalen, *Innenminister Behrens Lobt Vorbildliche Ordnungspartnerschaft: Straftaten von ‘Jugendlichen Intensivtätern’ Gehen um Fast 50% Zurück* (March 3, 2005) at [http://www.im.nrw.de/pe/pm2001/pm2001/news\\_1361.htm](http://www.im.nrw.de/pe/pm2001/pm2001/news_1361.htm) [hereinafter Innenministerium Press Release].

<sup>179</sup> BOYNE, *supra* note 34, at 209; Innenministerium Press Release, *supra* note 178.

<sup>180</sup> BOYNE, *supra* note 34, at 209; Innenministerium Press Release, *supra* note 178.

results can be sustained and whether any significant improvement in delinquency rates can be made in Berlin's tougher neighborhoods absent a change in the underlying socio-economic conditions. Absent those factors, these programs may only produce short-term, symbolic results.

### III. FEAR, FAIRNESS, AND CITIZENSHIP

A key question in the juvenile crime system is the issue of whether or not juvenile justice system treats immigrants differently than native Germans. On their face, incarceration statistics raise troubling issues. If we examine incarceration statistics, it is evident that young foreigners are overrepresented in youth prisons by a factor of close to 2.3 times<sup>181</sup> while young ethnic German immigrants are overrepresented by almost double.<sup>182</sup> At least part of the explanation for differences in youth incarceration rates is that foreigners report violent conflicts to the police more often than native Germans and the conflicts that they report are more likely to involve a foreign suspect.<sup>183</sup> Despite stark differences in incarceration rates, a few research studies show that, at least in terms of prosecutorial decision-making, young foreigners are not treated more harshly than ethnic Germans.<sup>184</sup> In fact, while there is scattered evidence showing that police agencies engage in discriminatory enforcement practices, other studies suggest that prosecutors dismiss cases against foreigners at a higher rate than cases involving German suspects.<sup>185</sup> According to Dünkel, the net result is that:

[T]he prevalence rates of foreign compared to German offenders are still higher but not as much as the police data would suggest. This means that prosecutors somehow “de-dramatise” (petty) offenses of foreigners to a more “realistic” level.<sup>186</sup>

While Albrecht supports Dünkel's position and claims that prosecutors act as a “counterweight against a trend toward overreporting

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<sup>181</sup> Holthusen, *supra* note 147, at 141 (drawing from data taken from a survey of 19 youth prisons in western Germany in 1998).

<sup>182</sup> *Id.*

<sup>183</sup> Dünkel, *supra* note 149, at 14.

<sup>184</sup> Albrecht, *supra* note 93, at 72.

<sup>185</sup> Dünkel, *supra* note 149, at 14; *see also* Rainer Geißler and Norbert Marissen, *Kriminalität imd Kriminalisierung Junger Ausländer: Die Tickende Ssoziale Zeitbombe-Ein Artefackt der Kriminalstatistik*. 42 *KÖHLER ZEITSCHRIFT FÜR SOZIOLOGIE UND SOZIALPSYCHOLOGIE* (4) 663 (December 1990); Jürgen Mansel and Jürgen Raithel, *Verzerrungsfaktorem im Hell-und Dunkelfeld und die Gewaltentwicklung*, in *KRIMINALITÄT UND GEWALT IM JUGENDALTER HELL-UND DUNKELFELDBEFUNDE IM VERGLEICH* 7-24 (Jürgen Raithel and Jürgen Mansel eds., 2003). *But see*, C. Pfeiffer, M. Kleimann, M., t. Schott, s. Petersen, *Migration und kriminalität. Ein Gutachten für den Zuwanderungsrat der Bundesregierung*. 27 *INTERDISZIPLINAREN BEITRÄGE ZUR KRIMINOLOGISCHEN FORSCHUNG* (disputing that this tendency exists).

<sup>186</sup> Dünkel, *supra* note 149, at 15 (citations omitted).

of minority offenders by police,<sup>187</sup> this phenomenon may be based more on the evidentiary weaknesses inherent in cases involving foreign suspects rather than prosecutor's desire to preserve the system's overall fairness. Bareinske's 2004 study of case dispositions in the state of Baden-Württemberg cast doubt on Dünkel's thesis. In a study of over 25,000 juvenile cases, Bareinske found that juveniles who possessed German citizenship received an informal sanction 72% of the time; while non-German juveniles received the benefit of an informal disposition at the lower rate of 68% of the time.<sup>188</sup> Although this variance is a small one, it is evident that further research on the potential existence of discriminatory practices in the justice system should be conducted to determine the source of the substantial differences in youth incarceration rates.

