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SENTENCING IN GERMANY AND THE UNITED STATES: COMPARING ÄPFEL WITH APPLES

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Contents:

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Introduction

Western nations all face similar issues of the purposes and criteria of punishment, and generally recognize similar sentencing options, but they differ significantly in their application of those options – particularly with regard to the use of custodial penalties (Tonry & Frase 2001; Jescheck 1984). A simple comparison of per-capita incarceration rates would suggest that the United States makes particularly heavy use of such penalties, whereas Germany and most of the other countries of Western Europe use custodial sanctions much more sparingly (Tonry 1999). Such comparisons, combined with various impressionistic measures, have given rise to what Lynch (1988) calls the Punitive Hypothesis (of much greater American custodial severity).

It is possible, however, that these per capita differences are largely explained by differences in the volume and seriousness of crime. For instance, if the volume of sentenced cases is much higher per capita in the United States than in Germany, or if American sentenced cases include a much higher proportion of violent offenders, then American per capita inmate populations would be expected to be much higher even if German and American sentencing policies were identical. Previous research on actual sentencing practices lends some support to the Punitive Hypothesis. But as explained more fully below, this research has a number of methodological limitations, and is subject to conflicting interpretations.

The purpose of this study is to obtain a better understanding of whether, when, and how Germans make use of non-custodial sanctions in cases (especially those involving non-violent crimes) which often would result in jail or prison sentences in the United States. The study also seeks to discover better ways to measure the differences that exist, and communicate these differences in a meaningful and convincing way to skeptical Americans - i.e., to those (scholars, judges, prosecutors, legislators, other policy makers, journalists, the public) who either reject the comparability of sentencing and correctional statistics, or who maintain that American sentences are properly harsher due to major differences in American crime-control needs and/or American culture.

Part I of this study examines the available evidence to support the limited form of the Punitive Hypothesis suggested above: that Germany makes much less frequent use of custodial sanctions for non-violent offenses. This analysis strongly suggests that the Hypothesis is true, even when unofficial custodial "sanctions" such as pretrial detention are included. Several proposals are made for further research to confirm the Hypothesis and make German-American sentencing comparisons more precise and more convincing.

Part II of this study assumes that the Hypothesis is true, and responds to the second set of objections referred to above - that even if German sentencing prac-

tices are very different, they are irrelevant to American sentencing policy decisions, due to fundamental differences in crime control needs and/or culture.

This study focuses on the sentencing of non-violent offenses, for several reasons. First: persons convicted of such offenses account for very high proportions of American jail and prison populations and annual admissions. In 1996, property, drug, and other non-violent offenses represented about 75% of the convicted jail inmate population (drunk driving cases alone were about 10 %), and about 50% of state prison inmate stocks. Such offenders also represented about two-thirds of sentenced inmates admitted to state prisons in 1996, and presumably a much higher proportion of jail admissions (Bureau of Justice Statistics [hereafter "BJS"] 1999a, tables 1.13, 1.22 & 4.2). This study gives special attention to sentencing of drug crimes, not only because such offenses account for a high proportion of American jail and prison populations, but also because this happens to be an offense with better comparative data for Germany and the United States.

A second reason for focusing on non-violent offenders is to avoid the special problems associated with America's much higher rates of life-threatening violent crimes, and much higher levels of public fear and public demand for punitive sanctions (Zimring and Hawkins 1997). As is discussed more fully in Part II, American rates of property crime are not very much different than German rates, so there are fewer political or legitimate crime-control reasons for harsher American sentencing. Third, most non-violent crimes (except drug offenses) receive relatively short custodial sentences in the U.S., and it is thus much more feasible, both politically and practically, to propose that such sentences be replaced with non-custodial alternatives. Finally, as explained more fully below, there is reason to believe that German-American differences in sentencing practices are most dramatic, and easiest to demonstrate, for non-violent crimes.[2] In short, non-custodial penalties are more appropriate, more politically acceptable, and more feasible to administer for non-violent crimes, and international comparisons are likely to be particularly instructive.

A threshold issue in any empirical legal study relates to the time periods for which data (and thus, the underlying legal provisions) are presented. In general, the most recent, nationally-representative sentencing data is presented for each country. The sentencing data-year then determines the choice of corresponding data years for earlier (police) and later (correctional) statistics. For most of the offenses examined here, the most recent national data on American sentencing is for 1996 (BJS 1999c, 1999d); accordingly, American police data (crimes known;

[2] On the other hand, any comparison of the incidence of custodial sanctions for minor crimes must take into account custody imposed (often without conviction) via pretrial detention, as well as major post-sentencing modifications such as imprisonment for nonpayment of fines. See further discussion in Part I, section B.4.

suspects arrested) is generally for 1995 (Federal Bureau of Investigation [hereafter "FBI"] 1996), and correctional (sentenced-prisoner) stock data is for year-end 1996 (prisons) and mid-year 1996 (jails) (BJS 1999a). Since the focus of this study is on the frequency rather than the duration of custodial sentences, the alternative of using mid-year 1997 jail population data seems less appropriate (most jail commitments begin and end in the same year as the sentence).

The most recent German sentencing statistics available at the time of this study were for 1998 (Statistisches Bundesamt [hereafter "StBA"] 2000), but 1997 sentencing data (StBA 1999a) was chosen instead, for several reasons: 1) 1997 was the most recent year with corresponding, complete prison-population data when the study began; 2) 1997 is closer in time to the sentencing year from which most of the American data is derived; 3) An inspection of the published statistics indicates that there was not much difference in German sentencing between 1997 and 1998. Accordingly, German police data is for the year 1996 (Bundeskriminalamt ["BKA"] 1997); prosecution screening and court-dismissal data is for 1997 (StBA 1998b and StBA 1998a, respectively); year-end prison inmate data is for 1997 (StBA 1998c); and additional inmate data is as of March 31, 1998 (StBA 1999b).

Readers will note that data is occasionally presented from one country (usually Germany), with no corresponding data from the other country. This was done in the interests of completeness, and to encourage other researchers to collect the missing data (or publish it, if it already exists in some form).

Most of the sentencing statistics and comparisons presented here are based on aggregate, national-level data for each country. There are, however, substantial variations in the sentencing policies of states and counties within the United States (Weidner & Frase 2000), and among the states of Germany (Weigend 2001).

I. Is the Punitive Hypothesis True, At Least For Non-Violent Crimes?

This section examines the available data on German and American sentencing law and practice, to see what support such data provides for the hypothesis that Germany makes much less frequent use of custody sentences for non-violent crimes. Part A reviews the support for the Hypothesis which can be gleaned from an examination of the existing legal and comparative sentencing literature. That supporting data consists, first, of the numerous provisions of German law which encourage the use of non-custodial sanctions. The following sections of Part A review the results of prior empirical research comparing German and American sentencing practices, and the limitations of that research. Part B then presents

several new statistical comparisons, and assesses their limitations. Part C proposes further research needed to confirm the Hypothesis, make it more specific, and make German and American sentencing comparisons more meaningful and convincing to skeptical Americans.

A. A Summary of German Sentencing Law and Prior Comparative Studies

1. German sentencing and sentence-related laws

There are several recent English-language summaries of German laws governing or related to sentencing (Albrecht 1995; Feeney 1998; Frase & Weigend 1995; Teske & Albrecht 1992; Weigend 1983, 2001). These summaries have identified numerous provisions of German statutory and case law which encourage (and in some cases, require) the use of non-custodial sanctions. Many of these provisions lack any counterpart in most American jurisdictions. Of course, "the law in action" does not necessarily conform to "the law on the books"; that is why empirical tests of the Punitive Hypothesis are also necessary. But formal law is still important, particularly in continental legal systems, where the role of theory and general legal principles is perhaps greater than in common law systems (which tend to be more pragmatic).

Although the focus of this study is on non-violent crimes, the following summary is somewhat broader, to provide an overall picture of the general philosophy underlying the German punishment system. As is illustrated by the first category discussed below, the definition of "sentencing" employed here includes much more than formal penalties. Non-prosecution is the most lenient "sentence" of all; on the other hand, arrest and pretrial detention can impose custody even if the alleged offender is never convicted.

a. Dismissal and diversion provisions

Some of the most important "sentencing" provisions of German law are found in the criminal procedure code (*Strafprozeßordnung*, (StPO)), or in the German drug law *(Betäubungsmittelgesetz*, or BtMG):

1) § 153 StPO authorizes prosecutors to decline to prosecute an offense, and authorizes the trial court to dismiss charges already filed, when the offender's guilt is minor and there is no public interest in prosecution. This provision (like all German laws permitting non-prosecution of provable charges) is limited to offenses classified as *Vergehen* rather than *Verbrechen*. The latter are crimes punishable with a minimum term of at least one year. Although the former term is sometimes translated as "misdemeanor", the German *Vergehen* category in-

cludes many crimes of moderate- to high-severity which would be felonies in most American jurisdictions (including, for example, burglary and almost all forms of theft; forgery; extortion; aggravated assault, and many drug crimes). Some *Vergehen* statutes include a specified minimum prison term; in that case, declination to file charges requires court approval. As discussed more fully in Part B, prosecutors and courts make very frequent use of the § 153 StPO dismissal power.

American prosecutors have even broader power to decline prosecution, since there are no statutory standards for such decisions (but also, no statutory legitimation of them) (Frase 1990, pp. 610-626).

2) §153a StPO authorizes prosecutors (or the court, after charges are filed) to conditionally dismiss *Vergehen* charges if the offense is not serious. Conditions of the dismissal can include the offender's payment of compensation to the victim, payment of money to a charity or to the state, performance of charitable or public service work, undertaking of certain family support obligations, or attendance at traffic school. This option, which is similar to Pretrial Diversion in the U.S. (Zimring & Frase 1980, pp. 349-95), is also very heavily used (see Part B). In some German prosecutors' offices there are internal guidelines specifying conditional dismissal as the regular disposition for certain types of cases, e.g., minor shoplifting (Weigend 2001).

3) §§154 and 154a StPO permit prosecutors (or the court, after charges are filed) to dismiss collateral counts or charges under a variety of circumstances (in particular: where such charges are deemed minor or unnecessary in light of other charges for which the offender has or will be convicted).

4) In addition to these general provisions, the BtMG contains specific provisions permitting dismissal or diversion to treatment in cases involving small amounts of drugs possessed for personal use (§§ 29(5), 31a(1), 37(1) & (2), 38(2) BtMG).

b. Penal Order provisions

If a *Vergehen* offense is not deemed appropriate for conditional or unconditional dismissal under the above provisions, it can still be disposed of rapidly, without a trial, by means of a Penal Order (*Strafbefehl*) (§§ 407-412 StPO). This procedure only permits a non-custodial sentence (usually a fine or loss of driving privileges); however, a suspended prison term of up to one year may be imposed, provided the accused is represented by an attorney.

Since Penal Orders, as well as Conditional Dismissals, require the consent of the court and the defendant, avoid the need for a trial, limit the severity of the penalty, and are often explicitly "negotiated", these German procedures bear some similarity to American plea bargaining. Like American guilty pleas, Ger-

man Conditional Dismissals and Penal Orders are very heavily used in Germany; unlike American pleas, however, the German procedures cannot be used to impose an executed custody sentence. Although "plea bargaining" as such is not authorized in Germany (because defendants are not asked to enter a formal plea), German practices analogous to plea bargaining have become increasingly common in recent years; moreover, even without bargaining or any express agreement, courts uniformly use their sentencing powers to reward defendants who confess or provide information on other suspects (Weigend 2001).

c. Decriminalization

Another form of statutory leniency (albeit at the systemic rather than the case level) consists of partial or total removal of penalties for conduct which would be criminal in most American jurisdictions (Frase & Weigend 1995). An example of total decriminalization is prostitution in permitted areas. For other conduct, a form of partial decriminalization is achieved by downgrading the offense to an administrative violation, punishable only with a fine and temporary loss of driving privileges. Such violations, called *Ordnungswidrigkeiten* (OWs), include not only most traffic offenses (including minor drunk driving violations), but also various forms of disorderly conduct, prostitution outside of permitted areas, advertising for prostitution, minor violations of controlled-drug regulations, and numerous other minor offenses against public order (§§ 111-130 OWiG (=Ordnungswidrigkeitengesetz); Weigend 1988).

Further limits on the scope of German criminal law have been recognized by the courts. The German federal Constitutional Court (*Bundesverfassungsgericht*, commonly abbreviated as BVerfG) held in one case that, although the drug statute itself was constitutional, principles of equality and proportionality in the German Constitution prohibited criminally punishing the defendant's purchase of a small amount of cannabis for personal use, because of the lack of sufficient state interest in prohibiting such conduct, and the very great differences in prosecution rates for this offense in the different German states (BVerfGE 90,145 [1994]).[3]

d. Juvenile and Young Adult provisions

Additional statutory encouragement of lenient dispositions is found in the juvenile court law (*Jugendgerichtsgesetz*, or JGG):

[3] German case citations use the following format: [court] [volume number], [first page number], [subsequent page number, if any, of specific material in the opinion]. Thus, the German Constitutional Court decision cited in text can be found in volume 90, starting at page 145. A similar format is used for cases decided by the German federal Court of Appeals (Bundesgerichtshof, abbreviated BGH). The year is not normally included in German case citations, but has been added here as a convenience to readers.

1) Juvenile Court jurisdiction extends up to age 18, and offenders under 18 may never be prosecuted as adults (although juvenile-law inmates 19 and over may be sent to adult facilities, § 92 JGG).

2) § 105 JGG permits young adults (at least 18 but not yet 21 at the time of the offense) to be prosecuted and sentenced under the juvenile law if either the offender's level of maturity was equivalent to that of a juvenile, or it was a "juvenile-type" offense. In practice, the majority of young adults are prosecuted as juveniles, including almost all who are charged with robbery or homicide (which, under adult law, carry high minimum sentences). It is generally assumed that young adults prosecuted as juveniles receive less severe sentences than they would under adult law, although there is some evidence to the contrary.[4]

In short: German law never treats juveniles as adults, and usually treats young adults as juveniles, whereas American law and practice increasingly treat juveniles as adults, and rarely treat young adults as juveniles.

