CRIMINAL LAW

A Comparative Approach

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PUNISHMENT: CONCEPTS, FORMS, LIMITS

A. Concepts and Forms of Punishment

Criminal Law is the law of punishment, as the German terms *Strafrecht* (literally, punishment law) and *Strafgesetzbuch* (literally, punishment code) make clear. Even those who prefer the moniker *Kriminalrecht*, or criminal law, to reflect the existence of (ostensibly) non-punitive "sanctions"—most notably the "measures" of rehabilitation and protection (*Maßregeln der Besserung und Sicherung*, originally, until 1975, dubbed measures of protection and rehabilitation) that supplement the expressly punitive sanctions labeled "punishments" in German criminal law—must acknowledge that punishment remains a central aspect of criminal law. Previous attempts to replace the punishment paradigm with a treatment paradigm altogether, as reflected, for instance, in the American Law Institute's Model Penal Code project, have not managed to turn punishment into a taboo. At any rate, criminal law is about a particularly—even uniquely—intrusive exercise of state power by any name, punishment or "hard" or "peno-correctional" treatment. No relabeling exercise can, or should, obviate the need for the justification of punishment.

And so we begin with a discussion of the so-called rationales for punishment. One would think, given that punishment is an exercise of state power, that these rationales would be framed in political terms. Instead, however, they have tended to be treated as an exercise in applied moral philosophy, illustrating the distinction between consequentialist—and particularly utilitarian—and deontological, or desert-based, moral theories (*ne peccetur* vs. *quia peccatum*, if you prefer Latin). This is particularly true of the Anglo-American literature, where the debate about "punishment theory" has continued for some two hundred years, swaying back and forth between consequentialism and retributivism. In Germany, the discussion has produced a wide consensus around a theory of punishment, "positive general prevention," which one might consider not so much an alternative to, as a combination of, the traditional accounts. Unlike the bulk of Anglo-American rationales, however, the German consensus view at least acknowledges the legal-political dimension of the problem, by addressing itself to citizens whose loyalty to the state's legal order is bolstered by the state's punishing those who violate its legal norms. (We will return to the question of the justification of punishment in our discussion of the constitutional limits on the state's penal power, in Chapter 3.)

While rationales for punishment also figure in the doctrine of the law of *crime* (i.e., substantive criminal law, narrowly speaking), if perhaps not as much as one might think (or perhaps as they should, given how much time is devoted to them in teaching and scholarship), they most directly influence the law of *punishment* (i.e., the law of sentencing). A court may turn to the rationales for punishment when deciding, say, a question in the law of attempt: an incapacitative approach might yield a more expansive view of the scope of attempt, moving the *locus poenitentiae* farther away from the consummation of the offense and thereby permitting state interference at an earlier point in the timeline from preparation

to attempt to consummation, than would a retributive approach, which may struggle to justify attempt liability except for conduct that comes perilously close to the consummation of the offense. But it is when determining the appropriate sentence, as opposed to considering the preceding question of criminal liability, that a court will find the rationales for punishment directly relevant: should this person be punished and, if so, how (quality) and how much (quantity)? Of course, one would hope that the rationales for punishment would also shape the *legislature*'s decision (or that of some state official to whom the legislature has delegated the power to generate norms, within some area of administrative expertise, backed by the threat of punishment for noncompliance), whether, and if so in what way, to threaten certain behavior with criminal punishment in the first place.

i. Rationales

United States v. Blarek
U.S. District Court, Eastern District of New York
7 F. Supp. 2d 192 (E.D.N.Y. 1998)

Weinstein, Senior District Court Judge.

Facts

Defendants Blarek and Pellecchia . . . were charged with Racketeering, 18 U.S.C. § 1962(c), Racketeering Conspiracy, 18 U.S.C. § 1962(d), and Conspiring to Launder Monetary Instruments, 18 U.S.C. §§ 371 and 1956(h) . . . Blarek was additionally charged with one count of Interstate Travel in Aid of Racketeering, 18 U.S.C. § 1952(a)(1). By way of indictment, the government sought the forfeiture of defendants' property traceable to their alleged criminality. Both defendants pleaded not guilty.

Blarek, while operating his own interior design firm in Coconut Grove, Florida, met Pellecchia in 1980. They worked together, and became intimate, cohabitating as homosexual partners. Quickly they established a new decorating company. Blarek was President and Pellecchia Vice-President. The venture was successful. Defendants designed, remodeled, and renovated homes and offices for a broad range of private persons and businesses.

Beginning in the early-1980's, the nature of defendants' operation changed. From that time forward they worked almost exclusively for a single, ill-famed and powerful criminal client—José Santacruz Londoño. Blarek met Santacruz by chance in 1979 during a visit to friends in Colombia. He agreed to work for Santacruz, designing the interior of the drug lord's new ostentatious home. . . .

Other dealings with Santacruz followed. Over a twelve year period, the defendants designed and decorated a number of offices and living spaces for Santacruz, his wife, his mistresses, and his children. . . .

Defendants knowingly laundered tainted cash for Santacruz in the United States in order to continue exercising their own craft and to enhance their own lives. . . . Both Blarek and Pellecchia knew who José Santacruz was, what he did, and from where his money was derived. Yet, each voluntarily agreed to, and in fact did, "wash" his drug proceeds . . .

Nearly all transactions between Santacruz and defendants were in cash. Defendants traveled to Miami, New York City, and other pre-determined locations to receive large sums of money from Santacruz's couriers. Payments as high as one million dollars at a time were hand-delivered to defendants in piles of fifty and one-hundred dollar bills. Defendants moved the cash between cities, traveling by car or train to avoid airport searches.

Portions of the funds were deposited in defendants' safe deposit boxes, or in bank accounts in amounts of less than $10,000 at a time to avoid federal bank transaction reporting requirements. See 31 C.F.R. § 103.22; see also 31 U.S.C. § 5324. In addition, defendants' own accountant, who pleaded guilty to money laundering and testified as a government witness, converted some one million dollars of the drug cash into checks for the defendants, thus "cleaning" the money for routine use in defendants' business operations . . .

After a two week trial, in February 1997, defendants were each found guilty of the Racketeering Conspiracy and Money Laundering Conspiracy counts. The jury also returned a verdict of Blarek's guilt of Interstate Travel in Aid of Racketeering.

Following trial, defendants entered into a stipulation with the government, forfeiting nearly all of their property, including their home in San Francisco worth over two millions dollars, three Harley

Davidson motorcycles, a Mercedes Benz automobile, approximately $75,000 worth of jewelry, and hundreds of thousands of dollars in bank accounts and safe deposit boxes.

According to the Presentence Reports prepared by the United States Probation Office, defendants' offense conduct after 1986 involved at least $5.5 million dollars. In the process of "grouping" the counts, Guideline level 20 was used as an appropriate base offense level reflecting a determination that violation of section 1956(a)(1)(b)(i) of Title 18 of the United States Code was one of the underlying objectives of the conspiracies. See U.S.S.G. § 2S1.1(a)(2). Additionally, enhancements were made to the initial offense levels based upon defendants' knowledge that the monies received were drug proceeds and for their supervisory role in the crimes. Further upward adjustment to Blarek's offense level was predicated upon obstruction of justice for his alleged false testimony at the trial.

Taking these factors into account, the Presentence Report indicates Blarek has a combined adjusted offense level of 33 based upon the three counts for which he was convicted. His criminal history category is I, since he has no prior record. His Guidelines imprisonment range would then be 135 to 168 months. A fine range for Blarek's crimes of $20,000 to $14,473,063, as well as a required period of supervised release of at least two but not more than three years is also indicated.

Pellecchia's combined adjusted offense level, according to the Presentence Report, is 33. He, too, was assigned a criminal history category of I by the Probation Office since he has no prior convictions. This assessment results in an imprisonment range of 135 to 168 months. The Presentence Report also indicates a fine range of $17,500 to $14,473,063 and a required period of supervised release of at least two but not more than three years . . .

Law

A. Sentencing Statute: 18 U.S.C. § 3553

1. Sufficient But Not Greater Than Necessary

Congress restructured the federal sentencing law in the 1980's to create the current Guidelines-based system. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1987, 1989–90 (1984). It expressly stated that courts "shall impose a sentence sufficient, but not greater that necessary," to comply with the purposes of criminal sanctions.18 U.S.C. § 3553(a). Harshness greater than that required is statutorily prohibited by this portion of the Sentencing Reform Act. Excessive leniency is also forbidden.

2. Seriousness of the Offense, Adequate Deterrence, Protection of the Public, and Correctional Treatment

The Sentencing Reform Act went on to explicitly delineate the purposes of criminal sanctions. Section 3551(a) provides that every defendant "shall be sentenced . . . so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case."

Subparagraphs (A) through (D) of section 3553(a)(2) instruct courts to consider the necessity of the sentence imposed:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other, correctional treatment in the most effective manner.

. . . (A) above largely constitutes a summary of the just deserts theory and (B), (C), and (D) encompass utilitarian concerns. In creating the sentencing statutes, "Congress spelled out the four traditional justifications of the criminal sentence—deterrence, incapacitation, retribution and rehabilitation—and expressly instructed the sentencing court to keep these purposes in mind . . . " Kenneth R. Feinberg, The Federal Guidelines as the Underlying Purposes of Sentencing, 3 Fed. Sent. Rep. 326, 326 (May/June 1991).

When enforcing the complex federal sentencing scheme, courts are required to consider six factors, subsidiary to the traditional sentencing rationales set out above. These are:

(a) "the nature and circumstances of the offense and the history and characteristics of the defendant";
(b) "the kinds of sentences available";
(c) "the kinds of sentence and the sentencing range established" by the Sentencing Guidelines;
(d) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct";

(e) "any pertinent policy statement issued by the Sentencing Commission"; and
(f) "the need to provide restitution to any victims of the offense."

18 U.S.C. § 3553(a)(1), (3)–(7).

To understand how these statutory provisions should be applied, a brief review of the theory and background of the purposes of criminal sentences is required.

B. Traditional Sentencing Rationales

Sentencing is a critical stage of a criminal prosecution. See Gardner v. Florida, 430 U.S. 349, 358, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977). It represents an important moment in the law, a "fundamental judgment determining how, where, and why the offender should be dealt with for what may be much or all of his remaining life." Marvin E. Frankel, Criminal Sentences vii (1973). It is significant not only for the individual before the court, but for his family and friends, the victims of his crime, potential future victims, and society as a whole.

Four core considerations, in varying degrees and permutations, have traditionally shaped American sentencing determinations: incapacitation of the criminal, rehabilitation of the offender, deterrence of the defendant and of others, and just desert for the crime committed . . .

Ascertaining priorities among these potentially conflicting notions has long been a point of contention amongst legislators, scholars, jurists, and practitioners. Somewhat oversimplifying, there are two basic camps. Retributivists contend that "just deserts" are to be imposed for a crime committed. Utilitarians, in their various manifestations, suggest that penalties need to be viewed more globally by measuring their benefits against their costs . . .

Implied in this debate are questions about our basic values and beliefs:

> Why do we impose punishment? Or is it properly to be named "punishment"? Is our purpose retributive? It is to deter the defendant himself or others in the community from committing crimes? Is it for reform? rehabilitation? incapacitation of dangerous people? Questions like these have engaged philosophers and students of the criminal law for centuries.
>
> Frankel, supra, at 7.

In the nineteenth and most of the twentieth century American prison and punishment system reforms were designed primarily to rehabilitate the prisoner as a protection against further crime. In more recent years there has been a perception by many that attempts at rehabilitation have failed; a movement towards theoretically based, more severe, fixed punishments, based upon the nature of the crime gained momentum. Two eighteenth and nineteenth century philosophers set the terms of the current . . . debate.

1. Kant's Retributive Just Desert Theory

Immanuel Kant, born in East Prussia in 1724, [famously held that] "the moral worth of an action does not depend on the result expected from it, and so too does not depend on any principle of action that needs to borrow its motive from this expected result . . . " Immanuel Kant, Groundwork of the Metaphysics of Morals 62–63 (H.J. Paton ed. & trans., Hutchinson Univ. Library 3d ed. 1965) (1785) (italics omitted).

. . . . Kant's anti-utilitarian thesis on criminal penalties is reflected in an oft-cited passage from his work, The Metaphysical Elements of Justice:

> Juridical punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the Law of things . . .
>
> Immanuel Kant, The Metaphysical Elements of Justice (Part I of The Metaphysics of Morals) 100 (John Ladd ed. & trans. 1965) (1797).

It follows from this position that the sole justification for criminal punishment is retribution or "jus talionis." See Leon Pearl, A Case Against the Kantian Retributivist Theory of Punishment: A Response to Professor Pugsley, 11 Hofstra L. Rev. 273, 274 (1982) ("Immanuel Kant . . . held that only a retributivist theory is properly responsive to the criminal's dignity as a rational agent capable of moral conduct, a dignity which he retains despite his commission of a legal offense.") . . . For Kant and his adherents, "punishment that gives an offender what he or she deserves for a past crime is a valuable end in itself and needs no further justification." Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. U. L. Rev. 453, 454 (1997). "It is not inflicted because it will give an opportunity for reform, but because it is merited." Edmund L. Pincoffs, The Rationale of Legal Punishment 7 (1966). Kantian "just deserts" theory, therefore, focuses almost exclusively on the past to determine the level of punishment that should be meted out to right the wrong that has already occurred as a result of the defendant's delict . . .

2. Bentham's Utilitarian Theory

Jeremy Bentham, an English philosopher born in 1748, advocated a far different, more prospective approach through his "Principle of Utility." For him, law in general, and criminal jurisprudence in particular, was intended to produce the "greatest happiness for the greatest number," a concept sometimes referred to as the "felicity calculus."

This is not to say that Bentham did not believe in sanctions. It was his view that punishment was sometimes essential to ensure compliance with public laws. See Jeremy Bentham, Bentham's Political Thought 167–68 (Bhikhu Parekh ed. 1973) ("For the most part it is to some pleasure or some pain drawn from the political sanction itself, but more particularly . . . to pain that the legislator trusts for the effectuation of his will.").

Unlike his contemporary, Kant, Bentham was not interested in criminal punishment as a way of avenging or canceling the theoretical wrong suffered by society through a deviation from its norms. Rather, a criminal sanction was to be utilized only when it could help ensure the greater good of society and provide a benefit to the community. Bentham's writings in An Introduction to the Principles of Morals and Legislation explain this theory:

> . . . all punishment is mischief: all punishment in itself evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil . . . in the following cases punishment ought not to be inflicted.
>
> I. Where it is groundless: where there is no mischief for it to prevent: the act not being mischievous upon the whole.
> II. Where it must be inefficacious: where it cannot act so as to prevent the mischief.
> III. Where it is unprofitable, or too expensive: where the mischief it would produce would be greater than what it prevented.
> IV. Where it is needless: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate . . .
>
> Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, in The Great Legal Philosophers: Select Readings in Jurisprudence 262, 270 (Clarence Morris ed., 1959).

Under the Benthamite approach, deterring crime as well as correction and reformation of the criminal, are primary aspirations of criminal law. While "the theory of retribution would impose punishment for its own sake, the utilitarian theories of deterrence and reformation would use punishment as a means to [a practical] end—the end being community protection by the prevention of crime." Charles E. Torcia, 1 Wharton's Criminal Law § 1, at 3 (15th ed. 1993).

3. Sanctions in Strict Retributive and Utilitarian Models

Given the divergence in underlying assumptions and theory, the competing retributivist and utilitarian theories suggest opposing methods for ascertaining proper penalties. Under a Kantian model, the extent of punishment is required to neatly fit the crime. "Whoever commits a crime must be punished in accordance with his desert." Pincoffs, supra, at 4.

In the case of murder, some believe that just desert is clear. A taker of life must have his own life taken. Even in the case of killings, however, there are degrees of mens rea, and over large portions of the world capital punishment is outlawed on a variety of just desert and utilitarian grounds. Cf. Alan I. Bigel, "Justices William J. Brennan, Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court," 8 Notre Dame J.L. Ethics & Pub. Pol'y 11, 44 (1994) (statistics show that utilization of death penalty does not significantly lower murder rate).

For lesser offenses, reaching a consensus on the proper "price" for the criminal act under the Kantian approach is even more difficult. As one scholar has written:

> The retributivist can perhaps avoid the question of how we decide that one crime is morally more heinous than another by hewing to his position that no such decision is necessary so long as we make the punishment "equal" to the crime. To accomplish this, he might argue, it is not necessary to argue to the relative wickedness of crimes. But at best this leaves us with the problem of how we do make punishments equal to crimes, a problem which will not stop plaguing retributivists.
>
> Pincoffs, supra at 16.

Two main theoretical problems are presented by this just deserts approach. The degree of the earned desert—that is to say the extent or length of the appropriate punishment—is subjective. The upper and lower limits of the punishment can be very high or very low, justified on personal views and taste. The "earned" punishment may be quite cruel and do more harm to society, the criminal, and his family, than can be justified on utilitarian grounds.

Determining the appropriateness of sanction differs under Bentham's utilitarian approach, although it too poses challenging theoretical and practical tasks for the sentencer. Under this model, among:

> the factors . . . [to be considered] are the need to set penalties in such a way that where a person is tempted to commit one of two crimes he will commit the lesser, that the evil consequences . . . of the crime will be minimized even if the crime is committed, that the least amount possible of punishment be used for the prevention of a given crime.
>
> See id. at 23.

Obviously, one problem with utilizing a system based only upon this approach is that "it is difficult . . . to determine when more good than harm has been achieved. . . . " United States v. Concepcion, 795 F. Supp. 1262, 1272 (E.D.N.Y. 1992).

As in the case of Kantian just deserts, the felicity calculation is subject to considerable difficulty and dispute. Another major problem with the utilitarian approach is that the individual criminal can be treated very cruelly, to gain some societal advantage even though the crime is minor—or very leniently, despite the shocking nature of the crime—if that will on balance benefit society.

Given these problems, it may make sense to continue to equivocate, oscillating between these poles, tempering justice with mercy, just deserts with utility calculations, in varying pragmatic ways. "Pragmatism," one of the hallmarks of the American political and legal system, itself suggests a leaning toward utilitarianism. See Webster's New Twentieth Century Dictionary (William Collins ed., 2d ed. 1979) ("in philosophy [pragmatism] . . . tests the validity of all concepts by their practical results").

C. Utility and Retribution Under Sentencing Guidelines

The Sentencing Guidelines, written by the United States Sentencing Commission pursuant to the Sentencing Reform Act, see Pub. L. 98-473, § 217, 98 Stat. 1987, 2019 (1984), purport to comport with the competing theoretical ways of thinking about punishment. The Guidelines state that they [seek to] "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation." See U.S.S.G. Chap. 1, Pt. A(2). A systematic, theoretical approach to these four purposes was not, however, employed by the Commission:

> A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of "just deserts." Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical "crime control" considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.
>
> Id. at A(3).

The Commission decided not to create a solely retributivist or utilitarian paradigm, or "accord one primacy over the other." Id.

It is claimed that, "as a practical matter this choice [between the competing purposes of criminal punishment] was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results." Id. This premise is flawed. In practice, results may vary widely depending upon theory. A penalty imposed based upon pure utilitarian considerations would hardly ever be identical to one that was imposed in a pristine retributive system. While it cannot be said that one is always harsher than the other, seldom would their unrestrained application produce the same sentence.

D. Deference to Sentencing Judge on Guidelines' Critical Sentencing Issues

Since the Sentencing Commission did not say how competing rationales should shape individual sentencing decisions, courts are left to make that judgment. . . .

In writing the initial Guidelines, the Commission "sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as its starting point data estimating pre-guidelines sentencing practice." U.S.S.G. Ch. 1, Pt. A(3). It contended that this:

> empirical approach . . . helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say

> exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.
>
> Id.

This statistically based foundation has proven inadequate to administer individual criminal litigations except in "routine" cases upon which there may be a "consensus." . . .

E. Application of the Guidelines

Until broad-based transformation of the current complex federal system takes place, individual judges have a duty under the statutes to consider all traditional purposes of sentencing when determining an appropriate penalty. Such "purpose-based analysis by judges may be the best hope for bringing justification to sentences imposed in the federal guideline system." Marc Miller, Purposes at Sentencing, 66 S. Cal. L. Rev. 413, 478 (1992).

1. Heartland

The Guidelines established base offense levels for criminal acts, representing an assessment of the quantity of punishment required for the "average" crime of that sort. As a result, "sentencing courts [are] to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes." U.S.S.G. Ch.1, Pt.A(4)(b). What this means, the Supreme Court has recently explained, is that "[a] district judge now must impose on a defendant a sentence falling within the range of the applicable Guideline, if the case is an ordinary one." Koon v. United States, 518 U.S. 81, 92 (1996).

The Guidelines, while intended to ensure "a more honest, uniform, equitable, proportional, and therefore effective sentencing system," U.S.S.G. Ch.1, Pt.A(3), must not be interpreted as eliminating judicial sentencing discretion. See Koon, 518 U.S. at 92. The traditional task of imposing a just and fair sentence based upon an independent view integrating all philosophical, statutory, Guidelines and individual particulars of the case at hand remains the job of the . . . judge.

2. Departures

Congress provided for judicial departures from the Sentencing Guidelines whenever a "court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b).

In the same way that the Commission could not have foreseen every type of criminal case, it could not have foretold every potential ground justifying departing from the Guidelines. Except perhaps for a limited few grounds that the Commission has expressly stated should not be considered as reasons for departing, it "does not intend to limit the kind of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." U.S.S.G. Ch.1, Pt. A(4)(b).

Law Applied to Facts

A. Guidelines Computations

. . . Probation's Presentence Report recommends that defendant Blarek should incur an upward adjustment for obstruction of justice based upon perjury in his trial testimony. See U.S.S.G. § 3C1.1. The government's argument supporting this view is rejected. Blarek appeared to be forthright in his presentation. Inconsistencies in his testimony might be attributed to the tricks memory often plays when a person wishes the past were different from what it was. See U.S.S.G. § 3C1.1 cmt.1 ("inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all . . . reflect a willful attempt to obstruct justice"). An allegation of perjury is not supported. See U.S.S.G. § 3C1.1 cmt.3(b) ("committing, suborning, or attempting to suborn perjury" warrant obstruction of justice enhancement).

Based upon these findings, defendant Blarek's total offense level should be reduced to 32, while defendant Pellecchia's is reduced to 30. Blarek faces a period of imprisonment of 121 to 151 months. Pellecchia faces 97 to 121 months' incarceration. . . .

B. Traditional and Statutory Sentencing Rationales

1. Incapacitation

Incapacitation seeks to ensure that "offenders . . . are rendered physically incapable of committing crime." Arthur W. Campbell, Law of Sentencing § 2:3, at 27–28 (1991). In colonial America, incapacitation was sometimes imposed in a literal sense. Id. at 28 (loss of organs). With the development of the penitentiary system, incarceration was seen as "a more reliable means of incapacitation." Adam J. Hirsch, The Rise of the Penitentiary: Prisons and Punishment in Early America 44 (1992).

In the instant case, incapacitation is not an important factor. First, these defendants have no prior criminal record indicating any propensity towards crime. Second, their connection to the criminal world, Santacruz, is now deceased. Third, it does not appear that long term restriction is necessary to ensure that defendants do not reenter a life of crime.

Consistent with utilitarian-driven analysis, little would be gained if the sentences emphasized incapacitation.

2. Rehabilitation

Rehabilitation is designed to instill "in the offender proper values and attitudes, by bolstering his respect for self and institutions, and by providing him with the means of leading a productive life. . . . " Wharton's Criminal Law, supra, at 18. Neither of these men is wayward or in need of special instruction on the mores of civilized society. They have in place strong communal support systems, as evidenced by the many letters submitted to the court by family and friends. They know how to live a law abiding life. It is not required that a penalty be fashioned that teaches them how to be moral in the future. This criterion, rehabilitation, therefore, is not one that is useful in assessing a penalty.

3. Deterrence

Of the two forms of deterrence that motivate criminal penalties—general and specific—only one is of substantial concern here.

Specific deterrence is meant to "disincline individual offenders from repeating the same or other criminal acts." Campbell, supra, at 25. Such dissuasion has likely already occurred. Defendants regret their actions. The ordeal of being criminally prosecuted and publicly shamed by being denominated felons and the imposition of other penalties has taught them a sobering lesson.

General deterrence attempts to discourage the public at large from engaging in similar conduct. It is of primary concern in this case. Defendants' activities have gained a great deal of attention. Notorious cases are ideal vehicles for catching the attention of, and conveying a message to, the public at large. While it is not appropriate under just desert views for defendants in famous cases to be treated more harshly than defendants in less significant ones simply for the sake of making an example of them, under a utilitarian view, the notoriety of a particular defendant may be taken into account by sentencing courts provided the punishment is not disproportionate to the crime.

4. Retribution

Retribution is considered by some to be a barbaric concept, appealing to a primal sense of vengeance. See Wharton's Criminal Law, supra, at 24. It cannot, however, be overlooked as an appropriate consideration. When there is a perception on the part of the community that the courts have failed to sensibly sanction wrongdoers, respect for the law may be reduced. This is a notion applicable under both just deserts and utilitarian balancing concepts that has had some resurgence with the current growth of the rights of victims to be heard at sentencing. See, e.g., 18 U.S.C. § 3555 (order of notice to victims). But see Susan Bandes, "Empathy, Narrative, and Victim Impact Statements," 63 U. Chi. L. Rev. 361, 365 (1996) ("victim impact statements are narratives that should be suppressed because they evoke emotions inappropriate in the context of criminal sentencing").

Should punishment fail to fit the crime, the citizenry might be tempted to vigilantism. This may be why, according to one group of scholars, "a criminal law based on the community's perceptions of just desert is, from a utilitarian perspective, the more effective strategy for reducing crime." Robinson & Darley, supra, at 454. "White collar" "victimless" offenses, such as the ones committed by these defendants, are harmful to all society, particularly since drugs are involved. It is important, therefore, that the imposition of a penalty in this case captures, to some rational degree, the "worth" of defendants' volitional criminal acts.

5. Sufficient But Not Greater Than Necessary

Mercy is seldom included on the list of "traditional" rationales for sentencing. It is, however, evinced by the federal sentencing statute, 18 U.S.C. § 3553(a), which provides, as noted above, that the

lowest possible penalty consistent with the goals of sentencing be imposed. See also United States v. Johnson, 964 F.2d 124, 125 (2d Cir. 1992) ("the United States Sentencing Guidelines do not require a judge to leave compassion and common sense at the door to the courtroom").

The notion that undue harshness should be avoided by those sitting in judgment has long been a part of the human fabric and spirit. Lenity is often the desirable route.

C. Departures

To impose the harsh sentence suggested by Probation and the government under the Guidelines without appropriate downward departures would amount to an act of needless cruelty given the nature of the crimes committed and the personal circumstances of these defendants. Reasoned application of both sets of philosophical considerations—just desert and utilitarian—lead to amelioration.

1. Not a Heartland Case

This case is outside of the heartland of racketeering and money laundering conspiracy cases contemplated by the Guidelines. Under such circumstances the law requires the exercise of a large degree of discretion as bridled and channeled by the sentencing statutes and Guidelines.

Unlike those in most prosecutions in drug money laundering cases, the acts of these defendants were not ones of pure personal greed or avarice. While their manner of living did greatly improve with the receipt of their drug-tainted income, their state of mind was one that was much more complicated—driven largely by excessive artistic pride. So obsessed were defendants with creating art that they lost sight of reality. Abandoned was their previously unblemished law abiding life. In exchange for professional glory and economic freedom to create, they chose to live by the credo of the Cali drug cartel. Cf. Irving Stone, The Agony and the Ecstasy (New American Library, 1996) (Medici family's support [of] Michelangelo). Unfortunately for these defendants, in our world Mephistophelean deals are circumscribed by the law.

The unique motivations behind their crimes do make defendants' acts somewhat different from those in the mainstream of criminality. While still morally culpable, the state of mind of these defendants must be taken into account when considering the various rationales behind criminal penalties. Because this and other factors "distinguish[s] the case from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing," departure is encouraged. U.S.S.G. § 5K2.0.

2. Vulnerability of Blarek and Pellecchia

The defendants are homosexual lovers in a case that has been broadly publicized. The sexual proclivity of these men will likely be well known to fellow inmates and others in the correctional facilities. Their status will, no doubt, increase their vulnerability in prison.

The Guidelines purport to prohibit sex from being taken into account in the determination of a sentence. See U.S.S.G. § 5H1.10. No mention is made of sexual orientation. See id. Sexual orientation as a basis for departure has been questioned on constitutional grounds. See United States v. Lara, 905 F.2d 599, 603 (2d Cir. 1990) ("That the district court did not base its sentence upon the defendant's bisexual orientation is of some significance because to have done so might have raised serious constitutional concerns."); see also United States v. Wilke, 995 F. Supp. 828 (N.D. Ill. 1998) (collecting cases indicating "one's status as a member of a particular group . . . cannot alone provide sufficient reason for departure from the otherwise applicable guideline range").

While sexual orientation may not be an appropriate ground for departure, related ancillary issues presented in some such cases support a reduction in sentence. The reality is that homosexual defendants may need to be removed from the general prison population for their own safety. This would amount to a sentence of almost solitary confinement, a penalty more difficult to endure than any ordinary incarceration. See, e.g., United States v. Lara, 905 F.2d at 603 ("severity of [defendant's] prison term is exacerbated by his placement in solitary confinement as the only means of segregating him from other inmates").

