



Max-Planck-Institut
für ausländisches und
internationales Strafrecht

Sanction Policies in Europe An Introduction

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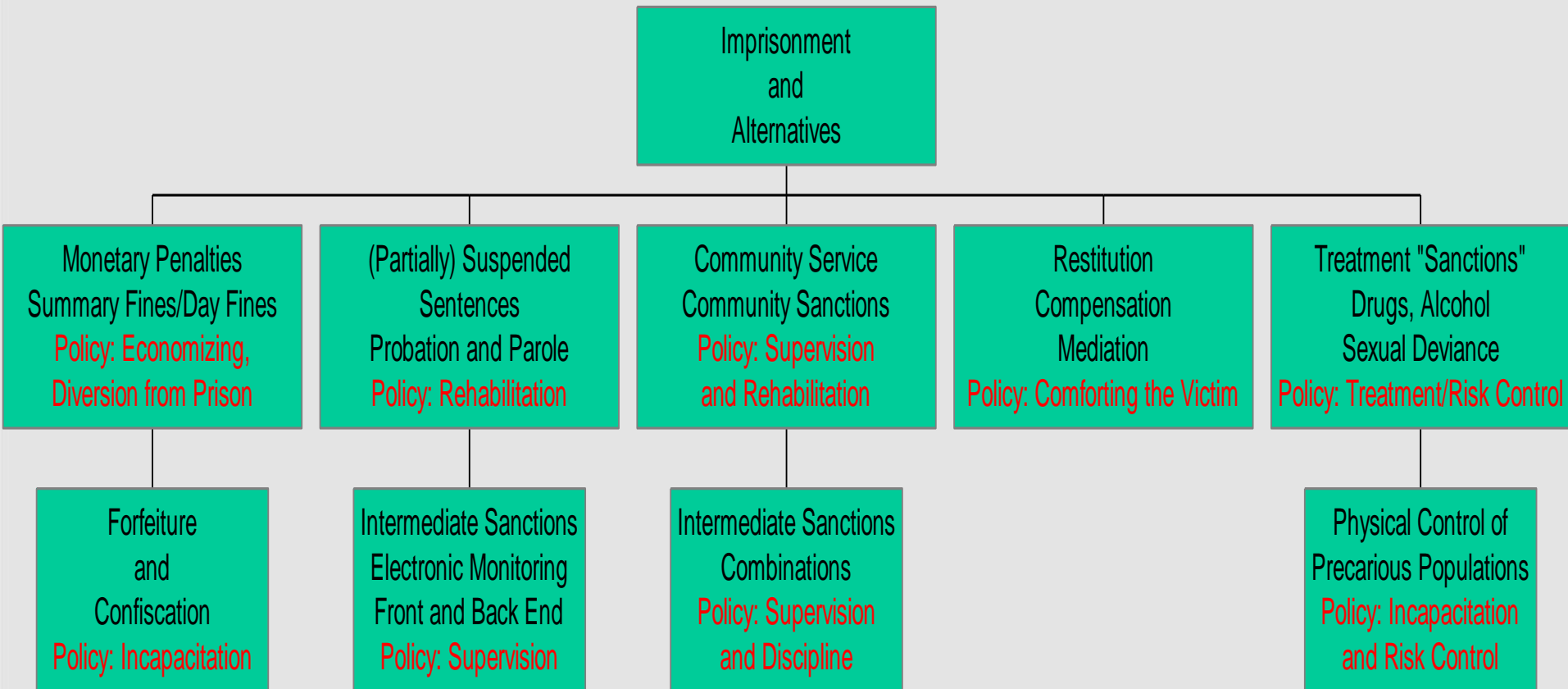
- Introduction and a Look Back
- Alternatives and Intermediate Sanctions
- Proliferation of Security Policies
- Models of Preventive Sanctions
- An Example: Sicherungsverwahrung in Germany
- What do we Know About Incapacitation?
- Conclusions

Looking Back: Criminal Law and Crime Prevention



- Some 40 years ago: Announcing the „Farewell to Kant and Hegel“ („Der Abschied von Kant und Hegel“)
 - Klug, U.: Abschied von Kant und Hegel. In: Baumann, J. (ed.): Programm für ein neues Strafgesetzbuch. Frankfurt 1968, pp. 36.
- Turning away from „just and desert“ and moving toward criminal law aimed at prevention of crime and protection of basic interests of societies
 - Friendly treatment of criminal offenders (rehabilitation)
 - Evidence based crime policies
 - Inclusion and integration
 - Crime prevention is based (also) on social welfare policies
- Today the preventative and welfare oriented criminal law according to critics has been replaced by a criminal law pursuing security and accommodating feelings of security
 - Hassemer, W.: Sicherheit durch Strafrecht. hrr-Strafrecht 4/2006, pp. 130-143.