Even where the criminal law is facially neutral with regard to the treatment of foreigners, the use of decision-making criteria which are facially neutral may have a disparate impact on some foreign residents. Hans-Jörg Albrecht points to a two-prong reason for this disparity:

System processing in the case of members of minorities is heavily influenced by two characteristics: legal particulars and certain types of crime involvement. Foreign offenders are likely to be handled differently compared with German offenders on legal grounds, as decision making in the criminal justice system in several respects takes account of bonds to conventional society such as place of residence. Participation of some ethnic minorities in black markets, especially drug markets, is likely to lead to disproportionate use of pretrial detention and prison sentences. This reflects concern not for ethnic minorities but for illicit drugs, which continue to provoke massive criminal justice reactions.<sup>189</sup>

The fact that many immigrant children possess few social bonds, lack a stable residential pattern, and belong to families who are socio-economically disadvantaged increases the likelihood that young foreigners who are suspected of committing a moderate to serious offense will be held in pre-trial detention. Thus, the use of justifiable routine decision-making criteria, such as an individual's ties to the community

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<sup>187</sup> Albrecht, *supra* note 93, at 71.

<sup>188</sup> Bareinske, *supra* note 49, at 75; Christian Bareinske, *Sanktion und Legalbewährung im Jugendstrafverfahren in Baden-Württemberg* [Sanction and Legal Probation in the Youth Prosecution Proceedings in Baden-Württemberg], MAX PLANCK INST. FÜR AUSLÄNDISCHES & INTERNATIONALES STRAFRECHT [MAX PLANCK INST. FOR FOREIGN & INT'L CRIM. L.], <https://www.mpicc.de/de/forschung/forschungsarbeit/kriminologie/archiv/legalbewaehrung.html> (last visited Feb. 12, 2017).

<sup>189</sup> Albrecht, *supra* note 93, at 37.

and their ability to flee out of the country, produce unequal outcomes such as higher pre-trial detention rates. Michael Tonry succinctly summarizes the problem:

The difficulty is that the rational and humane policy of restricting pretrial confinement to those least likely to appear for trial means that those who live the least settled lives—those without permanent residences, or stable family lives, or jobs—will be held. Those traits more commonly characterize disadvantaged people, and many minority groups are disadvantaged.<sup>190</sup>

This outcome has occurred in Germany as the available statistics regarding juvenile pre-trial detention rates indicates that young foreigners are overrepresented in the ranks of pre-trial detainees throughout the country.<sup>191</sup>

Thus, however impartial the law may be on its face, the fact that both judges and prosecutors possess substantial latitude in their decision-making processes, opens the door to accusations that the law is being implemented in a discriminatory manner. Consider the case of Nidal R., a young man from Lebanon whose repeated criminal exploits triggered the creation of Berlin's repeat offender unit.<sup>192</sup> He first attracted the attention of the police at age ten.<sup>193</sup> For four years his notoriety and string of repeated offenses attracted the attention of the press who singled his case out as an example of the juvenile justice system's ineffectiveness.<sup>194</sup> Against a backdrop of rising rates of violent juvenile crime, the publicity surrounding the case prompted members of both the conservative Christian Democratic Union (CDU) and the Social Democratic Party (SDP) to take notice. The case's trajectory is a disturbing one. On the one hand, the fact that the youth who is now 24 years old, committed over eighty criminal acts within a ten year period indicates that his decision-making was impervious to punishment.<sup>195</sup> Arguments can be made however; both that the judicial system intervened too late and that when it did intervene, that the harsh judgments it imposed were driven by intensive media scrutiny. The case of Nidal R. is one of a handful of cases throughout Germany whose

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<sup>190</sup> Michael Tonry, *Ethnicity, Crime and Immigration*, 21 CRIME & JUST. 1, 16 (1997).

<sup>191</sup> See Albrecht, *supra* note 93, at 79–80. Albrecht reports that in 1994 foreign youth made up 57% of the youth imprisoned in Hessen. *Id.* In Niedersachsen and Berlin, foreign pretrial detainees approached the 2/3 mark in 1992. *Id.*

<sup>192</sup> Von Jens Anker, *In der Hauptstadt jeter Jugendgewalt*, WELT (Feb. 22, 2007), [http://www.Welt.de/politik/article730948/In\\_der\\_Hauptstadt\\_der\\_Jugendgealt.html](http://www.Welt.de/politik/article730948/In_der_Hauptstadt_der_Jugendgealt.html).

<sup>193</sup> *Id.*

<sup>194</sup> *See id.*

<sup>195</sup> *Id.*



every development seemed to provoke media frenzy. Illustrative of the coverage which Nigal R.'s case received, the Berlin media labeled him as Berlin's "Number one Problem Child" and at one point, the headline of a popular Berlin newspaper described him as "20 years old, 80 crimes, 100 percent violent."<sup>196</sup>

According to a Berlin defense attorney, as a result of the publicity surrounding Nidal's case, prosecutors sought and courts inflicted unusually harsh sanctions on the youth including a lengthy period of imprisonment. As the attorney relates:

No reasonable appe[llate] judge dared for a long time to do anything for Nidal. When they finally had to release him he was so hungry for life and poor that it was very easy . . . to get a new arrest warrant for him for stealing cigarettes and [for] pushing away a policeman who just wanted to arrest him. The details of all these procedures are very interesting because they show that the concept beyond this new prosecut[ion] department is deterrence by super harsh treatment and provisional arrest . . . as a kind of fast punishment before a juvenile delinquent [can be found] guilty.<sup>197</sup>