There is ample authority for the proposition that the likelihood of a defendant being abused while in prison supports a downward departure. See Koon v. United States, 518 U.S. at 111–12 (departure based upon "susceptibility to abuse in prison"); United States v. Gonzalez, 945 F.2d 525, 527 (2d Cir. 1991) (departure based upon defendant's small frame and feminine looks resulting in extreme vulnerability in prison). Because these defendants will be especially vulnerable to abuse in prison given their sexual orientation as well as their demeanor and build, downward departure is warranted.

3. Pellecchia's Medical Condition

Defendant Pellecchia is HIV positive and has been for fifteen years. While he currently appears to be in stable condition and has not developed discernable AIDS related symptoms, there is no question that this defendant suffers from a serious medical condition. See Reid J. Schar, Comment, Downward Sentencing Departures for HIV-Infected Defendants: An Analysis of Current Law and a Framework for the Future, 91 Nw. U. L. Rev. 1147, 1154 (1997) ("although the [HIV-positive] individual may feel fine, the infected patient is capable of spreading the disease and the patient's immune system is deteriorating"). This defendant has an extraordinary and unpredictable impairment. See, U.S.S.G. § 5H1.4 ("extraordinary physical impairment may be a reason to impose a sentence below the applicable guidelines range").

Defendant represents that much of his relative well-being is attributable to a special regimen to which he has adhered. He has maintained a strict diet, exercised regularly, received acupuncture frequently, and taken a combination of vitamins and other natural supplements under the close supervision of a medical professional. Following a similar holistic plan within a correctional facility will likely be impossible. Federal prisons do provide appropriate medical care to those who are infected by HIV. Nevertheless, there will be no substitute for his present living arrangements.

While the government may be correct that it cannot be proven that defendant's unique treatment has contributed to his stable condition, defendant believes that it has. Since cruelty and its perception is as much a state of mind as a physical reality, he will suffer at least emotionally from the deprivation of his choice of treatment.

The extent to which inmates are exposed to diseases such as tuberculosis in prison is well documented. See Schar, supra, at 1156–57 ("The incidence of TB in prisons has recently been on the rise, and not surprisingly, those who tend to suffer most are HIV-infected prisoners."). Despite federal authorities' concern for prisoners' welfare, incarceration is likely to be detrimental to this defendant's health, resulting in a lessening of his present life expectancy. On this ground a reduction in defendant Pellecchia's sentence is required. . . .

D. Individual Sentences

The final task is weighing the sentencing considerations already delineated, with particular emphasis on general deterrence and imposition of a punishment that can be viewed as deserved in light of the seriousness and danger to society of the crimes. While defendants have [surrendered] most of their property to the government via forfeiture, and do deserve a downward departure from the Guidelines, a stiff fine to eliminate all assets as well as a substantial period of incarceration is required.

1. Blarek

Blarek, whose actions indicate a somewhat greater culpability than do Pellecchia's, begins with a computed offense level of 32. For reasons already indicated, the sentence imposed should reflect a downward departure of six levels to offense level 26. Blarek is sentenced towards the lower end of the Guidelines' range for level 26 to a concurrent term of 68 months' incarceration for his conviction on the three counts. A lesser or greater departure would not be appropriate in view of the facts and law.

In addition, Blarek is fined a total of $305,186, which represents his approximate total net worth after his forfeiture of over $2,000,000 in cash and property to the government, and his payment of attorney's fees. See 18 U.S.C. §§ 1956(a)(1), 1963(a), and U.S.S.G. 5E1.2(c)(4).

The maximum period of supervised release, three years, is imposed. U.S.S.G. §§ 5D1.1(a), 5D1.2 (a)(2). During the time that defendant is under supervision, he may not work for any clients or employers outside of the United States to ensure that he is not tempted again into money laundering. A mandatory special assessment of $150 is also imposed. 18 U.S.C. 3013(a)(2)(A) and U.S.S. G. § 5E1.3.

2. Pellecchia

Pellecchia's total offense level is computed at 30. The sentence should reflect a downward departure of seven levels to offense level 23. This represents the same six-level departure granted for defendant Blarek with an addition level of downward departure based upon defendant's health as well as his lesser culpability. A concurrent term of incarceration of 48 months, at the lower end of offense level 23, is imposed for his conviction on two counts. A lesser or greater departure would not be sufficient on the facts or the law.

No fine has been imposed for Pellecchia since he will have a negative net worth of over $100,000 after payment of attorney's fees.

Three years of supervised release is ordered. U.S.S.G. §§ 5D1.1(a), 5D1.2(a)(2). Like his co-defendant, Pellecchia may not be employed by anyone outside of this country during his period of

supervision to minimize chances of his being tempted again into money laundering. A special assessment of $100 is also imposed. 18 U.S.C. § 3013(a)(2)(A) and U.S.S.G. § 5E1.3.

German Federal Constitutional Court (*Bundesverfassungsgericht*) BVerfGE 45, 187 (June 21, 1977) Life Imprisonment Case

[The defendant, a police officer, had been convicted of murder and received a mandatory sentence of life imprisonment. In addressing a constitutional challenge to his mandatory sentence of life imprisonment, the court also commented on various justifications for criminal punishment.*]

The Federal Constitutional Court has repeatedly concerned itself with the meaning and purpose of state punishment without taking a position in principle on the theories of punishment, which have been propounded in the literature. Even in the present case there is no ground for giving consideration to the various punishment theories, because it cannot be the task of the Federal Constitutional Court to decide for constitutional reasons the theoretical dispute in criminal law jurisprudence. Nor has the legislature wanted to take a conclusive position in the criminal law reform statutes since 1969 on the purposes of punishment, and has contented itself with an open regime within limits which would not obstruct the further development of any of the jurisprudentially recognized theories (see BTDrucks. V/4094, p. 4 f.; Dreher, Criminal Code, 36th edit 1976, notes 3 and 4 on § 46 Criminal Code; Lackner, § 13 Criminal Code—eine Fehlleistung des Gesetzgebers?, in: Festschrift for Wilhelm Gallas, Berlin-New York 1973, pp. 117, 121, 136). The current criminal law and the case law of the German courts follows to a large extent the so-called unification theory, which—admittedly with various set main focuses—attempts to bring all the purposes of punishment into a balanced relationship to each other. This is in keeping with the framework of freedom of formulation under the constitutional separation of powers: it falls within the purview of the legislature, not the judiciary, to recognize individual purposes of punishment, to balance them against each other, and to coordinate them with each other. Consequently the Federal Constitutional Court has in its case law not only emphasized the culpability principle [*Schuldgrundsatz*], but also recognized the other purposes of punishment. It has described the general task of criminal law as being the protection the fundamental values of communal life. Attribution of guilt, prevention, resocialization of the perpetrator, expiation and retribution for wrong committed are described as aspects of an appropriate criminal sanction (see BVerfGE 32, 98 [109]; 28, 264 [278]).

Franz Streng, "Sentencing in Germany: Basic Questions and New Developments," 8 *German Law Journal* (2007), 153

German law is codified law. This means that not only the individual crimes are laid down in the German Criminal Code, but also the general principles concerning sentencing are contained therein. The constitutional basis of the sentencing structure can be drawn from the notion of the Rechtsstaat, which can be translated with the term "rule of law." This principle, which is laid down in Article 20 § 1 Grundgesetz (German Constitution—Basic Law), encompasses the culpability principle, under which the punishment must be proportionate to the individual guilt of the offender. Thus, section 46 § I of the Criminal Code (Strafgesetzbuch—Criminal Code) reads: "the guilt of the perpetrator is the foundation for determining punishment." The culpability principle is a specific expression of the proportionality principle, which is also a constitutional requirement of the "rule of law."

In sec. 46 § I S. 2 of the Criminal Code the law clarifies that the likely effect of the punishment on the perpetrator's future social life shall be considered. One of the principal aims of sentencing is therefore the rehabilitation of the offender. Apart from these two notions, the culpability principle and rehabilitation, the law stresses the importance of other, positive aims of sentencing, such as the preservation of the legal order or the confirmation of the norm (Verteidigung der Rechtsordnung).

However, the courts and legal scholars also draw upon other sentencing aims and objectives found in German criminal law theory: these include individual deterrence and incapacitation, and the deterrent effect a sentence might have on the general public.

In evaluating the role of the judge in sentencing one must take into account that German criminal law is in a specific sense democratic in principle. What I mean here is that German criminal law is a law for citizens. These citizens are not only addressees of the criminal law but also its carriers. And this is not to be understood in a purely formal democratic sense. Rather, the judge himself acts as a citizen when determining the punishment, who reflects society's values when assessing the

* [For a more detailed statement of the facts, see Chapter 1.B.i.]

appropriate punishment, whilst keeping within the statutory boundaries. In contrast to a technocratic or an authoritarian criminal law system the judge in our law system relies on values which are coined by his social and professional personality. Under this perception of his role the German judge thus demands for a wide sentencing range, from which he is free to choose a just and fair sanction in accordance to his persuasion. Mandatory sentencing guidelines would contradict this self-conception of the judges. The restrictive and problematic use of the only mandatory life sentence for murder under sec. 211 of the Criminal Code and for genocide under sec. 6 of the International Criminal Law Code also points to the necessity to open up a leeway for the judges in determining the punishment.

The seemingly harmless discourse of adapting the sanction to fit the individual case carries with it some substantial questions. Two important factors must be addressed. Firstly, it is difficult to find adequate parameters for comparing the individual case and the punishment. Without such a measure one cannot properly talk about a sanction which is proportionate to the crime committed. Second, it is questionable whether the general aims and objectives of criminal law besides retribution are relevant to the admeasuring of the sanction at all. I shall discuss these questions with regard to the so-called Spielraum-theory, Spielraum meaning "margin" or "leeway," which is the prevailing theory of sentencing in German jurisprudence and criminal law theory.

The Spielraum-theory, which is sometimes called Schuldrahmen-theory, that means framework of guilt-theory, is based on the proposition that the judge establishes a specific framework for the individual guilt derived from the general statutory provisions. Within this margin the judge then takes account of utilitarian, or as Germans prefer to say preventive aims, avoiding both overstepping and undershooting the guilt of the accused. One can call this method "prevention within the limits of repression," i.e. the individual guilt of the accused sets the limits to the objective of prevention. The term "guilt" in this context signifies a certain Strafzumessungsschuld, a specific "sentencing-guilt," quantifying the guilt of the offender and at the same time encompassing to a certain extent characteristics both preceding and following the criminal act.

Cornelius Nestler, "Sentencing in Germany,"
***7 Buffalo Criminal Law Review* (2003), 109**

Statutory penalty ranges tend to be fairly broad, thus allowing significant room for judicial sentencing discretion. This can be demonstrated with a few examples from the German Criminal Code:

223. Bodily Injury

(1) Whoever physically maltreats or harms the health of another person, shall be punished with imprisonment for not more than five years or a fine.

Section 223 is exemplary for many provisions that give a range of punishment up to a maximum penalty of (most often) three or five years while also allowing for a fine. Whether the sanction will be imprisonment or a fine is then structured by general provisions on sentencing: According to section thirty-eight, the minimum fixed term of imprisonment is one month, and according to section forty-seven an imprisonment of less than six months shall only be imposed in extraordinary cases. Fines are imposed in daily rates with the maximum of 360 days, the amount of each daily rate depending on the income of the convicted person.

224. Dangerous Bodily Injury

(1) Whoever commits bodily harm:
1. through the administration of poison or other substances dangerous to health;
2. by means of a weapon or other dangerous tool;
3. by means of a sneak attack;
4. jointly with another participant; or
5. by means of a treatment dangerous to life,

shall be punished with imprisonment from six months to ten years, in less serious cases with imprisonment from three months to five years.

Section 224 is an example for a provision regarding a more serious offense, setting a range between a minimum and a maximum punishment.

212. Intentional Manslaughter

(1) Whoever kills a human being without being a murderer, shall be punished for manslaughter with imprisonment for not less than five years.

Intentional Manslaughter is an example of a provision with a high minimum fixed term of imprisonment, and according to section thirty-eight the maximum fixed term of imprisonment is generally

fifteen years. The more serious offenses of the Criminal Code usually have a minimum term of imprisonment of one year (which does not allow for sentencing with a fine) or two years (which does not allow for suspended execution of the punishment) or even five years as in the case of Intentional Manslaughter . . .

German sentencing over the past thirty years can be summarized by describing two dominant tendencies: First, the number of long-term prison sentences has increased, primarily because of an increased number of drug convictions. Second, the total number of prison sentences has decreased due to more case dismissals by the prosecution, a shift from prison sentences to fines, and an increase in the numbers of suspensions of prison sentences. As a result, the numbers of adults in prison were the same for 1968 and 1996, although the numbers of registered and investigated crime nearly doubled between those years.

All these trends probably have very little to do with the theory of sentencing. Not only based on academic work but also from my practical experience as a defense counselor, I fully agree with Thomas Weigend's statement that the theory of sentencing is complicated, conceptually murky, and of very little practical relevance.[33]

Although rehabilitation does and should somewhat influence the sentence according to section 46 subsection 1, the basic guideline for sentencing, it is uncontested that the seriousness of the offense and the offender's blameworthiness are the most important considerations in sentencing. The predominant theory conceives that, starting with the range given by the offense's sentencing provision (in a serious drug case that would be for instance two to fifteen years), the offender's desert should define the sanction by setting a fairly broad range within the statutory range (using the same example, this could be a range between six and nine years); any sentence within this narrowed range would then be in accordance with the principle of proportionality between guilt and punishment. The specific length of the sentence is then determined with the help of preventive considerations.

All this is rhetoric and has little to do with the practice of sentencing for a variety of reasons:

First, in its verdict the court must not indicate which narrowed range it has chosen for the determination of the sentence. Therefore the theoretically prescribed method of finding the right punishment is a virtual one; the court's translation of sentencing considerations into concrete levels of punishment are not subject to any procedural control (although the reasoning of the sentencing in the court's verdict will indicate which factors the court regards as mitigating or aggravating, it is entirely in the discretion of the court whether, for instance, an attempted homicide or the import of one kilogram of cocaine will be punished with six or with nine years of imprisonment). A second procedural reason for the disparity between the practice and the theory of sentencing is that issues of guilt and issues of sentencing are decided in a comprehensive case—there is no separate sentencing stage comparable to the one in the U.S. procedure. Therefore, in their sentencing, courts often have very little information outside of the facts of the case.

Empirical research has shown that the sentence is usually based on four factors: The circumstances of the offense, the damage caused, the defendant's prior convictions, and the defendant's behavior in court. In recent years, the bargaining position of the defendant has become probably the most important factor in the determination of the sentence in more serious cases.

The motives by which sentencing is driven in Germany are primarily retribution, deterrence, a little bit of rehabilitation, and a lot of pragmatism. Even though retribution and deterrence are dominant factors in sentencing, they do not necessarily translate into prison sentences. The concept that offenders deserve punishment but nevertheless should not go to prison appears to be of high importance in German sentencing. Only once imprisonment has been deemed to be necessary are the concepts of retribution, deterrence, and incapacitation used to support relatively harsh sentences.

Markus D. Dubber, "Theories of Crime and Punishment in German Criminal Law," 53 *American Journal of Comparative Law* (2006), 679

In the Anglo-American literature, the debate about the rationale, or rationales, of punishment largely remains within the familiar framework of consequentialist and deontological theories of punishment. Ordinarily, lists of the rationales of punishment include the following four: deterrence (general and special), incapacitation, rehabilitation (or reformation), and retribution (or just deserts), with the first three classified as consequentialist and the fourth as deontological. The "consequences" that the first seek to achieve might differ from account to account, but the prevention of crime, or reduction of the crime rate, is certain to be among them.

[33] Thomas Weigend, Sentencing and Punishment in Germany, in Sentencing and Sanctions in Western Countries 188, 203 (Michael Tonry & Richard S. Frase eds., 2001).

After roughly two centuries of hostilities between the consequentialist and deontological camps, general exhaustion has set in. By and large, punishment theorists—and legislatures as well as sentencing commissions—have settled on some "mixed theory" or other, generously combining elements of what once were thought to be deeply irreconcilable views.

The analytic work of the English legal philosopher H. L. A. Hart proved to be particularly helpful in this regard. By differentiating between the different questions that a theory of punishment should answer, Hart made different answers to these questions possible. So one might be a consequentialist with respect to the justification of the institution of punishment in general, while choosing retributivism when it comes to justifying the infliction of punishment in a particular case. More specifically, we might think that we need punishment to deter people from committing crimes, but at the same time that we should not punish people unless they in fact deserve it.

Given the widely acknowledged staleness of debates about the rationales for punishment in Anglo-American law, one might be tempted to turn to the German literature on the subject. And indeed, it turns out that German criminal law theory has made a conscious effort to break out of the consequentialist-deontological rut. Whether the effort succeeds in the end remains to be seen.

German criminal law, too, once witnessed intense battles pitting consequentialists against deontologists, those who proposed punishment ne peccetur against those who preferred punishing quia peccatum est. The fiercest, and most prolonged, period of this dispute even had its own name, the "Clash of the Schools" (Schulenstreit), whose main protagonists were Franz v. Liszt, the founder of German criminology, for the "progressive school," and Karl Binding, the originator of "norm theory" in German criminal law, for the "classical school."

To characterize the dispute between Liszt and Binding (and their associates and successors) as one between consequentialism and retributivism, however, could be misleading. It is important to keep in mind that both Liszt and Binding were thoroughgoing legal positivists. Binding argued that punishment was justified, and only justified, as the state's response to a violation of a state norm. The essence of crime thus was the violation of a norm of positive law, rather than the commission of a wrongful act. The criminal law was not so much a demand of justice, or as Kant would have it, a "categorical imperative," as a state tool for the enforcement of state authority that the state may or may not choose to employ.

The "right to punishment," to Binding, was "nothing but the right to obedience of the law, which has been transformed by the offender's disobedience." The purpose of punishment thus was "the inmate's subjugation under the power of law for the sake of maintaining the authority of the laws violated." As such, punishment was to "represent the holiness and inviolability of the duties to which it is attached."

Liszt, by contrast, accused Binding and his fellow classicists of advocating pointless punishment. (That's not quite fair, as we just saw, since Binding thought punishment served the purpose of maintaining state authority.) Liszt insisted that punishment, to be legitimate in a modern enlightened state, had to serve some purpose. Punishment could never be an end in itself. More specifically, Liszt argued that punishment must (and does) seek to protect legal goods (*Rechtsgüter*) against criminal violation. These legal goods, in Liszt's view, included, broadly speaking, "the life conditions" of a given community. And crimes were all "those acts that this people at this time perceives as disturbances of its life conditions." Punishment served its purpose through rehabilitation (education), deterrence, or incapacitation, depending on the type of offender. The recidivist, for instance, would, upon his third conviction of an offense motivated by "the strongest and most basic human drives" (including theft, robbery, arson, and rape, but also damaging property), be sentenced to an indeterminate prison term, to be served in a state of "penal servitude," with the use of corporal punishment to enforce prison discipline. Truly incorrigible offenders were to be imprisoned for life, because "we do not wish to behead or hang and cannot deport" them—why that would be so Liszt did not explain.

In keeping with their broadly treatmentist approach, Liszt and his fellow progressives called for more or less radical legislative reforms. The cumbersome, and legalistic, construct of criminal law doctrine was to be replaced by a more flexible, modern, scientific ("progressive") system for the proper diagnosis, and classification, of offenders, which was crucial for the prescription of the correction quality and quantity of peno-correctional treatment. Ironically, these reform proposals did not come to fruition until after the National Socialists took power in 1933. One of the Nazis' first criminal law reforms was the Law Against Dangerous Recidivists and Regarding Measures of Protection and Rehabilitation of November 1933, which established the "two-track" sanctioning system that remains in place today. Since then, two general types of sanction have been available: punishments and measures. Only punishments "properly speaking" are subject to constraints of proportionality between culpability and sanction. "Measures" instead are unrelated to culpability and are determined exclusively by the offender's peno-correctional diagnosis. So if she requires rehabilitative treatment, she might be sent to a drug rehabilitation clinic; if she requires incapacitative treatment, she might be incarcerated indefinitely. Freed of the constraints of proportionality

between offense and sanction, "measures" are served independently—and where appropriate consecutively—to whatever "punishments" are imposed.

At the same time, the retention of the distinction between punishments and measures indicates that the victory of the progressive treatmentists was not complete. While "progressive" considerations governed the realm of "measures," that of "punishments" remained subject to "classical" quia peccatum considerations. In the end, then, a statutory compromise was reached. Strafrecht (literally, the law of punishment) remained, but was now only one component of the comprehensive vision of Kriminalrecht (literally, criminal law), which encompassed both punishment and treatment.

The German theory of punishment thus combined once incommensurable deontological and consequentialist elements, much like Anglo-American punishment theory. Unlike Anglo-American punishment theory, however, which has been content to resolve the tension between deontology and consequentialism, and between utilitarianism and retributivism, by combining these ingredients in "mixed" theories, German punishment theory eventually produced an altogether new theory of punishment that aims to reconcile the differences between what the Germans call "relative" and "absolute" theories of punishment.

This is the theory of "positive general prevention" (positive Generalprävention, or PGP for short), which today is the dominant theory of punishment in German criminal law. There are many varieties of positive general prevention, so many in fact that discussions of the theory as a matter of course caution that it may well be misleading to speak of the theory, rather than theories, of positive general prevention. Still, the basic features of positive general prevention can be discerned easily enough. It is "general" to distinguish itself from special prevention, which uses punishment to prevent crime by the particular offender subject to punishment, rather than by others. It is also "positive" because it seeks to prevent crime not by scaring potential lawbreakers into compliance, but by bolstering the law-abidingness of the rest of the population. Finally, and relatedly, it is about "prevention" generally speaking, rather than "deterrence" as a particular means of prevention. There could be no such thing as positive deterrence, after all.

It is pretty clear, therefore, what positive general prevention is not. One might think of it, in fact, as being constructed specifically to take advantage of the consensus that special deterrence is an entirely inappropriate attempt to legitimate punishment. Positive general prevention clearly is not negative special prevention (or special deterrence for short). That theory, after all, is generally thought to have been thoroughly, and permanently, laid to rest by the father of modern German criminal law, P. J. A. Feuerbach, at the turn of the 19th century.

But positive general prevention is also not positive special prevention, or rehabilitation. It is no accident that positive general prevention arose out of another, much later and somewhat narrower, consensus in German criminal legal science, namely that—to quote the familiar American phrase—"nothing works." While American criminal law, in particular, responded to the perceived failure of rehabilitative measures by (re)turning to retributivism, or "just deserts" as it was now called, the German response shifted emphasis among the objects of prevention, rather than leaving the realm of consequentialist punishment altogether. If positive special prevention did not work, then perhaps positive general prevention might. If punishment cannot rehabilitate offenders, perhaps it could stiffen the resolve of law-abiding offenders not to become (unrehabilitatable) offenders.

More generally, it was hoped that positive general prevention would steer clear of the normative and empirical problems that had plagued consequentialist theories of punishment, without endorsing a retributive theory of punishment for its own sake, which was dismissed as literally pointless, and hence barbaric.

The normative problems with deterrence theory have been familiar at least since Kant. The categorical imperative, after all, instructs us never to treat a person merely as a means to an end. And what is punishing one person to deter another from committing a crime, if not treating him as a means to the end of crime control? Invoking Kant in support of positive general prevention, however, is not without irony. Kant, after all, was an arch retributivist, and therefore was very much passé. Moreover, Kant's objection was not limited to deterrence, special or general, but applied to any consequentialist theory of punishment. For what is punishing one person to prevent another from committing a crime—no matter how—if not treating him as a means to the end of crime prevention?

But there was another normative problem with deterrence theories in particular, which a preventive theory, and more specifically a positive one, might avoid. This objection was formulated by another famous German retributivist, Hegel, who argued that prevention through deterrence was illegitimate because it disrespected the dignity of the deterred. For what, Hegel asked, is punishing for deterrence's sake if not treating the intended audience of this spectacle as animals, dogs to be precise, which (not who) are to be scared, and (in the case of special deterrence) beaten, into submission?

Positive general prevention did not threaten dogs with raised sticks, but instead addressed human beings capable of making choices, including the choice to follow or to break the law. It sought to

deter no one, neither the person punished nor anyone else. It merely aimed to reinforce the "general legal consciousness" of the community at large, perhaps including, but certainly not limited to, the specific offender.

But positive general prevention was to be more than the kinder, gentler version of general deterrence, thus solving, or at least circumventing, the normative problems that had dogged general deterrence for centuries. It was to solve consequentialist theory's empirical problems as well. For not only special prevention, or rehabilitation, had run into empirical difficulties, captured dramatically in the "nothing works" slogan. General deterrence, too, had never quite managed to bolster its scientific claims with hard empirical evidence. There certainly was a strong common sense notion that punishment would have a deterrent effect, but not much else. But common sense hardly seemed enough for a theory of punishment whose central claim was that punishment without a point (or for its own sake) was patently illegitimate. Unlike retributivism, consequentialism was not to rest a state institution as intrusive and violent as punishment on some metaphysics of crime and punishment, or on some abstract principle of justice (such as the categorical imperative). Instead, what was needed was hard evidence of results. Without that evidence, consequentialism was no better than retributivism. To persist in punishing in the absence of evidence of punishment's beneficial effects would be barbaric indeed.

Deterrence theory's most embarrassing empirical problem is that the mere fact of crime appears to disprove it. After all, if the point of punishment is deterrence then it becomes difficult, at least after a while, to ignore the fact that crime persists, and even increases, despite continued punishment. Positive general prevention, however, is thought to blunt the force of this empirical objection, largely by virtue of its very positiveness, so to speak. Who knows, after all, what positive effects the threat and infliction of punishment might have on the law-abidingness of the law-abiding? The mere existence of considerable numbers of undeterrable offenders does not imply the absence of scores of people who never even consider a life of crime because they see their trust in the authority of law reaffirmed, all contrary appearances in the form of continued lawbreaking notwithstanding. Clearly, not everyone is committing crimes all the time. Why should that not be the result of positive general prevention through punishment? Surely, punishment can claim to have made some contribution here.

This speculation, however, if it can be said to prove anything, proves not only the empirical soundness of positive general prevention, but of any method of preventive punishment, including through deterrence. And so one can find arguments that positive general prevention is attractive precisely because of the very absence of empirical evidence for its effectiveness—or more precisely, the impossibility of ever producing empirical evidence. For all intents and purposes, it is said, positive general prevention is empirically immune; it is "hardly falsifiable."

Nonfalsifiability might appear as an odd benefit of a punishment theory that is designed to combat the nonfalsifiable nature of retributivist metaphysics. In fact, at some point it becomes difficult to tell the difference between positive general prevention and retributivism. For many retributivists too were concerned with using punishment to manifest the authority of the state, or at least the force of criminal (or social, or moral, or legal) norms (see Binding above). Unlike most supporters of positive general prevention today, they did not claim that asserting the authority of law required any end beyond itself, but if achieving that end becomes so irrelevant as to not require verification (or even verifiability), then one might suspect that positive general prevention adds little to retributivism.

The line between retributivism and consequentialism becomes particularly blurry in a recent, and quite influential, variety of positive general prevention. Echoing Hegel's theory of punishment as the negation of the negation (of crime), Günther Jakobs regards the function of criminal law as "contradicting the contradiction of norms defining the identity of society." "Punishment," in Jakobs's conception, "is not only a means for the maintenance of societal identity, but already is this maintenance itself." As such, the efficacy of punishment is beyond empirical falsifiability; maintaining societal identity is what punishment means. That's not to say, of course, that retributivism, or any other theory of punishment that does not turn on empirical falsifiability, should for that reason be dismissed, only that nonfalsifiable varieties of positive general prevention cannot dismiss it for that reason.

The less emphasis is placed on the effects, the more weight is shifted onto the meaning of punishment. And the more positive general prevention insists that punishment is about meaning something, as opposed to accomplishing something (like prevention, say), the less it appears as a justification of punishment, as opposed to an analysis of it. At some point, positive general prevention becomes not a theory of punishment, but a function of punishment. Perhaps it is true that punishment "demonstrates to the community of law the inviolability of the legal order and thereby strengthens the population's loyalty to the law." But does this demonstration and strengthening justify punishment?

Here positive general prevention faces the same difficulties as the so-called expressive theory of punishment. The expressive theory of punishment, in fact, never claimed to justify punishment at all. The expression of the communal condemnation was not a purpose, or rationale, of punishment, but, as the title of the article popularizing it makes plain, a (not even the) "function of punishment." As an expressive analysis of the function of punishment, positive general prevention fits into a long tradition of sociological accounts, reaching at least as far back as Durkheim, who regarded state punishment as a medium for the satisfaction of society's collective feelings of revenge and, for that reason, as playing a crucial role in the maintenance of communal identity in modern societies devoid of substantive commonalities.

NOTES

1. Both the U.S. District Court and the German Federal Constitutional Court are reluctant to express a clear preference for one justification of punishment over another. Are they too reluctant or is a mix-and-match approach convincing? Does the notion of "oscillating" between the poles of just deserts and preventive thinking as expressed by the U.S. District Court make sense? Are the alternative approaches compatible?

