MODERATE AND NON-ARBITRARY SENTENCING WITHOUT GUIDELINES: THE GERMAN EXPERIENCE

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I
INTRODUCTION

The participants in the symposium for which this paper was written discussed sentencing reforms in different countries. Compared to the situation in other countries (such as Australia, Israel, England and Wales, and the United States) Germany stands out: sentencing laws have not undergone major reforms recently, nor are such reforms being discussed. Sentencing reform is not a political issue and the sentencing reform movement has not reached Germany. The notion that the legislature (either parliament or commissions working on behalf of parliament) should regulate judges' control of sentencing is alien to the contemporary German discourse. There is no pressure in this direction from either the public or academic circles. This provides an astonishing contrast with developments elsewhere, and requires an explanation. What accounts for this passivity? Why are Germans content to leave the control of a crucial step in the application of the criminal law solely in the hands of the judiciary?

Two possible explanations come to mind. It might be the case that German sentencing rules and practices in fact need reform, and the lack of reform proposals reflects a lack of critical evaluation or political inactivity in the face of known deficiencies. Or there is a simpler explanation: If the current system, without sentencing guidelines, works fairly well overall (that is, if it achieves both a satisfying degree of equality in sentencing and moderate, reasonable sentences) then this could provide a rational explanation for why reform is not on the political agenda. I tend towards the second explanation. Of course, it would be hyperbolic to claim that the situation concerning sentencing is perfect in Germany. In previous publications I have criticized the status quo of German sentencing theory from a normative perspective,[1] and it is still the case that a lot needs to be done to improve both principles and rules. In part II of this article,

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1. *See* TATJANA HÖRNLE, TATPROPORTIONALE STRAFZUMESSUNG (1999); Tatjana Hörnle, *Das antiquierte Schuldverständnis der traditionellen Strafzumessungsrechtsprechung und –lehre*, 54 JURISTENZEITUNG 1080 (1999).

the legal provisions of the German Criminal Code are sketched out, showing that they do not provide sufficient guidance for sentencing. But if one moves beyond sentencing theory and beyond the demand for improvement *within* the national legal framework, and instead focuses on sentencing practices from a *comparative* perspective, then a somewhat more optimistic stance seems defensible. As I am not a criminologist, I will not present my own empirical research. Instead, I will give a short overview of available data in part III, data which supports the conclusion that sentencing in Germany appears to be fairly moderate and consistent. The next step will be to suggest hypotheses in order to explain the status quo. What could be the factors that insulate a system against the danger of becoming overly harsh and punitive (as can arguably be seen in parts of the U.S. legal system, including the U.S. federal system)[2] and the danger of arbitrary sentencing decisions that produce a high degree of disparity? In part IV, circumstances of this kind will be considered. My more modest aim is to point out some influences that should (among others) be taken into account within complex models to explain why systems can achieve satisfactory sentencing outcomes without intensive legislative control.

II
THE LEGAL FRAMEWORK

A. Sentencing Provisions in the German Criminal Code

The major source for substantive criminal law in Germany is the Criminal Code, which was introduced in 1871. The Criminal Code and the Code of Criminal Procedure are federal laws, and courts within the sixteen German "Länder" apply these uniform federal laws.[3] The Criminal Code combines offense descriptions with a sentence range for each offense in its Special Part, and in its General Part it stipulates general principles for sentencing.[4] With respect to the *kind of sanctions* available, major reforms took place in the twentieth century. The most important changes were: the abolition of the death penalty (see Article 102 of the Basic Law—the German Constitution—and the corresponding reform of the German Criminal Code in 1953[5]); a reform of the modes of imprisonment, which were originally more differentiated than today;[6]

2. *See, e.g.*, MICHAEL TONRY, THINKING ABOUT CRIME (2004); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003).

3. The German Länder do not have penal codes of their own because the Basic Law (the German Constitution) declares that criminal law and criminal procedure are federal matters. *See* Art. 71 GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW], May 23, 1949, Bundesgesetzblatt [BGBl.] I.

4. Strafgesetzbuch [STGB] [Criminal Code], May 15, 1871, BGBl. I at 3322, as amended, §§ 46–47.

5. Drittes Strafrechtsänderungsgesetz [Third Law Amending Criminal Law], Aug. 4, 1953, BGBl. I at 735.

6. The German Criminal Code of 1871 distinguished places of detention according to their social stigma: very dishonorable ("Zuchthaus"), simple prison ("Gefängnis"), and confinement in a fortress, a

the availability of suspended sentences was introduced and expanded several times;[7] and the day-fine system was introduced in 1974.[8] An earlier reform had introduced measures that created a so-called two-track system with criminal punishment on the one hand, and measures of rehabilitation and incapacitation on the other.[9] In addition to detention in a psychiatric hospital for the mentally ill or treatment in an addiction treatment center, preventive detention constitutes another important means of incapacitation[10] (which was introduced in 1933 with the Law Against Habitual Criminals).[11] According to the model used in the German Criminal Code, preventive detention is clearly distinct from criminal punishment.[12] The crucial difference is that it is an incapacitating measure *in addition to* imprisonment (not in place of), which is executed after the offender has served his punishment (and thus has already suffered punishment according to his guilt and the wrong done).

With respect to criminal punishment, the General Part of the Criminal Code contains a few provisions concerning sentencing which restrict judges' choice of sanctions (the statutory punishment ranges often encompass fines, shorter suspended prison sentences, or longer terms of imprisonment). The Code expresses a preference for fines rather than short-term imprisonment (imprisonment for a period shorter than six months), and it does not permit suspended imprisonment if the sentence length exceeds two years.[13] But in other ways sentencing in Germany remains a rather traditional affair. While the types of sanctions available have changed considerably since the introduction of the

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"gentleman's place of arrest" ("Festungshaft"). Thus the same length of imprisonment had different meanings. For these distinctions and the processes which led to a uniform mode of confinement, see WHITMAN, *supra* note 2, at 131.

7. In 1953, suspended prison sentences were introduced, and in 1969–70 this option was extended. Now suspension is possible for prison terms of up to two years. *See* STGB § 56.

8. Einführungsgesetz zum Strafgesetzbuch [EGStGB] [Introductory Act to the Criminal Code], Mar. 2, 1974, BGBl. I at 469.

9. STGB § 61.

10. STGB § 66. The legislature has amended these provisions because the German Federal Constitutional Court declared them unconstitutional. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 4, 2011, 128 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 326. Superficial reports made it sound as if this was the end of preventive detention in Germany. In reality the message of the Constitutional Court was addressed primarily to those responsible for prison administration. The Court objected to common features in the execution of both imprisonment and preventive detention, and demanded that the "non-punitive" character of the latter be accentuated. In December 2012 the legislature clarified that offenders in preventive detention must be treated differently than those in "ordinary" prisons in numerous additional ways. Bundesgesetzblatt [BGBl] I at 2425.

11. Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Sicherung und Besserung [Law Against Habitual Criminals], Nov. 24, 1933, Reichsgesetzblatt [RGBl] I at 995.

12. The German notion of a clear-cut separation between imprisonment as criminal punishment and preventive detention has been challenged by the European Court of Human Rights (ECHR) in a decision which concerned the principle of retroactivity. *See* M. v. Germany, 2009 Eur. Ct. H.R. 1. But note that the ECHR objected to retroactive aggravation, not to the German institution of preventive detention in general.