Nor is the case of Nidal R. unique. The continued attention devoted by the Berlin media to the case histories of a group of serial offenders continues to call into question the efficacy of the system's response. Given the fact that over 80% of Berlin's serial offenders lack German citizenship,<sup>198</sup> media discussion of this crime problem has drawn attention to the fact the bulk of these offenders are non-German citizens. The link between immigration status, the impotency of the criminal justice system, and demands for an even stiffer response can be seen in this excerpt from a February 2007 article drawn from the *Berliner Morgenpost*.<sup>199</sup> The article focuses on the case of Levent U. who committed over 200 crimes between the ages of 12 and 25 and was on the run as a murder suspect at the time of the article's publication.<sup>200</sup>

Politicians and representatives of the police are angry and upset. Law-abiding citizens have become desperate about the judicial system. The domestic politics spokesman for the

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<sup>196</sup> BOYNE, *supra* note 34, at 211 (citing Corinna Werwigk-Hertneck, *Bekämpfung der Jugendkriminalität aus strafrechtlicher Sicht*, in INTERNETDOKUMENTATION DEUTSCHER PRÄVENTIONSTAG 1 (H.J. Kerner & Erich Marks, eds., 2004).

<sup>197</sup> Interview with 9DEP, Berlin Defense Attorney (June, 13, 2006).

<sup>198</sup> Anker, *Hauptstadt jeter Jugendgewalt*, *supra* note 192.

<sup>199</sup> Peter Oldenburger, *Kriminell-und doch auf freiem Fuss: Polizei und Politiker kritisieren "richterliche Milde" bei Intensivtätern*, BERLINER MORGENPOST (Feb. 21, 2007), <http://www.morgenpost.de/content/2007/02/21/berlin/884363.html>.

<sup>200</sup> *Id.*

Christian Democratic Party in the Berlin Senate, Frank Henkel, said yesterday: "Why is this criminal still at large? The citizens and the police no longer agree with judicial leniency and softness." [The leader of a police organization (*Gewerkschaft der Polizei*)] Klaus Eisenreich stated that: "These people present a danger to the public. They must be imprisoned." We must ask the question, why are these people still in Germany?<sup>201</sup>

While a connection exists between juvenile criminality and the cultural backgrounds of many juvenile offenders, it is impossible within the confines of this dissertation to adequately explore any causal connection which may exist between a juvenile offender's citizenship status and prosecutorial decision-making. It is evident however, that the German media has played a key role in drawing attention to the problem of juvenile crime in Germany's larger cities and that that attention has provoked a policy response that has affected prosecutorial decision-making. A significant question which remains unaddressed, and lies beyond the scope of this Article, is the degree to which the criminal justice system can, by itself, efficaciously address a state's underlying societal problems.

#### IV. DECISION-MAKING NORMS

For the past several decades, the prevailing norm in juvenile departments has been to give juveniles multiple opportunities to turn their lives around.<sup>202</sup> The case handling philosophy is dominated by a preference for using a wide range of mild pedagogical measures with juvenile suspects and harsher sanctions with young adults.<sup>203</sup> In concrete terms, this policy translates into case-handling practices dominated by case dismissals and the slow progression towards stiffer sanctions with each new offense. Given that cases of juvenile crime are often less complicated from an evidentiary standpoint than many adult crimes, one would expect that the model of delegating case investigation practices to the police that German prosecutors use in handling low-level general crimes would be duplicated in juvenile crime departments.

The softer sanctions imposed in juvenile cases combined with higher caseloads provide few incentives and little time for prosecutors to work closely with the police during the investigation stage.<sup>204</sup> Where cases require further investigation a prosecutor might send the file back to the police with instructions regarding further areas for investigation

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<sup>201</sup> *Id.*

<sup>202</sup> Interview with 6SB, Prosecutor (Jan. 23, 2006).

<sup>203</sup> Interview with 5CK, Senior Prosecutor (Jan. 22, 2006).

<sup>204</sup> Interview with 6SB, Prosecutor (Jan. 23, 2006).

or even attempt to perform the investigation themselves.<sup>205</sup> In a typical juvenile crimes department, the juvenile crimes prosecutors will interface with police units who do not specialize in juvenile crime. There may be a few officers who specialize in handling sexual crimes or violence in the schools for example, but the bulk of the officers may not possess any specialized training or competency.<sup>206</sup>

Where cooperation between police agencies and prosecution offices is only loosely coupled, the action taken in an individual case fluctuates greatly depending on a particular prosecutor's level of initiative and interest. This argument is supported by Asmus's (1998) research on the German prosecution service in which the German sociologist posits that German prosecutorial practice is constituted by bureaucratic decision practices.<sup>207</sup> According to Asmus, particular practices emerge out of the tension between legal norms and practical constraints.<sup>208</sup> Of particular interest here is an interview that Asmus conducted and documented with a juvenile crimes prosecutor regarding the prosecutor's decision to arrest a juvenile suspect. In the case being discussed, the prosecutor relates the sequence of background events that influenced his decision to arrest the suspect. At the time of the arrest, the juvenile had a documented history of minor offenses.<sup>209</sup> During the suspect's most recent crime spree, the prosecutor has been in almost daily telephone contact with the police. In the passage below the prosecutor describes the case's recent history:

