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SENTENCING IN WEST GERMANY

THOMAS WEIGEND *

Foreign observers call America a land of extremes. Although overbroad in many contexts, that characterization captures the essence of the American approach to sentencing. In recent years, the American criminal justice system has experienced a trend away from an individualized, highly discretionary approach toward offense-oriented, non-individualized, determinate sentencing. Criticism of either extreme suggests the need for finding a possible middle ground between traditional and "new" sentencing. An examination of West Germany's system of shared and controlled sentencing discretion can inform this search by serving as a paradigmatic "compromise" model.

For almost a century, the sentencing stage of the criminal process in America commonly was viewed as little more than a negligible interlude between adjudication and corrections. Once the state convicted an individual of a criminal offense, so the theory went, it must try to rehabilitate him and make him into a law-abiding citizen. Early experience with rehabilitative programs made it evident that rehabilitation takes time, and that the time needed is hard to predict. The sentence ordered by the judge was perforce tentative and no more than a vague guidepost on the path toward successful treatment. Because the offender's rehabilitative progress, gauged by scientific expertise, ultimately determined the length of his stay in prison, initial sentencing safely could be left to the untrammeled discretion of the trial judge.

Doubts about the wisdom of rehabilitation as the primary goal of the sentencing process, coupled with evidence that rehabilitation programs seldom reduce recidivism rates, have undermined the rehabili-

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ative ideal's popularity. The disappearance of a scientific justification for widely discrepant sentences laid bare the incompatibility of traditional sentencing with the principles of equality, proportionality, humanity, and justice.

In 1971, the American Friends Service Committee offered an influential alternative concept of "just" sentencing. Their proposal for a radical about-face in sentencing philosophy, which advocated retribution for a criminal act rather than rehabilitation, set the trend for the seventies. For example, the basic concept of offense-oriented, nonindividualized, nondiscretionary, determinate sentencing influenced California's Uniform Determinate Sentencing Act. After the first surge of enthusiasm, however, the reform movement's theoretical underpinnings and its legislative manifestations have met with severe criticism. Much of the original attractiveness of determinate sentenc-

4. See American Friends Service Committee, supra note 2. The study group proposed that the law should deal only with a narrow aspect of the individual, his criminal act or acts. The whole person is not the concern of the law. Whenever the law considers the whole person it is more likely that it considers factors irrelevant to the purpose of delivering punishment. . . . If there are mitigating circumstances society feels should be considered in administrating the law, these should be spelled out in defining the criminal act and not left unstated to be filled in later by functionaries operating with wide discretionary powers. . . .

Id. at 147.


The reform movement also found expression, in some states, in the abolition of parole and the establishment of sentencing commissions. These measures often were accepted as compromise steps by legislatures reluctant to pass determinate sentencing legislation. See, e.g., MINN. STAT. ANN. §§ 244, 244.09 (West Supp. 1982) (authorizing the establishment of determinate sentencing guidelines); PA. CONS. STAT. ANN. tit. 42, § 2151–2155 (Purdon 1981 & Supp. 1982) (Pennsylvania Commission on Sentencing).

6. See, e.g., Gardner, The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle, 1980 DUKE L.J. 1103 (expressing concern that punishment under determinate sentencing is disproportionate to offender fault and victim harm, and is imposed without sufficient eighth amendment checks); Orland, Is Determinate Sentencing an Illusory Reform?, 62 JUDICATURE 381 (1979) (no effect on sentencing disparity); Alper & Weiss, The Mandatory Sentence: Recipe for Retribution, 41:4 FED. PROBATION 15 (1977); Cole, Will Definite Sentences Make a Difference?, 61 JUDICATURE 58 (1977) (definite sentencing will have no effect on sentence length, certainty of punishment, or crime control, but will be symbolically valuable as open and fair); see also Cei, The Indeterminate Sentence at the Crossroads, 3 N. ENG. J. PRISON L. 85 (1975)
The debate has now reached three central questions: Does determinate sentencing rest on sound philosophical and penological theory? Would "flat sentencing," which removes all discretion from the judge's decision, be a desirable change? Is there a viable middle ground between traditional and "new" sentencing?

This article considers the third question by describing German sentencing. The weaknesses and deformities that the German system suffers in practice may indicate what would lie ahead were Americans to adopt a similar model of shared and controlled sentencing discretion. That is all that can be said with assurance. How a German-like system would function within the existing American judicial, law enforcement, and correctional framework, and whether it would be adequate to cope with the degree and type of crime in America, are matters for speculation and, perhaps, for empirical experimentation.

Sentencing in Germany is based on considerations of retribution and, to a lesser extent, of rehabilitation and general deterrence. The common sanctions are fines and probation; imprisonment is imposed only in very serious cases. The legislature sets statutory sentencing ranges, but otherwise provides scant guidance. The trial court is therefore responsible for sentencing an offender, but it must give reasons for sentences and those reasons are subject to intrusive appellate review. A special correctional court may release an offender from prison before he serves his entire sentence. In the following pages, I expand on each of these points. Section I describes the types of sentences authorized by German law and employed in practice. Sections II, III, and IV respect-

tively discuss the distribution of sentencing authority, sentencing procedure, and sentencing principles. The conclusion, Section V, examines how far Germany has progressed toward a rational, equal, and just sentencing system.

I. WHAT ARE THE SENTENCES?

German and American criminal statutes have much in common. The definitions of substantive offenses and the armamentarium of sanctions available to judges are similar, in general and for specific crimes. Yet the sentences imposed are strikingly different. Consequently, sentence inequalities take on different meanings in the two systems. Sentencing inequality in the United States can mean the difference between twenty years in prison and three years, or even between imprisonment and no sentence at all. Critics of arbitrary sentencing in Germany, by contrast, compare fifty “day fines” (explained below) to thirty “day fines,” or probation to a fine. Comparison of the United States and Germany would be misleading if it did not acknowledge this crucial difference.

One can only speculate as to what causes these huge discrepancies. Certainly the threat of serious crime is perceived as being much greater in the United States, and American society feels justified in striking back with equal force. The high incidence of dangerous crime thus may have led to a siege mentality on the part of American legislatures and judges which is absent from German legal thinking and practice. Despite great differences in education, attitudes, and class background, German offenders and German judges generally still share a minimum of common experience and philosophy. And the idea of rehabilitation has not degenerated into pure cynicism, but creates a spirit of humanism which prevails despite obvious instances of failure.

A. Authorized Sanctions

The German Penal Code or Strafgesetzbuch of 1871, which was substantially revised in 1975, authorizes criminal sanctions similar to

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those found in any modern American criminal code. The Code also provides for other measures, such as the “day fine” and “measures of rehabilitation and safety,” which are foreign to American systems.

The death penalty was abolished by the Constitution or Grundgesetz of 1949. Life imprisonment, the most severe sanction known under German law, is mandatory for aggravated murder (Mord), and genocide, and may be imposed for treason and in cases resembling the American felony murder. For all other offenses for which imprisonment may be imposed the legislature has prescribed statutory sentencing ranges or Strafrahmen within which a court determines the appropriate sentence. The maximum term of imprisonment, available only for a handful of crimes, is fifteen years. The minimum is one month. A trial court may choose any sanction within the Strafrahmen subject to criteria imposed by the legislature and to standards articulated by the appellate courts.

Fines or Geldstrafen provide an alternative to imprisonment for less serious offenses. The court tailors the fine to the gravity of the offense and to the offender’s income by means of the “day fine” system.

12. The federal constitutional court has held that life imprisonment is constitutional. 45 Bundesverfassungsgericht [BVerfG] 187 (1977).
13. Strafgesetzbuch [STGB] § 211 (Mord). Mord is distinguished from Totschlag, (literally “death blow”), which also involves the intentional killing of another, see STGB § 212, by the existence of a particularly base motive, e.g., sexual gratification, money, or covering up another offense, or of a manner demonstrating extraordinary callousness, e.g., torture. Id. Mord is not the equivalent to “first-degree murder” because “malice aforethought” is not the distinguishing factor.
14. STGB § 220a11 (Völkermord). Section 220a also includes forms of genocide that are not punished by life imprisonment (e.g., restraining reproduction of an ethnic group).
15. A court may impose life imprisonment for Totschlag, STGB § 2121, and treason, § 9411, and for crimes such as kidnapping, §§ 239a11, 239b11, robbery, § 2511, and arson, § 307, that cause the death of another.
16. The description of each offense in the Code is followed by a provision concerning the permissible sentence range. For example, § 212 on Totschlag indicates that the penalty should be between five and 15 years imprisonment. Some sections, e.g., STGB § 239b1 (hostage-taking), provide only minimums. The general statutory maximum of 15 years therefore applies. STGB § 3811. See infra text accompanying note 17.
17. See, e.g., STGB § 177 (first degree rape), § 212 (Totschlag), §§ 249–50 (robbery), § 253 (particularly serious cases of extortion).
18. STGB § 3811.
19. German courts rarely impose fines in addition to imprisonment, although the Code permits the combination if the offender committed the crime for pecuniary gain. STGB § 41.
20. German law distinguishes between Verbrechen (serious offenses), and Vergehen (less serious offenses), although that differentiation has lost much of its original significance. Verbrechen are offenses that carry a minimum penalty of one year of imprisonment or more; all others are Vergehen. STGB § 12. Vergehen generally include misdemeanors involving criminal intent or criminal negligence, and nonviolent felonies involving property. Representative offenses include aggravated assault, larceny, embezzlement, and statutory rape.
The court first sets the number of day fines, from a minimum of five to a maximum of 360, according to the seriousness of the crime. Next, the court determines the offender's daily net income after deducting a sum for family support and other necessary expenses. A single day fine can range from approximately one dollar to $5,000. The court then computes the amount owed by multiplying the offender's daily net income by the number of day fines, so the product can range from five dollars to $1.8 million. A fine thus can be more than a slap on the wrist. In practice, however, fines rarely exceed the aggregate amount of $800.

The fine is transformed automatically into a jail sentence if the offender does not pay up. The number of day fines imposed and unpaid equals the number of days to be spent in jail. Although there is no requirement of wilful non-payment for imprisonment, courts rarely impose this harsh alternative. According to a recent study, only four percent of those sentenced to pay a fine end up in jail. The remainder manage to pay, albeit at the last minute or by means of liberal installment programs granted by the court.

German law also provides for probation — the conditional suspension of the execution of sentences. If the court expects that the

21. STGB § 401.
22. STGB § 401I. This discussion assumes that one U.S. dollar is roughly equal to two Deutschemark (DM).
23. H. ALBRECHT, STRAFZUMESSUNG UND VOLLSTRECKUNG BEI GELDSTRAFEN 202 (Stafrecht und Kriminologie No. 8, 1980).
24. STGB § 43. This raises the possibility that an offender could be imprisoned for a term less than the statutory minimum of one month. See STGB § 38II. Some commentators have criticized the jailing of those unable to pay. See, e.g., Silving, Discussion of Sanctions, 24 AM. J. COMP. L. 737, 749 (1976).
26. In some German states an impecunious defendant can sign up for public work, e.g., in parks or forests, and thus work off the fine. Experience so far has shown, however, that few defendants make use of this opportunity; administrative costs per defendant are therefore high. See Baumann, Die Chance des Artikel 293 EGStGB: Freie gemeinnützige Arbeit statt Ersatzfreiheitsstrafe, 62 MONATSSCHRIFT FÜR KRIMINOLOGIE UND STAFRECHTSREFORM [MKS] 290 (1980).
27. Probation under German law thus is not an independent sanction; the trial court suspends the execution of an imposed sentence. STGB § 56. See Eser, Germany, 21 AM. J. COMP. L. 245, 254 (1973); Herrmann, Sanctions: German Law and Theory, 24 AM. J. COMP. L. 718, 727 (1976) [hereinafter cited as Herrman, Sanctions]. For minor offenses, the court also can give the offender a formal warning, or Verwarnung mit Strafverbehalt, and suspend the imposition of the sentence. STGB §§ 59–59c. American jurisdictions are divided whether probation involves the suspension of the imposition of a sentence, see, e.g., People v. Arguello, 59 Cal. 2d 475, 476, 381 P.2d 5, 6, 30 Cal. Rptr. 333, 334, (1963), or suspension of the execution of an imposed sentence, see, e.g., State v. Dull, 249 So. 2d 758, 760 (Fla. Dist. Ct. App. 1971). The American Bar Association has criticized this distinction as creating unnecessary semantic and legal confusion. See STANDARDS RELATING TO PROBATION
offender will not commit any crimes if the sentence is not executed, it may in its discretion suspend a sentence of imprisonment up to one year. The trial court also can order probation under "special circumstances," which are not defined by statute, in lieu of sentences of imprisonment between one and two years. During the probation period, which can range from two to five years, the offender usually is supervised by a probation officer and may have to fulfill additional conditions, such as paying damages, making a charitable contribution, or maintaining a certain residence.

Parole also is regarded as a conditional suspension of the execution of part of a prison sentence. A prisoner must be paroled when he has served two thirds of his sentence if he is not likely to commit a new offense. Under "special circumstances characterizing the offense and the personality of the offender," the Code authorizes suspension of prison sentences of two years or longer after the prisoner serves one half of the sentence. In practice, however, courts rarely grant parole before the offender has served two thirds of the original term.

The court will revoke probation or parole if the offender commits a new criminal offense or seriously violates the conditions imposed on him. No formal re-sentencing is necessary: the offender on probation must serve the prison term originally imposed; in cases of parole, he must serve the remaining part of his sentence. He receives no credit for time spent on probation or parole but he may receive credit for financial contributions made as a condition of probation or parole.

The German Penal Code distinguishes between two kinds of sanctions: the penalties discussed above for criminal behavior and measures of rehabilitation and safety. The latter sanctions are not punitive

§ 1.1(b) commentary at 25 (Approved Draft 1970). Maryland's probation statute allows the court to "suspend the imposition or execution of sentence . . . ." MD. ANN. CODE art. 27, § 641A (1982) (emphasis added).

28. StGB § 561. The section lists several factors the court must consider, such as the defendant's prior life, his post-offense conduct, and the seriousness of the offense.

