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Reforms of the Criminal Sanctions System in Germany –

Achievements and Unresolved Problems^{*1}

1. Preliminary remarks

Jaan Sootak is celebrating his 70th birthday, and I am happy to offer him my cordial congratulations at this birthday ceremony personally. We first met in the late 1980s, when I organised a conference on comparing prison systems worldwide.^{*2} While primarily a penal lawyer, he has remained in our network of co-operation in penology and youth justice for 30 years.^{*3} His achievements as a penal law reformer in Estonia are considerable, and he has always maintained a connection with German penal law jurisprudence as well as practice. I have therefore chosen as my subject the reform of criminal law sanctions in Germany. It was 17 years ago that I presented a paper at the law reform conference here in Tartu on the same issue, and I have to admit that the reform debate surrounding the criminal sanctions system in Germany continues to focus on the same problems as at the beginning of the century, and that no real will for change is visible. However, many aspects of the sanctioning practice could be seen as successes, and sometimes standstill might in fact be progress, when ideas are refused that would worsen the penal law system. I will come back to that when talking about electronic monitoring.

¹ The present paper deals with some of the recent debates on reform of the German criminal sanctions system, which are more comprehensively summarised in the research of Nicholas Mohr presented in his Ph.D. thesis; see Mohr, *Die Entwicklung des Sanktionenrechts im deutschen Strafrecht – Bestandsaufnahme und Reformvorschläge*, 2019.

² See the first results in van Zyl Smit/Dünkel, Eds., *Imprisonment Today and Tomorrow – International Perspectives on Prisoners' Rights and Prison Conditions*, 2nd ed., 2001 (1st ed., 1991), with a chapter on Estonia by Jaan Sootak, Rando Antsmäe, and Olavi Israel (238–252).

³ See, for example, his contributions on Estonia in Dünkel/Lappi-Seppälä/Morgenstern/van Zyl Smit, Eds., *Kriminalität, Kriminalpolitik, strafrechtliche Sanktionspraxis und Gefangenenraten im europäischen Vergleich*, 2010 (together with Anna Markina, 289–324) and in Dünkel/Grzywa//Horsfield/Pruin, Eds., *Juvenile Justice Systems in Europe: Current Situation and Reform Developments*, 2nd ed., 2011 (together with Jaan Ginter, 399–421). – DOI: <http://dx.doi.org/10.12697/issn1406-1082>.

2. Remarks on the recent history of reforms to the criminal sanctions system in Germany

From an international comparative perspective, the German criminal sanctions system may be characterised as ‘poor’, making only a few sanctioning options available.^{*4} The criminal sanctions system – *grosso modo* – consists of fines (*die Geldstrafe*); suspended sentences (*Freiheitsstrafe zur Bewährung*), the continental European form of probation; and unconditional prison sentences (*unbedingte Freiheitsstrafe*). Community service (*gemeinnützige Arbeit*) is – contrary to most other European countries’ approach^{*5} – provided only as a substitute sanction in the case of non-payment of a fine (i.e., for fine defaulters). Conditional (suspended) fines are only exceptionally applicable, under highly restrictive conditions (see §59 of the StGB, Criminal Code, cited as “CC”). The name of this sanction is *Verwarnung mit Strafvorbehalt* (meaning ‘warning combined with deferment of sentence’), and its content is a conditional fine of up to 180 day-fine units, which can be combined with directives and obligations, including supervision by the Probation Service. Other sanctions involving restriction of liberty, such as withdrawal of one’s driver’s licence, a professional disqualification, or electronic monitoring (EM; see Section V) are provided as measures for rehabilitation and security (independent of guilt but based on an assessment of dangerousness) for dangerous offenders. EM is restricted to the very few cases of dangerous offenders who have served a prison sentence in full or who are released from psychiatric hospitals. There exists also a form of suspending the driver’s licence (*Fahrverbot*) for up to 6 months, which is a supplementary sentence in combination with (usually) a fine. This sentence is a real penalty.^{*6}

Reforms promoting wider use of fines date back to the 1920s (see the so-called Law on Fines of 1923), practically the only successful law reform of the many discussed in the era of the Weimar Republic under then Minister of Justice *Gustav Radbruch*. The aim was to restrict the use of short-term imprisonment, which – since *Franz von Liszt*’s famous inaugural lecture in 1882 – had been judged detrimental to the rehabilitation of offenders.^{*7} The decisive change – replacing short-term imprisonment with fines – was implemented by the ‘major criminal law reform’ (*Große Strafrechtsreform*) of the years 1969–75. The application of prison sentences of less than 6 months was legally defined as exceptional (see §47 of the CC). In addition, the system of fines moved over from a lump sum to the day-fine system. This allowed rightful punishment by considering the income of individual offenders, which resulted in just and equal sentencing.^{*8}

It was only in 1953 that the system of suspended prison sentences was introduced. The enforcement of a prison sentence could be suspended for a probationary period ‘if there are reasons to believe that the sentence will serve as sufficient warning to the convicted person and that he will commit no further offences without having to serve the sentence’ (§56 of the CC). For the first time, a suspended prison sentence could be combined with supervision by the newly established Probation Service (via a probation order; see §56d of the CC). In the beginning, only prison sentences of up to 9 months could be suspended. In 1969, the scope was widened to up to one year, and even to two years in exceptional cases.^{*9} Court sentencing practice and the jurisprudence of the high courts and the Supreme Court (*Bundesgerichtshof*) have interpreted the exceptional nature of suspended prison sentences of between one and two years more and more as a regular option for the majority of cases: In 2015, 76% of these sentences were suspended (comparable to

⁴ See Dünkel/Morgenstern, Aktuelle Probleme und Reformfragen des Sanktionenrechts in Deutschland. *Juridica International* (Estonia), 2003, 24 ff. – DOI: <http://dx.doi.org/10.12697/issn1406-1082>.

⁵ See Dünkel/Lappi-Seppälä, Community Service in Europe, in Bruinsma/Weisburd, Eds., *Encyclopedia of Criminology and Criminal Justice*, 2013, 426 ff.; Dünkel, Gemeinnützige Arbeit – What Works? In: Kuhn, A., et al. (Hrsg.): *Kriminologie, Kriminalpolitik und Strafrecht aus internationaler Perspektive. Festschrift für Martin Killias zum 65. Geburtstag*, 2013, 839 ff. with further references.

⁶ Because of lack of space, the extensive debate on the sanction of suspending of the driver’s licence cannot be discussed here. However, the author shares the critique of the recent reform law of 2017, which expanded the application of this sanction to also other than traffic offences – see Mohr, *Entwicklung des Sanktionenrechts*, 2019, chapter 5.2 – and favours, on the other hand, the proposal to introduce this sanction as an independent (not only supplementary) sanction (*Hauptstrafe*) in cases of traffic offences.

