SENTENCING IN GERMANY: EXPLAINING LONG-TERM STABILITY IN THE STRUCTURE OF CRIMINAL SANCTIONS AND SENTENCING

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I
INTRODUCTION

In the last decades, much has been written on significant changes in the use of prison sentences and imprisonment. These changes are assumed to reflect growing punitiveness and a rapidly spreading demand for public protection through long periods of confinement. In particular, the heavy inflation of the U.S. prison population has triggered scholarly attempts to explain an apparently insatiable appetite for imprisonment.[1] Only marginal attention has been paid to the question of why consistency in sentencing, stability in sentencing outcomes, and a modest use of imprisonment can be observed in certain countries more than in others. For example, remarkable stability in the structure of criminal sanctions has been on display in Germany since the end of the 1960s, when a major law amendment gave priority to fines and significantly restricted the use of prison sentences. Since the end of the 1960s, now a period of four decades, four out of five criminal sanctions imposed by German criminal courts are day fines.[2] Although some variation in rates of imprisonment can be observed over the last forty years in Germany, upward and downward swings have been limited. Criminal court statistics also show that the bulk of criminal sentences fall in the lower third of the range of sentences carried by criminal offense statutes. In spite of a statutory framework of sentencing that does not provide effective guidance for judges, consistency and stability are evidently achieved

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1. NILS CHRISTIE, CRIME CONTROL AS INDUSTRY: TOWARDS GULAGS, WESTERN STYLE (3d ed. 2000); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); LOIS WACQUANT, PUNIR LES PAUVRES: LE NOUVEAU GOUVERNEMENT DE L'INSECURITE SOCIALE (2004).

2. A day fine (also called unit fine) refers to a three-step procedure of determining a fine. In the first step, the number of day fines (units) is fixed. The number of day fines shall reflect the seriousness of the crime. In the second step, the size of a day fine is determined on the basis of the daily net income of the defendant. In the third step, the size of the fine is calculated by multiplying the number of day fines by the size of the day fine. Thus, day fines, unlike fixed-sum fines, may be adjusted to the individual financial circumstances of the offender and will satisfy the need for equal punishment.

through channels other than authoritative sentencing guidelines. At first glance, it seems that significant restraints are at work in the sentencing process that prevent the use of protracted prison sentences as a punitive and deterrent response, and those restraints are unaffected by the rhetoric of German politicians—like that of their peers elsewhere—in favor of punitive responses to crime.[3]

A first clue in the analysis of what might serve as a restraint can be found in discourses originating in German politics about broadening the range of preventive detention (Sicherungsverwahrung) as a response to dangerous offenders.[4] Germany was on trial before the European Court of Human Rights on several occasions over the last two years, facing allegations of violations of Article 5 of the European Convention on Human Rights due to the introduction of a retroactive security measure allowing indeterminate (and possibly lifelong) preventive detention for offenders deemed dangerous (particularly violent and sexual offenders).[5] In the court hearings, the German Federal Ministry of Justice presented an interesting argument to the European Court. The Ministry of Justice lawyers argued that this type of security measure (preventive detention for dangerous habitual offenders) was contributing to the relatively low imprisonment rate observed in Germany.[6] Elaborating along this line of reasoning, Winfried Hassemer has argued that the advances in sentencing doctrine and sentencing theory—as well as corresponding standards of reasoning, transparency, and accountability imposed on trial courts by appellate courts and the Federal Court of Justice (Bundesgerichtshof)—have resulted in concentrating the political pursuit of security on this "second track" of criminal sanctions focused on preventive detention instead of personal guilt.[7] In fact, imprisonment rates have been on the decline in Germany for at least a decade, and in some German states this decline is so marked that prison capacity has had to be reduced significantly. The General Accounting Office of the State of Hamburg recently advised the state government to respond to the dramatic decline in the Hamburg prison population by adjusting the prison budget and reducing the prison capacity accordingly.[8]

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3. Hans-Jörg Albrecht, *Bestrafung der Armen? Zu Zusammenhängen zwischen Armut, Kriminalität und Strafrechtsstaat*, *in* GERECHTE AUSGRENZUNG? WOHLFAHRTSPRODUKTION UND DIE NEUE LUST AM STRAFEN 111 (Bernd Dollinger & Henning Schmidt-Semisch eds., 2011).

4. For particulars, see *infra* notes 12–14 and accompanying text.

5. Haidn v. Germany, App. No. 6587/04, Eur. Ct. H.R. (2011); M. v. Germany, App. No. 19359/04, Eur. Ct. H.R. (2010).

6. Heinz Schöch, *Sicherungsverwahrung und Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, *in* STRAFRECHT ALS SCIENTIA UNIVERSALIS; FESTSCHRIFT FÜR CLAUS ROXIN ZUM 80 GEBURTSTAG AM 15 1193, 1203 (2011).

7. Winfried Hassemer, *Sicherheit durch Strafrecht*, 7 HRRS-STRAFRECHT 130, 141 (2006).

8. 3,120 prisoners in 2003; 2,030 in 2008; and 1,720 in 2011. *See* JANN MEYER-ABICH ET AL., JAHRESBERICHT 2009 ÜBER DIE PRÜFUNG DER HAUSHALTS- UND WIRTSCHAFTSFÜHRUNG DER FREIEGIN UND HANSESTADT HAMBURG MIT BEMERKUNGEN ZUR HAUSHALTSRECHNUNG 2007, at 156 (Rechnungshof der Freien und Hansestadt Hamburg 2009).

The argument brought forward in favor of preventive detention is based on a logic of guilt-dependent criminal punishment, restricting not only the imposition of a criminal sentence, but also the length of a prison sentence. A system of sentencing strictly guided and limited by individual guilt—according to this logic—prevents inflation of prison sentences by sidelining incapacitation and the pursuit of security in the decision-making on criminal punishment in the courts. With a separate track of measures of rehabilitation and security, the German system of criminal sanctions provides for a narrow safety valve that very selectively responds to political and public pressure for security and deterrence.

II
AN OUTLINE OF SENTENCING AND CRIMINAL SANCTIONS IN GERMANY

Germany has adopted a two-track system of criminal sanctions: one track for criminal punishment (which requires a finding of guilt and the determination of a fine or a prison sentence) and another providing for so-called measures for rehabilitation and protection of public security.[9] These second-track measures do not depend on personal responsibility; they are not considered to carry blame. Instead, they are the consequence of a finding of dangerousness (based on assessments of risks presented to the court by forensic psychologists or psychiatrists) and a corresponding need for treatment or preventive detention. This two-track approach is based on the belief that proportional punishment limited by the principle of personal guilt may not be sufficient to respond effectively (in terms of public protection) to habitual offenders or offenders suffering from mental diseases or addictions to alcohol or drugs who are likely to recidivate. German criminal law (as well the criminal law of other continental European countries, such as Denmark, Austria, and Switzerland) therefore provides for a line of criminal sanctions that pursues prevention of serious recidivism alone. Measures of treatment and security address three groups of criminal offenders deemed to be particularly at risk of serious recidivism: the mentally ill, the addicted, and the habitual offender.[10] These groups figured prominently as early as in nineteenth century conceptions of crime and punishment.[11] In Germany, preventive detention (Sicherungsverwahrung) may be imposed in place of a prison sentence of two years or more if—besides some formal conditions referring to prior convictions—the status of a habitual felon and dangerousness are established.[12] Starting in 1998, a series of criminal law amendments driven by political

9. Hans-Jörg Albrecht, *Security Gaps: Responding to Dangerous Sex Offenders in the Federal Republic of Germany*, 16 FED. SENT'G REP. 200, 200 (2004).

10. HEINZ KAMMEIER, MAßREGELRECHT (1995).

11. DEVIANCE ET SOCIETE, RISQUE, DANGEROSITE ET SECURITE: RENAISSANCE ET MUTATIONS DE LA DEFENSE SOCIALE 34 (Christian N. Robert & Michel van de Kerchove eds., 2010).

12. STRAFGESETZBUCH [STGB] [CRIMINAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT [BGBL. I] 3322, § 66.

concerns about dangerous sexual offenders widened the legal scope of the preventive sentence significantly,[13] making it applicable retroactively and providing for the possibility of its imposition after a prison sentence has been served. Retroactive application and post-enforcement sentence imposition ultimately brought Germany before the European Court of Human Rights (after the Federal Constitutional Court had turned down challenges by detainees on the ground that the prohibition of retroactivity would apply to criminal punishment only).[14]

The system of sentencing and criminal sanctions implemented in Germany includes substantive and procedural elements.[15] The substantive elements are found in the criminal penalties provided in the criminal code as well as their minimum and maximum ranges, criminal offense statutes carrying each a minimum and maximum penalty, and statutory prescriptions as regards the choice between different criminal sanctions such as day fines and prison sentences. The basic rule on sentencing mentions personal guilt as the decisive factor in determining the sentence, but concedes that the impact of the sentence on the offender should be taken into account.[16] Moreover, a non-exhaustive list of offense and offender-related elements must be considered when it comes to determining the sentence.[17] Beyond that, the sentencing rule says only that characteristics that establish a criminal offense may not be used to justify a particular sentence.[18] The code gives explicit consideration to the victim and victim–offender reconciliation, allowing for mitigation in cases of seriously attempted or completely achieved reconciliation.[19] Recently, a crown-witness provision was introduced that provides for a sentencing discount, too.[20] Particular rules address sentencing of multiple offenses;[21] they demand a cumulative sentence (separate and consecutively enforceable sentences may not be imposed) and result in mandatory sentencing discounts.[22] In cases of statutorily defined mitigating circumstances (most importantly, diminished responsibility, participation in the form of aiding and abetting, and attempt), minimum penalties are lowered significantly.[23] A mandatory and general

13. For a summary of reforms, see Jörg Kinzig, *Die Neuordnung des Rechts der Sicherungsverwahrung*, 4 NEUE JURISTISCHE WOCHENSCHRIFT 177 (2011).

