## ARTICLES

# Sentencing in Germany: Basic Questions and New Developments

*By Professor Dr. Franz Streng*[*]

### A. Introduction

Before delving into the details of a specific German theory of sentencing, this first section attempts to very briefly outline the general framework of the sentencing process according to German law.

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

In sec. 46 § I S. 2 of the Criminal Code the law clarifies that the likely effect of the punishment on the perpetrator's future social life shall be considered. One of the principal aims of sentencing is therefore the rehabilitation of the offender. Apart from these two notions, the culpability principle and rehabilitation, the law stresses the importance of other, positive aims of sentencing, such as the preservation of the legal order or the confirmation of the norm (*Verteidigung der Rechtsordnung*).[1]

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[*] Professor of Criminal Law and Criminology, University of Erlangen-Nürnberg. Email: kriminologie@jura.uni-erlangen.de. This paper was translated from the German by associate professor Dr. Christoph Safferling, LL.M. (LSE), University of Erlangen-Nürnberg. Email: Christoph.Safferling@jura.uni-erlangen.de

[1] In greater detail, *see* FRANZ STRENG, STRAFRECHTLICHE SANKTIONEN. DIE STRAFZUMESSUNG UND IHRE GRUNDLAGEN, MN 428, 435 (2nd ed., 2002); Henning Radtke, *in* MÜNCHENER KOMMENTAR ZUM STGB, Vor § 38, MN 66 (2003).

However, the courts and legal scholars also draw upon other sentencing aims and objectives found in German criminal law theory: these include individual deterrence and incapacitation, and the deterrent effect a sentence might have on the general public.[2]

In evaluating the role of the judge in sentencing one must take into account that German criminal law is in a specific sense democratic in principle. What I mean here is that German criminal law is a law for citizens. These citizens are not only addressees of the criminal law but also its carriers. And this is not to be understood in a purely formal democratic sense. Rather, the judge himself acts as a citizen when determining the punishment, who reflects society's values when assessing the appropriate punishment, whilst keeping within the statutory boundaries. In contrast to a technocratic or an authoritarian criminal law system the judge in our law system relies on values which are coined by his social and professional personality. Under this perception of his role the German judge thus demands for a wide sentencing range, from which he is free to choose a just and fair sanction in accordance to his persuasion.[3] Mandatory sentencing guidelines would contradict this self-conception of the judges. The restrictive and problematic use of the only mandatory life sentence for murder under sec. 211 of the Criminal Code and for genocide under sec. 6 of the International Criminal Law Code also points to the necessity to open up a leeway for the judges in determining the punishment.[4]

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

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[2] *See also* HANS-JÜRGEN BRUNS, DAS RECHT DER STRAFZUMESSUNG 82, 94 (2nd ed., 1985); Karl LACKNER/KRISTIAN KÜHL, STRAFRECHT. KOMMENTAR, § 46, MN 26 (25th ed., 2004); Franz Streng, *in* NOMOS KOMMENTAR ZUM STGB § 46, MN 33 (2nd ed., 2005); BERND-DIETER MEIER, STRAFRECHTLICHE SANKTIONEN 184 (2nd ed., 2006).

[3] *See also* Franz Streng, *Probleme der Strafrechtsgeltung und -anwendung in einem Europa ohne Grenzen*, *in* STRAFRECHT UND KRIMINALITÄT IN EUROPA 143, 145 (Frank Zieschang, Eric Hilgendorf & Klaus Laubenthal eds., 2003).

[4] *See also* STRENG, *supra* note 1, at MN 408, 602.

"margin" or "leeway," which is the prevailing theory of sentencing in German jurisprudence and criminal law theory.[5]

## B. The Spielraum-theory in Sentencing

### *I. The Basic Principle*

The *Spielraum*-theory, which is sometimes called *Schuldrahmen*-theory,[6] that means framework of guilt-theory, is based on the proposition that the judge establishes a specific framework for the individual guilt derived from the general statutory provisions. Within this margin the judge then takes account of utilitarian, or as Germans prefer to say preventive aims, avoiding both overstepping and undershooting the guilt of the accused.[7] One can call this method: "prevention within the limits of repression,"[8] *i.e.* the individual guilt of the accused sets the limits to the objective of prevention. The term "guilt" in this context signifies a certain *Strafzumessungsschuld*, a specific "sentencing-guilt," quantifying the guilt of the offender and at the same time encompassing to a certain extent characteristics both preceding and following the criminal act.[9]

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[5] *See also* Bundesgerichtshof [BGH] [Federal Court of Justice] Entscheidungen des Bundesgerichtshofes in Stafsachen [BGHSt] 7, 28, 32; BGHSt 20, 264, 266; BGHSt 24, 132, 133; GÜNTER SPENDEL, ZUR LEHRE VOM STRAFMAß 176 (1954); HEINZ MÜLLER-DIETZ, GRENZEN DES SCHULDGEDANKENS IM STRAFRECHT 37 (1967); Friedrich Schaffstein, *Spielraum-Theorie, Schuldbegriff und Strafzumessung nach den Strafrechtsreformgesetzen,* in FESTSCHRIFT FÜR GALLAS, 99 (1973); BRUNS, *supra* note 2, 105; Walter Grasnick, *Strafzumessung als Argumentation*, in JURISTISCHE ARBEITSBLÄTTER [JA] 81, 83 (1990); Günther Gribbohm, in STRAFGESETZBUCH - LEIPZIGER KOMMENTAR ZUM STGB, § 46, MN 18 (11th ed., 1995); HANS-HEINRICH JESCHECK & THOMAS WEIGEND, STRAFRECHT. ALLGEMEINER TEIL, § 82 IV 6 (5th ed., 1996); GERHARD SCHÄFER, PRAXIS DER STRAFZUMESSUNG, MN 461 (3rd ed., 2001); STRENG, *supra* note 1, at MN 480; Radtke, *supra* note 1, at Vor § 38, MN 63; LACKNER/KÜHL, *supra* note 2, at § 46 MN 24; MEIER, *supra* note 2, at 153; HERBERT TRÖNDLE & THOMAS FISCHER, STRAFGESETZBUCH. KOMMENTAR, § 46, MN 19 (53rd ed., 2006).

[6] REINHART MAURACH & HEINZ ZIPF, STRAFRECHT. ALLGEMEINER TEIL 2 § 63, MN 1, 14 (7th ed., 1989); CHRISTOPHER ERHARD, STRAFZUMESSUNG BEI VORBESTRAFTEN UNTER DEM GESICHTSPUNKT DER STRAFZUMESSUNGSSCHULD 97, 316 (1992); Hans-Gerd Meine, *Der Schuldrahmen in der Praxis der Strafzumessung*, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NSTZ] 159, 162 (1994).

[7] *See also* BGHSt 24, 132, 133; BGHSt-GS (Grand Penal Senate for Criminal Law) 34, 345, 349; BGH, NSTZ 489 (1992); *also* BGHSt 43, 195, 208.

[8] *See also* BRUNS, *supra* note 2, at 105.