13. STGB §§ 47, 56.

German Criminal Code in 1871, this is less so for the principles that determine sentence *length*.

With respect to the legal techniques that frame judges' decisions concerning "how much" and "how long," not very much has changed since the nineteenth century. The legislature provides for upper and lower limits in all criminal norms that form the Special Part of the German Criminal Code, while leaving a wide range of sentencing options for most offenses. Within the Continental European tradition, the determination of the actual sentence was and still is the domain of judges.[14] The framework for determining sentence length in the original Code can still be seen in today's version. If one looks at some typical offenses, the statutory sentence range is still the same or similar to the original range of 140 years ago. For simple theft, in 1871 the judge could choose a term of imprisonment as short as one day and as long as five years. Today the range is between a fine and up to five years of imprisonment.[15] For simple robbery, the range has remained the same (one year to fifteen years).[16] Some of the upper limits have been extended (for bodily injury, the limit is now five years rather than the original three years), and others lowered (the mandatory minimum for sexual abuse of children was previously one year; now it is six months).[17] For our purposes, it is not necessary to list changes in the Criminal Code's sentence ranges in more detail. My point is that the basic structure has not changed. With the exception of murder, for which the law prescribes life imprisonment, the German Criminal Code does not contain determinate sentences.[18] For all other criminal offenses, the Criminal Code provides a rather wide range between the legally permissible lower and upper limits.[19]

In 1969, when the General Part of the Criminal Code underwent extensive reforms, a provision was introduced that lists general principles for sentencing. Section 46 (I) states: "The guilt of the offender is the basis for sentencing. The effects that the sentence can be expected to have on the offender's future life in society shall be taken into account."[20] The second subsection of § 46 then details circumstances that the sentencer should consider, such as the offender's motives and the consequences of the act.[21] The general demand of § 46 of the German

14. Judicial discretion is even more extensive in French criminal law. *See, e.g.*, SUSANNE MÜLLER, DIE ANWENDUNG VON STRAFZUMESSUNGSREGELN IM DEUTSCH-FRANZÖSISCHEN VERGLEICH (2004).

15. *See* STGB § 242.

16. *See* STGB § 249.

17. *See* STGB §§ 223, 176.

18. STGB § 211.

19. The same is true for criminal norms that were introduced more recently and placed outside of the Criminal Code, such as the Narcotics Act: the sale or possession of a non-trivial quantity of drugs can be punished with any sentence between three-months imprisonment and fifteen years: Betäubungsmittelgesetz [BtMG] [Narcotics Act], Jul. 28, 1981, BGBl. I at 358, § 29a. This is a considerably broad range (compare, for example, a suspended sentence of one year with twelve years of actual imprisonment).

20. STGB § 46 (I).

21. The second subsection states that

Criminal Code is to assess offenders' guilt while taking the effects of this process on their future lives into account. The demand is general, and does not easily lead to a conclusion that the accused offender should be sanctioned with a specific fine amount or term of imprisonment. The crucial step in sentencing is, however, to cross the gap between abstract principles and the numerical value that must be the final outcome. The question with a norm such as § 46 of the German Criminal Code is how much guidance for court practice can be expected from it. The answer is obvious: the text is a rather vague recipe for how to arrive at a specific sentencing outcome.

B. The Role of the Appellate Courts and the Federal Constitutional Court

Within a legal system characterized by wide statutory ranges for punishment and only a vague statutory outline of sentencing principles, the case law of the appellate courts seems an obvious source of additional guidance. In Germany, the Federal Court of Justice ("Bundesgerichtshof"), which decides some appeals in law, might be in a position to bridge the gap between a vague statutory framework and the actual decision-making of trial judges, and create uniform standards applicable across the country. But again, searching for detailed guidance leads to somewhat disappointing results. The Federal Court of Justice is responsible for only a small proportion of cases, namely those serious criminal cases that were heard initially by regional courts ("Landgerichte") at trial, rather than by lower local courts ("Amtsgerichte") which deal with the vast majority of criminal proceedings.[22] This means that the Federal Court of Justice cannot directly supervise sentencing for crimes that make up the bulk of trial judges' day-to-day work. Due to the complicated court system in Germany, which divides appellate tasks between regional courts and the Federal Court of Justice, crimes such as simple theft, burglary, or "hit and run" cases after traffic accidents do not appear before a federal court. The appellate system, therefore, is not well equipped to enforce uniform sentencing across the whole of Germany with a view to specific, practically important offenses. All that could be expected from the Federal Court of Justice are

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> When sentencing the court shall weigh the circumstances in favor of and against the offender; consideration shall in particular be given to: the motives and aims of the offender; the attitude shown in the offense and the degree of force of will involved in its commission; the degree of the violation of the offender's duties; the modus operandi and the consequences caused by the offense to the extent that the offender is to blame for them; the offender's prior history, his personal and financial circumstances; his conduct after the offense, particularly his efforts to make restitution for the harm caused as well as the offender's efforts at reconciliation with the victim.

STGB § 46 (II) (Michael Bohlander trans.).

22. If the case is heard by a local court (where the majority of criminal cases begin, at the "Amtsgericht"), then the appellate court is the regional court ("Landgericht"). It is also possible to lodge an appeal in law at the next level, the higher regional court ("Oberlandesgericht"). Only if the crime was of a serious nature, and therefore employed the regional court as a trial court, can the appeal in law be addressed to the Federal Court of Justice. *See* JÖRG-MARTIN JEHLE, CRIMINAL JUSTICE IN GERMANY (5th ed. 2009) (providing an overview of the German court system).

sentencing instructions that operate on a higher level of abstraction. And indeed, the Federal Court of Justice has provided some such outlines.

One of the approaches to be found in the Federal Court of Justice's rulings is called the "margin" or "leeway" theory ("Spielraumtheorie")—although the term "theory" is too ambitious for its thin content. It stipulates that within the broader statutory punishment range, there is a narrower scope of punishments which would be equally compatible with the particular offender's guilt, and that the court may apply preventive considerations (general and special prevention) to finalize the actual sentence within the margin-of-guilt-compatible sentences.[23] The margin theory purports to address the trial courts and their sentencing decisions. However, it is not very helpful for a judge at the local or regional court who has to deal with an individual case, who feels insecure due to the wide statutory range, or who would be seriously interested in learning more about how to arrive at a sentence. A convincing explanation is that the Federal Court of Justice's talk about "margin" and "leeway" represents an approach that was developed in the interest of the appellate courts. An indicator of the true function of the margin theory is the fact that the Federal Court of Justice does not demand that the margin be expressed numerically in the court's rationale for a particular sentence.[24] If finding the margin were taken seriously as a decisive step in the sentencing process, trial judges would be required to communicate the upper and lower limits of the margin. But appellate courts have a strong incentive to avoid giving detailed rules for sentencing. From the appellate perspective, vagueness is preferable because further precision might result in greater numbers of appeals. Therefore, the point of the margin theory is to refuse a detailed survey of sentencing decisions by postulating a "margin" of proportionate sentences.[25] It serves to reduce the number of appeals in law—not to assist judges of the lower courts in determining sentences.