⁷ See Mohr, *Entwicklung des Sanktionenrechts*, 2019, chapter 4.1.

⁸ Heinz, *Kriminalität und Kriminalitätskontrolle in Deutschland*, 2017, 100 (Internet publication at <http://www.ki.uni-konstanz.de/kis/>); see Subsection 3.2 for discussion of deficiencies of the sentencing practice that still exist today.

⁹ BGBl. I, 645; for the history of law reforms in this area, see Dünkel, *Rechtliche, rechtsvergleichende und kriminologische Probleme der Strafaussetzung zur Bewährung*, *Zeitschrift für die Gesamten Strafrechtswissenschaften (ZStW)*, 1983, 1039 ff.; Hubach, in *Leipziger Kommentar-StGB*, 11th ed., 2013, §56, note 1 ff.

probation).^{*10} The law reform of 1986 (23rd StÄndG) adjusted the legal conditions to the criteria developed by the jurisprudence. In addition, the legislator expanded early release (parole) cautiously by allowing release after one had served half of the sentence for offenders serving a first prison sentence or on the basis of the offence or the offender's personality in exceptional cases.

More far-reaching reform proposals, which were presented in the year 2000 by a commission of the Federal Ministry of Justice and which were in parts incorporated into several draft bills of a government led by the Social Democratic Party (SPD) in the early 2000s,^{*11} were dropped in 2006 with a reform law (*2nd Justizmodernisierungsgesetz*) that paid no heed to any of the reform proposals of the earlier bills. Since then, the reform debate has been paralysed by coalition governments composed of the SPD and the Conservative Party (Christian Democrats, CDU). Because of a strong decline in the prison population since about 2005, the urgency of law reforms aimed at decreasing the prison population by expanding alternative sanctions is somewhat limited, although the problem of an increasing number of fine defaulters (see Subsection 4.1) is a big challenge for the criminal sanctions system.

3. Success stories

3.1. Diversion

Diversion, or the discharge of proceedings for reason of opportunity (expediency), was considerably expanded in adult criminal procedure by the law reform of 1975.^{*12} The introduction of §153a of the Strafprozessordnung (Criminal Procedure Act, CPA) has not always been judged positively by penal law academics.^{*13} However, a pragmatic view on this cost- and time-saving procedural way of dealing with an increasing influx of offenders into the criminal justice system has been accepted in practice, particularly in complex economic and tax law cases.^{*14}

Juvenile justice law and practice have paved the way insofar as 76% of cases were dismissed in 2015 (compared to 41% in 1981), normally without informal sanctions such as community service or other minor sanctions being imposed.^{*15} In adult criminal procedure, the proportion of dismissals increased to 60% in 2015 (from 34% in 1981), which means an increase by almost 100%.^{*16} Diversion is inevitable on account of the limited capacity of the justice system. However, it is not only a pragmatic solution but also an empirically

¹⁰ Heinz, *Kriminalität und Kriminalitätskontrolle*, 2017, 120; the percentage of suspended prison sentences of more than one to two years, which legally should be suspended only under special (extraordinary) circumstances (see §56 (2) StGB), increased from 10% in 1975 to 76% in 2015.

¹¹ See the most progressive draft law bill, presented by the Federal Ministry of Justice in 2000, and the draft bills of the then federal government from 2002 (BT-Drs. 14/9358; see, for a summary, Dünkel/Morgenstern, *Aktuelle Probleme und Reformfragen des Sanktionenrechts in Deutschland*, *Juridica International* 2003, 24 ff. – DOI: <http://dx.doi.org/10.12697/issn1406-1082>; Dünkel, *Reform des Sanktionenrechts – neuer Anlauf, Neue Kriminalpolitik* 2003, 2 ff. – DOI: <https://doi.org/10.5771/0934-9200-2003-4-123-1>) and 2004 (Bundestagsdrucksache 15/2725).

¹² The scope of application was widened by the reform law (*Rechtspflegeentlastungsgesetz*) of 1993 by emphasising that a discharge of proceedings is not only possible if the guilt is of minor importance (*geringe Schuld*) but instead may apply also if the seriousness of the guilt does not exclude a discharge (rather sophisticated dogmatic terminology emphasising that *Schwere der Schuld nicht entgegensteht*), by thus including also cases of average seriousness of guilt and not only petty cases. See Pfeiffer, *StPO-Kommentar*, §153a, note 2. A further widening of its scope of application was given to §153a Criminal Procedure Act (StPO) by the law reform intended to incorporate the idea of restorative justice into the Criminal Procedure Act in 1999. The offender's efforts in mediation or victim-offender reconciliation were explicitly enumerated as special grounds to discharge proceedings in §153a, No. 5 StPO, and other, not explicitly named directives or obligations were admitted also, in order to give the prosecutors and judges a wider range of appropriate measures that could justify a discharge (see the word 'insbesondere' in the enumeration of §153a (1), sent. 2 StPO).

¹³ The aspersions cast, such as 'whisper proceedings' (*Tuschelverfahren*) or 'millionaire-protecting rules' (*Millionärsschutzparagraph*), clearly demonstrate the reservations in portions of the academic literature, see Kaiser/Meinberg, "Tuschelverfahren" und "Millionärsschutzparagraph"? *Neue Zeitschrift für Strafrecht*, 1984, 343 ff. with further references.

¹⁴ For reason of lack of space, this problem area cannot be dealt with in detail. See, amongst many others, Sauer/Münkel, *Abreden im Strafprozess*, 2014 as well as Joecks, *Studienkommentar StPO*, 4th ed., 2015, §257c.

¹⁵ See Heinz, *Kriminalität und Kriminalitätskontrolle in Deutschland – Berichtsstand 2015*, *Konstanzer Inventar zum Sanktionenrecht*, 2017, 90, <http://www.ki.uni-konstanz.de/kis/>. The recent increase by more than 200,000 cases of discharges per year without any obligations or directives may be explained by minor offences against the Immigration Law (*Aufenthalts-, Asylverfahrens-, Freizügigkeitsgesetz*) by migrants; see Heinz, *ibid.*, 75 ff.

¹⁶ See Heinz, *Kriminalität und Kriminalitätskontrolle*, 2017, 92.

validated strategy to avoid further delinquency. The recidivism rate is significantly lower for cases of diversion as compared to equivalent cases in which the court issues formal sanctions.^{*17}

One consequence of such expansive diversion practices is that the remaining 40% of chargeable cases represent a high selection of offenders with more serious delinquent behaviour.^{*18}

In fact, there is no need for further reform of the legal regulations pertaining to diversion. No doubt, the consistently visible disparities in regional diversion rates are annoying and of constitutional concern,^{*19} but evidently releases from the General Prosecutor's office or from the Ministers of Justice as well as critiques from academics have not been helping to overcome these disparities.^{*20} Therefore, the legislator should take up the challenge to give clear advice for decriminalising certain drug-related – in particular, cannabis-related – offences, shoplifting, and similar petty offences.