[9] *See also* Wolfgang Frisch, *Unrecht und Schuld im Verbrechensbegriff und in der Strafzumessung*, *in* FESTSCHRIFT FÜR MÜLLER-DIETZ 237, 238 (2001).; Radtke, *supra* note 1, at Vor § 38, MN 15; Streng, *supra* note 2, at § 46, MN 22; MEIER, *supra* note 2, at 173; Walter Stree, *in* ADOLF SCHÖNKE & HORST SCHRÖDER, STRAFGESETZBUCH. KOMMENTAR, § 46, MN 9 (27th ed., 2006); TRÖNDLE/FISCHER, *supra* note 5, at § 46, MN 33.

The *Spielraum*-theory is at its core based on equity, and is equipped with few concise criteria. One could go so far as to call this method a "black-box-model" of judicial decision-making. The judge is called upon to fit the individual case into the statutory framework taking into account the idiosyncrasies of the case, namely the intensity of the criminal mind, the amount of damage and the likelihood of re-offending. This classification according to the statutory framework is mainly done intuitively. However, the judge must not act arbitrarily but must take heed of the gravity of the criminal act in an all-encompassing way: lighter acts must be graded at the lower end of the statutory range of sentencing, serious crimes at the upper end of this scale and so forth.[10] Incorporating preventive aspects into this classification-method is not only legitimate but necessary, as sec. 46 § I Criminal Code tells us.

Surprisingly the prevailing case law does not require the judge to address the logical first step in the sentencing process, *i.e.* the determination of the specific framework for the individual guilt, in the reasoning of the sentencing judgment.[11] The whole sentencing process depends upon the judge ultimately imposing a punishment that appears to stand in proportion to the offender's guilt and takes into account the preventive objectives in an adequate manner.[12] A judgment that contains a complex, all-encompassing assessment of the case but does not contain the step-by-step approach as suggested by this model will be upheld on appeal. However, the sentencing judgment must contain a plausible discussion of both equity and prevention aspects.[13]

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[10] *See also* for *Strafrahmen als kontinuierliche Schwereskala* Eduard Dreher, *Über Strafrahmen*, in FESTSCHRIFT FÜR BRUNS 141, 149 (1978).

[11] Schaffstein, *supra* note 5, at 99, 107; BRUNS, *supra* note 2, at 108; MAURACH/ZIPF, *supra* note 6, at § 63 MN 77. In favour of declaring the framework for the individual case Heinz Giehring, *Universitäre Ausbildung im Recht der Straftatfolgen*, in INTEGRATION VON STRAFRECHTS- UND SOZIALWISSENSCHAFTEN 186, 202 (Heribert Ostendorf, ed., 1986); Grasnick, *supra* note 5, at 81, 84; HANS-GERD MEINE, DIE STRAFZUMESSUNG BEI DER STEUERHINTERZIEHUNG, MN 147 (1990); Meine, *supra* note 6, at 159, 162; critically as regards the jurisprudence KARL LACKNER, ÜBER NEUE ENTWICKLUNGEN IN DER STRAFZUMESSUNGSLEHRE UND IHRE BEDEUTUNG FÜR DIE RICHTERLICHE PRAXIS 14, 30 (1978); Ernst-Walter Hanack, in LÖWE/ROSENBERG, STRAFPROZEßORDNUNG. GROßKOMMENTAR § 337 MN 191 (1999).

[12] Critically in principle LACKNER, *supra* note 11, at 14; FRANZ STRENG, STRAFZUMESSUNG UND RELATIVE GERECHTIGKEIT 31 (1984); HANS-JÖRG ALBRECHT, STRAFZUMESSUNG BEI SCHWERER KRIMINALITÄT 40 (1994); WOLFGANG KÖBERER, IUDEX NON CALCULAT 55 (1996); JESCHECK/WEIGEND, *supra* note 5, at § 82 IV 6.

[13] *See also* in greater detail SCHÄFER, *supra* note 5, at MN 746; STRENG, *supra* note 1, at MN 581.

*II. Difficulties of the Spielraum-theory*

*1. Inevitable inconsistencies of "Guilt-Grading"*

It is precisely due to this discrepancy between theory and practice that some authors argue, that the only objective of the *Spielraum*-theory is to conceal the *de facto* impossibility of determining *the* single, one and only just and fair sentence.[14] It is true, however, that the opposing theory, the so called *Punktstrafetheorie*, according to which the judge is capable of pinpointing the just sanction to one precise point[15], failed because of its unrealistic approach.[16] Critics of the *Spielraum*-theory acknowledge that it avoids the dilemma of determining the one precise point, but claim that it does not add any further criteria.[17]

The crucial weakness of the *Spielraum*-theory lies in the fact that it relies on the notion of guilt. The term "guilt" is heavily debated.[18] At the same time it is unavoidable that the definition of guilt differs depending on the opinion of the individual judge.[19] Empirical research has illustrated disparities in sentencing-decisions convincingly. But upon closer scrutiny one can find such epistemological weaknesses in all sentencing theories which are based on the offender's guilt. Only

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[14] ARTHUR KAUFMANN, DAS SCHULDPRINZIP at 66, 260 (1961); MÜLLER-DIETZ, *supra* note 5, at 38, FN 47; Stree, *supra* note 9, at Vor § 38, MN 10; *see also* BRUNS, *supra* note 2, at 107.

[15] *See also* KAUFMANN, *supra* note 14, at 261; HEINZ ZIPF, DIE STRAFMAßREVISION 165 (1969); HANS-JÜRGEN BRUNS, STRAFZUMESSUNGSRECHT 91 (1974); HANS-HEINRICH JESCHECK, STRAFRECHT. ALLGEMEINER TEIL § 82 III 3 (1988).

[16] *See also* Streng, *supra* note 2, at § 46, MN 104.

[17] *See also* Dreher, *supra* note 10, at 141, 163; MICHAEL KÖHLER, ÜBER DEN ZUSAMMENHANG VON STRAFRECHTSBEGRÜNDUNG UND STRAFZUMESSUNG 22 (1983); Wolfgang Frisch, *Gegenwärtiger Stand und Zukunftsperspektiven der Strafzumessungsdogmatik*, 99 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZSTW] 349, 361 (1987); Bernd Schünemann, *Plädoyer für eine neue Theorie der Strafzumessung*, in NEUERE TENDENZEN IN DER KRIMINALPOLITIK 209, 210 (Albin Eser & Karin Cornlis eds., 1987); ANDREW VON HIRSCH & NILS JAREBORG, STRAFMAß UND STRAFGERECHTIGKEIT 23 (1991); KAI HART-HÖNIG, GERECHTE UND ZWECKMÄßIGE STRAFZUMESSUNG 13, 43 (1992); ALBRECHT, *supra* note 12, at 37; Georg Freund, *Straftatbestand und Rechtsfolgenbestimmung*, in GOLTDAMMER´S ARCHIV [GA] 509, 533 (1999); TATJANA HÖRNLE, TATPROPORTIONALE STRAFZUMESSUNG 27 (1999).