Another general principle developed by the Federal Court of Justice might be of greater interest when explaining sentencing practices from a comparative perspective. The Federal Court of Justice has drawn a distinction that might, on first hearing, sound rather technical but that impacts the general level of sanction severity (the question of "cardinal proportionality").[26] This is the distinction between an "average case" ("Regelfall") of a certain offense type (for example, the average residential burglary) as it frequently appears before the courts and a case of "medium severity" ("Durchschnittsfall"). One could come up with the idea that "average" and "medium" severity are the same and

23. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 27, 1970, 24 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 132, 133; Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 10, 1987, 34 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 345, 349; Franz Streng, *Sentencing in Germany: Basic Questions and New Developments,* 8 GERMAN LAW JOURNAL 153 (2007).

24. GERHARD SCHÄFER, PRAXIS DER STRAFZUMESSUNG 165 (4th ed. 2008).

25. HÖRNLE, TATPROPORTIONALE STRAFZUMESSUNG, *supra* note 1, at 35.

26. For the distinction between ordinal and cardinal proportionality, see ANDREW VON HIRSCH, CENSURE AND SANCTIONS 18–19 (1993).

develop the following thought: as the statutory sentence range for residential burglary, for instance, runs from six months to ten years imprisonment,[27] courts should locate the average case (of the kind which happens most frequently, such as burglaries causing between €2,000 and €5,000 of harm)[28] in the middle of the statutory range (the middle point being four-years-and-nine-months imprisonment). But the Federal Court of Justice rejects such reasoning. It argues that average cases would be sanctioned with disproportionate severity if the sentence were taken from the middle section of the statutory range rather than from its lower section.[29] This is convincing: the majority of burglaries cause only comparatively moderate financial harm; losses of millions of euros are rare events. The average case in the sense of the statistical median therefore is not the same as a case of medium severity.[30] From the perspective of criminal policy, the Federal Court of Justice's insistence that the average case not be sentenced from the middle of the statutory range is helpful in keeping overall sentence severity down.

Another factor behind German sentencing policy which is worth mentioning is the role of the Federal Constitutional Court ("Bundesverfassungsgericht"). In numerous rulings, the Court repeats that criminal punishment must be proportionate to the seriousness of the crime and the offender's guilt.[31] The Federal Constitutional Court also emphasizes that the principle of culpability (or the guilt principle, another common translation for "Schuldgrundsatz") is rooted in the constitutional guarantee to protect human dignity,[32] and therefore may not be abolished or restricted through changes to the Basic Law or European legislation.[33] The focus on the constitutional principle of culpability and the reiteration of the proportionality requirement are not to be misunderstood as the Federal Constitutional Court's willingness to supervise the sentencing practices of the criminal courts. Challenging the length of a criminal sentence by way of constitutional complaint is generally not a promising strategy. Even more so than the Federal Court of Justice, the Federal Constitutional Court cannot afford to be a last court of appeals on sentencing, as this would increase the already excessive number of citizens' complaints relative to the court's capacity. The impact of the Constitutional Court's

27. STGB § 244 (I) (3).

28. These are fictional numbers.

29. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 13, 1976, 27 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 2, 4.

30. Of course only pointing to financial harm is inadequate. Other factors, such as the psychological harm (anxieties etc.) inflicted on residents of the dwelling, should also be taken into account. In my example, I focus on financial harm to simplify the argument concerning the difference between an average case and a case of medium severity.

31. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 26, 2008, 120 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 224, 253; BVerfG Oct. 25, 1978, 50 BVerfGE 5, 12; BVerfG Feb. 26, 1969, 25 BVerfGE 269, 285; BVerfG Oct. 25, 1966, 20 BVerfGE 323, 331.

32. Art. 1 (1) GG, May 23, 1949, BGBl. I at 1.

33. BVerfG Jun. 30, 2009, 123 BVerfGE 267, 413.

jurisdiction is of a more indirect nature: it emphasizes the value of proportionality as a cornerstone of a vision of justice, and it anchors it in the consciousness of jurists, judges, and lawyers. And, in one important case, the Constitutional Court has specified a requirement that also implies some restrictions on the general punishment level, restrictions that would apply as constitutional restrictions if parliament were to consider sharply increasing terms of maximum imprisonment.[34] Ruling on a challenge to the constitutionality of life imprisonment, the Court stressed that it is a matter of human dignity to give every prisoner a chance to be released from prison, not as a matter of mercy but by way of a legal provision granting probation even for murderers.[35] Taking a stance against "real life" sentences for murder also means that it would be unconstitutional to opt for very long sentences in other cases that would, in effect, signify that offenders would actually need to spend the rest of their lives in prison.

III
SENTENCING PRACTICE

If the description of the legal framework is presented to someone unfamiliar with the practice of sentencing in Germany or with conviction statistics and imprisonment rates, some of its features could invite skepticism. No sentencing guidelines exist, the Code does not structure and regulate the sentencing decision effectively, and the reach of federal appellate review is limited. Should this not worry us? Taken together, this might invoke apprehensions of problematic sentencing outcomes. If judges are not guided by a tight legal framework, then they might base their decisions on a highly personal assessment of offense severity, the offenders themelves, and purported societal needs. The true determining factors could become judges' characters, their biases, and their personal visions of criminal policy. There are American studies indicating that judges' decisions are influenced by factors such as their degrees of self-esteem and their attitudes towards "law and order."[36] If this is the case in other systems, why is it not so in the German system, which lacks sentencing guidelines and other detailed legal prescriptions for determining sentence length? Unfettered judicial discretion could result in sentencing disparities attributable to judges' biases against groups of offenders, as well as inflated sentences driven by judges' belief in deterrence. In order to address such concerns, it is worthwhile to take a look at the German practice of sentencing.

34. For the importance of this ruling, see Frieder Dünkel, *Gefangenenraten im internationalen und nationalen Vergleich*, 8 NEUE KRIMINALPOLITIK 4, 10 (2010).

35. *See* BVerfG Jun. 21, 1977, 45 BVerfGE 187, 227, 242–245.

36. *See, e.g.*, James L. Gibson, *Personality and Elite Political Behavior: The Influence of Self Esteem on Judicial Decision Making*, 43 J. POL. 104 (1981); John Hagan, *Law, Order and Sentencing: A Study of Attitude in Action*, 38 SOCIOMETRY 374 (1975).

A. Indications of Punitiveness?

There is some debate whether our national sentencing practice shows signs of increasing punitiveness, which parallels the discussion about a "new punitiveness" in other countries, such as the United States and England.[37] If contrasted with imprisonment rates in other countries (see Table 1), however, the German situation does not indicate particularly high levels of sentence severity. Rather, they reveal relatively modest sentencing practices.

Table 1: Prison population rate (OECD Factbook 2010: Economic, Environmental and Social Statistics).