2. Kant's and Hegel's objections to consequentialist uses of punishment are cited frequently, at least in the German literature. Are they well-founded? Or are they dogmatic remnants of a time before crime and punishment came to be seen in the context of a general project of social ordering through law and other means? Can they be accommodated simply by assigning "retributivism" a limiting function (to prevent punishing the innocent, however great the deterrent effect, for instance), rather than a (or even *the*) justificatory function?

3. The U.S. District Court speaks of retribution with a fairly critical undertone, as "considered by some to be a barbaric concept, appealing to a primal sense of vengeance." Could one describe the criminal justice system's function in relation to a "primal sense of vengeance" in a positive light? For instance, might humankind consider it an achievement to have moderated, mediated and formalized the need for revenge that victims and their communities may feel after a crime? Nevertheless, within the moderation and barriers erected by state criminal law, the primary driving force behind all criminal justice systems still might be victims' need to have the wrong done to them condemned. Was James Fitzjames Stephen right that "criminal law is in the nature of a persecution of the grosser forms of vice, and an emphatic assertion of the principle that the feeling of hatred and the desire of vengeance . . . are important elements of human nature which ought in such cases to be satisfied in a regular public and legal manner"?*

4. From a European perspective, but not only from that perspective, the severity of the approach taken by the U.S. Sentencing Guidelines to the offenses in *United States v. Blarek* is startling. The German legislature took a different stance: for ordinary cases of money laundering, the penalty range in § 261 para. 1 Criminal Code (*Strafgesetzbuch*, StGB) is three months to five years. In severe cases, where the offender drew a continuous income from money laundering (§ 261 para. 4 StGB), the prescribed range is six months to ten years. German courts tend to choose from the lower ends of sentence ranges.† It is very rare that defendants are sentenced to more than two years' (twenty-four months') imprisonment, especially if they have no prior record. Compare this to the U.S. Guidelines range applicable in *Blarek*: 135–168 months.‡

The U.S. District Court relied on the defendants' lives and personal circumstances (their motive of "creating art," their homosexuality, Pellecchia's HIV infection) to mitigate their sentences, which the judge obviously considered too high. For the Court, there was no alternative to this line of argument because the Guidelines were mandatory.§ But consider

* James Fitzjames Stephen, *Liberty, Equality, Fraternity* (1873), 149.
† For more on money laundering, see Chapter 17.C.
‡ On the severity discrepancy between U.S. and German criminal sentences, see Chapter 1.A.iii and B.
§ This is no longer the case, see Note 5.

the Guidelines from a broader perspective. While the Guidelines explicitly demand that the sentence reflect the seriousness of the offense, are the relevant sentence ranges themselves based on this principle? Blarek and Pellecchia did not kill, mutilate or rape fellow human beings. Nor were they involved in drug sales, for instance, or inducing minors to become addicted to drugs. Of course, saying that their personal contribution to a dangerous market is remote does not mean that it is not blameworthy. Those who transfer funds and launder money share responsibility for the continuing existence of drug markets and, therefore, also for the harm done as a result of drug addiction. But in grading the seriousness of the offense, one cannot simply equate money laundering with the sale of drugs. The agent's responsibility is more diluted in the former case. Does a sentence range that starts with more than eleven years' imprisonment still seem proportionate, even in so-called "heartland cases" (in standard cases of money laundering)? In other words, do you agree that "the imposition of a penalty in [*Blarek*] captures, to some rational degree, the 'worth' of defendants' volitional criminal acts"? Or is it, in the end, about general deterrence only? About sending a message? What message? And to whom? Is the judge signaling that "'white collar' 'victimless' offenses'" are serious, too, "particularly since drugs are involved"?

5. Since *Blarek*, the U.S. Supreme Court has downgraded the Sentencing Guidelines from mandatory to advisory, not because they resulted in disproportionate sentences, but because they violated the right to a jury trial under the Seventh Amendment to the U.S. Constitution. In *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), the Court held that the Guidelines permitted—indeed required—courts to make an end run around the constitutional jury trial guarantee by calculating sentences on the basis of facts established at the (judicial) sentencing hearing under a standard of "preponderance of the evidence," rather than the "beyond a reasonable doubt" standard required at the guilt phase of the (jury) trial. In *Booker* itself, for instance, the sentence authorized by the jury verdict was 210 to 262 months in prison; that sentencing range increased to 360 months to life on the basis of facts established at the sentencing hearing following the guilty verdict, resulting in a thirty-year sentence, rather than the maximum sentence of twenty-one years, ten months that the judge could have imposed based on the facts found by the jury beyond a reasonable doubt at trial.*

6. Judges (and commentators) complained about the U.S. Sentencing Guidelines early and often.† Judge Weinstein, the district court judge in *Blarek* (and former Columbia Law School professor), was one of the Guidelines' earliest and most vociferous critics. His opinions in sentencing cases include extended scholarly and systematic assaults on the entire guidelines scheme as well as more subtle internal critiques, as illustrated by *Blarek*, a masterpiece of judicial guidelines avoidance.‡ How does Judge Weinstein try to produce a sentence that he considers just and appropriate without jettisoning the guidelines framework itself? Does he succeed? What about cases involving less sympathetic defendants, as, for instance, the beating of Rodney King by Los Angeles police officers, where the district judge also opted for a significant downward departure—again after a lengthy opinion—partly on a similar basis (vulnerability in prison)?§

* Note that this issue would not have arisen in German criminal law; there is no constitutional right to a jury trial, and lay participation in the criminal process has been limited to the participation of lay judges on panels alongside professional judges; there is no procedural separation between the guilt phase and the sentencing phase of a trial, with the court—whether a professional judge sitting alone, or a panel of professional and lay judges—deliberating on both guilt and, if appropriate, sentence, at the same time; and there is no distinction between the standard of proof on matters of liability and of sentence. On lay participation in German criminal cases in comparative perspective, see Markus D. Dubber, "American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure," 49 *Stanford Law Review* (1997), 547; for a general overview of the German and U.S. criminal process, see Chapter 5.

† For an exhaustive overview, see Daniel J. Freed, "Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers," 101 *Yale Law Journal* (1992), 1681.

‡ See generally Kate Stith, "Weinstein on Sentencing," 24 *Federal Sentencing Reporter* (2012), 217; Jeffrey B. Morris, *Leadership on the Federal Bench: The Craft and Activism of Jack Weinstein* (2011), ch. 8.

§ See *United States v. Koon*, 833 F. Supp. 769 (C.D. Cal. 1993), aff'd in part & rev'd in part, 518 U.S. 81 (1996).

7. The establishment of the U.S. federal sentencing guidelines was motivated in large part by an effort to limit judicial discretion. Ironically, federal district judges—notably Marvin E. Frankel, the author of the influential *Criminal Sentences: Law Without Order* (1972) (like Weinstein, a former Columbia Law School professor)—were among the loudest critics of what they regarded as arbitrary, even lawless and discriminatory, sentencing practices that were either unpredictable, or predictable by irrelevant factors (namely what judge happened to be assigned to the case or, more generally, "luck"). Since guidelines, and especially mandatory guidelines, limit judicial discretion, should one take judicial outrage about sentencing guidelines with a grain of salt? Are guideline-driven sentences any more lawful, or less lawless, than judge-driven ones? Are they more, or less, just? Or does the push-and-pull between guidelines and discretion merely reflect the tension between different conceptions, or perhaps aspects, of justice—one concerned with individual justice, the other with equality?

8. A common criticism of the U.S. federal sentencing guidelines was that, rather than guiding (never mind eliminating) judicial sentencing discretion, they simply shifted discretion—and therefore power—to federal prosecutors, who now controlled the sentence, within a narrow range, by deciding which offenses to charge. Prosecutorial discretion in the U.S. system, however, is essentially unconstrained, leaving prosecutors a largely free hand to engage in plea bargaining, or in this case *charge* bargaining (and in some cases even *fact* bargaining, insofar as findings of fact at the sentencing hearing—in particular about the quantity of drugs possessed, or distributed—could have a dramatic impact on the sentencing guidelines range). The guidelines, by this account, had not only retained sentencing discretion, but removed it from the open courtroom into the prosecutor's office, or the courtroom hallway, and took it out of the hands of the judicial branch and placed it into those of the executive branch, from an objective arbiter to a partisan party occupying the dominant position in an essentially unregulated process.*

The German literature, and jurisprudence, on sentencing does not reflect a similarly wide and deep concern about the exercise of judicial discretion by state officials in the criminal process.† Judicial discretion is not regarded as troubling. Prosecutors are seen as having no influence on sentencing, even indirectly through charging decisions; at any rate, the problem of prosecutorial discretion is thought to have been addressed by the introduction of the so-called *Legalitätsprinzip*, or principle of compulsory prosecution (literally, but confusingly, "principle of legality"), which requires prosecutors to charge every offense supported by credible evidence. This principle was more recently joined by a counter principle, the opportunity principle (*Opportunitätsprinzip*), which permits prosecutors to drop a charge in cases of minor culpability in the public interest. (This counter principle does not apply to police, who are subject only to the principle of compulsory prosecution.)‡

What is the connection between discretion (by whom?) and the various justifications for punishment? And conceptions of the role of judges and prosecutors in the criminal process? And trust in state officials (or in some officials rather than in others)?

9. What, exactly, is wrong with the federal sentencing guidelines? Too harsh? Too rigid? Too mandatory? Too detailed? Too retributive? Too consequentialist? Too administrative (after all, they're drafted by a "commission")? What else? Is the very project of sentencing guidelines doomed? Or can one imagine crafting guidelines that avoid some, all, or any of the problems associated with the U.S. Sentencing Guidelines in particular? The Minnesota

* Note that federal judges and prosecutors, unlike many of their state colleagues, are appointed, not elected: federal judges are appointed by the U.S. President for life, upon Senate confirmation, as members of the federal judicial branch, 28 U.S.C. § 134(a) ("during good behavior"); U.S. Attorneys are appointed to four-year terms but, as members of the executive branch, "are subject to removal by the President," 28 U.S.C. § 541(c).

† See Tatjana Hörnle, "Moderate and Non-Arbitrary Sentencing Without Guidelines: The German Experience," 76 *Law and Contemporary Problems* (2013), 189.

‡ See German Code of Criminal Procedure (*Strafprozeßordnung*, StPO) § 153ff.

Sentencing Guidelines are often held up as an example of an acceptable—kinder, gentler—alternative to the federal guidelines.*

10. *A note on the Model Penal Code and treatmentism.* It is worth taking a closer look at the rationale of punishment that underlies the Model Penal Code, both because the Model Penal Code plays such a central role in the present book and because its rationale of punishment plays such a central role in the Code itself. The MPC was a child of its time, which means that it reflects a treatmentist approach to criminal law. The treatmentist influence on the Code is strong, and can help one make sense of the Code in many respects (both large and small), but it was also tempered somewhat by two facts: it was drafted by Herbert Wechsler, who at bottom always remained a lawyer (rather than a social scientist, or penologist), and it was designed as a model code, which meant that it had to appeal to legislators (many of whom were lawyers), lawyers, and judges (law professors were less important in this regard). Treatmentism, according to Wechsler's 1930s manifesto "A Rationale of the Law of Homicide,"† reconceptualized criminal punishment as peno-correctional treatment for abnormal dangerousness. Crime was a symptom of that dangerousness, rather than some evil act that required retribution. Punishment was taboo, and retributivism was atavistic and barbaric. (Do you see traces of this view in Judge Weinstein's opinion in *Blarek*?) The criminal code, to put it pointedly, amounted to a rough manual for the pre-diagnosis of dangerousness, to be confirmed and refined by penological experts during the course of the implementation of sanctions of indeterminate duration.‡

11. *Culpability principle, take one.* The German Federal Constitutional Court opinion and Streng's overview of German sentencing law both refer to a norm that will make frequent appearances throughout this book: the culpability principle (also sometimes referred to as the guilt principle), or *Schuldprinzip* (or *Schuldgrundsatz*). This is a fascinating and central concept in contemporary German criminal law, with enormous range and power: range because it covers much doctrinal ground, from the proportionality—if not the justification—of punishment (as in the present context), to the law of *mens rea* (i.e., subjective offense elements), and eventually to the law of excuse.

It is the culpability principle that requires that punishment be proportionate to the offense, and to the offender, in the sense that the punishment reflect the offender's culpability, or desert. In other words, the culpability principle represents the idea of so-called limiting retributivism, which insists that punishment, apart from any consequentialist functions it might serve, not exceed the offender's desert. Some even ascribe to the culpability principle a more ambitious function, of justifying—rather than merely limiting—punishment as the consequence ("just deserts") of an ascription of culpability.§

As we will see later on, it is also the culpability principle that requires proof of *mens rea*, accounting for the categorical rejection of strict (or absolute) liability in German criminal law.¶ (Along the way, the culpability principle also has been invoked to support the similarly categorical rejection of corporate criminal liability,** on the ground that corporations are incapable of culpability.)

Finally, the culpability principle has been interpreted to require the recognition, and even the particular interpretation, of excuses. For instance, the culpability principle is taken to require a broad interpretation of the insanity defense to cover cases of extreme

* See Richard S. Frase, "Sentencing Guidelines in Minnesota, 1978–2003," 32 *Crime and Justice: A Review of Research* (2004), 139.

† Jerome Michael and Herbert Wechsler, "A Rationale of the Law of Homicide I," 37 *Columbia Law Review* (1937), 701; Jerome Michael and Herbert Wechsler, "A Rationale of the Law of Homicide II," 37 *Columbia Law Review* (1937), 1261.

‡ See generally Markus D. Dubber, *Criminal Law: Model Penal Code* (2002).

§ Contrast Claus Roxin, *Strafrecht: Allgemeiner Teil* (3rd edn. 1997), vol. 1, 59–60, with Hans-Heinrich Jescheck and Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil* (5th edn. 1996), 23–4.

¶ See Chapter 8.B.

** See Chapter 11.

intoxication as well as a broad reading of the mistake of law defense to cover (unavoidable) ignorance of law.*

The power of the culpability principle, however, is at least as impressive as its range. Already considered a fundamental principle of German criminal law science, it has not only been constitutionalized, but constitutionalized in the most dramatic form, by grounding it in the first and highest norm in German constitutional law: the inviolability of human dignity guaranteed in Article 1, section 1 of the Basic Law. For good measure, it has also been associated with the fundamental constitutional *Rechtsstaatsprinzip*, or rule-of-law principle.

The range and power of the culpability principle, however, is more easily identified than its substance, which—not surprisingly—depends on one's preferred notion of culpability (or guilt).† It is clear that the culpability principle is a *principle*, but what *culpability* does it protect? Consider this question any time you encounter a reference to the culpability principle in this book.

For now, here is a standard statement of the principle (cited in its Latinate version: *nulla poena sine culpa*), from elsewhere in the Federal Constitutional Court opinion excerpted below:‡

> The free human personality and its dignity represent the highest legal value within the constitutional order. The duty is imposed on state power in all forms of its manifestation to have regard to and to protect the dignity of the human being.
>
> This is based on the idea of the human being as a spiritual and moral being, intended for self-determination and self-development in freedom. . . . The maxim "a human being must always remain a goal in himself" applies without restriction for all areas of law, because the dignity of the human being as a person, which cannot be lost, consists in the fact that he continues to be recognized as a self-responsible personality.
>
> In the area of criminal justice in which the highest requirements are placed upon justice, art. 1 para. 1 Basic Law determines the conception of the nature of punishment and the relationship of guilt and expiation. The principle *nulla poena sine culpa* has the status of a constitutional principle. Every punishment must have a just relationship to the seriousness of the crime and to the guilt of the perpetrator.

ii. The victim's role

The victim's role in criminal law has received considerable attention in the United States and Germany, particularly during the last decades of the twentieth century. The victims' rights movement in the United States has proved very influential, particularly as an important plank in eventually ubiquitous tough-on-crime platforms. During the heyday of the so-called war on crime, the pursuit of victims' rights became largely indistinguishable from the attack on defendants' rights, in a backlash against the U.S. Supreme Court's concerted effort starting in the 1950s to revamp the criminal process, particularly, but not exclusively, in Southern states, through the enforcement of federal constitutional protections, which until then had been limited to federal criminal cases, which accounted for only a small fraction of criminal cases in the United States. Despite a wave of largely symbolic "victims' bills of rights" that swept the nation, however, the precise impact on legal doctrine and practice can be difficult to detect. Interestingly, the victims' rights movement showed little interest in, and had little effect on, crime victim compensation in the United States; yet, by the early 1990s the U.S. Supreme Court cited the victims' rights movement in support of a decision to reverse its previous rejection of victim impact statements in capital sentencing hearings.

* See Chapter 8.C.ii and 8.D.

† For a discussion of some of the various conceptions of culpability circulating in German criminal law scholarship, see Chapter 8.A.

‡ Other parts of the opinion are reproduced in Chapter 1.B.i.

Although the victims' rights discussion in Germany was less politicized, or at least less heated, and less focused on expanding victims' rights by limiting defendants' rights, it also produced fairly modest reforms. Still, considering the victim's role in criminal law remains a promising point of entry into a critical analysis of the enterprise of criminal law as a whole. Shifting one's perspective from the offender to the victim opens up a view of an alternative approach to the state's response to the phenomenon of crime, one focused on the determination of victimhood, rather than offenderhood, and of compensation, rather than of punishment, and of a road (so far) not taken.

Compensation and restitution

Uniform Victims of Crime Act (1992)*

Summary of Contents

The fundamental objective underlying this Act is the protection of the best interests of victims of crime. This Act seeks to ensure that crime victims are treated with the dignity and respect they deserve while functioning in a system in which they find themselves through no fault of their own. The Act seeks to accommodate that objective and crime victims' needs and rights with defendants' constitutional rights. . . .

§ 101. Definitions

In this [Act]:

(1) "Crime" means an act or omission committed by a person, whether or not competent or an adult, which, if committed by a competent adult, is punishable by [incarceration].

. . .

(6) "Victim" means a person against whom a crime has been committed, but does not include a person who is accountable for the crime or a crime arising from the same conduct, criminal episode, or plan and does not include a government or a governmental subdivision, agency, or instrumentality.

§ 304. Eligibility for Compensation

The following are eligible to receive compensation under this [Article]:

(1) a victim who has suffered physical, emotional, or psychological injury or impairment as a result of a crime [of violence, including driving while impaired and domestic abuse];
(2) an individual who, as a result of a crime [of violence, including driving while impaired and domestic abuse], has lost care or support from a victim;
(3) an individual who has suffered physical, emotional, or psychological injury or impairment as a result of preventing or attempting to prevent the commission of a crime, apprehending or attempting to apprehend a suspected criminal, aiding or attempting to aid a [law enforcement officer] to apprehend or arrest a suspected criminal, or aiding or attempting to aid a victim of a crime. . . .

§ 305. Award of Compensation

(a) The [agency] may award compensation for any economic loss directly caused by death or physical, emotional, or psychological injury or impairment, including:
  (1) reasonable expenses related to medical care, including prosthetic or auditory devices; ophthalmic care, including eye glasses; dental care, including orthodontic or other therapeutic devices; mental health care; and rehabilitation;
  (2) loss of income;
  (3) expenses reasonably incurred in obtaining ordinary and necessary services instead of those the victim, if not injured, would have performed, not for income but for the benefit of the victim or a member of the victim's family;

* [A model statute prepared by the National Conference of Commissions on Uniform State Laws, a non-profit association comprised of state commissions on uniform laws from each state. The Act has been approved by the American Bar Association.—Eds.]

(4) loss of care and support; and
(5) reasonable expenses related to funeral and burial or crematory services.

(b) An award may be made whether or not a person is charged, indicted, prosecuted, or convicted of a crime giving rise to the claim.

German Victim Compensation Act (*Opferentschädigungsgesetz*, OEG)

§ 1

(1) Who has suffered harm to his health through an intentional, unlawful physical assault against himself or another person or in defense against such an assault in the area where German law applies or on a German ship or aircraft, shall on demand receive financial assistance by the state for health or economic damages, according to the regulations in the Federal Assistance Act [*Bundesversorgungsgesetz*, traditionally applied to war victims—Eds.] . . .

(2) Equal to physical assaults are intentional poisoning and endangering others' life or health through the commission of a crime that endangered a great number of persons if this was done at least negligently. . . .

Sentencing

Payne v. Tennessee
United States Supreme Court
501 U.S. 808 (1991)

[Our decision in Booth v. Maryland, 482 U.S. 496 (1987), was based on two premises: that evidence relating to a particular victim or to the harm that a capital defendant causes a victim's family do not in general reflect on the defendant's "blameworthiness," and that only evidence relating to "blameworthiness" is relevant to the capital sentencing decision. However, the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment. Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm. "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater." *Booth*, 482 U. S., at 519 (Scalia, J., dissenting).

. . .

"The first significance of harm in Anglo-American jurisprudence is, then, as a prerequisite to the criminal sanction. The second significance of harm—one no less important to judges—is as a measure of the seriousness of the offense and therefore as a standard for determining the severity of the sentence that will be meted out." S. Wheeler, K. Mann, & A. Sarat, Sitting in Judgment: The Sentencing of White-Collar Criminals 56 (1988).

. . .

"We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death." Eddings v. Oklahoma, 455 U.S. 104, 114 (1982). Thus we have . . . required that the capital defendant be treated as a "uniquely individual human being." *Booth*, 482 U.S., at 504 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)). . . . *Booth* has, we think, unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering "a quick glimpse of the life" which a defendant "chose to extinguish," Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting). or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide.

The *Booth* Court reasoned that victim impact evidence must be excluded because it would be difficult, if not impossible, for the defendant to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant, thus creating a " 'mini-trial' on the victim's character." *Booth*, 482 U.S., at 506–507.

Payne echoes the concern voiced in Booth's case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this

kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead each victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be. . . .

"Within the constitutional limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." Blystone v. Pennsylvania, 494 U.S. 299, 309 (1990). The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the *Booth* Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. . . . Courts have always taken into consideration the harm done by the defendant in imposing sentence. . . .

We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. . . .

Tatjana Hörnle, "Distribution of Punishment: The Role of a Victim's Perspective," 3 *Buffalo Criminal Law Review* (1999), 175

Relying on a victim's perspective clarifies issues that have been treated rather superficially in traditional sentencing doctrine. For this reason, it is useful to mention a few distinctions in German criminal doctrine. The first is the distinction between wrongdoing (*Unrecht*) and culpability of the offender (*Schuld*). "Wrongdoing" refers to the criminal act; its wrongfulness and its consequences are judged from an outside perspective. Establishing culpability, on the other hand, means evaluating the offender's personal deficiencies from an internal perspective. Thus, the crucial determination is whether wrongdoing can be fully attributed to the offender.

A victim's perspective is relevant in assessing the degree of wrongdoing. The judgment of wrongdoing is a social one. It indicates borders between differing interests, the interest of the victim in having her rights preserved and the interest of the offender in exercising her liberty. The formal distinction between wrongful and legitimate conduct matters, but the qualitative judgment of "how much wrongdoing" has occurred confirms the extent to which the victim's sphere has been violated.

"Wrongdoing" is occasionally equated with "harm." . . . But reference to harm, that is, to the result of an intrusion, does not fully cover the range of objective circumstances that influence the degree of wrongdoing. Certain modes of acting do not affect the victim but nevertheless can affect the judgment about the offender's conduct, for example, if an armed burglar was lucky enough not to encounter anybody. A second distinction in the German literature, between *Erfolgsunrecht* and *Handlungsunrecht*, clarifies the circumstances of an offense and clarifies their relevance. The second concept, *Handlungsunrecht*, cannot be translated literally, but I will explain the difference. *Erfolgsunrecht* refers to the negative consequences of the criminal act; thus, the concept is analogous to harm. It is the *Handlungsunrecht* that widens the perspective; it denotes the wrongdoing of the act but not the act's result.

[A] victim's perspective is most useful with respect to the *Handlungsunrecht*. Like any other event, each offense can be described with an infinite number of details; for example, the temperature at the location, the time of the day, a description of the clothes the actors wore, or the contents of the offender's jacket pockets. This listing might look odd at first, but courts and commentators frequently cite aggravating circumstances that raise additional questions about an offender's culpability. Should it matter that the offender was a foreigner or, most important in practice, that he had numerous prior convictions? Does the definition of crime change when an act is committed by members of a very sophisticated criminal organization like a gang, rather than an unorganized group of offenders? Is it a greater wrong to plan an offense carefully in advance? Is it relevant that the offender carried tools (like a screwdriver) that could be used to hurt people? In order to separate relevant from irrelevant details, one must consider a victim's perspective. This process distinguishes which circumstances characterize the wrongdoing and which will be significant merely for preventive reasons. . . .

Take, for instance, mitigating circumstances that can be determined empirically. In German law, abnormal mental conditions not only can excuse the offender, but also are important for sentencing. The sentence can be mitigated considerably when the offender's ability to recognize the wrongfulness of his conduct or his ability to act according to this insight are substantially reduced. The victim does not, and, logically, cannot play a role in determining whether the offender was mentally ill or psychologically disturbed.

Some mitigating circumstances under German law are based not on empirically measurable internal conditions but on normative considerations. For example, an offense committed to ward off present danger to life, health, or liberty is excused. This excuse occasionally is said to derive from an abnormal mental condition that leads to an inaccurate assessment of danger. A straightforward normative justification, however, which bases the excuse on the general principle that one cannot be expected to avoid illegal behavior in the face of immediate danger clearly is preferable (*Theorie der Zumutbarkeit*). This principle can be extended to other situations in which attendant circumstances can mitigate a sentence.

The criteria for excuses and mitigations are not influenced by a victim's perspective. The normative perspective requires the judge to place herself in the position of the offender, that is, in the situation of an endangered person. What matters is the internal conflict the actor had to struggle with—the conflict between his interest in self-preservation and his general interest in obeying the law. The social conflict between the demands of the victim and the offender has already been examined on the level of wrongdoing. With respect to the narrower question of culpability, the interests of the victim have no specific relevance.

Markus D. Dubber, "The Victim in American Penal Law: A Systematic Overview," 3 *Buffalo Criminal Law Review* (1999), 3

In the theoretical underpinnings of the substantive criminal law, the so-called theory of punishment, the role of victims differs from theory to theory. Rehabilitation, the reigning ideology in American penal law until the late 1960s, had little use for victims. Punishment or, as the rehabilitationist would have it, peno-correctional treatment, turns on the offender's criminal pathology, as diagnosed by penological experts. Victims are no more relevant to this view of punishment than they are to the medical treatment of any other patient. This is not to say that victims are irrelevant, only that their characteristics or conduct matters merely insofar as they affect the diagnosis and treatment of a particular offender's deviance. So the victim's age might help substantiate a diagnosis of pedophilia. Similarly, her conduct might help the penologist identify the specific behavioral trigger of the offender's criminal episode, such as in provocation cases, or even constitute strong evidence against a diagnosis of criminal pathology, such as in cases of victim consent. More recently, victim participation has been said also to contribute to the offender's rehabilitative treatment. Victim offender meetings, for example, may assist the offender's rehabilitation by forcing her to confront the devastating and long term impact her deviant behavior has on the immediate victim and her community. . . .

By the 1970s, rehabilitationism began to give way to retributivism as the dominant ideology of punishment in the United States. . . .

Retributivism made room for victims insofar as its assessment of desert turned in part on the harm inflicted by the defendant's conduct not only in the abstract, i.e., in the definition of the offense, but also in the particular case, provided the offender displayed an attitude toward the harm that would permit the assignment of blame. The victim's role in retributivism, however, was not uncontested. Many retributivists, at least, rebelled against what they perceived as the rehabilitationists' ill-advised attention to the particular characteristics and circumstances of the offender, rather than to the nature of the offense, for two reasons. First, such efforts at particularization placed excessive discretion in the hands of those charged with applying penal norms, a discretion that in turn led to non-uniform punishment practices in general, and to discriminatory punishment practices in particular. Second, any offender-based punishment practice risked the degrading stigmatization of its object, who was marked as deviant, rather than judged as having wronged. In its most abstract form, retributivism thus viewed punishment as the vindication of a general penal norm (e.g., against homicide), rather than retribution for the particular harm suffered by a particular victim. The victim's experience was significant only insofar as it established the norm violation. Once the norm violation had been established, the particular sentence imposed on the offender could reflect the particular harm inflicted only insofar as the offender was aware of it (or possessed some other mental state).

This deontological interlude, however, proved short-lived. Certainly in practice, if not in theory, retributivism quickly gave way to its consequentialist analogue, vengeance, and the crudest form of consequentialist penology, incapacitation. The rise of the so-called victims' rights movement in the United States formed an important part of this consequentialist (re)turn. . . .

In the absence of a coherent theory underlying the victims' rights movement . . . , one is forced instead merely to identify the symptoms of this sociological phenomenon. . . . [T]he victims' rights movement can be thought of as the manifestation of a communal self-protective reflex or impulse. The victim would play a central role in such a phenomenology of reflex punishment. It is the injury to a fellow community member by an outsider that triggers the penal impulse. Through identification with the victim, other community members re-experience her suffering. Moreover, they may experience

the injury inflicted upon the individual victim as an injury to the community as a whole, and perhaps even as a threat to its continued existence. The victim, in the end, becomes an icon to a community of potential victims. The victim is entitled to an unrestrained manifestation of her pain and confusion, with her fellow community members as empathic onlookers.