Lines in the Development of Alternative Sanctions





- The Problem of Responding to Unsettled Groups
- Credibility and Sentencing Goals
- „Democracy at Work“: Public Demands for Punishment
- Proliferation of Security Policies

New Models of Offenders and Offending



- Rational Criminals and Criminal Networks - Organized Crime and Organized Illicit Markets
 - Rational choice
- Predators and Monsters: Violent Individuals
- New Precarious (Unsettled) Groups and New Dangerous Classes
 - Drug Offenders
 - Foreign and Ethnic Minorities
 - Illegal Immigrants
 - Long-Term Unemployed



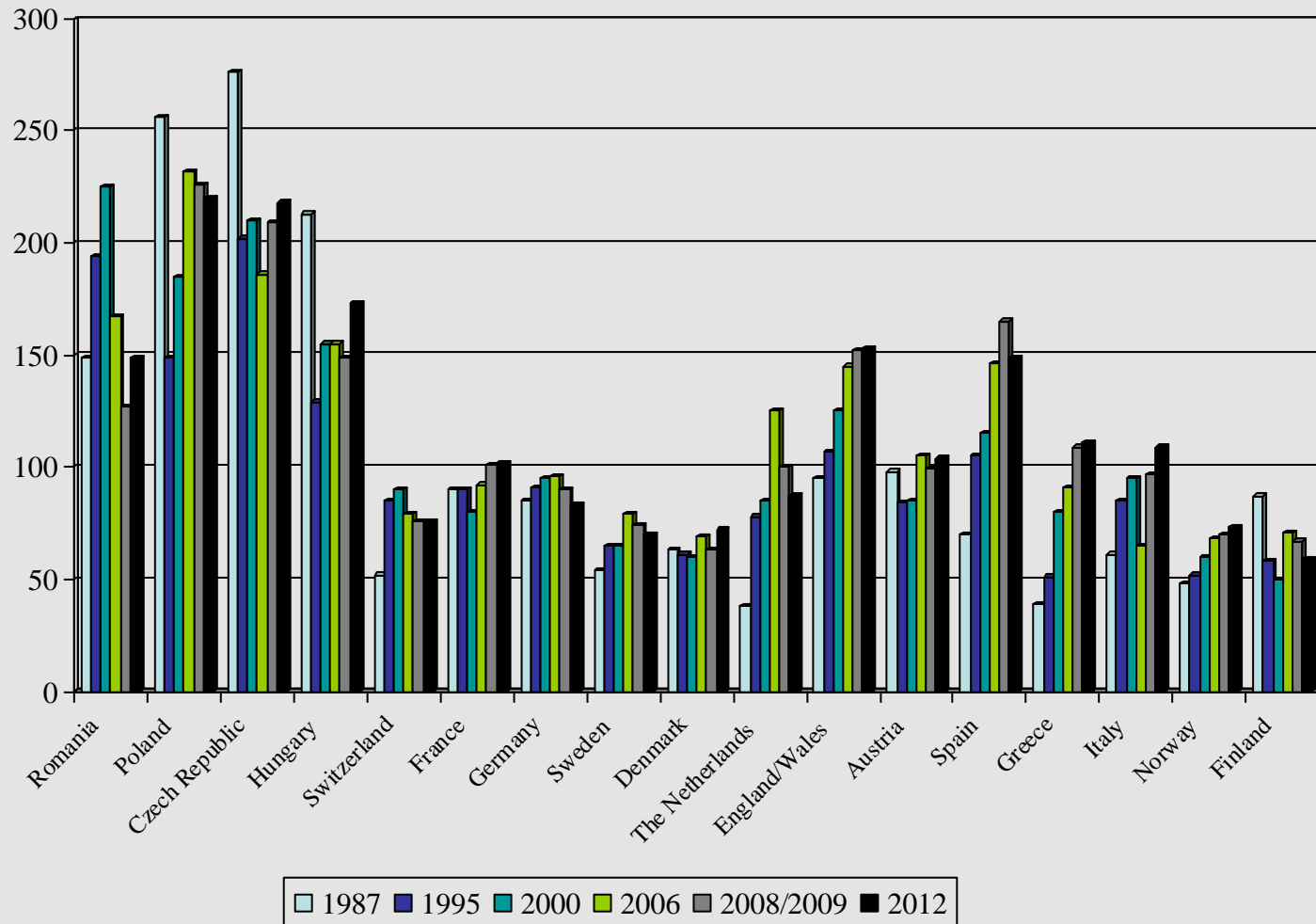
Welfare and Criminal Policies – Growing Distance