Prison Population Rate for the Year 2009								
United States	Israel	United Kingdom	Australia	Netherlands	France	Germany	Switzerland	Sweden
760	325	153	129	100	96	90	76	74

Nevertheless, authors who see a "new punitiveness" in Germany[38] point to a development in the last two decades: the imprisonment rate (number of prisoners per 100,000 persons) in Germany rose from seventy-one in 1992 to ninety-eight in 2001 (but fell to ninety in the year 2009). Some suggest that the developments in Germany are part of a broader pessimistic story, the story of increasing punitiveness.[39] However, these narratives are not always based on a careful reading of data or on a willingness to seriously explore the complex set of factors behind shifts in imprisonment rates.[40] The notion of "punitiveness" is fuzzy; this appears in more detailed empirical studies.[41] With regard to some

37. For critical studies concerning the situation in the United States and also in England, see NICOLA LACEY, THE PRISONER'S DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES (2008); Tim Newburn, *"Tough on Crime": Penal Policy in England and Wales*, *in* CRIME, PUNISHMENT, AND POLITICS IN COMPARATIVE PERSPECTIVE 425 (Michael Tonry ed., 2007); TONRY, *supra* note 2; WHITMAN, *supra* note 2; Joachim Savelsberg, *Knowledge, Domination and Criminal Punishment*, 99 AM. J. SOC. 911, 930 (1994).

38. *See* Fritz Sack, *Der weltweite "Punitive Turn": Ist die Bundesrepublik dagegen gefeit?*, *in* WEGE DER SICHERHEITSGESELLSCHAFT 165 (Axel Groenemeyer ed., 2010); Rüdiger Lautmann et al., *Beiheft "Punitivität,"* 8 KRIMINOLOGISCHES J. 51 (2004). For a somewhat more differentiated approach, see Axel Groenemeyer, *Punitivität im Kontext*, *in* GRENZENLOSE KONSTRUKTIVITÄT 209 (Birgit Menzel & Kerstin Ratzke eds., 2003).

39. *See* TOBIAS SINGELNSTEIN & PEER STOLLE, DIE SICHERHEITSGESELLSCHAFT: SOZIALE KONTROLLE IM 21. JAHRHUNDERT 90 (3d ed. 2012).

40. For a critique of grossly exaggerated pictures, see Dietrich Oberwittler & Sven Höfer, *Crime and Justice in Germany. An Analysis of Recent Trends and Research*, 2 EUR. J. CRIMINOLOGY 465, 494 (2005).

41. *See* Frieder Dünkel, *Werden Strafen immer härter?*, *in* GEWALTDELINQUENZ, LANGE FREIHEITSENTZIEHUNG, DELINQUENZVERLÄUFE 209, 233 (Britta Bannenberg & Jörg-Martin Jehle eds., 2011); Frieder Dünkel & Christine Morgenstern, *Länderbericht Deutschland, in* KRIMINALITÄT, KRIMINALPOLITIK, STRAFRECHTLICHE SANKTIONSPRAXIS UND GEFANGENENRATEN IM EUROPÄISCHEN VERGLEICH 97 (Frieder Dünkel et al. eds., 2010); Helmut Kury & Joachim Obergfell-

offenses (such as property offenses and robberies), the German sentencing practice shows increasing mildness; whereas violent crimes against persons and sexual crimes are evaluated as relatively more serious wrongdoing.[42] Conclusions about more punitive sentencing could only plausibly be made for a comparatively small subcategory of crimes, and it remains to be examined whether shifts in the assessments of harm which lead to greater emphasis on physical and sexual integrity deserve the stigma typically connected with the label "punitiveness."

There are other indicators against a general "increased punitiveness" hypothesis. First, the statutory maximum for all crime types has not been increased recently in Germany (as happened, for instance, in France in 1980 and again in 1994).[43] The statutory maximum in the German Criminal Code has remained (from a comparative perspective) remarkably low. The upper limit for all offense types is set at fifteen years, except for murder and a few other felonies involving the death of another. Currently, there are just over one hundred life sentences per year.[44] It does not matter what kind of felony or how many felonies the offender has committed: be it numerous aggravated robberies, awful kidnappings, a series of most humiliating rapes, or acts of particularly harmful arson, the maximum sentence is fifteen years imprisonment.[45]

Another argument can be drawn from the overall distribution of sanctions (Tables 2A and 2B). This distribution does not support the conclusion that sentencing practices in Germany are harsh overall. The vast majority of criminal offenses committed by adult offenders are sanctioned with a fine, and the proportion of unsuspended prison sentences is very small. Among prison sentences, longer sentences of more than five years are chosen infrequently.

Fuchs, *Punitivität in Deutschland. Zur Diskussion um eine neue "Straflust," in* FESTSCHRIFT FÜR HANS-DIETER SCHWIND ZUM 70. GEBURTSTAG 1021 (Thomas Feltes et al. eds., 2006); Helmut Kury, Martin Brandenstein & Joachim Obergfell-Fuchs, *Dimensions of Punitiveness in Germany*, 15 EUROPEAN J. CRIM. POL'Y & RES. 63 (2009).

42. Dünkel & Morgenstern, *supra* note 41, at 132–136.

43. Sebastian Roché, *Criminal Justice Policy in France: Illusions of Severity*, *in* CRIME, PUNISHMENT, AND POLITICS IN COMPARATIVE PERSPECTIVE 471, 497 (Michael Tonry ed., 2007).

44. See *infra* Table 2B. The mean length of actual prison time for a life sentence is 18 years. *See* Axel Dessecker, *Life Sentences in Germany: An Example of Increasing Punitiveness in the Criminal Justice System?*, *in* PUNITIVITY. INTERNATIONAL DEVELOPMENTS 21, 36–38 (Helmut Kury & Evelyn Shea eds., 2011).

45. STGB § 38 (II), § 54 (II).

Table 2A: Distribution of sanctions, without the minor misbehavior called "Ordnungswidrigkeiten" and without sentences for juveniles, from cases concluded in German courts in 2010 (German Federal Office of Statistics, Statistisches Bundesamt, Fachserie 10, Reihe 3).

Adults convicted	Fine	Imprisonment, suspended	Imprisonment
704,802 (100%)	575, 068 (81.6%)	92,073 (13.1%)	37,661 (5.3%)

Table 2B: Length of prison sentences from cases concluded in German courts in 2010 (German Federal Office of Statistics, Statistisches Bundesamt, Fachserie 10, Reihe 3).

Up to 1 year	1 to 2 years	2 to 5 years	5 to 10 years	10 to 15 years	Life
97,396 (75,781 suspended)	22,052 (16,292 suspended)	8,526	1,475	132	137

Also, the distribution of sentences for particular offenses within the given statutory punishment range shows a regular feature: there is no equal distribution of sentences across the whole area of the statutory range. This is a well-reported phenomenon in the German literature: trial judges prefer the lower third of the statutory range, and the vast majority of sentences cluster in this area.[46] Thus, the notion expressed by the Federal Court of Justice concerning appropriate sanctions in average cases (not in the middle of the range but in its lower parts) is obviously shared by trial judges.[47] This is true even for offense types that tend to stir strong emotions against offenders. Examples are sexual abuse of children and offenses relating to child pornography, such as distribution and possession (see Tables 3A and 3B). The statutory punishment range for sexual abuse of children begins with six-months imprisonment and ends with ten-years imprisonment. As the table 3A shows, however, sentences of more than two years are rare, and sentences cluster in the lower segment of the statutory range.[48]

46. HANS-JÖRG ALBRECHT, STRAFZUMESSUNG BEI SCHWERER KRIMINALITÄT 227 (1994); BERT GÖTTING, GESETZLICHE STRAFRAHMEN UND STRAFZUMESSUNGSPRAXIS 221 (1997); TILMANN SCHOTT, GESETZLICHE STRAFRAHMEN UND IHRE TATRICHTERLICHE HANDHABUNG 236 (2004).