The provisions for handling young adults pose some serious problems in making comparisons between Germany and the U.S., since German juvenile-law sentencing statistics usually do not distinguish between young adults and actual juveniles.[5] Although the focus of this study is on German sentencing under "general" (adult) criminal law, the comparisons in the remainder of this study will, where possible, present German data in two ways: excluding all juvenile-law sentences (thereby excluding some young adults), and including such sentences (even though the latter measures include many juveniles).

e. Arrest and pretrial detention

Another very important set of custody-imposing (or avoiding) provisions - those regulating arrest and pretrial detention - are also found in the criminal procedure code. Suspects may be arrested (*vorläufige Festnahme*) under two sets of provisions (Frase & Weigend 1995): 1) any citizen (including a law enforcement officer) may arrest a person "caught in the act" if either the offender's identify can-

[4] Some research suggests that such offenders, especially recidivists, receive more severe sentences under juvenile law than they would if prosecuted as adults (Teske & Albrecht 1992, n. 31), but it is not clear that the matched offenders in these studies were truly comparable. The high proportions of young adults prosecuted as juveniles, especially for the most serious crimes carrying minimum penalties, suggests an effort to mitigate penalties, not to enhance them (Albrecht 1995). A general mitigating effect is also very plausible, since juvenile measures generally have a five-year maximum term and no minimum, and judges tend to prefer sentences near the low end of the applicable range (Albrecht 1994). In any case, a juvenile-law conviction record and juvenile-law detention are probably seen as less serious than the analogous adult measures.

[5] In addition, one of the major juvenile law measures (Zuchtmittel, JGG §§ 13-16) includes both custodial and non-custodial alternatives, but these are sometimes not separately reported (see, e.g., StBA 1999a, table 6.2).

not be immediately determined, or there is a danger of flight (§ 127(1)); 2 StPO) prosecutors and most police officers may take a suspected offender into custody if the requirements for a pretrial detention order are met (including proportionality, see below), and there is not enough time to apply for a judicial warrant (§ 127(2) StPO). Arrested persons must be brought before a judge or released no later than the end of the day following the day of arrest (§ 128(1) StPO; Art.104 III GG, German Constitution). The latter requirement is similar to American "prompt court appearance" and review-of-warrantless-arrest rules. However, American standards for arrest appear to be looser, since they permit in-public arrests even of fully-identified suspects who pose no flight or other risks (and, in most states, even for very minor offenses, see below).

A pretrial detention order (*Untersuchungshaft*) may only be issued if three conditions are met (§§ 112, 112a StPO): 1) there is "urgent suspicion" (a standard that is higher than that required for a search warrant, but lower than required to file formal charges); 2) a need for detention is shown (see below); and 3) pretrial detention would not be disproportional to the severity of the offense and the expected sentence. A need for detention can be based on risk of flight, risk of tampering with evidence or witnesses, and/or risk of committing certain serious crimes (if the suspect is charged with such a crime). American pretrial detention standards are similar, but contain no express proportionality limit (although the Eighth Amendment does forbid "excessive" bail). Nor does any such limit apply to arrests; police in many states have discretion to make a custodial arrest (rather than issue a summons or citation) even for minor traffic and other non-jailable offenses, and courts have found no federal constitutional violation in these rules and practices (Atwater v. City of Lago Vista, 195 F.3d 242 (5th Cir. 1999) (en banc), *cert. granted* 120 S.Ct. 2715 (2000)).

f. The German criminal code

Numerous provisions of the German penal code (*Strafgesetzbuch,* or StGB) discourage custodial sentencing severity. Most of these provisions are more lenient than, or find no counterpart in, American law.

1) Except for life terms, the maximum prison term for any offense is fifteen years (StGB 38(2)), and the death penalty has been abolished. Authorized maximum sentences for common, non-violent offenses are modest by American standards, for instance: non-aggravated larceny (even involving substantial monetary value): five years (§ 242 StGB); residential burglary: ten years (§ 244(1)(3.) StGB [formerly: § 243(1)(1.)StGB]); possession or dealing in significant quantities of drugs (§ 29a) BtMG): fifteen years; possession of lesser amounts of drugs: five years. In cases of multiple conviction offenses, the combined sentence must be less than the sum of the maximum terms (§ 54(2) StGB).

2) Minimum prison terms are generally modest (e.g., six months, one year, two years, five years), and mitigating circumstances permit a (prescribed) lesser prison sentence (§ 49 StGB). Further mitigation authority has been created by case law.[6]

3) § 46 StGB imposes a general requirement of retributive proportionality of sentencing (the blame or *Schuld* principle), which limits both the minimum and especially the maximum severity of penalties designed to achieve crime-preventive purposes (Weigend 2001; Albrecht 1995). Under § 62 StGB, a different proportionality limitation (which takes into account the nature and degree of risk posed by the offender), applies to certain rehabilitation and security measures (commitment to a mental or treatment institution; post-prison security detention or supervision; drivers license revocations and occupational bans). However, as is illustrated by the modest and flexible minimum-sentence provisions described above, German sentencing law places greater emphasis on mitigation and individualization than on severity and uniformity of sentencing. The harsh mandatory minimum and sentencing guidelines provisions found in many American jurisdictions (particularly the federal system) find no counterpart in Germany (or, for that matter, in most other Western nations, see generally Tonry & Frase 2001).

4) § 47(1) StGB limits short custody sentences (those under six months) to "exceptional cases", and requires the court to give special reasons for any such sentence. When this provision was enacted, in 1969, the number of such sentences dropped dramatically, and has remained at reduced levels ever since. The same law abolished custody sentences of under one month, turned many former crimes into non-criminal (OW) violations, and authorized conditional dismissal after the filing of formal charges (Weigend 2001.)

5) § 56(1) StGB is interpreted to require the court to give special reasons for not suspending a sentence of one year or less (*id.*; Heinz 2000, citing BGHSt 24, 40, 42f).

6) § 56(2) StGB authorizes suspension of sentences of up to two years' duration, and allows courts to cite the offender's efforts to compensate the victim as grounds for this decision. Although such a suspension was originally expected to be exceptional, it is now the rule, accounting for two-thirds of prison sentences between one and two years (Weigend 2001).

7) § 46a StGB allows punishment to be mitigated (or even dispensed with, if the maximum authorized sentence is not over one year), because of the defendant's victim- restitution or mediation efforts.

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[6] Although the penal code provides a mandatory life sentence for murder, the German Federal Court of Appeals (Bundesgerichtshof, or BGH) held that a lesser penalty may be imposed when life would be disproportionate in light of mitigating circumstances (BGHSt 30, 105 [1981]). Decisions of the German Constitutional Court have expanded parole eligibility under a life sentence (BVerfGE 45, 187 [1977]; BVerfGE 86, 288 [1992]).

8) Under § 40 StGB, criminal fines are imposed using a day-fine system which automatically adjusts the fine to the offender's income (and to changes in the value of money). This provision, which was borrowed from the Scandinavian countries and was intended to further reduce the use of custody sentences, became effective in 1975. The maximum number of day-fine units is 360 (720, in case of multiple conviction offenses, § 54(2) StGB, and the maximum amount per unit is 10,000 German marks (about $4,500 at current (Spring 2001) exchange rates). However, the upper ranges within these limits are rarely used; in 1997, 92 % of fines in non-traffic cases were for 90 units (days) or less, and 99 % involved unit amounts of 100 marks or less (StBA 1998a, Table 3.3).

9) § 43 StGB specifies that unpaid fines may result in imprisonment at the rate of one day of custody per one unpaid day-fine. Federal law authorizes the states to enact laws permitting the substitution of community service for unpaid fines (Weigend 2001, n. 30). Such state laws currently require from four to six hours of service for each unpaid day-fine. § 59 StGB allows conditional suspension of day-fine penalties not exceeding 180 day-fines.

10) § 57 StGB permits release on parole after service of two-thirds of a custody sentence, and in some cases, after one-half.

2. Previous empirical studies comparing German and American sentencing

The summary of laws and overall sentencing practices presented above suggests lesser German punitiveness. But of course, what happens in practice, for particular offenses, may be an entirely different matter. There have been relatively few attempts to make detailed, offense-specific comparisons between German and American punishment practices, probably because of the serious methodological problems which such comparisons must overcome (discussed more fully below).

In a series of studies, James Lynch compared the frequency of custody sentences and the duration of such sentences (estimated actual time-served) for several countries, including Germany and the United States (Lynch 1988, 1993, 1995). Floyd Feeney later examined the imposition of custody sentences greater than one year,[7] in these two countries (Feeney 1998). The results of these studies are summarized in Table 1.

[7] The tables in Feeney's study report the proportion of offenders "sentenced to prison (1 year or more)". However, in most states a prison sentence must be for more than one year; custody terms of exactly one year (as well as shorter sentences) are served in local jails and workhouses (BJS 1999a, p. iv).

Table 1: Results of Prior Studies Comparing German with U.S. Sentencing

Lynch 1988, Table 3: Custody-sentence frequency
(as percent of persons charged, see text)

	Germany (1984)			U.S. (1982)
Estimate:	Low	average	High	
Homicide	.716	.766	.816	.706
Robbery	.125	.215	.305	.364
Burglary/larceny/car theft	.029	.042	.055	.118

Lynch 1993, Table 4: Custody-sentence duration
(estimated time served, in months)

	Germany (1984)	U.S. (1982)
Homicide	57.0	60.7
Robbery	39.6	24.5
Burglary/larceny/car theft	15.2	11.5

*Feeney 1998, tables 15-21: custody sentences longer than 1 year**
(as a percent of police suspects and of persons convicted)

	(West) Germany (1993)		U.S. (1992-93)	
base:	suspects	convictions	suspects	convictions
Willful homicide	42%	93%	32%	96%
Forcible Rape	15%	57%	15%	66%
Robbery	14%	47%	24%	70%
Aggravated Assault	1%	6%	4%	32%
Burglary	5%	13%	14%	44%
Serious theft	1%	9%	7%	39%
Drug offenses	4%	12%	9%	38%

* Including (U.S.) death sentences.

In their comparisons of custody-sentence frequency, Lynch and Feeney each used several bases (denominators). Lynch argued that comparisons based solely on convicted cases (e.g., "% of burglary convictions resulting in a custody sentence") would overstate American severity relative to Germany, since he believed that case-screening rates (declination of prosecution, dismissal, down-charging) were higher in the U.S. (Lynch 1988, at 187-88; Lynch 1995, n. 21). To use the example above, American "burglary" convictions would then be a more select group of cases which would merit more severe sentences due to more aggravated case facts, offender details, and/or strength of the evidence. Lynch tried to avoid such problems of non-comparable conviction-offense groups by using a more inclusive base. He computed American custody rates by dividing estimated custody sentences by the number of arrests for that offense. Lynch also believed that the German statistics on suspects identified by the police (*Tatverdächtige*) represent a much broader measure than American arrest statistics; therefore, in addition to offense-specific custody rates based on police suspects (the "low estimate"), Lynch computed a second rate for Germany ("high estimate"), based on the number of persons charged in a formal judicial proceeding (*Klage*) (Lynch 1988, at 189-90). For tabular presentation, he used the average of these two estimates. Table 1 presents all three of Lynch's estimates of German custody-sentence rates.

Feeney considered but rejected using Lynch's second (*Klage*) measure, since he felt that it was not needed. Feeney argued that even if German law might allow the police to identify persons as "suspects" and refer them to the prosecutor on grounds insufficient to meet the American probable cause standard for arrest, there would be no reason for the police to do so, since cases will not be prosecuted unless there is sufficient proof. Feeney also pointed out that both sets of statistics include many suspects who could not be physically arrested (e.g., out of the country). (It should also be noted that, in the U.S. as well as in Germany, many suspects are merely "cited" or given a summons to appear, and these offenders are included in the FBI's "arrest" statistics (FBI, p. 207; Frase 1990 at 598-99).) Based on a review of German literature and discussions with officials, Feeney concluded (pp. 72-3) that German "suspects" were roughly equivalent to American arrests, although he also appeared to concede that the German category is somewhat broader (*id.*. at 74, 79). Therefore, he based his estimated German custody-sentence-rates on police suspects (*Tatverdächtige*), and compared these rates to American custody rates based on "arrests" for each offense.[8] In addition,

[8] Feeney also reported the proportion of U.S. defendants initially charged with homicide, rape, robbery, and burglary who were eventually sentenced to prison on some other charge. These prison sentences are not included in the "suspects"-based figures shown in Table 1, since the German statistics do not separately report such sentences (Feeney, p. 78). If Lynch was correct in assuming that charge-reductions are more common in the U.S., the exclusion of these

Feeney presented German and U.S. custody-sentence rates based on persons convicted of each offense. Both of Feeney's rates – based on police-charges ("suspects"), and based on convictions – are shown in Table 1.

The results reported by Lynch and Feeney would seem to suggest that sentencing in the two countries is roughly similar for homicide and rape; for other crimes, American sentencing appears to be more severe in its frequency of custodial sentencing, but less severe in the average duration of custody terms. However, as discussed more fully below, there are several problems in reaching any firm conclusions from this data.

3. Methodological and other limitations of previous studies

As noted above, Lynch and Feeney both used initial-charge based measures, in an effort to control for differences in the average seriousness of cases reaching the stage of conviction. Lynch also adjusted his American rates (generally upward) to account for the effects of charge-modifications (Lynch 1988 at 206-9). For example: some persons who are arrested for burglary end up being convicted and incarcerated for larceny, thus tending to over-state the arrest-based custody-sentence rate for larceny, while under-stating the rate for burglary. But these methods are based on several critical assumptions: 1) that offense-specific caseloads in different countries "start out" (at some earlier, arrest- or court-charging stage) being roughly comparable (or at least, *more* comparable than they are at the conviction stage); 2) that statistics from different stages of case processing, collected by different agencies at different points in time, are comparable within as well as across jurisdictions; and 3) that the estimates and data manipulations needed to account for the various paths which cases take, from earlier to later stages, do not introduce new distortions. Unfortunately, there is very little data to support any of these assumptions.