14. Grischa Merkel, Case Note, *Retrospective Preventive Detention in Germany: A Comment on the ECHR Decision* Haidn v. Germany *of 13 January 2011*, 12 GERMAN L.J. 968 (2011).

15. Hans-Jörg Albrecht, SIMPLIFICATION OF CRIMINAL PROCEDURE SETTLEMENTS OUT OF COURT: A COMPARATIVE STUDY OF EUROPEAN CRIMINAL JUSTICE SYSTEMS, 20–23 (2001); Hans-Jörg Albrecht, *Sentencing and Punishment in Germany*, *in* PENAL REFORM IN OVERCROWDED TIMES 139 (Michael Tonry ed., 2001).

16. STGB, Nov. 13, 1998, BGBL. I at 3322, § 46.

17. *Id.*

18. *Id.*

19. *Id.* § 46a.

20. *Id.* § 46b.

21. *Id.* §§ 52–55.

22. *Id.* § 54.

23. *Id.* § 49.

statutory minimum for recidivists was abolished in 1986 (the minimum had previously been raised to six months but was considered to have no practical relevance), but recidivism as an aggravating factor was introduced specifically for sexual abuse offenders in a 2003 criminal law amendment.[24]

The procedural elements affecting sentencing refer to simplified criminal proceedings that—if applied—severely restrict the range of penalties available (day fines and suspended prison sentences up to one year may be imposed),[25] and to the recently introduced formal rules on sentence bargaining; further procedural elements concern the duty to give detailed reasons in writing[26] and the rules that allow for a review of sentencing decisions by the High Court or Federal Court of Justice. The duty to give detailed reasons in writing is suspended if both prosecutor and defense waive the right to appeal, resulting in the verdict becoming immediately final.[27]

The German system of criminal sanction is simple and provides for only two penal sanctions: day fines and imprisonment. Day fines come with a minimum of five-day fines and a maximum of 360-day fines; prison sentences in general may range from one month to fifteen years. The amount of a day fine unit (reflecting the net income of the defendant) may range from €1 to €30,000. Life imprisonment is almost exclusively restricted to murder, and the minimum period to be served before a lifer may be paroled is set at fifteen years. Prison sentences of up to two years may be suspended and conditions (fine, compensation, or community service) may be attached. The choice between a day fine and a short prison sentence (below six months) is strictly regulated (after a major law reform in 1969),[28] giving priority to day fines and imposing a duty on courts to explain in writing why the priority rule should not apply. Most criminal offense statutes do not prescribe a minimum sentence but define the maximum penalty only. For offenses considered the most serious, minimum penalties are statutorily defined, and the most common minimum penalty is one-year imprisonment. However, for selected serious crimes (in particular, aggravated robbery, rape, drug trafficking, and homicide) the minimum is raised to two, three, or five years, and, in exceptional cases, to ten years. But such increased minimums regularly come with a provision that reopens the minimum and provides for a lesser minimum in cases of crimes of "less seriousness" ("minder schwere Fälle"). In almost all of these cases, reduced minimums result in the possibility of suspending a prison sentence. A full criminal trial can be circumvented by resorting to simplified procedures and the

24. Hans-Jörg Albrecht, *Sexualstrafrecht—Reformen und Ergebnisse*, 59 RECHT DER JUGEND UND DES BILDUNGSWESENS 148, 154 (2011).

25. STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBL. I at 1074, § 407.

26. *Id.* § 267.

27. *Id.*

28. ERSTES GESETZ ZUR REFORM DES STRAFRECHTS (STRRG) [FIRST LAW AMENDING CRIMINAL LAW], June 25, 1969, BGBL. I at 645.

imposition of a penal order (Strafbefehl). A so-called penal order does not require a trial, but restricts the sentence imposed in the penal order to a day fine or a suspended sentence of imprisonment of a maximum of one year.[29]

Summarizing some of the characteristics of the German system of sentencing and sanctions that follow simply from substantive and procedural rules and that are of relevance for the analysis of stability, we find:

(a) No effective statutory and mandatory minimums,

(b) Strict obligations to justify sentencing in detail and in writing,

(c) Incentives to resort to lower penalty ranges with provisions for

(i) Simplified proceedings, and

(ii) Reduced obligations to give reasons for sentencing,

(d) Strict limitation of prison sentences to a fifteen-year maximum,

(e) Multiple-offense sentencing statutes preventing separately enforceable sentences, and

(f) A two-track system of criminal sanctions that separates preventive and retributive functions.

III

CRIME, SENTENCING, AND STABILITY: COMPARATIVE PERSPECTIVES

Over the last two decades, prisoner rates have increased significantly in many European countries, and particularly in North America. When looking at comparative prisoner rates in 2010 and 2011, Germany places in the bottom half of European countries. When looking at the course of imprisonment rates from various countries, Germany turns out to differ from a group of countries that have exhibited, during the last two decades, extreme movements in prisoner rates. The Netherlands, Spain, France, and especially England–Wales experienced a long-term increase in imprisonment rates from the 1980s forward.[30] This rate increase resulted, for example, in a quadrupling of the prison population in the Netherlands and unprecedented prisoner rates in England–Wales and Spain.[31] On the other hand, the Dutch prisons over the last six years have been rapidly emptied, which resulted in the closing of prisons.[32] Other countries exhibited further growth (particularly France after President Sarkozy put an end to the regular implementation of amnesties).[33]

Michael Tonry has raised the question why—despite facing the same crime problems and displaying the same punitive discourses in the political arena—

29. Hans-Jörg Albrecht, SIMPLIFICATION OF CRIMINAL PROCEDURE SETTLEMENTS OUT OF COURT: A COMPARATIVE STUDY OF EUROPEAN CRIMINAL JUSTICE SYSTEMS, 13–14 (2001).

30. *World Prison Brief: Europe*, INT'L CTR. FOR PRISON STUDIES, http://www.prisonstudies.org/info/worldbrief/?search=europe&x=Europe (last visited Mar. 23, 2012),

31. *Id.*

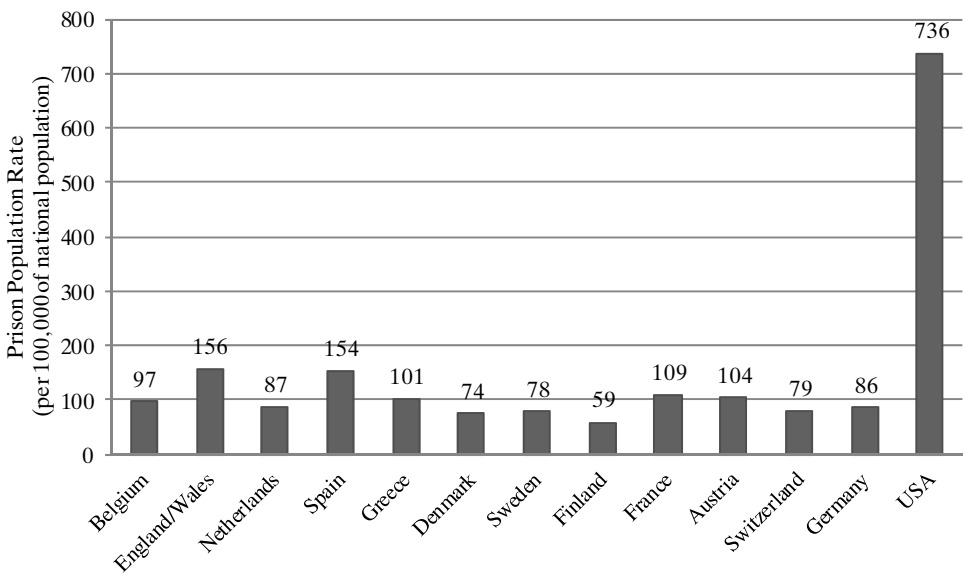
32. ROB ALLEN, REDUCING THE USE OF IMPRISONMENT: WHAT CAN WE LEARN FROM EUROPE? 5 (2012).

33. René Lévy, *Pardons and Amnesties as Policy Instruments in Contemporary France*, *in* CRIME, PUNISHMENT, AND POLITICS IN COMPARATIVE PERSPECTIVE 551, 580–82 (Michael Tonry ed., 2007).

German penal policies were not harsher and imprisonment rates higher.[34] From the course of German rates of imprisonment, on display in Graph 2, it seems clear that the crime rate is not strongly correlated with prisoner rates (exhibiting a Pearson correlation coefficient of -.054 in the observed data). Crime evidently does not explain punishment, at least not to a substantial extent and in its most serious form of imprisonment. In the 1960s and 1970s imprisonment rates declined while crime rates increased significantly. From the mid 1970s until the beginning of the 1980s a small window opens demonstrating a parallel increase of crime rates and prisoner rates. In the 1980s until the beginning of the 1990s imprisonment rates declined again while crime rates continued to climb. From the mid 1990s until today the imprisonment rate follows the crime rate in a remarkably stable and consistent way. Prisoner rates, therefore, are driven by policy, sentencing, or both.