In this model, everything would turn on the onlooker's identification with the iconic victim. Without identification, she cannot experience the victim's pain as her own, nor does she consider an injury to the victim as a threat to her own community . . .

[T]hough based on the perception of fellow community membership with respect to victims, the victims' rights movement, at the same time, has worked to block that identification when it comes to certain offenders. One might even go so far as to say that the victims' rights movement set out to replace offender identification with victim identification.

The inclusionary exclusionary nature of the victims' rights movement becomes most obvious in capital cases. Here identification with the victim is said not only to permit but to require differentiation from the offender. By declaring the offender an outsider so alien to the community that identification is simply impossible for lack of even the most basic similarity, the community purges itself of deviant elements and thereby heals itself as it salves the victim's pain. . . .

Once the offender is excluded from the realm of identification, the question "how could someone like us (or, stronger, like me) have done something like this" no longer arises. To the extent curiosity survives, it does not concern the offender's behavior, but the victim's suffering. Making room for victims thus often amounts to facilitating the search for an answer to the altogether different, passive, question "how could something like this have happened to someone like us (or me)." The offender and her behavior remains significant only insofar as it can help answer this elusive question, most obviously in the case of victim offender meetings after conviction.

Jörg-Martin Jehle, Criminal Justice in Germany: Facts and Figures (Federal Ministry of Justice, 2009)

Offender–Victim Mediation (*Täter-Opfer-Ausgleich*, abbreviated: TOA), which was given a legislative basis for the first time in 1990, refers to an offender's efforts to achieve a settlement with the injured party and in doing so to make good his or her offense, or to go a long way towards doing so. A settlement of this kind can take place at any stage during criminal proceedings and can cause the authorities to refrain from prosecution (§ 45 section 3 of the Act on Juvenile Courts), to drop the prosecution (§ 153a section 1 line 2 Nr. 5 Code of Criminal Procedure, § 47 section 1 no. 3 Act on Juvenile Courts) or to refrain from imposing a or mitigating the sanction (§ 46a StGB). According to juvenile criminal law, the judge can issue the instruction that the judged offender is to make efforts towards Offender–Victim Mediation (§ 10 section 1 line 3, no. 7 Juvenile Criminal Code). In order to enable TOA to be used more frequently and easily the criminal code provisions were augmented procedurally in 1999 with the new paragraphs 155a and 155b in the Code of Criminal Procedure. These oblige the prosecution service and the court to consider the possibilities for reaching a settlement between the accused and the victim at all procedural stages.

Offender–Victim Mediation is usually achieved upon prosecution service initiative, although a TOA institution, usually the juvenile court service, the court service or a specialist independent organization will be involved. This organization will consider whether a case is generally suited for TOA, whether the victim and perpetrator are prepared to enter settlement discussions, lead these discussions, record the result of these, supervise the actual compensatory efforts and inform the prosecution service and court of success or failure.

German Criminal Code (*Strafgesetzbuch*, StGB)

§ 46a Offender–Victim Mediation, Compensation for Damages

If the offender has:

1. in an effort to achieve mediation with the injured person (offender–victim mediation), completely or substantially made restitution for his act or earnestly tried to do so; or
2. in a case in which the restitution of damages required substantial personal accomplishments or personal sacrifice, completely or substantially compensated the victim,

the court may mitigate the sentence according to § 49 para. 1 or, if the maximum punishment would be imprisonment for up to one year or a fine, dispense with punishment.

NOTES

1. Considering the role of victims in the criminal law raises important questions. First, should or must the state offer financial compensation to the victims of crime? Second, may victims take an active role in the criminal trial, specifically by delivering victim impact statements at the sentencing stage? Third, should the law support and encourage victim-offender mediation or compensation? Fourth, as a matter of substantive criminal law, how should the victim's conduct or characteristics affect the offender's criminal liability?

2. The first issue, financial compensation by the state for victims of crime, tends to be thought of, in Germany, as the provision of a social service to citizens in need (analogous to other services such as medical insurance, workers' compensation, emergency aid, and so on), rather than as a matter of criminal law in general, or of criminal trials in particular. The German "federal support law" (*Bundesversorgungsgesetz*, BVG) was introduced in 1950 for victims of the Second World War. While it is easy to see why harm caused by the decisions of state organs (like the decision to declare war) ought to be compensated by the state, it is less evident in cases where the harm is caused by other citizens (which in general is the subject of civil lawsuits). But the German state now also compensates the victims of crime; the Victim Compensation Law (*Opferentschädigungsgesetz*, OEG) for violent crimes was introduced in 1985. It is not only a symbol of an extended welfare state; more importantly, it signifies a growing trend in German society to sympathize and identify with victims.*

In the U.S., crime victim compensation tends to attract little attention, and in general is under-theorized. The "victims' rights" agenda of the so-called "war on crime" instead regarded the protection of victims' and defendants' rights as a zero sum game; much of the pursuit of victims' rights, then, amounted to a restriction of defendants' rights and general calls for greater punitiveness (three-strikes laws for repeat offenders; increased and mandatory minimum sentences; expansion of capital punishment; restrictions on federal habeas corpus; primarily as an avenue to challenge state capital sentences; and so on).†

Crime victim compensation schemes in the U.S. appear less as a service provided by the general welfare state (which, in comparison to Germany, is much less developed, and far more controversial) than as a specific and more limited attempt to provide crime victims with financial assistance, as reflected in the crime-focused financing models adopted by various jurisdictions, for example, drawing on a portion of salaries earned by offenders from prison work or while on work release or parole, collecting forfeited assets from criminal activity, or allowing taxpayers to designate a part of their income tax refund to be used for crime victim services.

Victim compensation schemes in other common law countries pursue aims similar to the German scheme. For instance, the provision of financial assistance to victims of violent crime in the Canadian province of Ontario is said to further the following policy rationales:

> (a) Criminal injuries financial assistance reflects society's compassion for innocent victims and a collective desire to help those who have been harmed as a result of violent crime.
> (b) Governments fund a number of programs that are designed to promote the welfare of its citizenry and financial assistance for victims of violent crime is a reasonable extension of these kinds of state funded programs.
> (c) Similarly, governments provide several insurance-like programs such as health care insurance, unemployment insurance and workplace injury insurance that spread certain inevitable risks in society. Victim financial assistance is seen, again, as a reasonable extension of these kinds of programs.‡

* See generally "Symposium: Victims and the Criminal Law: American and German Perspectives," 3 *Buffalo Criminal Law Review* (1999), 1.

† See generally Markus D. Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* (2002).

‡ Report on Financial Assistance for Victims of Violent Crime in Ontario (2008), 17–18.

3. Consider the relationship between crime victim compensation law and criminal law. They can be seen as parallel mirror-image state responses to the phenomenon of crime, each focused on one of the persons constituting the legal event "crime": "offender" and "victim." Criminal law investigates the offender's punishability; compensation law the victim's compensability. The offender's punishability turns on her guilt; the victim's compensability on his innocence. Note that the Uniform Victims of Crime Act, in § 101(6), excludes from the definition of "victim" anyone "accountable for the crime": victims cannot be offenders, and innocence cannot be guilt. Similarly, under New York law, a "victim" for purposes of crime victim compensability is "an innocent person who suffers personal physical injury as a direct result of a crime."* The prerequisite of innocence can raise the specter of a second victimization, in the very process of victim compensation, by inquiring into the victim's "contribution" to the criminal offense against him or her.†

Can the requirement of innocence be squared with the view of victim compensation schemes as providing a state social service to the needy? To what extent are crime victim compensation schemes *crime* victim compensation schemes? Should they be?

4. Should victims be able to express their suffering and needs in criminal trials through victim impact statements? The answer to this question is not obvious. If the evolution of state punishment is seen as a crucial step in civilizing and restricting vindictive reactions, we might be reluctant to provide extensive victims' rights and specifically victim impact statements.

Under German law, victims in general are not entitled to participate actively in criminal trials and there are no victim impact statements. However, there are important exceptions to this rule of the "passive victim." The German Code of Criminal Procedure allows certain types of victims to appear as "accessory prosecutor" (*Nebenkläger*): §§ 395–402. This right is mainly available to victims of sexual offenses, assault and attempted murder, as well as to relatives of murder and homicide victims. The position of an "accessory prosecutor" includes a right to make statements. It does not, however, oblige the judge to put particular emphasis on the victim's suffering in his or her sentencing decision. Independent of the procedural aspect, even if victims do not themselves make statements about the crime's impact on their lives, judges will take evidence about harm (from medical reports, for instance) into account in sentencing.‡

5. Another question is whether the criminal justice system should consider attempts to improve the relationship between offender and victim as a mitigating factor or even promote and instigate mediation and compensation. In contemporary German criminal law theory, the issue of "restorative justice" plays a prominent role, and multiple forms of victim-offender mediation and compensation schemes are applied in practice. German criminal law does not include mediation as a feature of the criminal trial as such, but it encourages such procedures outside of the courtroom. Mediation may lead to termination of the criminal proceedings before trial, or, if a trial takes place, § 46a StGB allows a judge to reduce the sentence or, in less serious cases, to abstain from imposing punishment.

With respect to sentencing theory, this raises the question of whether mitigation of punishment (for actual, or even for attempted, mediation) can fit into a coherent approach. Could one argue that offenders' conduct after the crime should influence the assessment of their crimes insofar as it affected—and perhaps reduced—the harm done? What if efforts at victim–offender mediation, however genuine, have the opposite, even if unintended, effect and aggravate the victim's suffering? How would one measure this effect? Should a good faith effort by the offender be enough? Should victims be forced, or at least induced, to participate

* See Markus D. Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* (2002), 9–10, 233–5.

† See, e.g., *Re Jane Doe and Criminal Injuries Compensation Board*, (1995) 22 O.R. (3d) 129, [1995] O.J. No. 278 (reversing victim compensation board's 40 percent reduction of award for failure to take reasonable precautions against exposure to H.I.V.); *Sheehan and Criminal Injuries Compensation Board*, (1975) 5 O.R. (2d) 781 (upholding board's dismissal of prison inmates' claim on the ground that "but for their own prior criminal activity these applicants would not have found themselves in Kingston Penitentiary where they were injured").

‡ See generally William T. Pizzi and Walter Perron, "Crime Victims in German Courtrooms: A Comparative Perspective on American Problems," 32 *Stanford Journal of International Law* (1996), 37.

in mediation sessions? What about unsympathetic victims (e.g., someone who harbors racial prejudices against the offender)? Paranoid, traumatized, indifferent victims?*

6. What role does—should—the victim play in substantive criminal law? For instance, does it make the offender any less guilty if the victim consented to the offender's conduct, or does it make the conduct less criminal, or less wrongful, or harmful? We will take up the issue of consent later on, but for now think about what it means for the ostensible victim of a crime if the criminal law—i.e., the state in defining, applying, and enforcing criminal norms—declares that his or her consent is immaterial. (Think of adult partners in a consensual sado-masochistic sexual relationship, or terminally ill patients seeking the assistance of others in ending their lives, and thereby their suffering.†) Does the irrelevance of victim consent to the offender's criminal liability amount to a violation of "victims' rights"?‡

iii. Types of sanction

The *Blarek* opinion features a wide palette of sanctions: imprisonment (which gets all the attention, not just in this case, but in general, at least in Anglo-American criminal law), along with fine, forfeiture, supervised release, and a "special assessment" to boot. This list is fairly representative, even if it does not include the death penalty and so-called "alternative punishments," which is often taken as a synonym for (more or less) tailored shaming sanctions of some sort. We will pay particular attention to the fine, which is of considerable comparative interest because it is as irrelevant in Anglo-American criminal law as it is central to German criminal law (and to the criminal law of many other European countries, notably in Scandinavia).§

Apart from the retention of capital punishment in many American jurisdictions, the most obvious difference between criminal sentences in the United States and Germany (and, in fact, between the United States and any other Western country, and many non-Western countries besides) is the frequent use of imprisonment, which—combined with harsh sentences—has placed the United States at, or near, the top of incarceration rates worldwide. Even with recent developments in the direction of reducing the prison population, or at least of slowing its exponential growth (from 166 per 100,000 population in 1970 to 760 in 2009)—which tend to be driven by budgetary concerns about the high cost of imprisonment, rather than by a rejection of imprisonment as the sanction of choice—this radical distinction will remain in place for some time to come.

In the context of the American penal regime, every other sanction is measured against the paradigm of imprisonment. Against this backdrop, every other type of punishment appears as an alternative, as a deviation from the standard of imprisonment, in both directions of severity. The death penalty is an upward deviation from the norm, everything else a downward deviation, and both must be justified in these terms. The death penalty, as a *type* of sanction, is thought to be reserved for cases in which imprisonment, even life imprisonment without the possibility of parole, is considered insufficient for one reason or another (e.g., it does not reflect the seriousness of the crime, the offender's blameworthiness or dangerousness). Non-incarcerative types of sanction other than the death penalty are, by definition, considered less severe than a prison sentence, and thus regarded as an exceptional downward departure from the norm. In fact, so close is the association between punishment and

* See, e.g., *People v. Mooney*, 133 Misc. 2d 313, 506 N.Y.S.2d 991 (Co. Ct. 1986) (imposing community-based sentence in a case of violent crime "in a small cohesive community" despite victim's "continu[ing] in a state of reproachment, with strong feelings of anger and revenge," where "victim's mother expressed a less hostile attitude and was more receptive to a conciliatory process to eliminate the destructive nature of such feelings to his own future welfare").

† See Chapters 13.C (on consent) and 15.A.v (on assisted suicide).

‡ See generally Vera Bergelson, *Victims' Rights and Victims' Wrongs: A Theory of Comparative Criminal Liability* (2009).

§ For a detailed discussion of ostensibly non-punitive "measures," see Chapter 1.B.iii.

imprisonment that a common criticism of non-incarcerative sanctions—most notably fines—is that they are not "really" punishments. This political-conceptual context accounts, at least in part, for the interest in so-called "alternative" shaming sanctions, which are portrayed as alternatives to imprisonment that, to put it mildly, are less likely to be taken as insufficiently punitive than other alternatives, such as fines. At the same time, fines face the general objection that they discriminate against poor defendants, which is a serious concern in a country of greater income inequality than, say, Germany or Sweden, which rely heavily on criminal fines, even with a so-called day fine system aimed at addressing this problem. Nonetheless, it is a concern that pales in comparison to the reality of mass incarceration of predominately poor and, what is more, minority status persons. In 2005, 8.1 percent of all black males age 25 to 29 were in prison, compared to 1.1 percent of white males.*

Incarceration Rates (prisoners per 100,000 population, 2009)

U.S.A.	760
Russian Federation	624
South Africa	329
Israel	325
England	140
Australia	129
Canada	116
France	96
Germany	90
Sweden	74
Japan	63

Source: Organization for Economic Co-Operation and Development, Factbook 2010, Economic, Environmental and Social Statistics

Verdict, disposition, and sentence received in cases terminated in U.S. district court, 2009

	Number	*Percent*
Total Cases Terminated	95,891	100
Convicted	86,975	90.7
Plea	84,326	87.9
Bench/jury trial	2,649	2.8
Not convicted	8,916	9.3
Dismissed	8,425	8.8
Bench/jury trial	491	0.5
Sentence imposed		
Total convicted defendants	86,975	100
Prison	67,499	78.2
Probation only	9,401	10.9
Fine only	2,747	3.2
Suspended sentence	6,626	7.7

Source: Bureau of Justice Statistics, Federal Justice Statistics, 2009 (December 2011, NCJ 234184), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf>.

* U.S. Dep't of Justice, Prisoners in 2005 (2006).

Sentence received in cases terminated in German courts, 2009

	Number	*Percent*
Total convicted adults	727,641	100
Prison	37,911	5.2
Suspended prison	96,585	13.3
Fine only	593,128	81.5

Source: German Federal Office of Statistics (Statistisches Bundesamt, Fachserie 10, Reihe 3, Strafverfolgung)

United States Sentencing Guidelines

§ 5E1.2 (Fines for Individual Defendants)

(a) The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine. . . .

. . .

(d) In determining the amount of the fine, the court shall consider:
   (1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence;
   (2) any evidence presented as to the defendant's ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;
   (3) the burden that the fine places on the defendant and his dependents relative to alternative punishments;
   (4) any restitution or reparation that the defendant has made or is obligated to make;
   (5) any collateral consequences of conviction, including civil obligations arising from the defendant's conduct;
   (6) whether the defendant previously has been fined for a similar offense;
   (7) the expected costs to the government of any term of probation, or term of imprisonment and term of supervised release imposed;
   (8) any other pertinent equitable considerations.

   The amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive.

(e) If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine. In these circumstances, the court shall consider alternative sanctions in lieu of all or a portion of the fine, and must still impose a total combined sanction that is punitive. Although any additional sanction not proscribed by the guidelines is permissible, community service is the generally preferable alternative in such instances.

(f) If the defendant establishes that payment of the fine in a lump sum would have an unduly severe impact on him or his dependents, the court should establish an installment schedule for payment of the fine. The length of the installment schedule generally should not exceed twelve months, and shall not exceed the maximum term of probation authorized for the offense. The defendant should be required to pay a substantial installment at the time of sentencing. If the court authorizes a defendant sentenced to probation or supervised release to pay a fine on an installment schedule, the court shall require as a condition of probation or supervised release that the defendant pay the fine according to the schedule. The court also may impose a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit unless he is in compliance with the payment schedule.

(g) If the defendant knowingly fails to pay a delinquent fine, the court shall resentence him in accordance with 18 U.S.C. § 3614.

Commentary

Application Notes:

1. A fine may be the sole sanction if the guidelines do not require a term of imprisonment. If, however, the fine is not paid in full at the time of sentencing, it is recommended that the court sentence the defendant to a term of probation, with payment of the fine as a condition of probation. If

a fine is imposed in addition to a term of imprisonment, it is recommended that the court impose a term of supervised release following imprisonment as a means of enforcing payment of the fine.

2. In general, the maximum fine permitted by law as to each count of conviction is $250,000 for a felony or for any misdemeanor resulting in death; $100,000 for a Class A misdemeanor; and $5,000 for any other offense. 18 U.S.C. § 3571(b)(3)–(7). However, higher or lower limits may apply when specified by statute. 18 U.S.C. § 3571(b)(1), (e). As an alternative maximum, the court may fine the defendant up to the greater of twice the gross gain or twice the gross loss. 18 U.S.C. § 3571(b)(2), (d).

3. The determination of the fine guideline range may be dispensed with entirely upon a court determination of present and future inability to pay any fine. The inability of a defendant to post bail bond (having otherwise been determined eligible for release) and the fact that a defendant is represented by (or was determined eligible for) assigned counsel are significant indicators of present inability to pay any fine. In conjunction with other factors, they may also indicate that the defendant is not likely to become able to pay any fine.

4. The Commission envisions that for most defendants, the maximum of the guideline fine range . . . will be at least twice the amount of gain or loss resulting from the offense. Where, however, two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure from the fine guideline may be warranted.

Moreover, where a sentence within the applicable fine guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that otherwise would not be disgorged (e.g., by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted. . . .

. . .

6. The existence of income or assets that the defendant failed to disclose may justify a larger fine than that which otherwise would be warranted under this section. The court may base its conclusion as to this factor on information revealing significant unexplained expenditures by the defendant or unexplained possession of assets that do not comport with the defendant's reported income. If the court concludes that the defendant willfully misrepresented all or part of his income or assets, it may increase the offense level and resulting sentence in accordance with Chapter Three, Part C (Obstruction). . . .

Judith A. Greene, "Structuring Criminal Fines: Making an 'Intermediate' Penalty More Useful and Equitable," 13 *Justice System Journal* (1988), 37

First developed in Scandinavia in the 1920s and 1930s, and introduced into West Germany during the late 1960s and early 1970s, the day fine system of setting variable rather than fixed fine amounts rests upon a simple two step [process that embraces both proportionality and equity]. First, the court sentences the offender to a certain number of fine units according to the gravity of the offense, but without regard to his or her means. The value of each unit is then established as a share of the offender's daily income (hence the name "day fine"), and the total fine amount is determined by simple multiplication.

German Criminal Code

§ 40 (Day Fine Units)

(1) Fines are imposed in daily units. The minimum fine consists of five daily units and, unless the law provides otherwise, the maximum fine of three hundred and sixty full daily units.

(2) The court determines the amount of the daily unit taking into consideration the personal and financial circumstances of the offender. As a rule, it shall typically base its calculation on the average net income the offender achieves for one day or could achieve. A daily unit shall not be set at less than one euro and shall not exceed thirty thousand euros.

(3) The offender's income, his assets and other relevant factors may be estimated when setting the amount of a daily unit.

(4) The number and amount of the daily units must be indicated in the decision.

NOTES

1. The sentencing tables of U.S. district courts and German courts demonstrate remarkable differences in sentence severity. Of course, one has to be cautious with this comparison. The German data includes *all* sentencing decisions in criminal cases (including 176,091 criminal traffic offenses). The courts are administered by the sixteen states' Departments of Justice, but the German Federal Office of Statistics aggregates data the states supply and thus gives a comprehensive picture of German courts. The data about U.S. district courts above only portray one segment of the American criminal justice system—sentences handed out in federal trial courts, applying federal criminal law. Nonetheless, some general comparisons are permissible: German courts hand out lower sentences overall and more fines in particular. In U.S. federal courts (as well as state courts), very few cases end in a "fine only" sentence; in German criminal courts, only very few cases do not. Imprisonment is the penalty of choice in U.S. federal courts, while the fine is the default punishment in German criminal courts.*

2. The U.S. Sentencing Guidelines emphasize the "combined sentence" approach, that is, fines complementing prison sentences. Under German law, combinations of imprisonment and fines are possible,† but they are rarely applied in practice. "Fine only" sentences are the far more popular choice. Fining the offender is seen as sufficient punishment for the offenses that make up the daily business of local courts (minor property crimes like theft, fraud, and drunk driving).

That the day fine system is the standard form of punishment is not to say that offenders engaged in economic crimes, drug crimes or other forms of criminal enrichment may keep the proceeds. The German Criminal Code allows for forfeiture of both the means for committing crimes (weapons, computers, etc.) and the financial proceeds (confiscation and deprivation orders, §§ 73–76a). For most offenses, proof is required that assets found in the offender's possession are in fact the profits of the crimes charged; but for certain crimes (for instance, organized money laundering), a reasonable assumption is sufficient.‡ Confiscation and deprivation orders are not considered criminal punishment and the law distinguishes between such orders, on one hand, and fine, as punishment, on the other.§

Anglo-American law distinguishes between civil and criminal forfeiture: Civil forfeiture is an *in rem* proceeding against the tainted asset itself;¶ criminal forfeiture is a type of punishment. In a civil forfeiture case, the government must establish the asset's connection to criminal activity, with no need to obtain, or even to seek, a criminal conviction. The Eighth Amendment's prohibition of "excessive fines" (U.S. Const. Amendment VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.") is not limited to forfeitures labeled "criminal"; it also applies to "civil" forfeitures used for a "punitive" purpose, i.e., to civil *in rem* forfeitures that amount to punishment in fact, if not by label.** Not surprisingly, civil forfeiture is far more common than criminal forfeiture. It is also considerably more controversial, not only because it is said to pursue punitive aims without the procedural safeguards available in a criminal proceedings, but also because the ease and scale of civil forfeiture, particularly in the so-called War on Drugs, may be seen as creating perverse incentives for police departments.†† Between 1989 and 2010, the

* On the severity of punishment in U.S. and German criminal law, see Chapter 1.B.ii.

† See Criminal Code § 41.

‡ See Criminal Code § 73d.

§ See Note 5.

¶ E.g., *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931).

** See *Austin v. United States*, 509 U.S. 602 (1993) (applying Eighth Amendment to "civil" forfeiture of mobile home and auto body shop under 21 U.S.C. § 881(a)(4), applying to "conveyances . . . used, or . . . intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment" of controlled substances and § 881(a)(7), covering "real property, . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a [federal drug offense] punishable by more than one year's imprisonment").

†† Donald J. Boudreaux and A.C. Pritchard, "Civil Forfeiture and the War on Drugs: Lessons from Economics and History," 33 *San Diego Law Review* (1996), 79.

value of asset forfeitures recovered by U.S. federal prosecutors—not counting property seized by state law enforcement agencies—exceeded US$12 billion.*

3. Any system that includes fines among the range of criminal punishments has to deal with at least two questions: how to determine the amount of the fine in a given case, and how to deal with those who fail to pay the fine. Obviously, these questions are related: the higher fines are, the more offenders will be unable to pay. In the German system, the fine depends on the offender's income. Two defendants who have committed the same crime (for instance as co-perpetrators) can receive rather different sentences. The number of daily units would be the same (for instance, both may be sentenced to ninety daily units), but one could be fined ninety daily units of €200 each, that is, €18,000, and the other ninety daily units of €10, that is €900. Although the total amount can be quite small for low-income offenders, there are no signs of public discontent with the German day fine system. Does this differential treatment of equally culpable offenders raise justice concerns? Do these particularized sentences violate the right to equal treatment? Or are they perhaps less, rather than, more objectionable on equality grounds, insofar as they equalize the effect of a sentence on two differently situated defendants? But then should all punishments be tailored to the particular situation, mental and physical capacities and characteristics, vulnerabilities, pain threshold, job prospects, family situation, etc. of each defendant?†

4. A day fine system might initially address the problem of unpaid fines by setting a very low minimum day unit (like the €1 in the German Criminal Code), which an offender might be expected to afford to contribute, particularly if he or she applies for any social benefits that might be available. What happens if no social benefits are available, either because the offender is not entitled to them or because he lives in a jurisdiction that does not provide social benefits?

In Germany, failure to pay traditionally resulted in imprisonment. Section 43 StGB stipulates that one day-fine results in one day of imprisonment. The prosecution office (which supervises the execution of sentences) will try to work with the offender to create an installment plan before ordering imprisonment as a substitute for payment. But, if this fails, offenders will be incarcerated for trifling offenses. Does this raise concerns about proportionality? About equality, more generally, by distinguishing among offenders based on their economic resources? Or based on their willingness, rather than their ability, to pay the fine?

Prosecution offices in Germany are beginning to develop models that allow offenders to do community service if they fail to pay their fines. Does this place too much power in the hands of prosecutors?‡

5. So far we have dealt with fines as criminal punishment. German law distinguishes between criminal punishment and administrative penalties (addressed in more detail in Chapter 1.B. iii), and a large portion of fines for contraventions of the law belong to the area of administrative penalties. This is captured in a linguistic differentiation between *Geldstrafe* (monetary punishment) and *Geldbuße* (something like "monetary penalty"), which disappears once one uses the common English translation "fine." Does this linguistic distinction make a legal difference? German law places great weight on this distinction. For instance, corporations in German criminal law are said to be incapable of committing crimes (for various reasons, including that they cannot commit a criminal act, cannot form criminal intent, and cannot be criminally culpable). Even though corporations as a result cannot be punished criminally, they can be penalized administratively—they cannot receive something

* Kathleen Maguire (ed.), *Sourcebook of Criminal Justice Statistics, U.S. Department of Justice, Bureau of Justice Statistics* (2009), table 4.45.2010, <http://www.albany.edu/sourcebook/pdf/t4452010.pdf>.

† Compare here Judge Weinstein's consideration of the defendants' sexual orientation in reducing their prison sentence in *Blarek*, Chapter 1.A.i.

‡ See the discussion of the principle of compulsory prosecution, *Legalitätsprinzip*, in Chapter 5.C.

called a *Geldstrafe*, but they can receive something called a *Geldbuße*, even if the amount of the fine is the same in both cases or, in fact, even if the *Geldbuße* exceeds the *Geldstrafe*.*

6. Take another look at the fine line between fine as criminal punishment and fine as administrative penality. Are fines really punishments? Or are they mere slaps on the wrist that cannot reflect the seriousness of crime—of most crime, of some crime, or of crime in general? Does the significance of the fine as a sanction depend on the context of the criminal (and in fact the administrative) sanctioning system as a whole? More specifically, does a fine mean the same thing in U.S. and German criminal law, as they exist today?

The common perception of fines as non-punitive played a significant role in the search for so-called "alternative" sanctions in the United States. These sanctions, notoriously including shaming, were proposed as a viable alternative to the paradigmatic sanction in U.S. criminal law: imprisonment. Fines, the argument went, are thought to carry no condemnatory meaning, so that their imposition in fact may signal impunity; this leaves shaming sanctions, which are condemnatory by their very nature, as a viable alternative to imprisonment. Examples of shaming sanctions include publishing offenders' personal information in the newspaper, on local television, on billboards, or on the internet and requiring offenders to wear shirts or carry signs indicating their crime of conviction, or to perform public labor (commonly street cleaning).† Many advocates of shaming penalties cite their supposed superior efficiency relative to imprisonment. This claim may be difficult to verify. It may also be neither here nor there. Are shaming penalties, or could they be, more *just*?