[18] *See also* MÜLLER-DIETZ, *supra* note 5, at 41; HEINZ MÜLLER-DIETZ, GRUNDFRAGEN DES STRAFRECHTLICHEN SANKTIONENSYSTEMS 8 (1979); Hans-Heinrich Jescheck, *Wandlungen des Schuldbegriffs in Deutschland und Österreich*, JURISTISCHE BLÄTTER [JUR.BL.] 609 (1998); STRENG, *supra* note 1, at MN 461; CLAUS ROXIN, STRAFRECHT. ALLGEMEINER TEIL 1 § 19, MN 18 (2006).

[19] *See also* STRENG, *supra* note 12, at 20; for the well balanced analysis of the guilt-proportionate sentencing see Wolfgang Frisch, *Individualprävention und Strafzumessung*, in FESTSCHRIFT FÜR KAISER 765, 781 (1998).

the *Spielraum*-theory can mitigate these weaknesses, and even use them for legitimizing purposes. The *Spielraum*-theory in this sense reconciles modern criminal law, which is focused on utilitarian aims, *i.e.* the duty of the state to protect the legal goods of the citizens,[20] with the traditional culpability-principle, at least in a rudimentary way.
Utilitarian aspects can serve a double function in the sentencing process:[21] (1) prevention aspects are acknowledged to substantiate the punishment, thus the uncertainties connected to the grading of guilt as the only basis for sentencing are mitigated; and (2) the justification of public sanctioning is advanced, when taking prevention-aspects into account. Applying the objective of prevention to sentencing is generally seen as inevitable for a rational criminal law. As long as the sanction appears to be fair, elements of prevention can be legitimately integrated within this "guilt"-framework.

Another advantage of the *Spielraum*-theory may be seen in the fact that it suggests a step-by-step approach, which offers a basis for systematic self-control of the judge.[22] At the same time this approach reiterates the primacy of the culpability-principle incorporated in sec. 46 § I S. 1 German Criminal Code in an adequate manner.

However, these positive aspects of the *Spielraum*-theory can only be truly persuasive if its theoretical foundations prove to be conclusive.

### *2. Legitimacy of the Spielraum*

As has already been mentioned, critics say that the *Spielraum*-theory merely obscures the epistemological difficulties in finding the single fair punishment for

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[20] With regards to a consequentialist approach Heinz Müller-Dietz, *Folgenorientierung und Strafzumessung*, in FESTSCHRIFT FÜR SPENDEL 413 (1992); Karl-Ludwig Kunz, *Einige Gedanken über Rationalität und Effizienz des Rechts*, in STRAFGERECHTIGKEIT. FESTSCHRIFT FÜR ARTHUR KAUFMANN 187, 193 (1993); GÜNTHER KAISER, KRIMINOLOGIE - EIN LEHRBUCH § 30, MN 3, 19 (3rd ed., 1996); Gunther Arzt, *Dynamisierter Gleichheitssatz und elementare Ungleichheit im Strafrecht*, in FESTSCHRIFT FÜR STREE/WESSELS 49, 67 (1993); Franz Streng, *Strafrechtliche Folgenorientierung und Kriminalprognose*, in DIE TÄTER-INDIVIDUALPROGNOSE 97 (Dieter Dölling ed., 1995); Franz Streng, *Modernes Sanktionenrecht?*, in 111 ZSTW 827, 860 (1999).

[21] *See also* Franz Streng, *Grundfälle zum Strafzumessungsrecht*, JURISTISCHE SCHULUNG [JUS] 919, 920 (1993); Franz Streng, *Praktikabilität und Legitimität der Spielraumtheorie*, in FESTSCHRIFT FÜR MÜLLER-DIETZ 875, 886 (2001); JESCHECK/WEIGEND, *supra* note 5, at § 82 IV 6.

[22] Meine, *supra* note 11, at MN 125, 133; Friedrich Schaffstein, *Spielraum-Theorie, Schuldbegriff und Strafzumessung nach den Strafrechtsreformgesetzen*, in FESTSCHRIFT FÜR GALLAS 99, 107 (1973).

each individual case. Those critics, who adhere to the *Punktstrafetheorie* referred to above,[23] oversee the fact that guilt is neither a character of the offender nor one of the criminal act. In fact, guilt is an attribution of responsibility referring to the offender and his or her act. The transformation of guilt into punishment too does not work as an objective "exchange rate;" this transformation is again an active attribution according to social norms and values.[24] The grading of guilt and the equivalent grading of punishment is therefore no epistemological act; with the exception of the facts of the case, nothing can be recognised as real. This has been shown rather by the sociological school of "symbolic interactionism."[25]

Therefore, sentencing is a socially legitimate attribution of punishment referring to social norms and values, which has as a matter of course to be related to the characteristics of the act and the offender. Reproducing norms in law and as law is therefore committed to values of the general culture carrying the criminal justice system.[26] This general culture, however, consists of many partial cultures.[27] Their values and norms can differ notwithstanding the overall consensus. There is no single correct grading of a certain incident. With a view to the abstractness of the overall culture, which needs to be substantiated in partial cultures, even the search for such a single and singular grading is in vain. A consensus can only be expected for basic legal elements (*e.g.* the offender is excused or he/she is not excused) and for basic steps in grading (*e.g.* serious crime or very serious crime). A consensus is illusory with regard to the fine-tuning of the precise quantification of punishment. Within the general culture as a summary of the many partial cultures a consensus can only be reached if it is envisaged as a scale between limits and not as a precise point.

As a result we can claim that the *Spielraum*-theory is based on solid theoretical grounds and does not only serve to obscure epistemological difficulties.

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[23] *See also supra* note 15.

[24] *See also* HEINRICH HENKEL, DIE „RICHTIGE" STRAFE 31 (1969); Ulfrid Neumann, *Zur Bedeutung von Modellen in der Dogmatik des Strafzumessungsrechts*, in FESTSCHRIFT FÜR SPENDEL 435, 441 (1992).

[25] *See also* Herbert Blumer, *Der methodologische Standort des symbolischen Interaktionismus*, in ARBEITSGRUPPE BIELEFELDER SOZIOLOGEN (Hrsg.), ALLTAGSWISSEN, INTERAKTION UND GESELLSCHAFTLICHE WIRKLICHKEIT, Band 1, 80 (1981). With regard of the labelling approach *see also* HOWARD BECKER, AUßENSEITER. ZUR SOZIOLOGIE ABWEICHENDEN VERHALTENS 3 (1981); MICHAEL BOCK, KRIMINOLOGIE, MN 169 (2000); HEIKE JUNG, KRIMINALSOZIOLOGIE 75 (2005).

[26] *See also* Henkel, *supra* note 24, at 36; STRENG, *supra* note 12, at 301; Franz Streng, *Die Öffnung der Grenzen und die Grenzen des Strafrechts*, JURISTENZEITUNG [JZ] 109, 112 (1993).

[27] *See also* BECKER, *supra* note 25, at 3.

*3. Sentencing Within the Assured Centre of the Leeway?*

What needs to be clarified in the following is the question of how a rational deviation from the very centre of the sentencing leeway can be justified by crime prevention, social values and other considerations discussed above. One could imagine obliging the judge to place the amount of punishment right in the centre of the spectrum, so to speak in the assured array between "already" and "still" proportionate to the guilt of the offender.