29. StGB § 5611. Sentences exceeding one year are rare and are reserved for more serious offenses. Suspension of these sentences is limited to exceptional cases, such as mercy killing, or perjury for honorable motives. See, e.g., Herrmann, Sanctions, supra note 27, at 728 (advocating this limitation).

30. StGB §§ 56b–56d.

31. StGB § 571.

32. StGB § 5711.

33. In 1979, only 0.2% of all persons released from prison were paroled before they had served two thirds of their terms. F. Dünkel & A. Rosner, Die Entwicklung des Strafvollzugs in der Bundesrepublik Deutschland: Materialien und Analysen 77 (1981); E. Dreher, Strafgesetzbuch § 57 n.4 (1975).

34. StGB §§ 56f, 57111.

35. StGB § 56f11.
and enable a German court to help the individual and to protect the public without stretching punishment beyond the limits of the desert principle. Measures of rehabilitation and safety include commitment to a psychiatric hospital,\textsuperscript{36} commitment to an institution for alcohol or drug treatment,\textsuperscript{37} commitment to an institution of social therapy,\textsuperscript{38} security custody,\textsuperscript{39} and noncustodial sanctions such as revocation of a driver’s license and prohibition against working in a particular trade or profession.\textsuperscript{40} These measures are related not to the offender’s blameworthiness, but to his dangerousness.\textsuperscript{41} In practice, only revocation of drivers’ licenses is ordered with any frequency.\textsuperscript{42}

Table I gives representative statutory sentence ranges for Germany

\begin{itemize}
\item \textsuperscript{36} STGB § 63. There is no maximum term of confinement, but the court must examine the case once every year to see whether confinement is still necessary. STGB § 67eII.
\item \textsuperscript{37} STGB § 64. Commitment for withdrawal treatment cannot exceed two years. STGB § 67dI.
\item \textsuperscript{38} STGB § 65. Section 65 is scheduled to take effect on January 1, 1985, but because of a lack of funds and the disappearance of the original enthusiasm for social therapy, the section’s introduction may be deferred indefinitely. Institutions of social therapy are intended to deal with four groups of persons: dangerous habitual criminals with significant personality dysfunctions, dangerous sexual offenders, young offenders who evidence a tendency to become habitual offenders, and persons in need of psychiatric help under § 63 but whose needs are better suited to treatment in an institution of social therapy. \textit{Id.} A court could sentence to an institution of social therapy only a defendant whom it expects will respond to treatment. Confinement would not exceed five years. STGB § 67dI.
\item \textsuperscript{39} STGB § 66. The dangerous habitual offender is committed to security custody “if the public safety requires it.” The offender, however, must have two prior convictions resulting in imprisonment for serious offenses, currently face a prison term of at least two years, and be found by the court to be likely to commit future serious offenses and thus to be dangerous to the community. The maximum commitment for security custody is 10 years. STGB § 67dI. The Court must review the commitment every two years. STGB § 66.
\item \textsuperscript{40} Measures of rehabilitation and safety that do not involve imprisonment include: probationary surveillance, STGB §§ 68-68g, revocation of driver’s license, STGB §§ 69-69b, and prohibition against practicing a particular profession, STGB §§ 70-70b. The revocation or suspension of a driver’s license under STGB §§ 69-69b is to be distinguished from the punitive suspension for traffic offenses which is limited to one to three months. \textit{See STGB § 44.}
\item \textsuperscript{41} The German Penal Code states, however: A measure of rehabilitation and safety may not be imposed if it would be not in proportion to the seriousness of the offenses the offender has committed or probably will commit as well as to the danger he causes. STGB § 62.
\item In 1980, measures of rehabilitation and safety were imposed on 196,254 defendants. Eighty-five percent of these measures (167,697) involved the revocation of a driver’s license. \textit{Statistisches Bundesamt, Strafverfolgung 1980 30} (1981).
\end{itemize}
and Maryland. The elements of criminal offenses in the two systems
are not identical, but those selected for this table are roughly
comparable.

**TABLE 1**

**REPRESENTATIVE STATUTORY SENTENCE RANGES**

<table>
<thead>
<tr>
<th>CRIME</th>
<th>GERMANY</th>
<th>MARYLAND</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder, 1st degree<strong>44</strong></td>
<td>Imprisonment of 5 to 15 years or life</td>
<td>Probation, life</td>
</tr>
<tr>
<td></td>
<td>(under heinous circumstances)</td>
<td>imprisonment, or death</td>
</tr>
<tr>
<td>Manslaughter<strong>45</strong></td>
<td>Fine, probation, or imprisonment up to 5 years</td>
<td>Fine, probation, and/or imprisonment up to 10 years</td>
</tr>
<tr>
<td>Aggravated Assault<strong>46</strong></td>
<td>Fine, probation, or imprisonment up to 5 years</td>
<td>Probation or imprisonment of two to 30 years</td>
</tr>
<tr>
<td>First degree rape<strong>47</strong></td>
<td>Probation or imprisonment of 6 months to 15 years</td>
<td>Probation or imprisonment up to life</td>
</tr>
</tbody>
</table>

43. The substantive elements of each offense are from the German Penal Code, but the
denomination of each offense in the left-hand column is from the Maryland Annotated
Code. Some Maryland offenses may include behavior not within the scope of the particular
section of the German Penal Code.

44. StGB §§ 211, 212; see StGB § 381I; MD. ANN. CODE art. 27, §§ 407, 412(b) (1982).
The German offenses of Mord (§ 211) and Totschlag (§ 212) both involve a premeditated
killing. The offenses are distinguished by other circumstances. See supra note 13.

Probation may be granted in Maryland if the offense is punishable by fine or
imprisonment or both. If the offense is punishable by both fine and imprisonment, the court
can impose a fine and place the defendant on probation as to the imprisonment. MD. ANN.
CODE art. 27, § 641A (1982). Unless limited by the particular sentencing statute, a court
may suspend a “mandatory” life sentence. State v. Wooten, 277 Md. 114, 352 A.2d 829
(1976).

45. StGB §§ 222, 213; MD. ANN. CODE art. 27, § 387 (1982).

46. StGB § 223a (Gefährliche Körperverletzung); MD. ANN. CODE art. 27 § 12 (1982).
Maryland has no statutory sentencing range for any assault offense except assault with intent
to murder, ravish, or rob, which is a narrower offense than Gefährliche Körperverletzung.

The maximum sentence that a judge in Maryland can impose for any simple or
aggravated assault is 30 years, which is the maximum for an assault with intent to murder.
The cruel and unusual punishment provision of the eighth amendment may require that the
punishment for a lesser offense should not be more severe than the punishment for a greater
offense. See Roberts v. Collins, 544 F.2d 168, 170 (4th Cir. 1976); see also Roberts v.
Warden, 242 Md. 459, 460-61, 219 A.2d 254, 255 (1965); Simms v. State, 288 Md. 712, 717-
27, 421 A.2d 957, 961-65 (1980).

47. StGB § 177; MD. ANN. CODE art. 27, § 462 (1982).
The sentence ranges differ to some extent: German law favors higher minimum prison sentences (but usually offers probation as an alternative), whereas Maryland has higher maxima. The similarities, however, are more pronounced than these differences. In both systems, sentencing judges are accorded a wide latitude of sentencing options with respect to all offenses.

B. Imposed Sanctions

Comparison of statutory sentence ranges sheds light on the sentencing latitude each system allows the court but tells little about sentences actually imposed. Table II compares sentences imposed by German courts and by Maryland courts for similar crimes. As neither the definitions of offenses nor the features of sentences are identical, this juxtaposition provides only a rough illustration of variations in sentencing practices in the two systems.


Although conclusions should be drawn from the above figures only with caution, several stark differences stand out. German courts seldom impose prison terms longer than five years except for intentional homicide, whereas Maryland judges routinely give long prison sentences in cases of violent felonies. Short prison terms of less than one year are rare in both systems except for burglary in Germany. Probation and fine statistics are unavailable for Maryland, but German practice is striking in its greater use of probation for serious offenses, and less use when sentencing minor property offenders. And most important, the fine is the usual sanction for non-aggravated property crimes and assaults in Germany.53

51. The Maryland statistics are for Fiscal Year 1982 and were supplied by Richard A. Tamberrino, the Director of Research and Statistics of the Department of Public Safety and Correctional Services for the State of Maryland. The German statistics are for 1980 and are STATISTISCHES BUNDESAMT, STRAFVERFOLGUNG 1980 52-71 (1981). Because of rounding, the totals may not equal 100%.

52. Maryland statistics for probation and fines imposed as the only sanction are unavailable from the Department of Public Safety and Correctional Services of the State of Maryland. Probation, however, is a frequently imposed sanction. “Probation Intake” statistics for Fiscal Year 1982, which include both sentences of probation that are the sole sanction and sentences that begin after a term of imprisonment, show heavy use of probation:

<table>
<thead>
<tr>
<th>Offense</th>
<th>Number of Probationers Entering System</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>17</td>
</tr>
<tr>
<td>Rape</td>
<td>30</td>
</tr>
<tr>
<td>Robbery</td>
<td>422</td>
</tr>
<tr>
<td>Assault</td>
<td>2,846</td>
</tr>
<tr>
<td>Burglary</td>
<td>1,804</td>
</tr>
<tr>
<td>Forgery</td>
<td>580</td>
</tr>
</tbody>
</table>

53. A study on fines in Germany completed in 1979 demonstrates their growing importance. In 1967, fines made up 61% of all criminal sanctions; by 1977, their share had risen to 83%. H. ALBRECHT, supra note 23, at 4. Fines are the typical punishment for first offenders: of that group, only 2.9% were sentenced to probation or imprisonment in 1972; all others...
Since the 1930's, German scholars studying sentencing practices have found that most sentences imposed are at the lower end of the statutory punishment scale,\(^4\) which for most offenses means a fine. Two factors may account for this. First, German law prefers fines to short-term imprisonment as a penalty not only for economic reasons but also because of their greater social efficiency. The fine avoids the moral and social disintegration necessarily connected with a prison term and allows the offender to retain the self-image of a "normal" citizen rather than causing him to think of himself as a criminal.\(^5\) Only when the culpability of the offender is so great that the public would regard a fine or probation as clearly insufficient do German courts resort to imposing prison terms of moderate length (usually one to five years).

Second, although statutory descriptions of offenses necessarily encompass the most serious generic violations of social norms, most cases that come before German courts are petty violations, such as retail theft, minor fraud, and drunken driving.\(^6\) If drunken driving cases are left aside, most of any German criminal court's workload is property crime. The majority even of these and other offenses are less serious, if not petty, violations of the law.\(^7\) The ordinary case of larceny, fraud, assault, and battery is thus of lesser gravity than the hypothetical "median" case to which the "median" sentence of each offense is geared.\(^8\)

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\(^{4}\) Id. at 98-99. More than one half of those who had earlier received a prison sentence received only a fine for a subsequent offense. (This last statistic may reflect more the pettiness of the subsequent offense than the insignificance of recidivism as a factor in selecting the type of punishment). See also Gillespie, Fines as an Alternative to Incarceration: The German Experience, 44:4 Fed. Probation 20 (1980).


\(^{7}\) In 1980, of more than 900,000 persons accused of criminal offenses, 42% were charged with serious traffic offenses such as drunken driving (lesser offenses not being covered by the Penal Code), and 33% with nonviolent property crimes. Sex offenders and robbers together constituted less than 2% of the courts' clientele. Statistisches Bundesamt, Strafverfolgung 1980 28 (1981).

\(^{8}\) According to police statistics, in 68% of all reported cases of simple or aggravated larceny (including burglary) the damage was below the equivalent of U.S. $400. Bundeskriminalamt, Polizeiliche Kriminalstatistik 1981 88, 95 (1982).

If German sentences appear generally low, this may be a reflection of the generally low intensity of criminal behavior in Germany.

II. WHO SENTENCES?

Every legal system distributes the function of sentencing among several agents. Although the German system generally regards sentencing as the business of the trial court, others are involved as well. The legislature determines the limits of punishment for each offense. The prosecutor, unlike his American counterpart, lacks meaningful charging discretion but can influence the sentence in various other ways. Laymen also play an important role: except in petty cases, sentencing is not left to a single professional judge but to a mixed panel consisting of professional and lay judges. Finally, the German equivalent of parole is granted by a special panel of the district court which is located closest to the prison where the offender is detained.

A. Legislature

The impact of legislative decisions on individual sentences is greater in theory than in practice. Scholars and courts alike repeatedly have emphasized the theoretical importance of the legislature’s task: by defining the lower and upper limits of punishment the law-giver expresses the degree of society’s disapproval of each offense. As the severity of the sanction correlates with the importance of the protected social interest, the legislature, by setting sentence standards, establishes a rank order of values and interests which binds every participant in the process.59

Unfortunately, the broad statutory sentencing ranges make the rank ordering of offenses less precise than it could be, thus weakening the legislature’s impact on the sentencing process. These policy statements on social and moral priorities could be expressed more clearly by fixed penalties or narrower sentence ranges for each offense. Such legislative rigor would enable an individual to foresee the exact consequences of his acts, and would reduce drastically the discretionary powers of the executive and judicial branches of government. Yet German theory, while staunchly requiring certainty in the description of an offense and subsequent sanction,60 has never reached out toward the chimera of “flat” sentencing.

59. 27 BVerfG 18, 29 (1969); 45 BVerfG 187,256 (1977); H. JESCHECK, W. RUSS & G. WILLMS, STRAFGESETZBUCH, LEIPZIGER KOMMENTAR § 46 n.34 (10th ed. 1978) [hereinafter cited as LEIPZIGER KOMMENTAR]; Dreher, supra note 58, at 150.

60. The principle of legality or nulla poena sine lege is set forth in Article 103(2) of the Grundgesetz or Constitution.
The elimination of all discretion would collide with a basic tenet of German sentencing philosophy: the desert principle. Punishment in Germany must be commensurate with the culpability of the offender. The desert principle requires the court to assess the extent of the defendant’s deviation from common ethical standards and to determine the penalty accordingly. The task of tailoring the punishment to the offender’s individual culpability requires information not available to even the most informed legislature or sentencing commission and therefore must be left to the trial court.