3.2. Fines

One of the most important and successful reforms to the German criminal sanctions system was the expansion of fines and the subsequent reduction in short prison sentences (sentences of up to 6 months). Since the beginning of keeping criminal court statistics (*Strafverfolgungsstatistik*), in 1882, fines have developed into the most important alternative to imprisonment. The share of fines among all court convictions rose from 22% in 1882 to 84% in 2015.^{*21} With the introduction of the day-fine system, fines have become more fairly balanced and proportionate to the income of the convicted offender. However, in practice, some unjustified sentencing still occurs, because most fines are issued through a written procedure and estimation of the income of the offender. This is one of the possible reasons for fine default in many cases.^{*22}

In 2009, the legislator increased the maximum amount of one day-fine unit from 5,000 to 30,000 euros in response to the reality of very rich convicts (e.g., football players or managers of banking or other such enterprises).^{*23} Further reform needs cannot be identified. However, the execution of fines and the system for dealing with fine defaulters is in serious need of reform, particularly with regard to reducing imprisonment for failure to pay the fine. I return to this issue in Subsection 4.1).

3.3. Suspended sentences and supervision by the Probation Service

As mentioned above, the scope of suspended sentences and that of supervision by the Probation Service were expanded considerably in the 1970s and 1980s. The Probation Service has successfully learnt to work with more serious and recidivist offenders. This has been recognised by the courts and thereby resulted in an increase of the rate of suspended prison sentences involving probation from 30% in 1954 to 70% of all prison sentences in 2015.^{*24} In 2015, 77% of all prison sentences of up to two years were suspended. The legislative changes to ease the legal prerequisites for suspending prison sentences of between one and two

¹⁷ See Storz, *Jugendstrafrechtliche Reaktionen und Legalbewährung. Ergebnisse einer Untersuchung zur erneuten justitiellen Registrierung nach formeller und informeller jugendstrafrechtlicher Sanktionierung von Jugendlichen des Geburtsjahrgangs 1961 anhand von Daten des Bundeszentralregisters*, in Heinz/Storz, *Diversion im Jugendstrafverfahren der Bundesrepublik Deutschland*, 3rd ed., 1994, 131 ff. (197 ff.); in summary, Dünkel, *Youth Justice in Germany*, in: *Oxford Handbook on Juvenile Justice*, 2016. – DOI: <https://doi.org/10.1093/oxfordhb/9780199935383.013.68>.

¹⁸ In the area of juveniles (14–17) and young adults (18–20 years of age), the formal sanctioning by the youth courts therefore is restricted to about only one fourth of all chargeable cases (2015: 24%). Questions of reforming the sanctions system of the Juvenile Justice Act (JGG) cannot be discussed in this paper, but see, in summary, Dünkel, *Reformen des Jugendkriminalrechts als Aufgabe rationaler Kriminalpolitik*, in *Recht der Jugend und des Bildungswesens*, 2014, 294 ff. – DOI: <https://doi.org/10.5771/0034-1312-2014-3-294>.

¹⁹ The German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) emphasised in its so-called Cannabis decision that the federal states have to ensure an 'essentially uniform practice of discharging cases by the prosecutorial offices'; see BVerfGE 90, 145 (190).

²⁰ For empirical evidence, see Heinz, *Das strafrechtliche Sanktionensystem und die strafrechtliche Sanktionierungspraxis in Deutschland 1882-2012*, 2014, 67 ff., who emphasises that in the wake of the decision of the Federal Constitutional Court (BVerfG) the regional disparities have even increased rather than diminish.

²¹ See Heinz, *Kriminalität und Kriminalitätskontrolle*, 2017, 101, 112.

²² See Heinz, *Kriminalität und Kriminalitätskontrolle*, 2017, 107 ff.

²³ Bundestagsdrucksache 16/11606, 6.

²⁴ See Heinz, *Kriminalität und Kriminalitätskontrolle*, 2017, 118.

years were a major success: the ratio of suspended prison sentences for terms of that length increased from 10% in 1975 to 74% in 2015.^{*25}

Statistics for the practice of granting early release (see the Prison Statistics data) after half or two thirds of the sentence has been served are less clear, but, from individual studies, we can assume that the practice has become applied with more reluctance in recent years.^{*26}

The ‘natural experiment’ to increase the rate of suspended sentences is one of the most successful reform projects for the German sanctions system. Although more and more serious and recidivist offenders have been put under the supervision of the Probation Service, the rate of reconviction or revocation of the suspension of sentence has declined. Astonishingly, the revocation rates for probationers with a history of prior convictions and probationary supervision reveals the greatest increase in successful completion of the probation term.^{*27}

Therefore, it is understandable that more far-reaching reform proposals in Germany go beyond the two-year limit – in fact, demanding that the scope of suspended sentences be expanded to up to three years. There is, however, the danger that judges would impose longer sentences only to subsequently suspend them (up-tariffing). On the other hand, such a reform would enable the courts to suspend sentences that – for reason of the high minimum sentences required by law (e.g., for certain violent and sexual crimes) – currently can only be suspended by applying questionable constructions of declaring cases to be of ‘minor importance’ (*minder-schwerer Fall*). The potential danger that more offenders with long sentences will enter the prison system in consequence of revocations seems to be very limited, as the revocation rates for the longer sentences in current practice (that is, for sentences of more than one year up to two years) are particularly low.^{*28}

Another matter worthy of reform-related thought is the role that deterrence plays in the assessment of whether there is eligibility for a suspended sentence in a particular case. Restrictions on suspending a sentence that are based on interests of protecting public safety and order (“*Verteidigung der Rechtsordnung*”; see §56 (3) CC) should be abolished, as they are not justifiable by empirical arguments.^{*29}

4. Problem areas

Talking about problem areas, one first has to clarify that, in Germany, we do not (yet) have real deficits in the sense of pitfalls or aberrations in a strict sense. The expansion of alternative sanctions has been successfully implemented in a remarkable way. However, there nonetheless appears to be some potential for reform to further reduce imprisonment. On account of the space restrictions of the present paper, some promising reform proposals must be left aside: the decriminalisation of certain minor crimes such as shop-lifting^{*30} or using a public transport system without a ticket, on one hand, and the lowering or abolition of

²⁵ See Heinz, *Kriminalität und Kriminalitätskontrolle*, 2017, 120.