As a matter of fact the *Spielraum*-theory has been criticised for appreciating utilitarian aspects when determining the amount of punishment. Some scholars rely only on an evaluation of the offender's guilt, rejecting preventive aspects as being too vague. This school of thought, the so-called *Stellenwerttheorie* ("status-theory"), refers to preventive aspects only on the second level of the sentencing process, *i.e.* the determination of the form of punishment.[28] Constraining the sentencing process in this way produces yet another conflict with the general parameters of the German Criminal Code. By choosing a rather ambiguous formula in sec. 46 § I S. 1 Criminal Code the legislator has clearly voted against the gravity of the criminal act as the only or even dominating parameter. Above all the so called *Sozialklausel* in sec. 46 § I S. 2 Criminal Code requires that aspects of rehabilitation have to be taken into account at all times, *i.e.* at any level of the sentencing process.[29]

The outcome of the new theory of a proportionate sentencing – developed by Andrew von Hirsch, Nils Jareborg, and Andrew Ashworth[30] – is quite comparable to the *Stellenwerttheorie*. In order to avoid inequalities in sentencing caused by the application of utilitarian aims, the gravity of the crime comes to the fore as the yardstick. Excluding all preventive considerations from the sentencing process,

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[28] In greater detail Henkel, *supra* note 24, at 23; HEINZ SCHÖCH, STRAFZUMESSUNG UND VERKEHRSDELINQUENZ 80, 91 (1973); Heinz Schöch, *Grundlagen und Wirkungen der Strafe*, in FESTSCHRIFT FÜR SCHAFFSTEIN 255, 258 (1975); Eckhard Horn, in SYSTEMATISCHER KOMMENTAR ZUM STGB § 46, MN 33 (7th ed., 2001); Grasnick, *supra* note 5, at 81, 87; CHRISTOPH REICHERT, INTERSUBJEKTIVITÄT DURCH STRAFZUMESSUNGSRICHTLINIEN 280 (1999).

[29] *See also* HEINZ MÜLLER-DIETZ, GRUNDFRAGEN DES STRAFRECHTLICHEN SANKTIONENSYSTEMS 28 (1979); STRENG, *supra* note 12, at 38.

[30] *See also* ANDREW VON HIRSCH & NILS JAREBORG, STRAFMAß UND STRAFGERECHTIGKEIT (1991); ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993); NILS JAREBORG, *Humanity and Sentencing*, in SCRAPS OF PENAL THEORY 107 (2002); ANDREW VON HIRSCH, FAIRNESS, VERBRECHEN UND STRAFE: STRAFTHEORETISCHE ABHANDLUNGEN 131 (2005); ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING (2005). Regarding German language literature Schünemann, *supra* note 17, at 209 (1987); HÖRNLE, *supra* note 17.

however, is not in conformity with the requirements of German law;[31] the problems of this theory are thus similar to those discussed with the "status-theory."[32]

To summarize: German law presupposes the filling of the existing framework by taking recourse to utilitarian objectives. Including social and utilitarian criteria next to an ever-ambiguous evaluation of the amount of the offender's guilt into the sentencing process is warranted by both legal and pragmatic considerations. The requirement of a "reasonable punishment" as necessitated by the German legal system[33] is best served by complementing equity-considerations with utilitarian aims in order to justify the intrusion into the offender's rights.

## C. An Asymmetric Spielraum-theory

### *I. The requirements of the principle of proportionality*

Punishment is the intentional infliction of an evil on the offender by the state. Leaving the infliction of this evil as a matter of course to the judge's gusto seems therefore highly problematic, even within the limits of the offender's guilt. A *modus operandi* which would aim right at the centre of the spectrum of guilt, or placing the punishment at the upper end of the scale, would not be in conformity with the constitutional requirements of the principle of proportionality in many cases. Moreover this course of action stands as proof for a rather traditional and self-righteous approach that the culprit "gets what he deserves."

Also punitivity, *i.e.* the urge for punishment, in public opinion has risen considerably since the mid 1990s.[34] This change in public opinion can be shown by written interviews of first year law students which have been conducted on a regular basis since 1989, consisting of an overall 2.305 answering sheets. The test

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[31] This is conceeded by HÖRNLE, *supra* note 17, at 191, 326; put into perspective by VON HIRSCH/JAREBORG, *supra* note 17, at 56.

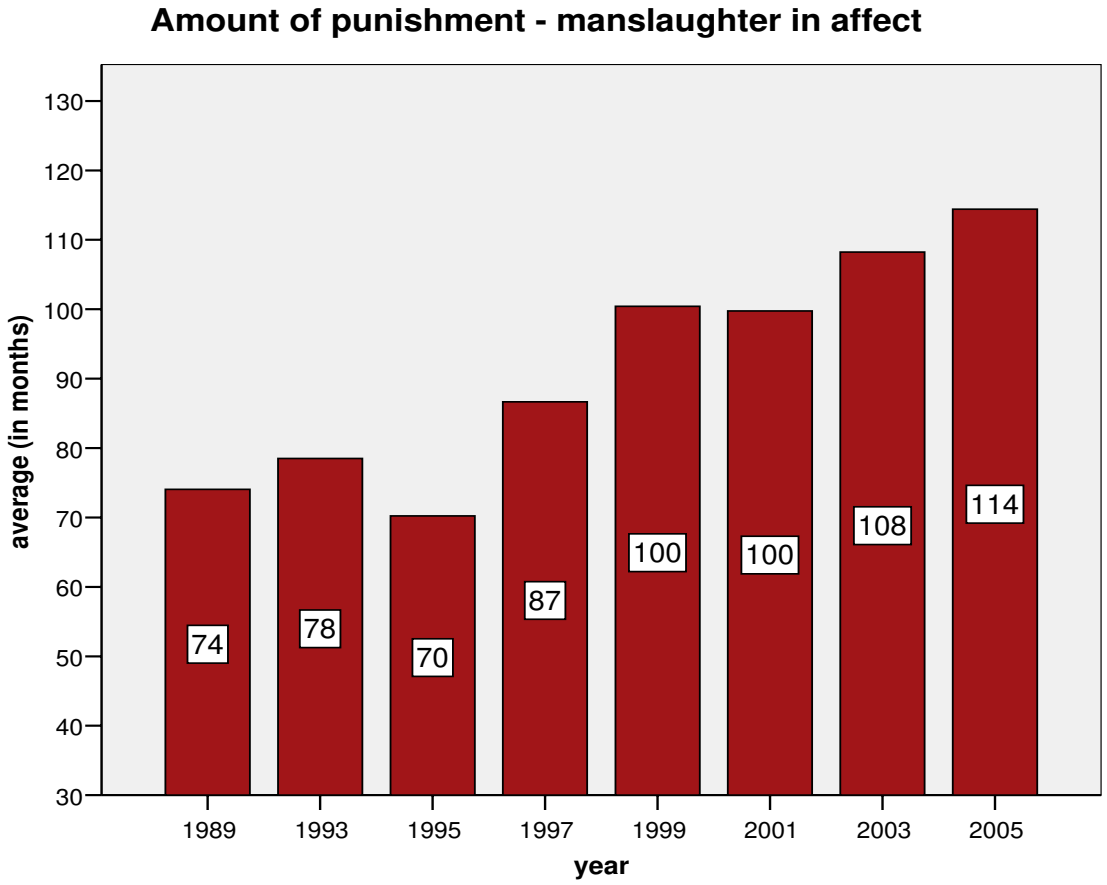
[32] For a combination of both approaches see CHRISTOPH REICHERT, INTERSUBJEKTIVITÄT DURCH STRAFZUMESSUNGSRICHTLINIEN 280 (1999).