- Franz v. Liszt: The best criminal policy is a good social welfare policy
- 'Nothing Works' doctrine results in discrediting of rehabilitation as a leading goal of punishment
 - Breaking the link between welfare policy and criminal policy
- Welfare policies and welfare institutions are increasingly seen as part of social control (Foucault)
- The rise of the welfare state goes hand in hand with an increase in crime (high crime societies)
 - Crime problems become in particular apparent where social welfare is concentrated
- Social welfare policies fail where support was necessary
 - Protecting abused and neglected children



Imprisonment in Europe: a heterogeneous picture





The Proliferation of Security Policies



Sentencing and systems of sanctions



- One track systems (punishment only)
 - Majority of CoE member countries
 - Sentence length also determined by preventive needs

- Two track systems (punishment and measures of rehabilitation and security)
 - Germany, Switzerland, Austria, Denmark
 - Punishment justified with guilt
 - Preventive detention justified with necessity

- Exceptional one track system (Sweden)
 - Punishment applies also to those judged not responsible due to insanity



- Preventive detention beside a prison sentence (Germany, Austria, Switzerland)
 - Prior convictions, prison time served, habitual criminal
 - High risk of relapse into serious crime
 - Expert evidence (risk assessment)
- Preventive detention instead of a prison sentence (Denmark)
- France (2008): After completion of a prison sentence of 15 years or more imposed for violent/sexual crimes and an assessment of dangerousness based on the evaluation of a commission, detention for public security may be imposed



- Two track systems
 - Indeterminate (Germany and most other countries)
 - Determinate (Austria, Switzerland, 10 years)
 - Detention for life: Switzerland
 - In particular sexual murder
 - Release possible only if experts provide for new evidence that offenders may be treated effectively
- One track systems
 - Life sentences (without parole)
 - Sentence enhancement in case of recidivism
 - Imprisonment for public protection (sentence is split into a punitive part and in a preventive part)

New Institutions and arrangements



- Swiss Commission for the Assessment of Treatment (“treatability“) of Offenders Detained for Life

- Risk Management Authority (Scotland)
 - Policy development
 - Risk assessment research and standards
 - Accreditation of „risk assessors“

- Multi-Agency Public Protection Arrangements (England)

- Heads etc. programmes for released sexual offenders at risk of re-offending (Germany)

The Course of Preventive Detention (Sicherungsverwahrung) in Germany



- German criminal law allows for so-called measures of rehabilitation and security which do not depend on personal guilt but on the degree of dangerousness (necessity principle)

- This two track approach is based on the conviction that proportional punishment limited by the principle of personal guilt may not be sufficient to respond effectively to dangerous criminals

- Measures of treatment and security address three groups of criminal offenders assessed to be particularly at risk of serious recidivism
 - the mentally ill (mental illness and violence)
 - the addicted (alcohol and violence)
 - the habitual offender (the untreatable offender (Franz v. Liszt); enemies)

Pursuit of Security through preventive detention



- 1998 Law on Combating Sexual Crime
 - Extension of preventive detention through reducing formal requirements
 - Requirement of prior convictions reduced to 1 prior conviction (sexual and violent crime and a prison sentence of 3 years or more) in case of sexual and violent crime
 - No prior convictions required if at least two separate criminal offences (which carry a minimum prison sentence of 2 years) and if sentenced to 3 years imprisonment or more
 - Abolition of 10 years maximum in case of first time imposition, retroactive application
- 2002
 - Introduction of the conditional incapacitative sentence (imposition postponed if dangerousness of the offender cannot be established beyond reasonable doubt at time of trial)
- 2003
 - Introduction of a conditional incapacitative sentence for young adults (minimum prison sentence of 5 years)