²⁶ The percentage of prisoners released early shown in the Federal Prison Statistics (*Strafvollzugsstatistik*) is unclear, as the total number released includes many prisoners serving a substitute fine-default prison sentence, where, according to prevailing criminal law doctrine and jurisprudence, an early release is excluded. Individual studies have revealed, however, that, with regard to longer prison sentences, those of more than two years, an early conditional release is the rule (again with large regional disparities). See Dünkel, in *Nomos-Kommentar-StGB*, 5th ed., 2017, §57, note 104; a lower percentage of early releases can be computed from the federal recidivism statistics, but these statistics include all the sometimes rather short prison sentences that entail a low chance of getting a positive conditional release decision in due time. The overall percentage of early releases for prisoners serving prison sentences in relation to the general criminal law (StGB) in 2007 was 36%, and that for prisoners serving youth prison sentences under the Juvenile Justice Act (14 to 20 years old at the sentencing stage) was 49%, as computed in accordance with the work of Jehle *et al.*, *Legalbewährung nach strafrechtlichen Sanktionen*, 2013, 57, 61, 78); there seems to be a trend of decline in granting early release – see Dünkel, in *Nomos Kommentar-StGB*, 5th ed., 2017, §57, note 104 with further references.

²⁷ See Dünkel/Spieß, *Perspektiven der Strafaussetzung zur Bewährung und Bewährungshilfe im zukünftigen deutschen Strafrecht*, in *Bewährungshilfe*, 1992, 118 ff.; Dünkel, *Rechtliche, rechtspolitische und programmatische Entwicklungen einer Sozialen Strafrechtspflege in Deutschland*, in *DBH-Fachverband für Soziale Arbeit, Strafrecht und Kriminalpolitik/Justizministerium Mecklenburg-Vorpommern*, Eds., *Kriminalpolitische Herausforderungen. Bewährungs- und Straffälligenhilfe auf neuen Wegen*. Zinnowitz 2008, 2009, 20 ff.; Heinz, *Das strafrechtliche Sanktionensystem*, 2014, 85 f.

²⁸ Mohr, *Entwicklung des Sanktionenrechts*, 2019, chapter 6.2.1.

²⁹ Dünkel/Spieß, *Perspektiven der Strafaussetzung zur Bewährung und Bewährungshilfe im zukünftigen deutschen Strafrecht*, in *Bewährungshilfe*, 1992, 133; in agreement, Horn, in *Systematischer Kommentar-StGB*, 9th ed., 2016, §56, note 24; Jescheck/Weigend, *Lehrbuch des Strafrechts*, AT, 1996, 839.

³⁰ See, for details, Harrendorf, *Absolute und relative Bagatellen: Grenzen des Strafrechts bei geringfügiger Delinquenz*, 2019 (in press); Mohr, *Entwicklung des Sanktionenrechts*, 2019, chapter 5.6 with further references; see also, on proposals to

extended minimum sentences (for example, for serious robbery or drug crimes), on the other, where we find strong discrepancies and inconsistencies with regard to proportionate sentencing.^{*31} In addition, the decriminalisation of cannabis products seems to be a realistic target, in light of developments in the USA, the Netherlands, Portugal, Uruguay, etc. Such reform could serve to counteract penal hypertrophies and to reduce the use of penal law by reflecting its *ultima ratio* function in the regulation of societal conflicts related to norm conformity.^{*32}

4.1. Community service / imprisonment for fine defaulters

The German Criminal Law does not provide for community service orders (CS) as originary, primary, or main sentences; these are only to be a substitute sanction for fine defaulters. The traditional argument was based on constitutional concerns about the prohibition of forced labour, which is allowed only in the context of the execution of prison sentences (Art. 12 (3) Basic Law, GG). From the standpoint of crime policy, it is likely that CS as a primary or main sanction, rather than as a substitute sanction, would replace not (short-term) prison sentences but fines and other community-linked sanctions instead. Therefore, the German legislator introduced CS only as a substitute sanction for fine defaulters in order to avoid imprisonment for not paying a fine.^{*33}

The great success of the German fines system (see Subsection 3.2, above) is contested by the fact that Germany, in European comparison, has the highest proportion of prisoners serving a term of imprisonment for being fine defaulters. On 1 September 2015, 7.0% of the total prison population were fine defaulters, as opposed to 4.4% in Switzerland, 3.6% in the Netherlands, and under 2% in all remaining countries in Europe.^{*34} When one looks only at the sentenced adult prison population, the German statistics become even less favourable: the proportion was no less than 10.4% on 31 August 2017.^{*35}

From taking this substantial (10%!) inappropriate occupation of prison capacity into consideration, the need for reforms becomes evident. All German federal states have introduced community service schemes to avert imprisonment for fine defaulters, but apparently they are not being implemented sufficiently (in terms of staff, organisational structure, administrative barriers, etc.). The proposal – as already made under the Social Democratic and Green Party coalition in the early 2000s (with the drafts of 2002–2004) – is to provide for community service as a primary substitute (or surrogate) sanction for a fine that cannot be paid. The present system only provides for community service as a substitute sanction after a prison term has been imposed on the person in default, a rather bureaucratic and complicated way of executing fines (see Art. 293 EGStGB and the decrees of the federal states on organising community service as a substitute

decriminalise travelling without a ticket, Harrendorf, Zur Adäquität von Strafe bei der Beförderungerschleichung, in Dünkel et al., Eds., *Strafrecht, Wirtschaftsstrafrecht, Steuerrecht – Gedächtnisschrift für Wolfgang Joecks*, 2019, 97 ff.

³¹ See detailed discussion by Mohr, *Entwicklung des Sanktionenrechts*, 2019, chapter 6.1.

³² In Germany, more than 120 criminal law professors already in 2014 had pointed to the failures of the crime policy pertaining to cannabis and called for a reversal of the general drug policy; see <http://www.dw.com/de/juraprofessoren-fordern-cannabis-legalisierung/a-17553293>. More recently, also the association of German CID officers requested decriminalisation of minor drugs offences (possession for personal use); see <https://www.rbb24.de/politik/beitrag/2018/02/bund-deutscher-kriminalbeamter-gegen-cannabis-verbot.html> (public statement of 5 February 2018).

³³ On account of the restricted space, the manifold problems of community service as an independent criminal law sanction cannot be discussed here; see the comprehensive discussion by Mohr, *Entwicklung des Sanktionenrechts*, 2019, chapter 5.3.2.