Other than using broader rate bases, neither of these prior researchers made a serious effort to control for differences in the gravity of offenses or offenders included in the offense categories studied. However, Lynch did note that the observed difference between his estimated German and U.S. custody-sentence rates for robbers could be due to the higher proportion of American robberies involv-

"other charges" custody sentences tends to understate U.S. severity (for example, the U.S. "suspects"-based custody-sentence rate for homicide would be 38% rather than 32%). But this bias helps to compensate for the use of police suspects as a base (which, if Lynch and Feeney are correct, tends to overstate relative U.S. severity, since the German base may be somewhat broader). Drug cases present an additional problem, since American arrest data includes misdemeanor as well as felony charges, whereas the sentencing data is for cases which almost all began as felonies. If the misdemeanor drug arrests were excluded from the "suspects" base, the custody rate for drugs shown in Table 1 (9%) would be higher.

ing guns, and he also speculated that American defendants might have more serious criminal histories (Lynch 1988, pp. 196-7). (The current study provides some data on the latter issue, see part I.B.3, below, especially Table 6.)

A further common limitation of the previous studies is that they only compared sentencing of serious crimes. It seems quite likely that the differences between German and American sentencing are greatest for crimes of lower severity since, in previous studies, the greatest German-American differences were for the least serious offenses (Lynch 1995). Moreover, statistical comparisons of sentences for low-severity crimes are less likely to be seriously affected by unmeasured offense and offender factors, either because such factors are rarely present (e.g., use of a weapon), or because courts tend to ignore many case details, when sentencing low-severity crimes. Such crimes, because of their high volume, must be processed rapidly, based on a few, easily-appraised factors (the type of crime; the offender's prior conviction record) for which data is readily-available to the court (Albrecht 1980, 1991; Weigend 2001) - and is also likely to be available to the researcher. Finally, as noted at the outset, it is especially important to document international differences in the use of non-custodial penalties for less serious crimes, since such penalties are more appropriate, more politically acceptable and/or more feasible to administer in such cases.

Feeney's alternative comparison was based on conviction offenses (e.g., the percentage of burglary convictions resulting in a custody sentence). However, as noted above, such comparisons would overstate American incarceration rates if American convictions represent, on average, a more heavily-screened (severe) group of cases due to higher rates of pre-filing declination of prosecution, undercharging, or post-filing dismissal and/or down-charging. A systematic difference between German and American conviction-case severity seems, on first inspection, quite plausible. Since German formal law places greater limits on the discretion of the police and prosecutors to decline, dismiss, or undercharge provable causes (Frase & Weigend 1995), one might expect a higher proportion of low-severity cases to survive to the stage of conviction, thus justifying a lower level of average sentence severity. (This particular theory is examined further below, see especially Table 3; the contemporary reality is that German prosecutors screen out a very substantial proportion of cases.)

A further limitation of both of Feeney's measures (arrest-based and conviction-based) is that, in order to analyze caseflow in the pre-conviction stages, he was forced to rely on data from a sample of the largest urban counties. This data may not be representative of state-court sentencing for the nation as a whole, and it also excludes sentences imposed in federal court (German statistics include all sentences, since there is no separate, federal criminal jurisdiction).

Finally, an important limitation of Lynch's 1993 article on custody-sentence duration needs to be mentioned. Both the text and the tables in the article suggest

that German sentencing is more severe for robbery and for burglary/theft. But this result could be entirely explained by fact that custody sentences for these crimes are much less frequent in Germany (as Lynch's previous study shows). In general, when custody terms are imposed less frequently in a jurisdiction, such terms are normally reserved for the most serious cases; accordingly, the average length of custody terms will be longer, reflecting the greater average seriousness of these cases (Weidner & Frase 2000). Lynch briefly mentions this possibility at the end of his prison-duration article, but does not suggest any means to examine it. One way to gain an overall impression of German versus American sentencing severity is to simply combine the results of Lynch's two studies (that is, multiply his custodial-frequency rates for each offense by his estimates of average time-served). When this is done, overall German and American custodial severity is roughly similar for homicide and robbery, but for the combined property-crimes category, American severity is much greater:[9]

	Germany 1984			U.S. 1982
	Estimate:			
	Low	Average	High	
Homicide	40.8	43.7	46.5	42.9
Robbery	5.0	8.5	12.1	8.9
Burglary/ Larceny (incl. MVs)	.44	.64	.84	1.36

B. A Review and Comparison of Current German and American Sentencing Statistics

What do more recent German and American sentencing statistics suggest about the relative severity of sentencing in the two countries? Can comparisons based on such statistics overcome the methodological difficulties identified above? This section reviews the available statistics for both countries, with emphasis on non-violent crimes. For the reasons suggested earlier, comparison of sentences for less serious offenses seems more likely to reveal significant differences in German and American practices, and is also more likely to lead to feasible American sentencing reforms.

[9] Another overall custodial severity measure is based on the total number of prisoners held (inmate "stocks"), relative to (i.e., divided by) the total number of arrests (or adult arrests). For examples of the use of this technique, see Frase & Weigend 1995, at 347-8, and Table 8, infra.

The previous methodological discussion raises a preliminary question: how should these statistics be presented, that is, what base (denominator) should be used? The German and American custody sentence rates presented in part 1 below are based on convictions for each of the offenses examined. Part 2 explains the reasons for this choice, and Part 3 presents data supporting the comparability of German and American conviction-offense categories.

1. Recent sentencing statistics for non-violent crimes

Table 2 summarizes recent sentencing data for Germany and the United States. German data is still only available for the former West German states and East Berlin (the five excluded eastern states contain about one quarter of the adult German population); U.S. data includes sentences imposed in federal as well as state courts. As noted previously, it is not possible to present data which include all German adults and exclude all juveniles; many German young adults are prosecuted as juveniles, but offense-specific statistics for juvenile-law sentences combine young adults and juveniles, without distinction. In Table 2, the first German figure under "incarceration" is for adults sentenced under general criminal law (thus excluding some young adults who were sentenced as juveniles). The second figure (in parentheses) includes all offenders sentenced under either adult or juvenile law (thus including some juveniles).[10]

The proportions of German defendants receiving monetary sanctions are even higher than the figures shown in the table under "fine", since the latter does not include monetary payments imposed as a condition of probation. Under § 56b(2) StGB, probation conditions may include payments to the state or to a charity (*Geldbetrag*), and/or payments to the victim (*Wiedergutmachen*). Such probationary payments are seen as different than being sentenced to a fine (*Geldstrafe*) and, unlike the latter, are not separately reported in published sentencing statistics (except for fines combined with a prison term, under § 41 StGB, which are rare). However, the use of monetary probation conditions is quite common (Heinz 2000, Weigend 2001, Becker 1999). One study found that, among defendants placed on probation, payments to the state or to a charity (*Geldbuße*) were required, alone or in combination with restitution or community service, in 48% of the cases of burglary, 44% of the robberies, and 54% of the rapes; in another 10%, 3% and 3% of these offense groups, respectively, restitution alone was ordered (Albrecht 1994, p. 453, figure 50).

[10] For the offenses reported in the table, the proportion of juvenile-law sentences in 1997 which involved actual juveniles varied from 23% (drunk driving) to 64% (theft). "Custody" sentences, under Juvenile Law, include Jugendstrafe and Jugendarrest, but not other forms of Zuchtmittel (§§ 13-16 JGG), since most of the latter probably do not involve detention.

Table 2: German versus U.S. Sentences Imposed for Selected Crimes, 1996-97[1]

	(West) Germany (1997) (most serious penalty) (%)			U.S. (1996)
offense	fine[2]	probation	incarceration[3]	incarceration %
all non-traffic	77%	15%	8% (10%)	n.a.
burglary	23%	43%	34% (34%)	71%
all theft[4]	85%	10%	6% (8%)	n.a.
serious theft	37%	38%	26% (27%)	63%
fraud & embezzlement[4]	85%	12%	3% (4%)	47%
forgery[4]	76%	17%	7% (9%)	55%
drugs - total	51%	31%	18% (19%)	73%
possession	79%	14%	8% (9%)	70%
dealing[5]	45%	35%	21% (20%)	74%
drunk driving[6]	90%	8%	2% (2%)	10% -100%

[1] Sources: Germany (former West German states): Stat. Bundesamt (StBA)1999a, tables 2.3, 3.1, 4.1, 4.3.; U. S.: Bureau of Justice Statistics (BJS) 1999c, tables 3, 5, 6. [Felony sentences only].

[2] Does not include fines imposed as a condition of probation (see text).

[3] Numbers in parentheses include sentences under juvenile law (see text).

[4] German figures probably include many offenses which would be misdemeanors, or not criminal violations, in the United States (see text).

[5] Includes possession of substantial amounts (Germany), or with intent to sell (U.S.).

[6] German data excludes many offenses which were charged as non-criminal (fine-only) violations (see text). U.S. custody-sentence data are from: Alaska Judicial Council, pp. 15-16, 20 (100% received jail sentences in 1981); California Dept. of Motor Vehicles, p. 23 (75% jail rate in 1997; however, "many" jail sentences were satisfied through community service); Massachusetts Office of the Commissioner of Probation, p. 13 (10% jail rate in 1991); Pennsylvania Commission on Sentencing, 1996 Table 16 (87% jail).

The results in Table 2 suggest that Germany makes much less use of custodial penalties for non-violent crimes. But, as with the results of prior research, there are a number of problems in drawing firm conclusions from this data.

2. Methodological problems with these statistical comparisons

Table 2 uses offense-specific convictions as the base (e.g., "burglary custody sentences divided by burglary convictions"). As noted previously, conviction-offense comparisons would overstate American severity to the extent that American convictions represent a more select (more heavily-screened) group of offenses or offenders. The American cases might also be more serious due to unmeasured differences in crime definitions, and/or differences in typical crime behaviors.

In theory, one might try to avoid the problem of different screening rates by identifying cases at an early stage, and following them to disposition (so-called "offender-based transaction statistics" or "OBTS"). For example, one could compare, for each country, what % of burglary arrests result in a custody sentence on any charge. For a period in the 1980s, OBTS statistics were collected for several American cities; however, the latest data is for 1990, covering only 11 states (BJS 1994), and similar statistics are not available for Germany. As noted previously, Lynch and Feeney attempted a limited version of this approach, but their attempts to, in effect, simulate OBTS statistics required complex data transformations, and relied on numerous, impossible-to-verify assumptions and estimates. Indeed, even the OBTS "ideal" is based on the largely unverifiable assumption that groups of cases identified by arrest charge are similar in different jurisdictions.

In light of these problems, the present study uses, as its primary data, conviction-based sentencing rates. This is the most direct measure, with the fewest data manipulations, and avoids the problems and uncertainties of using broader rate bases. However, in section 3, below, various data is presented in an effort to assess the likelihood that American cases are more heavily screened, and thus likely for that reason to be of greater average severity. Some of this data also bears on the question of whether, apart from case screening, U.S. conviction offenses or offenders are more "serious".

As for the problem of offense definitions, there is reason to believe that several of the offense categories shown in table 2 are fundamentally non-comparable.[11] As the table indicates, there is no national U.S. data for "all non-traffic" offenses, "all theft"; or "drunk driving". The available, nationally-representative U.S. sentencing data is limited to felonies, and many thefts, as well as almost all drunk driving violations, classified as misdemeanors. (The U.S.

[11] There is also the general problem in making offense-specific comparisons, that the least serious crimes in any given offense category also tend to be the most numerous; thus, small differences in offense and/or category definitions, for these minor offenses, can have a major impact on the totals in each category (Zimring & Frase 1980, p. 78).

drunk driving data shown in the table is from a few states which have collected and reported statistics for this offense.)

Nor is there any sub-category of German theft which can be compared to American felony-theft sentences. The German category of "serious theft" shown in Table 2 appears to be much narrower, both in definition and case volume. Unlike most American theft laws, German law recognizes no automatic enhancement rule based on the value of property stolen; in addition, the number of "serious theft" convictions seems much too low in comparison to case volume for U.S. felony theft.[12] Feeney, who went to great lengths in trying to match German and U.S. offense categories, ended up conceding that the German and U.S. cases included in his "serious theft" category were not truly comparable (Feeney 1998, pp. 60-61). However, using the broader (felony-conviction-based) measure for the U.S. and the much narrower, "serious theft" category for Germany does provide a conservative test of the Punitive Hypothesis – and strongly confirms that hypothesis (U.S. incarceration rate of 63%, versus rates of 26-27% for Germany, depending upon whether juvenile law convictions are excluded or included).

Based on the much higher German case volume, there is also reason to question the comparability of the fraud-embezzlement and forgery categories shown in Table 2 (particularly the former).[13] Moreover, German statistics do not contain any narrower categories of designated "serious" frauds or forgeries which could be used to provide a conservative comparison. Therefore, no further analysis will be made of these crimes.

As for the other crimes shown in Table 2, the offense definitions seem roughly comparable and, in any case, further breakdowns or comparisons of subcategories are not possible. Although the German burglary category is limited to residential burglaries, such offenses are usually punished more severely than other burglaries, in both countries (§ 244(1)(3.) StGB; Model Penal Code Sec. 221.1(2)); thus, the German custody sentence rate for burglary, shown in Table 2, would probably be even lower if non-residential burglaries were included.

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[12] In Germany, the number of "(other) serious theft" convictions (Diebstahl in anderen besonders schweren Fällen – which includes non-residential burglary, but excludes a few, hard-to-classify theft offenses involving weapons and gangs – is less than one fourth the number of convictions for residential burglary (Einbruchdiebstahl). In the U.S., felony theft convictions are 32% more numerous than burglary convictions, even though the latter category includes non-residential burglaries (which accounted for about one-third of all burglaries known to the police in 1995, FBI 1996, p. 39).