**Prosecutor:** I now have a case: The police called me, last week, and explained to me: The [suspect] had also stolen three mopeds and had committed a burglary in a supermarket. We searched by him and found . . . an entire storeroom. [The police asked] Should we summon him? I said, well, does he have a job? Yes he works somewhere. Does he live with his parents? Yes. Also not [a sufficient condition by itself to warrant an arrest]. The day before yesterday the police called and said: The "wretch" has stolen a moped again. What should we do now? He simply will not stop. And then I said. Well okay. Then [the police] said: 'But we don't have him [in custody].' [I]n the meantime he has absconded. Then I said, 'Good, bring us the file, we will file a motion for an arrest warrant and then if you catch him, then we

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<sup>205</sup> *Id.*

<sup>206</sup> Interview with 5CK, Senior Prosecutor (Jan. 22, 2006).

<sup>207</sup> Hans-Joachim Asmus, *Der Staatsanwalt – ein bürokratischer Faktor in der Verbrechenskontrolle?*, 17 ZEITSCHRIFT FÜR SOZIOLOGIE [Journal of Sociology] 117, 118 (1998).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 122–23

can hold him in custody.’

Now yesterday I was not here. The police went to my [the prosecutor who was standing in for me] and my replacement said, Hmm merely a moped-well the theft of a pair of mopeds, no we will not detain him. Today the police called me again and said. Now he has again broken into a store and stood behind a case of mineral water, and then loaded the case onto another stolen moped (laughing). I said, it is too much, now he will be arrested, now is the end.

[My substitute] is lazy. Yes that is true! That I must honestly say, because the reason for the arrest, everyone [finds] for themselves . . . There is the danger of harm, which is not present from this dimwit. He is too dumb. Then there is the danger of flight-that is probably also not present. He stays . . . and steals again. Then there is the risk of repeat offense but for that he must have already been appropriately punished [for a similar crime]. That has not happened.

And I must say, that a ground for an arrest was found. One says... it exists in the danger of flight, probably he could go. This is the case of an investigative detention which the law is not designed for, which is called the “educative” detention, in narrow circumstances and which I find very sensible.<sup>210</sup>

The prosecutor’s explanation of the events as well as his comments about the inaction of his stand-in supports the thesis that, in a typical juvenile crimes department, the character of the actions taken are strongly influenced by the prosecutor’s own level of initiative. Although the law seeks to define a series of legally binding prerequisites for taking action, ultimately the prosecutor’s own judgment, shaped with the input of the investigating officers, and his or her preference for action shapes the decision to arrest.

While individual prosecutors’ preferences for action shape case outcomes, by far the strongest impact on sanctions is exerted by regional norms of practices. As I have already pointed out, prosecutors throughout Germany are bound to enforce the same juvenile code. While the law is defined at the federal level, it is at the regional and local levels where standards of interpretation develop. This development is reflected in the widespread variations between the diversion, pre-trial detention, and incarceration rates at the state level. The variations in diversion rates are depicted in Table 3.5. The three states with the lowest diversion rates include: Saarland (SL) at 50%, Bavaria (BY) at

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<sup>210</sup> *Id.* at 121–22.

61%, and Niedersachsen (NI) at 65%.<sup>211</sup> The three states with the highest rates are: Bremen (HB) at 85%, Hamburg (HH) at 84%, and (BB) West Berlin with a diversion rate of 79%.<sup>212</sup> According to Dünkel, the high rates of diversion in the city-states of Berlin, Bremen, and Hamburg, indicates that these states are discharging a higher percentage of cases via diversion to cope with elevated crime rates.<sup>213</sup> In fact, the rates of juvenile crime in these three cities are among the highest in Germany. When we examine juvenile crime rates per 100,000 residents; Hamburg (11,007), Bremen (10,268), Saxony (9,771), and Berlin (9,649) top the list of German states.<sup>214</sup> At the other end of the scale are Baden-Württemberg (5,151), Hessen (5,506), and Bavaria (5,736) with the lowest juvenile crime rates.<sup>215</sup>

## V. NEW MODELS OF PRACTICE

The search for new responses to address juvenile crime began in the early 1990s when projects such as victim-offender mediation were introduced.<sup>216</sup> This program targeted offenders who had committed minor offenses that would typically be destined for diversion with the imposition of certain conditions.<sup>217</sup> Although an amendment to the Juvenile Code enacted in 1990 opened the door to mediation programs,<sup>218</sup> in some areas these programs eventually closed down because prosecutors refused to support them.<sup>219</sup> In many cases the diversion-related programs that have survived have been sustained by closer working relationships between police, social workers, and prosecutors.

The increase in juvenile crime rates in some German cities has opened the door to, if not mandated, closer working relationships between local branches of government responsible for responding to juvenile crime.<sup>220</sup> As working relationships have become more closely knit, there has been an increased sharing of information between the police officers, prosecutors, social workers, and judges during the investigation and

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<sup>211</sup> Dünkel, *supra* note 46, at 239, 241.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 237.