German discomfort with nondiscretionary sentencing is illustrated by the controversy over one of the two flat sentencing provisions of the German Penal Code. Section 211, which prescribes life imprisonment as the only penalty for first degree murder, raises serious constitutional questions. In 1976, one district court found the provision to be unconstitutional, holding that section 211, by excluding all judicial discretion, violated the principles of equal protection and proportionality between crime and punishment as guaranteed by the Rechtsstaat or due process clause of the Constitution. Mandatory sentences, the court maintained, cannot adequately reflect differences of culpability among individual offenders. The Federal Constitutional Court rejected that argument, however, observing that the elements of the legal definition of first degree murder leave some room for judicial interpretation and adjustment, and that the Code allows for lesser punishment in cases of reduced responsibility because of mental impairment. Thus, the rigid sentencing provision of Section 211 passed constitutional muster only because “in practice the threat of life imprisonment . . . is less absolute than appears at first blush.”

The 1977 decision of the Federal Constitutional Court failed to conclude the debate. In 1981, the Federal Appellate Court again confronted the question whether a life sentence is appropriate in every case...

61. In the German system, a criminal sanction must be proportionate to the offense. Only then does the offender get his “just deserts.” See infra text accompanying notes 185 to 192.
62. See supra notes 12-14 and accompanying text. Life imprisonment is also mandatory for certain genocide offenses. StGB § 220a.
63. GG art. 3.
64. GG art. 28.
66. The Federal Constitutional Court, as its name suggests, decides the constitutionality of statutes that have been called into doubt. GG art. 100.
67. See supra note 13.
69. Id. at 261.
of murder. The court declared that the constitutional principle of proportionality required mitigation of punishment if "extraordinary circumstances" had prompted the offense. The court thus applied a general mitigation clause designed only for cases of attempt and impaired responsibility, and reduced the maximum penalty to fifteen years imprisonment notwithstanding the clear language of the statute to the contrary.

Despite the turmoil over section 211, the claim that the legislature unduly curtails judicial sentencing discretion is exceptional. Critics more often charge the legislature with improperly delegating sentencing responsibility to the courts, leaving judges with no guide but their consciences. Those charges are plainly justified with respect to many offenses. Extortion is a clear example: An offender can be sentenced to pay a fine or to serve a term of imprisonment of one to five years; in "particularly serious cases," a term not defined by the Code, the sentence can be as severe as fifteen years imprisonment.

Special sentence ranges for "particularly light" and "particularly serious" cases provide sentencing courts with additional leeway to deal with extraordinary offenses. The legislature did not define these terms, but it responded recently to criticism that it seldom provides standards for sentencing by adding enumerations of aggravating circumstances, or Regelbeispiele, which give rise to a presumption that the case is "particularly serious" and thus deserving of a stiffer sentence. The court

70. 30 BGHSt 105 (1981). This case involved Turkish nationals residing in Germany. The deceased, an uncle of the defendant, had raped the defendant's wife and had bragged about the act in the Turkish community. The defendant's wife thereupon attempted suicide several times and sought a divorce. About six months after learning of the rape, the defendant walked into a bar where the deceased was playing cards with several friends. The defendant watched his uncle for a while and then, without warning, fired 14 shots from a pistol, killing his uncle on the spot. The defendant's conduct met the murder statute's requirement of "malice" as had been developed by earlier decisions of the Federal Appellate Court.

71. StGB § 49.


73. StGB § 253.

74. Section 243, concerning "particularly serious" cases of larceny, is in practical terms the most important example of a Regelbeispiele provision. The section presumptively raises the maximum penalty from five years imprisonment to 10 years if one of the following aggravating circumstances exists:

(1) the thief broke into a building;
(2) the stolen object was secured against theft;
(3) the offender is a professional thief;
(4) the stolen object is one of religious veneration;
(5) the stolen object was exhibited in a museum or art collection open to the public; or
may disregard the existence of *Regelbeispiele* or may label the offense "particularly serious" in the absence of any circumstances enumerated in the statute, but in either event must give specific reasons to justify its decision.  

Most legal writers regard the introduction of *Regelbeispiele* as a major improvement because it structures judicial discretion but leaves room for appropriate disposition of exceptional cases.

The debate over allocating sentencing authority between the legislative and judicial branches has resulted in a compromise. The legislature sets comparatively broad limits, sometimes indicating substantive factors to be considered by the trial courts, who in turn remain free to "individualize" sentences within limits imposed by the appellate courts.

**B. The Prosecutor**

Germans tend to view sentencing as the exclusive province of the trial court, overlooking the influence of the public prosecutor, or *Staatsanwalt*, whose involvement is hidden from public view. Prosecutorial influence is not as blatant as it is in the United States, where broad charging discretion, overt sentence bargaining, and sentence "recommendations" which everyone accepts as binding often turn the prosecutor into the true decision-maker.

A significant difference in legal status exists between American and German prosecutors. Although both represent the state in criminal proceedings, German law casts the prosecutor in a more neutral position. He is to uphold the law, not simply to seek conviction. The German Code of Criminal Procedure explicitly provides that the prosecutor shall investigate exonerating as well as inculpatory circumstances. If the prosecutor believes that the defendant is innocent, he is duty-bound at the end of the trial to plead for acquittal (the court although is not obliged to acquit). Given the objective, almost judicial position of the German prosecutor, he can safely be trusted to

(6) the offender took advantage of an accident or the helplessness of another.

75. SCHÖNKE & SCHÖRDER, supra note 72, § 243 n.42.

76. See, e.g., LEIPZIGER KOMMENTAR, supra note 59, § 46 n.50; R. MAURACH & H. ZIPF, supra note 72, at 421; Wessels, Zur Problematik der Regelbeispiele für "schwere" und "besonders schwere Fälle," in FESTSCHRIFT FÜR REINHART MAURACH ZUM 70. GEBURTS-TAG 295 (1972).

77. STRAFPROZESSORDNUNG [StPO] § 160II.


79. Historically, the office of the prosecutor in Germany has its roots in the judiciary. The tasks of the inquisitorial judge, a common figure in civil-law criminal systems, were divided in Germany in the nineteenth century between the trial court and the public prosecutor. See T. WEIGEND, ANKLAGEPFLICHT UND ERMESSEN 53-58 (1978); Damaska, Versuche zur Rationalisierung der Strafzumessung in den U.S.A., 93 ZStW 119 (1981); Herrmann, The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in
share sentencing authority with the judge.

Despite the prosecutor's quasi-judicial position, the German Code of Criminal Procedure prescribes and controls his actions to an extent that must baffle American jurists. A rule of compulsory prosecution compels the prosecutor to prefer charges in more serious offenses whenever the evidence makes conviction of the suspect at trial probable. The court, not the prosecutor, decides upon the legal characterization of the charge. The prosecutor may not withdraw the charge once the court accepts it, even in light of changed circumstances, and his sentencing recommendations in no way bind the court.

The letter of the law makes it appear as if the prosecutor decides little in the criminal system, least of all the sentence. Reality, however, is different. The prosecutor codetermines the sanction imposed upon the defendant in three common situations: penal orders, sentencing recommendations, and conditional suspension of prosecution.

1. Penal Orders — The court may dispose of minor cases, or Vergehen, in a written procedure known as a Strafbefehlsverfahren, or a penal order proceeding. On the basis of the prosecutor's file, the court issues a provisional judgment, which sets forth the sentence, usually a day fine, but never imprisonment. If the defendant appeals within a week, an ordinary trial is held. Otherwise, the judgment becomes final and has the status of a conviction.


82. STPO §§ 206, 207 II(3).

83. Vergehen are crimes equivalent to American misdemeanors and nonviolent felonies involving property. Examples include assault, car theft, embezzlement, tax fraud, and shoplifting. See supra note 20.

84. STPO §§ 407-12. Such minor offenses are handled by a single professional judge; no lay judges are involved.

85. STPO § 407 II.

86. STPO §§ 410, 409 I(7).
The prosecutor dominates the penal order proceeding: he decides whether a *Strafbefehl* is employed instead of a trial and drafts the provisional judgment which includes a sentence. The judge receives *Strafbefehl* applications on a take-it-or-leave-it basis. He can refuse to issue the penal order as drafted and order a trial, but he has no authority to alter it. The penalty in a penal order proceeding thus effectively is determined by the prosecutor, with only nominal control by the judge in whose name the penal order issues.

Judges almost never withhold consent. Court statistics for 1980 indicate that the judge ordered a trial instead of issuing the penal order in 0.6% of all cases in which the prosecutor filed an application for penal order. This figure does not mean that the judge meekly goes along with whatever disposition the prosecutor proposes, but indicates that informal channels exist for reaching agreement between prosecutor and judge. Internal rules explicitly direct the judge to attempt to reconcile his differences with the prosecutor by negotiation rather than to deny a *Strafbefehl* application. Although the frequency of such informal discussions is not known, few lawyers doubt that the prosecutor, not the judge, determines the sentence in the ordinary *Strafbefehl* case.

Penal orders, which save time and labor for all concerned and guarantee the defendant that he will not serve a term of imprisonment, have become a major part of the German criminal process. Almost half of all criminal cases in which the prosecutor files an accusation are

87. StPO §§ 407, 408.
88. StPO § 408II. A judge, for example, may deny a penal order when he has doubts about the defendant's guilt, when there is a record of recidivism, or if the offender requires individualized treatment. Felstiner, *Plea Contracts in West Germany*, 13 LAW & SOC. 309, 310 (1979).
91. One author claims that "[a] judge in Hamburg told [the author] that he could review 70 routine cases in fifteen minutes (shoplifting, for instance, or riding a subway without a ticket), an average of one case every 13 seconds . . . ." Felstiner, *supra* note 88, at 312 (emphasis in original). Courts, however, will pay greater attention to unusual cases, such as "a psychologically disturbed defendant, a problem too complicated to be captured on paper, a difficult family situation, an offense with a history, or a defendant who appears to contest the facts." Id. at 313.
processed by "Strafbefehl". The great majority of fines imposed for assault, larceny, fraud, and the more serious traffic offenses (the penal code does not cover less serious traffic offenses) are disposed of by penal order. Approximately eighty-five percent of penal orders drafted become final because the defendant either acquiesces or later withdraws his appeal.

2. Sentence Recommendations — Although disagreement between the prosecutor and judge is extremely rare in "Strafbefehl" cases, it occurs more frequently when a trial is held. At the end of a trial, if the prosecutor believes the defendant is guilty, he will recommend a specific sentence. A recent study suggests that courts view this recommendation as the most severe appropriate sentence and will follow the prosecutor's suggestion in approximately half of all cases. Only rarely will courts impose a harsher sentence. Even when the court does not follow the prosecutor's recommendation, the deviation tends to be slight.

The German prosecutor's influence on sentences imposed at trial is much less than that of his American counterpart. A prosecutor can be expected to adapt his recommendation to the known sentencing practices of the court, sometimes adding a "bonus" which can be subtracted to mollify the defense. The widespread reluctance of courts to pronounce a harsher sentence than those proposed by the prosecutor

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92. In 1980, German prosecutors moved for a trial in 494,000 cases and a penal order in 428,000 cases. Statistisches Bundesamt, Strafgerichte 1980 20, 26 (1981).
93. The German Penal Code covers only the most serious traffic offenses such as driving under the influence of alcohol or drugs, culpably injuring persons or damaging valuable property, and leaving the scene of an accident. All other traffic violations are regarded as noncriminal and disposed of by a special administrative procedure under the Gesetz über Ordnungswidrigkeiten, or Administrative Violations Act.
94. H. Albrecht, supra note 21, at 94; E. Blankenburg, K. Sessar, & W. Steffen, supra note 84, at 70; Felstiner, supra note 88, at 311.
95. H. Albrecht, supra note 21, at 94, 96. Approximately 90% of those who go to trial are found guilty. Felstiner, supra note 88, at 314.
96. One author found that courts will follow the prosecutor's suggestion in about 50% of all cases. A lower sentence was pronounced in 43% percent; only in the remaining 7% did the sentence imposed exceed the sentence proposed. D. Dölling, Die Zweierteilung der Hauptverhandlung 211 (1978).
97. Only in about 8% of all cases were "considerable" differences found between the sentence suggested by the prosecutor and the sentence actually imposed. Id.
98. The vast majority of American prosecutors also make specific sentencing recommendations. Teitelbaum, The Prosecutor's Role in the Sentencing Process: A National Survey, 1 Am. J. Crim. L. 75 (1972). This practice has been severely criticized. See, e.g., Standards Relating to Sentencing Alternative and Procedures § 5.3 commentary (c) at 242 (Approved Draft 1968) ("[S]ystematic recommendations from the office of the prosecutor might induce too much reliance by the court as a substitute for independent formulation of the sentence.").
evidences an ability of the prosecutor effectively to "put a lid" on the sentence received by the defendant.99

3. Conditional Suspension of Prosecution — The third mode of prosecutorial influence in the sentencing process is the conditional suspension of prosecution, which resembles American diversion.100 The public prosecutor, under section 153a of the German Code of Criminal Procedure, with the consent of the court (except in nonserious property offenses) and the defendant, can suspend prosecution of Vergehen if the offender’s culpability is minor.101

The suspension is conditioned upon the defendant making restitution to the victim, or paying a sum of money to the state or to a charitable organization. The court enters no formal finding of guilt; the order to pay is technically not a criminal sentence.102 In practice, however, these payments are hard to distinguish from ordinary fines. Everyone involved regards them as a sanction for the defendant’s transgressions even though no sentence is imposed by a court. Conditional suspension of prosecution thus permits the prosecutor to determine the appropriate sanction in many less serious offenses and, since its inception in 1975, it has become a popular prosecutorial device.103

The requirement that the defendant consent to the forfeiture of his rights is likely to evoke the image of plea bargaining in the American reader. Section 153a resembles an invitation to barter. Instances of

99. Contrary to what Americans might expect, there is no real sentence bargaining between prosecutors and defense counsel. German prosecutors would resent strongly any attempt to influence their professional judgment at any stage of the proceeding. See generally Langbein, Land Without Plea Bargaining, supra note 80.