- 2004
 - Introduction of a subsequently applicable sentence of preventive detention (nachträgliche Sicherungsverwahrung)
 - Restricted to serious violent and sexual crime
 - Facts indicating dangerousness not known during the trial become apparent during enforcement of a prison sentence
 - Substantive conditions (dangerousness and criminal habit) are established; risk of relapse into serious violent/sexual crimes
 - Either formal requirements of §66 are fulfilled (prior convictions) or prison sentence of 5 years or more for violent/sexual criminal offences
- 2008
 - Introduction of subsequent preventive detention for juvenile offenders: prison sentence of 7 years or more, sexual or violent crime, risk of relapse into serious violence/sexual crime

Constitutional Challenges

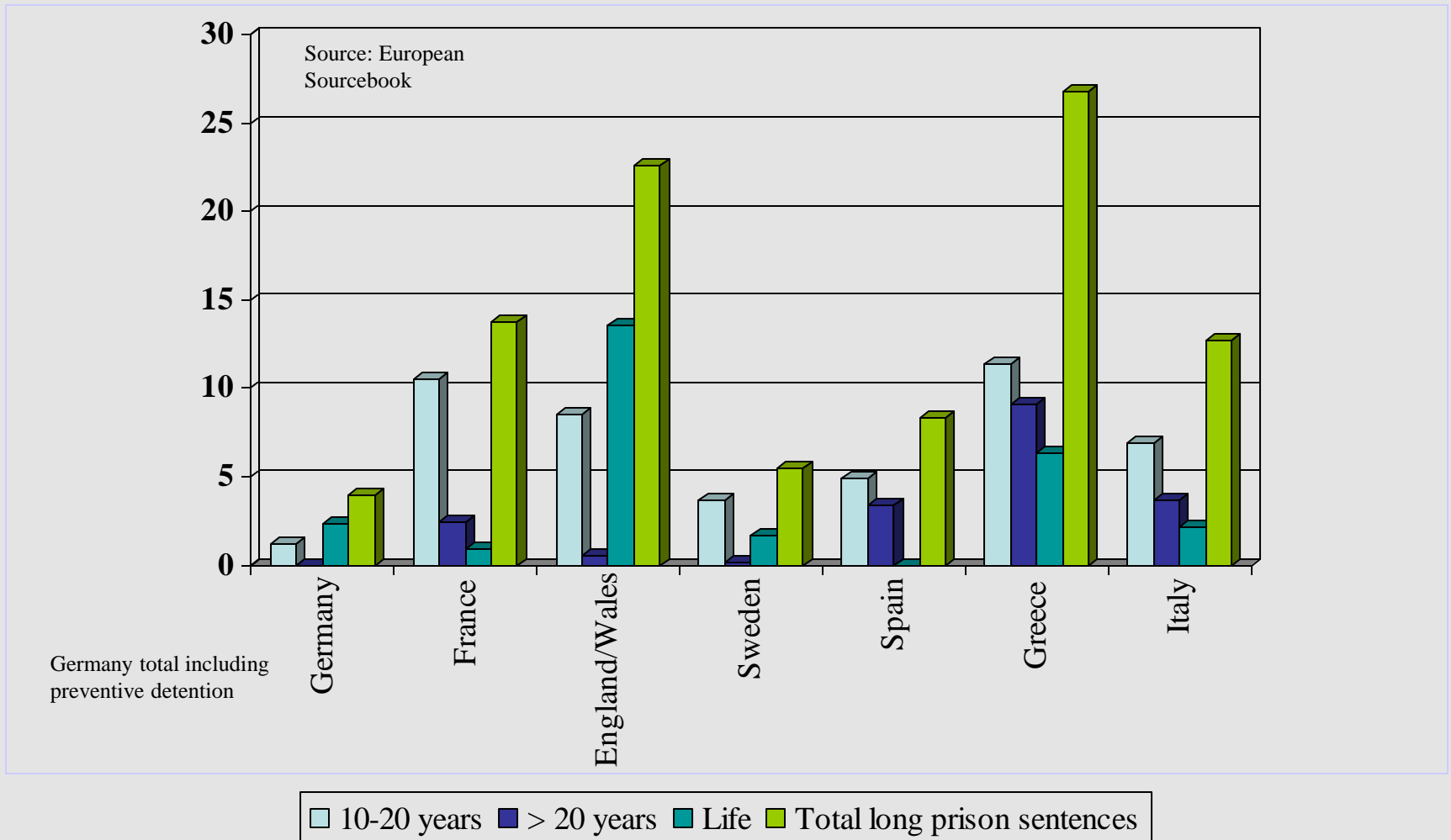


- Supreme Court and Federal Constitutional Court have upheld all amendments 1998 – 2008 against challenges brought forward
 - Retroactivity
 - Proportionality
- Argument: preventive detention does not equal criminal punishment