In contrast, England–Wales, the United States, Spain, and recently France display a reverse pattern. Rates of imprisonment moved up despite a long-term trend of declining crime rates[35] (for the United States and England–Wales this is accounted for in both police statistics and crime surveys).[36] Stable rates of

Graph 1: Prisoner Rates in Europe and in the United States, 2010–2011 (Most Recent Figures).[37]



34. Michael Tonry, *Why Aren't German Penal Policies Harsher and Imprisonment Rates Higher?*, 5 GERMAN L.J. 1187 (2004).

35. THE PEW CTR. ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS (2010); ROY WALMSLEY, WORLD PRISON POPULATION LIST (8th ed. 2009).

36. JENNIFER L. TRUMAN & MICHAEL R. RAND, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2009 (Georgette Walsh & Jill Duncan eds., 2010); CRIME IN ENGLAND AND WALES 2010/11: FINDINGS FROM THE BRITISH CRIME SURVEY AND POLICE RECORDED CRIME (Rupert Chaplin et al. eds., 2d ed. 2009); INT'L CTR. FOR PRISON STUDIES, *supra* note 30.

37. Source: INT'L CTR. FOR PRISON STUDIES, *supra* note 30.

imprisonment are observed in most Scandinavian countries, with the exception of Finland where rates of imprisonment declined significantly during the 1990s.[38]

The course of imprisonment rates in Germany sometimes follows the course of crime rates, but also consistently responds to criminal law reforms that restrict imprisonment or offer alternatives to imprisonment. The drop in the number of prisoners in the second half of the 1960s was caused by the introduction of a rule giving priority to day fines and requiring detailed reasoning when courts resort to short-term prison sentences.[39] The drop occurring in the 1980s reflects the impact of a criminal law amendment lowering the legal requirements to suspend a prison sentence.[40]

International comparative research on criminal sanctions and sentencing is still in its infancy. Research so far has dealt with various approaches to explain increases (and, to a lesser extent, decreases) in prison populations. Increases in prisoner rates are commonly linked to a growth in the demand for punishment. Public opinion has been perceived as crucial in understanding the increase in prison populations in some countries.[41] However, it is evident that the course of

Graph 2: Rates of Imprisonment and Crime in Germany 1961 Through 2010.[42]

38. Tapio Lappi-Seppälä, *Reducing the Prison Population: Long-Term Experiences from Finland*, *in* CRIME POLICY IN EUROPE 139, 148–49 (Council of Europe ed., 2004).

39. STGB, Nov. 13, 1998, BGBL. I at 3322, § 47.

40. 23. STRAFRECHTSÄNDERUNGSGESETZ [CRIMINAL LAW AMENDMENT ACT], Apr. 13, 1986, BGBL. I at 393.

41. Arie Freiberg & Karen Gelb, *Penal Populism, Sentencing Councils and Sentencing Policy*, *in* PENAL POPULISM, SENTENCING COUNCILS AND SENTENCING POLICY 1, 3 (Arie Freiberg & Karen Gelb eds., 2008).

42. Sources: Bundeskriminalamt: Polizeiliche Kriminalstatistik 1961–2010. Wiesbaden 1962–2011; Statistisches Bundesamt: Strafvollzug 1961–2010. Wiesbaden 1962–2011.

imprisonment and the trends in the size of prison populations do not follow a common set of variables or conditions. Developments in prison populations are diverse and reflect—as Tonry and Farrington recently observed—idiosyncrasies that necessitate careful analysis of individual national systems of sanctions and criminal justice.[43]

Political will as to what role prison sentences should play in a system of criminal sanctions and how they should be enforced certainly holds a central place in explanations of the differences in prison populations. A major impact on the size of prison populations can be expected from deliberate political decisions to cut down the use of imprisonment. Examples can be drawn from decisions made by Austrian and German parliaments to reduce the use of short-term prison sentences (up to six months) in the 1960s.[44] Finland opted also for a major change in the use of prison sentences when making a decision to adopt practices implemented in other Scandinavian countries.[45] Both examples, the German–Austrian as well as the Finnish, also demonstrate what is needed to initiate political discourses and ultimately political changes that reduce the prison population effectively: a justificatory system or a narrative that is politically acceptable, that endorses decarceration policies or alternatives to imprisonment, and that is embraced by the legal professions to whom the implementation of crime policies is entrusted.[46] The narrative drawn from the program of Franz von Liszt[47] was very successful when Germany and Austria implemented a criminal policy that gave priority to fines and drastically cut back short prison sentences in the 1960s. In Finland, it was evidently the desire to fall in line with the rest of the Scandinavian countries that resulted in adopting a decarceration policy that decreased the prison population significantly.[48]

However, it is not clear how such narratives are put to work effectively and, in particular, how they achieve insertion into the collective conscience and value system of the judiciary and other legal professions.

The Finnish case shows that discourses on the role of prison sentences and the size of the prison population may be initiated by placing national prison figures and sentencing practices into a comparative perspective.[49] In the 1990s in

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43. Michael Tonry & David P. Farrington, *Punishment and Crime Across Space and Time*, *in* CRIME AND PUNISHMENT IN WESTERN COUNTRIES, 1980–1999, at 1 (Michael Tonry & David P. Farrington eds., 2005).

44. HANS-HEINRICH JESCHECK & GERHARDT GREBING, DIE GELDSTRAFE IM DEUTSCHEN UND AUSLÄNDISCHEN RECHT 39, 663–664 (1978).

45. Lappi-Seppälä, *supra* note 37.

46. James B. Jacobs, *Finding Alternatives to the Carceral State*, 74 SOC. RES. 695 (2007).

47. Franz von Liszt, *Der Zweckgedanke im Strafrecht*, 3 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 33 (1883) (arguing that imprisonment without long-term rehabilitative efforts would particularly make first-time offenders worse, and therefore criminal punishment in the lower scales of seriousness should not exceed a fine).

48. Hanns von Hofer, Tapio Lappi-Seppälä & Lars Westfelt, NORDIC CRIMINAL STATISTICS 1950–2010, at 16 (8th ed. 2012); Lappi-Seppälä, *supra* note 37.

49. Tapio Lappi-Seppälä, *Penal Policy in Scandinavia*, 36 CRIME & JUST. 217, 233-44 (2007).

Australia, the question was raised why New South Wales would experience a much higher prisoner rate than the demographically similar state of Victoria.[50] The research suggested a mix of causes. In New South Wales, more imprisonment for fine default, longer prison sentences, and a higher rate of custodial sentences can be observed; whereas Victoria makes use of an additional alternative, periodic detention. Such comparisons seem to become effective within clusters of countries (or political entities) that are, due to various reasons, close to each other. However, comparisons may also result in discourses that point towards sentence enhancements and increases in the size of the prison population. At the occasion of the publication of English prison figures in 2005, the Chairman of a Northern Irish political party expressed surprise when he noticed that Northern Ireland had prison population figures of half of those documented for England–Wales.[51] Referring to pressing issues of violence and security, it was then stated that the public would not understand that Northern Ireland resorts very rarely to imprisonment.

The questions to be answered now concern, first, how stability in sentencing outcomes can be demonstrated other than by the rather crude measures of imprisonment rates, and, second, what explains stability in basic patterns of sentencing, if stability can be observed.

IV
MEASURES OF STABILITY IN SENTENCING

Stability of sentencing can be observed when looking at the course of the structure of criminal sanctions. In this respect, Germany displays a remarkably stable pattern. Between 1970 and 2010, the structure of criminal penalties evidently did not change at all. In 1970, after a political decision to give priority to fines, fines accounted for more than 80% of criminal penalties—the same proportion that can be found in 2010. In between, minor fluctuations reflect "white noise" only.[52]

When considering developments in the second track (measures of rehabilitation and security), we find a long-term decline in the number of offenders sentenced to incapacitating preventive detention. This trend was reversed in the mid-1990s, when dangerous-sexual-offender legislation widened the applicability of preventive detention.[53] This development was stopped by a

50. PATRICIA GALLAGHER, NEW SOUTH WALES BUREAU OF CRIME STATISTICS AND RESEARCH, WHY DOES NSW HAVE A HIGHER IMPRISONMENT RATE THAN VICTORIA? (1995).

51. *Surprise at Prison Population Figures*, THE ALLIANCE PARTY OF N. IR. (Sept. 11, 2005), http://web.archive.org/web/20050926143117/http://www.allianceparty.org/news.asp?id=1576 (internet archive).

52. WOLFGANG HEINZ, DAS STRAFRECHTLICHE SANKTIONENSYSTEM UND DIE SANKTIONIERUNGSPRAXIS IN DEUTSCHLAND 1882–2008, at 67 (2010).