[13] The number of (West) Germans sentenced for fraud and embezzlement is almost twice the number for the U.S., even thought the U.S. population is about four times greater. Using the burglary "yardstick" employed above (see previous note), fraud and embezzlement cases are seven times more numerous than burglaries in Germany, but only half as numerous in the U.S.; forgeries are twice as numerous in Germany, but less than half as numerous in the U.S.

As for drug crimes, the per-capita rate of drug convictions is over two times higher in the U.S., but this may simply reflect heavier American drug use and/or more active law enforcement efforts, rather than differences in offense definition or case screening. In one respect, the German conviction-offense drug charges appear more serious: only 15 to 17 % (depending on whether juvenile-law convictions are included) of German drug convictions are for simple possession, compared to an estimated 37 % of U.S. felony drug convictions. (Further data on police charges and prosecutorial screening in drug cases is examined in sections 3a and 3b, below.)

For drunk driving offenses, no direct comparisons of case volume are possible. However, there is reason to believe that the German statistics reflect a more serious group of cases. These statistics include only those offenders convicted of criminal drunk driving, for which the "per se" blood alcohol (BA) level is .11 % (Becker 1999); the U.S. data shown in Table 2 is from states which use lower (.10 or a .08) "per se" BA limits. Moreover, in Germany in 1997, persons with a BA of at least .08 could be charged with a non-criminal, fine-only violation (*Ordnungswidrigkeit*). Although many such persons could also be charged with criminal drunk driving (if there were evidence of actual driving impairment), it appears that the practice was to charge most drivers having BAs between .08 and .11 with the non-criminal violation (Schöch 1997, p. 32). There is no national data on the precise numbers of and sanctions given for non-criminal violations, but since the latter do not permit incarceration, their inclusion would lower the German custody-sentence rate for drunk driving even further.[14]

Despite these plausible assumptions, however, it remains possible that the greater American sentencing severity shown in Table 2 is at least partially the result of differences in the nature and/or severity of the conviction cases in each country. This is particularly the case for the burglary and drug comparisons. Burglary is a crime likely to involve a considerable degree of variation in initial charging and subsequent charge-reduction in different countries (Frase 1990 at 660; Lynch 1988 at 208). Drug crimes, because they involve no complaining witnesses independent of the police, are even more susceptible to cross-jurisdictional variations in enforcement and charging.

3. Some additional data, addressing the problems identified above

There are no easy answers to most of the methodological objections noted in the previous section. Nevertheless, there is reason to believe that the German cases, for which sentencing data is reported in Table 2, are at least as serious as the

[14] One study from Cologne in 1997 found that the number of drivers with a BA between .08 and .109 represented about 1/3 of the number with higher BAs (Iffland & Balling 1999).

American cases with which they are compared. The previous section provided some of the basis for this conclusion, with respect to thefts, drug crimes, and drunk driving offenses. This section presents additional supporting data relating to the offenses and offenders being compared.

a. Screening, diversion, and dismissal rates

In earlier sections of this article, as well as in previous research, it has been assumed that case-screening rates (police non-enforcement; declination of prosecution; diversion; various dismissals) are higher in the U.S. than in Germany, which would mean that American convicted cases are of greater average severity (again, assuming that cases "start out" being roughly comparable). The assumption of higher U.S. screening rates seems plausible, given the greater restrictions on police and prosecutorial discretion under German law. German Police have, in theory at least, no discretion to decline to enforce the law (but see Frase & Weigend 1995 at 337, note 135). German prosecutors are legally required to file all *Verbrechen* charges for which there is sufficient evidence (although very few non-violent offenses are *Verbrechen*); lesser crimes (*Vergehen*) can only be declined or dismissed under certain conditions, and often only with court approval (§§ 152-154e StPO, see Part .A.1, above). In contrast, American police and prosecutors enjoy almost unlimited discretion, both in practice and in terms of formal law.

In fact, however, German prosecutors exercise very substantial discretion, and a high proportion of cases received from the police are declined, diverted, or dismissed – either unconditionally, due to the minor nature of the offense, or under conditions similar to Pretrial Diversion, in the U.S. Moreover, the proportion of cases declined or diverted by German prosecutors has been growing steadily in recent decades (Heinz 1999a, 1999b, 2000). Unfortunately, the national-level German data on these practices is not offense-specific (except for drug crimes, see below; see also Feeney 1998, pp. 18-24 (Tables 7-13), presenting estimated offense-specific screening rates based on various German studies). Furthermore, this data provides less detail as to offenders than as to matters, and does not always provide separate figures for juvenile and traffic offenses. Also, there is no comparable nationwide U.S. data. Nevertheless, the available German data lends considerable support to the conclusion that German convictions are a select group of cases, perhaps even as select as U.S. convictions.

The German data on case screening is presented in Table 3, showing the numbers of matters (cases) and defendants prosecuted and dismissed in the former West German states (the jurisdictions for which sentencing data is available, see Table 2).[15] The available separate figures for juvenile, drug, and

[15] This data is apparently limited to cases with known (bekannte) suspects (Heinz 1999a).

Table 3: Matters and Defendants Charged, Dismissed and Convicted in (West) Germany, 1997

	Matters	*Defendants*
prosecution decisions[1]		
Prosecuted (*Klage*, Penal Order, or other)	1,010,192	1,111,045
in juvenile court	180,525	n.a.
traffic matters (incl. juveniles)	322,968	n.a.
dismissal with conditions	201,499	211,465*
juvenile	10,574	n.a.
drugs	323**	n.a.**
traffic matters (incl. juveniles)	66,970	n.a.
dismissal without conditions	508,714*	n.a*.
juvenile	124,464	n.a.
drugs	50,499**	n.a.**
dismissal of unneeded collateral charges	193,487	n.a.
dismissal due to deportation or extradition	22,077	n.a.
dismissal for lack of evidence, death, etc.	979,478	n.a.
non-final disposition, e.g., withdrawn complaint	587,643	n.a.
decisions by local and district courts:[2]		
dismissal with conditions	49,459	53,973*
drugs	350	377**
dismissal without conditions	32,546	37,542*
dismissal of unneeded collateral charges	26,874	30,783
juvenile law dismissals (w/ or w/o conds)	37,533	46,618*
dismissal due to deportation or extradition	1,065	1,210
dismissal for lack of evidence, death, etc.	16,425	18,941
acquittals	n.a.	25,581
adult law drugs	n.a.	919
juvenile law drugs	n.a.	141
other juvenile law	n.a.	3,289
traffic crimes (incl. juveniles)	n.a.	4,141
Total persons dismissed with or without conditions (sum of *s)		858,312
Persons dismissed in drug law cases (sum of **s)		51,199
convicted (persons)	n.a.	780,530
drugs, adult law	n.a.	32961
drugs, juvenile law	n.a.	8371
other crimes under juvenile law	n.a.	79436
traffic crimes (incl. juveniles)	n.a.	250,219

[1] Source: Statistisches Bundesamt [StBA] 1998b, Tables 2.2 and 2.4.
[2] Sources: StBA 1998a, Tables 2.2, 2.3, 4.2 and 4.3; StBA 1999a, Tables 2.1, 2.2.

traffic cases are also reported. This data shows that the estimated total number of defendants receiving a conditional or unconditional dismissal (sum of single-starred figures: 858,312) is actually higher than the number of persons convicted (780,530), even though dismissals have been very conservatively estimated (data on the number of matters dismissed by prosecutors without conditions is used as a proxy for the number of defendants dismissed, although the latter are clearly more numerous; all dismissals of collateral charges are excluded, as well as all dismissals based on problems of law or evidence, and all withdrawn complaints and other dismissals (well over a half million matters per year).

The only offense-specific data on screening decisions is for drug crimes (apparently because, as noted in Part A.1 above, the German drug law contains specific provisions permitting dismissal or diversion to treatment in cases involving small amounts possessed for personal use). As shown in Table 3, the total estimated number of drug-law defendants dismissed in 1997 (51,199), was considerably greater than the number who were convicted in that year (41,332, adult law plus juvenile law). Moreover, the estimated number of dismissals is again very conservative; only dismissals which were explicitly noted as involving drug laws are counted, and almost the entire estimate is based on matters (even though many drug cases involve multiple defendants).

Thus, it appears that convicted defendants in Germany, particularly in drug cases, are a very "select" group. Of course, it remains possible that American convicts are an even more select group. However, the limited available data actually suggests *less* American prosecution and conviction selectivity for the one category, drug crime, as to which there are national-level statistics for both countries.[16]

b. Types of drugs and drug crimes.

As previously noted, German drug convictions include a lower proportion of simple possession, and a higher proportion of "dealing" offenses. But this difference might be entirely attributable to charging differences; many U.S. defendants initially charged with dealing plead guilty to possession, yet their more severe sentences may still at least partly reflect the original dealing charge.

[16] The 1990 OBTS data for 11 states, previously mentioned, indicates that 88 percent of felony arrests for drug crimes were prosecuted, and that of these, 73 percent resulted in a conviction on felony or lesser charges (BJS 1994, tables 1 & 6). Combining these figures, an estimated 64 percent of drug arrests resulted in conviction. The German data in Table 3 can be combined to yield an estimated drug-crime conviction rate (persons convicted divided by the sum of persons convicted, dismissed or acquitted) of 44 percent. Feeney 1998, p. 24 (Table 13), presents a much lower estimated prosecution rate for drug offenses (37 percent). However, the denominator used (arrests) includes misdemeanors, whereas the numerator is limited to felony-level charges.

Table 4: Police Data on Drug Crimes and Drug Types in Germany and the United States, 1995-96

	Germany (1996) (all states): % of matters *investigated* *	U.S. (1995): % of persons *arrested* *
Trafficking:[1]	35.1%	24.9%
heroin or cocaine	15.3%	14.7%
marijuana	13.7%	5.8%
other illegal drugs	6.1%	4.4%
Possession:[2]	63.0%	75.1%
heroin or cocaine	23.7%	27.8%
marijuana	29.7%	34.1%
other illegal drugs	9.6%	13.3%
other not specified:	1.9%	0
All charges:	100%	100%
heroin or cocaine	39.0%	42.5%
marijuana	43.4%	39.9%
other illegal drugs	15.6%	17.7%
not specified	1.9%	0

* Because of rounding, percentages may not add to total. German police data based on drug suspects is not presented because it is less complete and less comparable (see text).

[1] In U.S. statistics, this category is called "sale/manufacturing"; the German figures represent the sum of two categories called "trading and smuggling" and "importing".

[2] In U.S. statistics, this category is called "possession"; the German category is called "general violations of Drug Law § 29" (the main provision, which includes all cases of simple possession, see text).

Sources. Germany: BKA 1997, Table 01, p. 235; United States: FBI 1996, p. 207.

However, a comparison of police statistics for the two countries (Table 4) suggests that German drug cases (from all German states) also "start out" with a higher proportion of dealing charges, and that police-charged drug cases in the two countries involve similar proportions of hard and soft drugs.[17] Moreover,

[17] The source of the German figures reports figures based on matters (*Fälle*) as well as figures based on suspects (*Tatverdächtige*). The former data is presented here because it includes information on all major drug types, and lists drug cases and charge types according to the most serious charge (BKA 1997, p. 234, n.1). German data on suspects includes overlapping

some of the German cases assumed to be "possession" may actually be some form of dealing.[18]

It is still possible, of course, that convicted American drug cases are more serious. Perhaps the German and U.S. police statistics use fundamentally different rules to define and categorize "dealing" and "possession" charges. Or, perhaps the German data on "matters" somehow exaggerates the seriousness of German drug cases and suspects. It is also possible that American offenders possess or deal in larger amounts of these drugs. Finally, police data may not be a good indicator of the seriousness of prosecuted and convicted drug offenders in each country, due to differences in prosecutorial screening (although, as previously noted, drug cases are heavily screened in Germany).

A case study of German drug sentences. In order to gain further insight into the sentencing of German drug offenders, including information as to the type and amount of drugs involved, a sample of drug cases collected by researchers at the Max Planck Institute was examined, and the sentences imposed in these cases were compared with guideline and mandatory-minimum sentences specified and imposed under American state and federal laws.

These drug cases, from courts all over Germany, were selected as part of a study of money-laundering laws in Germany and other European countries (Kilchling et al. 2000). Drug violations provided the source of illegal funds in 45 of the cases, but of these, only 12 cases had detailed information about both the type(s) and amount(s) of drugs involved. At the time, German money-laundering laws were not applicable to actual drug dealers, but only to the "launderers" (e.g., those who took drug money to a bank, wired it out of the country, or changed it into smaller bills or foreign currency). Sentences given to the launderers were always recorded, but sentences of other participants often were not. Also, no criminal history data was collected for any of the participants; however, it is

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categories, the sum of which totals to more than the actual number of suspects; data of the latter type would overstate the proportion of German cases involving less serious drugs (Cannabis) and charges (possession), when compared to U.S arrest statistics (which, like German matters data, are based on the most serious offense; see FBI 1996, p. 368 ("Hierarchy Rule")). Were it not for these problems, the suspects measure would be better, since (like sentencing) it is based on offenders, and excludes matters in which illegal drugs were seized but no suspect was identified (the number of drug matters in 1997 was 28% more than the number of suspects).

[18] As indicated in note 2 of Table 4, the German "possession" data is from a category called "general violations of Drug Law § 29", which may include some dealing offenses. However, given the size of this category, the inclusion of another, much smaller category labeled "other drug law violations", as well as the inclusion of categories explicitly labeled as dealing offenses, it is likely that the "general violations" category is primarily composed of simple possession violations.

likely that the "launders" (many of whom were relatives of the principal parties) had few if any prior convictions.