<sup>214</sup> *Id.* at 238 (citing 2003 data).

<sup>215</sup> *Id.*

<sup>216</sup> Holthusen, *supra* note 147, at 12, 16.

<sup>217</sup> See Rob Allen, *Reducing the Use of Imprisonment: What Can We Learn From Europe?* REP. FOR THE CRIM. JUST. ALLIANCE (May 2012).

<sup>218</sup> Erstes Gesetz zur Ämerung des Jugendgesichtsgesetzes [1 JGGÄndG] [First Act Amending the Juvenile Courts Act] (August 30, 1990) ELEKTRONISCHER BUNDESANZEIGER [EBANZ] at 1853.

<sup>219</sup> See Thomas Trenczek, *Victim-Offender Mediation in Germany—ADR Under the Shadow of the Criminal Law?* 13 BOND L. REV. 1, 8 (2001).

<sup>220</sup> BOYNE, *supra* note 34, at 215.

adjudication stages of the proceedings. As a result, within the past ten years in particular, local juvenile justice agencies have been experimenting with a variety of programs which aim to increase the system's responsiveness to such problems as juvenile delinquency and violence. While these projects take various forms from housing police officers, juvenile welfare officers, and prosecutors under one roof to scheduling regular information sharing meetings, the goal of many of these projects is to improve the coordination between agencies.<sup>221</sup>

For example, the program initiated in the city of Mönchengladbach, Germany aims to reduce crime committed by repeat offenders by improving the exchange of information between agencies, accelerating the adjudication process, and instituting home visits to the residences of repeat offenders by police and youth welfare officials. This program, which has shown promising results in reducing delinquency rates, has cut the time between the investigation and adjudication stages in half.<sup>222</sup> Similarly, Stuttgart's "House of Youth Law" (*Haus des Jugendrechts*) decreased the average case processing time from 230 days to 86 days during the project's implementation period.<sup>223</sup> Similar programs, which have been introduced on the local level, have restructured interagency relationships as well as case decision-making processes. In particular there has been a blurring of traditional decision-making competencies which mandated that the police collect the "facts" surrounding a criminal incident while the prosecutors made legal decisions based on those facts. The joint nature of the decision-making process is reflected in the description of the working relationships between police and prosecutors detailed by these prosecutors.

[Q: *How would you describe your working relationship with the police?*]

We get to know each other and [as a result] can work better with each other. We get together with each other in training

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<sup>221</sup> Gabriel Gabriele, *Fast-tracking and Co-operation Between Police, Justice and Soc. Services-crime as a Cause for Looking if Support is Required in* PREVENTION OF YOUTH CRIME IN GER.: EDUC. STRATEGIES: TRENDS, EXPERIENCES AND APPROACHES 99, 100–01 (Ctr. for the Prevention of Youth Crime eds., 2004).

<sup>222</sup> KRIMINALISTISCHES INSTITUT, CRIME PREVENTION IN GERMANY: SELECTED EXAMPLES OF PROJECTS IN THE "INFOPOOL PREVENTION" DATABASE 17 (Jörg Bässman ed., 2006), <http://www.kriminalpraevention.de/files/DFK/sprachen/en/08selected-projects-2006.pdf>. According to this report, the rate of repeat offenders among 14 to 18 years old declined from 45.88% between 2003 and 2004. *Id.*

<sup>223</sup> KRIMINALISTISCHES INSTITUT, CRIME PREVENTION IN GERMANY: SELECTED EXAMPLES OF PROJECTS IN THE "INFOPOOL PREVENTION" DATABASE 14 (Jörg Bässman, Bundeskriminalamt eds., 2004), <http://www.kriminalpraevention.de/files/DFK/sprachen/en/09selected-projects-2004.pdf>.

sessions, meetings, and conferences. . . . The decisions take shape through an impression we [form] . . . when we make a decision whether or not to seek an arrest [and must determine] whether the preconditions for an arrest are present. The police come to us in the larger cases and we talk about what the case looks like and how we should proceed. We coordinate our actions so that there is no superfluous investigation. . . . We work with each other. As a result, we also learn what we have to offer each other. For example when we need a search warrant we must go before the judge with all of the facts. We must prepare the motion. That means that the police must come to us with the file and prepare the motion. The police will often come to us in person.<sup>224</sup>

With the repeat offender program, I work very closely with the police . . . We telephone each other daily and make many decisions together. A police officer will call and say “the witness said this and that, should I send you the updates?” Should I talk to the accused again? Should we do this?” The relationship is very tight.<sup>225</sup>

When I have a case where the juvenile has committed several crimes and there is a possibility of punishment, the police will contact me early in the investigation. This [is especially true] when they would like to make an arrest. Then we stay in contact with each other throughout the investigation. When a suspect has been arrested we will work very closely together to bring the case to court.<sup>226</sup>

A key assumption which underlies many information-exchange programs is that too often cases processed according to the traditional investigation and prosecution model take too long to adjudicate.<sup>227</sup> When a period of several months to a year elapses between the commission of the delinquent act and the system’s response, the connection which the offender will make between the two events is too attenuated to provoke a behavioral change. This premise was borne out in a number of the cases that I observed as cases were often continued and rescheduled for a variety of reasons, for example, if the child had another pending case in another court, or if the court decided that it needed a psychological evaluation of the child. While, in some cases these delays were warranted, in other cases prosecutors complained to me that judges

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<sup>224</sup> Interview with 13EU, Senior Prosecutor (Dec. 6, 2005).