³⁴ Finland, with a comparable high percentage of fines, reaches a proportion of fine defaulters in prison of only 1.5%, with England and Wales having 0.1%; see Aebi/Tiago/Burghardt, Council of Europe Annual Penal Statistics. SPACE I. Survey 2015, 2016, 74; Mohr, *Entwicklung des Sanktionenrechts*, 2019, chapter 3.3.5. The example of the Netherlands demonstrates that successfully reducing fine-default imprisonment can be a realistic policy option. In the Netherlands, the proportion of fine defaulters among the total prison population has been reduced to one third of the 9.4% figure recorded in 2009; see Dünkel, *Ersatzfreiheitsstrafen und ihre Vermeidung. Aktuelle statistische Entwicklung, gute Praxismodelle und rechtspolitische Überlegungen*, in *Forum Strafvollzug* 2011, 144 f. Sweden does not provide for fine-default imprisonment and instead prefers the enforcement of fines by civil law. Finnish crime policy achieved a reduction by adjusting the conversion rate between day fines and time served in prison to 1:3 (i.e., one day in prison counts as three day fines; Estonia has the same conversion rate) and by excluding fine-default prison sentences for fine amounts below 20 day fines; see, in summary, also from a European comparative perspective, Drápal, *Day Fines: A European Comparison and Czech Malpractice*, *European Journal of Criminology*, 2018, 461 ff., 470 ff. – in particular, Table 4 on p. 471 ff. – DOI: <https://doi.org/10.1177/1477370817749178>.

³⁵ The proportion of prisoners serving a term for defaulting on fines increased in absolute terms from 3,625 in 2004 (or 6.7%) to 4,700 in 2017; see *Statistisches Bundesamt*, Ed., *Bestand der Gefangenen und Verwahrten*, at the site www.destatis.de (author's own calculations).

sanction). This would imply a change in the organisational structure of executing fines, probably resulting in a great decline in use of substitute prison terms.^{*36} This change is a promising strategy that has been evaluated in some pilot projects, such as the Mecklenburg – Western Pomerania project called ‘Exit’ (*Ausweg*), as demonstrating that, in a lot of cases, it is foreseeable that fines will not be paid^{*37} but the offenders would be willing to work instead. However, the research has revealed also that supervision and support by the probation and aftercare services is recommendable, as the majority of fine defaulters represent a highly problematic population with deficits in many respects (related to socio-economic problems, long-term unemployment, poor housing, alcohol and drug problems, etc.). The draft bills of 2002–2004 were designed to enhance the standing of community service as a primary substitute to fines and referred to the positive findings of the Mecklenburg – Western Pomerania project:

This requires intensified efforts of the justice agencies and the co-operation of the third-sector aftercare services, to offer fine defaulters the possibility of carrying out community service. The results of the Mecklenburg – Western Pomerania project “Ausweg” revealed that a considerable quantity of substitute prison terms can be avoided through optimising the organisational structure of rendering work facilities suitable for community service – in case involving the support and care of the aftercare services, while the fine defaulter is working.

Further, the research reveals also

that even particularly difficult offenders who have accumulated personal problems are able to successfully complete community service if the work facilities are carefully selected according to the capabilities of the clients and if intensive mentoring is provided. The reduction of inappropriate use of prison capacities and saving of social costs are positive results in this regard.^{*38}

The introduction of community service as a primary substitute for fines should lead to shortening of the execution procedure. A well-grounded reform proposal in this context is that one day-fine unit should be equal to 2–3 hours of community work (instead of the 6 currently witnessed in the practice of the German federal states).^{*39}

If the substitute sanction of community service fails because of offender non-compliance, the further substitute prison term for fine defaulters should also be considered for reform. In Germany, at present, one day-fine unit corresponds to one day in prison. In future, one day in prison should correspond to at least two day-fine units, as is the case in Austria, Liechtenstein, Poland, Slovenia, and Spain. In Finland and Estonia – as mentioned above – one day in prison even counts for three day-fine units.^{*40} The Austrian model would immediately reduce the population of fine defaulters in prison (4,700 on 31 August 2017) by half, the Finnish one by two thirds. A conversion rate of 2 or 3 to 1 is in line with justice considerations ‘that a day in prison is a much heavier burden than the loss of a day’s net income’.^{*41}

In accordance with the draft bill of 2004, community service should – beyond substituting for fines – serve as a substitute for prison sentences of up to 6 months.^{*42}

³⁶ See Bundesratsdrucksache 15/2725, 18 f., 21 f.

³⁷ For a summary, see Dünkel/Scheel, Vermeidung von Ersatzfreiheitsstrafen durch gemeinnützige Arbeit: das Projekt „Ausweg“ in Mecklenburg-Vorpommern, 2006.

³⁸ See *Bundesministerium der Justiz*, Referentenentwurf eines Gesetzes zur Reform des Sanktionenrechts (Stand: Juni 2003), 2003, 42; Bundestagsdrucksache 15/2725, 21.

³⁹ This proposal goes back to the expertise of *Schöch* and the predominant opinion among penal sentencing law experts, who refer to the so-called net-cash principle characterising the German day-fine system: the amount of a day fine shall correspond to the net income after taxes, maintenance obligations, etc. have been subtracted out. This part of the income is earned by 3–4 working hours per day. The substitute community service therefore should not come to more than about 3 hours; see *Schöch*, Gutachten C zum 59. Deutschen Juristentag, 1992, C 86 ff., 98; see, in summary, *Mohr*, Entwicklung des Sanktionenrechts, 2019, chapter 5.3.1, who proposes, with good arguments, two hours of community service as equivalent to one day fine. The proposal for a conversion rate of 2–3 hours for one day fine also refers to the fact “that community service implies a much stronger restriction of liberty than the paying of the fine”; see Bundestagsdrucksache 15/2725, 21.

⁴⁰ See *Drápal*, *European Journal of Criminology*, 2018, 470 ff.

⁴¹ See the draft bill proposal of the then government in Bundestagsdrucksache 15/2725, 19.

⁴² See *Dünkel/Morgenstern*, Aktuelle Probleme und Reformfragen des Sanktionenrechts in Deutschland, in *Juridica International*, 2003. – DOI: <http://dx.doi.org/10.12697/issn1406-1082>; the proposal goes back to the final reasoning report of the penal sentences reform commission (Kommission zur Reform des strafrechtlichen Sanktionensystems), 2000 (in a 6–3 vote). The subsequent draft bill of the Federal Ministry of Justice (Referentenentwurf des Bundesjustizministeriums) of December 2000 provided for a further form of community service as a substitute for suspended prison sentences (probation) of up to

4.2. Warning with deferment of sentence

The warning with a deferment of sentence (WDS, *Verwarnung mit Strafvorbehalt*), introduced in 1975 (see §59 CC), has the function of a suspended fine with a maximum of 180 day-fine units. Irrespective of some cosmetic reform to increase its applicability for judges (see the last reform law of 2006, *2nd Justizmodernisierungsg*), the sanction still holds a shadow existence, accounting for only 1% of all convictions in 2015 ('insignificant practice').^{*43} The WDS was introduced as a sentence in exceptional cases ('special circumstances of the offender's personality or the delinquent act') and – in spite of legislative efforts to enhance its importance (see Section 2) – has never gained statistical significance. The reason might be that 1975 also saw the introduction of discharging cases in combination with minor informal sanctions (§153a of the CPA), which has 'skimmed the market' for warnings in line with §59 of the CC.