53. JÖRG KINZIG, DIE LEGALBEWÄHRUNG GEFÄHRLICHER RÜCKFALLTÄTER: ZUGLEICH EIN BEITRAG ZUR ENTWICKLUNG DES RECHTS DER SICHERUNGSVERWAHRUNG (2010); Jörg Kinzig, *Das Recht der Sicherungsverwahrung nach dem Urteil des EGMR in Sachen M. gegen Deutschland*, 30 NEUE ZEITSCHRIFT FÜR STRAFRECHT 233 (2010).

series of decisions of the European Court of Human Rights mentioned above[54] and ultimately by a landmark decision of the German Federal Constitutional Court[55] declaring all second track provisions related to preventive detention (Sicherungsverwahrung) to be unconstitutional (due to violation of the principle of proportionality) and fixing a time limit of 2013 for the Federal Parliament to enact legislation in line with the Basic Law (Grundgesetz, German Constitution). However, the absolute number of offenders sentenced to preventive detention and confined after having served a prison sentence was always relatively small, amounting in the year 2010, for example, to 101 cases (preventive detainees never comprised more than 1% of the prison population at large).[56] Such small numbers certainly will not affect the structure (and stability) significantly; the existence of such a group of detainees characterizes a penal system that exposes a few offenders to extreme (indeterminate and possibly lifelong) measures of security in exchange for routine sentence application in the first track of criminal sanctions. As mentioned in the introduction, Hassemer has interpreted the role of the second track as relieving the system of criminal penalties and sentencing from pressure to consider dangerousness and security when imposing criminal punishment. A system of punishment determined and restricted by personal guilt will be in all societies—focused on risk and the management of risk—confronted with an enormous pressure to accept risk and the prevention of risk as a salient goal.[57] With a two-track system, risk management can be channeled to measures of security that follow a different logic of implementation.

Another way of making stability in sentencing and sentencing outcomes visible concerns patterns in the length of imprisonment imposed and the course these patterns take. Four cases will be presented: burglary, aggravated robbery, rape, and homicide. These offenses were chosen because they represent varying degrees of policy choices as regards resorting to prison sentences due to different minimum sentences prescribed by the offense statutes. Although robbery, rape, and homicide offense statutes prescribe minimum penalties,[58] these statutes also include rules that lower the minimum penalty for "less

54. See *supra* note 5.

55. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 22, 2009, 2 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 2365.

56. STATISTISCHES BUNDESAMT, RECHTSPFLEGE—STRAFVERFOLGUNG 2010, 331 (2011).

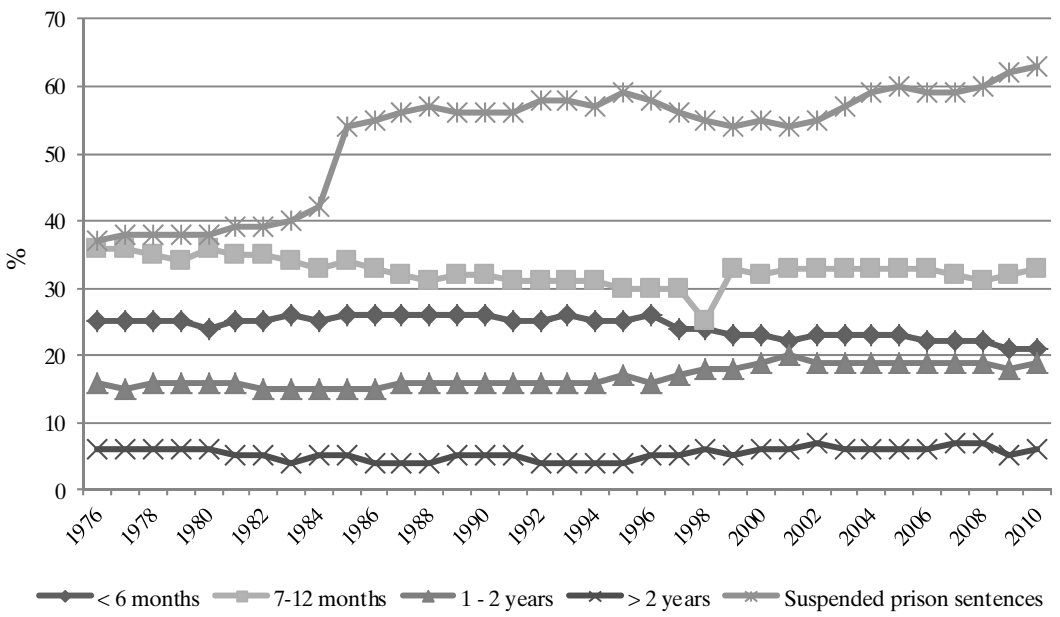
57. Hassemer, *supra* note 7, at 133.

58. The minimum penalty for burglary is three months. STGB, Nov. 13, 1998, BGBL. I at 3322, § 243. The minimum penalty for rape is two years (until the end of the 1990s—in 1998, as a result of expanding the offense statute and including marital rape cases and sexual assault in general, the minimums were differentiated into one, two, three, and five year categories). *Id.* § 177. The aggravated-robbery offense statute prescribed a minimum penalty of five years imprisonment (until the end of the 1990s, then the minimum was split up into three years and five years attached to different sets of aggravating circumstances). *Id.* § 250. Murder carries life. *Id.* § 211. And voluntary homicide carries five years. *Id.* § 212. For rape, aggravated robbery, and homicide the minimums are statutorily downgraded for less-serious offenses (for rape, six months to one year, *id.* § 177(V), aggravated robbery one year, *id.* § 250(III), and homicide one year, *id.* § 213).

serious cases" (of rape, robbery or homicide) to penalty ranges that allow for suspension of a prison sentence. A definition of less serious offenses is not provided by the law, but is left to the assessment of criminal courts, which on appeal is subject to review by the Federal Court of Justice.[59]

Sentencing of burglary cases results—in the thirty-five year period covered in Graph 3—in a stable pattern of prison sentences (and day fines). There is evidence that an amendment mentioned above,[60] which lifted particular restrictions placed on suspending prison sentences between one and two years, had a significant impact by increasing the rate of suspended prison sentences in burglary cases immediately from about 40% to approximately 60%. However, after this significant increase, the rate of suspended prison sentences tends to become stable again at around 60%. Moreover, the rate of day fines imposed for burglary offenses (a day fine may replace a prison sentence between three and six months) between 1976 and 2010 likewise does not reveal particular trends. The rate does not vary significantly from an average of about 25% during the period under observation. Most importantly, long prison sentences (over two years), despite a statutory maximum prison sentence of ten years, remain consistent and, over a period of thirty-five years, well under 10% of all sentences imposed for burglary. Although burglary and burglars in the 1960s

Graph 3: Prison Sentence Length and Rates of Suspended Prison Sentences for Burglary, 1976–2010 (%).[61]



59. *See* Sönke Gerhold, *Der unbenannte minder schwere Fall im Strafrecht und seine Bedeutung für die Strafzumessung*, 2 ZEITSCHRIFT FÜR DAS JURISTISCHE STUDIUM 260 (2009).

60. See *supra* note 39.

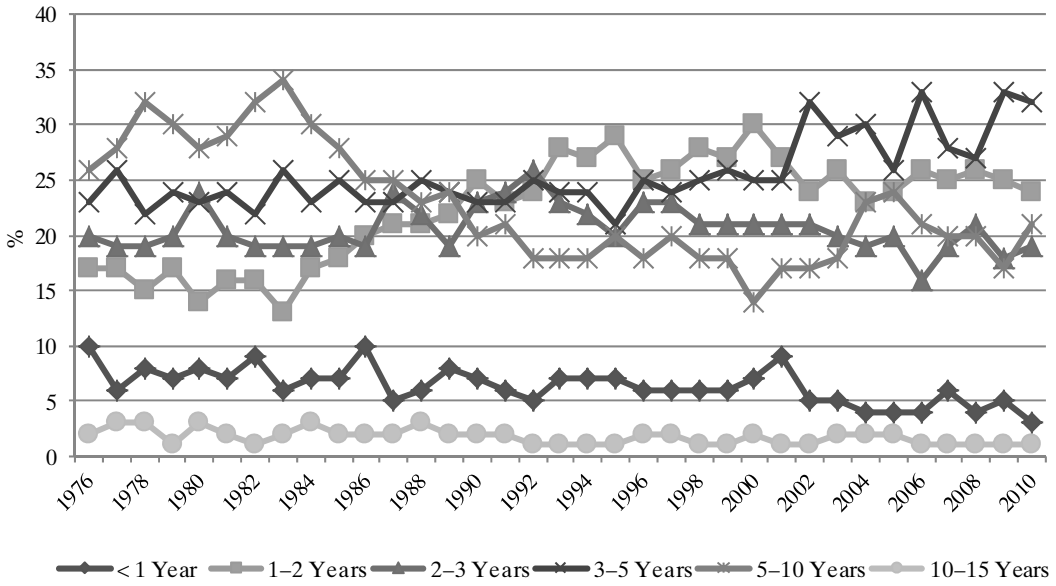
61. Sources: Statistisches Bundesamt: Strafverfolgung 1976–2010. Wiesbaden 1977–2011.

were still convenient candidates for the second track and preventive detention due to the large share of recidivists, and in particular recidivists easily passing the formal thresholds of preventive detention (prior convictions and prior prison experience), property offenders moved out of preventive detention since the 1960s. This trend was initiated by court practice in the 1970s and 1980s and then acknowledged in recent amendments restricting imposition of preventive detention essentially to violent crimes.[62]

Aggravated robbery carries a minimum prison sentence of five years (since the end of the 1990s, minimums of three and five years) and a statutory maximum of fifteen years. However, the offense statute reduces the minimum penalty to one year if a case of minor seriousness is established.

