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Chapter 8.: A Strained Restraint: The Ambivalences of Penal Moderation in Germany and France

Kirstin Drenkhahn, Fabien Jobard and Tobias Singelstein

Abstract

In this chapter, the findings of this book are summarized with a view to penal moderation and how it is challenged and then analysed to find out how the public, politicians and the media interact in the production of penal moderation. What we see is a dynamic between these three spheres of a constant renegotiation of rational restraint and passionate outbursts – a strained restraint. While these outbursts as well as assumptions about attitudes in the population in particular contribute to an increase in punitiveness foremost in penal legislation, these reactions are themselves moderate in their outcome. The chapter concludes with reflections on role of deliberation processes in a democratic society for penal culture.

Introduction

The chapters of this book on our own empirical research paint a detailed picture of three areas of German and French society that are considered by Punishment and Society research to be of great importance for determining the role of criminal law and punishment within a society, namely the public, the political, and the media spheres. But what can we conclude from our findings regarding penal moderation in those two countries and in general? As described in Ch. 1, the evolution of criminal social control in France and Germany has been described as one of stable moderation in comparison with developments in the Anglo-American world, characterized by a “punitive turn”. Yet, some of those repressive developments are also to be found in Germany and France in an attenuated form, where a tightening of criminal law and a more punitive tone in the debate on criminal law and crime have also been observed. While they are often not registered from the outside, these upheavals are clearly perceived by domestic researchers in both countries.

This contrast between the outside and the inside perspective of research is mirrored in our own findings and discussions. We find many arguments in support of the penal moderation thesis for Germany and France, but at the same time, there are also arguments in favour of increased punitiveness. In this last chapter, we discuss the claim of the robustness of penal moderation and whether recent developments call this core of Continental Europe's penal culture into question. What do we find when we zoom in on the system's actors? How does penal moderation work as a practice when we look beyond the macro level of models of democracy, the welfare state or prison population rates as signifiers of punitiveness? After a summary of the key findings of our different investigations into the – alleged – penal restraint in France and Germany, we discuss our results in the light of the concepts of “ambivalence” and “bifurcation”, and finally outline some of the consequences of our findings for futures debates on crime and punishment.

Key Findings

Trends in Criminal Law and Practice

In defining offences, criminal sanctions and rules for criminal procedures, criminal law not only constitutes the scope of action for the criminal justice system but also mirrors highly influential ideas about punishment. Rooted in Continental Europe's civil law tradition, both France and Germany traditionally rely on general codifications as the backbones of their criminal law system. However, Ch. 2 reveals important nuances regarding the provisions on criminal sanctions and procedures in light of the notion of penal moderation.

While both countries' provisions on criminal sanctions rely on a two-track system that distinguishes between penalties and preventive measures, this differentiation is stronger and

better established in Germany. Having been abolished as a category by the new *Code pénal* in 1994, preventive measures have only recently made their official return to French criminal law. Penalties in both countries can serve multiple functions, but they are nonetheless always based on an offender's guilt and wrongdoing. Both countries use imprisonment and fines as their main penalties. However, in France, especially, the idea of the individualization of punishment following the ideas of the new social defence movement is mirrored in a vast array of alternative and complementary non-custodial measures with educational or therapeutic intentions. German criminal law has many similar measures which by contrast do not serve as stand-alone punishments, but rather as accompanying directives and obligations for suspended prison sentences or in cases of conditional early release. These and many more possibilities to modify the execution of a prison sentence also exist in the French system.

In both countries, there are preventive measures that do not have a person's culpability as a necessary precondition but focus on an assumed dangerousness and seek to prevent recidivism. They include custodial as well as non-custodial measures and range from a focus on surveillance and security to measures with a more therapeutic approach. Both systems provide for a measure of secure preventive detention aimed at offenders who are considered to be very dangerous even after their prison sentence has expired.

So, the comparative analysis of criminal sanctions law shows that a similarly multifaceted and multi-functional understanding of state reactions to criminal behaviour prevails in both countries, with tailor-made measures that are based on ideas of retribution and rehabilitation and a strong security orientation.

Concerning the ideal pathway from the infraction to the sanction, the law of criminal procedure, we also find a lot of similarities in the grand structures and important differences in the details.