Consider this dissent from a federal appellate court opinion affirming "the legality of a supervised release condition that requires a convicted mail thief to spend a day standing outside a post office in San Francisco wearing a sign board stating, 'I stole mail. This is my punishment.'":

> There is precious little federal authority on sentences that include shaming components, perhaps indicative of a recognition that whatever penal justification may be marshaled in support of sentences involving public humiliation, they simply have no place in the majesty of a [federal] courtroom. Some state courts have reviewed such sentences and the results have been mixed.
>
> *People v. Hackler*, 13 Cal. App. 4th 1049, 16 Cal.Rptr.2d 681, 686–87 (Cal. Ct. App. 1993), involved a condition that required a shoplifting offender to wear a court provided t shirt whenever he left the house that read: "My record plus two six packs equals four years" on the front and "I am on felony probation for theft" on the back. Applying a state sentencing regime similar to the federal guidelines—authorizing the imposition of reasonable conditions of probation to foster rehabilitation and to protect public safety—the court struck down the condition. The court held that the relationship between the required conduct (wearing the t shirt) and the defendant's crime (stealing beer) was so incidental that it was not reasonable and that the true intent behind the condition was to expose Hackler to "public ridicule and humiliation" and not "to foster rehabilitation."
>
> As in Hackler's case, the purpose behind the sandwich board condition was not to rehabilitate Gementera, but rather to turn him into a modern day Hester Prynne.[4] This sort of condition is simply improper under the Sentencing Reform Act.
>
> *Ballenger v. State*, 210 Ga. App. 627, 436 S.E.2d 793 (Ga. Ct. App. 1993), approved a condition that a convicted drunk driver wear a fluorescent pink identification bracelet identifying him as such. . . .
>
> Just as in *Hackler* and *Ballenger*, the true intention in this case was to humiliate Gementera, not to rehabilitate him or to deter him from future wrongdoing. When the district court initially imposed the sandwich board condition, . . . Gementera filed a motion to correct the sentence by having the sandwich board condition removed. He urged that humiliation was not a legitimate objective of punishment or release conditions. Only at the hearing on Gementera's motion did the district court change its characterization of the shaming punishment, remarking that the punishment was one of deterrence and rehabilitation and not merely humiliation.

* See also the discussion of corporate criminal liability, in Chapter 11.

† See Dan M. Kahan, "What Do Alternative Sanctions Mean?," 63 *University of Chicago Law Review* (1996), 591.

[4] *See* Hawthorne, *The Scarlet Letter*. . .

> . . . To affirm the imposition of such punishments recalls a time in our history when pillories and stocks were the order of the day. To sanction such use of power runs the very great risk that by doing so we instill "a sense of disrespect for the criminal justice system" itself. *Ballenger,* 436 S.E. 2d at 796 (Blackburn, J. dissenting).
>
> I would vacate the sentence and remand for re sentencing, instructing the district court that public humiliation or shaming has no proper place in our system of justice.
>
> United States v. Gementera, 379 F.3d 596 (9th Cir. 2004) (Hawkins, J., dissenting).

Note that the dissenting judge frames his objection in terms of "the majesty of a federal courtroom" and "disrespect for the criminal justice system"? Note also that the billboard was a condition of supervised release from federal prison, so (literally) an alternative to imprisonment, rather than as an independent punishment. Should this make a difference? Can treatment that is illegitimate on its own become legitimate if it is offered as an alternative to another, legitimate, sanction? Is (chemical, or even physical) castration of sexual offenders legitimate if it is offered as an alternative to imprisonment?

"Dignity" does not appear in the dissent, nor anywhere in the majority opinion (except as part of the standard reference to "the dignity of man" as "[t]he basic concept underlying the Eighth Amendment."). Unlike in German constitutional law, which assigns pride of place (as does the German Basic Law) to the protection of dignity, the concept of dignity does not figure prominently in U.S. constitutional law in general, and the U.S. Supreme Court's Eighth Amendment jurisprudence in particular, despite the reflexive reference to dignity as the "basic concept underlying" the prohibition of "cruel and unusual punishments" in the Eighth Amendment to the U.S. Constitution.* Eighth Amendment analysis, if it has any bite in noncapital cases at all, instead focuses on a comparison between the challenged sentence and sentences imposed in other—relevantly similar—cases (to determine whether the sentence is not only cruel but also "unusual").†

7. In Germany, community service is not a common type of punishment. Prosecutors may allow offenders to substitute community service for payment of fines, and in the case of a suspended prison sentence the court can also require the offender to do community service, § 56b StGB. But there is no independent sanction that consists of community service alone. Proposals for such sanctions have been made, but a crucial constitutional question arises. Article 12, para. 2 Basic Law prohibits forced labor with the exception of duties imposed on everyone; Article 12 para. 3 Basic Law makes an exception for work during imprisonment.‡

B. Limits on Punishment

U.S. constitutional law draws an important distinction between constitutional limits on capital punishment and on non-capital punishment. The relevant constitutional provision here is the Eighth Amendment to the U.S. Constitution, which prohibits "cruel and unusual punishments." Much of modern Eighth Amendment jurisprudence has been concerned with the question whether capital punishment is unconstitutional *per se*, and if not, under what circumstances it could meet Eighth Amendment criteria. After a five-year moratorium on

* See generally James Q. Whitman, "The Two Western Cultures of Privacy: Dignity Versus Liberty," 113 *Yale Law Journal* (2004), 1151.

† For further discussion of constitutional limitations on criminal law, see Chapters 1.B and 3.

‡ Compare this to the Thirteenth Amendment to the U.S. Constitution (1865), which is famous for abolishing slavery, but also contains a lesser known exception: "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction." (Emphasis added.) The association of imprisonment and slavery, and between prisoners and slaves, has a long history. See, e.g., *Ruffin v. Commonwealth*, 62 Va. 790 (1871) (imprisonment as civil death: "[The prisoner] is for the time being the slave of the State. He is *civiliter mortuus*; and his estate, if he has any, is administered like that of a dead man."); see also Cesare Beccaria, *Of Crimes and Punishments* (1764), 16, 30.

capital punishment, the U.S. Supreme Court, in *Furman v. Georgia*,* struck down all existing state and federal death penalty statutes. *Furman* did not produce a majority opinion setting out the Court's rationale; instead each Justice wrote a separate opinion. Three of the Justices in the 5-4 majority raised concerns about arbitrariness; only two (Brennan and Marshall) found the death penalty unconstitutional *per se*. In the years after *Furman*, dozens of states set out to craft capital punishment schemes that would address the arbitrariness concerns raised in *Furman*, setting the stage for *Gregg v. Georgia* and its companion cases in 1976 (*Proffitt v. Florida*, *Jurek v. Texas*, *Woodson v. North Carolina*, and *Roberts v. Louisiana*).

While the U.S. Supreme Court, after *Gregg*, got into the business of subjecting the procedure for the imposition of capital punishment and even, though to a lesser extent, the substantive law of capital murder,† to constitutional scrutiny, it lavished considerably less attention on noncapital sentences. Only recently did the Court show a willingness to scrutinize sentences of imprisonment under the Eighth Amendment, which as a general matter were previously thought to fall within the states' sovereign authority to develop their criminal law as they saw fit. Currently, the Supreme Court appears to have settled on a narrow proportionality requirement for noncapital sentences, illustrated in *United States v. Angelos*, excerpted in Chapter 1.B.ii.

The German case addressing the constitutionality of life imprisonment *per se* parallels *Gregg v. Georgia* insofar as it concerns a qualitatively different, and more serious, punishment: mandatory life imprisonment. Yet, at the same time, it also differs significantly from *Gregg* in that it deals with a noncapital sentence, which under U.S. law would be subject at best to a narrow proportionality analysis. There is no doubt, then, that the mandatory life imprisonment at issue in the German case would pass constitutional muster in the U.S. Note simply that the case, which is usually cited as the origin of the narrow proportionality analysis in noncapital cases, *Harmelin v. Michigan*, 501 U.S. 957 (1991) (in a concurring opinion by Justice Kennedy), considered—and, by a 5-4 vote, affirmed—the constitutionality of a mandatory sentence of life imprisonment without the possibility of parole for simple possession of "650 grams or more" of cocaine. Compare this sentence to that in the German case: mandatory life imprisonment with the possibility of parole for murder with base motives. In the U.S., given the existence of capital punishment, this sentence for murder would be held up, also and especially by death penalty opponents, as an example of constitutional punishment.

We shift gears at the end of this Section to throw light on a central distinction in the German law of punishment, between punitive and non-punitive sanctions, between punishments and "measures." This distinction lies at the heart of the German two-track sanction system of backward-looking, guilt-based punishment and forward-looking, dangerousness-based preventive detention. The two-track system is interesting in its own right, from a theoretical and historical perspective, as it tests the boundaries of the concept of punishment. More particularly, it also tests the boundaries of constitutional scrutiny, insofar as constitutional constraints that apply to punishment, narrowly speaking, may not apply to non-punitive sanctions. From a comparative perspective, the German two-track system is worth a closer look because there is nothing quite like it in American criminal law.

i. Ultimate sanctions: death and life imprisonment (quality)

Gregg v. Georgia
United States Supreme Court
428 U.S. 153 (1976)

[U]ntil Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual

* *Furman v. Georgia*, 408 U.S. 238 (1972).
† See Chapter 15.

punishment in violation of the Constitution. Although this issue was presented and addressed in Furman, it was not resolved by the Court. Four Justices would have held that capital punishment is not unconstitutional per se; two Justices would have reached the opposite conclusion; and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed. We now hold that the punishment of death does not invariably violate the Constitution.

The history of the prohibition of "cruel and unusual" punishment already has been reviewed at length. The phrase first appeared in the English Bill of Rights of 1689, which was drafted by Parliament at the accession of William and Mary. See Granucci, "Nor Cruel and Unusual Punishments Inflicted: The Original Meaning," 57 Calif. L. Rev. 839, 852–853 (1969). The English version appears to have been directed against punishments unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved. The American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned, however, with proscribing " 'tortures' and other 'barbarous' methods of punishment."

In the earliest cases raising Eighth Amendment claims, the Court focused on particular methods of execution to determine whether they were too cruel to pass constitutional muster. The constitutionality of the sentence of death itself was not at issue, and the criterion used to evaluate the mode of execution was its similarity to "torture" and other "barbarous" methods. See Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464, 67 S.Ct. 374, 376, 91 L.Ed. 422 (1947) (second attempt at electrocution found not to violate Eighth Amendment, since failure of initial execution attempt was "an unforeseeable accident" and "(t)here was no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution").

But the Court has not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner. . . . As Mr. Chief Justice Warren said, in an oft-quoted phrase, "(t)he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958). Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. . . . [T]his assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.

But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." Trop v. Dulles, 356 U.S., at 100, 78 S.Ct., at 597 (plurality opinion). This means, at least, that the punishment not be "excessive." When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in this particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime) is under consideration, the inquiry into "excessiveness" has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime. . . .

[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." Furman v. Georgia, 408 U.S., at 383 (Burger, C.J., dissenting). The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy." Gore v. United States, 357 U.S. 386, 393 (1958). . . .

In the discussion to this point we have sought to identify the principles and considerations that guide a court in addressing an Eighth Amendment claim. We now consider specifically whether the sentence of death for the crime of murder is a per se violation of the Eighth and Fourteenth Amendments to the Constitution. We note first that history and precedent strongly support a negative answer to this question.

The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England. The common-law rule imposed a mandatory death sentence on all convicted murderers. And the penalty continued to be used into the 20th century by most American States, although the breadth of the common-law rule was diminished, initially by narrowing the class of murders to be punished by death and subsequently by widespread adoption of laws expressly granting juries the discretion to recommend mercy.

It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes. C. 9, 1 Stat. 112 (1790). The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law. . . .

And the Fourteenth Amendment, adopted over three-quarters of a century later, similarly contemplates the existence of the capital sanction in providing that no State shall deprive any person of "life, liberty, or property" without due process of law . . .

Four years ago, the petitioners in Furman and its companion cases predicated their argument primarily upon the asserted proposition that standards of decency had evolved to the point where capital punishment no longer could be tolerated. The petitioners in those cases said, in effect, that the evolutionary process had come to an end, and that standards of decency required that the Eighth Amendment be construed finally as prohibiting capital punishment for any crime regardless of its depravity and impact on society. This view was accepted by two Justices. Three other Justices were unwilling to go so far; focusing on the procedures by which convicted defendants were selected for the death penalty rather than on the actual punishment inflicted, they joined in the conclusion that the statutes before the Court were constitutionally invalid.

The petitioners in the capital cases before the Court today renew the "standards of decency" argument, but developments during the four years since Furman have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.

The most marked indication of society's endorsement of the death penalty for murder is the legislative response to Furman. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. . . . [A] ll of the post-Furman Statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.

The jury also is a significant and reliable objective index of contemporary values because it is so directly involved. The Court has said that "one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system." Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968). It may be true that evolving standards have influenced juries in recent decades to be more discriminating in imposing the sentence of death. But the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment per se. Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases. Indeed, the actions of juries in many States since Furman are fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases. At the close of 1974 at least 254 persons had been sentenced to death since Furman, and by the end of March 1976, more than 460 persons were subject to death sentences.

As we have seen, however, the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment. Trop v. Dulles, 356 U.S., at 100, 78 S.Ct., at 597 (plurality opinion). Although we cannot "invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology," Furman v. Georgia, 408 U.S., at 451 (Powell, J., dissenting) the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.

The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.[28] In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

[28] Another purpose that has been discussed is the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future.

[Retribution is not] a forbidden objective nor one inconsistent with our respect for the dignity of men. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive. As one opponent of capital punishment has said:

> (A)fter all possible inquiry, including the probing of all possible methods of inquiry, we do not know, and for systematic and easily visible reasons cannot know, what the truth about this "deterrent" effect may be. . . .
>
> The inescapable flaw is . . . that social conditions in any state are not constant through time, and that social conditions are not the same in any two states. If an effect were observed (and the observed effects, one way or another, are not large) then one could not at all tell whether any of this effect is attributable to the presence or absence of capital punishment. A "scientific" that is to say, a soundly based conclusion is simply impossible, and no methodological path out of this tangle suggests itself.
>
> C. Black, Capital Punishment: The Inevitability of Caprice and Mistake 25–26 (1974).

Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.

The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. Indeed, many of the post-Furman statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent.

In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Finally, we must consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed. There is no question that death as a punishment is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed. But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender,[35] we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes. We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.

German Federal Constitutional Court
BVerfGE 45, 187 (June 21, 1977)
Life Imprisonment Case

A.

The subject matter of the proceedings is the question of whether life imprisonment for a murderer who commits his crime insidiously or in order to conceal another crime is compatible with the Basic Law.

[35] We do not address here the question whether the taking of the criminal's life is a proportionate sanction where no victim has been deprived of life for example, when capital punishment is imposed for rape, kidnaping, or armed robbery that does not result in the death of any human being.

Facts

The regional court of Verden has suspended criminal proceedings and in accordance with art. 100 para. 1 Basic Law referred to the Federal Constitutional Court for decision the question of whether § 211 para. 1 Criminal Code is unconstitutional in so far as it determines that murder is punishable by life imprisonment.

1. The charge and the initial decision in the original proceedings accuse the defendant Detlev R., who is a 31-year-old Berlin police officer that on the night of May 13, 1973 in Nienburg / Weser* he murdered the 22-year-old drug addict Günter L. The outcome of the main proceedings so far is that the lay assessor's court found the defendant guilty of murder. It has in essence established the following facts:

The defendant had dealt in drugs for a long time. He was sentenced to five years and six months imprisonment for drug dealing concomitantly with tax offenses by a legally effective judgment of the regional court of Verden on March 5, 1976. At the end of April 1973 the defendant became acquainted with the drug addict Günter L. through a Turkish intermediary in Nienburg. He sold him morphine base in return for cash. As the defendant wanted to transfer his drug dealing to West Germany, he travelled to Nienburg again a few days later, and gave L. morphine base to sell on commission. L. was to pay 1000 DM to the defendant for this. However, on a police search of L's home the majority of the drugs were seized, so he was short of drugs. In order to force the defendant to supply him with drugs again, in spite of the morphine base not having been paid for, he telephoned the defendant in Berlin, and threatened to report him to the police if he did not provide more drugs. As a result of this the defendant decided to travel to Nienburg and shoot L.; in this way he intended to prevent the threatened accusation and continuing blackmail by L. At the same time he lulled him into a sense of false security by promising him over the telephone to supply morphine base. The defendant drove to Nienburg in the night of May 13, 1973 together with the Turk, and gave L. the promised morphine base at his home. L. wanted immediately to prepare some "Berliner Tinke" from this for an injection. Whilst the Turk went into the kitchen with him, the defendant waited in the living room. When L. was sitting with his back to the door in the kitchen and was in the course of preparing the injection, the defendant approached L., who was distracted by the injection, from behind and fired three shots at his head from a distance of half a meter. All the shots met their mark and Günter L. died instantly.

2. The regional court of Verden states that if § 211 para. 1 Criminal Code was compatible with the Constitution, the defendant should be sentenced to life imprisonment. However, if the norm was unconstitutional, a fixed term imprisonment of fifteen years at the most (§ 38 para. 2 Criminal Code) would fall to be considered.

3. The regional court holds the norm referred for examination to be incompatible with art. 1, art. 2 para. 2 sentence 2 in combination art. 19 para. 2 and further with art. 3 para 1 Basic Law. It explains its reasoning as follows: Scientific investigations about personality changes in imprisonment had confirmed that lengthy deprivation of freedom caused harm to the personality. After a period of detention of ten, fifteen, twenty or in any case twenty-five years, the stage would be reached in practice with every prisoner in which the abatement of good feelings, resignation, apathy and indifference would cause a change in personality that would end in unsuitability for life, sophistry about innocence, and pre-senile delusions about pardon, and frequently stupefaction. After about twenty years' stay in prison the prisoner would become physically and mentally no more than a wreck. In agreement with the Prison Commission, the legislator had therefore refused to prescribe a maximum term of more than fifteen years for a fixed term of imprisonment, as a longer period was not defensible either for protection of legal goods or from the aspect of resocialization. The criminal's final exclusion from society by life imprisonment, and his psychological destruction associated with it, violated the duty set for the legislature in art. 1 Basic Law to have regard to human dignity to which every human being, even the common criminal, is entitled . . .

Reasons

B.

The reference is permissible. . . .

C.

§ 211 Criminal Code is compatible with the Basic Law in the scope to be examined here according to the following observations and in the restrictive interpretation that arises from these.

[* A medium-sized county seat halfway between Hannover and Bremen.—Eds.]

I.

1. Life imprisonment represents an extraordinarily severe invasion of the basic rights of the person affected. Freedom of the person, which art. 2 para. 2 sentence 2 Basic Law guarantees as inviolable, is taken away on a permanent basis by this punishment, which stands at the summit of the catalogue of punishments in current criminal law. The verdict "lifelong" in the strict sense means the final exclusion of the criminal from the society of free citizens. Not only is the basic right under art. 2 para. 2 sentence 2 Basic Law restricted by the implementation of life imprisonment, but there are—depending on the situation in the individual case—also numerous other basic rights guaranteed in the Constitution that are affected. This makes the weight and significance of the constitutional law problem clear.

It is true that the right to personal freedom in accordance with art. 2 para. 2 sentence 3 Basic Law can be curtailed on the basis of a statute. The legislative freedom of formulation is, however, limited in several ways by the Constitution. The legislature must in exercising the power given to it have regard to the inviolability of human dignity (art. 1 para. 1 Basic Law), the highest principle of the constitutional order, and further constitutional norms, in particular the requirement of equality (art. 3 para. 1 Basic Law) and the requirement of the constitutional and social state (art. 20 para. 1 Basic Law). If the freedom of the person is such an elevated legal good that it may only be limited on especially important grounds (BVerfGE 22, 180 [219]), the lifelong deprivation of this freedom needs an especially strict examination against the standard of the proportionality principle.

Within these boundaries there remains room for legislative decision-making. Life imprisonment, from the point of view of the role of criminal law in modern society, raises a string of questions about legal and criminal policy. The resolution of these falls on the legislature. It has so far decided in favor of the retention of life imprisonment for the most serious crimes. The Federal Constitutional Court only can, within the framework of this reference, examine whether this decision is compatible with the Constitution.

2. Since time immemorial life imprisonment has belonged to the core stock of criminal law sanctions. Its significance was, however, smaller, in comparison to the present time, because the death penalty headed the list of punishments. The dispute over the death penalty made "life" the alternative, and the permissibility of "life" in constitutional law was not generally called into question. There is nevertheless a not insignificant older literature that concerned itself rather thoroughly with the effect of lifelong deprivation of freedom on the human personality and its consequences (see M. Liepmann, Die Todesstrafe (The Death Penalty), Berlin 1912, Gutachten für den 31. Deutschen Juristentag). It was a popular argument with supporters of the death penalty that life imprisonment was crueler and less humane ("agony without end") than the death penalty ("end by agony"). Only after the arguments about the death penalty had subsided did the academic community begin towards the end of the 1960s to concern itself with the problem of lifelong deprivation of freedom again. Since then the discussion about this maximum penalty is no longer fragmentary. In this connection a prominent feature is that the argument in the academic literature in recent years has become continually more vigorous, but the case law on the other hand has as good as not concerned itself with the problems raised thereby at all, until the reference from the regional court of Verden. The criminal courts have assumed the permissibility in constitutional law of life imprisonment without further discussion until recent times. . . .

II.

1. Regard for and protection of human dignity are constitutional principles of the Basic Law. The free human personality and its dignity represent the highest legal value within the constitutional order (see BVerfGE 6, 32 [41]; 27, 1 [6]; 30, 173 [193]; 32, 98 [108]). The duty is imposed on state power in all forms of its manifestation to have regard to and to protect the dignity of the human being.

This is based on the idea of the human being as a spiritual and moral being, intended for self-determination and self-development in freedom. The Basic Law understands this freedom not as that of an isolated and autocratic individual but as of one who is related to and tied to society (see BVerfGE 33, 303 [334] with further references). In view of this commitment to society the freedom cannot be "unlimited in principle." The individual must accept those limits of his freedom of action which the legislature draws for the cultivation and furtherance of social communal life within the limits of what is generally reasonable in relation to the given facts; the independence of the person must however be preserved (BVerfGE 30, 1 [20]—eavesdropping case). This means that even within society each individual must in principle be recognized as a member with equal rights and an intrinsic value. It therefore contradicts human dignity to make a human being a mere object within the State (see BVerfGE 27, 1 [6] with further references). The maxim "a human being must always remain a goal in himself" applies without restriction for all areas of law, because the dignity of the human being as a person, which cannot be lost, consists in the fact that he continues to be recognized as a self-responsible personality.

In the area of criminal justice in which the highest requirements are placed upon justice, art. 1 para. 1 Basic Law determines the conception of the nature of punishment and the relationship of guilt and expiation. The principle *nulla poena sine culpa* has the status of a constitutional principle (BVerfGE 20, 323 [331]). Every punishment must have a just relationship to the seriousness of the crime and to the guilt of the perpetrator (BVerfGE 6, 389 [439]; 9, 167 [169]; 20, 323 [331]; 25, 269 [285 f.]). The requirement to have regard to human dignity means in particular that cruel, inhuman and demeaning punishments are forbidden (BVerfGE 1, 332 [348]; 6, 389 [439]). The perpetrator ought not to be made a mere object of the battle against crime in such a way as to violate his claim to social value and regard that is protected in constitutional law (BVerfGE 28, 389 [391]). The fundamental prerequisites of individual and social existence of human beings must be maintained. The duty of the state to provide the minimum requirements for livelihood that contribute to an existence worthy of a human being is therefore derived from art. 1 para. 1 Basic Law in combination with the social state principle—and that applies in particular for the implementation of punishment. It would be incompatible with human dignity understood in this way if the State were to claim for itself the right to strip human beings of their freedom by force without them at least having the chance of being able to obtain freedom again.

For all that, it must not be forgotten that human dignity is something inalienable. The knowledge of what the requirement to have regard to it demands cannot however be separated from historical developments. The history of the administration of criminal justice shows clearly that the cruelest punishments have continually been replaced by milder punishments. Progress from the more brutal to the more humane, from the more simple to the more differentiated forms of punishment has continued and in this connection the path that is still to be covered can be recognized. A judgment on what corresponds to human dignity can therefore only be based on the current state of knowledge and no claim can be made to timeless validity.

2. If the content and effects of life imprisonment are tested according to these standards, it follows that there is no violation of art. 1 para. 1 Basic Law.

a) The regional court bases violation of human dignity chiefly on the reference to scientific investigations of personality changes during imprisonment and prison experience that on a lengthy deprivation of freedom consequences damaging to the personality arise, which, "after a period of detention, assessed variously at 10, 15, 20 or in any case 25 years, reach a stage with practically every prisoner in which the abatement of mood feelings, resignation, apathy and indifference cause a change in personality that ends in unsuitability for life, sophistry about innocence, and presenile delusions about pardon; and frequently stupefaction."

The regional court did not carry out its own surveys on this question. If the literature that is described by the court or otherwise pertinent is examined, substantial doubts arise as to whether the evidence quoted for the harmful effects asserted in respect of life imprisonment is underpinned methodically and objectively in such a way that conclusions in constitutional law can be derived from it in order to assess the legislature's decision. It is noticeable in particular that few authors can rely on their own investigations. Many assertions are ultimately based on the opinion of M. Liepmann for the 31st German Jurists Conference in 1912. . . . The results of Liepmann's investigation are based on extensive findings and the analysis of information about more than 2000 life prisoners from various European countries as well as on preliminary work of other academics. The opinion accordingly doubtless represents a well-founded investigation of the effects of life imprisonment. It must however be borne in mind that the implementation of prison sentences at the beginning of this century cannot be compared to the present-day circumstances in prisons in the Federal Republic. Even if the buildings of numerous prisons may originate from this period, the decisive factor is the treatment of prisoners in them in day-to-day life. It is precisely in this respect that fundamental alterations have occurred through the change from mere "detention" to "treatment," even though much may still need to be improved. . . .

Views in the more recent literature about the consequences of detention in cases of life imprisonment show a very broad spectrum. They stretch from assertion of severe personality changes to description of successful resocialization of the vast majority of prisoners after their discretionary release. . . . Even where occurrence of harm in the case of long-term prisoners is confirmed in principle, opinions differ strongly about the point in time from which permanent personality damage to the prisoners has to be reckoned with. . . .

b) Even the hearing of evidence that occurred in these proceedings did not lead to an unambiguous conclusion. The experts who gave evidence at the oral hearing on the question of harm caused by life imprisonment came to similarly varied conclusions, like those already to be gleaned from the literature. Professors Dr. Dr. Bressner and Dr. Rasch—both psychiatrists—were in the end result united in their testimony, in spite of substantially differing investigation methods, that their investigations did not reveal that life imprisonment as a rule caused irreparable damage to the

personality or to the health of the prisoners. . . . On the other hand the experts Dr. (Mrs.) Einsele and Dr. Stark—both prison practitioners—agreed on substantial points in explaining that according to their experiences substantial damage of a physical as well as of a psychological and mental kind arose after a certain period of detention and that this could scarcely be remedied.

It is not a matter for the Federal Constitutional Court to decide on how such differing assessments can be reached. . . . It must further be borne in mind that the experiences on which the experts' statements are based are proportionately small according to their own admissions. Sufficient experience about the effects of life imprisonment cannot be available because as a rule early release ensues, and the hope of this release could have influenced the development of the prisoner. The differing conditions of detention in the individual prisons can also have played a role. Important points of view can be asserted for both standpoints. But the difficulty consists in the fact that at present neither is verifiable by sufficiently reliable investigations. . . .

c) In a situation of this kind, restraint is required in the examination by the Constitutional Court (see BVerfGE 37, 104 [118]; 43, 291 [347], with further references). It is true that the protection of the basic rights as against the legislature is transferred to the Federal Constitutional Court. The Court is not therefore bound to the legislature's view about the law in its examination. However, in so far as evaluations and factual assessments of the legislature are of importance here, the Court can in principle only disregard them if they are refutable. It might seem questionable that obscurities in the assessment of facts should operate to the disadvantage of the holder of a basic right. If the Federal Constitutional Court nevertheless denies an infringement of human dignity through possible harm resulting from detention, the following grounds are decisive for this:

aa) The threat of life imprisonment finds the complement it needs in constitutional law in meaningful treatment of prisoners. Prisons are obligated to work for the resocialization of prisoners, including those sentenced to life imprisonment, to maintain their ability to cope with life, and to combat harmful effects of the deprivation of freedom, and therefore also (and primarily) distorting changes to the personality . . . these tasks are fulfilled by prisons to the required extent, they make a fundamental contribution to combating threatened personality changes with prisoners.

Punishment in the Federal Republic is already no longer simple "detention"; the goal is now "treatment" directed at resocialization of prisoners. This also corresponds with the case law so far of the Federal Constitutional Court on questions of punishment. The Court has emphasized on a number of occasions that the requirement for resocialization corresponded in constitutional law to the self-image of a society that placed human dignity at the center, and was committed to the social state principle. This resocialization interest for the perpetrator arose from art. 2 para. 1 in combination with art. 1 Basic Law. The convicted perpetrator had to be given a chance to fit into the community again after serving his sentence (BVerfGE 35, 202 [235 f.]—Lebach; 36, 174 [188]) . . . If it is assumed that even a person sentenced to life imprisonment must in principle be allowed a chance of being able to obtain his freedom again, then logically he must also have a claim to resocialization, even if he only has the prospect of preparing himself for life in freedom after serving a lengthy sentence (see on this the decision BVerfGE 40, 276 [284], which concerned a murderer sentenced to life imprisonment).