Graph 4 shows that over a thirty-four year period, consistently around 70–75% of sentences fall below the statutory minimum of five years (revised in 1998). In the upper half of the regular sentencing range (ten to fifteen years), a stable trend prevails. Imprisonment of more than five years holds a constant level between 1976 and 2010. Changes are evidently confined to the area below the regular minimum penalty and to an exchange of penalties from above five years to prison sentences of between three and five years. A change, indicating a move towards imprisonment of between one and two years, is paralleled by an

Graph 4: Prison Sentence Length and Rates of Suspended Prison Sentences for Aggravated Robbery, 1976–2010 (%).[63]



62. JÖRG KINZIG, DIE LEGALBEWÄHRUNG GEFÄHRLICHER RÜCKFALLTÄTER: ZUGLEICH EIN BEITRAG ZUR ENTWICKLUNG DES RECHTS DER SICHERUNGSVERWAHRUNG (2010); JÖRG KINZIG, DIE SICHERUNGSVERWAHRUNG AUF DEM PRÜFSTAND: ERGEBNISSE EINER THEORETISCHEN UND EMPIRISCHEN BESTANDSAUFNAHME DES ZUSTANDES EINER MAßREGEL (1996).

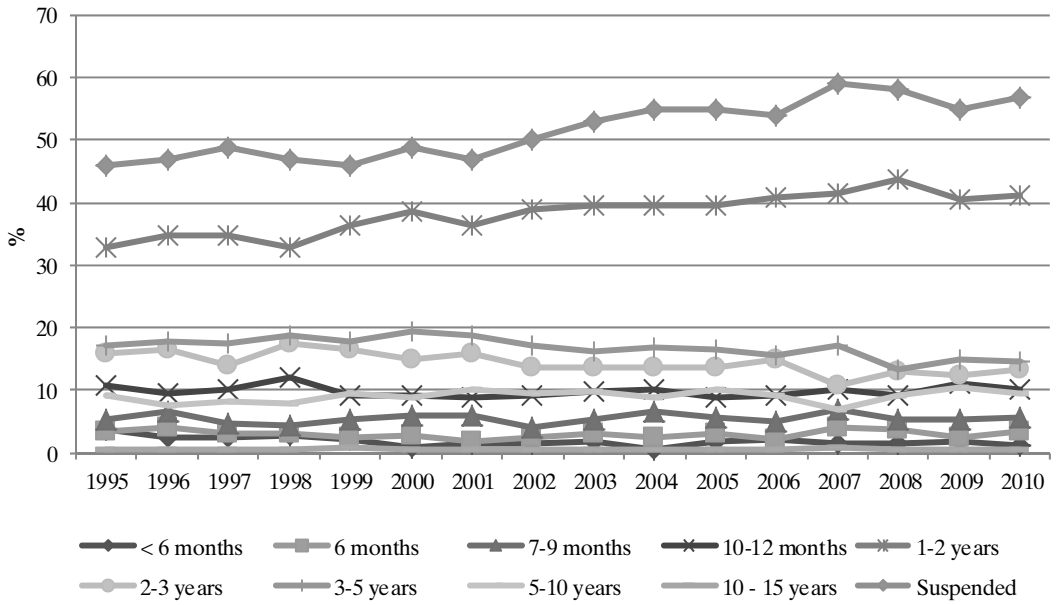
63. Sources: Statistisches Bundesamt: Strafverfolgung 1976–2010. Wiesbaden 1977–2011.

increase in suspended prison sentences. In robbery cases, the use of preventive detention remains stable; preventive detention is added to approximately 0.5% of aggravated robbery sentences.

The time series accounting for sentences for rape offenses offers an opportunity not only to look at stability but also at possible effects of a major revision of the rape statute in 1998.[64] This amendment—which went into force in 1998—followed public outrage about sexual murders of children by sexual offenders released on forensic assessments of having a low risk of re-offending.[65] As indicated above, the minimum penalties were differentiated and raised according to various aggravating circumstances.[66] Moreover, restrictions on the security measure of preventive detention have been eased. The amendment went beyond the provision of enhancement of punishment and easing preventive detention. The amendment responded also to other policy issues, including marital rape as well as same-gender rape.

When looking at sentencing patterns unfolding between 1995 and 2010 in rape cases, two trends can be observed: an increase in prison sentences of one to two years and a parallel increase in the rate of suspended prison sentences.

Graph 5: Prison Sentence Length and Rates of Suspended Prison Sentences for Rape, 1995–2010 (%).[67]



64. GESETZ ZUR BEKÄMPFUNG VON SEXUALDELIKTEN UND ANDEREN GEFÄHRLICHEN STRAFTATEN [LAW ON COMBATING SEXUAL CRIME AND OTHER DANGEROUS CRIMINAL OFFENSES], Jan. 26, 1998, BGBL. I at 160.

65. Hans-Jörg Albrecht, *Die Determinanten der Sexualstrafrechtsreform*, 111 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 863 (1999).

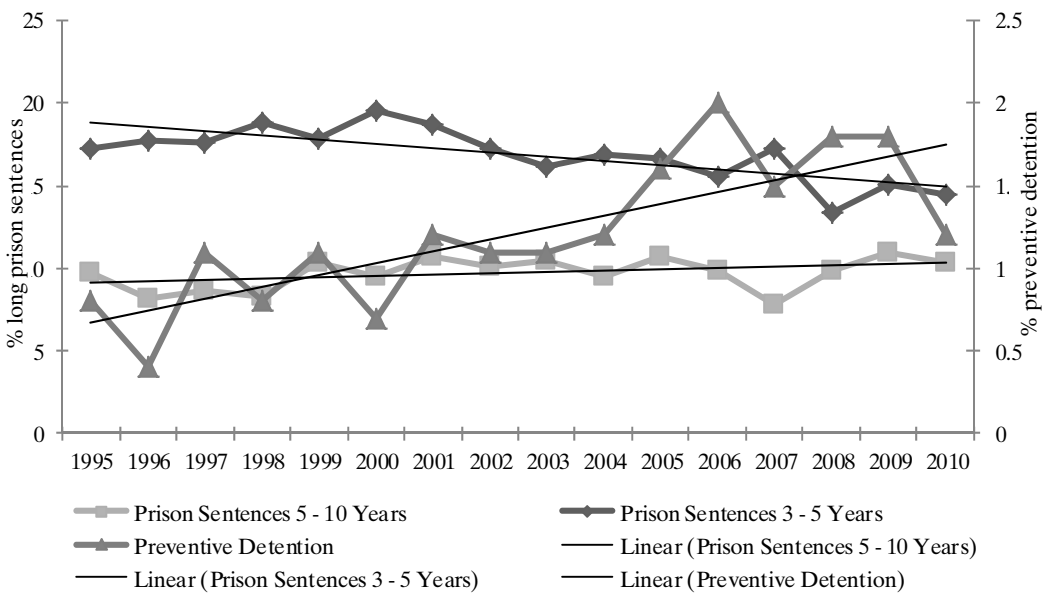
66. See *supra* note 58.

67. Sources: Statistisches Bundesamt: Strafverfolgung 1995–2010. Wiesbaden 1996–2011.

The increase in the one to two years category slightly affects other categories of prison sentences.

From police statistics it is known that during the last twenty years, and evidently influenced by the law reform of 1998, patterns of victim–offender relationships in rape cases known to the police changed.[68] Although the number of stranger rapes reported to police declined, the number of rapes in close partnerships increased. From that it may tentatively be concluded that the changes in the one to two years category and the increase in suspended sentences reflect a change in the structure of rape cases brought to criminal courts. It may be assumed that marital rape cases attract more prison sentences out of the one to two years category, which in turn will also be more likely to be suspended (an assumption that is plausible on the basis of what is known about the effect of the victim–offender relationship on sentencing).[69] Trends in other sentence categories display stability. A look at the imposition of preventive detention during this period reveals a slight increase in absolute numbers (before 1998 preventive detention is imposed on average in eleven cases per year; in the period after 1998 some twenty-one cases are counted per year).

Graph 6: Long Prison Sentences and Preventive Detention in Rape Cases.[70]



68. *PKS-Zeitreihen 1987 bis 2011* (Jan. 19, 2013), http://www.bka.de/nn_193232/DE/Publikationen/PolizeilicheKriminalstatistik/PksZeitreihen/pksZeitreihen__node.html?__nnn=true.

69. HANS-JÖRG ALBRECHT, STRAFZUMESSUNG BEI SCHWERER KRIMINALITÄT; EINE VERGLEICHENDE THEORETISCHE UND EMPIRISCHE STUDIE ZUR HERTSTELLUNG UND DARSTELLUNG DES STRAFMASSES (1994) [hereinafter ALBRECHT, STRAFZUMESSUNG BEI SCHWERER KRIMINALITÄT]; Hans-Jörg Albrecht, *Sentencing and Disparity—A Comparative Study*, 2 EUR. J. ON CRIM. POL'Y & RES. 98 (1994) [hereinafter Albrecht, *Sentencing and Disparity*].