47. *See supra* Part II.B.

48. Note that there is a separate offense titled "aggravated sexual abuse of children" covered by STGB § 176a. But even for aggravated sexual abuse, the upper statutory punishment range (ten- to fifteen-years imprisonment) is rarely used. In 2010 there were four such sentences in the upper range, out of 605 total sentences. Even the five- to ten-years range does not play much of a role. In 2010, 99 out of 605 sentences fell within this range. *See* German Federal Office of Statistics, Statistisches Bundesamt, Fachserie 10, Reihe 3.

Table 3A: Sentences for those convicted of sexual abuse of children (§ 176 I, II, III Criminal Code) in 2010 (German Federal Office of Statistics, Statistisches Bundesamt, Fachserie 10, Reihe 3).

All convictions	Imprisonment up to 1 year	1 year to 2 years	2 to 5 years	5 to 10 years
850	379 (373 suspended)	314 (294 suspended)	99	17

Neither in sexual abuse cases nor in child pornography cases does the sentence distribution show an unusual degree of punitiveness (punitiveness could be deduced from a more pronounced preference for sentences within the upper statutory sentence range). The sentence ranges for offenses in § 184b of the Criminal Code, relating to the prohibition of child pornography, differentiate between distribution (three-months to five-years imprisonment), commercial distribution (six months to ten years), and mere possession (fine or imprisonment up to two years). Unfortunately the sentencing statistics lump these different modes of committing the offense together. Still, the picture is one of relative mildness. Although this offense elicits strong emotions against offenders, actual time in prison for this offense is rare, and judges tend to prefer fines or low probation sentences.

Table 3B: Sentences for distribution and possession of child pornography (§ 184b Criminal Code) in 2010 (German Federal Office of Statistics, Statistisches Bundesamt, Fachserie 10, Reihe 3).

All convictions	Fine	Imprisonment up to 1 year	1 year to 2 years	2 to 5 years	5 to 10 years
1998	1094	763 (741 suspended)	127 (113 suspended)	14	0

B. Unequal or Even Arbitrary Sentencing?

The foregoing suggests that the lack of sentencing guidelines in the German criminal justice system does not seem to result in particularly severe sentences. The rough overview indicates that the system works fairly well (at least from the perspective of liberal criminal policy) in terms of overall sentence severity levels. However, it needs to be mentioned that data from the sentencing statistics are aggregate data published by the Federal Office of Statistics. Some, albeit limited, conclusions may be drawn by looking at sentencing patterns over time, again using the national statistics. It is quite surprising to see how the distribution of sentences for a given offense resembles the pattern of the

preceding year.[49] Observers have characterized German criminal policy as embodying "stability and a certain inertia,"[50] as well as "remarkable consistency,"[51] which can also be observed in the national sentencing statistics. If German judges were given to highly idiosyncratic, wildly different choices of sentences, this would probably be evidenced by erratic patterns and greater fluctuation, even in the aggregate data.

But still, the numbers in the German sentencing statistics do not exclude the possibility of some degree of inequality. Such inequality might be based on the impact of extralegal factors, that is, rule-like heuristics that should not be applied by a sentencing judge because they are not part of the normative program, such as the offender's immigration background or socio-economic status. There is not much systematic empirical analysis—research on German sentencing practices beyond the national statistics is sparse.[52] The few existing studies did not detect systematic biases of this kind.[53] This is not conclusive evidence, however, that extralegal factors are as irrelevant as they should be—they might influence some judges more than others or only affect sentencing for particular offenses. However, according to the state of knowledge as it is, it would be speculative to argue that the lack of sentencing guidelines leads to manifest disparities.

Even if biases due to personal characteristics of offenders (and judges) cannot be uncovered, the question remains to what degree sentencing is shaped by factual, non-normative influences. One such factor is regional court cultures. There are strong hints that regional differences do exist, both at the state level ("Länder") within the German federal system, and at the level of court districts in closer geographic proximity.[54] This is hardly surprising if one is aware of how information about the "appropriate sentence" is spread. Entirely uniform practices across a country as large as Germany would be unlikely in view of the lack of guidelines. Transfer of knowledge about sentencing happens mostly on a regional level, by way of oral transmission: young judges knock at their older colleagues' doors and ask them what is typical. Attorneys who are aware of regional customs concerning standardized crimes (such as possession of a certain amount of drugs for personal use) are likely to appeal if a local judge deviates from what is common in this region. The judges at the regional court who decide such appeals tend to have a better overview than an inexperienced

49. *See* BERND-DIETER MEIER, STRAFRECHTLICHE SANKTIONEN 228 (2009).

50. Oberwittler & Höfer, *supra* note 40, at 466.

51. Dünkel, *supra* note 41, at 218.

52. Oberwittler & Höfer, *supra* note 40, at 494.

53. *See* ALBRECHT, *supra* note 46, at 199; MEIER, *supra* note 49, at 228; Sven Höfer, *Zur Kongruenz von Recht und Praxis der Strafzumessung,* 88 MONATSSCHRIFT FÜR KRIMINOLOGIE 127, 132 (2005).

54. MARGIT OSWALD, PSYCHOLOGIE DES RICHTERLICHEN STRAFENS 174 (1994); SCHOTT, *supra* note 46, at 224; STEFAN SUHLING & TILMANN SCHOTT, DER ANSTIEG DER GEFANGENENZAHLEN IN DEUTSCHLAND. FOLGE DER KRIMINALITÄTSENTWICKLUNG ODER WACHSENDER STRAFHÄRTE 26 (2001); Höfer, *supra* note 53, at 133.

newcomer at a local court. But having pointed out the likelihood of regional differences and the studies that show their existence, it is also important to mention that this phenomenon should not be exaggerated. It does not mean that, for instance, court A sanctions robberies with five-years imprisonment on average and court B only with two-years imprisonment. The differences are not that pronounced but amount to, for instance, a slightly greater percentage of suspended sentences for robbery and aggravated theft.[55] It would thus be incorrect to claim that there is highly disparate or even arbitrary sentencing as a consequence of the vague legal framework.

IV
EXPLANATIONS

A. The Puzzle

The foregoing sections leave us with something of a puzzle. On the one hand, German law does not provide much guidance for sentencing decisions. On the other hand, the system as a whole seems to work fairly well in the sense that its observers have detected neither arbitrary, highly personalized judicial decision-making, nor particularly punitive sentences. The concern that judges might not cope with sentencing satisfactorily does not occupy space in German discussions. This seems surprising in comparison to the discussion of recent developments with regard to the U.S. Sentencing Guidelines. The U.S. Supreme Court decisions at the beginning of this century declaring that the U.S. Federal Sentencing Guidelines are not mandatory have prompted a debate about increased sentencing disparity.[56] It appears that at least some judges have returned to more personalized sentencing, which is seen as a problem that deserves attention.[57] There is no comparable degree of scholarly or public focus on the possibility of sentence disparity in Germany.