<sup>225</sup> Interview with 9QL, Prosecutor (June 14, 2006).

<sup>226</sup> Interview with 12CJ, Prosecutor (Nov. 29, 2005).

<sup>227</sup> Gabriele, *supra* note 221, at 99.

delayed adjudication because they were reluctant to impose the stiff sentence which appeared to be warranted under the circumstances.<sup>228</sup>

As I noted previously, in the past, the traditional form of inter-agency communication used in prosecution practice relies heavily on time-consuming written communications between the prosecution office, investigative agencies, and the courts.<sup>229</sup> To achieve change, local communities have sought to restructure the relationships between organizations by mandating more timely and frequent inter-agency communication and formulating joint strategies.<sup>230</sup> While implementing these operational changes did not require local communities to seek any changes in the existing juvenile laws or regulations, the changes could not occur without changing the organizational structure and decision-making processes in the cooperating local organizations. This decision-making freedom on the local level has positive and negative aspects. On the positive side, local communities are free to implement modest change without petitioning the federal legislature. On the negative side, local communities were free to introduce new programs that impacted the delivery of criminal justice services without a national debate.

Not surprisingly, some of the most effective local projects have involved eliminating the physical distance between the agencies, either through the Stuttgart model of housing all of the police, prosecutors, and youth welfare workers in a single building or, as the state of Sachsen has done, by housing representatives from the Youth Services Agency (*Jugendgerichtshilfe*) (JGH) within police agencies.<sup>231</sup> Regardless of the physical proximity of the cooperating agencies, the essence of the fast-track approach is that the representatives from the police, prosecutor's office, and the JGH cooperate with each other and coordinate their responses as soon as possible after a suspect has been identified.

A question that has been largely unaddressed to date is the impact that fast-tracking a case may have on the offender—not only on their development but on their legal rights as well.<sup>232</sup> Since many innovative

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<sup>228</sup> Interview with 7SE, Prosecutor (April 5, 2006).

<sup>229</sup> See Gabriele *supra* note 221, at 100.

<sup>230</sup> *Id.* at 100–01, 107.

<sup>231</sup> *Id.* at 100–01.

<sup>232</sup> See *id.* at 103. Gabriel states: “Without detailing all the possible constellations, it can be established that arguments in favour of fast tracking should be qualified in a number of ways. For one thing, although procedures extending over a long period of time do indeed run the risk of losing contact with the context, dynamics and background of an offence, those who work in the area are familiar with many constellations in which permitting time to elapse is the appropriate, and necessary, response because it enables the suspects and their families to ‘cool down’ and acquire a more detached view, irrespective of possible official intervention. Indeed, it should not be forgotten that the fast tracking discussed here is invariably official action, taken in the name of the State, and that, rather than solving a problem it can make matters worse.” *Id.*



programs aim to reform the procedures used and decisions made during a juvenile proceeding's investigation stage, the decision-making processes of prosecutors and the range of their discretion inevitably stand at the focal point of questions which challenge the efficacy of reform. A key question is whether or not improved case communication and the fast-tracking of cases has led to "the premature introduction of sanctions" for minor offenses.<sup>233</sup> If this proposition were true, we would see an increase in the number of cases disposed of under Section 45 (2) JGG which requires the offender to comply with certain socio-educational measures and a relative decrease in the number of cases which are summarily dismissed without consequences pursuant to Section 45 (1) JGG. The percentage of cases disposed of under both sections steadily increased between 1981 and 2004.<sup>234</sup> Although, no comprehensive study of fast-track programs has been completed to date, initial data from the Stuttgart program has been published. This data indicates that, while the cases disposed of pursuant to Section 45 (1) JGG during the tenure of the model program increased 30% (from 6.8% to 8.8 % of total dispositions), dispositions imposed pursuant to Section 45 (2) JGG registered an over 80% increase (5.8% to 10.6%).<sup>235</sup>

The sanctioning processes used by some fast-track programs also raise distribution of powers concerns. With many fast-track programs, it is not the courts that determine what programs should be "recommended" to offenders eligible for diversion programs, but rather police officers who work in consultation with prosecutors.<sup>236</sup> Ideally, the decision-making of front-line personnel is guided by recommendations formulated by community workgroups. Diversion guidelines assist the agencies who participate in inter-agency task forces to navigate the conflicts that emerge between the competing mandates imposed on their own individual organizations mandates and help to facilitate interagency cooperation. For example, social workers may be reluctant to report crimes because it may undercut their effectiveness and credibility with their clients. At the same time, police officers are bound by the principle of legality to register and investigate every potential offense that comes to their attention. On the other hand, the realities of tight fiscal constraints have forced prosecutors to loosen their faithfulness to the principle of mandatory prosecution. While programs which attempt to fast-track juvenile cases offer the promise of breaking

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<sup>233</sup> *Id.* at 106.