Many academics, however, saw a chance to expand the use of the warnings in the early 1990s by approximating its content to a kind of probation including the possibility of supervision by the Probation Service.^{*44} The decisive motive for this proposal was that in the general criminal code (apart from in the Juvenile Justice Act; see §10 JGG) the support of the Probation Service is provided only to offenders sentenced to a suspended prison term and that a need for social work support was often evident also in cases that did not reach the threshold for a prison sentence.^{*45} One could replace many suspended prison sentences of up to one year with such a probation sentence, which in the event of a recall would result only in a maximum of 60 day-fine units or 240 hours of community service. The proposal would also result in relief of some work of the Probation Service as, instead of two to five years of supervision as in the present system of suspended sentences, the new probation sentence would be combined with a maximum of one year's supervision. Regrettably, these reform proposals have not reached the level of a governmental draft bill yet, but they remain on the agenda at least in the academic world.

4.3. Early release

A significant reform deficit can be observed in the regulations on early release from prison. Since the cautious expansion in 1986 (23rd StÄndG), mentioned above, no further action has been considered by the legislator. International comparative research and empirical evidence reveal the positive impact early release can have on the desistance process of offenders. Therefore, even release of offenders after they have served half of their sentence seems to be a realistic option.^{*46} No other country providing early release after half the sentence restricts this to first-time offenders with sentences of two years or less, as is the case in Germany.^{*47} Another desideratum pertains to the prognostic requirements in the so-called midrange cases, in which predictions are unreliable or neutral. This refers to the fact that the majority of offenders, at the stage when predictions are made about their future behaviour, fall into a range where the likelihood of recidivism is around 50%, precisely what the probability would be if it were simply left to chance.^{*48} The answer to the

one year (see §55a, (2) Referentenentwurf in *Bundesministerium der Justiz*, Referentenentwurf eines Gesetzes zur Reform des Sanktionenrechts vom 8.12.2000, 2000, 8 f., explanatory statement, 6 f.

⁴³ Albrecht, in *Nomos-Kommentar-StGB*, 5th ed., 2017, §59, note 1.

⁴⁴ See, in particular, Schöch, Gutachten C zum 59. Deutschen Juristentag 1992, C 90 ff., who proposed the possibility of combining the WDS with obligations and directives as well as with temporary withdrawal of the driver's licence. Going even further, to establishing the WDS as a form of independent probation sanction (similar to the educational measure of a supervisory directive in accordance with §10 of the Juvenile Justice Act), were Dünkel/Spieß, *Perspektiven der Strafaussetzung zur Bewährung und Bewährungshilfe im zukünftigen deutschen Strafrecht*, in *Bewährungshilfe*, 1992, 127 f., 132. In their view, the new warning sentence should consist of a conviction by the court combined with a suspended fine in combination with directives and/or obligations (e.g., reparation to the victim, paying maintenance to the family or children, etc.), including a probationary term, with the supervision of the Probation Service, of up to one year. The legislator considered all these proposals at only a rudimentary level, by introducing very marginal changes, with the result that the practice related to the WDS remained statistically unimportant and highly exceptional.

⁴⁵ Dünkel/Spieß, *Perspektiven der Strafaussetzung zur Bewährung und Bewährungshilfe im zukünftigen deutschen Strafrecht*, in *Bewährungshilfe*, 1992, 125 with further references.

⁴⁶ This was also the proposal made by the reform commission mentioned above (Kommission zur Reform des strafrechtlichen Sanktionensystems), 2000, and of the Federal Ministry of Justice, on 8 December 2000.

⁴⁷ See, for a summary, Dünkel, in *Nomos-Kommentar-StGB*, 5th ed., 2017, §57, notes 90 ff., 92.

⁴⁸ For the criminological basic research on prognostic decisions, Dünkel, in *Nomos-Kommentar-StGB*, 5th ed., 2017, §57 Rn. 107 ff., 113 f.; Streng, *Strafrechtliche Sanktionen*, 3rd ed., 2012, notes 770 ff., 823 ff.; in general, one can state that, in practice, at least half of individual prognoses lie in the so-called middle field of uncertain decision-making (i.e., the prognosis based

question of whether release can be justified, therefore, cannot be yielded by empirical arguments but must be based on normative regulations. Should uncertain prognoses be handled conservatively at the expense of the offender, or should the principle be *in dubio pro libertate*? The present German solution demands a positive prognosis – i.e., that cases of uncertainty be decided against the favour of the offender. The jurisprudence of the Supreme Court (BGH) has lowered this requirement by granting release if it can be ‘justified’: there must be realistic hopes of a crime-free life after release, and the risk of minor relapses into crime may not lead to a negative decision on early release. However, in light of comparative research, this does not seem to be enough. In accordance with a proposal made in 1966 (the so-called Alternative Draft Bill, AE-StGB), early release should be made the rule and denial thereof the exception, the latter to be based on facts that demonstrate a concrete risk of serious crimes after such a release.^{*49} Accordingly, in cases of offenders serving a sentence for serious violent or sexual crimes, a special examination of the risks of committing similar serious offences should take place. In all other cases, the rule of an early release without individual-specific diagnostics would apply. Such rather automatic early release in the large majority of cases may be justified on the basis of positive experiences in other European countries – for example, in Belgium, in Finland (after the individual has already served half of the sentence), or in Sweden.^{*50} Possible high-risk cases can be identified best if the prison administration is ready to regularly and widely use prison leaves (day leaves or long-term leaves of absence of several days), transfer to open or less secure prison facilities, and other relaxations as a kind of ‘endurance test’, which makes predictions more reliable. The experiences with such prison relaxations can also contribute to finding the appropriate interventions and directives for the time after release. Psychiatric experts deal with that problem under the term ‘social reception room’ (*sozialer Empfangsraum*), where this space has to be designed in a favourable way in order to further desistance processes.

A remarkable reform associated with prognostic criteria was passed in Austria: §46 (1) of the Austrian Penal Code provides for a comparative prognosis. The judge shall grant early release if the risk of recidivism after early release is not less than if the offender were to serve out the full sentence. In other words, it must be proved that serving the sentence in full would diminish the risk of recidivism. This regulation, when taken seriously, normally justifies an early release, as, in general, prisoners who are released early show a lower propensity to recidivate than prisoners serving their full sentence.^{*51} This can be explained by the better transition management, supervision, and control parolees receive.