[33] *See also* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 28 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 386 (391); BVerfGE 45, 187 (253); BVerfGE 73, 206 (253).

[34] *See also* Franz Streng, *Strafmentalität und gesellschaftliche Entwicklung — Aspekte zunehmender Punitivität*, in KRIMINALITÄTS-GESCHICHTEN. EIN LESEBUCH ÜBER GESCHÄFTIGKEITEN AM RANDE DER GESELLSCHAFT 211, 216 (Rafael Behr, Helga Cremer-Schäfer & Sebastian Scheerer eds., 2006); Franz Streng, *Befunde und Hintergründe zunehmender Punitivität*, in VERANTWORTUNG FÜR JUGEND, 354 (Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen ed., 2006).

case was a manslaughter resulting out of an argument between a couple, the perpetrator being in a status of diminished responsibility. Whereas the suggested average punishment amounted to six years and two months imprisonment in 1989, there was a raise to nine years and six months in 2005 (see Table 1).[35] Similarly, nowadays judges do in fact impose life imprisonment for murder in around 70% of the cases, compared to a mere 50% at the beginning of the 1990s. A soaring urge for harsher punishment can also be shown by a change in sentencing standards of the courts in manslaughter cases.

**Table 1**




[35] Life term imprisonment is reproduced in this table by 20 years = 240 months imprisonment.

Transporting public opinion without verification into the judicial practice is highly problematic in particular with a view to criminological research. Research studies could not verify that harsh punishment improves the deterrent effect on either the general public or the individual.[36] One could follow from these studies that a proportionate yet harsh sanction can be substituted by a less infringing one as long as the criminal act is not minimised by the sentence.[37] This means that the judges must be expected to dissociate themselves professionally from a senseless urge for harsh punishment.

Yet the notion of a *Bürgerstrafrecht*, a criminal law for citizens, necessitates the judiciary to embrace the values and needs of the general public.[38] In order to harmonize the different approaches and their requirements a compromise seems necessary: on the one hand the judge is bound by the values of the general public as he, being a citizen, himself draws the sentence for the individual offender out of the specific framework of guilt. On the other hand he avoids unreasonably harsh punishments and those detrimental to the biography of the offender, by aligning the sentence to the available minimum, *i.e.* the lowest level of the individual framework of guilt.

Such course of action conforms to the principle of proportionality, since by placing the emphasis on the minimum punishment the considerations of a relevant and necessary punishment are incorporated. Moralising valuations are being repelled and the sensible and necessary is brought to the centre of the decision-making. These considerations find more and more supporters, even in criminal law, and were in fact alluded to by the Federal Constitutional Court when it established the

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[36] *See also* Karl-Kudwig Kunz, *Überlegungen zur Strafbemessung auf erfahrungswissenschaftlicher Grundlage*, in ENTWICKLUNGSLINIEN DER KRIMINOLOGIE 29, 43 (Gerhard Kielwein ed., 1985); ALBRECHT, *supra* note 12, at 66; Heinz Müller-Dietz, *Prävention durch Strafrecht*, in KRIMINALPRÄVENTION UND STRAFJUSTIZ 227 (Jörge-Martin Jehle ed., 1996); Heinz Schöch, *Die Rechtswirklichkeit und präventive Effizienz strafrechtlicher Sanktionen*, in KRIMINALPRÄVENTION UND STRAFJUSTIZ, *supra,* 291 (1996); Wolfgang Heinz, *Kriminalpolitik an der Wende zum 21. Jahrhundert*, 47 BEWÄHRUNGSHILFE [BEWHI] 131, 146 (2000); STRENG, *supra* note 1, at MN 54, 61, 273; Bernhard Villmow, in NOMOS KOMMENTAR ZUM STGB, *supra* note 2, at Vor § 38, MN 62.

[37] *See also* GÜNTHER KAISER, VERKEHRSDELINQUENZ UND GENERALPRÄVENTION 380, 392, 595 (1970); Hans-Jörg Albrecht, Frieder Dünkel & Gerhard Spieß, *Empirische Sanktionsforschung und die Begründbarkeit von Kriminalpolitik*, 64 MONATSSCHRIFT FÜR KRIMINOLOGIE UND STRAFRECHTSREFORM [MSCHRKRIM] 310, 314 (1981); ALBRECHT, *supra* note 12, at 67; KAISER, *supra* note 20, at § 91, MN 4; Hans-Jürgen Kerner, *Erfolgsbeurteilung nach Strafvollzug*, in JUGENDSTRAFVOLLZUG UND BEWÄHRUNG 3, 89 (Hans-Jürgen Kerner, Gabriele Dolde & Hans-Georg Mey eds., 1996); Heinz, *supra* note 36, at 131, 148, 152; STRENG, *supra* note 1, at MN 278; Bernhard Villmow, in NOMOS KOMMENTAR ZUM STGB, *supra* note 2, at Vor § 38, MN 68; Michael Walter, JUGENDKRIMINALITÄT, MN 335 (2005).

[38] *See also* Franz Streng, *Die heranwachsende Juristengeneration und die Aufgabe des Strafrechts*, *in* 47 BEWHI, 422, 434 (2000).

principle of "sensible and moderate sentencing."[39] Consequently it can be stated that principally the punishment must be orientated to the minimum within the framework, so far as there are no specific grounds justifying a harsher sentence.[40]

However, in field of criminal law a direct reference to the constitutional principle of proportionality is not self-evident. The culpability principle is an autonomous category of criminal law[41] and itself derived from the principle of proportionality.[42] The requirements of justice which are embodied in the measure of guilt are authoritative in so far as any excessive punishment, *i.e.* punishment overstepping guilt, violates the principle of proportionality.[43] Yet not every punishment which is proportionate to the guilt of the offender can be automatically regarded as adequate in relation to the wider general aims of sentencing. The existing leeway in the perception of what is adequate, the range of which can be observed in empirical studies[44], prohibits such an equation.[45]

Let me once more refer to the interviews conducted amongst first year law students, which have already been mentioned earlier. Pertaining to the manslaughter case, which has been reported above, in the years 1999 and 2001, 453

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[39] See also BVerfGE 28, 386 (391); BVerfGE 45, 187 (253); BVerfGE 73, 206 (253).