Table 5: German drug cases (Max Planck Institute Money-Laundering sample)

case #	launder's *role(s)*	type & amount *of drugs seized*	launder's *total sentence*	No. of other *participants*	known sentences of *other participants*
11	hid $ in bank box	14 kg. hashish	3 months suspended	1	
17	held $, some drugs	13.4 g. cocaine	90 day-fines	5	
22	took $ to bank; wired $ abroad	85 g. heroin	6 months suspended	3	39 months prison; 6 months supervision
100	changed $, smaller bills	10.5 g. heroin	12 months suspended	7	
102	took drugs to Spain, changed $, $ to bank	50,000 ecstasy pills	24 months suspended	2	
111	held drugs, $ for son	40 g. hashish	80 day-fines	1	24 months prison
113	wired $, hid drugs, her apartment used	15 g. heroin	22 months suspended	3	
122	attempted to wire $ abroad	10 kg. hashish, 800 g. cocaine	27 months PRISON	8	
127	wired $ abroad	1 kg. heroin	24 months suspended	11	
136	wired $ abroad	930 g. heroin	21 months suspended	3	
137.1	wired $ abroad, bought heroin	700 g. heroin	24 months suspended	11	84 months prison; 12 & 24 mo's suspended
137.2	drugs stored, packed in her apartment	700 g. heroin	18 months suspended	11	[same as above]

As shown in Table 5, all 12 of the "launderers" in the cases with recorded drug types and amounts were involved in very serious drug crimes, and often played a key role, yet only one of them received an executed custodial sentence. Of the six other participants with known sentences, only three received an executed custody sentence (ranging from 24 months to 84 months).

How would these offenses have been handled in the United States? Although there are not enough case facts to precisely calculate the probable sentence in any U.S. jurisdiction (and state laws and practices vary considerably), here is a preliminary assessment under Minnesota and federal laws, based on the indicated drug types and amounts (and assuming no prior convictions):

Minnesota. Ten of the 12 cases would be first degree drug crimes, for which Minnesota Sentencing Guidelines recommend a prison term of at least 81 months. In 1996, about 90 % of first-degree offenders with no prior felony drug convictions received a custody (jail or prison) sentence (Minnesota Sentencing Guidelines Commission 1997, p. 11).

Federal. Eleven of the 12 cases would have recommended custody terms under the U.S. Sentencing Guidelines, and five cases would be subject to a 5- or 10-year mandatory minimum prison term (although some offenders might avoid the minimum either by providing "substantial assistance" to the prosecution, or by application of the "safety valve" provision for low-level, low-criminal history offenders). In 1996, 95 % of federal offenders convicted of drug trafficking received a custody sentence (U.S. Sentencing Commission 1997, table 12).

In short: the comparisons above add further support to the conclusion that the more lenient sentencing of drug cases in Germany is not due to the minor nature of the offenses involved. But further research is needed, with larger, more varied samples and more detailed case facts.

c. Offender prior records

Whatever else may explain lenient German sentencing of non-violent crimes, it is apparently not due to a high proportion of first offenders. As shown in Table 6, the majority of German offenders convicted of burglary, theft, or drug crimes under general (adult) criminal law have at least one prior conviction, and many have five or more. The lengthy prior records of German offenders reflect, at least in part, the considerable degree of case screening conducted by German prosecutors, which tends to weed out low- or no-criminal-history offenders (see discussion above). Table 6 also suggests that the prior records of German and American offenders are roughly similar, both in the number and severity of prior convictions.[19]

[19] Only very crude comparisons of prior-conviction severity are possible, since American statistics report the most serious prior crime *type* (violent felony, other felony, or misdemeanor), whereas German statistics report the most serious prior *sentence.* However, similar proportions (about 15%) of persons convicted in each country fall into the "worst" prior conviction category or group of categories reported for that country ("violent" felonies, in the U.S.; custody sentence of 6 or more months, in Germany). Table 6 compares the proportions, by offense, of such "worst-15-percent" prior records.

*Table 6: Prior Conviction Records of Sentenced Offenders in the U.S. and (West) Germany, 1996-97 **

	Number of convictions:					Most serious prior conviction/ sentence:	
		% with indicated number of prior convictions				U.S.:	Germany:
conviction *offense*	% with at least one *prior conviction*	*one*	*2*	*3-4*	*5+*	% with a prior violent *felony*[1]	% with a prior custody sentence of six *months or more*[2]
Burglary							
U.S.	72	12	12	17	32	16	
Germany	74	11	9	14	40		36
Theft							
U.S. (felonies)	66	14	7	14	31	13	
Germany							
-- all thefts	57	15	9	10	23		17
--serious thefts	67	13	8	12	35		29
Drug crimes							
U.S.	67	16	12	14	25	12	
Germany	63	14	10	13	26		24

* U.S. data is for convicted defendants charged with felonies in May, 1996 in 40 counties representing the 75 largest counties in the U.S. For the three offenses shown in the table, prior record data are available for 93-94% of the cases. Source: National Archive of Criminal Justice Data [downloaded from: http://www.icpsr.umich.edu/NACJD/home.html; compare BJS 1999d, Tables 10 & 12 (similar data, but including acquitted and dismissed defendants)].

German data is for offenders age 18 or over who received adult-law sentences in 1997 in the former West German states (excludes young adults (18-20) receiving juvenile-law sentences). Prior record data are available for 97-98% of offenders. Source: StBA 1999a, Tables 2.1, 7.1.

[1] The same source indicates that, in 1996, 14% of felony convictions imposed in these 40 counties were for "violent offenses". BJS 1999d, Table 28.

[2] Percentages exclude all sentences under Juvenile Law (durations of which are not indicated), but include suspended adult sentences. In 1997, 15% of adult, non-traffic offenders convicted under general (adult) criminal law in former West German states received custody terms (including suspended terms) of six months or more. StBA 1999a, Table 3.1

However, these comparisons are at best only approximate, owing to several important limitations in the data for each country. U.S. data is from a sample of sentenced felons in 40 of the 75-largest counties; these jurisdictions probably

have higher crime rates, and thus more serious prior-record rates, than the average American jurisdiction. On the other hand, two countervailing factors may tend to overstate the German prior record rates shown in Table 6, and/or understate the American rates: 1) It is not clear to what extent the American data includes prior juvenile adjudications; the German data clearly includes some prior convictions under juvenile law (although less than 10% are so identified, and many of these were probably imposed on young adult offenders, and thus are comparable to adult convictions in the U.S.). 2) The German rates exclude young adults (age 18-20 at the time of the offense) convicted under juvenile law;[20] it seems likely that these defendants had less serious prior records than the average German offender convicted under general criminal law.

4. More problems of comparison, and responsive data

The sentencing data presented in Table 2, like that in previous studies, is limited to formal penalties imposed by the sentencing court. But many defendants, particularly in minor cases, receive informal custody "sentences" by means of pretrial detention and/or other measures such as immigration detention. In addition, many defendants initially receive a non-custodial sentence, but end up "doing time" when their release is revoked. What if informal custodial penalties, and/or the various forms of custody-imposing post-trial sentence modification, are more common in Germany than in the U.S.?

a. Informal custody

It is certainly true that many German defendants are held in pretrial detention (*Untersuchungshaft* - "U-Haft") or immigration detention (*Abschiebungshaft* - "A-Haft"), and that some of these offenders are never found guilty, or are convicted but receive a non-custodial sentence (Albrecht 1998; Gebauer 1987). Similar cases of informal detention undoubtedly occur in the U.S., but there is very little published data. And neither country has good data showing how immigration detention relates to criminal charging and disposition (whether for immigration or other crimes).

As for Germany, the published data show sharp increases, in the early 1990s, in the number of persons entering or remaining in custody under U-Haft or A-Haft. The peak year for both was 1994 (StBA 1998c, Table 1.4 (and corre-

[20] The prior record data for persons convicted under juvenile law does not distinguish between young adults and juveniles; if all such persons were included, the very limited criminal records of the juveniles would produce criminal history estimates that are clearly much too low. The prior record data shown in Table 6 go with the main (adult-law) sentencing data shown in Table 2 (not the figures in parentheses, which include sentences under juvenile law).

sponding reports for earlier and later years); Heinz 2000, Figure 19 (proportion of adult- and of juvenile-law offenders held in pretrial detention, by year); Albrecht 1998, table 1). However, the numbers and durations of A-Hafts (as measured by year-end inmate stocks, remained relatively low compared to both U-Haft and sentenced-inmate stocks. At year-end, 1997, the following numbers and categories of persons were detained in the former West German states (StBA 1998c, Table 1.4):

U-Haft inmates	16,954	[including 724 juveniles]
A-haft inmates	2,112	
Juvenile sentenced institutions	4,067	[including 32 with adult law sentences]
Adult sentenced institutions	33,537	[including 967 with juvenile law sentences and 616 in treatment facilities]

Since there is no offense-specific or other criminal-justice-status data on A-Haft detentions, the remainder of this section will focus on the use of U-Hafts.

Although the number of U-Haft inmates shown in the table above is relatively high when compared to sentenced-inmate populations, the proportion of offenders subjected to pretrial detention in Germany is quite low, and the number of these who do not receive a custody sentence is even lower (although still arguably much too high). Table 7 shows the proportion of prosecuted persons subject to a pretrial detention order (the "Pretrial Detention Rate"), and the "Informal Custody Sentence Rate" relative to the number of formal, executed-custody sentences. Informal custody sentences include defendants held in pretrial detention who either were not convicted, or who were convicted but did not receive a formal custody sentence. The Informal Custody Sentence Rates shown in the table are computed by dividing the number of such informal custody sentences by the number of defendants who received a formal, unsuspended custody sentence for that offense (i.e., the numerator used to compute the main "incarceration" rates shown in Table 2).[21] Informal custody sentence rates are based on (divided by) formal custody sentences for two reasons: 1) the most plausible alternative base, persons prosecuted, may not be comparable for Germany and the U.S. (see discussion in parts A.2 and A.3 above); and 2) basing the informal rates on the number of formal custody sentences allows one to appreciate the relative use of informal and formal custody, for each offense.

[21] Because the German pretrial detention statistics do not clearly separate adult and juvenile offenders, all offenders are included. The Table also counts all Juvenile Law "disciplinary measures" (Zuchtmittel) given to detained persons as "custody" sentences, because some are (though many are not); hence, these cases are not counted as informal custody sentences.

Table 7: (West) German and U.S. Rates of Pretrial Detention and Informal Pretrial Custody "Sentencing"

	Pretrial Detention Rates[1]		Informal Custody Sentence Rates[2]	
offense	(West) *Germany (1997)*	U.S. (75 largest *counties) (1996)*	(West) *Germany (1997)*	U.S. (75 largest *counties) (1996)*
all non-traffic crimes	.06	--	.36	--
burglary	.19	.76	.30	.62
theft				
all thefts	.03	--	.21	--
serious theft	.14	.55	.30	.57
drugs crimes	.16	.63	.44	.52
drunk driving	.004	--	.13	--
immigration laws	.12	--	2.62	--

"--" = data not available.

[1] German rate equals prosecuted persons ordered held in pretrial detention (U-haft) (excludes one- or two-day police detentions) divided by total persons prosecuted for this offense. The latter figure includes adults and juveniles adjudicated (*Abgeurteilte*) under general criminal law or under juvenile law, plus certain other persons whose prosecution or penalty was suspended (*Strafvorbehalt, Entscheidung ausgesetzt,* and *von Verfolgung abgesehen*). Source: StBA 1999a, Tables 2.1, 2.2 and 6.1.

U.S. rate equals prosecuted persons held in pretrial custody for more than two days, divided by total persons prosecuted for this offense. Source: National Archive of Criminal Justice Data [downloaded from http://www.icpsr.umich.edu/NACJD/home.html]

[2] German rate equals detained (U-hafted) prosecuted persons who were not convicted or who received a non-custody sentence, divided by the number of persons receiving formal, unsuspended custody sentences for this offense. Non-convictions include *von Strafe abgesehen, Verfahren eingestellt, and Freispruch*. Non-custody sentences include *Freiheitstrafe-Aussetzung, Jugendstrafe-Aussetzung, Geldstrafe, Maßregeln*, & *Andere* (other) *Entscheidungen*. Unsuspended custody sentences include *Freiheitstrafe*, *Strafarrest*, *Jugendstrafe*, and *Jugendarrest*). Source: StBA 1999a 3.1, 4.1, 4.3 & 6.2.

U.S. rate equals prosecuted persons held in pretrial custody for more than two days who were not convicted, or who received a non-custody sentence, divided by the number of persons receiving formal, unsuspended custody sentences for this offense. Source: downloaded National Archive data, see note 1 above.

As shown in the first column of Table 7, German U-Haft rates are relatively low, both overall (about 6 % of prosecuted non-traffic offenders) and by offense. On the other hand, informal custody rates are very high, especially for drug and im-

migration violations. For immigration offenses, informal custody "sentences" are over two and a half times more frequent than formal ones (and the ratio would be even higher if the informal custody sentence rate included immigration (A-Haft) detentions); apparently, temporary custody (followed, in many cases, by deportation) is seen as a sufficient sanction in many immigration cases. But the high informal custody sentence rate for all non-traffic crimes (36 % - a rate higher than the rates for burglary or serious theft) shows that this is a widespread phenomenon, not one that is limited to a few offenses.

These findings are bad news not only for Germany, but also for researchers attempting to compare "custody sentence" rates in these two countries (or any other jurisdictions, including within national boundaries). Unless an effort is made to assess pretrial detention rates, any observed differences may simply reflect the extent to which jurisdictions differ in the frequency with which pretrial custody is formally recognized (or "legitimated") with a custody sentence. This problem is particularly acute when the dependent variable under study is "any custody"; however, the problem also affects narrower dependent variables (e.g., custody sentences of more than 30 days)

National-level pretrial detention statistics are not available for the United States. The available data which is shown in Table 7 (from the previously-cited sample of 40 large counties, representing the 75 largest counties in the U.S.)[22] suggests both much higher rates of pretrial detention and much higher rates of informal custody "sentencing". Although it is not known how representative this data is of the U.S. as a whole, the informal custody rates shown in Table 7 are consistent with earlier research at the local level. One study of case processing in New York City in the early 1970s found that about one half of persons held in pretrial detention either received a non-custodial sentence, or were not convicted at all (Zeisel 1982, p. 219; see also Frase 1990 at 594-610, discussing U.S. data on pretrial detention).