One possible explanation could be that the German lack of anxiety about this point can simply be traced back to the scarcity of in-depth research. After all, the more the issue is scrutinized, the more likely it becomes that differences in the sentencing patterns of judges will be uncovered. This basic logic applies to any subject: as long as empirical research is somewhat superficial, it is easier to assume that everything is just fine the way it is. However, this does not seem to be the most convincing explanation. It would not be fair to trace the lack of concern about sentencing practices in Germany solely to a lack of empirical knowledge. The data that is available and the assessments of criminologists who work with it are too uncontroversial to be written off as irrelevant. I will thus proceed with the assumption that it is an adequate description (rather than an

55. SCHOTT, *supra* note 46, at 225.

56. Ryan W. Scott, *Inter-Judge Sentencing Disparity after Booker: A First Look*, 63 STAN. L. REV. 1, 13–14 (2010).

57. *Id.* at 30.

expression of sheer ignorance) to say that sentencing practice in Germany works fairly well. But why is this so?

B. Political, Economic, and Cultural Factors Behind Sentencing Patterns

In the field of comparative studies, several authors offer answers to the question of what may have created and perpetuated differences between the German way of dealing with deviant behavior and the Anglo-American approach, or differences between a greater number of legal systems. Such explanations are typically rooted in political theory and socio-economic reflections, or are derived from historical and cultural observations. James Whitman, in his book *Harsh Justice*,[58] emphasizes degradation through punishment as one key factor. Along this line of thought, dominant features of the U.S. criminal justice system include its emphasis on degrading practices and a pronounced lack of respect for criminal offenders; whereas the German and French systems show greater willingness to treat everybody, including criminals, with respect.[59] Whitman traces his description of the status quo back to historical developments. Punishment practices were traditionally closely related to social status, and in Continental Europe differences between "high status" punishments and "low status" punishments were still pronounced in the nineteenth and early twentieth centuries.[60] Since then, however, Whitman claims that a process of "leveling up" has taken place, which made "high status" treatment the norm.[61] Whitman argues that this did not happen in the United States because distinguished "high status" punishment did not exist in the nineteenth century.[62] Whitman's theory has strong explanatory power with respect to modes of sanctions (for example, the idea of introducing "shaming sanctions" is met in Germany with abhorrence), life in prison, and prison law. But it also applies to sentence length: respectful treatment entails keeping physical exclusion (imprisonment) and deprivation of property (monetary sanctions) moderate. Joachim Savelsberg connects criminal justice practices to the conditions that shape public opinions, as well as to the impact of public opinion on the legislative, executive, and judicial branches, and the academic sector.[63]

Some newer publications put greater emphasis on economic arrangements and basic structures of political organizations. Tapio Lappi-Seppälä, writing about penal policy in the Scandinavian countries, explains the particularly low imprisonment rates and the still (despite some minor changes) impressive leniency of these Northern parts of Europe. He connects the "Scandinavian model" to general observations about the role of the state, the relationship

58. WHITMAN, *supra* note 2.
59. *Id.* at 41.
60. *Id.* at 97.
61. *Id.*
62. *Id.* at 151.
63. Savelsberg, *supra* note 37.

between state and citizens, and political and social culture in general.[64] He focuses particularly on the consensual and corporatist political culture, the strong welfare state, and high levels of social trust as important factors.[65] Similarly, in their book *Penal Systems: A Comparative Approach*, Michael Cavadino and James Dignan relate the features of national criminal justice systems to societies' basic political and economic structures (which they sort into the categories of neoliberalism, conservative corporatism, social democratic corporatism, and oriental corporatism).[66] Nicola Lacey also emphasizes the role of socio-economic factors, and she adds insight into how electoral arrangements influence party politics as well as the emphasis on "law and order" within these processes.[67] A somewhat simpler economic approach argues that richer countries are less inhibited about expanding prison capacities because they can afford to do so.[68]

Macro-level studies that aim to explain broad and diffuse concepts such as "punitiveness" invite a critical view of methodological issues like questions of operationalization and validity.[69] Awareness of typical problems afflicting macro-level research, such as definitions and the plausibility of causal relationships, does not, of course, challenge the basic notion that the broad picture matters if the task is to explain sentencing patterns. To deny that legal systems have to be seen against the complex backdrop of a given society or nation (including its cultural and historical roots, as well as its contemporary economic and political structures) would hardly be convincing. Nevertheless, one can probably gain more insight by taking a narrower focus. This means preference for "mid-level" descriptions which focus on specific features of legal cultures, institutions, and practices.[70] A multitude of such descriptions might yield more promising results in comparative criminal justice than attempts to "get at the big picture at once" in macro-level research. In the following sections, features of the German legal system that might explain sentencing patterns will be discussed: the impact of preventive detention on sentencing practices, the recruitment and self-concept of judges, and the impact of legal education.

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64. Tapio Lappi-Seppälä, *Penal Policy in Scandinavia*, *in* CRIME, PUNISHMENT, AND POLITICS IN COMPARATIVE PERSPECTIVE 217 (Michael Tonry ed., 2007).

65. *Id.*

66. MICHAEL CAVADINO & JAMES DIGNAN, PENAL SYSTEMS: A COMPARATIVE APPROACH (2006).

67. *See* LACEY, *supra* note 37 (discussing the impact of electoral arrangements).

68. John van Kesteren, *Public Attitudes and Sentencing Policies Across the World*, 15 EUROPEAN J. CRIM. POL'Y RES. 25, 43–45 (2009).

69. *See* DAVID NELKEN, COMPARATIVE CRIMINAL JUSTICE 61–70 (2010).

70. For the notion of "legal culture," see David Nelken, *Comparing Legal Cultures*, *in* THE BLACKWELL COMPANION TO LAW AND SOCIETY 113 (Austin Sarat ed., 2004).

C. Harsh Incapacitation in Exceptional Cases

In part I, preventive detention as an element of the German criminal justice system was mentioned. The issue of preventive detention ought to be taken up again because the mere existence of this means of incapacitation (which, according to the German Criminal Code, is not criminal punishment) might be one of several factors behind the general finding of not-particularly-harsh sentences. With regard to quantitative importance, preventive detention does not play a major role. In the German discussion about punitiveness, however, the issue of preventive detention appears often,[71] because several legislative reforms extended the scope for preventive detention during the last decade[72] and because the number of convictions has risen visibly.[73] But the numbers are still very small if compared to the number of total convictions (see Table 2A above).[74]

And my point here is this: To discuss preventive detention only under the heading of "increased punitiveness" misses something. The existence of this institution might have an *indirect* impact on judges' sentencing decisions in the "ordinary" cases of criminal punishment. But this impact actually works to moderate "punitiveness." Preventive detention exists to address the problem of particularly dangerous offenders: the small group of persons who are prone to committing serious sexual and violent crimes.[75] The German two-track system separates the small category of "hard-line incapacitation" from the much larger category of "proportionate criminal punishment." Of course, this does not mean that all offenders are divided neatly into two categories with "dangerous" offenders being sentenced to preventive detention and "non-dangerous" offenders receiving proportionate punishment. If this were the case, then the number of sentences resulting in preventive detention could be expected to be much higher than approximately one hundred per year. However, the scope of

71. *See, e.g.*, Kury et al., *supra* note 41, at 71; Dünkel, *supra* note 41, at 214.