100. Diversion . . . refers to the legal pretrial exercise by the police, probation personnel, the prosecutor, or the judge of discretion to suspend or otherwise hold in abeyance charges against selected defendants [such as underemployed minor offenders or alcoholics] for a specified period of time, on condition that the defendant participate in a prescribed program of rehabilitative activity or refrain from activity of a criminal nature, and on the stipulation that if the accused fulfills the condition, the charges will be dismissed.


101. StPO §§ 153a. The offender’s culpability must be gering, which may be translated also as “slight” or “trifling.”

102. Id.

103. In 1978, 28% of all discretionary dismissals were based on section 153a; in 1979, 17% of all defendants who were sentenced in any way were ordered to make payments under this section. Riess, Statistische Beiträge zur Wirklichkeit des Strafverfahrens, in Festschrift für Werner Sarstedt zum 70. Geburtstag 253, 281-82, 282 n.93a, 307 (Hamm ed. 1981).
negotiations certainly occur, and the subtle pressures on the defendant to accept the solution proposed by the professionals are not unlike those felt by an American defendant who is offered a plea bargain. Yet it would be an exaggeration to say that section 153a conduces to party involvement in the sentencing decision. The self-esteem of German prosecutors, who regard themselves not as partisans but as quasi-judicial officers, disinclines them to permit meaningful outside interference with their decisions. Moreover, defense counsel lack any credible threat against a prosecutor who does not agree to a lenient disposition. Because the regular criminal process is always available as a relatively uncomplicated and expedient way to dispose of the case, the German prosecutor will rarely "sell the court" to a defendant simply to get a case off the docket. Finally, prosecutorial sanctioning policy, which often is prescribed by informal office guidelines, allows the individual prosecutor little leeway in which to bargain.

C. The Trial Court

A German trial court can consist of a single professional judge, one professional and two lay judges, or a panel of three professional and two lay judges. Each judge, lay or professional, has an equal

104. See Langbein, Land Without Plea Bargaining, supra note 80, at 224; Weigend, Continental Cures, supra note 81, at 415-18.
106. See supra text accompanying notes 77-80.
107. Lay judges are selected from the population at large by representatives of the local parliament in a semi-political process and serve four year terms. They represent a cross-section of the local community, as do their American counterparts. For two excellent accounts of the selection and role of German lay judges, see generally Langbein, Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?, 1981 A.B.F.R.J. 195 and Casper & Zeisel, Lay Judges in the German Criminal Courts, 1 J. LEGAL STUD. 135 (1972).
108. Criminal courts of first instance exist at the County Court (Amtsgericht), District Court (Landgericht), and State Appellate Court (Oberlandesgericht) level. The bulk of cases are tried in County Court, either by a single judge (Strafrichter) or by a panel consisting of one (or two) professional judges and two lay judges (Schöffengericht). The prosecutor has the choice to file the accusation with either the Strafrichter or the Schöffengericht; he shall bring before the Strafrichter only cases in which a punishment of not more than one year imprisonment is to be expected. GERICHTSVERFASSUNGSGESETZ [GVG] § 25III. District
Generally, the serious offenses, or *Verbrechen*, are tried before mixed courts; the single-judge court has jurisdiction over the *Vergehen*, including those disposed of by penal orders. The single judge and the small mixed panel may not impose a sentence of more than three years imprisonment. This restriction reserves only the most serious crimes for the large panels as few offenses in Germany are punished by more than three years imprisonment. If it turns out, in the course of the trial, that the case requires a more severe sentence than anticipated, the single judge or small mixed panel must refer it to a large panel.

German observers agree that some element of discretion is involved in judicial determination of a sentence, although the nature and the limits of judicial sentencing discretion are far from clear. The debate about discretion may be called typically German: it is entirely academic but it is conducted nonetheless with great intensity and intellectual vigor. The central question is whether there is, in each case, one optimal sentence which can be “found” by correctly applying the law, or whether the law allows the sentencing court a range within which any sentence is “correct” or “legal.” Everyone agrees, however, that in practice the court must retain some room for responsible creation of a sentence because, for obvious epistemological reasons, the

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Court panels of three professional and two lay judges (*Grosse Strafkammer*) are competent to try the 23 most serious offenses (which are listed in GVG § 74II), certain cases of political and economic crime, and all other cases that the prosecutor presents because they are particularly important or because a sentence of more than three years imprisonment is expected. State Appellate Courts, sitting in panels of three professional judges, try cases of treason, genocide, and a number of offenses directed against the state.

109. GVG § 30.
110. GVG § 24II. If the prosecutor decides that a more severe sentence is appropriate, he must file an accusation with the large mixed panel of three professional and two lay judges. *Id.*
111. StPO § 74I.
“correct” sentence remains an elusive ideal. Under neither theory, of course, may a judge’s personal prejudices, ideologies, or caprice influence the sentencing decision.115

As the court’s deliberations are secret, relatively little is known about the influence of lay judges on sentences. One study found evidence that professional judges sometimes compromise with lay judges. In 6.1% of their cases, dissenting lay judges affected the eventual sentence, more often than not by voting for a more lenient disposition.116

D. Correctional Courts and the Executive

Although the German Penal Code has long adhered to the idea of determinate sentencing of adult offenders,117 the Code has provided for parole and pardon since its inception in 1871. Today, special correctional courts, or Strafvollstreckungskammern, staffed solely by professional judges,118 are responsible for granting and revoking parole, and for hearing prisoners’ complaints against correctional authorities.119

The trial courts, which determined early releases before 1975, had been criticized as too far removed from correctional reality.120 Meaningful parole decisions were difficult because the composition of the trial court often had changed since the original trial, or the judges simply could not remember the defendant.

The correctional court is designed to ensure that parole policies are more consistently and more rationally enforced.121 It is located at or


This leeway is known as the “Spielraum,” or margin. See infra text accompanying notes 198-200.

115. Reliable empirical research on this subject is rare, but one study working with hypothetical cases found that “authoritarian” and “liberal” judges do not differ significantly in their sentencing policies. K. Opp. & R. Peuckert, Ideologie und Fakten in der Rechtsprechung: Eine soziologische Untersuchung über das Urteil im Strafprozess 52-53 (1971).


117. Juvenile courts, however, may impose indeterminate sentences with a statutory four-year maximum. Jugendgerichtsgesetz § 19. But juvenile courts rarely impose such sentences: in 1974, defendants in only 3.4% of all juvenile cases received an indeterminate sentence; in 1978, that figure dropped to 2.2%. Statistisches Bundesamt, Ausgewählte Zahlen für die Rechtspflege 1975 30 (1977); Statistisches Bundesamt, Ausgewählte Zahlen für die Rechtspflege 1978 32 (1980).

118. The correctional court consists of a single professional judge in cases of imprisonment of two years or less, and three judges if the prison term is longer. GVG § 78.

119. GVG § 78a1.


121. A prisoner is generally eligible for parole when he has served two thirds of his sentence. He shall be released “when the likelihood that the prisoner will not commit any
near a correctional institution and decides all cases arising in one prison, thus gaining close familiarity with the possibilities and limitations of treatment in that institution.\textsuperscript{122} Although individual rehabilitative needs are generally understood to be the controlling criteria in parole decisions, judges sometimes are subject to pressure to use parole powers to control prison populations. For example, the Hesse Ministry of Justice recently issued guidelines requesting correctional courts to make more liberal use of early parole in order to reduce the overflow of prisoners in that state's institutions.\textsuperscript{123}

Although parole proposals such as the Hesse guidelines raise doubts about the propriety of executive interference in what is considered a judicial determination, the government's pardon power offers a legitimate alternative.\textsuperscript{124} The right to pardon an offender usually belongs to the prime minister of the state in which the offender was convicted, and is regulated by statute or executive order. A pardon is an act of grace, not a legal remedy. Consequently, the denial of pardon by the executive cannot be challenged in court.\textsuperscript{125}

III. THE PROCESS OF SENTENCING

Procedures and institutions for judicial sentencing in America and Germany differ markedly. Trials and sentencing hearings are kept separate in America; in Germany they are unified. Except for a handful of jurisdictions having sentencing guidelines or a determinate sentencing law,\textsuperscript{126} most American courts lack criteria for sentencing. In Germany's offense-oriented system, judicial discretion is restricted by

\begin{itemize}
\item offenses justifies the risk." In making its decision, the correctional court is to take into account the circumstances of the offense as well as the prisoner's character, prior life, conduct in prison, personal situation, and the effects that early release may have on him. StGB § 57.
\item In exceptional cases, parole can be granted after one half of the sentence has been served. In 1979, 30\% of all prisoners including juveniles released from prison were paroled; only 1\% of this group were released before they had served less than two thirds of the sentence. F. Dünkel & A. Rosner, Die Entwicklung des Strafvollzugs in der Bundesrepublik Deutschland seit 1970 75, 77 (1981).
\item 122. H. Müller-Dietz, Strafvollzugsrecht 221-23 (2d ed. 1978).
\item 123. See Deutscher Richterbund, Gegen landesrechtliche Richtlinien zur Strafaussetzung auf Bewährung, 58 DRZ 232 (1980).
\item 124. Because the Code until recently prohibited parole of prisoners serving life sentences, only a pardon could open prison doors for a "lifer." Few offenders serving terms of life imprisonment were pardoned before having served 20 years. R. Maurach, Deutsches Strafrecht, Allgemeiner Teil 806 (4th ed. 1971).
\item 125. 25 BVerfG 352, 358 (1969). The denial of parole can be appealed to the State Appellate Court.
\item 126. See, e.g., Maryland Sentencing Guidelines Project, Maryland Sentencing Guidelines Manual (1981); Comment, Criminal Procedure — The North Carolina Fair Sentencing Act, 60 N.C.L. REV. 632 (1982); see also supra note 5.
\end{itemize}
strong statutory presumptions in favor of fines over imprisonment and the suspension of short terms of imprisonment. American judges seldom need give reasons for their decisions. German judges must account for their decisions both orally and in writing. Appellate sentence review is rare and ineffectual in America, but pervasive and intrusive in Germany.

A. The Conduct of the Trial

In the United States, the rules governing trials differ greatly from those controlling sentencing hearings. The law of evidence limits considerably the nature and sources of information that may be considered during the guilt phase of a trial, but it imposes few limits at the time of sentencing. The prohibition against evidence about the offender's prior criminality, for example, dissolves once the defendant is convicted. The court is thus relatively unencumbered, and the defendant unprotected, by evidentiary or other rules during the sentencing phase.

The guilt-finding and sentencing functions are not separated under German law: the trial court finds the facts, decides upon the verdict, and determines the sentence, all in one proceeding — the Hauptverhandlung (literally: main hearing). Consequently, German law does not distinguish between evidence admissible on the issue of guilt and other evidence, as in America, admissible only in connection with sentencing. The trial court must gather simultaneously the information necessary to reach a verdict and to arrive at an appropriate sentence.

The court collects evidence relevant to sentencing according to the same standards that it follows in taking proof on the issue of guilt — standards which must appear comparatively loose to the American observer. For example, hearsay evidence may be introduced and the exclusion of illegally obtained evidence is limited by statute to extreme cases, such as the use of deception, illegal threats, and hypnosis.127 Evi-
dence concerning the defendant's character, including prior convictions, also can be introduced even if the defendant refuses to testify. There is no prescribed sequence in which evidence relating to guilt and sentencing must be presented: the court is not precluded from hearing character evidence first and evidence concerning the details of the offense later. Although the Code of Criminal Procedure recommends that evidence of prior offenses be introduced only "as far as necessary,"128 in practice the defendant's rap sheet is usually read into the record at the very end of the trial before the closing arguments.

At first glance, many American lawyers would regard German procedures as unfair to defendants. A court that considers evidence about the defendant's character, including his prior record, may be prejudiced against him. Germans, however, generally do not regard the unified trial and its unstructured mode of gathering evidence as unjust.

German confidence in the fairness of its procedures derives from two sources: the absence of an unsupervised lay fact-finder and a heritage of inquisitorial procedure, which together result in a different approach to truth-seeking. First, the German court system, unlike the American, does not have to control the deliberations of lay jurors through complicated rules of evidence.129 German lay judges deliberate and decide cases together with their professional colleagues and are under the latter's continual guidance and advice. The German system relies on the professional judge's ability to explain the relevance and the weight of the evidence to the lay judges to prevent them from confounding the issues. Professional judges, due to their training and experience, are presumed to know how properly to assess evidence without the guidance of formal rules.

Second, Germany has a long history of inquisitorial procedures. For more than three centuries it was the task of the court to investigate the case, pronounce the verdict, and impose the sentence.130 Although the investigatory functions were transferred to the public prosecutor in the Nineteenth Century, separate adjudication of guilt and sentencing has been unknown at least since the end of the Middle Ages.131

Germany's inquisitorial heritage has given rise to a mode of truth-

128. StPO § 243IV.
129. Langbein, Land Without Plea Bargaining, supra note 80, at 207.
130. The Constitutio Criminalis Carolina of 1532, which set forth these requirements, was in force in Germany for more than three centuries. An English translation of the provisions of the Carolina dealing with criminal procedure can be found in J. Langbein, Prosecuting Crime in the Renaissance 259-308 (1974).
sentencing different from that in a common-law system. In America, the truth emerges in an indirect fashion from a contest between the parties. Thus, the procedural rules that guide and regulate that contest are of paramount importance. In Germany, however, the court seeks the truth directly by questioning those who are most likely to know it. While that does not mean that the truth can be sought at any cost, the German system puts less emphasis on formality and rules of evidence and looks in a less inhibited fashion to the desired end result: the emergence of the truth.

A German judge would think it absurd to limit testimony from a witness who is about to convey useful information on the defendant’s need for rehabilitation because the witness was called to testify about the offense. The loss of “truth” would be regarded as much more harmful than any disturbance in the intended sequence of taking proof.

One might expect German courts to be awash with evidence pertaining not to the crime but to the offender. Yet a look at German trial practice shows that this is not the case. In the average case, no presentence report is prepared, and judges often limit their attention to the defendant’s prior record and his monthly income (if a day fine is to be imposed), refraining from obtaining more detailed information on his personal situation and history. One study found that independent evidence concerning the appropriate sanction was presented in only six percent of all criminal trials, and that discussion of issues related to sentencing in open court takes no more than five minutes in the average trial, which usually lasts less than an hour.