The much higher estimated American pretrial detention rates suggest that the previously reported differences between German and U.S. custody-sentencing rates (Table 2) are not simply the result of higher German rates of informal custody. On the contrary, there is a consistent pattern of higher American use of custody both in the pretrial phase and in formal sentencing. A similar pattern of consistently higher American custody rates was observed in a study of French

[22] As indicated in the notes to Table 7, this data was downloaded from the Nation- al Archive of Criminal Justice Data [http://www.icpsr.umich.edu/NACJD/home.html]. Some of this pretrial detention data is published in BJS 1999d. For purposes of Table 7, American defendants were counted as held in "pretrial detention" if they were held in pretrial custody for more than two days, since this is the period after which, in Germany, such detention requires court approval (see Part I.A.1, supra). Thus, both the German and the U.S. data exclude preliminary investigatory (police) detention.

criminal justice (Frase 1990). In general, there appears to be a strong, mutually-reinforcing relationship between pretrial and post-conviction incarceration, both in individual cases and system-wide. Arrest and pretrial detention are less frequently imposed in cases (and systems) where there is no expectation of any significant custodial sentence. Conversely, a custodial sentence is much less likely to be imposed if there has not been any significant pretrial custody. To a large extent, this is because released defendants are able to demonstrate their ability to comply with conditions of release; also, such defendants do not face the mounting pressure to plead guilty in return for a sentence of "time already served". Both ends of this problem need to be addressed, in American criminal justice systems; indeed, reducing the use of pretrial custody should perhaps be given a higher priority (since these decisions are made early in each case, and often determine everything after that point). This issue is especially important in less serious cases, since pretrial custody is likely to exceed the appropriate custodial sentence (if any).

b. Major post-trial sentence modifications

As noted earlier, another problem with the sentencing data in Table 2 (and with all prior studies comparing the frequency of custody sentences in Germany and the U.S.) is that the initial sentence imposed by the court is often not the "last word". Many offenders who initially receive a non-custodial sentence end up in custody because they fail to pay a fine, or because their probation is revoked for violation of the conditions of release (other than commission of a new offense). Both of these custody-imposing post-trial sentencing modifications are common in Germany. One study found that, for the three serious crimes studied, initial and "final" sentences were quite different, in terms of the proportions of cases in which a fine, probation, or actual imprisonment was the most severe sanction (Albrecht 1994 , Tables 5 and 10, pp. 266, 273):

	% Fine		% probation		% prison	
	initial	final	initial	final	initial	final
Burglary	21	16	35	26	44	58
Robbery	3	3	35	26	62	73
Rape	2	2	36	32	62	66

The study above only considered one non-violent offense (burglary), and no similar studies appear to have been conducted in the U.S. Moreover, the German study covered cases processed in 1979-1981. Since that time, the use of "substitute imprisonment" for non-payment of fine (*Ersatzfreiheitsstrafe*, EFS) appears

to have become increasingly common (Hamsdorf & Wölber 1999),[23] and there is also evidence that probation revocation rates unrelated to commission of a new offense have increased (Albrecht 2000).

To compare initial and final sentences in the two countries, one would, ideally, follow matched samples of German and U.S. cases from filing (or even from arrest) through sentencing and later sentence modifications. In the absence of such studies, the best available comparison is of total inmate populations (stocks) for each offense. Looking at inmate stocks allows one to take into account all custody-imposing decisions, whether made as part of initial sentencing or later.

Of course, there are also some disadvantages and problems in using comparisons based on inmate stocks: 1) Stocks reflect not only the frequency but also the duration of custodial sentences (actual time-served), and do not permit the separate contribution of each to be assessed; 2) Unlike the conviction-based comparisons presented in Table 2, inmate-stock comparisons require the selection of some appropriate, crime-rate or sentenced-caseload-related "base". As noted above, in the discussion of prior U.S.-German comparative studies, there is a problem – whatever base one uses – not only in assuring at least rough comparability between the two countries, but also comparability of offense categories within each country (since the inmate and base statistics will have been compiled by different agencies). There is a further, related problem with the German statistics: the court data which might be used as a base (e.g., persons convicted, or persons prosecuted) is only available for the states of the former West Germany, whereas the published inmate data is for all of Germany.

In light of the latter problem, the base used for the inmate-stock comparisons. shown in Table 8, is persons charged by the police ("suspects" data, for Germany; arrest data, for the U.S.). (As explained below, a different base is used for drunk driving, since there is no German suspects-data for traffic offenses.) Like the inmate data, suspects-data is reported by offense for all of Germany. Although most of the previous comparisons in this study were limited to the former West German states, it is useful to have measures which include the eastern states. It is possible that sentencing is much more severe in those states, since public attitudes appear to be more punitive there (Kury & Ferdinand 1999).

[23] The only data on the use of EFS consists of the number of such persons in custody at the start and end of each calendar year (stocks), and the total number of such persons admitted and discharged from prison within the year (flows), see, e.g., StBA 1998c. However, all of these numbers are problematic. The stock data is distorted by the practice of releasing offenders for the holidays (Weigend 2001, n. 49). The flow data includes transfers between prisons, and multiple entries for one person in connection with a single fine (Eisenberg 2000, §33, Rn 24). Thus, the data is of little use in any absolute sense, but has some value in determining trends (assuming these biases remain constant).

Table 8: German and U.S. Adult-inmate, Police-charge-based Incarceration Rates, by offense[1]

	Germany (all states)			U.S.		
offense	sentenced adult inmates *[A]*	adult suspects *[B]*	Rate *[A/B]*	sentenced prison & (adult) jail inmates *[C]*	adult arrests *[D]*	Rate *[C/D]*
burglary	5,866	70,277[2]	.083	129,463	250,681	.516
theft[3]	7,689	529,468	.015	99,845	1,130,971	.088
drugs[4]	7,623	127,024	.060	293,239	1,286,326	.228
drunk driving	2,148	258,000	.008	51,200	1,448,756	.035

[1] Persons under 18 are excluded from the suspects and arrests bases in both countries, and from all German inmate counts. An estimate for such persons is excluded from the U.S. jail inmate counts for each offense, based on the under-18 proportion for convicted jail inmates (all offenses). German inmate counts include young adults sentenced under Juvenile Law (*Jugendstrafe*).

[2] Applies the police-statistics "burglary" categories identified in Feeney 1998, pp. 56-7.

[3] Excludes burglary and embezzlement.

[4] Includes possession as well as trafficking offenses.

Sources:

German inmates: StBA 1999b, Table 5;
German suspects (except DWI): BKA 1997, Table 20 (appendix) (sum of columns 14 + 24);
German DWI suspects: Kraftfahrt-Bundesamt [KBA] 1998, Table RZM97.01;
U.S. inmates (except DWI): BJS 1999a, Tables 1.13 (prisons) and Tables 2.1, 2.6, & 4.2 (jails);
U.S. DWI inmates: BJS 1999b, Table 4;
U.S. arrests (except DWI): FBI 1996, Table 29 (total arrests) and Table 38 (arrests by age);
U.S. DWI arrests: FBI 1997, Tables 29 (total) and 38 (by age)

As noted previously, some researchers have concluded that the police-suspects base is broader and thus tends to understate German severity when compared to U.S. rates based on arrests. Therefore, consideration was given to including a second German base in Table 8: prosecuted defendants. However, this alternative was rejected, for several reasons. First, as noted above, there is no offense-

specific data on prosecuted defendants in the five new (eastern) German states, and there is no published offense-specific inmate data for the former West German states. Second, in light of the high degree of prosecutorial screening in Germany (Table 3), the German prosecuted-defendants base seems likely to be *much* narrower than the U.S. "arrests" base, thus greatly over-stating relative German sentencing severity. Third, the German "suspects" base, although perhaps broader than U.S. "arrests", includes a compensating bias in the other direction (U.S. offense-specific rates probably exclude more offenders who were convicted on different charges than the arrest charge, see text *infra* and note 8, *supra*).

As shown in Table 8, the U.S. rates of sentenced inmates per arrest are four to six times higher than the German rates based on inmates-per-suspects. In the case of drug crimes, there is good reason to believe that the German "suspects" base is comparable to the American arrest base. Using these bases, the 4:1 U.S.-German ratio for drug crimes is similar to the ratio of custody rates shown in Table 2; moreover, one would not expect a measure of suspects to differ much from arrests for this crime - most persons become suspects when they are observed dealing or in possession of drugs, and are then (in the U.S.) promptly arrested.

As for drunk driving, the German base is the number of convicted criminal or non-criminal "alcohol delicts" reported to the central German traffic registry (*Verkehrszentralregister* - VZR) by courts and administrative authorities (pursuant to the traffic code, §§ 28 & 28a StVG). In one respect, this comparison tends to understate the American incarceration rate relative to Germany, since many U.S. arrests do not lead to conviction. On the other hand, it's possible that the VZR drunk driving data includes some duplicate records, or some minor violations that would not be illegal in the U.S. (as of 1997, only 15 U.S. states used the .08 *per se* limit applicable in Germany in 1997, BJS 1999b).

As for burglary and theft, the German "suspects" base may be slightly broader than the U.S. "arrests" base, so the true U.S.-German ratio is may be less than six-to-one. But there is at least one countervailing bias in the burglary comparison: the higher assumed rate of charge reduction in the U.S. (see previous discussion) means that the U.S. inmate category for "burglary" is likely to exclude many persons convicted on "lesser offenses" who were included in the "arrests" denominator. Attrition through charge reductions is particularly common for American burglary arrests (BJS 1999d, table 27).

Finally, there is a question whether the imposition of pretrial detention "sentences" affects the stock comparisons shown in Table 8. Considering the frequency of such informal penalties (Table 7), it would be desirable to compute alternate inmate-stock incarceration rates which include pretrial detainees, but this is not presently possible (there is no offense-specific pretrial detention "stock" data for Germany). However, in a previous study, comparing overall (all-offenses) inmate stocks-per-arrest, the ratio of U.S. to German incarceration rates

did not change much when pretrial detainees were added to the numerators of the U.S. and German measures (Frase & Weigend 1995, n. 215).

C. Summary; Additional Research Needed

In light of the legal provisions and data presented in sections A and B above, the "Punitive Hypothesis" of much greater U.S. custodial severity seems very plausible for non-violent crimes. Yet all such comparisons have significant methodological limitations, and this is likely to remain true for the foreseeable future. Thus, there is a need to go beyond comparisons of law, published statistics, and impressions of "usual" practices – all of which tend to be fairly abstract, and thus, less convincing to skeptical Americans.

In order to make German-U.S. comparisons more meaningful, abstract sources need to be supplemented with case-level, concrete comparisons of actual sentencing practices. One way to do this is to see how judges in the two countries react when given a series of simulated cases. Some hypothetical-case studies of this type have been carried out with German judges (Albrecht 1991), but no study has presented the same cases to both German and American judges. Although "scenario" methods have their limitations,[24] there is a strong need for further cross-national studies of this type, as a means of corroborating the results of more abstract comparisons. In general, given the limitations of available data and permissible research designs with human subjects, studies of social phenomena must always employ a variety of methodologies and data sources so as to provide, in Hans Zeisel's classic phrase, "triangulation of proof" (Zeizel 1968).

Another way to make sentencing comparisons more meaningful would be to collect actual case files from each jurisdiction, in order to provide detailed, concrete examples of the use of different sanction types and amounts. Such files would be selected to represent fairly "typical" fact patterns and outcomes for offenses which are frequently prosecuted in both countries, and which often result in custody sentences in the U.S., and non-custodial alternatives in Germany. (A preliminary test of this approach, applied to drug violations, was presented in Section B.3, above.) Of course, some system would have to be devised to validate the claim that the cases are "typical", and data-privacy standards (which are particularly strict in Germany) would have to be respected.

[24] See, e.g., Lynch & Danner 1993. These authors' objection is that the offense and offender details provided in scenarios are necessarily quite limited, and that respondents may differ considerably in the assumptions they make about critical missing information. One way to lessen this problem is to instruct respondents to apply the traditional "in dubio pro reo" maxim (doubt benefits the accused), and assume the facts most favorable to the defendant (while also inviting respondents to specify, in written comments, the major assumptions they have made).

But future research, whether it is based on statistics, hypothetical scenarios, or actual case files, needs to be accompanied by further development of reliable and meaningful ways to measure custodial "punitiveness". For example, comparative sentencing scholars have not reached consensus on whether, if a single measure is needed, it should be based on frequency or on duration of custodial terms (Frase 2001). Here are two more examples, previously noted:

1) Measures of "custody sentencing" need to assess – and then decide how to "count" – informal custodial measures such as arrest, pretrial detention, and immigration "holds." From a human rights perspective, and in the context of "low-end" sentencing, a broad, custody-versus-no-custody measure seems best - locking a human being in a cage, even for one day, should be seen as an extremely serious intrusion, to be used as little as possible. However, in order to exclude very brief, investigatory or identity-check detentions, it might be necessary to limit such a measure to "any overnight custody". (But what about arrests made *during* the night?) Since German, American, and many other laws require police-initiated detentions to be court approved after one or two days, an alternative "broad" measure could be one which only counts custody of more than two days (or nights). Comparisons of crimes of greater seriousness may require much narrower measures (e.g., sentences of over one year, Feeney 1998). However, as previously noted, such measures are problematic unless there is good data on the length of time actually served. This leads to the other example, previously mentioned.

2) Studies of "custody sentencing", whether of frequency or duration, need to also measure - and decide how to "count" - sentence modifications which occur after the point of initial sentencing. Again, from a human rights perspective, what matters is the final "bottom line" sentence carried out, which may be far different from the one which the court initially imposed. Moreover, failure to consider later sentence modifications can distort cross-jurisdictional comparisons of custodial punitiveness. A jurisdiction might impose a large number of non-custodial sentences, but require such onerous conditions of release that high revocation rates are inevitable.