[40] *See also* WOLFGANG FRISCH, REVISIONSRECHTLICHE PROBLEME DER STRAFZUMESSUNG 171 (1971); Heinz Giehring, *Ungleichheiten in der Strafpraxis und die Strafzumessungslehre*, in STRAFZUMESSUNG. EMPIRISCHE FORSCHUNG UND STRAFRECHTSDOGMATIK IM DIALOG 77, 110, 113 (Christian Pfeiffer & Margit Oswald eds., 1989); Grasnick, *supra* note 5, at 81, 87; Löhr, *Im Zweifel weniger*, in STRAFVERFOLGUNG UND STRAFVERZICHT 579, 592 (Heribert Ostendorf ed., 1992); KAI HART-HÖNIG, GERECHTE UND ZWECKMÄßIGE STRAFZUMESSUNG 137 (1992); Horn, *supra* note 28, at § 46, MN 35; Else Koffka, *Welche Strafzumessungsregeln ergeben sich aus dem geltenden StGB?*, in JURISTISCHE RUNDSCHAU [JR] 322, 325 (1955); Claus Roxin, *Strafzumessung im Lichte der Strafzwecke*, in LEBENDIGES STRAFRECHT. FESTGABE FÜR HANS SCHULTZ 463, 472 (1977); Karl-Ludwig Kunz, *supra* note 36, at 29, 37; Müller-Dietz, *supra* note 20, at 413, 427; Wolfgang Frisch, *Individualprävention und Strafzumessung*, in FESTSCHRIFT FÜR KAISER 765, 772 (1998).

[41] *See also* MÜLLER-DIETZ, *supra* note 29, at 24; GÜNTHER STRATENWERTH, DIE ZUKUNFT DES STRAFRECHTLICHEN SCHULDPRINZIPS 41 (1977); WOLFGANG NAUCKE, DIE WECHSELWIRKUNG ZWISCHEN STRAFZIEL UND VERBRECHENSBEGRIFF 177 (1985); Wolfgang Schild, *Strafbegriff und Grundgesetz*, in FESTSCHRIFT FÜR LENCKNER 287, 290, 309 (1998).

[42] *See also* IVO APPEL, VERFASSUNG UND STRAFE 460, 525 (1998); GEORG FREUND, ERFOLGSDELIKT UND UNTERLASSEN 87 (1992); OTTO LAGODNY, STRAFRECHT VOR DEN SCHRANKEN DER GRUNDRECHTE 384 (1996).

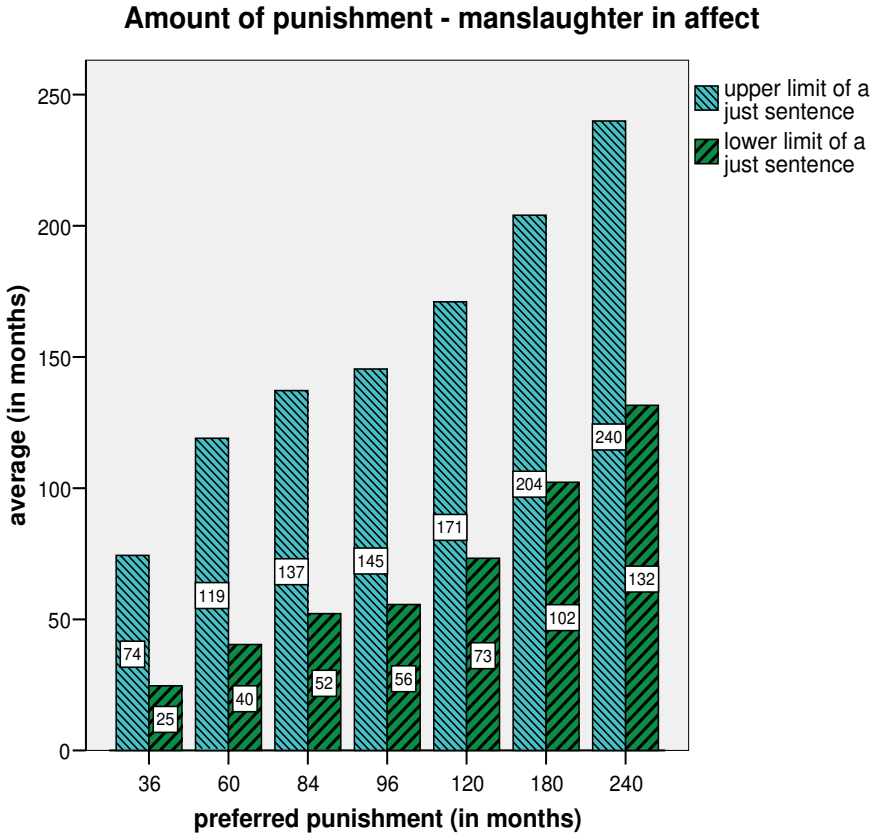
[43] *See also* BVerfGE 50, 205 (215); BVerfGE 73, 206 (253).

[44] *See also* Franz Streng, *Strafzumessungsvorstellungen von Laien*, *in* 87 MSCHRKRIM 127, 140 (2004).

[45] *See also* Thomas Weigend, *Der Grundsatz der Verhältnismäßigkeit als Grenze staatlicher Strafgewalt*, in FESTSCHRIFT FÜR HIRSCH 917, 929 (1999).

interviewees have been asked to name both a minimum punishment which would be acceptable and a maximum penalty, which would still be seen as a just sentence (*Table 2*). Most frequently (77 persons) the students voted for either five or ten years imprisonment in this case. Those who gave five years as a just and equal sentence identified a framework between three years and four months as a minimum up to nine years and eleven months as the harshest punishment possible. This gives an average range of six years and seven months. Those who voted for ten years imprisonment named a framework of six years and one month as a minimum and 14 years and three months as a maximum. This unfolds an average range of eight years and two months. The result is most remarkable: the sense of justice of the interviewees encapsulated in the framework for a just and acceptable punishment covers an astonishing wide range.

**Table 2**



This means that there still is room for an application of the general principle of proportionality even within the framework of what is adequate with regard to the individual guilt. Again, the Federal Constitutional Court has supported this perspective by emphasizing the need for a sensible and moderate sentencing.[46]

*II. Transforming the Asymmetry into the Guilt-Framework*

The process of determining the amount of punishment consists of the following steps: the judge identifies the statutory limits of the punishment and has to decide which would be the minimum sentence in this case, *i.e.* which punishment would be seen as being the lowest adequate to the guilt of the offender. He must then clarify whether in this individual case there are certain needs regarding crime prevention justifying a deviation from this minimum sentence onto a higher level.

The "asymmetrical *Spielraum*-theory" is thus orientated towards a minimum penalty. Nevertheless the decision must be acceptable to the majority of the general public as just and fair. Otherwise the decision fails to have a public norm-confirmation effect, which after all is the main objective of criminal law and distinguishes criminal law from other institutions safeguarding public order such as police powers. But there is no necessary conflict with the proposed sentencing process: a high standard of competence and professionalism on the part of judges allow them to pass sentences which although publicly perceived as low or even too low at first glimpse, nevertheless are accepted by the public in the end.[47]

Transforming this directive into court-practice suffers from one epistemological problem: the upper and lower end of the sentencing framework do not consist of hard and fast limits, which can be pinpointed.[48] Rather, in order to avoid a common misunderstanding, the *Spielraum*-theory, as used by the courts, does not even claim to find objective limits; in truth, it only asserts to find a definable leeway. The reality of this rather humble claim finds support in empirical studies.[49] Even

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[46] *See also supra* note 39.