The similarities were to be expected because the French laws on procedure from Napoleonic times were the model for the German Code of Criminal Procedure of 1877. Since then, there were a lot of changes. While in Germany, the institution of the investigating judge and proper jury courts were abolished, these features have been retained in France until today. Also in France, there is the possibility for an appeal (factual and legal error) for all first instance judgements, while in Germany for the most serious cases, there is only a review of errors of law. This means that there are more safeguards for the most serious cases in France which could lead to more cautious sentencing. In the area of minor and medium criminality, both countries have a range of summary written procedures and speedy trials in order to cope with the vast amount of input into the system. Even though Germany copied e.g., the penal order which is a written procedure for minor crimes and also has an accelerated procedure that shares many features with the infamous *comparution immédiate*, the effects of the differences in the details are massive (see below). In Germany, for both the written penal order and the accelerated proceedings with a hearing, the maximum penalty is one year of imprisonment. In France, there is a sanction gap between the penal order with only non-custodial sanctions and the *comparution immédiate* that can be used for almost all misdemeanours and thus has a maximum penalty of ten years of imprisonment. In addition, the fine as a principal punishment in France is designed as a lump sum which makes it more difficult to handle than the day fine in Germany. Concerning the system of criminal law, this means that there are far less safeguards for the bulk of the cases of less serious crime and less time to take into account the personal situation of the accused persons. For the large variety of community measures in the French system of sanctions, this is a disadvantage because they are designed precisely for less serious offences but require time for the investigation of the personal situation of the defendant.

In our analysis of the evolution of criminal legislation (Ch. 6.3), we find abundant and continuous legislative activity over the past 25 years and a clear indication of legislative

punitiveness. From 1995 onwards, France and Germany each adopted more than 100 laws amending the criminal codes. In France, these laws resulted in nearly twice as many changes as in Germany. The vast majority of these legislative changes made criminal law more repressive and can therefore be categorized as punitive. Contrary to most expectations, the political orientation of governments does not seem to have a direct impact on legislative activity: specific political parties in power have no notable immediate influence either on the quantity or the degree of punitiveness of the analysed adopted criminal laws.

In both countries, during the period studied, there are no signs of a punitive turn as such, though. Despite strong fluctuations, a rather stable preference for more punitive provisions emerges instead. In France, this goes hand in hand with a slight overall increase in legislative activity, due to a growing investment in matters of law and order within the political game as we have seen in our own research on media and politics.

However, it is necessary to clarify what is meant by “punitive”. This term was operationalized for this endeavour as meaning an expansion of the state’s punitive courses of action and a subsequent curtailment of individuals’ rights when compared with the prior version of the law. Interestingly, the standard legislative change does not consist in an increase in penalties for a particular offence as the archetype of legislative punitiveness. Hence, there is no clear tendency for a net-deepening of criminal law. Punitiveness is marked rather by an expansion of the elements defining an existing offence to include more forms of behaviour in both countries and thus a trend of net-widening. Although there are examples of decriminalization or limitation of criminal liability, these are extremely rare. Moreover, in both countries, nearly 20 to 25 percent of all legislative modifications change general provisions for criminal sanctions, i.e., change or (re-)define the nature, the content and the applicability of criminal sanctions. This indicates that

the nature of punishment and the adequacy of certain criminal sanctions is strongly and almost consistently contested.

But what about developments in the field of penal practice (Ch. 3)? Penal practices do not necessarily evolve in parallel with legislative provisions and the French and German situations are very good examples of this. The comparison shows that even in international research, the effort to analyse more than just the prison population rates and to look at longer periods of time is worth the while. The initial input into the criminal justice system as documented in the police statistics rose steeply from our point of departure in 1970 until the mid-1990s in both countries when the number of registered cases per 100,000 of the population started to meander for some time and then to decline until in France, it reached a plateau around 2010 with about 5,500 cases per 100,000 residents. In Germany, the decline – apart from a bump in 2015/2016, still continues (2020: 6,400 cases). Interestingly, the development of the number of convictions per 100,000 of the population has developed in the opposite direction in both countries with a steady decline since the late 1970s with about 850 per 100,000 residents in 2019. This means that the two criminal justice systems use the filtering mechanisms at the stage of prosecution more and more to cope with the massive input from the police. When it comes to a conviction, though, the default option in France is still a – short and suspended – prison sentence while the many community sanctions play a very minor role in the outcome of trials. In Germany on the other hand, the vast majority of convicts receive a fine. For this outcome, the speedy trial options are important: in France, the convergence of the *comparution immédiate* and the design of fines as a lump sum create a legal situation that goes counter to the design of the sanctions system.