As noted earlier, the best way to assess such later modifications is to follow cases all the way to the expiration of the sentence. To do this with retrospective case-file studies, however, requires looking in more than just the court file (and, in many systems, more than just the prosecutor's file). An alternative, simpler approach is to use inmate-stock measures which reflect all custody-imposing decisions. Post-sentencing "sentences" are perhaps most difficult to assess with scenario methods, which underscores the need to combine such studies with other methodologies. But whichever method is used, one would still need to identify and decide how to count release revocations occasioned by commission of a new offense.

II. Is the German Sentencing Practice Relevant to American Sentencing Policy Decisions?

Assuming that the Punitive Hypothesis is true - that Germany does make much less use of custodial sanctions, in cases of non-violent crime - so what? The most skeptical view is that the German and American social contexts are so fundamentally different that German practices have no practical relevance to American sentencing policy decisions. If this is true, there would be very little "payoff" in carrying out the future research suggested above, designed to confirm and make more precise the nature and extent of German-American differences.

The supposed barriers to basing American sentencing reforms on less custodial German practices seem to fall into two main categories: 1) America's supposed greater crime-control or practical need to rely on custodial penalties; and 2) American political and legal "culture". Objections of the former type include arguments based on supposedly higher American crime rates, American's large, highly mobile social "underclass", and it's more limited social and welfare support systems. Arguments based on American culture point to punitive public opinion; the strong, severity-promoting influence of U.S. media and politicians on sentencing policy; and deeply imbedded American conceptions of the meaning and proper type and amount of "punishment".

It is certainly appropriate - indeed, essential - to take into account these broader legal and social contexts of sentencing. But as I will argue below, none of these differences between the German and American situation poses insuperable barriers to wider American implementation of non-custodial penalties.

A. American Crime-control Needs and Practical Constraints

1. Higher U.S. crime rates

Until the advent of international crime victimization surveys, it was generally assumed that crime rates for all types of offenses were much higher in the U.S. than in other Western countries. If this were true, it might justify more punitive sentencing, to more effectively deter and incapacitate a larger number of actual and potential offenders. Even if the actual effects of punitive measures on crime rates are, from a scientific perspective, not very great, such measures might be a political necessity.

The International crime surveys, combined with more careful research on specific types of crime in different nations, suggest that, although America has much higher rates of life-threatening violent crimes, property crime rates are not much higher in the U.S. than in Germany (Zimring & Hawkins 1997; Lynch 1995; van Dijk et al. 1990, Table E5). Most of the comparisons in the latter sources are from the 1989 ICS, since more recent published ICS surveys (1992 and 1996) did

not include Germany. However, post-1989 ICS data for the U.S. show stable or declining rates for most property crimes (Mayhew & van Dijk 1997, App. 4), whereas police-reported rates of burglary and minor property crimes in West Germany were generally higher in the years after 1989 (BKA 1997, pp. 171-78). As for drug crime, comparisons are more difficult since this offense is not included in the ICS or in American "crimes known" statistics, and police data on the number of drug suspects identified or arrested are heavily influenced by law enforcement decisions. For what it is worth: the latter statistics show that, in the mid-1990s, drug-suspect rates were three times higher in the U.S., but that such rates had been increasing much faster in Germany: an increase of 240%, from 1987 through 1996, versus "only" 65% in the U.S., between 1986 and 1995 (BKA 1997, pp. 234-42; FBI 1996, pp. 207-9; see also BKA 1997, p. 241, reporting numbers of "drug-related" deaths which were 3 to 5 times higher in 1990 through 1996 than in 1987).

2. A larger, more mobile U.S. criminal underclass and less social welfare support

There appears to be a more or less permanent social underclass in the U.S. (Wilson 1987), many of whom are unemployed and unemployable, with few sources of family or community support. Many offenders come from this underclass; they have a high risk of re-offending, and are also likely to violate conditions of a non-custodial sentence. Such sentences are rendered even more difficult to employ by the mobile nature of American society, and the limited social welfare benefits and programs available in many American communities. American offenders are probably harder to keep track of, once they are released, given the open borders between states, the long and relatively open international borders, the high residential mobility of Americans, and the lack of any system of required residence-registration or identification.

As for the effects of different social welfare systems (which seem likely to persist, given America's strongly individualistic traditions), limited welfare benefits mean that many offenders have virtually no disposable income with which to pay a fine, even one adjusted to their means (Frase & Weigend 1995, p. 347). More generally, limited training, educational, and welfare programs provide fewer resources to support non-custodial sanctions, and increase the perceived unfairness of giving training and other support to criminals which is not generally available to non-criminals (Morris & Tonry 1990; Frase 2001). Thus, even without considering the impact of racial prejudice or race- and class-inspired fears of crime, it is not surprising - some would say, it is almost inevitable - that so many poor, non-white underclass offenders end up in America's prisons and jails, and that incarceration rates are substantially higher in the U.S. than in a

country like Germany, with its much stronger tradition of social welfare, and much more ethnically homogenous and socially-integrated population.

But the contrast portrayed above, although undoubtedly true, must be qualified in several important respects. First, Germany is facing increasing problems of mobile and/or socially marginal offenders. Second, the high inmate populations in the U.S. include a great many well-integrated offenders for whom fines and other non-custodial sentences are quite feasible; such offenders are especially likely to be incarcerated for crimes such as drunk driving, domestic assault, and various white collar crime offenses (particularly in federal courts). There are also many middle- and working-class drug offenders in jails and prisons. Broader use of fines, community service, and other non-custodial sanctions for such offenders would require some investment in staffing and programs (discussed below), but in the mid- and long-term it would be much cheaper than incarceration. And also more appropriate - why should the public have to "pay twice", for an offender's crime?

To return to the first point raised above: the recent opening of borders in Europe, and the general increase in the frequency of migration within and across national boundaries, means that German offenders are much more mobile than they once were, and increasing numbers of them are non-Germans.[25] Apart from issues of mobility and nationality, there is considerable evidence of a growth in the numbers of socially marginal and "precarious" offender populations - not just foreigners and other migrants, but also the long-term unemployed, persons working illegally, and others who are not well-integrated socially, and for whom fines and even substitute community service (as well as pretrial release) do not work as well (Albrecht 1998, 1999, 2000; Weigend 1992). Such offenders undoubtedly help to explain the previously-noted steady increases in the use of imprisonment for non-payment of fine, and the increases in U-Haft rates in the early 1990s. In addition to the practical problems in sentencing such offenders, any major increase in the proportion of foreign, non-white, or socially-marginal offenders risks decreasing empathy and increasing punitiveness on the part of the general public; both German and American researchers have found that race and class differences and other aspects of "social distance" are positively related to punitiveness (Boers & Sessar 1991; Weidner & Frase 2000).

Thus, it appears that more and more German defendants resemble U.S. "underclass" offenders (although in Germany, such persons still probably represent a much smaller proportion of all offenders). This trend represents a challenge for

[25] The number of persons held in deportation detention (Abschiebungshaft) at the end of 1997 (2,112) was nine times the number held in 1985 (StBA 1998c, table 1.4). Among police suspects, the proportion of non-Germans in 1993 (36.2%) was twice as high as the proportion in 1985 (BKA 1997, p. 113). (All figures are for former West German states only.)

Germans who want to maintain high rates of non-custodial sentencing. So far at least, it appears that Germany has met this challenge; although rates of longer custody terms have increased over the past 25 years, the proportions of adult sentences to fines or probation have remained constant or increased somewhat, and rates of diversion have increased substantially, under both adult and juvenile law (Heinz 2000; Weigend 2001). The only qualification to this otherwise rosy picture is that rates of informal custody "sentencing", by means of pretrial and/or immigration detention, have increased somewhat (see previous discussion of informal sentences; see also Heinz 2000, Figure 19 (proportion of adult- and of juvenile-law offenders held in pretrial detention increased considerably, in the early 1990s)). Nevertheless, it appears that Germany has avoided any major decline in the use of non-custodial sanctions; moreover, it appears that German policymakers intend to continue to heavily emphasize such sanctions (see Kommission zur Reform 2000, discussed in the Conclusion, *infra*).

To summarize: recent changes in the nature of German offenders pose problems for the maintenance of German sentencing policy. At the same time, however, this bad news for Germany is (relatively) good news for reform-oriented Americans: Germany and the U.S. are becoming more similar. If Germany can continue to find non-custodial alternatives for socially marginal offenders, perhaps so can (some) American jurisdictions. Of course, it is possible that Germany will simply become more like the U.S. in its sentencing as well as its social conditions. But there is reason to hope that Germany (and other Western countries) will examine the American experiment in mass incarceration and reject this approach. Comparative criminal justice is useful not just in telling policy makers what to do, but also what NOT to do (Tonry & Frase 2001).

B. American Culture

As noted previously, various "cultural" differences between the United States and nations such as Germany pose another set of actual or supposed barriers to broader American use of non-custodial sanctions. Such differences consist of more punitive American public opinion; the adverse influences of U.S. media and politics on sentencing policy; and traditional American conceptions of the meaning and proper application of "punishment". Again, there is no denying that there are major differences between American and German society, on these dimensions. Nevertheless, a closer examination of each of these areas suggests that the differences may not be as great as they once were.

1. Punitive public opinion

Several studies have found that Americans hold more punitive views than Germans. One study, conducted in the early 1980s (Teske & Arnold 1991), found

that Texans favored the death penalty much more than citizens of the German state of Baden-Württemberg; Texans also saw the purposes of prisons to be less for rehabilitation and more for punishment, deterrence, and incapacitation, and had a much less favorable view of the courts (77% of Texans, but only 46% of Germans, thought the courts were "too easy" in dealing with convicted criminals). One might question whether the punishment attitudes of Texans are representative of the entire country;[26] however, other studies have also reported greater American punitiveness (Savelsberg 1994, summarizing research).

International Crime Surveys have provided a dramatic index of greater American punitiveness. As part of the 1989 survey (van Dijk et al. 1990, pp. 81-83), citizens in over a dozen countries, including Germany and the U.S., were asked what sentence would be most appropriate for a "a man of 21 years old who is found guilty of burglary for the second time. This time he stole a color TV". Over half of the Americans said that a prison term was the appropriate sentence. American views on this question were among the most punitive of all the countries surveyed, and were equaled or exceeded only by the views of respondents in several developing countries (India, Czechoslovakia, Indonesia, Philippines, and China) (Kury & Ferdinand 1999; see also Mayhew & van Dijk 1997, Table 1). The percentages of German and U.S. respondents in favor of several common sentencing alternatives were as follows:

	fine	community service	Prison
West Germany	8.8%	60.0%	13.0%
United States	8.2%	29.6%	52.7%

However, these survey results are less impressive than they appear, and are somewhat contradicted by other research. Just as there is no clear relationship between crime rates and incarceration rates (Tonry 1999; section II.A.1, above), there is also no direct relationship between sentencing practices and punitiveness as revealed in public opinion surveys. By some measures, U.S. public punitiveness increased the most in the 1960s and 1970s, yet the greatest increases in American prison populations came after 1980, and especially in the late 1980s (Savelsberg 1994 at 917, fig. 1, and 929-30). Moreover, research on the timing of

[26] Besides being in the South (a more punitive region), it appears that the Texas sample was much more urban (54% lived in communities with a population over 100,000, compared with only 15% of the German sample); this difference may explain why the Texas sample reported much higher victimization rates (a factor which, by itself, would be expected to increase punitive attitudes), even for property crimes.

shifts in public opinion suggests that they often follow, rather than lead, changes in media coverage and political emphasis (Tonry 1999).[27]

Most fundamentally: public opinion measures have several important limitations, of which policy makers, researchers, and the public itself need to be constantly reminded: 1) in all countries, the public tends to understate the severity of punishments actually imposed, and to believe that such penalties are "not severe enough"; 2) survey questions are often vague, and research results depend critically on the precise wording of the questions; 3) public attitudes are less punitive, and quite similar to those of judges, when both kinds of respondents have the same information (in particular: information about restitution, community service, and other non-custodial alternatives - alternatives which the public, when asked, strongly supports); and 4) most people have a very distorted view of typical criminal cases (since only serious cases receive much attention in the media), and view prison as a "normal" response in part because of constant repetition by leaders and the press (Kury & Ferdinand 1999). These limitations of public opinion surveys, and of public opnion itself, are not immutable; they can - and should - be changed. But until they are, researchers should not take opinion surveys too seriously (and policy makers should not be allowed to simplistically cite such surveys as an excuse for greater sentencing severity).

Finally, an assessment of differences in public opinion in the U.S. and Germany should also be aware of the most recent trends, in each country. Several studies suggest a significant increase in punitive attitudes in Germany (Streng 1999; Kury & Ferdinand 1999; Kury & Obergfell-Fuchs 1998). Such changes are not surprising, given increased crime rates, general insecurity due to open borders, increased ethnic diversity, rising unemployment, and (as discussed more fully below) increased media and political focus on (and distortions of) crime issues (Kury 1998).

Here, too, it appears that Germany is becoming at least a bit more like the U.S. And again, this may be bad news for Germany, but (somewhat) good news for Americans interested in comparing and borrowing German practices. If, despite growing public punitiveness, Germany can continue to make high use of non-custodial sanctions (perhaps, in part, by means of increased use of restitution, mediation, and other victim-friendly measures which help to diffuse punitive pressures), then perhaps so can (some) American jurisdictions.

To summarize: American public opinion is not an insuperable barrier to broader use of non-custodial penalties. Public opinion is increasingly punitive even in Germany, yet Germany continues to make heavy use of non-custodial sanctions. More importantly: when properly measured and interpreted, public opinion in all Western countries isn't actually that punitive.

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[27] See also Frase 2001 (sudden, sharp increase, in 1994, of Gallop poll respondents listing crime as the country's "most important problem").