German courts thus treat sentencing as subsidiary to the overriding concern in the information-gathering phase of adjudication: the determination of guilt or innocence. Critics committed to the rehabili-

133. 14 BGHSt 358, 365 (1960); K. Peters, \textit{supra} note 78, at 77-78.
135. The German Code of Criminal Procedure authorizes the prosecutor to delegate the collection of sentence-related evidence to a special agency known as \textit{Gerichtshilfe}, or “Court Aid,” StPO § 160III, but not all of the states have created such agencies. Where they exist, lack of manpower often limits their activities to the most difficult and extraordinary cases. C. Roxin, \textit{supra} note 134, at 53; Stöckel, \textit{Der Sozialdienst in der Justiz}, in \textit{Festschrift für Hans-Jürgen Bruns zum 70. Geburtstag} 299, 301-03 (W. Frisch & W. Schmid eds. 1978).
138. \textit{Id.} at 179.
139. The average trial in Germany takes only 50 to 60 minutes. \textit{Id.} at 219; Weigend, \textit{Continental Cures}, \textit{supra} note 81, at 411.
tative ideal have regarded that one-sided emphasis as inadequate. The great majority of German legal writers in the last decade have called for the introduction of a two-phase proceeding patterned after the Anglo-American model. They argue that the split trial permits more detailed consideration of the accused's personality and mitigating and aggravating circumstances, and that it may reduce the likelihood that evidence germane to sentencing will influence adjudication on the merits. Moreover, the two-phase trial would free defense counsel from his present summing-up dilemma: counsel in one final statement must both assert the defendant's innocence and explain why he deserves a lenient sentence if found guilty.

The split trial exists today primarily in the pages of academic journals. No enabling legislation has been passed, but the Code of Criminal Procedure does not explicitly prohibit informal separation of hearings on the issues of guilt and sentence. One jurisdiction tested the concept and an evaluation of this experience demonstrated that the split trial is a feasible alternative in that it does not create insurmountable procedural problems. Although the sentences imposed did not differ significantly from those handed down in traditional trials, the average time devoted to receiving evidence concerning the sanction increased from five minutes to ten minutes. The minimal increase in time suggests the strength as well as the weakness of the proposal: legal scholars welcome the more intensive exploration of factors relevant to sentencing, but practitioners may be wary of any change that increases overall trial time.

B. The Court's Deliberations

Little is known about the next phase of sentencing, the internal deliberations of the court. Legal scholars argue that consideration of the appropriate sentence should consist of at least two stages: first, setting a sentence that reflects the offender's culpability; second, correcting

141. See, e.g., C. Roxin, supra note 134, at 234-35; D. Dölling, supra note 96, at 2 n.2.
142. D. Dölling, supra note 96, at 204.
143. D. Dölling, supra note 96, at 178.
144. Proponents of the split trial still differ about specifics such as the allocation of the issue of insanity, and the binding character of the judicial determination of guilt marking the end of the first phase. Legislative reform, therefore, if it comes at all, will come slowly.
it for his rehabilitative needs; and possibly further adjusting it to satisfy the demands of general deterrence.\textsuperscript{145} It is not likely that many panels actually undertake these complicated mental operations. A court needs a two-thirds majority to impose any sentence other than the legal minimum,\textsuperscript{146} and usually hands down sentences in round numbers.\textsuperscript{147} These factors suggest that other, non-doctrinal considerations frequently influence the deliberative process: a court, for example, may compromise to accommodate differing sentencing philosophies among the panel. A court also may give undue weight to practical considerations as when it sets a sentence of probation instead of a fine in order to allow supervision by a probation officer.\textsuperscript{148}

The German Penal Code constrains the court's deliberations, not only by setting sentence ranges for individual offenses, but also by providing statutory preferences for certain types and degrees of sanctions. The authorized sanctions for most offenses before German courts are either imprisonment, probation, or a fine. The German Penal Code views imprisonment only as a last resort, stating a clear preference for day fines in offenses of lesser or medium seriousness.\textsuperscript{149} Section 47 of the Code, part of an international trend against short-term imprisonment, permits the court to impose prison sentences of up to six months only "if special circumstances regarding the offense or the personality of the offender make imprisonment indispensable to influence the offender or to protect the legal order."\textsuperscript{150} Barring special circumstances, the court must suspend prison sentences of one year or less if it expects that the defendant will not commit additional offenses.\textsuperscript{151}

In practice, the courts largely honor the legislative policy against


146. \textit{STPO} § 2631.

147. H. Albrecht, \textit{supra} note 23, at 76; Hassenmer, \textit{supra} note 54, 78-79; K. Rolinski, \textit{Die Pragnanztendenz im Strafurteil} 105 (1969). Defendants usually receive sentences such as one year, two years, three years imprisonment, or 20 or 30 day fines, and not one year and seven months, or 38 day fines, as could be expected given Germany's complicated sentencing system.


It is impermissible to sentence an offender to a prison term because the court thinks that he will be unable to pay a fine. The day fine system makes it possible to adapt the fine to the offender's financial means. Schöneke & Schröder, \textit{supra} note 72, § 46 n.61. \textit{See supra} note 22 and accompanying text.

150. \textit{STGB} § 471. The statute does not define the term "special circumstances."

151. \textit{STGB} § 56.
terms of imprisonment for less serious offenses. First offenders usually receive fines, and prison sentences are generally reserved for repeat offenders. Recidivism is the paradigmatic “special circumstance” which permits the imposition of a prison term; age or economic status does not influence an offender’s chance of being sent to prison. The criminal career of the typical recidivist, especially one who continues to repeat the same crime, is almost uniformly mirrored by advancement on the rungs of the sentence ladder: first a fine, then probation, and finally a prison sentence. One may doubt the wisdom of this escalation from the least to the most dissocializing sanction, in which the state beats the drum to the offender’s march to the point of no return, but German courts adhere to this sentencing philosophy.

C. Imposition of Sentence

Once the court has decided upon a verdict and a sentence, it resumes the public session and pronounces the judgment. The presiding judge states in court the reasons for both the verdict and the

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153. Id. at 99; Schönke & Schröder, supra note 72, § 47 n.11.

Under German law, recidivists are treated more severely, but the enhancement of the sentence is low compared to some American statutes: an offender who is convicted for the third time and who has previously spent at least three months in prison must be sentenced to a minimum period of six months imprisonment. StGB § 48. In a feeble attempt to conform this provision to the desert principle, the statute requires that the offense be such that the offender can justly be blamed with failing to heed the warning of the earlier conviction. No provision, however, increases an offender’s term beyond the maximum.

154. J. Schiel, Unterschiede in der deutschen Strafrechtsprechung 45-46 (1969); see H. Albrecht, supra note 23, at 160, 170. See infra text accompanying notes 238-244.

A defendant convicted of more than one offense receives only one sentence. If he violated two or more provisions of the Code by committing a single act, e.g., by killing the victim in an act of rape, he is sentenced only for the more serious offense. StGB § 52. If, however, he committed two or more independent criminal acts, the court determines the appropriate sentence for each offense, adds the two, and deducts a discretionary “bonus.” StGB §§ 53, 54.
sentence, as required by statute. The explanation, even in minor cases, takes an average of four minutes. Judges regard it as important that the parties, especially the defendant, understand how the court evaluated the evidence and why it chose a particular sentence. Although judges often try to make the oral statement as comprehensive as possible, it has little legal significance: the statement is not recorded, nor is it subject to review. The court also must prepare an extensive written statement of the reasons for the verdict, as well as for the sentence, within five weeks after the pronouncement of the judgment. This statement contains the official justification for the deprivation of liberty or property imposed upon the defendant and is subject to close scrutiny by the higher court if either party files an appeal.

The written statement ideally should include a description of the defendant's personality, an extensive discussion of sentencing alternatives available for the offender, and a persuasive statement of the considerations that moved the court to select the particular sentence. But practice often falls short of the ideal. Critics complain that some judges do no more than recite a common formula, such as "with respect to the nature of the offense and to the personality of the offender, the sentence imposed was necessary and sufficient," or that judges simply enumerate sentencing factors with no attempt to relate them to the actual sentence. Although appellate courts do not require explanations to cover all conceivable grounds for sentencing, such mechanical incantations of magic formulae certainly do not fulfill the law's aim of ensuring a reasoned sentencing decision.

Appellate courts may be to blame for taking the juice out of sentencing reasons. The higher courts have kept a tight rein on lower courts by overturning many judgments for allegedly "illegal" sentencing considerations, thus driving the true reasons underground and

158. StPO § 268II.
159. D. Dölling, supra note 96, at 230. See supra note 139.
160. 7 BGHSt 363, 370-71 (1955).
161. StPO §§ 267, 275.
162. If both parties waive their right to appeal, the written judgment can be filed in an abridged form. StPO § 267.
163. Seebald, supra note 54, at 8; see also H. Bruns, supra note 112, at 137 ("'sufficient and necessary' or 'proper and requisite' ").
165. See 24 BGHSt 268 (1971); Otto, Möglichkeiten und Grenzen der Revision in Strafsachen, 31 NJW 1, 10 (1978).
166. Judgments of trial courts may be "illegal," and therefore subject to reversal, because of "irrelevant" considerations in sentencing. See, e.g., H. Bruns, supra note 112, at 360-61 (the trial court considered that the offender would be expelled from the civil service if given a sentence of imprisonment of more than one year); 40 Verkehrsrechtssammlung 418 (Fed. App. Ct. 1971) (the court, in a trial involving reckless killing with an automobile, had held it
encouraging trial courts to rely on meaningless formulae.\textsuperscript{168} An additional reason for the frequency of unsatisfactory explanations is the lack of dissenting opinions at the trial level.\textsuperscript{169} The court's written statement often explains a compromise disposition, perhaps one with which the author disagrees.\textsuperscript{170} Yet, although the German sentencing process falls short of fulfilling its promise of open reasoning and rationality, it may be preferable to a system where the defendant need not be given any explanation for his sentence.\textsuperscript{171}

D. Appeal of Sentence

German law liberally grants both the defendant and the prosecutor the right to seek review of a criminal judgment.\textsuperscript{172} Either party may appeal a decision of a local court, or Amtsgericht, which consists of either a single professional judge or one professional and two lay judges, without alleging specific reasons and demand a trial de novo in the district court, or Landgericht. This appeal, called a Berufung, usually attacks both the verdict and the sentence, but the defendant can limit the appeal to the sentence only if he concedes guilt but considers the sentence disproportionately severe.\textsuperscript{173} If only the defendant ap-

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against the defendant that he had not expressed his regrets to the widow of the deceased); 1980 Juristische Rundschau 76 (St. App. Ct. 1979) (the court considered the young age of the victim as an aggravating factor in an automobile manslaughter case).

\textsuperscript{167} There is a saying among German lawyers that for each judgment there are three sets of reasons: the oral reasons, the written reasons, and the real reasons.

\textsuperscript{168} Hassemer, supra note 54, at 80-82.

\textsuperscript{169} Only judges on the Bundesverfassungsgericht, or Federal Constitutional Court, can dissent. This court has published dissenting opinions since 1971.

\textsuperscript{170} Hassemer, supra note 54, at 89. Only the presiding judge or one of the other professional judges can write the trial court's opinion. \textit{Id}.


\textsuperscript{172} The American reader may be surprised that the German prosecutor can appeal from a verdict of acquittal. While the general principle of double jeopardy is recognized in German law, see GG art. 103(3), it is limited to \textit{multiple prosecutions} for the same act. The original prosecution is thought to end only when there is a final judgment, i.e., a judgment from which no appeal can be taken.

\textsuperscript{173} StPO § 318.
peals a judgment of the local court, the sentence cannot be increased. All judgments of the district court, including appeals from local courts, may be appealed as a matter of right to an appellate court. Appeals in cases originally tried in the local court are heard by the State Appellate Court, or Oberlandesgericht; cases started at the district court level must be appealed to the Federal Appellate Court, or Bundesgerichtshof. At this level, the appellant must allege specific procedural or substantive mistakes by the district court as evidenced in the record and, in particular, the written judgment.

During the first few decades following the introduction of the Code of Criminal Procedure, appellate courts seldom overruled sentencing decisions. The courts regarded sentencing as based on the facts of the case, not the law, and therefore outside the purview of appellate review. Sentencing in their view was a matter of the trial court's unreviewable discretion, particularly because sentences are based in part on the impression an offender makes on the court — a factor which cannot be reproduced in the record or in the written judgment.

These arguments did not prevent a gradual broadening of the scope of appellate sentence review. Since 1945, Germans have regarded the idea of uncontrolled discretion at any level of any governmental branch as irreconcilable with the principles of democracy and the rule of law. The movement toward strict application of legal standards in decisions affecting the individual citizen, carried forward by courts and scholars alike, soon reached the area of sentencing. In an important 1962 decision, the Federal Appellate Court emphasized the trial court's primary responsibility in sentencing, but announced that it would overturn sentences if the trial court's reasons for the sentence were legally improper, if the trial court had failed to consider one of the recognized purposes of punishment, or if there was a strong disproportionality between the offender's culpability and the punishment.

Today, appellate courts still pay lip service to the trial court's sentencing discretion, but have set narrow limits on its exercise. At one time only blatant blunders in the lower court's sentence reasons led to reversal, but no longer. Appellate courts increasingly tend to weigh

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174. StPO § 331.
176. See GG art. 28.
177. 17 BGHSt 35, 36-37 (1962).
178. See, e.g., 27 BGHSt 2, 3-4 (1976).
179. Appellate courts reversed trial courts that incorrectly cited aggravating factors in mitigation, failed to consider the personality of the offender, explicitly went beyond the punishment proportionate to the culpability of the offender for purposes of general deterrence,
the overall fairness of the sentence and do not hesitate to order resentencing if they deem the sanction imposed either too severe or too light. Insufficient reasoning in the lower court's opinion is usually the technical grounds invoked for reversal. The wider the gap is between the actual disposition and the "normal" sentence, the heavier the burden of justification will be on the district court. Appellate judges take their standards of "normal" not from a body of formal law, but from their own feeling of equity and justice and from their experience with the sentencing policies of other trial courts. Thus, although defendants cannot successfully base their appeals on more lenient treatment received by other defendants under similar circumstances, the equality of sentences in comparable cases is furthered by the controlling influence of appellate courts.