Concerning the prison population rate (prisoners per 100,000 residents), the German and French rates have remained far lower than the rates in the U. S. and the UK (or rather England and Wales). According to the World Prison Brief, the rates in 2018 (before the Covid-19 pandemic) were 642 in the United States, 140 in England and Wales, 77 in Germany and 114 in France (including overseas territories). Although this difference has been highlighted in English-language publications of the past 20 years, it is only true with reference to the long-standing tradition of high prison population rates in the U. S. Also, it does not mean that the rates in France and Germany have not evolved over time – quite the contrary. Over the past 50 years, French statistics show a slow but steady increase from a low of 49 in 1975 to 107 in 2018 for France Métro. Since 2000, the absolute number of prisoners has risen from about 50,000 to about 70,000 (before the pandemic). Thus, the prison population has in fact been growing both in absolute and relative terms for over half a century, and while a real, sharp turn can be observed in the five years after 2000, this only compensated a sharp fall in the five years before. In Germany, it is a slightly different story. The long-term evolution of prison population rates since the 1970s was marked by ups and downs in West Germany, fluctuating between 70 and 93 in the 1970s and 1980s, then registering a steep increase in the 1990s following reunification until 2004 with a rate of 98 for the whole country. Since then, the rate has decreased, reaching a plateau of around 78 before the pandemic. Contrary to France, the absolute numbers dropped by about 20,000 between 2004 and 2018, from 80,000 to 60,000.

Visions of crime and punishment

Do the social representations of crime and punishment indicate a shared and moderate public opinion in France and Germany? We investigated this among the population as well as judges

and prosecutors with a quantitative survey on how they would punish and with qualitative interviews with persons from the general population on why they would use specific punishments.

The results for different types of questions in the population survey (Ch. 5.1) seem inconsistent. For more general questions, there are strong demographic and ideological differences between the German and French populations. This is true e.g., for the death penalty question. While two-thirds of the German population are against reintroducing the death penalty, nearly 60 percent of French respondents are leaning towards this. French and Germans' opinions also clearly differ concerning the purposes of punishment. In France, retribution is most often named as the prime aim of punishment (25 percent of respondents), while the Germans, whose system considers retribution as a starting point, think first of protecting society (33 percent) and thus lend a preventive value to criminal convictions. In both countries though, rehabilitation is rather an also-ran. But these penal philosophy attitudes are somewhat disconnected from the actual decisions about sanctions for specific criminal acts in our vignettes where French and Germans mostly converge.

First, the distribution of sentences is very homogeneous across the two populations with the majority usually opting for the same sentence. Secondly, in most of the cases, opinions within both countries are split: responses are in most cases spread over the whole range of sanctions, from community work, fines and probation to unsuspended imprisonment. This shows that criminal matters overall do not generate a consensus, be it punitive or lenient. But contrary to what the findings to the general questions about punishment suggest, a significant proportion of Germans and French are committed to probation or community work, or even to therapeutic obligations or no sanction at all. Interestingly, the highest level of severity is displayed by both

Germans and French when dealing with the traffic offence vignette. This result certainly has more to do with the person who is stopped by the police while driving under the influence of alcohol than with the offence itself. The offender is portrayed as an ex-convict who had previously been sentenced to five years of imprisonment for assault, and surprisingly makes two thirds of the respondents opt in this case for a prison sentence for drunk driving. Thus, a common figure of the outcast emerges for the first time: a violent, formerly incarcerated person. When compared to judges and prosecutors, French and German members of the public are not more severe than the professionals. Still, there are differences between the countries. Like their non-specialist compatriots and the German public, French criminal justice professionals make wide use of all sentences and measures. Their choices are very wide-ranging and neither more nor less punitive, in most cases, than those of the French population. The case of the German professionals is different because professionals most often use only two punishments – fines and imprisonment (albeit on probation), the only two main penalties of the German Criminal Code. Beyond these general observations, the public expresses very clear punitive attitudes towards certain people (former prisoners or recidivists) or certain crimes (domestic violence and tax fraud).