<sup>234</sup> Wolfgang Feuerhiem, *Das Haus des Jugendrechts in Stuttgart Bad Cannstatt: Konzeption und empirische Befunde*, (INFO 2003) 57, 74–75 (Institut für Sozialpädagogische Forschung Mainz, 2004) at <http://www.uni-heidelberg.de/institute/fak2/krimi/DVJJ/Ausfsaetze/Feuerehelm2003.pdf>.

<sup>235</sup> *Id.* at 74–75, 79.

<sup>236</sup> Gabriele, *supra* note 221, at 102, 106.

the pattern of sanctioning practice which has imposed too few consequences, too late in time, those programs require an additional investment of both time and personnel. Without a net gain in overall agency resource levels, the increased time and effort devoted to fast-tracking cases may be achieved at the expense of attention paid to other cases. Critically, if the Ministries of Justice at the state level assign prosecutors and judges to offices and courts strictly on the basis of average case load levels, the introduction of new programs may improve prosecutorial effectiveness in one area while creating shortages in other areas. In sum, in an era in which prosecution offices have faced tight budget constraints, new programs which require prosecutors work more closely with other agencies and to do more than routinely process files, may lead to higher case dismissal rates in other departments which experience stiffer resource constraints.

#### VI. COURT HEARINGS & SENTENCING PRACTICES

Although a key goal of juvenile proceedings is to ascertain the state of the juvenile's mind and the status of their development, the proceedings must first establish the suspect's guilt before formal sanctions may be imposed. Nevertheless, the procedural rules which govern juvenile proceedings contain several provisions which attempt to balance the judicial system's quest for truth and transparency with the system's aim to encourage child development. For example, to protect children from publicity, juvenile proceedings are closed to the public.<sup>237</sup> In addition, the juvenile code instructs prosecutors to exclude information from the charging document which could harm a child's development where possible.<sup>238</sup> In the small number of children's court proceedings that I observed,<sup>239</sup> both prosecutors and judges did not simply accept the allegations as filed but waded through witness testimony and dismissed charges that could not be substantiated. In addition, rather than project a distant, authoritative air, several judges and prosecutors attempted to establish a friendly, but stern, parental tone. Thus, through the tone and communication style of the proceedings, judges and prosecutors attempt to cajole and persuade young offenders to return to the fold of good citizenship. In this sense, the proceedings themselves

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<sup>237</sup> JGG, *supra* note 35, §48(1)–(2). Where the proceedings also include charges filed against young adults (aged 18 to 21) or adults the proceedings are open to the public unless the court elects to hold closed hearings. *Id.* § 48(3).

<sup>238</sup> *Id.* § 46.

<sup>239</sup> Due to the fact that I only observed a small number of juvenile proceedings, the comments in this subsection must be interpreted with caution. In the future, I anticipate conducting more extensive participant observation studies focusing on court proceedings. Of particular interest would be to compare proceedings initiated by the repeat offender units with the typical juvenile proceedings.

possess a certain performance value that goes beyond the mandate of the law to “find the truth.” In this sense, the fact that a young suspect has participated in the process and appears amenable to reform possess a value in and of itself. As a result, the judicial process possesses its own independent educative value. This fact, plus the fact that the system is oriented towards child development, rather than the imposition of punitive sanctions increases the likelihood that cases will be dismissed and that no sanctions will be imposed.<sup>240</sup> The predominant assumption underlying the treatment of juvenile crime is the thesis that society should tolerate a certain level of juvenile delinquency because it is a normal part of the development process. As one prosecutor explains:

If you asked a number of university students how many of them had broken the law growing up, most of them would say “yes.” Because of that the sanctions that we use to respond to this behavior should be minimal. That is the reason that we work with the office of youth services and the juvenile court workers to ascertain what is happening in the child’s life. These social workers also participate in the court proceedings as they are familiar with the child’s history. The interviews that they conduct do not focus exclusively on the actions at issue but also the nature of the child’s family relationships. . . . So when the case is not serious, the court will require the child to participate in a so-called “growing up talk,” mediation with the victim, or community service.<sup>241</sup>

The familiarity that develops between judges, prosecutors, and social workers assigned to assist in juvenile proceedings breeds a feeling of community and a sense of familiarity. Because in most cases the prosecutors and judges who work on juvenile cases specialize in handling juvenile cases, they know each other well. In the proceedings that I observed, the prosecutor was able to “guess” with uncanny accuracy what the outcome would be before the proceeding started. This prescience is the product of the prosecutor’s prior experiences before the court. Judges and prosecutors in particular communities possess a similar knowledge base of shared experience. While this premise holds true to a certain extent in all communities, the fact that juvenile courts form their own communities within a community heightens the level of familiarity of the participants.