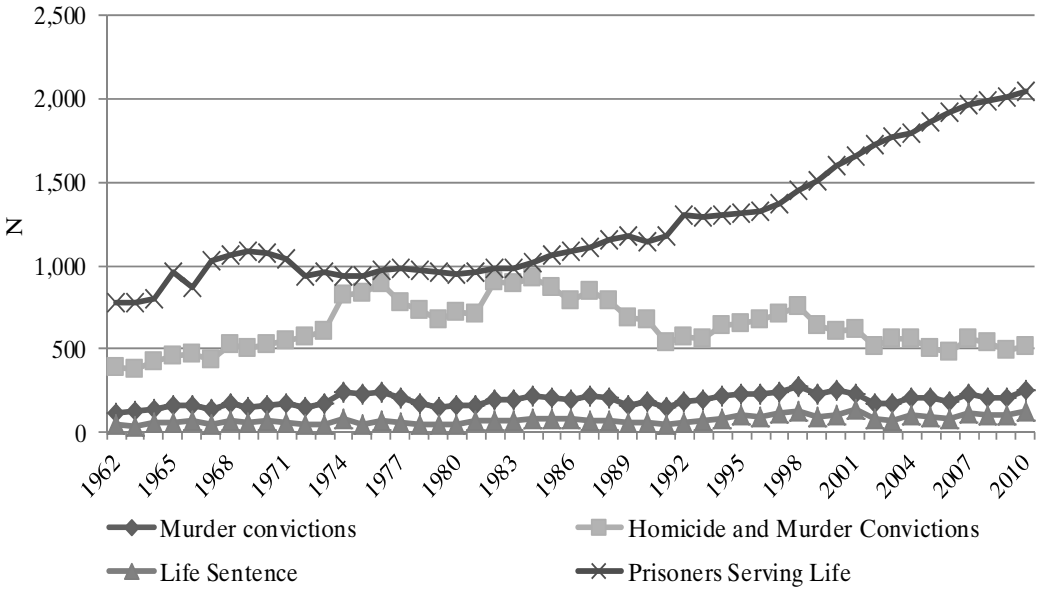
70. Sources: Statistisches Bundesamt: Strafverfolgung 1995–2010. Wiesbaden 1996–2011.

Criminal courts thus have responded to the amendment of 1998 as Hassemer has suggested.[71] Criminal punishment after the reform was imposed in the same way and with the same results as was done before. The course of criminal punishment evidently does not reflect security concerns. This is in line with decisions of the Federal Court of Justice (Bundesgerichtshof) holding that incapacitation may not be invoked as grounds in sentencing since the second track of criminal sanctions provides for exclusive rules regarding security and protection of the public.[72]

The safety valve of preventive detention on the second track was opened slightly to trap a few more sex offenders, but the punishment track remained stable—and with that the imposition of prison sentences on the basis of personal responsibility and guilt.

Stability in sentencing is also visible in murder and homicide cases. Murder as defined in § 211 of the Criminal Code carries mandatory life imprisonment. However, decisions of the Federal Constitutional Court and the Federal Court of Justice—despite the explicit wording of the law—have opened the murder statute for prison sentences below life (basically with the argument that a

Graph 7: Homicide and Murder Convictions, Life Sentences, and Prisoners Serving Life Sentences (N).[73]



71. *See* Hassemer, *supra* note 7, at 133.

72. Bundesgerichtshof [BGH] [Federal Court of Justice], 21 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 595, 2001.

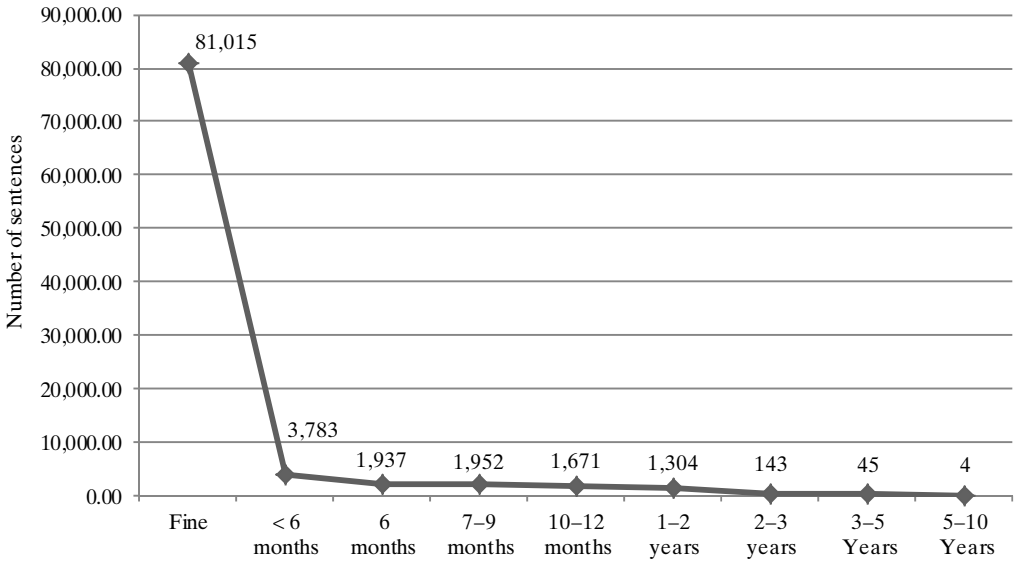
73. Sources: Statistisches Bundesamt: Reihe Strafverfolgung 1962–2010. Wiesbaden 1963–2011; Reihe Strafvollzug 1962–2010. Wiesbaden 1963–2011.

mandatory criminal penalty does not comply with the need for individualization and the consideration of personal guilt).[74]

In fact, murder convictions during the last fifty years never generated a corresponding number of life prison sentences. Courts obviously found ways to circumvent the mandatory penalty long before the Federal Constitutional Court held that a murder conviction need not always result in life imprisonment.[75] From the conviction and sentencing data as well as data on offenders serving life sentences, it may be concluded that despite long-term flat lines in murder convictions and life sentences, the number of prisoners serving life sentences doubled between the early 1980s and 2010. The only explanation here may be found in life prisoners serving longer terms and post-sentencing decisions that delay release from life imprisonment.

A last approach to sentencing stability concerns a look at the reversed J-curve distribution of sentencing outcomes. The reversed J-curve distribution comes in two forms and evidently can be traced back to the beginning of the twentieth century. For the first decades of the twentieth century, Franz Exner pointed out that criminal sentences were not normally distributed over the penalty range prescribed in a criminal offense statute but—in those cases for which data back then were accessible—come in the form of a reversed J-

Graph 8: Sentencing Fraud—Distribution of Criminal Sentences, 2010.[76]



74. Tatjana Hörnle, *Strafzumessungslehre im Lichte des Grundgesetzes*, DAS STRAFENDE GESETZ IM SOZIALEN RECHTSSTAAT 105 (Eva Schumann ed., 2010).

75. *See* KLAUS SESSAR, RECHTLICHE UND SOZIALE PROZESSE EINER DEFINITION DER TÖTUNGSKRIMINALITÄT 186–87 (1981) (outlining judicial strategies which avoid the imposition of a life sentence).

76. Source: Statistisches Bundesamt, Reihe Strafverfolgung 2010. Wiesbaden 2011.

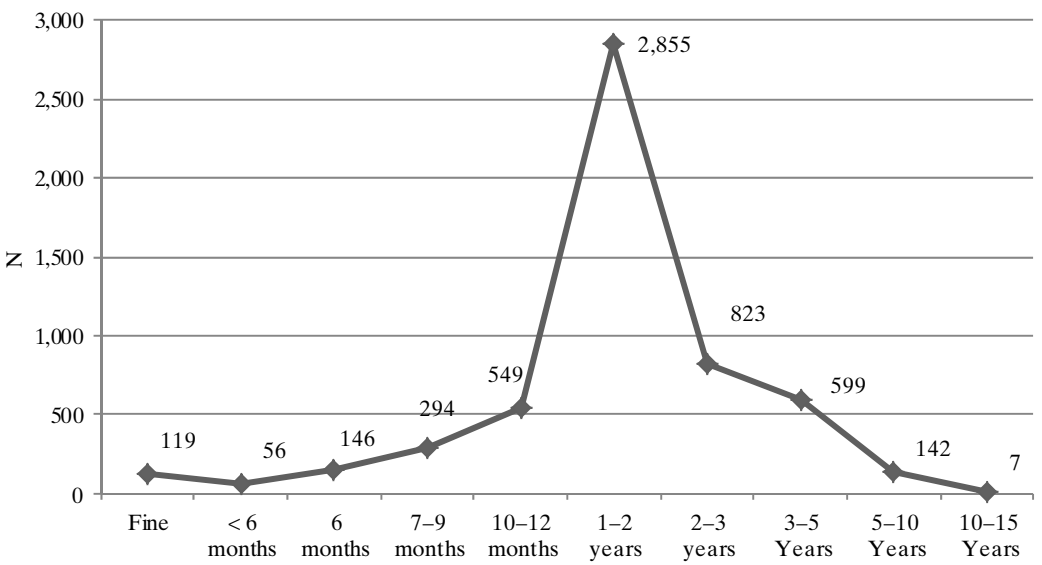
distribution, placing the bulk of penalties close to the minimum prescribed by a criminal offense statute.[77]

Sentencing of fraud cases results in an extreme reversed J-distribution. The fraud offense statute carries a penalty range of a minimum of a day fine and a maximum of ten years' imprisonment. Data on display in Graph 8 shows that sentences above two years are extremely rare and that the bulk of sentences are concentrated on penalties below six months and on day fines. Virtually all criminal offenses with a maximum of five years (or lower) and no minimum display this distribution.

Another type of reversed J-distribution becomes apparent in cases with an elevated minimum penalty. Here, the distribution charts sentences below the minimum in cases when courts resort to the reduced sentence made available through provisions exempting less serious offenses from the mandatory minimums.