IV. THE PRINCIPLES OF SENTENCING

German sentencing principles can be approached in several ways. A reader might explore the jurisprudential rhetoric of sentencing, consult the criminal statutes to learn what guidance the legislature has given the courts, or study how courts in practice handle the recurring practical problems of sentencing. This section discusses German sentencing from these three perspectives and in this order.

A. Jurisprudence

German jurisprudence since 1945 has recognized retribution as the primary justification and purpose of punishment. Retribution gained or, contrary to StGB § 46III, cited constituent elements of the offense as aggravating or mitigating circumstances. See LEIPZIGER KOMMENTAR, supra note 59, § 46 n.125.

180. Two examples of sentences reversed for undue leniency:

In one case, the defendants had tried several times to destroy a police station with home-made bombs. The bombs finally exploded, but the station sustained little damage due to the defendants' poor craftsmanship. Despite prior records, the district court sentenced each defendant to only four months imprisonment and granted probation. See 30 MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR] 941 (Fed. App. Ct. 1976).

In another case, the defendants had solicited young people to join a criminal gang which committed politically motivated terrorist acts, including bombings. The defendants did not have prior records. They stated that they did not regret their criminal activities. The district court sentenced one to six months imprisonment and granted probation; the other received a fine of approximately $2000. See 31 NJW 174 (Fed. App. Ct. 1977).


182. See H. BRUNS, LEITFADEN DES STRAFZUMESSUNGSRECHTS 282-84 (1980).

183. LEIPZIGER KOMMENTAR, supra note 59, § 46 n.28; H. JESCHECK, supra note 112, at 700.
additional favor after the abuses of the Nazi regime, which had emphasized deterrence in sentencing, had demonstrated the dangers of deviation from the idea of strict proportionality between culpability and punishment.\textsuperscript{184} Rehabilitation, general deterrence, and incapacitation are only of secondary importance.

1. \textit{Culpability and Desert} — The foundation principles of modern German sentencing theory are that punishment requires culpability and that the primary purpose of punishment is retribution for the offender’s culpable act.\textsuperscript{185} A modern secular system of sanctions cannot be based on a metaphysical notion of subjective responsibility, to be established only by the \textit{forum internum}. Rather, the desert principle — that the offender’s culpability in committing an act should determine the sanction — is related to the modern state’s task of safeguarding social peace and order.\textsuperscript{186} If punishment is to restore the social peace disturbed by the offense, the penalty must be such that everyone affected — the victim, the offender, and society at large — can accept it as a commensurate, fair, and sufficient response to the wrongful act. Otherwise, punishment becomes socially counterproductive. Let it be too strict and the offender and his sympathizers will be resentful. Let it be too lenient and the victim and his friends will remain dissatisfied. Thus, rather than restoring social peace, potential sources of conflict may be created.

The exact boundaries of culpability are far from clear. The concept includes more than blameworthiness, which is one prerequisite of a finding of guilt and can be defined as the internal connection between the offender and his act.\textsuperscript{187} All circumstances related to the social impact of an offense — including the nature of the offense, the offender’s motivation, the degree of his deviation from generally approved standards of conduct, and the extent of damage caused or intended — constitute elements of culpability. Some writers contend that an assessment of culpability also requires consideration of the defendant’s character, his general law abidance as demonstrated by his behavior

\textsuperscript{184} See Bruns, "\textit{Stellenwerttheorie}" oder "\textit{Doppelspurige Strafshöhenbemessung}"?, in \textsc{Festschrift für Eduard Dreher zum 70. Geburtstag} 252 (H. Jescheck & H. Lütgert eds. 1977).

\textsuperscript{185} \textsc{Leipziger Kommentar}, \textit{supra} note 59, \S 46 n.13; Herrmann, \textit{Sanctions}, \textit{supra} note 27, at 719-20 (1976); see also Jescheck, \textit{supra} note 112, at 701.

\textsuperscript{186} Roxin, \textit{supra} note 114, at 468.

\textsuperscript{187} Roxin, \textit{Zur jüngsten Diskussion über Schuld, Prävention und Verantwortlichkeit im Strafrecht}, in \textsc{Festschrift für Paul Bockelmann zum 70. Geburtstag} 279, 304 (A. Kaufmann, G. Bemmann, D. Krauss & K. Volk eds. 1979); \textsc{Leipziger Kommentar}, \textit{supra} note 59, \S 46 n.6; see T. Hertz, \textit{Das Verhalten des Täters nach der Tat} 64-65 (1973).
before and after the commission of the offense, and the intensity of his anti-social behavior.\textsuperscript{188} Other commentators believe that only the characteristics of the offense are relevant, and would consider elements of the offender's personality only in connection with rehabilitation.\textsuperscript{189}

Under the desert principle, the offender may receive neither more nor less punishment than he deserves. Some scholars, however, argue that the offender's reintegration into society should be the overriding concern of a sentencing court and that a court may fix a lesser penalty if imposition of the deserved punishment would decrease the offender's rehabilitative prospects.\textsuperscript{190} But the courts refuse to deviate from the desert principle and thus have rejected this argument. Otherwise, the courts contend, punishment would lose its force and would degenerate into an ethically neutral measure of prevention.\textsuperscript{191}

Any system relying on culpability and desert as yardsticks for sentencing is faced with a seemingly insoluble problem: Punishment, and perhaps even culpability, can be measured quantitatively but it is hardly possible to correlate the two. Culpability cannot easily be translated into years and months of imprisonment nor into sums of money.\textsuperscript{192} Such calculations, if possible at all, lack objective validity.

The German sentencing system is thus anchored in irrationality. There is no articulable reason why the culpability of an average robber should be worth one year in prison, and not three years, or six months. Once that inevitably arbitrary choice has been made, however, setting commensurate sentences can be done with some accuracy. If one year of imprisonment is the sanction for an "average" robbery, it is quite rational to say that the punishment for armed robbery should be somewhat more severe, perhaps eighteen months in prison, and that the

\textsuperscript{188} LEIPZGER KOMMENTAR, supra note 59, § 46 n.6; Bruns, supra note 113, at 752.

\textsuperscript{189} See R. Maurach & H. Zipf, supra note 72, at 430; G. STRATENWERTH, supra note 155, at 28-37.

\textsuperscript{190} SCHÖNKE & SCHRÖDER, supra note 72, § 46 n.4; R. MAURACH & H. ZIPF, supra note 72, at 449; K. LACKNER, supra note 145, at 25; Roxin, supra note 114, at 476-78.

A group of liberal professors proposed a more radical solution in 1966 in an alternative draft proposal for a penal code. See supra note 10. They proposed that: "The punishment to be imposed for the offense shall not exceed that which is required in order to reintegrate the offender into society and to protect legal interests." ALTERNATIV-ENTWURF, supra note 7, § 59 II. Under this provision, which was rejected by the German legislature, culpability would no longer have been the controlling factor in sentencing. Id. at 52, 54.


\textsuperscript{192} See Roxin, Prävention und Strafzumessung, in FESTSCHRIFT FÜR HANS-JÜRGEN BRUNS ZUM 70. GEBURTSTAG 191 (W. Frisch & W. Schmid eds. 1978); Silving, supra note 24, at 745-49; Schoene, Die Regelstrafe: Ein Versuch zur Linderung des Unbehagens bei der Strafzumessung, 20 NJW 1118, 1119 (1967); Ostermeyer, supra note 52, at 2302.
punishment for attempted robbery should be less, perhaps six months. Setting appropriate anchor values is the crux of the German sentencing system; we shall see later what solutions courts have found to deal with the practical aspects of this problem.

2. Rehabilitation — Rehabilitation, although regarded as co-equal with retribution in theory, has never been more than a complementary purpose of punishment in practice.\textsuperscript{193} German courts are precluded from prolonging or shortening a sentence in order to facilitate the rehabilitation of the offender. Any sentence surpassing the limits set by the desert principle is regarded as strictly impermissible.\textsuperscript{194} If the defendant needs specific treatment, the court can order measures of rehabilitation independently of and in addition to the punishment.\textsuperscript{195}

The rehabilitative model of sentencing, rejected in Germany, does not permit the strictly rational fixing of sentences, but for different reasons than a system based on the desert principle. Decades of experience have shown that the rehabilitative — as opposed to the incapacitative — potential of long prison sentences is low.\textsuperscript{196} All other general statements about rehabilitative success remain largely speculative. Given the state of today's research into the prognosis and treatment of offenders, no responsible legal commentator or scientist can predict a specific date for the earliest safe release of any convicted offender.\textsuperscript{197} In light of this uncertainty the conservatism of German doctrine with respect to rehabilitative considerations in sentencing looks progressive.

A trial court may consider the effects of punishment on the offender's chances of reintegration only within a relatively narrow range left by the desert principle. The jurisprudence of the Federal Appellate

\begin{footnotes}
\footnotetext{193}{See K. Lackner, \textit{supra} note 145, at 29; R. Maurach & H. Zipf, \textit{supra} note 72, at 456.}
\footnotetext{194}{20 BGHSt 264 (1965). See \textit{supra} notes 189-190 and accompanying text.}
\footnotetext{195}{The arrangement reeks of double punishment: the offender is sent to prison for what he did, and then he is sent to another institution for what he might do. The offender thus pays a heavy price for the neat doctrinal separation between culpability and dangerousness; he will hardly be consoled by knowing that his sojourn in a mental institution, a drug treatment center, in an institution of social therapy, or in "security custody" is labelled nonpunitive. See Müller, \textit{Sanktionen in juristischer und soziologischer Sicht}, 32 JZ 381, 382 (1977). Since 1975, however, measures of rehabilitation and security are executed before the execution of criminal punishment, and the offender is often granted parole after serving the "nonpunitive" term. See StGB § 67. See \textit{supra} text accompanying notes 36-42.}
\footnotetext{196}{G. Stratienwerth, \textit{supra} note 155, at 21.}
\footnotetext{197}{Dreher, \textit{supra} note 58, at 158; E. Horn, \textit{Systematischer Kommentar, supra} note 114, § 46 n.5; Bruckmann, \textit{Vorschlag zur Reform des Strafzumessungsrechts,} 6 \textit{Zeitschrift für Rechtspolitik} 30, 32 (1973); H. Schöch, \textit{supra} note 181, at 83-84. See Hassemer, \textit{supra} note 54, at 89.}
\end{footnotes}
Court lets rehabilitation in by a tiny back door: the epistemological imperfection in the culpability — punishment relationship. The inability to calibrate culpability on scales of years, months, or sums of money leaves a range of permissible sentences, known as the Spielraum, in which a court may consider the goal of rehabilitation. Although some commentators argue that this theory lacks logic and that it is far removed from the manner in which judges actually compute sentences, the Spielraum theory provides a tenable theoretical basis for a compromise between retributive and rehabilitative considerations.

3. General Deterrence — German scholars argue heatedly about the appropriateness of increasing sentences to warn possible offenders of the state's readiness to react forcefully to behavior that seriously disrupts social peace. No writer advocates an increase of punishment beyond the Spielraum for reasons of general deterrence, but some would forbid any consideration of general deterrence. They argue that it is manifestly unfair to punish someone more severely in order to educate others, and that too little is known about the actual deterrent effect of increased penalties.

German appellate courts have few scruples in regard to general deterrence. They consistently rule that a sentencing judge acts within the bounds of legal discretion when he considers the deterrent effect of a sentence, especially with respect to crimes typically committed by calculating offenders, such as espionage and tax fraud. Many courts impose sentences approaching the upper limit of the Spielraum by in-
voking the need to deter possible offenders.203

Some commentators who favor consideration of general deterrence take a more restrictive approach. They would permit consideration of deterrence only as a counterweight to factors that would justify a sentence in the lower range of the Spielraum. In the case of a socially well-integrated defendant, for example, if the court considers rehabilitation of the offender, a lesser penalty, such as a fine, might appear more appropriate than an “average” punishment, such as imprisonment, which might disintegrate the offender’s social ties. The public, however, might interpret such a sentence as an incomprehensible and unjustifiable surrender to crime.204 The court, the argument goes, should counterbalance the effect of a strictly offender-oriented sentence by invoking principles of general deterrence.

The legislature has explicitly mandated that the court consider general deterrence when making two important sentencing decisions: First, the court should not suspend a sentence of imprisonment between six months and one year if “defense of the legal order” requires its execution.205 Second, the court should impose a prison sentence of less than six months if necessary to maintain the legal order.206 Within the Spielraum, a trial court can thus adapt the sentence to public expectations about the role of the criminal courts in maintaining law and order. For example, the court can impose a short-term prison sentence and deny probation if the offender acted with particular audacity or otherwise demonstrated that he failed to take seriously the prohibitions of the criminal law.207 But even the “defense of the legal order” cannot justify a sentence beyond the limits set by the culpability of the offender.208

Too much should not be made of these legislative mandates. They may be merely of theoretical interest because courts rarely invoke deterrence as a ground for imposing a term of imprisonment, rather than a fine or probation. One sample of 540 judgments of lower courts, for example, did not contain a single decision in which the necessity to defend the legal order was cited as the reason for imposing a short prison sentence or for denying probation.209

203. See Bruns, supra note 182, at 78–85; Mösl, supra note 181, at 167; Lorenz, May & Schubert, supra note 164, at 194.
204. LEIPZIGER KOMMENTAR, supra note 59, § 46 n.24; R. MAURACH & H. ZIPF, supra note 72, at 454.
205. StGB § 56III.
206. StGB § 47I.
207. 24 BGHSt 40, 47 (1970); Grünwald, supra note 149, at 232.
The lack of emphasis on deterrence in German sentencing may surprise the American reader. Yet deterrence does not necessarily require frightening people into obedience by threatening them with exorbitant penalties. In modern German theory, deterrence is understood as general prevention — the state's effort to back up and stabilize fundamental social norms by means of the least intrusive measures sufficient to prevent disruption of the social order. Deterrence in that sense is a by-product of any punishment and is best achieved by sentences that reflect the degree of the offender's culpability. The spectacle of an offender receiving his "just deserts" reassures the public of the state's readiness to uphold its most fundamental norms, which include justice and respect for every fellow man's freedom and liberty.