72. *See* Jörg Kinzig, *Die Neuordnung des Rechts der Sicherungsverwahrung*, 64 NEUE JURISTISCHE WOCHENSCHRIFT 177 (2011).

73. Only 31 offenders were sentenced to preventive detention in 1990, 56 in 2002, 66 in 2003, and 101 in 2010. *See* STATISTISCHES BUNDESAMT [FEDERAL OFFICE OF STATISTICS], ABGEURTEILTE UND VERURTEILTE NACH DEMOGRAPHISCHEN MERKMALEN SOWIE ART DER STRAFTAT, ANGEWANDTEM STRAFRECHT UND ART DER ENTSCHEIDUNG. [THOSE JUDGED AND SENTENCED BY DEMOGRAPHIC CHARACTERISTICS, TYPE OF CRIME, PROCEDURE USED, AND TYPE OF DECISION] (2010), *available at* https://www.destatis.de/DE/Publikationen.

74. 504 persons were kept in preventive detention in March 2011 compared to 53,464 adults and 6,099 juveniles imprisoned for criminal punishment. If the current rate of about 100 preventive detention sentences per year is continued, then the overall number of persons in preventive detention will rise quickly to over 1,000. Still, it would be false to suggest that preventive detention is nearly as relevant as criminal punishment. STATISTISCHES BUNDESAMT [FEDERAL OFFICE OF STATISTICS], STRAFVOLLZUG: DEMOGRAPHISCHE UND KRIMINOLOGISCHE MERKMALE DER STRAFGEFANGENEN [DEMOGRAPHIC AND CRIMINOLOGICAL CHARACTERISTICS OF PRISONERS], (2010), *available at* https://www.destatis.de/DE/Publikationen.

75. The governing provision requires (in addition to prior offenses and other factors) that "a comprehensive evaluation of the convicted person and his offenses reveals that, due to his propensity to commit serious offenses, particularly of a kind resulting in serious emotional trauma or physical injury to the victim, he poses a danger to the general public." STGB § 66 (I) (4).

applicability for preventive detention covers only extreme circumstances, not an unspecified notion of "dangerousness."[76] It would be misleading to assume that preventive detention is an instrument intended to address recidivism in general. Rather, my argument points to a possible psychological phenomenon: the mere availability of preventive detention as a last resort (even if seldomly used in practice) might promote a more relaxed attitude in general, and thus moderate sentencing overall.

D. Recruitment and the Self-Concept of the Judiciary

1. A Key Factor: The Judiciary

Some answers to the question of why German judges tend to issue sentences in a fairly moderate, consistent, and equal fashion might also be found by examining the way the judiciary is trained, appointed, and organized. Legal cultures and institutional contexts can influence sentencing outcomes. This is not a new observation. Several writers who focus on comparing the U.S. system with European criminal justice systems mention the relevance of the career judge or judges-as-civil-servants model for moderate sentencing (in Germany, as in other Continental European countries, judges are not elected).[77] The following section is based on several assumptions: the way judges arrive at decisions, including sentencing decisions, is influenced by the way the profession operates; career paths and modes of recruitment matter; and the degree of professionalization is important.

This is not to say that one could explain differences between countries simply by pointing to differences in the organization of their judiciaries. If one were to compare overall sentence severity in European countries, differences would most certainly appear even when basic features of the judiciary are identical (for example, no elections and similar modes of training). The following short descriptions of the German judiciary neither imply that these features are unique (it would require a lengthy study to paint a full comparative picture, even for continental Europe), nor that they are always the key elements to explain differences in sentencing. The assumption that one could identify one or a few key factors that explain differences or similarities in sentencing outcomes between nations would be out of touch with reality. My aim is more limited: to draw attention to circumstances that might promote relatively moderate, non-disparate sentencing in the absence of guidelines. This does not mean that similar institutional contexts will lead to comparable sentencing

76. *See* STGB § 66.

77. Savelsberg, *supra* note 37, at 931–932; TONRY, *supra* note 2, at 206–210; Lacey, *supra* note 37, at 73–74; Frieder Dünkel & Christine Morgenstern, *Einleitung*, *in* 2 KRIMINALITÄT, KRIMINALPOLITIK, STRAFRECHTLICHE SANKTIONSPRAXIS UND GEFANGENENZAHLEN IM EUROPÄISCHEN VERGLEICH 16 (Frieder Dünkel et al. eds., 2010); Tapio Lappi-Seppälä, *Vertrauen, Wohlfahrt und politikwissenschaftliche Aspekte—Vergleichende Perspektiven zur Punitivität*, *in* KRIMINALITÄT, KRIMINALPOLITIK, STRAFRECHTLICHE SANKTIONSPRAXIS UND GEFANGENENZAHLEN IM EUROPÄISCHEN VERGLEICH 937, 982–983 (Frieder Dünkel et al. eds., 2010).

outcomes; other factors might nevertheless overshadow these.

2. Recruitment

Sentencing can be influenced by judges' dependence on political parties, political movements, and public opinion. Within systems that choose judges by public election, it is plausible to assume that public expectations (not necessarily on a national level, but rather the expectations of the local constituency) will influence not only the way judges present themselves in the election, but also how they decide cases once in office. The greatest dependence can be expected in systems that subject judges to re-election campaigns after a certain period of time (retention elections). In theory, the effects of public opinion could go either way. It might result in severe sentences for all or for some offenders; but it could also lead to low levels of punishment. However, it seems more realistic to expect the former.

Election of judges is not the only way to influence the judiciary's decision-making. Sentencing policies could also be influenced when appointments depend on the candidates' political affiliations, or other factors that increase the likelihood of biased sentencing. Politically motivated appointments of judges could be as distorting for moderate, equal sentencing as politically charged elections.[78] It is thus important to consider how far a legal system is isolated from such dangers. In Germany, the states' ministries of justice appoint judges. Initially, this might invite skepticism about the potential for political clientelism because the ministers of justice are in office due to their political affiliations. However, the appointment procedure for judges appears to work in a neutral, meritocratic fashion. Eligibility to become a judge is based on merit, that is, on the grades candidates have achieved in the two state exams that everyone must pass to become a lawyer, prosecutor, or judge. A grading system with a broad scale (from zero to eighteen points) allows for assigning individual ranks to each of the several hundred candidates who take an exam. Due to a widespread distribution of grades that thins out towards the top, it is possible to identify the best candidates with relative precision. This is not to say that the German state exams provide an entirely reliable picture of each candidate's capability as a jurist or as a judge. Talented persons can underperform, and the skills tested are not comprehensive enough to warrant the conclusion that those with the highest grades will automatically make the best judges. But the crucial point is not the exams' reliability as a measure of talent, but rather their usefulness for politically neutral, meritocratic appointment procedures.