Section 29a I, No. 2 of the Narcotics Law provides for a minimum of one-year imprisonment and a maximum of the general maximum (fifteen years) for drug trafficking (including production, trafficking, and possession of significant amounts of controlled drugs).[78] In cases of minor seriousness, the minimum is reduced to three months. The distribution of sentences approaches a normal distribution (when considering day fines as the legal minimum). However, the

Graph 9: Distribution of Criminal Sentences for Drug Trafficking (Significant Amounts of Drugs).[79]



77. FRANZ EXNER, STUDIEN ÜBER DIE STRAFZUMESSUNGSPRAXIS DER DEUTSCHEN GERICHTE 75–85 (1931).

78. GESETZ ÜBER DEN VERKEHR MIT BETÄUBUNGSMITTELN [LAW ON THE MARKETING OF DRUGS], July 28, 1981, BETÄUBUNGSMITTELGESETZ [BTMG].

79. Source: Statistisches Bundesamt: Reihe Strafverfolgung 2010. Wiesbaden 2011.

left side of the distribution exhibits exemptions from the regular range of penalties that start at the one- to two-years category. From this point on, the reversed J-curve takes effect, demonstrating the concentration of sentences at the bottom of the penalty range.

Summarizing sentencing patterns for Germany, it can be concluded that criminal punishment demonstrates significant stability over the last four decades. The structure of criminal sanctions and measures of sentence length also exhibit immediate responsiveness to criminal law amendments that established priority over fines at the end of the 1960s and expanded suspension of prison sentences in the 1980s. Responsiveness to law reform addressing the choice between fines, prison sentences, suspended prison sentences, and immediate imprisonment may be explained by a reversed J-distribution of criminal sentences that places the bulk of criminal sentences in penalty ranges that are open to these choices. The provision of less-serious offense statutes allowing deviation from elevated minimum penalties opens a road back to the choice between day fines and prison sentences, or suspended and immediate imprisonment. The question of stability of sentencing therefore moves away from sentence length and towards the choice between intermediate (or community) penalties and imprisonment. The second track of sanctions, a major issue of law reforms aiming at protection of the public in the 1990s and in the new millennium, does not affect structure and stability of criminal punishment, but serves evidently as a safety valve that exposes few offenders (a negligible number in terms of structure and structural impact) assessed to be dangerous in rather complex and complicated proceedings to indeterminate confinement. Although a direct test of the "safety valve" hypothesis is not possible, the time series of criminal punishment and preventive detention provide for significant empirical support of a theoretically plausible mechanism exerting restraint on resorting to long prison sentences.

V
WHAT ACCOUNTS FOR STABILITY IN SENTENCING?

Explanations of the course of criminal sentencing on the basis of comparative approaches have been sought over the last decade in the political and social framework within which sentencing is implemented and in the constitutional arrangements that define the relationship between the judiciary, the public, and the political system.[80] Explanations have been sought in differences in the welfare orientation expressed in penal systems.[81] In fact, retention of welfare policies seems to be correlated with vertical trust (trust in state institutions), less punitive attitudes of the public, and, ultimately, less use

80. *See, e.g.*, MICHAEL CAVADINO & JAMES DIGNAN, PENAL SYSTEMS: A COMPARATIVE APPROACH (2006).

81. DAVID GARLAND, PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES (1985); Lappi-Seppälä, *supra* note 49.

of imprisonment and more stable patterns of imprisonment.[82] However, France, Greece, Belgium, and Spain have political agendas embracing the welfare state but display punitive patterns in the development of criminal penalties and prison populations.

Thus, the extent of insulation of the judiciary from the political system has been proposed as an explanatory factor. Insulation of the judiciary and protection against political pressures to implement punitive policies may make transformation of punitive tendencies into sentencing practice more difficult and sustain stability. In particular, when considering that certain arrangements might be designed to "reflect public emotion" in sentencing,[83] this assumption certainly has considerable credit when comparing the United States with continental European countries. But differences in such arrangements do not explain why judicial systems that are comparably insulated and designed to separate judicial and political arenas display completely different patterns of sentencing (and responses to punitive discourses and policies). Germany also seems to be different in another aspect of the political (and legislative) input into the system of sentencing. In Germany, there has not been a serious political attempt at raising minimum sentences in the last five decades without offering at the same time an escape ramp in the form of a "minor seriousness" category that then reopened the way back to lesser penalty ranges.[84]

Insulation (and stability) might also be achieved through a professionalized body of judges, and a consolidated and imagined (but convincing) explanation of sentencing that gets entrenched in the legal profession, in particular in the judiciary.

In fact, sentencing theory as developed by the judiciary and its essential elements confirmed in legal doctrine provided for an effective path to restricting sentencing discretion and creating commitment to sentencing standards among the judiciary. The judiciary has generated mechanisms that stabilize sentencing outcomes through a strong attachment to traditional and established sentencing tariffs. Sentencing research has confirmed that professional socialization of judges (and public prosecutors) includes learning patterns that feed almost exclusively on (1) sentencing information passed and communicated through informal channels (within the judiciary), (2) documents containing information on past sentences (prior records accessible for prosecutors and judges before the sentencing decision), and (3) trial arrangements that provide for sentencing proposals of the public prosecutor

82. Helmut Hirtenlehner & Dina Hummelsheim, *Schützt soziale Sicherheit vor Kriminalitätsfurcht? Eine empirische Untersuchung zum Einfluss wohlfahrtsstaatlicher Sicherungspolitik auf das kriminalitätsbezogene Sicherheitsbefinden*, 94 MONATSSCHRIFT FÜR KRIMINOLOGIE UND STRAFRECHTSREFORM 178 (2011); Lappi-Seppälä, *supra* note 49, at 373–377.

83. Tonry, *supra* note 34, at 1198.

84. *Cf.* Michael Tonry, *Criminology, Mandatory Minimums, and Public Policy*, 5 CRIMINOLOGY & PUB. POL'Y 45, (2006) (describing American experiences with minimum sentences).

and defense council before the judicial decision is made.[85] In addition, an effective system of self-control within the judiciary has been developed that reduces opportunities and incentives to deviate from established sentencing patterns.

This system is simple but comes with an elaborate sentencing doctrine and complex reasoning that is based on rather restricted statutory guidance (available in § 46 of the Criminal Code,[86] which emphasizes personal guilt as the decisive basis for sentencing and criminal punishment).[87] However, elaborate normative reasoning and corresponding sentencing doctrine or theory neither explain mechanisms of sentencing guidance (or sentencing practices), nor can they account for stability in sentencing. They just reflect the difference between presenting (or reasoning about) a sentencing decision and the way a sentencing decision is made.

Criminal law and doctrine do not provide for guidance and structure beyond the statement that personal guilt must be the basis of a sentencing decision. Individual guilt in this respect has two functions: it determines the imputation of criminal responsibility (rationale of punishment) and it determines the sentencing decision and the size of the penalty (limitation or restriction of punishment). The judiciary has developed a model of joining various functions of criminal punishment:

> (1) The limiting function of guilt does not allow deviation from criminal punishment commensurate with guilt.[88]
>
> (2) Deterrence and rehabilitative purposes may only be considered within a range of sentences that is commensurate with individual guilt.

The sentencing theory of "margins" (Spielraumtheorie), as adopted by the German Court of Justice[89] and widely supported by penal scholars, assumes that a single sentence length exists that corresponds exactly to individual guilt as expressed in the criminal offense.[90] However, it is also assumed that it is not possible to determine this sentence with precision because of general limitations in decision-making under conditions of uncertainty and limited access to the truth. The discourse on this issue is neither theoretically interesting nor of any value for sentencing practice. The theory of margins simply says that a sentence corresponding to personal guilt may be chosen from a (narrow) range of sentences determined within the range of penalties carried by the offense statute. Minimum and maximum sentences of this narrow range must still be justified by guilt. Of course, such an assertion is tautological. If it is not possible

85. Albrecht, *Sentencing and Disparity*, *supra* note 69.

86. STGB, Nov. 13, 1998, BGBL. I at 3322, § 46.

87. TATJANA HÖRNLE, TATPROPORTIONALE STRAFZUMESSUNG (1999); FRANZ STRENG, STRAFRECHTLICHE SANKTIONEN: DIE STRAFZUMESSUNG UND IHRE GRUNDLAGEN 215 (2002).

88. BGH Apr. 10, 1987, 34 BGHST 345.

89. BGH Nov. 10, 1954, 7 BGHST 29 (32); BGH Aug. 4, 1965, 20 BGHST 264 (267); BGH Oct. 27, 1970, 24 BGHST 132 (133).

90. BERND-DIETER MEIER, STRAFRECHTLICHE SANKTIONEN 115 (3d ed. 2009); STRENG, *supra* note 78, at 252.

to quantify the criminal penalty that would exactly correspond to personal guilt, why should it then be possible to quantify the lower and upper borders of a sentence still commensurate with guilt? Within this assumed range of guilt-commensurate sentences, however, preventive functions of the penalty may be considered. Sentences falling within the range are considered to be legally acceptable penalties. The consequence of the theory of margins, therefore, is not the generation of an effective tool for determining the size of a criminal penalty, but the theory contributes to opening a normative discourse on which arguments should influence the limits of a guilt-commensurate criminal penalty. German doctrine and judicial decisions over the last forty years have generated an impressive amount of literature and judicial decisions as regards what factors may be used as aggravating or mitigating circumstances in sentencing decisions, how the aggravating or mitigating character must be determined, and under what conditions deterrence may influence the penalty.[91] Normative discourses on sentencing center around the question of the relationship between personal guilt and positive general prevention, questions of proportionate sentencing and the range of admissible aggravating and mitigating circumstances, the weight to be attached to certain circumstances, and how such weight might be expressed. Likewise impressive is that these discourses—which are, as regards doctrinal depth and theoretical underpinning, unparalleled in this world—are completely unrelated to sentencing scales and penalty ranges.