4. Incapacitation — The goal of incapacitation plays only a minimal role in articulated sentencing decisions of German courts. Incapacitation is a by-product of a prison sentence, but may not be used to justify an extension of a sentence beyond what the culpability of the offender compels. A trial court may, however, impose one of the non-punitive measures available under German law, such as "security custody" or the revocation of a driver's license, which serve primarily incapacitative purposes.

This list of jurisprudentially approved purposes of punishment provides only a vague guide to a trial court, yielding more prohibitions than affirmative direction for the sentencing judge. Culpability has absolute priority as the yardstick courts must use in sentencing. This leaves little room for consideration of rehabilitation and general deterrence.

B. Legislation

The German legislature has given the courts little statutory guidance for sentencing decisions. The sole provision of the German Penal Code concerning the decision-making process, section 46, is a

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210. See Roxin, supra note 114, at 466–67.
211. See H. Jescheck, supra note 112, at 53.
212. See id. at 61. As early as 1928, the famous German jurist Eduard Kohlrausch coined the phrase: "Um Generalprävention braucht man sich nicht zu sorgen." (One does not have to worry about general prevention.). E. Kohlrausch, Fortschritte und Rückschritte in den kriminalpolitischen Bestimmungen des neuesten Strafgesetzentwurfes, in 3 MITTEILUNGEN DER INTERNATIONALEN KRIMINALISTISCHEN VEREINIGUNG, NEUE FOLGE 5, 14 (1928).
213. LEIPZIGER KOMMENTAR, supra note 59, § 46 n.18.
214. See supra note 39.
215. See supra notes 40 & 41.
216. See supra note 195.
compromise formula which states rather than resolves the perennial conflict between retributivists and rehabilitators.\textsuperscript{217} "The culpability of the offender is the basis of sentencing. The effects which the punishment is expected to have on the offender's future life in society shall be taken into account."\textsuperscript{218} Appellate courts have interpreted this vague prescription to forbid trial courts to go outside the range of desert-oriented punishment to meet the rehabilitative needs of the offenders. Additionally, the section provides scant guidance to judges in choosing the proper sentence within the \textit{Spielraum}.

A novel proposal for interpretation of the statutory formula recently has received attention. Under this two-step approach, culpability and rehabilitation would dominate different phases of the sentencing process. First, the court would determine the length of the sentence according to the offender's culpability. It then would decide the nature of the sentence, i.e., imprisonment, probation, or day fine, depending on the offender's rehabilitative needs.\textsuperscript{219} The Code now permits the trial court to interchange sanctions for offenses punishable up to a maximum of a one-year sentence. Within this range, which covers the majority of cases, the Code allows the court to send the defendant to prison, to order the prison sentence suspended, or to impose a day fine. This proposal argues that the choice among modes of punishment, as opposed to its quantum, should be guided by criminological knowledge rather than by an assessment of culpability.

Most commentators have rejected the proposal and argue that the mechanical allocation of sentencing considerations to different phases of sentencing is too simple to be fair: It can be damaging to the defendant if the court determines the length of the punishment without regard to his potential for rehabilitation, and it would likewise appear unfair not to consider the minor seriousness of the offense when choosing among a fine, probation, or imprisonment.\textsuperscript{220} Nor does section 46 permit the total exclusion of rehabilitative considerations from the determination of the sentence length. The proposal also offers no solution to

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\item[\textsuperscript{217}] Leipziger Kommentar, supra note 59, § 46 n.12; T. Hertz, supra note 187, at 11; see G. Stratwenwerth, supra note 155, at 11.
\item[\textsuperscript{218}] StGB § 461.
\item[\textsuperscript{219}] Horn, Zum Stellenwert der "Stellenwerthorie," in Festschrift für Hans-Jürgen Bruns zum 70. Geburtstag passim (W. Frisch & W. Schmid eds. 1978); E. Horn, Systematischer Kommentar, supra note 114, § 46 nn.21-35; Schöch, Grundlage und Wirkungen der der Strafe: Zum Realitätsgehalt des § 46 Abs. 1 StGB, in Festschrift für Friedrich Schaffstein passim (G. Grünwald, O. Miehe, H. Rudolphi & H. Schreiber eds. 1975); H. Schöch, supra note 181, at 91-97.
\item[\textsuperscript{220}] Schönke & Schröder, supra note 72, § 46 n.4; K. Lackner, supra note 145, at 16-22; Roxin, supra note 192, at 186-89; see Bruns, supra note 184, at 261-65.
\end{enumerate}
\end{footnotesize}
the problem of sentencing in serious cases where the conflict between culpability (which here requires a long prison term) and rehabilitation (which is often best served by noncustodial treatment) is most acute.221

C. The Courts in Practice

Sentencing courts must accept the unresolved antinomy between statutory punishment goals.222 Neither section 46 nor any other provision of the German Penal Code resolves this conflict. The official list of sentencing factors in section 46 only states indefinite criteria, such as the offender's motive and "prior life," without ranking these factors or specifying which circumstances should be weighed in favor of the defendant, and which against him.223 But German courts, like American ones, must sentence the defendants before them, no matter how ambiguous the formal rules may be. Perforce courts must face a number of troubling and sometimes controversial choices.

First, may a court consider criminal acts of which the defendant was acquitted or for which prosecution was dropped as aggravating factors? The "prior life" clause of section 46, according to the Federal Appellate Court224 and a majority of commentators,225 allows the consideration of such factors which are unrelated to the offender's culpability in committing the offense because they permit conclusions as to the personality of the offender.

Second, can an offender be held legally responsible (schuldig) for unforeseen harm caused by his act? Some writers would exclude unforeseen damage from sentencing decisions226 and others would require at

221. One of the proponents of this theory, Professor Schöch, recently has retreated from significant parts of it. See Schöch, Kriminologie und Sanktionsgesetzgebung, 92 ZStW 143, 182-83 (1980).
223. StGB § 4611. A translation reads:

In the process of determining the sentence, the court shall weigh the factors speaking for and against the offender. In particular, it shall take into account: the offender's motives and objectives; the attitude expressed by the offense, and the will power needed to commit it; the degree of neglect of duty; the manner of committing the offense and its effects as far as the offender is responsible for them; the offender's prior life, his personal and economic circumstances; and his behavior after the commission of the offense, in particular efforts to make restitution for the harm done.

225. E. Dreher & H. Tröndle, supra note 224, § 46 n.24; Schönke & Schröder, supra note 72, § 46 n.33; Mös, supra note 181, at 168; H. Jescheck, supra note 112, at 713.
least negligence as to that harm.\textsuperscript{227} The Federal Appellate Court, however, allows judges to consider any additional harm, even if the offender could not have foreseen the possibility of its occurrence, "because he had culpably opened the door through which all kinds of harm could enter."\textsuperscript{228}

Third, is the offender's behavior after the commission of the offense related to his culpability in committing the act, or is it only relevant to his prospect of rehabilitation? It is illogical to say that an offender's subsequent behavior affects his culpability in committing the offense.\textsuperscript{229} Most commentators nonetheless agree that subsequent behavior can indicate the degree of hostility the offender has toward the law, and thus may be indicative of his culpability.\textsuperscript{230} Consequently, later crimes can be taken into account in sentencing for a prior offense even if the defendant has not been convicted of the new offense.\textsuperscript{231} This practice is particularly questionable in light of the "presumption of innocence": the state can use against the defendant offenses of which the law presumes him innocent.\textsuperscript{232}

Fourth, what influence, if any, should a confession or any other form of cooperation have on the sentencing decision? The resolution of this issue is of great practical importance, and to the German mind provides a litmus test of the ethics of any criminal justice system. Cooperation with the police and the prosecutor says nothing about the defendant's culpability, and it permits few inferences about his prospects for reintegration into society. The defendant may, after all, cooperate for the simple reason that he desires a more lenient sentence. The prosecutor and the court, however, have strong interests in obtaining confessions, and sentence discounts are a comparatively inexpensive inducement. Thus, German courts and commentators, who are proud of the independence and dogmatic integrity of German theory, twist and bend the concept of culpability to accommodate the interests of effective law enforcement and efficient judicial functioning.

Only one leading commentator has stated the obvious: the defendant's behavior before and during the trial has nothing to do with his culpability. But even that writer would allow the court to consider

\textsuperscript{227} See, e.g., \textit{Leipziger Kommentar}, supra note 59, § 46 n.57; E. Horn, \textit{Systematischer Kommentar}, supra note 114, § 46 nn.70-71; H. Bruns, \textit{supra} note 112, at 423.
\textsuperscript{228} 10 BGHSt 259, 264 (1957); see also 22 MDR 895 (Fed. App. Ct. 1968).
\textsuperscript{229} G. Stratenwerth, \textit{supra} note 155, at 32.
\textsuperscript{230} \textit{Leipziger Kommentar}, supra note 59, § 46 n.93; H. Bruns, \textit{supra} note 112, at 591-95; T. Hertz, \textit{supra} note 187, at 95-104.
\textsuperscript{231} 11 MDR 528 (Fed. App. Ct. 1957); 30 MDR 1036 (St. App. Ct. at Schleswig 1976).
such factors as the steadfast denial of guilt in determining the offender's need for rehabilitation. All other leading writers have argued that the defendant's pretrial and trial behavior does relate, albeit indirectly, to his culpability and his prospects for rehabilitation. Lying or verbally abusing prosecution witnesses at trial, for example, manifests the defendant's stubborness and his hostility toward the law, which commentators say reflects back to his attitude when the defendant committed the offense, and thus his culpability. A confession may be indicative of repentance and remorse and is therefore related to the defendant's rehabilitative prospects. This argument is not persuasive, however, because it is neither logically nor psychologically convincing to infer anything about an offender's attitude toward the criminal provision violated when he committed the act from his attitude toward the norms of the criminal process at a later point in time. Moreover, the practice of considering the defendant's readiness to cooperate is bound to have a chilling effect on his right not to cooperate in the state's effort to convict him. Nevertheless, lower courts frequently include the defendant's remorse among their stated sentence reasons. The court can easily establish the facts, and a clear message is conveyed to prospective defendants. Despite the apparent influence of cooperation, one study concluded that no clear pattern of preferential treatment of confessing defendants exists. This finding is not inconsistent with the frequent mention of confessions in written sentencing reasons because many judges probably rely on other considerations and use the factor as a make-weight with welcome educational side-effects.

Most participants in the protracted debates on the subleties of general sentencing theories recognize that the legal literature on the subject is purely academic. German judges tend simply to disregard the theorizing in their day-to-day decisions thus creating space for the exercise of judicial discretion.

Trial courts rely on only a few factors in selecting the appropriate sentence for an offender. According to studies of the criminal courts, only the prior record of the accused and the monetary harm caused by

\[\text{233. See E. Horn, Systematischer Kommentar, supra note 114, § 46 nn.75 & 76.}\]
\[\text{234. See, e.g., Schöneke & Schröder, supra note 72, § 46 nn.41 & 42; Leipziger Kommentar, supra note 59, § 46 nn.95 & 96; R. Maurach & H. Zipf, supra note 72, at 475; see also Mösl, supra note 181, at 168; 31 MDR 982 (Fed. App. Ct. 1977) (defendant's attempt to destroy evidence indicative of personal shortcoming).}\]
\[\text{235. See E. Dreher & H. Tröndle, supra note 224, § 46 n.29; H. Bruns, supra note 112, at 595-608.}\]
\[\text{236. J. Schiel, supra note 154, at 52, 117-18.}\]
\[\text{237. See K. Lackner, supra note 145, at 35.}\]
the offense play an important role in decision-making. One study found that a defendant's prior record and his "orderly life style" (which consists of his employment history, residential stability, and marital status) explained more than fifty percent of sentence variations, but others found that neither age, sex, marital status, nor job status individually had any significant effect on the sentence. The universe of possible sentencing considerations is thus reduced to three two-dimensional factors: If the defendant has a prior criminal record, seriously injures his victim or damages property, or leads a "disorderly" life, his sentence is increased. In most cases nothing else is significant to the court's decision, though other factors may appear in the written judgment to bolster the sentencing decision and to make it revisionsfest or "appeal-proof."

The isolation of the mitigating and aggravating factors that influence a court, however, does not enable one accurately to predict sentencing decisions. What is missing is the point of departure: what is the "normal" sentence for the "normal" case of larceny, drunken driving, fraud, or assault? Unfortunately, the desert principle leaves the problem of defining anchor sentences unresolved. Mathematical models suggested by some German writers have failed to rationalize the sentencing process because it is impossible to draw reliable conclusions from the aggregate of largely irrational and unquantifiable factors proposed by these authors.

As is so often the case, when reason fails tradition steps in to guide the courts. Analysis and prediction of sentencing decisions thus must focus on sentencing patterns of particular trial courts and increasingly on standards enunciated by appellate courts.

Sentencing surveys show marked differences between standard sentences in different cities and regions of Germany, but within a single

238. H. Albrecht, supra note 23, at 82-83 & passim.
244. The amount of damage is of very little or no consequence in drunken driving cases, H. Albrecht, supra note 23, at 133, 142, but plays a significant role in cases of negligent wounding, larceny, and criminal fraud. Id. at 143-49, 152-54.
245. See supra text accompanying note 192.
judicial district sentencing tends to be uniform. A ready explanation lies in the way German criminal judges are trained. After graduation from law school which, as in America, gives only passing attention to sentencing, graduates begin a four-month internship at either the district attorney’s office or a criminal court. After additional internship placements in other parts of the legal system, the young lawyer takes, and usually passes, the German equivalent of the bar examination. With only this much exposure to the practical problems of criminal justice, he can become a criminal judge if his grades are better than average. In most cases, the court first will assign him to a three-judge panel, which deliberates and determines sentences together. The novice thus gradually learns the local sentencing tariffs from the presiding judge, who himself learned them from an elder judge years earlier. If a young judge sits alone and bears sole responsibility for sentencing, he will often ask his more experienced colleagues, or in urgent cases the prosecutor, what the “usual sentence” is in a particular case. Local sentencing traditions are thus passed on from one judicial generation to the next, a practice which can lead to strong homogeneity within courts and to stark differences between courts.