[47] *See also* Werner Theune, *Gerechte Strafe*, in STRAFRECHT, UNTERNEHMENSRECHT, ANWALTSRECHT. FESTSCHRIFT FÜR GERD PFEIFFER 449, 451 (1988); Franz Streng, *Schuld ohne Freiheit?*, 101 ZSTW 273, 290 (1989); REINHOLD ZIPPELIUS, DIE EXPERIMENTIERENDE METHODE IM RECHT 18 (1991); REINHOLD ZIPPELIUS, RECHTSPHILOSOPHIE 80, 138 (1994).

[48] *See also* Eduard Dreher, *Zur Spielraumtheorie als der Grundlage der Strafzumessungslehre des Bundesgerichtshofes*, 22 JZ 41, 45 (1967); ALBRECHT, *supra* note 12, at 38.

[49] *See also* Franz Streng, *Praktikabilität und Legitimität der Spielraumtheorie,* in FESTSCHRIFT FÜR MÜLLER-

current jurisprudence speaks of the possibility of declaring theoretical limits; we can refer to the recent case law relating to plea-bargaining in German law. According to the *Bundesgerichtshof*, the Federal High Court of Justice, the court can, for the case of a confession, announce an upper sentencing limit for the accused that will not be exceeded.[50]

However, the limits of the asymmetric *Spielraum*-theory as presented here are obvious. Neither the central problem of sentencing, which is the grading of guilt by the individual judge, nor the disparities in measuring guilt, are resolved. The uncertainties concerning the grading of the offender's guilt remain, now encompassed in the determination of the lowest level of the leeway. Additionally, the range of the framework differs according to the individual judge in the same way as has been described. Anyhow, the upper limit of the framework is less important because of the "bottom-up" approach which is proposed here.

In order to ease these named difficulties one can only suggest that the judges collect enough information about the sentencing traditions at other courts and work towards a consensus in this regard.[51] One could rightly pose the question, whether the model of proportionate sentencing – as formulated by Andrew von Hirsch and others – is the right answer to the difficulties identified. However, this issue goes beyond the scope of this article.

## D. The Limits of the Culpability-Principle in Sentencing

The *Spielraum*-theory, in whatever form, is based primarily on the culpability-principle, which is the scaffolding for the sentencing process. In the following, two special cases will be discussed in order to question the limits of this concept.

### *I. Sentencing Petty Offences of Recidivist Offenders*

Recent case law has repeatedly shown that sentencing which is related only to the social-psychological valuation of the guilt of the offender is limited in dealing with

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DIETZ 875, 877 (2001); Franz Streng, *Strafzumessungsvorstellungen von Laien*, *in* 87 MSCHRKRIM 127, 140 (2004).

[50] *See also* BGHSt 43, 195, 206; in greater detail Franz Streng, *Verfahrensabsprachen und Strafzumessung*, in FESTSCHRIFT FÜR SCHWIND 447, 448 (2006).

[51] *See also* STRENG, *supra* note 12, at 304; Franz Streng, *Die Strafzumessungsbegründung und ihre Orientierungspunkte*, NSTZ 393 (1989); Wolfgang Frisch, *Straftatsystem und Strafzumessung*, in 140 JAHRE GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 1, 28 (Jürgen Wolter ed., 1993).

petty offences of recidivistic offenders. Re-offending is regularly seen as an aggravating factor, particularly in the field of property crimes.[52] The fact that the prior conviction did not serve as a warning to the offender generally leads to a harsher punishment compared to the first-time-offender.[53] The rational behind the raising of the sentence is to be seen in the fact that the relapse is taken as an intensified form of rebellion against the legal order.[54] Consequently the guilt of the offender is considered to be higher. This produces a discrepancy between the damage done to the norm[55] as observed by the judge and the damage done to the individual victim. By aggravating the punishment for recidivism the reasonable balance is lost regarding the resultant damage, done to the individual victim. By aggravating the punishment for recidivism the reasonable balance is lost regarding the resultant damage, when *e.g.* a prison sentence is imposed for shoplifting an article worth twenty six cents.[56]

It has been long accepted that the recidivist offender, who relapses out of weakness and personality deficits, cannot be punished too harshly. The legislator has thus abolished the mandatory aggravation of punishment incorporated in the former sec. 48 of the Criminal Code.[57] Furthermore, academics have criticised the traditional increasing of the punishment for recidivists.[58]

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[52] *See also* Bernd-Dieter Meier, *Die Strafzumessung bei Rückfalltätern in der Bundesrepublik Deutschland*, in DEUTSCHE FORSCHUNGEN ZUR KRIMINALITÄTSENTSTEHUNG UND KRIMINALITÄTSKONTROLLE 1333, 1350 (Hans-Jürgen Kerner, Helmut Kury & Klaus Sessar eds., 1983); ALBRECHT, *supra* note 12, at 333, 381; SVEN HÖFER, SANKTIONSKARRIEREN 105 (2003); BERT GÖTTING, GESETZLICHE STRAFRAHMEN UND STRAFZUMESSUNGSPRAXIS 230 (1997); TILMANN SCHOTT, GESETZLICHE STRAFRAHMEN UND IHRE TATRICHTERLICHE HANDHABUNG 245 (2004); Streng, *supra* note 50, at 447, 453, 461.

[53] *See also* BGHSt 24, 198 (200); HANS-JÜRGEN BRUNS, NEUES STRAFZUMESSUNGSRECHT? 59 (1988); Gribbohm, *supra* note 5, at § 46, MN 158; Ulrich Franke, in MÜNCHENER KOMMENTAR ZUM STGB § 46, MN 40 (2003); LACKNER/KÜHL, *supra* note 2, at § 46, MN 37.

[54] *See also* Franz Streng, *Schuld, Vergeltung, Generalprävention*, 92 ZSTW 637, 651 (1980); Freund, *supra* note 17, at 509, 528; Wolfgang Frisch, *Strafkonzept, Strafzumessungstatsachen und Maßstäbe der Strafzumessung in der Rechtsprechung des Bundesgerichtshofs*, in 50 JAHRE BUNDESGERICHTSHOF. FESTGABE AUS DER WISSENSCHAFT, BAND IV: STRAFRECHT, STRAFPROZEßRECHT 269, 285, 291 (Claus Roxin & Gunther Widmaier eds., 2000); MICHAEL PAWLIK, PERSON, SUBJEKT, BÜRGER. ZUR LEGITIMATION VON STRAFE 93 (2004); for a critical analysis, see GÜNTHER STRATENWERTH, TATSCHULD UND STRAFZUMESSUNG 18 (1972).

[55] Critical in principle Radtke, *supra* note 1, at Vor § 38, MN 16.

[56] *See also* OLG Stuttgart, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3188 (2002).

[57] *See also* Heinz Zipf, *Die Behandlung des Rückfalls und der Vorstrafen nach Aufhebung des § 48 StGB*, in FESTSCHRIFT FÜR TRÖNDLE 439 (1989).