The Prison Act (StVollzG) of 16 March 1976 (BGBl I p. 581) takes account of these requirements for punishment in conformance with the Constitution. The goal is described in § 2 sentence 1 StVollzG Act as being that the prisoner should be capable of leading a life of social responsibility without crime in the future. According to § 2 sentence 2 StVollzG, implementation of punishment also serves to protect the general public from further crimes. At the same time life in detention should as far as possible be brought into line with the general circumstances of life. Harmful consequences of the deprivation of freedom must be counteracted—. . . . The Act incorporates life imprisonment in this, and assumes that the carrying out of this sentence ought not to isolate the prisoner more severely than is necessary for the implementation of imprisonment and treatment of the prisoner. The prisoner should remain able to cope with life to such an extent that he can come to terms with normal life again if he is released from detention. . . .

bb) According to the findings made, serving the full sentence of life imprisonment is a rare exception. People who are sentenced to life imprisonment—except in a few cases in which the social prognosis is unfavorable, and further implementation of the sentence is required on grounds of public security—are released early by way of reprieve. This creates a further fundamental restriction to the risk of serious personality alterations. The established practice of reprieve in the federal states over a period of thirty years shows that out of the 702 released prisoners only a few (48) were reprieved before ten years and also only a few (27) after an extreme length of detention of up to thirty years. The majority of reprieves takes place between the fifteenth and the twenty-fifth year of detention. On average the length of detention is approximately twenty years. . . .

III.

We agree with the referring court that the present state of the law according to which life imprisonment can only be suspended or remitted by way of reprieve gives rise to doubts based on the principle of the constitutional state. The constitutional state principle requires legal regulation of the practice of reprieve.

The right of reprieve belongs to the President of the Federal Republic, to the First Ministers in the states, to the Council of Ministers in Saarland, and to the Senates in the city states. This amounts to a diverse treatment of the right of reprieve. In particular, it leads to convicted persons in the individual federal states needing to have served terms of differing length before they can expect release from life imprisonment by way of reprieve. Thus according to communications from the states the average length of sentence in the period from May 8, 1945 to December 31, 1975 was about sixteen years in Hamburg, seventeen and a half years in Berlin, around eighteen years in Baden-Württemberg, between twenty and twenty-one years in Bayern, Bremen, Hessen, Niedersachsen, Saarland und Schleswig-Holstein, between twenty-one and twenty-two years in Nordrhein-Westfalen and something over twenty-two years in Rheinland-Pfalz. . . .

On examination of the constitutionality of life imprisonment, it has appeared, in particular from the viewpoint of art. 1 para. 1 Basic Law and the constitutional state principle, that implementation of such imprisonment in accordance with human dignity is only ensured if the convicted person has a concrete chance, which can also in principle be realized, of being able to obtain his freedom again at a later point in time. This is because the core of human dignity is affected when the convicted person has to give up any hope of winning his freedom once more, regardless of the development of his personality. The institution of reprieve on its own is not enough to ensure this prospect (which is the only thing that makes implementation of life imprisonment in accordance with the understanding of the personal dignity endurable) in a manner that corresponds with constitutional law requirements. . . . The practice of the States in relation to reprieve admittedly reveals considerable care in the preparation of the reprieve decisions. However, substantial differences exist in the procedure and the determination of the time of release, without the grounds for this being available for examination. . . .

On the facts present here, which concern a decision about a serious question of existential significance for the person affected, the principle of legal certainty as well as the requirement for substantive justice demand that the prerequisites under which life imprisonment can be suspended and the procedure to be applicable are regulated by statute. . . .

Whether early release should be oriented exclusively towards a favorable social prognosis and a certain minimum term served is another question. . . . Consideration could, for instance, be given to taking also into account the degree of wrong and guilt in the murder in question when establishing the point in time for release. A possibility of differentiation in this manner could do justice to the special character of the individual case in question. It is the task of the legislature to find a meaningful regime here. . . . From the above considerations, it follows that the legislature has a duty in constitutional law to introduce an appropriate statutory regime. . . .

IV.

If the legislature regards life imprisonment as a necessary and reasonable sanction for the worst kind of crimes against life, this does not violate the constitutional law requirement of sensible and moderate punishment.

1. . . . *

2. The referring court states that life imprisonment was not justified according to the purposes of punishment recognized by the Federal Constitutional Court. It did not have the deterrent effect assumed by the legislature, it was superfluous in most cases as a safeguard against possible recidivists, and it contradicted the claim to resocialization based on constitutional law. It was also not appropriate for expiation and retribution.

This view cannot be acceded to. An examination according to the standard of the purposes of punishment recognized by the Federal Constitutional Court, and corresponding in essence to the prevailing unification theory, reveals instead that life imprisonment, as a sanction for the most serious crimes against life, fulfills an important function for the protection of human life as an outstanding legal good. It corresponds with the concepts of values existing in the population today, and at the same time proclaims a negative value judgment that inculcates deeper awareness. This sanction is not in any way inconsistent with a later resocialization of murderers who are not in danger of relapse,

[* This section, concerning the purposes of punishment in general, is excerpted in Chapter 1.A.i.—Eds.]

and corresponds to the punishment functions of settlement for culpability and expiation. When seen as a whole, life imprisonment for murder is not therefore a senseless punishment.

a) If the chief goal of punishment is to preserve society from socially harmful behavior and to protect the fundamental values of communal life ("common general prevention"), it is necessary first to proceed on the basis of the value of the violated legal good and the extent of social harmfulness of the violating act—in comparison also with other acts subjected to punishment—when carrying out the overall survey that is required here. The life of every individual human being is included in the highest legal goods. The duty of the state to protect it arises directly from art. 2 para. 2 sentence 1 Basic Law. Besides this it follows from the provisions of art. 1 para. 1 sentence 2 Basic Law. If the legislature imposes the most severe sanction at its command for especially reprehensible violations of this highest legal good (described with the traditional concept of "murder"), this cannot be objected to—at any rate as a starting point—on constitutional law grounds.

Admittedly the general preventive effect of life imprisonment for murder is evaluated in very varied ways. See Röhl, Über die lebenslange Freiheitsstrafe, Berlin 1969, p. 201 ff. A distinction must be made between the negative and positive aspects of general prevention here, as the experts, in agreement with the relevant criminological and criminal law literature, have explained.

aa) The negative viewpoints are traditionally described with the concept of deterrence of others who are in danger of committing similar crimes ("special general prevention" See BGHSt 24, 40 [44]). On this issue the experts have unanimously stated that a deterrent effect of life imprisonment for murder could not be established for the potential circle of perpetrators. Admittedly, special studies are to a large extent lacking here. The general empirical investigations on the problem of deterrence are also, as was explained in the oral hearing, to be regarded with reservations as to their methodological reliability, capacity for generalization, and therefore meaningfulness.

Certainly a large proportion of murderers act in a conflict situation. However, it cannot be deduced from this alone that the threat of punishment in these cases is ineffectual. This is because even the perpetrator in a conflict case does not necessarily decide rashly, thoughtlessly or carelessly to remove the difficulties that exist by a murder. Even this perpetrator will rather consider various possibilities for resolution of the conflict situation, and only plan murder when he sees no other way out. It is precisely in this phase in which the potential murderer seeks a way out of his situation that the assessment of human life that exists in the general consciousness, and therefore the assessment of murder, can prevent him from carrying out the deed. Life imprisonment can even have a direct effect upon him so that he seeks for other solutions in order to avoid this punishment. The case is admittedly otherwise with compulsive or passionate perpetrators who as a rule do not carry out this kind of assessment and search for a way out. But even in this respect, as the criminal law practitioners who gave evidence have indicated, complete ineffectiveness of the threat of punishment cannot be assumed from the outset.

bb) The positive aspect of general prevention is generally seen in the maintenance and strengthening of confidence in the power of the legal order to survive and assert itself (see BGHSt 24, 40 [46]; 24, 64 (looo); BGH GA 1976, p. 113 [114]). One of the purposes of punishment is to enforce the law against the wrong committed by the perpetrator, in order to demonstrate before the legal community the inviolability of the legal order and thus to strengthen the population's fidelity to the law. Admittedly there are so far no well-founded investigations of the effectiveness of this. Probably, in relation to the most serious crimes against life, effects that reduce crime cannot be measurably proved at all from a certain threat of punishment or punishment practice. On the other hand there are sufficiently certain grounds for saying that the threat and imposition of life imprisonment are of importance for the status attached to human life by the general public's sense of right and wrong. . . .

For this reason the objection that life imprisonment is not necessary for the purposes of general prevention is wrong. Admittedly, reference can be made to the fact that even at the time when the death penalty was still permissible, murders were committed, and that in the countries that do not recognize life imprisonment any more, no clear increase in capital crime has taken place. It is, however, an open question according to the present state of criminological research whether a thirty or twenty-five or even twenty year term of imprisonment could also achieve a sufficient general preventive effect. In this situation the legislature is keeping within the framework of its freedom of formulation if it not only limits itself to the negative aspects of general prevention but also attaches importance to the effects explained above of life imprisonment for the general public's sense of right and wrong, which would not follow from the threat of fixed term imprisonment.

b) The purpose of negative special prevention by the securing the individual perpetrator can be perfectly attained by his detention for the period of his life. But whether lifelong imprisonment is necessary on security grounds depends on the danger of relapse. It is, as appears from the survey of the states, small with murderers (about 5%), whilst the usual frequency of relapse is 50 to 80%. This circumstance makes the argument employed by the regional court appear well founded, that the purpose of securing the perpetrator does not on its own justify the imposition of life imprisonment for murder without exception. But regular sentencing of all murderers to life imprisonment at any rate ensures that the level of the punishment, and therefore the length of the detention, of murderers does not depend from the outset on the result of a long term criminal prognosis that is extraordinarily difficult and often also very uncertain. Otherwise there would be a greater risk that dangerous and violent criminals would attain freedom again after serving a fixed term of imprisonment on the basis of an incorrect prognosis. It must certainly not be overlooked that under the current regime even those murderers who could be released into freedom without risk to the general public after serving a certain term are sentenced to life imprisonment. This can, however, be corrected by the practice of release referred to above.

c) Taking into account the practice of reprieve so far and the required legal regulation of penal suspension proceedings, the imposition of life imprisonment does not contradict the resocialization concept, which is based on constitutional law (positive special prevention). The murderer sentenced to life imprisonment has the chance in principle to obtain his freedom again after serving a certain term. For him as well the resocialization goal secured by the Prison Act has a positive effect. It guarantees that on a later release he will still be able to cope with life and reintegrate. It is only with criminals who continue to be dangerous to the general public that the resocialization goal of criminal enforcement cannot be realized. That is however not based on the sentence of life imprisonment but on special personal circumstances of the convicted person concerned, which exclude successful resocialization on a permanent basis.

d) Finally, so far as the goals of settlement of culpability and expiation are concerned, it corresponds with the existing system of criminal sanctions that murder is punished with an especially high penalty because of the extreme wrongfulness and culpability of the act. This penalty is also in harmony with the general expectation of justice. It was logical for the legislature to threaten the highest penalty available to it for the destruction of human life in the especially reprehensible form of murder.

The expiation function of the penalty is admittedly vigorously disputed at a time when the concept of "*défense sociale*" is given a continually more prominent place. If the legislature still regards expiation as a legitimate purpose, then it can be guided by the fact that the criminal, in destroying a human life by murder, incurred a heavy burden of guilt, and his reintegration into the legal community presupposes that he will come to terms with guilt, and this also is facilitated by a very long sentence of imprisonment with the chance of early release.

The references to an alleged development in a different direction in other countries do not take matters any further. In most countries that have abolished the death penalty, a life sentence is still threatened as a sanction for the most serious crimes. The Italian Constitutional Court has expressly confirmed its compatibility with art. 27 para. 3 of the Italian Constitution in its decision of November 7/22, 1974 (no. 264—Racc. Uff. Vol. XLII [1974], p. 353). The purpose and goal of the penalty was not only to reintegrate the criminal. Deterrence, prevention and social protection were permissible reasons for a penalty, to no lesser an extent than improvement.

German Basic Law*
(*Grundgesetz*, GG)

Art. 1

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
(3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.

Art. 2

(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

[* The German Constitution of May 23, 1949, BGBl 1.—Eds.]

(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

Art. 102

Capital punishment is abolished.

German Prison Act (*Strafvollzugsgesetz*, StVollzG)*

§ 2

During the execution of a prison sentence, the imprisoned person should learn to lead her future life in a socially responsible way, without committing further offenses (goal of imprisonment). The execution of a prison sentence also serves to protect the public against future offenses.

NOTES

1. Unlike the U.S. Constitution (and the European Convention on Human Rights (ECHR)), the text of the German Basic Law does not explicitly prohibit "cruel and unusual punishments" (or "inhuman or degrading treatment or punishment" in the ECHR's case). However, such a prohibition has been developed by the Federal Constitutional Court, following its standard practice of deducing unwritten principles from cornerstone provisions of the Basic Law, notably the guarantee that "human dignity shall be inviolable," in art. 1 para. 1. The U.S. Supreme Court has been considerably more reluctant to adopt a similarly flexible approach, instead generally insisting on hewing more closely to the constitutional text. Does this difference in general approach, and in textual foundation, affect the analysis of the constitutionality under German and U.S. law?

2. That art. 102 is part of the Basic Law does not necessarily mean that the death penalty could never be reintroduced in Germany. Changes of the Basic Law are in general possible; they require a two-thirds majority in the *Bundestag*, the Federal Parliament, and also in the *Bundesrat*, the Federal Council (representing the German states, or *Länder*).† However, art. 79 para. 3 prohibits changes that affect the principles in art. 1. Thus, the crucial constitutional question would be whether the death penalty is incompatible with human dignity. In the literature on this question, some come to the same result as the U.S. Supreme Court, arguing that the death penalty does not *per se* (that is, independent of the procedures involved and the mode of execution) violate the convicted person's human dignity. But the majority of German constitutional lawyers take the position that art. 1 para. 1 Basic Law would stand in the way of abolishing art. 102, even with two-thirds majorities in both houses. Under this view, art. 102 Basic Law may never be abolished. Who has the better of this argument? Is capital punishment compatible with human dignity, or is it not? Is it more, or less, compatible than, for instance, life imprisonment without the possibility of parole? How would one go about deciding this question, or about resolving differences of opinion? Does the answer depend on cultural, historical, political context? Is it possible that something violates "human dignity" in one legal system—say, the United States—but not in another—say, Germany? Or, within a given system, at one point in time, but not at another?

On the history of the abolition of the death penalty in art. 102, see Richard J. Evans, *Rituals of Retribution: Capital Punishment in Germany, 1600–1987* (1996). Evans, in this exhaustive historical study of the German death penalty, found that at the deliberations over the Basic Law in 1948 the proposal to abolish capital punishment was raised by the leader of the far-right German Party (*Deutsche Partei*), at a time when opinion polls indicated that 77 percent

[* The federal Prison Act will be partly replaced by state statutes, due to a reform of the federalist system initiated in 2006.—Eds.]

† See Basic Law art. 79, para. 2.

of the West German population favored it. According to Evans, "only the hope of being able to save Nazi criminals from the gallows . . . persuaded conservative deputies from the German Party and the Christian Democrats to cast their votes in favor of abolition in sufficient numbers to secure its anchorage in the Basic Law."

3. Note that the German case concerning life imprisonment did not reach the Federal Constitutional Court because the offender, Detlef R., filed an appeal. Rather, the judges at the regional court made use of a provision in the Basic Law, art. 100 para. 1: if a court doubts whether the law to be applied is compatible with the Basic Law, it can refer this question to the Federal Constitutional Court. Note that, in the United States, constitutional questions also are not reserved for the U.S. Supreme Court (or, in the case of state constitutional law, for the highest state court), but may be—and, if properly raised, must be—addressed by any court.*

4. After the German Federal Constitutional Court's decision about life imprisonment, the German parliament responded to the Court's demand to regulate discharge from lifelong imprisonment by federal statute, rather than leaving this as a matter of mercy. Section 57a German Criminal Code now provides that those sentenced to life imprisonment be released on parole if the following three conditions are fulfilled: the offender has served 15 years, the offense was not particularly serious, and no strong countervailing security interests exist.

What, precisely, is wrong with leaving the decision about parole as a matter of mercy (or reprieve, or pardon)? The Court praises the care with which the responsible authorities in the various states discharged their obligation in these cases. What is added by passing a provision like § 57a? Does it make it more likely that inmates will be paroled? That officials denying parole will think more deeply about their decision, take into account other (better, more relevant) considerations or weigh these considerations more carefully, or appropriately, or sensitively? Is the underlying concern one about equality of treatment? But why is this a concern in these cases, in this particular question, at the back end of the penal process, and not in the much more common *ex ante* sentencing decision, where the exercise of unbridled judicial discretion does not attract similar attention in German criminal law? What is the difference, if any, between the reasons for constraining the discretion of officials who make decisions on parole in cases of life imprisonment, on the one hand, and the reasons for guiding the discretion of those who impose a criminal sentence, on the other? Or is this the German system's attempt to deal with the extraordinary case of a mandatory sentence, which contrasts so starkly with the wide sentencing discretion available in other cases? If so, would it not make more sense to address the issue directly, by eliminating the initial requirement of a life sentence? For a sustained critique of life imprisonment in a European context, see Dirk van Zyl Smit, *Taking Life Imprisonment Seriously in National and International Law* (2002).

5. The U.S. Sentencing Guidelines, discussed in Chapter 1.A.i, abolished parole altogether, to make sentencing determinate not only at the front end (by "guiding" judicial discretion) but also at the back end (by eliminating early release), all in the name of predictability. This goal was endorsed even by prisoners' rights advocates, who regarded indeterminate sentences that were subject to adjustment by prison officials as oppressive attempts to force inmates into compliance with prison regulations at best, and to wield power arbitrarily, and discriminatorily, at worst. Liberal reformers, presumably, did not envision the sentencing guidelines system that emerged in the end, which combined determinacy with severity. Why would a system that—like the U.S. one—gives prosecutors virtually unlimited discretion drastically constrain the discretion of other officials at later stages in the penal system? Conversely, why would a system that—like the German one—virtually eliminates prosecutorial discretion grant wide discretion to other officials at later stages in the penal system?

6. Do you find the courts' rejection of constitutional attacks on capital punishment and life imprisonment persuasive? What about moral or political objections? Do these considerations

* See the constitutional analysis of the application of a statute to a particular case by the federal district judge in *U.S. v. Angelos*, in Chapter 1.B.ii.

affect the constitutional legal analysis in these cases? Should they? Should murder (or some other crime, or crimes) receive a punishment that is qualitatively different than other crimes? Why? If so, will not this punishment be subject to the same objections that were raised to the punishments at issue in the two cases above? If so, is it possible to argue that murder *requires* capital punishment? Or that murder requires (legally, morally, politically?) some qualitatively more serious punishment than other crimes? Or would the quantitatively most serious punishment be enough?*

ii. Proportionality (quantity)

We now descend from the heights of constitutional scrutiny of the most serious, and qualitatively unique, punishment in American and German criminal law, to the constitutional constraints, if any, governing the imposition of a sentence along a quantitative spectrum, and along the spectrum of imprisonment in particular.

United States v. Angelos
U.S. District Court for the District of Utah
345 F. Supp. 2d 1227 (D. Utah 2004)

Paul G. Cassell, United States District Judge:

Defendant Weldon Angelos . . . is a twenty-four-year-old first offender who is a successful music executive with two young children. Because he was convicted of dealing marijuana and related offenses, both the government and the defense agree that Mr. Angelos should serve about six to eight years in prison. But there are three additional firearms offenses for which the court must also impose sentence. Two of those offenses occurred when Mr. Angelos carried a handgun to two $350 marijuana deals; the third when police found several additional handguns at his home when they executed a search warrant. For these three acts of possessing (not using or even displaying) these guns, the government insists that Mr. Angelos should essentially spend the rest of his life in prison. Specifically, the government urges the court to sentence Mr. Angelos to a prison term of no less than 61½ years—six years and a half (or more) for drug dealing followed by 55 years for three counts of possessing a firearm in connection with a drug offense. In support of its position, the government relies on a statute (18 U.S.C. § 924 (c) which requires the court to impose a sentence of five years in prison the first time a drug dealer carries a gun and twenty five years for each subsequent time. Under § 924(c), the three counts produce 55 years of additional punishment for carrying a firearm.

Mr. Angelos . . . argues that his 55-year sentence under § 924(c) violates the Eighth Amendment's prohibition of cruel and unusual punishment. . . .

[T]he court must engage in a proportionality analysis guided by factors outlined in Justice Kennedy's concurrence in Harmelin v. Michigan, 501 U.S. 957 (1991). In particular, the court must examine (1) the nature of the crime and its relation to the punishment imposed, (2) the punishment for other offenses in this jurisdiction, and (3) the punishment for similar offenses in other jurisdictions.

Before turning to these Harmelin factors, it is important to emphasize that the criminal conduct at issue is solely that covered by the three § 924(c) counts. Mr. Angelos will be fully and appropriately punished for all other criminal conduct from the sentence on these other counts. Thus, the proportionality question in this case boils down to whether the 55-year sentence is disproportionate to the offense of carrying or possessing firearms three times in connection with dealing marijuana.

The first Harmelin factor requires the court to compare the seriousness of the three § 924(c) offenses to the harshness of the contemplated penalty to determine if the penalty would be grossly disproportionate to such offenses. In weighing the gravity of the offenses, the court should consider the offenses of conviction and the defendant's criminal history, as well as "the harm caused or threatened to the victim or society, and the culpability of the offender."[82] . . .

The criminal history in this case is easy to describe. Mr. Angelos has no prior adult criminal convictions and is treated as a first time offender under the Sentencing Guidelines.

The sentence triggering criminal conduct in this case is also modest. Here, on two occasions while selling small amounts of marijuana, Mr. Angelos possessed a handgun under his clothing, but he

* For a detailed discussion of the law of murder, see Chapter 15.

[82] Solem v. Helm, 463 U.S. 277, 292 (1983).

never brandished or used the handgun. The third relevant crime occurred when the police searched his home and found handguns in his residence. These handguns had multiple purposes—including recreational activities—but because Mr. Angelos also used the gun to protect himself while dealing drugs, the possession of these handguns is also covered by § 924(c).

Mr. Angelos did not engage in force or violence, or threats of force or violence, in furtherance of or in connection with the offenses for which he has been convicted. No offense involved injury to any person or the threat of injury to any person. . . .

It is relevant on this point that the Sentencing Commission has reviewed crimes like Mr. Angelos' and concluded that an appropriate penalty for all of Mr. Angelos' crimes is no more than about ten years (121 months). With respect to the firearms conduct specifically, the Commission has concluded that about 24 months (a two level enhancement) is the appropriate penalty. The views of the Commission are entitled to special weight, because it is a congressionally established expert agency which can draw on significant data and other resources in determining appropriate sentences. Comparing a recommended sentence of two years to the 55-year enhancement the court must impose strongly suggests not merely disproportionality, but gross disproportionality.

The next Harmelin factor requires comparing Mr. Angelos' sentence with the sentences imposed on other criminals in the federal system. Generally, "if more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."[155] This factor points strongly in favor of finding that the sentence in this case is excessive. . . . Mr. Angelos will receive a far longer sentence than those imposed in the federal system for such major crimes as aircraft hijacking, second degree murder, racial beating inflicting life threatening injuries, kidnapping, and rape. Indeed, Mr. Angelos will receive a far longer sentence than those imposed for three aircraft hijackings, three second degree murders, three racial beatings inflicting life threatening injuries, three kidnappings, and three rapes. Because Mr. Angelos is "treated in the same manner as, or more severely than, criminals who have committed far more serious crimes,"[156] it appears that the second factor is satisfied.

The final Harmelin factor requires the court to examine "sentences imposed for the same crime in other jurisdictions."[157] Evaluating this factor is also straightforward. Mr. Angelos' sentence is longer than he would receive in any of the fifty states. The government commendably concedes this point in its brief, pointing out that in Washington State Mr. Angelos would serve about nine years and in Utah would serve about five to seven years. Accordingly, the court finds that the third factor is satisfied.

Having analyzed the three Harmelin factors, the court believes that they lead to the conclusion that Mr. Angelos' sentence violates the Eighth Amendment. But before the court declares the sentence unconstitutional, there is one last obstacle to overcome. The court is keenly aware of its obligation to follow precedent from superior courts—specifically the Tenth Circuit and, of course, the Supreme Court. The Supreme Court has considered one case that might be regarded as quite similar to this one. In *Hutto v. Davis*, the Supreme Court held that two consecutive twenty year sentences—totaling forty years—for possession of nine ounces of marijuana said to be worth $200 did not violate the Eighth Amendment. If *Davis* remains good law, it is hard see how the sentence in this case violates the Eighth Amendment. Here, Mr. Angelos was involved in at least two marijuana deals involving $700 and approximately sixteen ounces (one pound) of marijuana. Perhaps currency inflation could equate $700 today with $200 in the 1980's. But as a simple matter of arithmetic, if 40 years in prison for possessing nine ounces marijuana does not violate the Eighth Amendment, it is hard to see how 61 years for distributing sixteen ounces (or more) would do so.

The court is aware of an argument that the 1982 *Davis* decision has been implicitly overruled or narrowed by [more recent decisions of the Supreme Court.] [Nonetheless,] in light of . . . continued references to *Davis* [by the Supreme Court], the court believes it is obligated to follow its holding here. Indeed, in *Davis* the Supreme Court pointedly reminded district court judges that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts. . . ."[164] Under *Davis*, Mr. Angelos' sentence is not cruel and unusual punishment. Therefore, his Eighth Amendment challenge must be rejected. . . .

The 55-year sentence mandated by § 924(c) in this case appears to be unjust, cruel, and irrational. But our constitutional system of government requires the court to follow the law, not its own personal views about what the law ought to be. Perhaps the court has overlooked some legal point, and that the appellate courts will find Mr. Angelos' sentence invalid. But applying the law as the court understands it, the court sentences Mr. Angelos to serve a term of imprisonment of 55 years and one day. The court recommends that the President commute this unjust sentence and that the Congress modify the laws that produced it. The Clerk's Office is directed to forward a copy of this

[155] Solem, 463 U.S. at 291.
[156] Solem, 463 U.S. at 299.
[157] Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring).
[164] Hutto v. Davis, 454 U.S. 370, 375 (1982).

opinion with its commutation recommendation to the Office of Pardon Attorney and to the Chair and Ranking Member of the House and Senate Judiciary Committees.

Higher Regional Court (*Oberlandesgericht*, OLG) Braunschweig
1 Ss 52/0176, NStZ-RR 2002, 75 (October 25, 2001)

Facts

The accused stole a packet of cigarettes to the value of five DM from a supermarket. The local court sentenced him to two months imprisonment for this. Following his appeal in law the sentence was reduced to one month.

Reasons

II.

The appeal in law has been lodged in a permissible manner and is well founded; it is partially successful. This is because a sentence of imprisonment of two months cannot be regarded as a just settlement of culpability if the defendant is merely accused of having stolen a packet of cigarettes to the value of five DM from a shop.

It is true that both courts below correctly proceeded on the basis that in the light of the accused's extraordinary number of previous convictions for theft and considerable number of sentences of imprisonment served, there are special circumstances in his personality in the sense of § 47 para. 1 Criminal Code that make the imposition of a sentence of imprisonment indispensable both for its effect on the accused and for defense of the legal order. This applies particularly in view of the fact that the accused committed the current theft after less than a month from his release from custody. It applies—even in taking the aspect of proportionality into account—to trivial offenses as well (Oberlandesgericht Düsseldorf, NStZ 1986, 512, for theft of tobacco to a value of 8.80 DM; Bayerisches Oberstes Landesgericht, NStZ 1989, 75, for theft of coffee to a value of 13.99 DM).

To this extent the appeal in law must be rejected on the application of the public prosecutor's office and after hearing the defense in accordance with § 349 para. 2 Code of Criminal Procedure.

In view of the length of the two month sentence of imprisonment imposed, though, the appeal in law cannot be unsuccessful. It is true that in principle determination of sentence is a matter for the judge of fact. The court hearing the appeal in the law can only intervene if the judge of fact leaves legally recognized purposes of criminalization out of consideration or if the punishment abandons, either upwards or downwards, its purpose of being a just settlement of culpability (BGHSt 24, 132 [134] = NJW 1971, 61; Tröndle/Fischer, Criminal Code, 50th edit, § 46 marginal no. 108). The latter is the case here. The basis for punishment of the perpetrator is the culpability that is expressed in the crime. This relates to taking an item valued at five DM from a department store. The wrongness of the act here must be regarded as extremely small in a double sense: for one thing because of the trivial value of the packet of cigarettes and for another thing having regard to the merely abstract removal of an object of value in a department store without any actual personal sphere being affected. If the state reacts to this with a sentence of imprisonment of two months, it exceeds the scope of what is reasonable with regard to the guilt; the punishment is out of proportion to the crime, which is located in the most trivial category. It is not possible to speak of a just settlement of culpability here even if the numerous previous convictions and the considerable number of prison sentences served are considered.

The Senate* is also of the view that the sentence of two months' imprisonment here violates the constitutional principle of proportionality. According to the consistent case law of the Federal Constitutional Court, punishment must be in a just relationship to the seriousness of the crime and to the culpability of the perpetrator; it ought above all to be "not simply inappropriate" to the action that is being punished (BVerfGE 50, 205 [215] = NJW 1979, 1039). The Senate regards it as being "simply inappropriate" to punish the theft of a packet of cigarettes from a department store with a sentence of imprisonment of two months.