A reform of early release regulations in Germany (§57 CC) should take up the idea of reversing the places of rule and exception by making early release the rule and fully serving the sentence the exception. This reflects the impossibility of reliable prognoses in the so-called midrange cases and follows the principle *in dubio pro libertate*. One should be granted early release after having served half (for first-time incarcerated offenders) or two thirds of the sentence (§57 (1) and (2) CC) ‘unless, because of concrete facts, a high risk of further serious crimes becomes evident’.^{*52}

5. (Possible) aberrations, meanders, or pitfalls: Electronic monitoring in European comparison

Electronic monitoring (EM) is practised in Europe in two distinct forms. The first is the form of radio-frequency-based devices (electronically monitored house arrest), and the more recent is use of the GPS surveillance technique, which allows one to identify where the surveilled person is at any moment of time.

on scientific prognostic instruments is no better than throwing a coin, with a 50% probability of false or of right decisions). In consequence, parole decisions in that range of probability cannot be justified by empirically based prognoses but only by a normative decision of the legislator providing a presumption in favour of or against release on parole in cases without a clear evidence-based prognosis. With regard to the principle of proportionality and the least restrictive use of state intervention, a decision-making rule of “*in dubio pro libertate*” seems to be preferable.

⁴⁹ See Baumann *et al.*, Alternativentwurf eines StGB, 1966, §48; see also Böhm/Erhard, Strafrechtsaussetzung und Legalbewährung, 1988, 219.

⁵⁰ In Finland, 99% of prisoners are released early (typically after having served half or two thirds of the prison sentence; a similar practice can be found in the other Scandinavian countries and in Belgium; see Dünkel, in Nomos-Kommentar-StGB, 5th ed., 2017, §57, note 105.

⁵¹ See, for a summary, Dünkel, in Nomos-Kommentar-StGB, 5th ed., 2017, §57, note 129 *ff.*

⁵² For details, see Dünkel, in Nomos-Kommentar-StGB, 5th ed., 2017, §57, note 136.

The latter technique allows zones to be defined that the offender is not allowed to enter (for example, the area of a kindergarten in the case of paedophile offenders). In Germany, in contrast against most of the other European countries, the use of EM has been met with strong reservations, or even criticism. Only the federal state of Hesse developed a pilot project, in the year 2000, and even that received only marginal numbers of cases (mainly in the form of radio-frequency-controlled house arrests).^{*53} The GPS-based form of EM was introduced nationwide in 2011 in the context of supervision of conduct orders (*Führungsaufsicht*), a measure of supervision after the release of offenders from psychiatric hospitals, after release from the measure of preventive detention, or upon the person having served the full prison sentence (§ 68b (1), sent. 1, No. 12 CC). It only applies in cases where the offender is seen as a high risk for future serious violent or sexual crimes and if other forms of supervision do not seem to be sufficient.^{*54} EM in Germany is therefore an exceptional form of supervision for high-risk ('dangerous') offenders and covers around 100 cases at the moment, which number is quantitatively negligible relative to the roughly 35,000 offenders under a supervision of conduct order. This very reluctant use of EM in Germany reflects the intrusive nature of EM and the constitutional principle of proportionality as it is interpreted in Germany (see also below).

In other European countries, an amazingly dynamic rise in EM has taken place, particularly in England and Wales, Scotland, Belgium, and the Netherlands. This may be explained by commercial interests that are evident from looking at the activities of private companies selling the technique and technology, insofar as a new quality in the penal law has emerged (similar to the rise of the US prison industry from privatising imprisonment there), which endangers the role of the state. The driving forces in crime policy – apart from a fascination with new techniques^{*55} – were problems of prison overcrowding, the crisis of the traditional probation services (in England and Wales), and a naïve belief in technical instead of human-interaction-based solutions for preventing further crimes. This resulted in countries such as Belgium, England/Wales, or Scotland introducing EM as a stand-alone measure of control without the classic support the probation service used to offer. The target groups are low-risk offenders, and the period of supervision in most cases does not exceed 6 months. The comparative European study of Dünkel, Thiele, and Treig came to the overall conclusions:

- that the introduction of EM in Europe had no significant impact on prison population rates and to solve the problem of prison overcrowding (see, for example, England/Wales, France, Italy, Poland, and at least until recently Belgium; a possible exception – however, with limited impact – might be Estonia);^{*56}
- that in most cases EM represents an additional and intensified form of social control (net-widening);
- that in some countries it has contributed to reducing the importance of the traditional social support schemes for offenders (as usually provided by the probation and aftercare services) by introducing EM as a stand-alone measure (for example, in England/Wales, Belgium, or Scotland [...]); and
- that, on the other hand, in some countries EM was integrated into the rehabilitative system of community sanctions under the leading role of the probation services and/or the prison administration – for example, in Austria, the Netherlands, Sweden, Switzerland, and increasingly Scotland again, as well as in a few cases in Germany.^{*57}

⁵³ For a very limited evaluation of the pilot project of the first few years of the practice in the Federal State of Hesse, see Mayer, *Modellprojekt elektronische Fußfessel*, 2004.

⁵⁴ On the legal development and practice and for a crime policy assessment focused on Germany, see Dünkel/Thiele/Treig, *Bestandsaufnahme der elektronischen Überwachung in Deutschland*, in Dünkel/Thiele/Treig, Eds., *Elektronische Überwachung von Straffälligen im europäischen Vergleich*, 2017, 11 ff.

⁵⁵ See, on this aspect in particular, Nellis, *Die elektronische Überwachung von Straftätern: Standards, ethische Grundlagen und Kriminalpolitik im digitalen Zeitalter*, in Dünkel/Thiele/Treig, Eds., *Elektronische Überwachung*, 2017, 275 ff.

⁵⁶ In contrast, the summarising chapter on the EU-funded project with Belgium, England and Wales, Germany, the Netherlands, and Scotland as project partners expressed the paradoxical conclusion that 'a less often application [*sic*] of EM was associated with long-term reduced prison population rates and [a] smaller number of prison entries'. At the same time, 'high prison population rates are associated with a more frequent use of EM'; i.e., the net-widening hypothesis is supported by these findings. See Hucklesby *et al.*, *Abschließender Vergleich des EU-Projekts*, in Dünkel/Thiele/Treig, Eds., *Elektronische Überwachung*, 2017, 272.

⁵⁷ Dünkel/Thiele/Treig, *Elektronische Überwachung von Straffälligen und Beschuldigten in Europa – Zusammenfassender Vergleich und Perspektiven für die Kriminalpolitik*, in Dünkel/Thiele/Treig, *Elektronische Überwachung*, 2017, 521 f.

The use of EM in cases of pre-trial detention as practised in several countries (which includes the pilot project in Hesse) has to face serious criticism. If there is a risk of absconding and not standing trial (which is the reason for a warrant in 90% of cases in Germany^{*58}), EM cannot prevent an escape. If there is only a low risk of not standing trial, then there is no justification for a warrant to pre-trial detention. Therefore, the number of appropriate cases must *per definitionem* tend toward zero. In addition, research has revealed that EM does not fit the typical clients of pre-trial detention, as they may not have stable living conditions and a telephone connection.