- Case of M. v. Germany, (Application no. 19359/04), judgment, Strasbourg, 17 December 2009, Final, 10/05/2010
 - Art. 5 §1 ECHR
 - No causal connection between sentencing decision (Art. 5 §1 a ECHR) and continuing deprivation of freedom (after 10 years had expired)
 - Art. 7 ECHR
 - The measure of preventive detention (§66 German Criminal Code) is criminal punishment in the light of the European Convention („going behind appearances“, „assessing the substance“)
 - » Prevention and punishment overlap (prevention may be regarded to be a constituent element of punishment)
 - » Preventive detention is enforced in ordinary prisons
 - » Special detention regimes do not apply to detainees
 - Prohibition of retroactivity applies

Prisoners With Long Prison Sentences (100.000) 2006





- A land mark decision
 - All provisions concerning preventive detention are unconstitutional
 - Violation of the right to freedom (disproportional restriction of freedom)
 - The provisions on preventive detention may be applied until May 31 2013 (with restrictions); then, the Federal legislator has to introduce legislation which complies with the standards developed by the Federal Constitutional Court
 - Preventive detention represents a massive restriction of personal freedom
 - Preventive detention therefore can only be justified if
 - The dangers assumed outweigh restriction of personal freedom
 - Detention conditions are established which reduce the need for detention as fast as possible
 - Detention conditions reflect a visible difference compared with conditions of serving a prison sentence (providing for a significant distance between prison and preventive detention facility)
 - Stricter implementation of the proportionality principle (eg. annual review of dangerousness instead review every 2 years)

Preventive Detention amended



- Abolition of „subsequent“ preventive detention (§66b) for adults
- Restriction of preventive detention essentially to felonies and violent/sexual crime
- Introduction of (enforced) electronic monitoring for offenders released from prison or other forms of detention and assessed to pose a risk of serious crime
 - GPS, tracking
 - Interference with equipment: criminal offence (maximum 3 years prison)
- Introduction of detention in a special psychiatric hospital for offenders considered a high risk if this is due to „psychological“ disorders