[58] *See also* Christian Pfeiffer, *Zur Strafschärfung bei Rückfall*, *in* FESTSCHRIFT FÜR BLAU 291 (1985); Wolfgang Frisch, *Gegenwärtiger Stand und Zukunftsperspektiven der Strafzumessungsdogmatik*, *in* 99 ZSTW 751, 771 (1987); Helmut Geiter, *Rückfallvorschrift (§ 48) aufgehoben*, ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 376

Despite these critical voices it has been necessary for appeal courts to correct sentences of petty offences over and over again. Recent decisions have done this by focusing the grading of the guilt of the offender in the field of minor offences to the gravity of the actual criminal act.[59] Another way of dealing with these kinds of offences was illustrated by the Federal Constitutional Court, which referred to the principle of proportionality[60] in the so-called Cannabis-decision.[61]

The basic criteria of the new theory of proportionate sentencing can also be emphasised in this field. As this theory refers to the criminal act and in particular to the damage done as the crucial anchor for sentencing[62], some of the weaknesses of the culpability principle can be avoided. Therefore characteristics of the act and the offender, which could be relevant to the weight of the punishment, can be reduced[63] and give way to more reliable criteria. This helps to focus on the specific damage of the criminal act and to push back the judge's urge to relate the sentencing primarily to the virtual damage done to the legal system as such.

*II. Misconduct by the Public Prosecutor as a Mitigating Factor*

Being seduced by an overzealous *agent provocateur* to commit a criminal act is accepted as a special case for mitigation. This mitigation is in some respect unrelated to both the offender's guilt and utilitarian objectives. The guilt of the

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(1988); CHRISTOPHER ERHARD, STRAFZUMESSUNG BEI VORBESTRAFTEN UNTER DEM GESICHTSPUNKT DER STRAFZUMESSUNGSSCHULD 67, 259, 302 (1992); HÖRNLE, *supra* note 17, at 159; REINHART ENßLIN, SPEZIALPRÄVENTIVE STRAFZUMESSUNG 252 (2003); Heinz Zipf, *Die Behandlung des Rückfalls und der Vorstrafen nach Aufhebung des § 48 StGB*, *in* FESTSCHRIFT FÜR TRÖNDLE 439, 444 (1989); Hartmut Horstkotte, *Gleichmäßigkeit und Schuldangemessenheit der Strafzumessung*, *in* INDIVIDUALPRÄVENTION UND STRAFZUMESSUNG 151, 170 (Jörg-Martin Jehle ed., 1992); HEIKE JUNG, SANKTIONENSYSTEME UND MENSCHENRECHTE 212 (1992).

[59] *See also* OLG Braunschweig, NEUE ZEITSCHRIFT FÜR STRAFRECHT-RECHTSPRECHUNGSREPORT [NSTZ-RR] 75 (2002); OLG Stuttgart, *supra* note 56, at 3188; OLG Karlsruhe, NJW 1825 (2003); KG Strafverteidiger [STV] 383 (2004); CHRISTOPHER ERHARD, STRAFZUMESSUNG BEI VORBESTRAFTEN UNTER DEM GESICHTSPUNKT DER STRAFZUMESSUNGSSCHULD 154, 259 (1992); STRENG, *supra* note 1, at MN 427.

[60] Regarding petty offences see Oberlandesgericht [OLG] Karlsruhe, MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR] 85 (1997); OLG Stuttgart, *supra* note 56, at 3188; OLG Karlsruhe, *supra* note 59, at 1825; OLG Braunschweig, *supra* note 59, at 75; OLG Celle, NSTZ-RR 142 (2004).

[61] *See also* BVerfGE 90, 145, 172, 187.

[62] *See also* Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, in 11 OXFORD JOURNAL OF LEGAL STUDIES 1 (1991); ANDREW VON HIRSCH, CENSURE AND SANCTIONS 31 (1993); HÖRNLE, *supra* note 17, at 223, 373 (1999); concurring Horstkotte, *supra* note 58, at 151, 165.

[63] *See also* Bernd Schünemann, *supra* note 17, at 209, 226; HÖRNLE, *supra* note 17, at 133 (1999); CHRISTOPH REICHERT, INTERSUBJEKTIVITÄT DURCH STRAFZUMESSUNGSRICHTLINIEN 66 (1999).

offender, who has been persuaded to commit the crime by a member of the prosecution services and has not been conspicuous before, is to be graded on a comparatively low level.[64] But the mitigation of the punishment is not only necessitated by the marginal guilt of the offender; the conduct of the prosecuting authorities requires the judiciary to reduce or even abandon punishment.

In view of the extraordinary circumstances of such a case the *Spielraum*-theory is incapable of integrating this important mitigating factor. The frame-building would need to be extended below the basis permitted by sec. 46 § I S. 1 Criminal Code. Any attempt to integrate such a massive mitigation into the *Spielraum*-theory would turn it into a rather meaningless justification-formula: the basis of the entire sentencing process would suffer, because the relation of the punishment to the offender's guilt would be abolished.

Quite rightly the courts in such cases accept a blatant undershooting of a sanction which would be guilt-adequate in these cases.[65] It can fairly be stated that the public sense of justice is not shaken by abstaining from full punishment. The imposition of a sanction below the usual framework in a case like this – even if it contradicts the general system of sentencing – is thus justified by higher general principles of justice.[66]

**E. Summary**

The *Spielraum*-theory is burdened with a number of insufficiencies as has been shown not only by these final remarks. The amendment suggested here, being named "asymmetrical *Spielraum*-theory," endeavours to enhance the justification of this sentencing theory. However it cannot claim to reach a general curative effect.

This concession does not mean that the opposing theory of proportionate sentencing prevails. Nor does this latter theory offer a conclusive solution for cases involving an *agent provocateur*. Yet the concept of proportionate sentencing is

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[64] *See also* BGH, StV, 435 (1987); Hans-Jürgen Bruns, *Über die Unterschreitung der Schuldrahmengrenze aus schuldunabhängigen Strafmilderungsgründen*, in MDR 177, 181 (1987); TRÖNDLE/FISCHER, *supra* note 5, at § 46, MN 67.

[65] In greater detail *see also* BGHSt 32, 345 (355); BGH, StV, 296 (1988); BGH, StV, 131 (1995); concurring UWE HELLMANN, STRAFPROZEßRECHT II § 3, MN 90 (1998); a similar approach WERNER BEULKE, STRAFPROZEßRECHT, MN 288 (2005).

[66] *See also* Streng, *supra* note 49, at 875, 901; Horn, *supra* note 28, at § 46, MN 147.

promising in at least one respect: it constrains sentiments of disappointment or irritation on the part of the judge dealing with re-offenders.

In any case, sentencing in a democratic society must take heed of values and persuasions of the general public and integrate internalised norms/standards into the sentencing process. A sentencing system which bears no relation to the need to re-enforce accepted standards would lead to a technocratic system of criminal law, expressed in an unnecessarily high standard of punishment.

What is worth mentioning in this regard is the European dimension to this problem. National criminal law systems are more and more influenced and dominated by European standards of so-called penalty levels contained in European norms. National idiosyncrasies in values and established sentencing levels are mostly ignored by the European Union paving the way to a technocratic criminal law with – maybe – excessively high standards of sentencing.[67]

[67] In greater detail Franz Streng, *„Demokratisches Strafrecht" in einem vereinigten Europa*, in OPFERSCHUTZ, RICHTERRECHT, STRAFPROZESSREFORM – 28. STRAFVERTEIDIGERTAG 85 (2005)