The legal basis for EM in Germany – apart from the regulation of §68b of the CC for high-risk offenders – is not clear, and the legal constructions are possibly in violation of constitutional law, although the Frankfurt on Main district court has recognised the possible application of probation law.^{*59} However, in my opinion, there must be an explicit legal authorisation for EM also in the context of regular probation (§56c of the CC).^{*60} In any case, the principle of proportionality requires a restrictive practice for EM and a double check of the principle of proportionality: first, EM must be proved legitimate as a sanction that really replaces imprisonment rather than just other community sanctions; second – and this is often overlooked – it must be legitimised by other, less intrusive community sanctions, such as traditional supervision by the Probation Service (§56d of the CC), having been excluded as being inappropriate.^{*61} EM therefore can be justified as an intermediate sanction only in the rare cases where supervision by the Probation Service is not sufficient and imprisonment can be avoided only through a combination of probation with intensified control via electronic devices. No wonder, therefore, that in Hesse only about 100 out of the 16,000 probationers in 2011 were under EM.

The way in which some European countries have implemented EM to replace short-term imprisonment or to employ EM as an additional form of controlling prisoners on prison leave etc. must – with only a few exceptions (e.g., Finland, Austria, and in parts in the Netherlands) – be seen as a meander or failure.^{*62} Accordingly, the law introducing EM for fine defaulters serving their prison term in the community and for prisoners on prison leave in Baden-Württemberg was repealed in 2013, as no appropriate cases involving a need for EM could be identified.^{*63}

Altogether, German crime policy was well advised to restrict EM to very serious cases of high-risk offenders and to rely for the rest on the traditional forms of probationary supervision, which, without going into details, one can characterise as corresponding to the evidence from empirical research on offender treatment and from desistance research – i.e., the evidence on how and under which conditions offenders abandon their criminal lifestyle.^{*64}

6. Outlook

In general, the criminal sanctions system in Germany has proved to be of value. Fines and suspended prison sentences represent remarkable success stories of German penal law and have contributed to imprisonment really becoming a last resort. Germany with its prison population rate of 76 per 100,000 inhabitants belongs

⁵⁸ See Jehle, *Strafrechtspflege in Deutschland*, 6th ed., 2015, 22 (2013: 92.7%).

⁵⁹ See LG (Regional Court) Frankfurt Neue Juristische Wochenschrift 2001, 697 ff. (the decision was issued before the reform of §68b StGB in 2011 was due to come into force).

⁶⁰ See the detailed discussion by Dünkel/Thiele/Treig, *Bestandsaufnahme der elektronischen Überwachung in Deutschland*, in Dünkel/Thiele/Treig, Eds., *Elektronische Überwachung*, 2017, 68 f.

⁶¹ In this context one should consider that some federal states (e.g., Mecklenburg – Western Pomerania) have introduced intensive probationary supervision projects, which include a reduced case load for probation officers, who will take care of and control so-called high-risk offenders (sexual and violent offenders with a high risk of serious re-offending). The check of proportionality mentioned above must also consider this intensive probationary supervision measure as a less intrusive form of state intervention, which in cases of its applicability should exclude the use of EM.

⁶² On the not-promising results for the effects on deterrence and similar repressive goals of EM, see Dünkel, *Electronic Monitoring – Some Critical Issues*, in Bijleveld/van der Laan, In *Liber Amicorum for Gerben Bruinsma*, 2017, 108 ff.

⁶³ See, in summary, Schwedler/Wößner, *Elektronische Aufsicht bei vollzugsöffnenden Maßnahmen*, 2015. Whether, from the standpoint of police-based interventions against ‘dangerous’ citizens (not yet registered as offenders; *Gefährder*), a reasonable scope of application of EM can be found, seems to be doubtful as well; see the critical comments on the Police Law draft bill provided by Dünkel/Thiele/Treig, *Bestandsaufnahme der elektronischen Überwachung in Deutschland*, in Dünkel/Thiele/Treig, Eds., *Elektronische Überwachung*, 2017, 71 ff.

⁶⁴ See the summary discussion by Pruin, “What Works” and What Else Do We Know? – Kriminologische Erkenntnisse zum Übergangsmanagement, in Dünkel *et al.*, Eds., *Die Wiedereingliederung von Hochrisikotätern in Europa*, 2016, 251 ff.; Pruin, *Die Entlassung aus dem Strafvollzug: Strukturen für einen gelungenen Übergang in ein straffreies Leben im europäischen Vergleich*, 2019 (in preparation).

to the low-level imprisonment countries and has joined the ‘Scandinavian exceptionalism’. Deficiencies can be seen in some boundary areas of the execution of fines, with too many prison terms as substitute sanctions applied to fine defaulters. Furthermore, suspended sentences and early release deserve wider and – in the case of early release – earlier application. Further reducing prison population rates depends on the sentencing practice and inmate structure of a country. Whereas in Germany short-term imprisonment prevails (on 1 September 2014, 45% were serving a sentence of only up to one year; compare to Estonia’s 11%), in other countries, such as Estonia, long-term prison sentences, of 5 years or more, are the problem (Estonia: 2014: 40%; Germany: 12%). In Germany, therefore, promising strategies to reduce the prison population entail expanding alternatives to prison sentences; in Estonia, it would be preferable to focus on reducing the length of the prison sentences imposed or the stay in prison by expanding early release.

Moderate penal law, which further reduces the imposition of prison sentences, is to be seen not as a beneficence for offenders, who should – according to populist thinking – be treated with harsh punishment, but as a rational evidence-based strategy, which at the same time serves to prevent crime and protect (future) victims. Especially in times of populist political currents in society and crime policy, one has to warn against a hypertrophy of penal law. Moreover, I think that one of the things to Jaan Sootak’s credit is having done so in his writings in favour of moderate penal law and sentencing practice. In this context, it is right to confront possible negative developments, such as electronic monitoring, and other manifestations of a ‘New Punitiveness’ (more and longer prison sentences), as they can be observed in many European countries (see Section 5).⁶⁵ Estonia – thanks to Jaan Sootak’s foresightfulness and knowledge of foreign penal systems and developments – has made great progress in overcoming the old Soviet approach to penal law and has successfully integrated into the EU family of human-rights-based penal law. We thank him for his efforts and wish him lots of energy for many more years to advocate for humane penal law.

⁶⁵ See, with particular consideration of the USA, Pratt *et al.*, *The New Punitiveness: Trends, Theories, Perspectives*, 2005; Travis/Western/Redburn, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 2015. – DOI: <https://doi.org/10.17226/18613>. It seems that Europe displays more resistant power against ‘punitive’ crime policy tendencies, which Snacken and Dumortier explain by a stronger orientation to human rights and constitutionally based reservations against disproportionate sentencing; see Snacken/Dumortier, *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy*, 2012. – DOI: <https://doi.org/10.4324/9780203806654>.