Several methods for achieving greater sentencing equality between courts have been proposed. Some commentators urge judges to inform themselves about sentencing practices in other courts. Others advocate an extension of the existing practice of annual national conferences of judges on sentencing for traffic offenses to other offenses. The recommendations of such conferences, however, are regarded only as guidelines which leave the discretion of the individual judge intact. A third possibility would be to strengthen the appellate court’s traditional role of guaranteeing the uniformity of jurisprudence in their district.

The Federal Appellate Court has long hesitated to set national standards but is now more willing to shoulder that responsibility.


248. Schoene, supra note 192, at 1118.

249. H. SCHÖCH, supra note 181, at 76; Schoene, supra note 192, at 1120; Tröndle, supra note 247, at 458.

250. LEIPZIGER KOMMENTAR, supra note 59, § 46 n.29; K. LACKNER, supra note 145, at 9; Seebald, supra note 54, at 8.

251. There are twenty State Appellate Courts and one Federal Appellate Court. If a State Appellate Court believes that the decision of another State Appellate Court or of the Federal Appellate Court should be overruled, it must present the issue to the Federal Appellate Court, which then decides the question. GVG § 12111.

252. See H. BRUNS, supra note 112, at 504–08.
The court is reversing more lower court judgments if the sentence is extraordinarily severe or lenient when compared with sentences imposed by other courts in similar cases.\textsuperscript{253} The usual ground for reversal of such judgments is an insufficient explanation for the deviation from the sentence expected by the appellate court.\textsuperscript{254} This court’s expectation is based on its experience with similar cases decided by other trial courts.\textsuperscript{255} This development implies a bold step forward from the review of sentence reasons to the review of lower courts’ sentences,\textsuperscript{256} but is not without its pitfalls. The new approach toward sentence review must be measured not only against traditions of sentencing discretion, but also against the principle of equality which requires that different cases be treated differently.

V. AN APPRAISAL

The legal provisions, statistics, and arguments that I have discussed give rise to many unresolved questions. Every sentencing system faces similar problems: should sentencing be based on retribution or rehabilitation, who should sentence, how much discretion should the sentencing official have, and so forth. Discussion of all of these problems is impracticable, but I will offer a few comments based on a very personal evaluation of the German system.

A. Who Should Decide?

The allocation of sentencing authority raises difficult questions, the solution of which depends on the value a given system attaches to a number of concerns, including: the separation of powers principle, the presumption of innocence, and faithful adherence to a consistent sentencing theory. The trial judge — not the legislature or the prosecutor — should remain the central figure in sentencing because it entails the typically judicial function of applying the law to a given case. Moreover, the trial court has ready access to the facts necessary to an informed and rational sentencing decision. But despite the success of the German experience with mixed courts of professional and lay judges,

\textsuperscript{253} R. Maurach & H. Zipf, supra note 72, at 482. See supra text accompanying notes 179–183.


\textsuperscript{255} 28 BGHSt 318, 324 (1979). In this case, the Federal Appellate Court declared that trial courts may conform to other courts’ sentencing practices regarding offenses frequently before these courts.

\textsuperscript{256} See Mösl, supra note 181, at 167.
sentencing should not be left to lay judges sitting alone because of the
difficult legal questions that trial courts face.

Prosecutorial sentencing powers present difficult and seemingly
unsolvable problems. The prosecutor’s powers to offer conditional sus-
pension of prosecution or to initiate a penal order create efficiencies
and economies so attractive that no rational system of justice can
blithely dispense with them. Yet prosecutorial disposition of cases im-
plies the separation of powers principle. Even if that constitutional
question is avoided by regarding the prosecutor as a quasi-judicial
figure,257 the problem remains that those dispositions do not involve a
formal finding of guilt: the defendant in effect must waive the pre-
sumption of innocence. There is no easy escape from this dilemma. It
is sophistry to argue that the defendant voluntarily submits to the sen-
tence. The voluntariness of his choice is illusory given that his refusal
could result in a more severe punishment. Moreover, dispositions con-
trolled by the prosecutor clearly are criminal sanctions; they are in-
tended to be an expression of society’s disapproval of the defendant’s
alleged criminal behavior. And if they are viewed as a mere warning to
forestall future criminal behavior,258 their validity is doubtful in a sys-
tem that permits the imposition of sanctions only for past, not future
wrongs.

One possible way to reduce the open conflict between
prosecutorial sentencing and the presumption of innocence might be to
ensure the voluntariness of the defendant’s decision. This could be ac-
complished by giving the defendant the right to judicial review of any
sentence determined by the prosecutor, while precluding the judge
from increasing the sentence. The prosecutor in routine cases would
impose sentences without a formal finding of guilt and without the ini-
tial consent of either the judge or the defendant. The defendant would
have the right to appeal this disposition. The objective of this appeal
would be either a verdict of not guilty or a reduction of the sentence.
After a hearing, the court would pronounce a guilty verdict if satisfied
that the defendant is guilty; if it determines that the sentence is too
harsh then it would shorten the sentence. But the court would lack
authority — barring extraordinary circumstances, such as a finding that
the offense had much more serious consequences than had been known
by the prosecutor — to increase the original sentence. As the defendant

257. See supra text accompanying notes 78–79.
258. This is the common interpretation of similar sanctions in Poland. See E. Weigend,
_Die bedingte Einstellung des Strafverfahrens in Polen — zugleich ein Beitrag zur Diskussion
urn § 153 StPO_, 24 RECHT IN OST UND WEST 186, 193–94 (1980).
can appeal the sentence with no risk, his acquiescence could then be regarded as tantamount to a voluntary admission of guilt.

The usefulness of such a procedure would hinge on the number of appeals against the prosecutorial sentence. Absent a judicial policy of routine reduction of sentence, the appeal rate may be lower than many would expect because offenders soon would realize that an appeal is worthwhile only if the prosecutor truly erred. This procedure could help to solve some of the legal problems of diversion and plea bargaining in America — at least with respect to less serious cases — and it could counter some of the objections against conditional dismissal.259

I join those who would severely restrict the powers of parole boards and similar institutions. Absent a showing that reliable predictions of future criminal behavior can be better made at some point after trial than at the time of sentencing, the retention of a special institution to make this prognosis serves no purpose. Early release should turn solely on good behavior in prison rather than a subjective decision whether the offender has been rehabilitated. Parole boards and correctional courts, if they are to exist, should thus be responsible only for monitoring good time credits, and possibly correctional measures affecting prisoners. Post-release services, of course, should continue.

B. One Hearing or Two?

The Anglo-American system of separate guilt-finding and sentencing proceedings seems to me clearly preferable to the German system of integrated trials.260 A bifurcated sentencing hearing may prevent the decision of guilt from being influenced by a negative stereotype of a defendant predisposed to crime. Even if, as in a system based on the desert principle, the sentence is largely determined by the characteristics of the offense, so that an extensive investigation of the offender's personality is not necessary, a separate hearing allows the court and the parties to concentrate on sentencing options and on aggravating and mitigating factors.

C. Presumptive Sentences

Equality in sentencing is a realizable goal, but it cannot be achieved by the elimination of all sentencing flexibility as in a "flat" sentencing statute. Prefabricated sentencing scales must fail because no

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259. See supra text accompanying notes 104–106. See also Silving, supra note 24, at 249–50.
260. See supra text accompanying notes 141–144.
legislature can foresee all possible factors that affect the gravity of an offense; they produce procrustean, not equal justice.

The presumptive sentence approach, advocated by some American commentators, seems a better approach to achieving sentencing equality. A presumptive sentencing statute should consist of specific penalties (e.g., one year imprisonment) for narrowly described offenses (e.g., forgery of an official document, burglary of a home). In addition, there should be a range in mitigation for cases of lesser seriousness, and a range in aggravation for more serious cases. The sentencing court would have discretion to choose any sentence within the two ranges, but its discretion should be guided further by lists of mitigating and aggravating factors. These factors should be specific to each group of offenses even though some of them, such as excessive amount of damage and unnecessary use of violence, would recur with some frequency. The list of factors should be neither compelling nor exhaustive. The court would remain free to give other reasons for choosing a sentence below or above that presumptively appropriate, or to stick with the standard penalty even though the case contains aggravating or mitigating circumstances.

Under a presumptive sentence approach, the court would carry the burden to justify its decision, and the sentence would be subject to strict review by an appellate court upon appeal by either party. Sentence reasons would relate to the offense rather than to the offender's general character or to his rehabilitative needs. As such facts easily can be spelled out in the written judgment, little would be left for consideration of the personal impression the offender made on the court, or for other inscrutable factors. The sentencing decision therefore would be subject in its entirety to appellate review. The higher court could assess both the correctness of the sentencing reasons cited, and the weight given to each of them, especially when the sentence imposed differs from the presumptive sentence. Sentencing courts would thus be under tight control. They would maintain the right to tailor the sanction to the circumstances of each case, but they would have to do so in an open and rationally articulated process.

Whether the legislature, a judicial council, or a sentencing commission develops the presumptive standards is not a question of principle but of political convenience. In a system like the German, in which

judgments concerning value preferences are normally left to the legisla-
ture, presumptive sentences should be molded in statutory form. In
America, however, where public pressure makes the legislature an un-
likely forum of sensible liberal reform, a sentencing commission might
be the better choice. Sentencing scales in those American states that
enacted presumptive sentencing laws demonstrate that legislatures are
prone to give in to popular demands for harsher punishment without
seriously considering the consequences upon the individual offender
and upon the justice system as a whole.

D. "Honest" Sentencing

The previous subsection assumes that equal sentences are rational
and just sentences, and that a maximum of equality is therefore to be
desired. Not everyone would agree with that proposition. Hassemer
and other commentators recently suggested an alternative concept of
rationality in sentencing. Rational sentencing, argues Hassemer, is
most of all honest sentencing. He would require the sentencing judge
to discuss his subjective reasons for imposing a sentence with the de-
fendant and to admit frankly his doubt about the feasibility of both
finding a sentence proportionate to the offender's culpability and pro-
moting the offender's and the general public's welfare. The defendant
should have an extensive right to be heard, and his views should be
discussed both in open court and in the written judgment. The result of
such a process, according to Hassemer, might not be a sentence of strict
equality, but one that is the result of a free and rational discourse.

An honest sentencing approach would be inimical to detailed
prestructuring by guidelines as well as to close appellate review. The
appellate court would have to accept the trial court's sentence if based
on plausible arguments and on acceptable preferences of the individual
sentencing judge. Hassemer's concept has initial appeal, especially in
view of the habit of many trial courts to repeat "safe" but empty for-
mulae instead of spelling out the genuine reasons for the sentences they
pronounce. But Hassemer's idea of rationality is deficient because it
places form above substance: the defendant's participation in the de-
termination of his fate is purely formal. Because he has nothing but


263. See Tonry, Real Offense Sentencing, supra note 262, at 1552 & 1552 n.8.

264. See Hassemer, supra note 54, at 89-98; Mösl, supra note 181, at 165; see also Damaska, supra note 132, passim.
words to offer, his power to influence the outcome remains nil. Although the offender benefits by learning the court's true motives, he pays a heavy price: those motives are essentially impervious to review.

Given the choice between the two models of rationality — one that calls for a court to articulate its subjective reasons or one that requires it to adhere to the objective standards promulgated by the legislature — I would opt for the traditional concept: He who sentences applies the law, no more and no less. Although sentencing may involve value judgements and other imponderables more difficult than the application of a tax statute, the mechanism should be the same. The decision-maker must attempt to determine, by employing the usual methods of statutory interpretation, the disposition that best conforms to the applicable law and rules, and he must explain the decision against the background of strictly formulated legislative standards. A higher tribunal which authoritatively construes and interprets the law should review the sentence and the reasons for it, thus gradually making sentencing decisions more equal and more foreseeable.

E. Punishment's Purpose

My final remarks concern the purposes of punishment, and are determined by my personal creed: I believe that a rational system of punishment should be based on the principles of desert and retribution. I do so not out of a belief in metaphysical justice, but because I think that desert, correctly understood, restricts punishment to the extent most socially tolerable. A state should not inflict more harm on its citizens than is absolutely necessary. The amount of punishment should be determined by what is needed to restore the public peace and to calm the waves tossed up by the offender's act. An offender must pay the price for what he has done. He must suffer to settle the disturbance his offense has created. This position permits reductions in punishment for defendants who acted in situations of conflict, or under stress. But it forbids extension of a sentence based on consideration of the dangerousness of the offender, his rehabilitative needs, or society's interest in imposing exemplary punishment to deter others. I would go even further by denying the wisdom and fairness of longer sentences for repeat offenders; in a sentencing system strictly based on desert, it is difficult to find a rational justification for that practice.265

265. A desert-oriented theory does not permit sentencing decisions to rest on predictions of future criminality. Any reliance on an offender's prior criminal record can only rest on prediction rather than desert. See G. Fletcher, supra note 153, at 466 (1978) (consideration of prior convictions reflect a concern to protect society by retarding future conduct); Schiller, Book Review, 67 J. Crim. L. & Criminology 356, 357–58 (1978) (criticizing theory
The German penal system is a far-from-perfect embodiment of the desert principle: It contains special recidivist statutes, allows rehabilitative and general deterrence considerations to influence the decision, and permits the imposition of additional sanctions for dangerous offenders. Although theorists may be inclined to criticize the legislature for being inconsistent, only academics enjoy the privilege of not being political animals and of carrying a banner of "invariable truth" in the face of practical problems and political pressures. Sentencing will remain a field of compromise; what we must work for is a better compromise.

But see A. Von Hirsch, supra note 153, at 132-40 (recidivism is an appropriate consideration in a system based on desert); von Hirsch, Desert and Previous Conviction, 65 Minn. L. Rev. 591 (1981). Von Hirsch argues that: "A repetition of the offense following [an earlier] conviction may be regarded as more culpable, since he persisted in the behavior after having been forcefully censured for it through his prior punishment." A. Von Hirsch, supra note 153, at 85.