This outcome is indirectly confirmed by the fact that according to the statutory position applying between 1912 and 1974, a maximum penalty of six weeks "detention" (and therefore not prison) was provided for this contravention on the basis of the privileged definition of petty theft (§ 370 para. 1 no. 5 Criminal Code, old version). Certainly it was not the intention of the legislature when abolishing this definition of the contravention of petty theft, to increase the threatened penalty in

* [A "senate" is a panel of a German appellate court, of varying size: e.g., three (at a Higher Regional Court, OLG), as in this case, or nine (at the Federal Court of Justice, *Bundesgerichtshof*, BGH).—Eds.].

relation to this trivial crime. Even the Second Senate of the Federal Constitutional Court in its decision of January 17, 1979 (BVerfGE 50, 205 = NJW 1979, 1039), in which it confirms the constitutionality of the definition of theft of an item of trivial value in accordance with §§ 248a, 242 Criminal Code, certainly did not proceed on the basis that the criminal courts, after the abolition of contraventions and therefore also the definition of petty theft, would use the new statutory situation as an opportunity for punishing trivial crimes more severely, in the case of "incorrigible" perpetrators, than was possible under the previous statutory situation applying since 1912. This ought in any case to be accepted for theft crimes like the present one, which would come within the earlier privileged definition of petty theft.

III.

On the application of the chief public prosecutor the Senate has not referred the matter back, but has stipulated the sentence here of one month as what would reasonably be regarded as the lowest statutory punishment (§§ 38 para. 2, 47 para. 1 Criminal Code).

NOTES

1. What does the reasoning in *U.S. v. Angelos* tell us about the relationship between the courts and the legislature? Which constitutional principles could be cited either to defend a strong role for the legislature or to demand greater power for the courts when confronted with harsh laws such as the one at issue in *Angelos*? Does it make a difference that in this case—in contrast to Blarek*—the sentence resulted from an application of a (legislative) statute, rather than a set of (administrative) guidelines drafted by an unelected sentencing commission? Even if the commissioners are appointed by the (elected) chief executive (here, the U.S. President) and include several (life-term federal) judges, and the commission's guidelines are subject to approval by the legislature (here, the U.S. Congress)?†

How about the relationship between courts and the executive, or law and mercy? The district judge in *Angelos* takes the highly unusual step of urging the President to exercise his constitutional pardon power: "The court recommends that the President commute this unjust sentence and that the Congress modify the laws that produced it." Compare the famous nineteenth-century case of *Dudley & Stephens*,‡ where the court affirmed the defendants' death sentences for murder, only to have the Queen commute the sentences to time served (six months' imprisonment). Does this division of labor reflect poorly on a legal system—including the substantive norms, and the institutions and people who apply them? What sort of conception of law, and the relationship between law and justice—and between courts and law and justice—underlies it? What does it mean to reach a result that complies with the law but not with justice? Does it indicate a failure of law, or of those who apply it?§

Angelos's sentence was affirmed on appeal. *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006) (Angelos's sentence not "disproportionate to his crimes"). As of November 2013, Angelos's sentence had not been commuted.¶

2. What sort of guidance might a trial court derive from the opinion of the appellate court in the German shoplifting case? What does it mean to say that a punishment is "simply inappropriate"? Does it add anything to calling it "out of proportion to the crime"? Wouldn't the trial court be in a better position to determine the "appropriateness" of a sentence, or for that matter its proportionality? What sort of comparative analysis does the appellate court undertake, if any? Is the remedy (the reduction of a sentence by one month) proportionate to the supposed constitutional nature of the question? Or does this case illustrate German courts' general reluctance to impose prison terms? Compare this case to *Angelos*.

* See Chapter 1.A.i.

† See generally *Mistretta v. United States*, 488 U.S. 361 (1989) (rejecting nondelegation challenge to federal sentencing scheme).

‡ See Chapter 6.C.

§ See the discussion of *Rechtsbeugung* ("bending the law") in Chapter 17.B.

¶ See Editorial, *Salt Lake Tribune*, November 15, 2013, <http://www.sltrib.com/sltrib/opinion/57134523-82/angelos-former-letter-president.html.csp>.

3. To what extent does proportionality of the punishment depend on prior convictions? Are repeat offenders punished for their most recent offense only, or also for their previous ones? Or are they punished for their likely future offenses as well? Does it help to think of the punishment for a first offense as reflecting a first-timer discount, rather than of the punishment for a second offense as a second-timer "recidivist premium"?* Do prior convictions increase culpability, or decrease it, or do they make no difference? Do they reveal the offender's dangerousness, recalcitrance, evil character, lack of impulse control, antisocial personality? If so, should these factors affect punishment?

4. The sentence in *U.S. v. Angelos*, once again, illustrates the comparative severity of U.S. criminal sentences. While it may be justifiable in principle to aggravate sentences if an offender carried a weapon, because this means risks for others involved in the interactions and for innocent bystanders, the amount of additional punishment in the U.S. Code appears excessive. Under German law, the basic sentence range proscribed by the Narcotics Act (*Betäubungsmittelgesetz*, BtMG) for drug dealing is 2–15 years and, if the offender carried a handgun, the range is 5–15 years. But independent of the increased mandatory penalty, if an offender is sentenced for multiple counts of drug dealing (even of large quantities) while carrying a gun, he could not be sentenced to more than 15 years under German law. One might debate whether the German legislature's decision to set 15 years as the upper limit in all cases except murder† is compelling. But the crucial point (which the U.S. Court in the *Angelos* decision clearly points out) is that relative, and not only absolute, proportionality matters: even if a 55-year sentence for simple gun possession is not disproportionate on its terms, punishing the mere possession of a gun more severely than aircraft hijacking, kidnapping or rape surely is.

The district judge in *Angelos* agrees with all this, and finds the sentence grossly disproportionate even under the narrow *Harmelin* standard. At least as noteworthy as this conclusion (which is rare enough) is the ultimate decision, which nonetheless upholds the sentence, not because it is not grossly disproportionate, but because invalidating it would conflict with (another) Supreme Court precedent: *Hutto v. Davis* (which, however, itself is difficult to square with subsequent decisions by the Supreme Court).

Of course, one might attack *Davis* on the merits, but that would be beside the point. The district judge may very well share the view that *Davis* was wrongly decided, but the point is that having decided that it is on all fours with the case before him and remains good law (both conclusions that are not inescapable), he has no choice but to follow it. This situation would not arise in Germany or other civil law countries, that do not follow the rule of *stare decisis*. The U.S. federal trial judge is free to undertake a constitutional analysis, but that analysis is bound by precedential decisions of higher courts (in particular the superior federal appellate court, here the U.S. Court of Appeals for the Tenth Circuit—which, as we noted, in fact affirmed Angelos's sentence, though on other grounds than did the district court—and the supreme federal appellate court, the U.S. Supreme Court).

5. Is U.S. criminal punishment so harsh, and the severity discrepancy between U.S. and German criminal punishment so stark, that comparing one with the other amounts to comparing apples with oranges?

Accounting for the difference between criminal punishment in the U.S. and Europe is tricky. Whitman,‡ recently has proposed a sociological explanation (contrasting American "leveling-down" with European "leveling-up," so that American offenders were all treated equally poorly, and European ones equally princely); the prevalence and persistence of slavery, and its lingering after effects, will have to feature prominently in any account (not

* See Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (1985).

† See German Criminal Code § 38 para. 2.

‡ James Q. Whitman, *Harsh Justice: Criminal Punishments and the Widening Divide Between America and Europe* (2003).

only because inmates were classified at one point as rightless "slaves of the state";* perhaps a political-legal account can make a contribution as well (building on the recognition that U.S. penality never underwent a radical reform in light of constitutional principles, instead adapting the patriarchal mode of penal governance from its erstwhile colonial master in the guise of the essentially unlimited and discretionary "police power."† There are signs, however faint, that Whitman's "divide between America and Europe" at least may no longer be "widening," even if it is not narrowing just yet. The police power in the U.S. being a state power, and emphatically not a federal power, criminal law has always been, and will always remain, primarily a state matter, which means—among other things—that change, if it comes, comes slowly and sporadically. Even the U.S. Supreme Court can do little more than patrol the constitutional margins of state action, unless it were to commit itself to an all-out national reform effort as did the Warren Court some fifty years ago, but only in the area of criminal procedure, not substantive criminal law.‡

That said, the Supreme Court at least has begun to show a greater willingness to place constitutional constraints, if not on norms of the general or special part of criminal law, then at least on the law of punishment, narrowly speaking, particularly in the area of juvenile criminal law.§ We have already noted the Court's greater scrutiny of cases involving the death penalty, which it regards as a *sui generis* sanction; while the vast bulk of this attention has fallen on procedural criminal law, the Court occasionally has recognized constitutional limits on substantive criminal law in capital cases.¶

iii. Punishment vs. measure

The law of punishment is one thing. The law of criminal sanction is another. Both legal systems under analysis in this book differentiate between punitive and non-punitive criminal sanctions, with the latter being exempt from the legal (and perhaps constitutional) constraints governing the state's exercise of its power to "punish" (which is not to say that they may not be subject to other legal and constitutional limits). A prohibition of "cruel and unusual punishments" obviously does not apply, on its face, to a state action that does not qualify as "punishment," and so on. Not surprisingly, this differentiation between punitive and non-punitive sanctions has been controversial.

The 1997 U.S. Supreme Court decision in *Kansas v. Hendricks*, the "sexually violent predator" case excerpted below, attracted considerable attention, and widespread criticism. It was attacked as an attempt by the Court to exempt preventive detention schemes from significant constitutional scrutiny, by allowing legislatures to sidestep constitutional constraints on "punishment" (however weak), including not only the Eighth Amendment's "cruel and unusual punishments" prohibition, but also the Fifth Amendment's double jeopardy clause and the *ex post facto* prohibitions in §§ 9 and 10 of Article 1 of the U.S. Constitution. On the other side of the Atlantic, the far more ambitious, and long-standing, German two-track system of criminal sanctions labeled "punishments" and

* See Chapter 1.A.iii, Note 7.

† See Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005).

‡ The discrepancy between U.S. constitutional protections in procedural and substantive criminal law is explored in Chapter 3.

§ See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (Eighth Amendment's "cruel and unusual punishments" clause prohibits capital punishment for juveniles); *Graham v. Florida*, 560 U. S. ___ (2010) (Eighth Amendment prohibits life without parole for juveniles convicted of a non-homicide offense); *Miller v. Alabama*, 567 U.S. __ (2012) (Eighth Amendment prohibits mandatory life without parole for juveniles); see also *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (Eighth Amendment prohibits death as punishment for child rape).

¶ See, e.g., *Enmund v. Florida*, 458 U.S. 782 (1982) (*mens rea*; felony murder); *Tison v. Arizona*, 481 U.S. 137 (1987) (same); *Atkins v. Virginia*, 536 U.S. 304 (2002) (mental retardation).

"measures" has faced similar criticism, if not by German courts, then by the European Court of Human Rights.

Kansas v. Hendricks
United States Supreme Court
521 U.S. 346 (1997)

Justice Thomas delivered the opinion of the Court.

The Kansas Legislature enacted the Sexually Violent Predator Act (Act) in 1994 to grapple with the problem of managing repeat sexual offenders. . . . In the Act's preamble, the legislature explained:

> [A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute]. . . In contrast to persons appropriate for civil commitment under the [general involuntary civil commitment statute], sexually violent predators generally have anti-social personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the [general involuntary civil commitment statute].
>
> Kan. Stat. Ann. § 59-29a01 (1994).

As a result, the Legislature found it necessary to establish "a civil commitment procedure for the long term care and treatment of the sexually violent predator."

The Act defined a "sexually violent predator" as:

> any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which make the person likely to engage in the predatory acts of sexual violence.
>
> Kan. Stat. Ann. § 59-29a02(a).

A "mental abnormality" was defined, in turn, as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." § 59-29a02(b).

As originally structured, the Act's civil commitment procedures pertained to: (1) a presently confined person who, like Hendricks, "has been convicted of a sexually violent offense" and is scheduled for release; (2) a person who has been "charged with a sexually violent offense" but has been found incompetent to stand trial; (3) a person who has been found "not guilty by reason of insanity of a sexually violent offense"; and (4) a person found "not guilty" of a sexually violent offense because of a mental disease or defect.

The initial version of the Act, as applied to a currently confined person such as Hendricks, was designed to initiate a specific series of procedures. The custodial agency was required to notify the local prosecutor 60 days before the anticipated release of a person who might have met the Act's criteria. The prosecutor was then obligated, within 45 days, to decide whether to file a petition in state court seeking the person's involuntary commitment. If such a petition were filed, the court was to determine whether "probable cause" existed to support a finding that the person was a "sexually violent predator" and thus eligible for civil commitment. Upon such a determination, transfer of the individual to a secure facility for professional evaluation would occur. After that evaluation, a trial would be held to determine beyond a reasonable doubt whether the individual was a sexually violent predator. If that determination were made, the person would then be transferred to the custody of the Secretary of Social and Rehabilitation Services (Secretary) for "control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large."

In addition to placing the burden of proof upon the State, the Act afforded the individual a number of other procedural safeguards. In the case of an indigent person, the State was required to provide, at public expense, the assistance of counsel and an examination by mental health care professionals. The individual also received the right to present and cross examine witnesses, and the opportunity to review documentary evidence presented by the State.

Once an individual was confined, the Act required that "[t]he involuntary detention or commitment . . . shall conform to constitutional requirements for care and treatment." Confined persons were afforded three different avenues of review: First, the committing court was obligated to conduct an annual review to determine whether continued detention was warranted. Second, the Secretary was permitted, at any time, to decide that the confined individual's condition had so changed that release was appropriate, and could then authorize the person to petition for release. Finally, even without the Secretary's permission, the confined person could at any time file a release petition. If the court found that the State could no longer satisfy its burden under the initial commitment standard, the individual would be freed from confinement. . . .

[Hendricks] contends that where, as here, newly enacted "punishment" is predicated upon past conduct for which he has already been convicted and forced to serve a prison sentence, the Constitution's Double Jeopardy and Ex Post Facto Clauses are violated. . . .

The categorization of a particular proceeding as civil or criminal "is first of all a question of statutory construction." We must initially ascertain whether the legislature meant the statute to establish "civil" proceedings. If so, we ordinarily defer to the legislature's stated intent. Here, Kansas' objective to create a civil proceeding is evidenced by its placement of the Sexually Violent Predator Act within the Kansas probate code, instead of the criminal code, as well as its description of the Act as creating a "civil commitment procedure." Kan. Stat. Ann., Article 29 (1994) ("Care and Treatment for Mentally Ill Persons"), § 59-29a01 (emphasis added). Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm.

Although we recognize that a "civil label is not always dispositive," we will reject the legislature's manifest intent only where a party challenging the statute provides "the clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil." United States v. Ward, 448 U.S. 242, 248–249 (1980). In those limited circumstances, we will consider the statute to have established criminal proceedings for constitutional purposes. Hendricks, however, has failed to satisfy this heavy burden.

As a threshold matter, commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a "mental abnormality" exists or to support a finding of future dangerousness. We have previously concluded that an Illinois statute was nonpunitive even though it was triggered by the commission of a sexual assault, explaining that evidence of the prior criminal conduct was "received not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior." In addition, the Kansas Act does not make a criminal conviction a prerequisite for commitment—persons absolved of criminal responsibility may nonetheless be subject to confinement under the Act. An absence of the necessary criminal responsibility suggests that the State is not seeking retribution for a past misdeed. Thus, the fact that the Act may be "tied to criminal activity" is "insufficient to render the statute punitive." United States v. Ursery, 518 U.S. 267, 292 (1996).

Moreover, unlike a criminal statute, no finding of scienter is required to commit an individual who is found to be a sexually violent predator; instead, the commitment determination is made based on a "mental abnormality" or "personality disorder" rather than on one's criminal intent. The existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes. See Kennedy v. Mendoza Martinez, 372 U.S. 144, 168 (1963). The absence of such a requirement here is evidence that confinement under the statute is not intended to be retributive.

Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement. And the conditions surrounding that confinement do not suggest a punitive purpose on the State's part. The State has represented that an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution. Because none of the parties argues that people institutionalized under the Kansas general civil commitment statute are subject to punitive conditions, even though they may be involuntarily confined, it is difficult to conclude that persons confined under this Act are being "punished."

Although the civil commitment scheme at issue here does involve an affirmative restraint, "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." United States v. Salerno, 481 U.S. 739, 746 (1987). The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate non punitive governmental objective and has been historically so regarded. The Court has, in fact, cited the

confinement of "mentally unstable individuals who present a danger to the public" as one classic example of nonpunitive detention. Id., at 748–749. If detention for the purpose of protecting the community from harm necessarily constituted punishment, then all involuntary civil commitments would have to be considered punishment. But we have never so held.

Hendricks focuses on his confinement's potentially indefinite duration as evidence of the State's punitive intent. That focus, however, is misplaced. Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others. If, at any time, the confined person is adjudged "safe to be at large," he is statutorily entitled to immediate release. Kan. Stat. Ann. § 59-29a07 (1994).

Furthermore, commitment under the Act is only potentially indefinite. The maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year. If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement. This requirement again demonstrates that Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.

Hendricks next contends that the State's use of procedural safeguards traditionally found in criminal trials makes the proceedings here criminal rather than civil. . . . The numerous procedural and evidentiary protections afforded here demonstrate that the Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards. That Kansas chose to afford such procedural protections does not transform a civil commitment proceeding into a criminal prosecution. . . .

Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent. We therefore hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive. Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims.

German Federal Constitutional Court
BVerfGE 109, 133 (February 5, 2004)

Facts

The complainant, who was born in 1957, has only spent a few weeks in freedom since he was 15 years old. He would have been released on August 18, 2001, because of the expiry of the ten year maximum period for detention had it not been for the new regime, which he [is] challenging.

1. After he had had to be judicially cautioned in 1971 for shoplifting, he served five days in youth detention about a year later for theft and stealing food. Almost a month later, amongst other things he broke into a number of vehicles and caravans with other young people. In September 1972 he was given a youth custody sentence of undetermined duration, because of continued aggravated joint theft in three cases, amongst other things. He completed the maximum period of detention of three years on July 5, 1975. During the sentence he escaped on a total of three occasions. Less than three weeks after his release from the youth detention center he again committed offenses of, amongst other things, breaking into several cars, and was finally sentenced in November 1975 to a youth custody sentence of ten months. During this detention period, he was at large for a week. The sentence ended in July 1976.

2. A week after his release from detention he committed a joint robbery concomitantly with joint infliction of grievous bodily harm and extortion by force; an attempted murder on the following day; and on a subsequent day, a joint theft in a particularly serious case.

The regional court of Kassel sentenced the complainant to youth detention of six years because of these crimes in October 1977. He first completed two thirds of this sentence in July 1980, before the sentence was interrupted in favor of the two following sentences, and he finally completed it in October 1984.

3. In November 1977, the complainant committed another criminal offense during his detention. For some trivial reason, he threw a heavy metal box at a supervisor, and then stabbed him with a

screwdriver. The regional court of Wiesbaden therefore sentenced him to a term of imprisonment of one year and nine months in March 1979 for infliction of grievous bodily harm.

4. Before the imposition of this sentence, a dispute with a fellow prisoner about an open cell window had led to the infuriated complainant kicking the head of a fellow prisoner, who was severely disabled and physically weaker, with all his might, pouncing on him, and striking and throttling him. The regional court of Marburg sentenced the complainant, inclusive of the punishment mentioned under 3 above, to a total sentence of imprisonment of two years and six months for infliction of bodily harm.

5. The complainant at first behaved in an unobtrusive and compliant manner, but then decided to escape in July 1985. On the basis of the relaxation of his prison arrangements he went on parole for several hours with a voluntary prison assistant who had kept in touch with him since 1980. The prison assistant first invited the complainant to lunch. They then went for a walk, and the complainant suddenly knocked his companion down and throttled her, intending to kill her. He only desisted when three young people approached the spot. He fled, taking her handbag with him. A few days later—after a planned robbery of a user of a multi-story car park failed just before its execution—he was captured. The regional court of Marburg sentenced him to a term of imprisonment of five years in November 1986 for attempted murder, concomitantly with robbery, and ordered him to be committed to preventive detention. The court assumed on the basis of expert evidence that the complainant had been fully responsible for his crimes. He had, however, a deep-rooted and intensive inclination to violations of the law by which his victims were severely harmed psychologically, and above all physically. He was inclined to rash aggressive reactions, and these were also to be expected in future. It had to be assumed that the complainant when free would regard any lack of money as a reason for committing acts of violence against people, and would not even shrink from killing his victims. Preventive detention was imposed from August 18, 1991.

6. During the detention the complainant took advantage of a day's parole in October 1995 to escape. But in November he gave himself up to the police. In July 1996 he broke a fellow prisoner's nose, in order to give emphasis to an alleged claim for 100 DM. In 1998, the prison reported that the complainant was increasingly showing impulsive aggressive behavior. Inconsiderateness had become a principle in his life. For some time he had identified with the skinhead scene. SS signs, swastikas and pictures of Hitler and Goebbels had been taken from his cell. He refused to co-operate with foreign prisoners. His hatred for the prison governor had become deeper; he had described him as a "worthless life" who "in the Third Reich would have ended up in a concentration camp," because of a back problem.

7. After seeking an expert's opinion from a psychiatrist, the criminal sentencing chamber again declined, by the decision that is being challenged here, to suspend the preventive detention on probation. There was no question of the complainant having a psychiatric illness. But he showed histrionic personality traits, which were embedded in a distinctive narcissistic problematic nature. In addition, he had a very pronounced lack of empathy. It was true that he had learnt to assess social situations cognitively, but he had no emotional barriers that prevented him from asserting himself in a way that harmed others. He had isolated himself, and, with his highly narcissistic need to be noticed and receive attention, was in danger of falling "by the wayside." It was to be expected that he would take new ways to resolve things, and in this context would commit new crimes that would seriously harm the victims psychologically or physically.

There were no objections in constitutional law to the new statutory regime, which permitted a continuation of the preventive detention originally ordered beyond ten years.*

Reasons

C.

The constitutional complaint is unfounded.

I.

Confinement in preventive detention, without an upper time limit regulated by statute, does not violate the guarantee of human dignity contained in art. 1 para. 1 Basic Law.

1.

a) Respect for and protection of human dignity are constitutional principles of the Basic Law (see BVerfGE 45, 187 [227]; BVerfGE 87, 209 [228]; BVerfGE 96, 375 [398]; BVerfGE 102, 370 [389]). The social claim of human beings to value and respect is protected by human dignity. This claim

* [The retroactivity of this change is considered in the two following judgments.—Eds.]

forbids human beings being made a mere object of the state or being exposed to treatment that in principle puts their subject quality in question (see BVerfGE 27, 1 [6]; BVerfGE 45, 187 [228]). Human dignity in this sense is also the entitlement of somebody who cannot act sensibly because of his physical or mental condition. It is not lost even by "unworthy" behavior. It cannot be taken away from any human being. The claim to respect that arises from it can however be violated (see BVerfGE 87, 209 [228]).

b) For the administration of criminal justice, the requirement to respect human dignity means, in particular, that cruel, inhuman and demeaning punishments are forbidden. The perpetrator may not be made a mere object of the fight against crime by violation of his social claim to value and respect, which is protected in constitutional law (BVerfGE 45, 187 [228]). The fundamental prerequisites for individual and social existence of human beings must be maintained, even when the person entitled to the basic right does not do justice to his free responsibility and the community takes away his freedom because of crimes that he has committed. The duty of the state to formulate even the deprivation of freedom in a manner consistent with human dignity follows from art. 1 para. 1 Basic Law. It would be incompatible with the guarantee of human dignity if the State were to claim for itself the right to strip human beings of their freedom compulsorily without their having at least the chance of ever enjoying freedom again (see BVerfGE 45, 187 [229]).

The court has decided that, for the threat and implementation of a life prison sentence, . . . constitutional law requires meaningful treatment. Prisons are obliged, having regard to the basic rights of a prisoner serving a life sentence, to combat, as far as possible, the harmful effects of deprivation of freedom, above all distorting personality changes that seriously put the prisoner's ability to cope with life in question and prevent him from being able to cope in normal life in the case of a release from captivity (see BVerfGE 64, 261 [272f.]). Harmful effects for the physical and mental constitution of the prisoner must so far as is possible be counteracted.

c) These standards also apply when accommodating criminals in preventive detention. Human dignity is not violated by lengthy detention if this is necessary because of continuing danger posed by the detainee. The state community is not prevented from protecting itself against dangerous criminals by taking their freedom away (see BVerfGE 45, 187 [242]). The individual's relationship and commitment to the community that are prescribed in the Basic Law justify the taking of indispensable measures to preserve essential community interests from harm. It is, however, also necessary in these cases to preserve the independence of the detainee, and to respect and to protect his dignity. Therefore preventive detention must, in the same way as punishment for crime, be orientated towards creating the prerequisites for a responsible life in freedom. It is necessary to work towards resocialization of the detainee within the framework of preventive detention also. If hardened criminal tendencies are present, this may be more difficult than with those imprisoned as punishment. However, the protection of human dignity requires statutory guidelines as well as implementation programs that give detainees a real chance of recovering their freedom.

2. Preventive detention in its present formulation satisfies this standard.

a) Preventive detention for continuing danger does not violate the basic right under art. 1 para. 1 Basic Law when regard is had to the individual's commitment to the community.

The Basic Law has resolved the tension between the individual and the community in favor of the individual's relationship with and commitment to the community, but without thereby encroaching on its intrinsic value (see BVerfGE 4, 7 [15f.]). Because of this picture of the human being, preventive detention is compatible with the Basic Law even as a preventive measure for the protection of the general public. The person affected is not in this way turned into a mere object of state action; he is not reduced to a mere means to an end or a commodity.

b) There is no requirement in constitutional law arising from art 1 para. 1 Basic Law in relation to preventive detention that a maximum time limit should be set when the detention is ordered or at a later point when it is reviewed. This is because the prognosis of a danger is always only possible in the present for the future. How long this danger will continue depends on future developments that cannot be reliably predicted. There is therefore no objection to the legislature providing that a binding decision about the detainee's expected time of release will not be made in advance.

aa) The statute guarantees reviews at each stage of the measure, which can lead to the release of the person affected: . . . the court must before the end of the sentence examine whether the convicted person will still after the end of it represent a danger that requires implementation of preventive detention, taking into consideration his development during the sentence (see BVerfGE 42, 1 [6ff.]). After commencement of the detention, investigations will be made on the state's initiative at intervals of two years as to whether the measure can be suspended for a probationary period . . . This system of recurring reviews of readiness for suspension and completion guarantees to the person affected the appropriate procedural legal security.

bb) The information from the state governments in the present proceedings confirms the effectiveness of the normative guidelines. Even if this information is only based on partial surveys over a limited period of time, and there is so far no representative collection of data based on uniform standards, they allow the conclusion that detainees have a concrete and realizable chance of being released from preventive detention. It is true that preventive detention is only rarely suspended on probation before the execution of detention. On the other hand the regular review of preventive detention after the commencement of its implementation frequently leads, even though with regional variations, to decisions about suspension of detention.

c) The statutory framework conditions of preventive detention are interpreted in such a way as to counteract as far as possible harmful effects for the physical and mental constitution of the detainee.

aa) Preventive detention does not violate art. 1 para. 1 Basic Law on account of possible harm caused by custody (see, for life imprisonment, BVerfGE 45, 187 [237ff.]). New research on the effects of lengthy deprivation of freedom does not support the idea that the standard period of preventive detention inevitably leads to irreparable harm of a psychological or physical kind. Impairment of health on the basis of lengthy imprisonment cannot be excluded; however, the statute and implementation practice curb such harm.

bb) Preventive detention that is not limited in time finds the supplementation required by constitutional law in meaningful treatment (see BVerfGE 45, 187 [237ff.]; BVerfGE 98, 169 [200f.]). Preventive detention is both normatively and factually orientated towards the concept of resocialization. The goal of resocialization (§ 2 sentence 1 Prison Act) applies also for prisoners against whom subsequent preventive detention is ordered. . . .

II.

There is likewise no violation of the basic right to freedom under art. 2 para. 2 Basic Law. The preventive detention regime that the complainant challenges is bearing in mind the following considerations, a limitation of a basic right that conforms to the Constitution (art. 2 para. 2 sentence 3 Basic Law).

1. . . .

2. Freedom of the person—as the foundation and prerequisite of the citizen's opportunities for development—occupies high rank among the basic rights. This is expressed by the fact that art. 2 para. 2 sentence 2 Basic Law describes it as "inviolable." . . . Invasions of this legal good are in general only permissible if they are required by the protection of others or the general public, having regard to the principle of proportionality (see BVerfGE 90, 145 [172]). The need for the security of the general public from expected substantial violations of their legal goods is countered by the detainee's claim to freedom as a corrective; they are to be weighed against each other in the individual case. . . .

a) In assessing the suitability and necessity of the chosen means of attaining the goals sought, as well as the evaluation and prognosis of the dangers threatening the individual or the general public that has to be undertaken in this connection, the legislature has a margin of discretion that can only be examined by the Federal Constitutional Court to a limited extent, according to the particular nature of the subject area in question, the opportunities of forming a sufficiently safe judgment and the legal interests at stake (BVerfGE 90, 145 [173]). Against this background there is no objection to the legislature having regarded it as appropriate and necessary to delete the maximum limit for first time preventive detention, in order to improve the protection of the general public from dangerous criminals. Whether this increase in the severity of the law of preventive detention was caused by an objective increase in violent criminality or—as many critics think—whether it merely took account of an increased feeling on the part of the general public that they were under threat does not have to be assessed by the Federal Constitution Court. This is because it is primarily a matter for the legislature to decide on the basis of its concepts and goals in relation to criminal policy within the scope of its prerogative of assessment, which measures it will take in the interest of the common good. It is only obviously defective decisions of the legislature that are subject in this respect to correction by the Constitutional Court (see BVerfGE 30, 292 [317]; BVerfGE 77, 84 [106]); there can be no question of that here.