These discourses fail, however, to make a distinction between the presentation of a sentencing decision and the making of a criminal sentence. Making the sentence refers to the decision-making process that results in imposing a concrete criminal penalty. The sentencing decision then has to be presented in writing and elaborated on all relevant factors that have been considered in determining the penalty. Presentation and making the sentence have to be distinguished, particularly in legal systems where the criminal court is obliged to give detailed reasons in writing for a concrete penalty imposed. Presentation and making the sentence fulfill different functions.

With respect to making a sentencing decision, most important are those rules that determine placement of an individual case on the applicable scale (or range) of penalties. The proposition that the range of penalties carried by an offense statute represents a scale that reflects seriousness of offenses is not contended. But the question of how a distribution curve should look has received only marginal attention. This question is certainly more important than reasoning about individual sentencing characteristics and how much influence should be attached to general deterrence within a guilt-commensurate penalty range (which, in fact, cannot be indicated in concrete cases). With the elaboration of the concept of the normal or typical case (Regelfall) the German Federal Court of Justice has presented an answer to that question. A "normal

91. *See, e.g.*, HANS-JÜRGEN BRUNS, STRAFZUMESSUNGSRECHT: GESAMTDARSTELLUNG (1974); MEIER, *supra* note 81; STRENG *supra* note 78.

case" shall represent the typical perpetration of a criminal offense.[92] With this approach, a comparative and empirical view is adopted (an approach that poses the question, "What is typical, and which elements should be considered when establishing whether an offense falls into the category of a normal or typical criminal offense?").[93] The typical offense—and this is the decisive point—is placed within the lower third of the penalty range carried by the respective offense statute. The Federal Court of Justice assumes (and certainly is correct when considering mainstream assumptions on how seriousness of crime should be construed) that the typical criminal offense displays a low degree of seriousness that does not justify its placement in the middle of the sentencing range.[94] In fact, the distribution of losses in cases of theft, burglary, fraud, or robbery, and the intensity of injuries in case of violent offenses, as well as other indicators, all display a concentration at the low end of scales measuring seriousness of crime. The comparative and empirical approach to the placement of criminal offenses within the sentencing range is in principle not compatible with the normative access to discussing guilt and personal responsibility, and vice versa. Although the latter approach—be it based on individualized assessments or proportionate thinking—is not capable of identifying a place in the range of sentences (and it is symptomatic for normative discourses not to refer to concrete cases or sentencing decisions), the comparative but also empirical approach is not capable of accounting for the myriad of arguments coming with individualized sentencing and possible expressions of personal guilt. This conflict cannot be resolved. It is also interesting to see that while penal doctrine does not seem to be satisfied with this approach,[95] some penal scholars describe it as a matter of fact,[96] but essentially request to individualize this step, too, although the alternative to the "typical case" standard of the Federal Court of Justice consists of giving cloudy hints to acts of appraisal, judicial experience, and judicial skill, which are then labeled as acts of extreme complexity.[97]

However, the German normative framework of sentencing provides an opportunity to satisfy the obvious need to discuss all factors relevant for individualized sentencing and to achieve a decision that is carried primarily by those factors that establish the "typical case" (or establish deviations from it). Sentencing research dealing with the question of whether a criminal sentence can be predicted by the arguments used in writing (and justifying the sentencing decision) has revealed that a (small) part of the grounds introduced in the

92. BGH Sept. 13, 1976, 27 BGHST 2.

93. MATTHIAS MAURER, KOMPARATIVE STRAFZUMESSUNG: EIN BEITRAG ZUR FORTENTWICKLUNG DES SANKTIONENRECHTS (2005).

94. BGH Jan. 13, 1983, 4 NSTZ 217 (1983); *see also* BERT GÖTTING, GESETZLICHE STRAFRAHMEN UND STRAFZUMESSUNGSPRAXIS. EINE EMPIRISCHE UNTERSUCHUNG ANHAND DER STRAFVERFOLGUNGSSTATISTIK FÜR DIE JAHRE 1987 BIS 1991 (1997).

95. STRENG, *supra* note 78, at 305.

96. MEIER, *supra* note 90, at 208.

97. Hörnle, *supra* note 74, at 116.

sentencing decision in fact predicts the sentence, as do the same factors that have been established before the sentencing decision was made (essentially, losses, prior convictions, and extent of injuries). But most of the reasoning in sentencing decisions was linked to arguments that did not correlate with the sentencing outcomes.[98] From that, it seems clear that, at least for systems that require detailed written explanations of sentencing decisions, such written accounts display a response to normative demands for complex decisions that in making a decision cannot be met, but in presenting a decision can perfectly be complied with. The normative discourses around the sentencing decision triggered in German penal sciences as in jurisprudence of appellate courts embrace individualization of the penalty as the centerpiece of criminal punishment theory. The most powerful idea of individualization follows from post-Enlightenment thinking that each human being should be considered unique and should be treated according to such uniqueness. Although the idea of individualization was adopted in sentencing the criminal offender, sentencing of administrative (or regulatory) offenses evidently was based on another concept. This concept provides for fixed tariffs—for example, in the case of motor vehicle offenses (speeding, red light violations, et cetera)[99] when circumstances other than the offense itself are not taken into account. This system is based on the conviction that in certain situations persons (when offending) are to be treated solely on the basis of the role they play in these situations (for example the role of the motor vehicle driver). In the making of a criminal sentence, the administrative concept of tariffs evidently has been implemented.

This system of generating at the same time complex legal reasoning and straightforward practical results (in terms of placing cases regularly at the bottom of sentencing ranges) is backed by an appellate and review system, which during the last decades has increasingly treated sentencing as a decision based on the application of law, rather than discretion. Thus, the German Federal Court of Justice could identify several areas along the decision-making process where mistakes in law may occur when deciding on a criminal sentence.[100] First, the court identifies inconsistency in reasoning, which has obtained the status of a legal mistake, and which is directly related to the demand for complexity in reasoning about a criminal sentence.[101] Second, flawed assessment of sentencing facts (either mitigating or aggravating) has received the court's attention,[102] as has, third, deviation from the "usual" penalty

98. ALBRECHT, STRAFZUMESSUNG BEI SCHWERER KRIMINALITÄT, *supra* note 69, at 408.

99. The Federal Ministry publishes a so-called Bußgeldkatalog [Catalogue of Administrative Fines], available at http://www.bmvbs.de/SharedDocs/DE/Artikel/StB-LA/bussgeldkatalog.html?nn=36008#9. This catalogue details tariffs for all administrative offenses. For example, speeding less than ten kilometers per hour above the limit within city limits incurs a €15 fine.

100. STRENG, *supra* note 87, at 265.

101. BGH Jan. 9, 1961, 17 BGHST 35.

102. BGH Dec. 7, 1990, 1991, 10 NSTZ 231.

(or tariff) in sentencing.[103] The latter argument is close to the concept of an error of law that is based on the finding that a sentence imposed by a trial court is "completely unjustifiable." Then, the extent of reasons given in writing for a criminal sentence must match the seriousness of the sentence. It follows from this that the closer the sentence is to the maximum penalty allowed by the offense statute, the more detailed the reasons given in writing must be.[104] Appellate court (and Federal Court of Justice) decisions over recent decades have significantly widened review of sentencing decisions on legal grounds.[105] Although sentencing once was considered to be fully at the discretion of the trial judge, today a sentencing decision is considered to be, in its essential parts, the application of law.

The design of this approach caters to the essential need to generate belief in the fairness or justice of criminal punishment. Individualization of criminal punishment may be seen as being just because its consequences result in each offender being judged on the basis of his or her uniqueness. But individualization is not compatible with the maxim "treat like cases alike"[106] because like cases are difficult to imagine if each offender (and the related criminal offense) is unique.

The German system of sentencing therefore is designed not to respond to external influences but to increase incentives to stay in line with past sentencing decisions and resulting patterns, and to drastically reduce opportunities to deviate from established sentencing patterns.

VI
CONCLUSION

The German system of sentencing is based on a deeply entrenched mechanism of learning and transmitting established sentencing patterns. This mechanism performs the same functions as sentencing guidelines or sentencing councils, but is more effective in sustaining stable and predictable sentencing patterns through

(1) self-control and commitment generated within the judiciary itself, and

(2) a comparative and empirical approach to assessing cases that separates making a sentencing decision from reasoning about a sentencing decision.

Both levels are important, though. The comparative and empirical approach allows for learning, professional socialization, and the formation of collective knowledge about where to place "typical cases." The level of normative reasoning and development of legal doctrine on sentencing serve to satisfy the demand for individualized sentencing and—due to elaborated statutory duties

103. BGH Feb 27, 1992, 1992, 12 NSTZ 381.
104. BGH October 22, 2002, 2003, 8 NSTZ-RR 52.
105. RAINER HAMM, DIE REVISION IN STRAFSACHEN 543 (7th ed. 2010).
106. MICHAEL TONRY, SENTENCING MATTERS 186 (1996).

to justify sentencing in writing—as a permanently available reservoir of mistakes in law that allow for interventions by appellate courts.

The normative framework supports this system of self-control by providing a second track of measures of security that facilitate commitments to guilt and relieve the first track of pressures to consider risk and security that would not be compatible with learning routines, values, and sentencing discourses developed and transmitted in the judicial system.