3. The Impact of a "Judges As Civil Servants" Model

The German judiciary is characterized by fairly strong internal cohesion and conservative inertia, in the sense of faithfulness to established principles and

78. For the situation in the United States, see Herbert Jacob, *Courts and Politics*, *in* COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE 16, 19 (Herbert Jacob et. al. eds., 1996). For the situation in England, see NELKEN, *supra* note 69, at 43.

values that are identified as part of its professional self-understanding.[79] There are some caveats to be made with respect to this statement. First, generalizations about a multitude of judges in a large country have to be treated with some caution: a sociologist's focus allows for different sub-types.[80] Second, one could object that "internal cohesion" and "conservative inertia" could be used to describe the judiciary everywhere in the world. Arguably many judges in many countries are aware of their separate status as a "third power," along with a high social standing, leading them to strongly identify themselves with their professional backgrounds. I assume, however, that despite common features which one could probably extract from a comparative study (strong internal cohesion and conservative inertia are certainly not unique to Germany), there are also differences. One could contrast as ideal-types (which real legal systems only approximate) a judges-as-individuals model (judges who feel entitled to express their own personality and obliged to listen to their personal conscience) on the one hand, with a judges-as-civil-servants model on the other (judges who act in a corporatist way). The stronger the corporatist spirit is, the more it discourages individual expressions of one's personal and political preferences in sentencing decisions. For example, in Germany, judges typically enter their office in their late twenties or early thirties following the second state exam, and stay within the judiciary for decades until retirement. An early start to a judicial career can promote a tendency to identify oneself in a particularly strong way with the expectations connected with the role of a judge.[81]

Obviously, this should not be read as simple praise of the German system (an attitude which would be a poor starting pointing for any exercise in comparative criminal justice).[82] First, the path taken by a civil-servant based, corporatist judiciary prone to inertia is subject to various contingencies. Second, inertia does not imply complete immunity from shifts in the "Zeitgeist" in the long run. Important influences cannot be described as a matter of organization. If the "corporate spirit" happened to have been shaped by benevolent influences, the judiciary will keep these alive for a longer period even after the public mood has changed and public opinion and the more-political executive branch pursue other trends. However, the same phenomena can occur with less than benevolent influences. If we look back seventy years, praise for a German corporatist judiciary obviously would not be appropriate. At that point in time, if a choice had been possible between the judges-as-individuals model (judges who listen to their personal conscience) and the judges-as-civil-servants model, the evident choice would have been the former. Seen against this background, it

79. Dünkel, *supra* note 41, at 233.

80. *See* THORSTEN BERNDT, RICHTERBILDER: DIMENSIONEN RICHTERLICHER SELBSTTYPISIERUNGEN (2010).

81. *Id.* at 283.

82. *See* Chrisje Brants, *Comparing Criminal Process as Part of Legal Culture*, *in* COMPARATIVE CRIMINAL JUSTICE AND GLOBALIZATION 49, 51 (David Nelken ed., 2011).

is paradoxical for a German author to emphasize the benefits of a corporate judiciary. However, within the contemporary context, the corporatist model seems to have worked in Germany with benevolent effects. Influences that shaped the majority of high school and law students in the 1970s and 1980s still linger within the system. These liberal attitudes can be best described by what they are against: "law and order," retribution, and harsh punishment. The judiciary did not create these attitudes. It is just better at preserving them within the context of a corporatist environment.

E. The Role of Legal Education in Law Schools

Although the cultural, historical, political, and economic factors underlying sentencing patterns are widely discussed, and the institutional context has been mentioned, there is less discussion about the contribution of legal education. One would assume that the socialization of future judges in law school might have *something* to do with the way they work later. My remarks at this point are tentative. But my impression is that German judges are not shaped exclusively by the "Zeitgeist," but also by a strong, deep-rooted commitment to the value of proportionality and justice and an equally strong skepticism of deterrence through harsh sentences. The question of whether a sentence is proportionate to the particular wrong is taken seriously. This point, however, is missing in James Whitman's analysis. Whitman emphasizes a continental European commitment to mercy and individualization as factors working against harsh criminal justice.[83] However, more important are strong convictions among German jurists that severe sentences (such as some sentence ranges in the U.S. Sentencing Guidelines) are grossly disproportionate to the harm caused by the prohibited conduct. This is not a matter of individualization, but of the appropriate assessment of wrongdoing. If a group of German judges were presented with a case such as *United States v. Blarek*,[84] they most likely would all agree that this sentence was shockingly disproportionate.

My comparison of teaching in American law schools with teaching in German law departments (which is admittedly based on only superficial knowledge of the former) has led me to suspect that the professional self-understanding of those who teach at law schools might impact future lawyers—and thus future judges. Law school courses can be developed from either an internal or external perspective. The internal perspective is a normative perspective: it is focused foremost on the interpretation of positive law, but not exclusively. It is also focused on finding the appropriate, just solution for a legal conflict. In contrast, the external perspective takes an outsider's look at the law and applies the perspective of sociology, cultural theory, history, literature, or economics. The external perspective is often not interested in the positive law or court decisions, but rather focuses on the cultural, political, or economic

83. WHITMAN, *supra* note 2, at 1.

84. *See* United States v. Blarek, 7 F. Supp. 2d 192 (E.D.N.Y. 1998) (despite no prior record, the defendant received a prison sentence of eleven to fourteen years for money laundering).

roots and relations of the law. Or in some cases it is focused on deconstructing court decisions, rather than on developing solutions. My impression is that the external view of the law is more popular in American law schools. One could, of course, argue that the external approach is more intellectually stimulating (and one should not propose that it ought to be neglected altogether). But the internal perspective, combined with a strong commitment to the value of proportionality, has its advantages, too. Here we might find a second paradox, a second irony: well-meaning modern agendas promote an attitude of critical distance—but this detached, external view might be less than ideal for the education of judges-to-be compared with an affirmative stance towards legal values such as justice and proportionality.

V
CONCLUSION

Hopefully, two points have been made. First, legal systems can work fairly well and achieve moderate, non-disparate sentencing patterns, even if the legislature does not strive to curtail judges' discretion through sentencing guidelines. Second, details deserve attention beyond broad pictures of the historical, socio-economic, and cultural frameworks. Circumstances which might help keep sentencing levels down and avoid arbitrariness are: the existence of a "last resort" measure to cope with extremely dangerous violent offenders, politically neutral and meritocratic recruitment of judges, a liberal self-concept of the judiciary dominating the corporate identity, and a legal education system that affirms legal values such as proportionality rather than focusing on external views of the law. The approach was explanatory, not normative. I do not claim that the German legal system is perfect when it comes to sentencing law and sentencing theory—it certainly is not—but desirable revisions to German sentencing law were not the topic here. Nor do I wish for these tentative explanations to be confused with simple policy prescriptions. Obviously, remodeling another judiciary around a corporatist, civil-servant model would not be an easy task. And, more importantly, sentencing outcomes are also a product of contingencies. While the corporatist model seems to work well within the Zeitgeist of contemporary Germany, this does not mean that a benevolent impact is to be expected at all times. The same holds for the bifurcation between measures of incapacitation and criminal punishment, which in Germany seems to relieve the criminal punishment sector of some pressure. But introducing a measure of preventive detention might not have this effect in all legal systems. Concerning the need to strengthen the normative commitment to proportionality in legal education, one might conclude that this could be desirable regardless of the socio-political-cultural context. But, admittedly, it is hard to estimate the impact of legal education compared to the many other factors that determine judges' sentencing decisions.