The uncertainties of the prognosis that is the foundation of the detention (see Dünkel/Kunkat, Neue Kriminalpolitik 2001, 16 [17f.]; Adams, StV 2003, 51 [53]; Kinzig, NJW 2001, 1455 [1458]; Ullenbruch, NStZ 2001, 292 [295]; Nedopil, NStZ 2002, 344 [349]; Streng, in: Festschr.f. Lampe, p. 611 [621f.]) have effects on the minimum requirements for a prognosis opinion and its assessment in connection with the prohibition on excess. . . . They remove however neither the suitability of nor the necessity for the invasion of freedom. Prognosis decisions always carry the risk of being defective, but in law they are unavoidable. The prognosis as a basis for avoiding any

danger is and remains indispensable, even if it is inadequate in individual cases. Moreover, in the practice of forensic psychiatry, understanding of risk factors has significantly improved in recent years so that in relation to some delinquents relatively good and reliable prognostic statements can be made (see Nedopil, NStZ 2002, 344 [346]). Both experts heard in the oral hearing have submitted that a determined and determinable proportion of the subjects acquire an accumulation of risk factors of such a kind that a prognosis of danger can be given with certainty . . .

M. v. Germany
European Court of Human Rights
Application no. 19359/04 (December 17, 2009)

The facts

Circumstances of the case

The applicant was born in 1957 and is currently in Schwalmstadt Prison. . . . * Since 18 August 1991 the applicant, having served his full prison sentence, has been in preventive detention in Schwalmstadt Prison . . . On 10 April 2001 the Marburg Regional Court dismissed the applicant's requests to suspend on probation his preventive detention . . . On 26 November 2001 the applicant lodged a complaint with the Federal Constitutional Court against the decisions ordering his continued preventive detention even on completion of the ten-year period . . . On 5 February 2004 a panel of eight judges of the Federal Constitutional Court dismissed the applicant's constitutional complaint as ill-founded. [BVerfGE 109, 133 (February 5, 2004)—Eds.] . . .

Relevant domestic, comparative and international law and practice

At the time of the applicant's offense and his conviction, Article 67d of the Criminal Code, in so far as relevant, was worded as follows:

> **Article 67d Duration of detention**
> (1) Detention in a detoxification facility may not exceed two years and the first period of preventive detention may not exceed ten years . . .

Article 67d of the Criminal Code was amended while the applicant was in preventive detention for the first time, by the Combating of Sexual Offenses and Other Dangerous Offenses Act (*Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten*) of 26 January 1998. The amended provision, in so far as relevant, provided:

> **Article 67d Duration of detention**
> (1) Detention in a detoxification facility may not exceed two years . . .

According to the information and material before the Court, the member States of the Council of Europe have chosen different ways of shielding the public from convicted offenders who acted with full criminal responsibility at the time of the offense (as did the applicant at the relevant time) and who risk committing further serious offenses on release from detention and therefore present a danger to the public. Apart from Germany, at least seven other Convention States have adopted systems of preventive detention in respect of convicted offenders who are not considered to be of unsound mind, in other words, who acted with full criminal responsibility when committing their offense(s), and who are considered dangerous to the public as they are liable to re-offend. These include Austria (see Articles 23 et seq. and 47 et seq. of the Austrian Criminal Code, and Articles 435 et seq. of the Austrian Code of Criminal Procedure), Denmark (see Articles 70 et seq. of the Danish Criminal Code), Italy (see Articles 199 et seq. of the Italian Criminal Code), Liechtenstein (see Articles 23 et seq. and 47 of the Liechtenstein Criminal Code and Articles 345 et seq. of the Liechtenstein Code of Criminal Procedure), San Marino (see Articles 121 et seq. of the San Marinese Criminal Code), Slovakia (see Articles 81 and 82 of the Slovakian Criminal Code) and Switzerland (see Articles 56 et seq. of the Swiss Criminal Code). Preventive detention in these States is ordered, as a rule, by the sentencing courts and is generally executed after the persons concerned have served their prison sentences (with the exception of Denmark, where preventive detention is ordered instead of a prison sentence). The detainees' dangerousness is reviewed on a periodic basis and they are released on probation if they are no longer dangerous to the public. . . . In many other Convention States, there is no system of

* [The applicant is the same as in the decision of the German Federal Constitutional Court of February 5, 2004, above.—Eds.]

preventive detention and offenders' dangerousness is taken into account both in the determination and in the execution of their sentence. On the one hand, prison sentences are increased in the light of offenders' dangerousness, notably in cases of recidivism. In this respect, it is to be noted that, unlike the courts in the majority of the Convention States, the sentencing courts in the United Kingdom expressly distinguish between the punitive and the preventive part of a life sentence. The retributive or tariff period is fixed to reflect the punishment of the offender. Once the retributive part of the sentence has been served, a prisoner is considered as being in custody serving the preventive part of his sentence and may be released on probation if he poses no threat to society (see, *inter alia*, sections 269 and 277 of the Criminal Justice Act 2003 and section 28 of the Crime (Sentences) Act 1997).

As regards the distinction between penalties and preventive measures in the Convention States and the consequences drawn from the qualification of the sanction in question, it must be noted that the same type of measure may be qualified as an additional penalty in one State and as a preventive measure in another. Thus, the supervision of a person's conduct after release, for example, is an additional penalty under Articles 131-36-1 et seq. of the French Criminal Code and a preventive measure under Articles 215 and 228 of the Italian Criminal Code . . . The French Constitutional Council, in its decision of 21 February 2008 (no. 2008-562 DC, Official Gazette (*Journal officiel*) of 26 February 2008, p. 3272), found that such preventive detention, which was not based on the culpability of the person convicted but was designed to prevent persons from re-offending, could not be qualified as a penalty (§ 9 of the decision). Nevertheless, in view of its custodial nature, the time it may last, the fact that it is indefinitely renewable and the fact that it is ordered after conviction by a court, the French Constitutional Council considered that post-sentence preventive detention could not be ordered retrospectively against persons convicted of offenses committed prior to the publication of the Act (§ 10 of the decision). In this respect, it came to a different conclusion than the German Federal Constitutional Court.

The Law

. . .

Alleged Violation of Art. 7 of the Convention

The applicant . . . complained that the retrospective extension of his preventive detention from a maximum period of ten years to an unlimited period of time violated his right not to have a heavier penalty imposed on him than the one applicable at the time of his offense. He relied on Article 7 § 1 of the Convention, which reads:

> 1. No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed.

. . .

The concept of "penalty" in Article 7 is autonomous in scope. To render the protection afforded by Article 7 effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see *Welch v. the United Kingdom*, 9 February 1995, § 27, Series A no. 307-A; *Jamil v. France*, 8 June 1995, § 30, Series A no. 317-B). The wording of Article 7 paragraph 1, second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offense." Other relevant factors are the characterisation of the measure under domestic law, its nature and purpose, the procedures involved in its making and implementation, and its severity (see *Welch*, 9 February 1995, cited above, § 28; *Jamil*, cited above, § 31; *Adamson v. the United Kingdom* (dec.), no. 42293/98, 26 January 1999; *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-XV; and *Kafkaris*, cited above, § 142). The severity of the measure is not, however, in itself decisive, since, for instance, many non-penal measures of a preventive nature may have a substantial impact on the person concerned (see *Welch*, cited above, § 32; compare also *Van der Velden*, cited above).

The Court shall thus examine, in the light of the foregoing principles, whether the extension of the applicant's preventive detention from a maximum of ten years to an unlimited period of time violated the prohibition of retrospective penalties under Article 7 § 1, second sentence. The Court observes that at the time the applicant committed the attempted murder in 1985, a preventive detention order made by a sentencing court for the first time, read in conjunction with Article 67d § 1 of the Criminal Code in the version then in force, meant that the applicant could be kept in preventive detention for ten years at the most. Based on the subsequent amendment in 1998 of Article 67d of the Criminal

Code . . . , which abolished that maximum duration with immediate effect, the courts responsible for the execution of sentences then ordered, in 2001, the applicant's continued preventive detention beyond the ten-year point. Thus, the applicant's preventive detention was prolonged with retrospective effect, under a law enacted after the applicant had committed his offense—and at a time when he had already served more than six years in preventive detention.

The Court, having regard to the criteria established in its case-law, therefore needs to determine whether the applicant's preventive detention constitutes a "penalty" within the meaning of the second sentence of Article 7 § 1 . . .

As to the characterization of preventive detention under domestic law, the Court observes that in Germany, such a measure is not considered as a penalty to which the absolute ban on retrospective punishment applies. Under the provisions of the German Criminal Code, preventive detention is qualified as a measure of rehabilitation and protection. Such measures have always been understood as differing from penalties under the long-established twin-track system of sanctions in German criminal law. Unlike penalties, they are considered not to be aimed at punishing criminal guilt, but to be of a purely preventive nature aimed at protecting the public from a dangerous offender. This clear finding is, in the Court's view, not called into question by the fact that preventive detention was first introduced into German criminal law, as the applicant pointed out, by the Habitual Offenders Act of 24 November 1933, that is, during the Nazi regime.

However, as reiterated above, the concept of "penalty" in Article 7 is autonomous in scope and it is thus for the Court to determine whether a particular measure should be qualified as a penalty, without being bound by the qualification of the measure under domestic law. . . .

The Court shall therefore further examine the nature of the measure of preventive detention. It notes at the outset that, just like a prison sentence, preventive detention entails a deprivation of liberty. Moreover, having regard to the manner in which preventive detention orders are executed in practice in Germany, it is striking that persons subject to preventive detention are detained in ordinary prisons, albeit in separate wings. Minor alterations to the detention regime compared to that of an ordinary prisoner serving his sentence, including privileges such as detainees' right to wear their own clothes and to further equip their more comfortable prison cells, cannot mask the fact that there is no substantial difference between the execution of a prison sentence and that of a preventive detention order. . . .

Furthermore, having regard to the realities of the situation of persons in preventive detention, the Court cannot subscribe to the Government's argument that preventive detention served a purely preventive, and no punitive purpose. It notes that, pursuant to Article 66 of the Criminal Code, preventive detention orders may be made only against persons who have repeatedly been found guilty of criminal offenses of a certain gravity. It observes, in particular, that there appear to be no special measures, instruments or institutions in place, other than those available to ordinary long-term prisoners, directed at persons subject to preventive detention and aimed at reducing the danger they present and thus at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offenses . . .

Furthermore, given its unlimited duration, preventive detention may well be understood as an additional punishment for the offense by the persons concerned and entails a clear deterrent element. In any event, as the Court has previously found, the aim of prevention can also be consistent with a punitive purpose and may be seen as a constituent element of the very notion of punishment (see *Welch*, 9 February 1995, cited above, § 30).

As regards the procedures involved in the making and implementation of orders for preventive detention, the Court observes that preventive detention is ordered by the (criminal) sentencing courts. Its execution is determined by the courts responsible for the execution of sentences, that is, courts also belonging to the criminal justice system, in a separate procedure. . . .

In view of the foregoing the Court, looking behind appearances and making its own assessment, concludes that preventive detention under the German Criminal Code is to be qualified as a "penalty" for the purposes of Article 7 § 1 of the Convention.

. . . In view of the foregoing, the Court concludes that there has been a violation of Article 7 § 1 of the Convention.

[The Court awarded the applicant €50,000 in respect of non-pecuniary damage.]

German Federal Constitutional Court
BVerfGE 128, 326 (May 4, 2011)

The complainants object to the continuation or retrospective ordering of their confinement in preventive detention . . . [T]he constitutional complaints are well-founded.

The provisions [in the German Criminal Code] on which the disputed decisions are based are incompatible with art. 2 para. 2 sentence 2,* art. 104 para. 1 sentence 1† and art. 2 para. 2 sentence 2 in combination with art. 20 para. 3 Basic Law.‡

The provisions [in the German Criminal Code] do not infringe this basic right in its core content (see BVerfGE 109, 133, 156 [excerpted in Chapter 1.B.iii]. However, they do not satisfy the principle of proportionality. The serious invasion of the basic right to freedom inherent in preventive detention can only be justified by strict examination in the light of proportionality. The rules about preventive detention are not compatible with the (minimum) requirements in constitutional law concerning the execution of these measures.

. . . [T]he value judgements of art. 7 para. 1 ECHR lead to the refinement of the requirements, which apply anyway in constitutional law, for the execution of a preventive deprivation of freedom that is independent of guilt and differs qualitatively from criminal punishment (the so-called distinction requirement, *Abstandsgebot*). . . .

The distinction requirement is based on the differing grounds of legitimation in constitutional law and differing purposes of imprisonment and preventive detention:

Imprisonment and preventive detention differ fundamentally with regard to their legitimation in constitutional law. The state's entitlement to impose criminal punishment in form of imprisonment and to execute such sentences is based in essence on the culpable commission of a crime. A perpetrator should only be sentenced and subjected to imprisonment if he has done wrong in a reprehensible manner. This is based on the conception of man in the Basic Law as a human being capable of free self-determination, which is to be taken into account with the culpability principle, which is rooted in human dignity (see BVerfGE 123, 267, 413). . . . On the other hand, the entitlement to order and implement measures that take away freedom like preventive detention follows from the principle of the prevailing interest (see Radtke, in: Münchener Kommentar zum StGB, vol 1, 1st edit. 2003, intro. to §§ 38 ff. marginal no. 68). Such ordering and execution are only legitimate if the general public's interest in protection outweighs the right to freedom of the person affected in the individual case (see BVerfGE 109, 133, 159). . . .

As the execution of the measure is only justified on the principle of the prevailing interest, it must immediately be terminated if the protected interests of the general public no longer outweigh the detainee's right to freedom. The state has the duty at the same time to provide appropriate concepts from the start when executing the measure in order to make it possible to eliminate the danger posed by the detainee. . . .

A freedom-oriented observation of the distinction requirement will take account of the value judgments underlying the case law of the European Court of Human Rights on art. 7 para. 1 ECHR. The Court has in this connection referred to the fact that in the light of the undetermined length of preventive detention special efforts were necessary for the support of detainees who as a rule were not in a position to achieve progress in the direction of release by their own endeavors. A high degree of care by a multi-disciplinary team was necessary as well as intensive and individual work with the detainees on the basis of individual plans that should be drawn up without delay (see ECtHR, Judgment of December 17, 2009, complaint no. 19359/04, M. v. Germany, marginal no. 129).

The concept for the regime of preventive detention, for formulation by the legislature, must . . . include at least the following aspects:

Preventive detention can only be ordered as a last resort if other less radical measures do not suffice to take the general public's safety interest into account. This *ultima ratio* principle in the ordering of preventive detention is followed by the idea that execution must also correspond with this principle. Where preventive detention comes into consideration all possibilities must be exhausted during the execution of the sentence in order to reduce the danger posed by the convicted person.

A comprehensive investigation, corresponding to modern scientific requirements, with respect to treatment must take place without delay, and at the latest at the start of the execution of preventive detention. The individual factors that are decisive for the danger posed by the detainee are at the same time to be analyzed in detail. An execution plan must be drawn up on this basis that will indicate in detail whether and, if necessary, with which measures the risk factors present can be minimized or compensated for by strengthening protective factors . . .

* ["Freedom of the person shall be inviolable."—Eds.]

† ["Liberty of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein."—Eds.]

‡ ["The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice."—Eds.]

The undetermined length of preventive detention can have serious psychological effects, demotivating the detainee and leading him into lethargy and passivity. This is to be dealt with first by an offer of therapy and care, which if possible opens up a realistic prospect of release (thus also ECtHR loc. cit. marginal nos. 77 and 129). Besides this, the preparedness of the detainee to co-operate in his treatment by well-directed motivational work must be aroused and promoted.

The existing regulations about preventive detention do not satisfy these demands.

Since 1998 the legislature has . . . continually expanded preventive detention, but without—contrary to the Senate's guidelines in its judgment of February 5, 2004 (BVerfGE 109, 133, 166 f.)—developing an overall concept for the detention that is orientated in favor of freedom and directed towards therapy and that would do justice to the distinction requirement . . .

The psychological or psychiatric care of those in preventive detention is in practice insufficient. According to studies, an average of only about 30% of those in preventive detention are receiving any therapy, although the proportion of detainees with a distinctive characteristic requiring therapy is clearly higher at 79.3% (see Bartsch, Sicherungsverwahrung [Preventive detention], 2010, p. 228; Habermeyer, Die Maßregel der Sicherungsverwahrung [The measure of preventive detention], 2008, p. 54). . . .

According to the judgment of the chamber of the 5th Section of the European Court of Human Rights of December 17, 2009 (complaint no. 19359/04, M. v. Germany) retrospective lengthening of the earlier maximum period of ten years . . . violates art. 7 para. 1 ECHR, because preventive detention is a punishment in the sense of art. 7 ECHR. This classification of preventive detention in Convention law is based amongst other things on the fact that it, like a sentence of imprisonment, results in a deprivation of freedom and is executed in prisons. Also, according to the chamber of the 5th Section of the European Court, having regard to the factual situation of detainees in preventive detention it was not comprehensible that preventive detention only had a preventive function and did not serve any purpose of punishment.

This interpretation of art. 7 para. 1 ECHR argues in favor of delineating the distinction requirement more clearly but it does not require the interpretation of art. 103 para. 2 Basic Law to be brought completely into line with that of art. 7 para. 1 ECHR . . .

There is accordingly no reason to adapt the Basic Law concept of punishment in the art. 103 II GG to the concept of punishment in art. 7 para. 1 ECHR. The European Court of Human Rights itself explains in this respect that the concept of "penalty" in the sense of art. 7 ECHR should be interpreted "autonomously"; it—the Court—was not bound by the classification of a measure under national law (ECtHR, Judgment of December 17, 2009, complaint no. 19359/04, M. v. Germany, marginal no. 126). . . . The concept of punishment in art. 103 Basic Law will continue to be interpreted as expressed in the decision of February 5, 2004 (BVerfGE 109, 133, 167ff.) under the constitutional order of the Basic Law as it has evolved . . .

Having regard to the value judgments [of art. 5 ECHR] and in view of the substantial invasion of the trust of persons in preventive detention affected in their basic right under art. 2 para. sentence 2 and art. 104 para. 1 sentence 1 Basic Law, the purpose of protecting the general public from dangerous criminals to a large extent takes second place to the trust protected by the basic rights in termination of preventive detention after the expiry of ten years . . . A deprivation of freedom by preventive detention that is retrospectively ordered or extended can therefore only be regarded as proportionate if the required distinction from punishment is maintained, extreme danger of the most serious violent or sexual crimes can be deduced from actual circumstances in the personality or behavior of the detainee (see also BGH, Judgment of November 9, 2010, 5 StR 394/10, 440/10, 474/10, NJW 2011, 240, 243) and the prerequisites of art. 5 para. 1 sentence 2 letter e ECHR* are fulfilled. Only in such exceptional cases can predominance of the public interests in safety still be assumed . . .

NOTES

1. Note that the four judgments excerpted above all address the distinction between punishment and some other form of carceral sanction: civil commitment, preventive detention, or more generally, a "measure." But only one of the excerpts—the first decision by the German Federal Constitutional Court, from 2004—addresses the constitutionality of the supposedly non-punitive measure itself. The other three consider indirect constitutional challenges that apply only once the distinction between punishment and "measure" has been rejected: double jeopardy, or more precisely double punishment for the same

* [ECHR Art. 5 para. 1 sentence 2: No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . . (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants. . . . —Eds.]

offense (*ne bis in idem*) (in *Hendricks*) and retroactivity (*ex post facto*) (in *Hendricks*, *M. v. Germany*, and the 2011 decision by the German Constitutional Court.*

On the first question, the constitutionality of preventive detention *per se*, what work, if any, does the concept of dignity do in the court's reasoning? Note that the German Constitutional Court's 2011 judgment in the same case makes much less of dignity, and instead relies heavily on the right to freedom.

On the second question, do you find the rationales in *Hendricks*, on one hand, and in the German Constitutional Court's 2004 and 2011 judgments, on the other, convincing? (How do they differ?) Or are they a series of taxonomical sleights of hand that, in the end, amount to little more than the repetitive insistence on the reality, and constitutional significance, of the distinction between punishment and measure?

Should it make a difference whether the legislature deliberately labeled a sanction a "measure" or something, anything, other than a "punishment" partly, or even entirely, in order to escape the constitutional limits (e.g., double jeopardy, retroactivity) that apply only to something called a "punishment"? What do you think of the ECHR's professed effort to "go behind appearances"? How willing are the domestic courts (both the U.S. and the German court) to question "their" legislatures' labeling efforts? How comfortable are they with engaging in labeling exercises themselves?

2. There are different ways and techniques to organize preventive detention. In the U.S., over the last two decades, state legislatures have introduced Sexually Violent Predator Acts, which allow civil commitment of persons with mental abnormality or personality disorder and the tendency to commit, acts of sexual violence.

In Germany, preventive detention has a longer history. The Criminal Code distinguishes between criminal punishment and measures of rehabilitation and protection (*Maßregeln der Besserung und Sicherung*), which aim to rehabilitate dangerous offenders and to protect the public. This two-track system of sanctions was created in November 1933 by the so-called Habitual Offenders Act: Law Against Dangerous Habitual Offenders and Regarding Measures of Incapacitation and Rehabilitation (*Gewohnheitsverbrechergesetz*) of November 24, 1933, RGBl. I 995, art. 3, § 17.† Preventive detention (§§ 66–66b StGB) is not limited to sexual offenders. Until recently, preventive detention required (besides a criminal sentence of at least two years imprisonment plus previous convictions) a general propensity "to commit serious offenses, notably those which seriously harm their victims physically or mentally or which cause serious economic damage." In 2010, the legislature eliminated the "serious economic damage" clause from § 66 StGB. But the Act still applies to a larger group of offenders than does the Kansas Sexually Violent Predator Law.

In 1965, 1,430 persons were being held in preventive detention in Germany, and this included chronic property offenders. As preventive detention increasingly became the subject of criticism, the numbers dropped to 183 persons in 1995. Since then, the numbers have risen again, to 536 in 2010 (out of 60,693 prison inmates).

Does it make sense to extend preventive detention to some dangerous offenders, but not to others? Put another way, if preventive detention of some dangerous offenders is constitutionally unobjectionable, then why would it be objectionable to preventively detain all dangerous offenders? Does the selective preventive detention of some dangerous offenders, but not others, raise constitutional (equal treatment) concerns? Other common law countries have preventive detention schemes that rival the breadth of Germany's.‡

* For a detailed discussion of retroactivity, see Chapter 2.A.

† The original title of the relevant section of the German Criminal Code was revised, in 1975, from "Measures of Protection and Rehabilitation" to "Measures of Rehabilitation and Protection." Compare StGB § 42a (old version) with StGB § 61 (current version), respectively.

‡ See, e.g., Can. Crim. Code pt. xxiv ("dangerous offenders"); *R. v. Lyons*, [1987] 2 S.C.R. 309 (reviewing history of preventive detention in English law, and rejecting constitutional challenge—under prohibition of "cruel and unusual treatment or punishment" in § 12 Canadian Charter of Rights and Freedoms—to revised Canadian dangerous offender scheme, "now carefully tailored so as to be confined in its application to those habitual criminals who are dangerous to others"); see generally Christopher Slobogin, "Preventive Detention in Europe and the United States," Vanderbilt Public Law Research Paper Working Paper No. 12-27 (June 27, 2012).

3. Decisions of the European Court of Human Rights (ECtHR) are strictly binding for Germany only with regard to the individual case (the obligation to pay compensation to individual claimants). The legal document that is the source for the ECtHR's jurisprudence, the European Convention on Human Rights (ECHR), has the status of a simple statute in German law. The ECHR does not have the constitutional status of the German Basic Law. It is therefore not evident that general rules and principles developed by the ECtHR are mandatory for the application of German law. How far the German courts will go in adapting their case law to conform to principles appearing in the European Court's jurisprudence is mainly a political matter. In recent years, the political will has, however, grown so that a victory before the European Court will have wider consequences beyond merely affirming the claimant's view and granting him or her financial compensation.

In the United Kingdom, the ECHR has had a noticeable impact on English criminal law in the wake of the Human Rights Act 1998, which requires that, "[s]o far as it is possible to do so, primary legislation and subordinate legislation . . . be read and given effect in a way which is compatible with the Convention rights."*

Compare the relationship between the U.S. Supreme Court and the legislatures of U.S. states (Kansas in this case), on one hand, and that between the ECtHR and the member states (Germany in this case), on the other. Might the ECtHR's relative lack of power help to account for its relative lack of deference? Note that a negative decision by the U.S. Supreme Court—as the final arbiter of matters of federal constitutional law—is not merely advisory, but renders a state (and federal) statute null and void.

How does the German Federal Constitutional Court's 2011 decision deal with the ECtHR's critical review (if not the literal overturning) of its 2004 decision? Does it accept the ECtHR's central conclusion that preventive detention is "punishment," all "appearances"—including its own previous decision—to the contrary notwithstanding? Or does it treat what appears as dismissal by the ECtHR instead as confirmation of the central holding in its 2004 decision, namely that the distinction between punishment and measure must make a difference, i.e., it must result in palpable differences in the conditions of incarceration?

4. After the European Court of Human Rights decided *M. v. Germany*, a number of other claimants who were detained in Germany demanded to be released immediately. In the time period after the European Court decision, there was a state of confusion among German courts that supervise the execution of preventive detention. Some courts released detainees who fell under the retroactive extension of preventive detention through the 1998 legislation. Other courts did not. The German Federal Constitutional Court had to take up the matter again because new complaints were filed. Those were decided in the second ruling from May 4, 2011, excerpted above.

The German Federal Constitutional Court was in a somewhat awkward position. On the one hand, it would have meant complete capitulation before the European Court to accede now that preventive detention was criminal punishment—exactly what the German Federal Constitutional Court had denied in 2004. On the other hand, simply restating what they had said in 2004 would have been interpreted as a blatant sign of disrespect for the European Court of Human Rights. Therefore, the judges at the German Federal Constitutional Court had to find a compromise.†

The crucial point in the 2011 decision is to stress what the Court calls *Abstandsgebot*, a distinction requirement; the execution of preventive detention must be made (yet) more distinct from imprisonment than it had previously been. In December 2012 (Law for the Implementation of the Distinction Requirement in Federal Law), the German legislature introduced § 66c German Criminal Code which stipulates some general principles

* UK Human Rights Act (1998) § 3(1).

† See generally, Kirstin Drenkhahn, Christine Morgenstern, and Dirk van Zyl Smit, "What Is in a Name? Preventive Detention in Germany in the Shadow of European Human Rights Law," *Criminal Law Review* [2012], 167.

for the administration of preventive detention according to the 2011 decision by the Federal Constitutional Court. With respect to the narrower problem of "old cases" (persons in preventive detention who would have been released under the "ten-years-only-for-first-time-preventive-detention" rule abolished in 1998), the Court tightened the requirements without totally giving in to the European Court. According to the ECtHR, applying art. 7 para. 1 ECHR, a retroactive extension of the period in preventive detention is prohibited without exceptions. The German Federal Constitutional Court does allow for limited exceptions under the following conditions: the required distinction from punishment is maintained, extreme danger of the most serious violent or sexual crimes can be deduced from actual circumstances in the personality or behavior of the detainee, and the detained person suffers from an "unsound mind" in the sense of art. 5 para. 1 sentence 2 number (e) ECHR.

Assuming this account captures the Constitutional Court's reasoning well enough, what do you think of making constitutional law through compromise? Should decisions about fundamental constitutional principles—dignity, freedom, *Rechtsstaat*—be subject to considerations of inter-curial (or more broadly political, international, or intranational, i.e., federal) deference, or lack thereof?

5. In the German Criminal Code, there is a range of other measures of rehabilitation and protection. They include placement in a psychiatric hospital (§ 63, not as civil commitment but ordered through a criminal court) or in a detoxification facility (§ 64), but also somewhat less intrusive measures like the revocation of drivers licenses after traffic offenses (§ 69) or employment restrictions (§ 70). In the U.S., some of these sanctions, along with a long list of others (including disenfranchisement, deportation, and loss of welfare and housing benefits), are classified as "collateral consequences" and have been subjected to vigorous debate, largely focused on obligations (by defense attorneys, prosecutors, judges) to inform defendants of their potential, if not mandatory, application as a result of certain convictions, the vast majority of which in the U.S. result from guilty pleas.*

* See, e.g., Uniform Law Commission, Uniform Collateral Consequences of Conviction Act (2009); see generally Meda Chesney-Lind and Marc Mauer (eds.), *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (2003).