At the same time, the predictable nature of case outcomes did not necessarily signal that prosecutors agreed with a particular judge’s sentencing philosophy or that prosecutor’s relinquish their role during

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<sup>240</sup> Interview with 6SB, Prosecutor (Jan. 23, 2006).

<sup>241</sup> Interview with 5CK, Senior Prosecutor (Jan. 22, 2006).

the fact-finding and sanctioning proceedings. As the interview excerpts below indicate, prosecutors are not only aware of differences in judicial sentencing philosophies, but in some circumstances, they will engage in or support efforts to steer cases to judges whose sentencing philosophies they support. While this is a common practice in the American system, it is almost unthinkable in a civil law system founded on the premise that law can and should be uniformly implemented.<sup>242</sup>

I know the juvenile judge in *Falkenberg* very well and I know most of the time what the outcome is likely to be. . . . However the juvenile judge in is too lenient. In one serious case that I was handling he dismissed the case with only the requirement that the juvenile had to complete forty hours of work. When possible I will avoid that judge by filing more serious cases before the *Jugendschöffengericht*.<sup>243</sup> This goes against the spirit of the regulations.<sup>244</sup>

[W]e are very happy that we could come to a change of [sentencing philosophy with the repeat offender unit] which goes hand in hand with a change in thinking in general. So the generation of 68'ers goes to pension . . . Thank heavens.<sup>245</sup> And we have [new] judges for young people. It is now the generation of forty- somethings. . . They see things absolutely different than the [judges who are] twenty years older or so. And that leads to the effect that the prisons for young persons are overcrowded and [our unit] is one of the reasons that they are over- crowded. . . . A mugger [that comes to our unit] normally is sentenced to imprisonment. Sometimes [a] suspended sentence with imprisonment.<sup>246</sup>

Finally, while there is a high percentage of routine decision-making in juvenile crime cases, the decision-making process in more complex cases can be a more deliberate one that requires skills and knowledge beyond that which a prosecutor acquired during their university training. For

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<sup>242</sup> StPO, *supra* note 51, § 24. While a prosecutor or a defense attorney may file a challenge against a judge, according to § 24 of the StPO, challenges may only be filed if there is a fear of bias or a reason to doubt the judge's impartiality.

<sup>243</sup> The *Jugendschöffengericht* is a juvenile court comprised of one professional judge and 2 lay judges.

<sup>244</sup> Interview with 6SB, Prosecutor (Jan. 23, 2006).

<sup>245</sup> The "generation of 68'ers" refers to the individuals who received a university during the turbulent societal upheaval of the late 1960's and early 1970's in Germany-many of whom possessed liberal attitudes towards sentencing and societal problems. *See '68 Movement Brought Lasting Changes to German Society*, DEUTSCHE WELLE (Apr. 11, 2008), <http://www.dw.com/en/68-movement-brought-lasting-changes-to-german-society/a-3257581>.

<sup>246</sup> Interview with 9AI, Senior Prosecutor (June 14, 2006).

instance, when asked what type of skills are needed to function in their department, one prosecutor responded:

First, one must be able to weigh the evidence clearly and to apply the law. . . . You must be able to sift through the testimony of the witnesses. One must understand the psychological testimony and weigh it accurately. I must say that that requires having a knowledge of society and psychology. For this one needs experience and ongoing education . . . . What is most important is that one must possess a desire to achieve justice . . . . This means finding the sanction that fits the crime . . . . We must protect society.<sup>247</sup>

### CONCLUSION

The traditional mode of juvenile crimes practice, which is dominated by case dismissals rather than punitive sanctions, often provides juvenile delinquents with multiple opportunities to reoffend. In some cases, this pattern of practice proved to be impotent in combating more severe forms of delinquency. However, stiffer sanctioning programs run the risk of failing to attack the roots causes of juvenile delinquency and achieving only symbolic, politically-responsive gains. In the exercise of their discretionary authority, juvenile crimes prosecutors stand at the midpoint of these sentencing dilemmas. Absent an adequate flow of information about a juvenile offender's history, sufficient cooperation between community agencies, time, and sufficient resources, rather than reflecting a considered judgment about a youth's developmental level, culpability, and potential for rehabilitation, prosecutorial discretion may reflect narrow policy preferences which fail to advance the goals of the juvenile justice system. An additional significant concern is the widespread discretion which courts and prosecutors possess in determining which youthful offenders will be prosecuted in adult courts. The combined impact of regional preferences, judicial desires to preserve discretion in the sentencing extremely violent offenders, and prosecutors' preferences for utilizing Section 153 StPO has led to incongruous, and perhaps unconstitutional, differences in practice.

There are downsides to this wide ambit of flexibility. The development of widespread regional disparities has undermined not only the law's uniformity, but also the principle of equal treatment under the law. Moreover, the flexible nature of juvenile law has made prosecutors and judges more vulnerable to local political pressures in some communities. As a result, media coverage of sensational cases has forced

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<sup>247</sup> Interview with 5CK, Senior Prosecutor (Jan. 22, 2006).

some prosecution offices to stiffen sentencing practices. It remains to be seen whether Germany will stay the course.