2. U.S. media and politics

Several researchers have noted the greater degree to which issues of criminal justice are addressed - and sensationalized - in American news media, a difference which has been attributed to the dominance of privately owned, market-oriented media in the U.S. (Savelsberg 1994). It has also been frequently noted that criminal justice policy is much more politicized in the U.S., where elected legislative and executive officials often campaign on "law-and-order" issues, and where judges and prosecutors are generally elected rather than appointed (Tonry 1999). In contrast, criminal justice policymaking in Germany and other European countries tends to be more influenced by professional, academic, and bureaucratic experts, and is less often the subject of partizan political debate (Frase 2001).

There is, unfortunately, much truth to these generalizations; the influences of the media and of short-term, partizan politics on American sentencing policy are undoubtedly very great. But again, recent trends are reducing the contrast between the American social context and that in other Western countries. In some of these countries (especially in the former socialist countries of Eastern Europe), there are signs of increased media exploitation and sensationalizing of crime stories. As privately-owned media become more numerous, and face increasing market competition, the tendency is to "report what sells" - especially sex and crime "dramas" (Frase 2001; Kury & Ferdinand 1999; Kury 1998). As for the policymaking process, the most recent (Sixth) German criminal law reform statute, effective in 1998, was enacted quite suddenly and without paying much attention to the views of academic, professional, and government experts (Weigend 2001; Logodny 1999); the result is penal legislation which, like American three strikes laws, is primarily symbolic and "publicity"-oriented (Streng 1999).

Thus, although media exploitation of crime issues, and partizan, "law-and-order" politics, still play much more limited roles in German policymaking than they do in the U.S., their influence is felt, and may be growing - again, reducing the "culture gap", and making the German experience more relevant to the U.S. That experience includes not only specific sentencing policies and practices, but also the different solutions which the Germans have found to the fundamental problem of achieving well-informed criminal justice policy in a way that is consistent with democratic values and freedom of the press.

3. Traditional U.S. conceptions of the meaning and purposes of punishment

When expanded use of options such as fines, community service, and home detention are proposed in the U.S., the objection is often heard that such measures are not "real punishment" - they do not adequately convey moral condemnation

and shame (Kahan 1996). Moreover, to the extent that, in practice, defendants with the least money or social connections tend to end up in jail or performing public service rather than paying a fine, the strong value which Americans place on equal justice leads them to conclude that if some defendants must go to jail, then all of them should. Although Germans also tend to believe that fines favor the rich, the use of fines nevertheless enjoys strong public support (Albrecht 1991).

Again, there is no doubt that cultural differences of this sort exist, but on closer inspection, they don't pose insuperable barriers to increased use of non-custodial sentencing options in the U.S. For one thing, "American" conceptions of punishment are actually quite diverse: there are many states and local jurisdictions within the U.S. which make much less frequent use of non-custodial sanctions (Frase 2001; Weidner & Frase 2000). Furthermore, social values and punishment practices tend to run in cycles (Tonry 1999). After several decades of massive increases in jail and prison populations, there is reason to believe that more American jurisdictions will soon begin to see the need to stop wasting scarce public resources on incarceration when there are other penalties which can convey strong societal disapproval at much lower social and private cost, and without neglecting - as custodial penalties tend to do - the real needs of the individuals and communities victimized by crime. Already, there has been increasing awareness, in recent years, that communities (especially poor, non-white communities) are also "victimized" by criminal justice policies which remove huge numbers of young males from the community, and then bring them back a few months or years later with even fewer prospects for leading a productive and law-abiding life. Recent research has reported that over a half million offenders are released from American prisons each year, three-quarters of whom have drug or alcohol problems (Beck 2000). If persons released from local jails were included (many of whom also have serious, untreated chemical dependency problems), the number of annual returning inmates would number several million.

C. Making Intermediate Sanctions Work, in the American Context (With Help From Abroad)

It was argued above that, although the American and German social contexts are significantly different, these differences are not as great as is sometimes supposed, and may be decreasing. The American public definitely has a CD (custody-dependency) problem, but it is not incurable. Moreover, it may, to some extent, just be an unfortunate historical phase the U.S. has been going through, which it will eventually grow out of. But American sentencing reformers need not sit idly by, waiting for the historical pendulum to swing the other way (as it eventually almost certainly will); there are concrete, feasible reform strategies

which could greatly encourage a shift to broader use of non-custodial penalties. The first two strategies suggested below draw specifically from the German experience; the third seeks to overcome a structural difficulty in the American context which German sentencing policy has not had to confront.

1. Meeting the needs of victims and communities

As was noted above, America's heavy dependence on custodial sentencing options has not, in fact, done much to address the real needs of crime victims and of communities injured by crime. The strong trend toward Restorative Justice in the U.S. suggests that these needs are finally starting to be recognized. Sentencing reformers should strongly support such victim- and community-oriented programs, not only because this is the right thing to do, but because it can help to combat punitive measures. Angry, dissatisfied victims and communities are a major source of punitive pressure, which can be diffused via compensation, mediation, community service, and other restorative measures (Boers & Sessar 1991). Moreover, the failure to do so allows crime victims and communities to become the rhetorical "heros" of punitive-minded politicians and the media. One important lesson from the victim's rights movements in Europe is that the valid concerns of crime victims and communities should not and need not be "captured" or "coopted" by proponents of law-and-order politics - as they often have been in the U.S.

In recent years, although great attention has been paid in Europe to crime victims, individual victims and major victim-support organizations do not generally advocate greater punitiveness, or fewer defense rights; instead, they focus on improved victim services, and greater use of mediation and restitution (Joutsen 1999; Baurmann & Schädler 1991; Erez 1991; Kilchling 1991). And although victims enjoy protection under Human Rights norms promulgated by the Council of Europe (Tsitsoura 1991), such norms have sought to maintain a fair balance between victims' and defendants' rights; it is believed that protection of the victim need not conflict with other objectives of criminal justice, and may even assist them. In contrast, the current proponents of a U.S. federal constitutional Victims' Rights Amendment tend to be proponents of greater sentencing severity and fewer defense procedural rights. Indeed, this anti-defendant bias has been present ever since the President's Task Force on Victims of Crime issued its report in 1982 (Kirchhoff 1991). Although German conservatives have occasionally attempted to usurp the interests of crime victims in support of law-and-order politics (*id*.), these efforts have not succeeded in capturing the victim's rights movement.

The lesson for Americans is clear - the legitimate needs of crime victims and the community can and should be met through Restorative Justice measures

which generally do not require incarceration - and often argue strongly against it (incarcerated offenders have fewer means to pay fines, compensate victims, or perform service). Failure to meet victim and community needs allows these legitimate interests to be marshaled in support of harsher, custodial penalties.

2. Explicit exchange rates between custodial and non-custodial sanctions

Judges and prosecutors in Germany and other European systems may be encouraged to view intermediate sanctions as real "punishment" by the existence of explicit, official exchange rates which link day-fine units and hours of community service to days of incarceration. If such exchange rates were more widely promulgated in the U.S., this might help to legitimate non-custodial options, and thus encourage their use.

The calculation of exchange rates is not, however, a simple task, and the optimum rates may depend very much on the particular jurisdiction. Indeed, the ratios of custody to non-custody units may not even run in the same direction. In Germany, national law specifies a 1-to-1 ratio between day-fine units and days of custody (§ 43 StGB), and state laws generally allow one day-fine to be satisfied with 6 hours of community service (Weigend 2001). Several proposals have been made to make the fine-units/custody-days ratio two- to-one (as is the current rule in Austria), and one commentator recently proposed a four-two-one ratio of day-fine units, community service days, and custody days (Streng 1999). Such proposals are designed to reduce the duration of custody which must be served by offenders who neither pay their fine nor complete community service, and are premised on the theory that time spent in custody is far more onerous than the same amount of offender time or labor taken away by means of non-custodial measures.

In the U.S., exchange rates have been less widely promulgated, and their ratios have varied substantially. Like the German proposals just mentioned, some American exchange ratios value custody days more heavily. Yet, in some jurisdictions at least, there reasons to prefer ratios that run in the opposite direction (i.e., less than a one-to-one ratio of non-custodial to custodial sanction units). One reason is that there are practical limits to the number of day-fines, and particularly the number of hours of community service, which can be readily enforced (Morris & Tonry 1990); this means that, at least in the U.S. (with its tradition of lengthy custody sentences, and judges who think *first* in terms of custody), days of custody must be allowed to be satisfied by less than the same number of days of community service, and possibly also a lesser number of day fines. In Germany, where custody sentences are often shorter, and day-fines are seen as a primary sentencing option, judges begin by imposing a fine realistically calibrated to the offender's needs, and only later consider a short custody term, as a (last-resort) substitute.

Since most intermediate sanctions depend critically on the offender's full cooperation, another important consideration in setting exchange rates is the need to give offenders a strong incentive to prefer the option or options which are socially most desirable (for reasons of victim and public benefit, cost, and/or enforceability). Again, this would suggest exchange rates of less than 1 to 1, between non-custody and custody sanctions. For instance, considering only the options of fines and/or monetary restitution, community service, and incarceration, it would seem that the former are the best option (because they are the cheapest and easiest to enforce); community service is second-best (because it requires more support and supervision); and incarceration is by far the worst (because it costs the most, and has the most negative consequences). Thus, a suitable exchange rate for these three options, from an offender-incentive perspective (as well as for the reasons of practical enforceability, noted above), might be something like 1 day fine equals 2 days community service equals 3 days custody - the offender "pays" the smallest numerical "price" if he accepts and completes the best option.[28]

How can we reconcile all of these policy considerations? Perhaps, in the end, these competing arguments cancel each other out, and we are left with a simple 1:1 ratio of non-custodial to custodial units. Clearly, this is an area which needs much more research - not only theoretical work on the justifications underlying exchange ratios between different forms of punishment, but also empirical work examining the practical trade-offs involved. And although the precise exchange rates chosen may need to vary considerably, from one nation or state to another, the concept of such rates has universal value.

3. Overcoming certain structural/economic defects of the American system

Government in Germany and other European nations is much more centralized at the state and national levels; hence, their systems of punishment give local units of government much less control over sentencing policy, and such policy receives more financial and research support from state and national sources. In American systems, sentences are imposed by local judges with little research or funding support from the state - unless an offender is sent to state prison. Since prisons (and, in many systems, also post-prison supervision) are paid for by the state, there is a temptation to minimize local correctional costs by sentencing offenders to state custody (what Zimring & Hawkins (1991) refer to as the "correctional free lunch" problem). In short, there are two, inter-related problems caused

[28] Current Finnish law appears to reflect a version of this theory. One hour of community service is equated to one day-fine or one day of custody (Streng 1999); such a rule strongly encourages offenders to prefer and successfully complete their service.

by the structure of American sentencing systems: lack of local fiscal responsibility for prison sentences (the "free lunch" problem), and lack of local resources to implement, or even fully understand, community-based sentencing options.

The latter problem is greatly compounded by the conflict between short-term and long-term sentencing economics - matters about which local American judges and other officials have very little concrete information. Non-custodial options such as fines, community service, intensive probation, and home detention are, in the long run, much cheaper to employ than custodial penalties, but the former require some initial investments - increased staffing and other resources for probation and court services offices, or payment to private vendors - in order to ensure that sanction conditions are actually enforced. Adequate staffing of non-custodial options may actually cost more, in the short run, than continued reliance on incarceration. The marginal cost of putting one more offender in jail or prison is often quite low (particularly in jurisdictions which are willing to operate very large and overcrowded institutions).

To overcome these economic disincentives caused by the particular structure of American government, sentencing reformers need to engage the services of economists, legislative auditors, and other public and private "bean counters", to more fully document the short-term and long-term costs of different sentencing options. At the same time, states seeking to avoid the "correctional free lunch" problem, and encourage broader use of locally-run sentencing options, need to provide subsidies for the latter and/or local charge-backs for the use of expensive state correctional resources. A number of American states have became aware of these problems while conducting statewide research and planning to implement sentencing guidelines; as a result, several of these guidelines states have recently established or increased state funding for community corrections (Frase 2000).

IV. Conclusion

This paper has argued that the available published data strongly supports the Punitive Hypothesis in its most plausible form: that Germany makes much greater use of non-custodial penalties for non-violent crimes. Further research was proposed to confirm this hypothesis and make it more precise and convincing to skeptical American policy makers. It was then argued that such research is of great practical value; supposed crime-control and cultural differences between the German and American contexts need not prevent U.S. courts from making much broader use of non-custodial sanctions, particularly for socially well-integrated offenders. Some specific suggestions were provided, of reform strategies which would greatly encourage use of such sanctions in the U.S. These strategies are either based on German practices, or seek to overcome specific problems of the American sentencing context which are not present in Germany.

In short: there is much for Americans to learn from the German experience with non-custodial sentencing options over the past three decades. The Germans have shown (even through the rising crime rates of the 1980s and the turbulent, post-Unification years of the early 1990s) how to deal humanely and efficiently with high-volume, low- and medium-severity crimes, most of which are committed by socially-integrated offenders for whom non-custodial sanctions are both feasible and highly cost-effective. Less well-integrated offenders, including minorities and foreigners, pose greater problems, but Germany has, thus far, managed to accommodate substantial increases in the numbers of such offenders without greatly increasing custody sentence rates.

There is reason to believe that the strong German emphasis on non-custodial sanctions will continue, in the years ahead. The recent report of a criminal law and sentencing reform commission strongly endorses continued use, and even modest expansion, of such sanctions (Kommission zur Reform 2000). In particular, the Commission advocates replacement of fines and custody with community service, and increased use of restitution. Although the Commission did not support some proposals to expand non-custody-sanction options, one must take into account that the Commission was established by the former conservative government, and its membership reflected these origins. The Commission's report thus strongly confirms the stable, bi-partizan political consensus in Germany in favor of non-custodial sentencing options.

Germany will face more and more challenges, as its offender population becomes more diverse, and both this population and public attitudes toward punishment become more similar to those of the U.S. But these increased challenges for Germans represent an increased opportunity for Americans to learn from abroad. If the Germans can continue to find ways to sanction unemployed, socially-marginal offenders, without resorting to custody, and can continue to accommodate the needs of crime victims and communities, then perhaps so can American jurisdictions — or at least some of them.

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