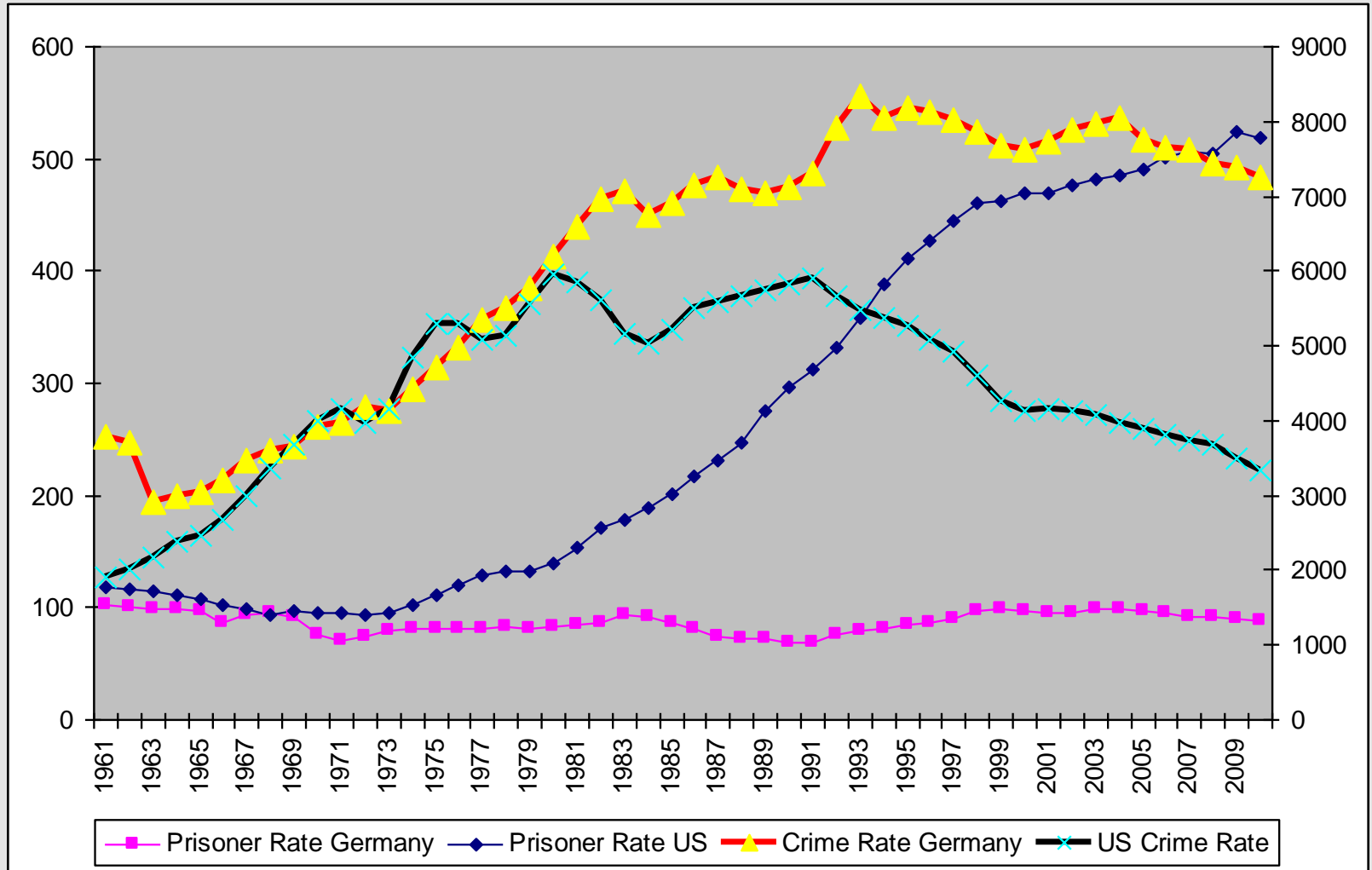
What Do We Know About Incapacitation?



- Does incapacitation reduce crime?
- New interest voiced by economists in the 1990s
 - American prison experiment and econometric research
 - Mixed results (comparable to death penalty and violence-gun research)
 - High costs
 - Mass re-entry of released prisoners
- Comparative research shows significant decreases in crime without resorting to mass imprisonment
 - Canada, European countries



Crime and Prisoner Rates Germany and US 1961 - 2010



Preventive Detention and Prevention of Crime



- What method to assess the efficiency of preventive detention?
- Natural experiments
- A study of recidivism of prisoners deemed to be dangerous by prison administration and Public Prosecutor and for whom preventive detention was applied for before release but rejected by the court

- Between 2004 and 2006 77 cases
- After 1,5 – 3,5 years non crimes recorded for 50persons
 - 10 sentenced to a fine
 - 5 sentenced to suspended prison
 - 12 sentenced to imprisonment, among which 3 with additional preventive detention
- Alex, M., Feltes, T.: Nachträgliche Sicherungsverwahrung. Anmerkungen zur aktuellen Diskussion. Forum Strafvollzug 59(2010), pp. 159-163, p. 160.
- Müller, J. et al.: Legalbewährung nach Gutachten zur nachträglichen Sicherungsverwahrung. Monatsschrift für Kriminologie und Strafrechtsreform 94(2011), pp. 253-263.
 - Appr. 75% of ex-prisoners assessed to be dangerous do not recidivate or are re-sentenced to lieght penalties (petty crime)

- Corresponds to the results of research on Baxter and Dixon

Conclusions



- Alternatives and intermediate criminal sanctions have been to a certain extent successful
- Security policy tends to neutralize the „proprium“ of criminal law: personal responsibility and blame
- Proliferation of preventive detention adopts various forms
- Preventive detention must be contained by strict implementation of proportionality and is confined to grounds in line with the ECHR
 - Insanity, addiction, habitual criminals
- The future
 - How to deal with dangerousness located in
 - » Agency, free will
 - » Affiliation, networks