For the qualitative part of the study (Ch. 5.2), we used Languin et al.'s (2004) distinction of attitudes towards crime and punishment (prospectivism, contractualism, ostracism) as a template. This approach shows that one of the main drivers of penal temperance among interviewees is the fact that the vast majority operate inductively: they reason on a case-by-case basis. This is an element of temperance insofar as the sentence is not derived schematically from criminal law, a moral code, or any other categorical principle, but from a detailed examination of the offender's motives and personality, and of the seriousness of the damage.

Contrary to this type of reasoning is the application of mandatory sentences or sentencing guidelines, which are known to be vectors of penal severity.

However, this detailed inductive examination of the acts and persons involved also considers the various theories of the purpose of punishment. In many cases, German and French interviewees assess the comparative advantages of the contractualist and prospectivist perspectives in relation to the case under consideration in their reasoning – and on rare occasions the ostracist perspective. But the casuistic examination also does not exclude *a priori* the punitive solution. It is part of the systematic examination of several principles of sentencing, which in the end still leads to temperance.

Nonetheless, there are phenomena that cause outrage, in which case respondents lose the sense for individualization and show ostracism. The argumentation in these cases recalls the concept of bifurcation in penal matters. The triggers are some very specific behaviours: among our vignettes, rape and a preparatory act of terrorism where no harm was caused; or a mix of behaviour and penal stigma, like the ex-prisoner stopped for drunk driving. It seems that how people react to certain crimes depends on how that field of criminality has been framed in politics and the media (see also below). We see this in the more punitive attitudes of French respondents towards the drunk driving case and the domestic violence case. Both offence categories were much debated in the French media and the political sphere. Still, this bifurcation is limited in scope. We see no trace of an overall argument that would make offences against physical integrity an area where the principle of balanced and individualized sentencing does not apply. Finally, penal temperance mainly shows in the way that interviewees talk about imprisonment. Even those who view imprisonment as a desirable punitive and retributive sentence take into account the damage caused by this to the individual and his or her ability to

re-integrate into society, and they try to mitigate this by other measures. Some even view prison as the place for therapeutic intervention.

Politics

The second societal field, the political sphere, is represented in our analysis by politicians. Inspired by the idea that crime has become, at least in the United States, a tool of government, we wanted to know what the situation was like in Germany and France. Therefore, we investigated whether working on penal policy and security issues boosts political careers (Ch. 6.1) and interviewed parliamentarians in Germany and France about the way they deal with these issues in their parties and parliaments (Ch. 6.2).

The biographical analysis of politicians in the highest offices in France and Germany did not confirm the hypothesis that law-and-order issues are political career-boosters in these two countries – it is rather the opposite. In both countries, most political actors who became ministers of justice and of the interior had studied law. However, this is not significant since studying law is a very common path for political actors in general. Retracing the political use of law-and-order issues within parties and in public discourse is more helpful in understanding how punitive positions may become a political resource for individual actors. In France and Germany, some actors did address such issues before and during their ministerial term. But in most cases, this was not sufficient to access the highest political positions. Positions in the party and in Germany also the specific arithmetic of forming a coalition government as well as having a prior government position in a different field or on the state level are far more important in determining a political career at the national/federal level than addressing law-and-order issues. Examples from Germany are Social-Democrat Gerhard Schröder and Conservative Horst

Seehofer who indeed had argued for law and order before holding positions in the federal government, but more importantly were in the leadership of their parties and ministers-president of a state. Most actors in France who held ministerial positions, or even reached the head of the executive, had not specialized in law-and-order issues, even in most recent decades, with the exceptions of Conservative Nicolas Sarkozy (Minister of the Interior 2002-2007, then President) and Socialist Manuel Valls (Minister of the Interior from 2012, then Prime Minister in 2014), who then faced a series of political defeats and have since withdrawn from political life. In short, the appointment of a minister or head of government depends mainly on the accumulation of political resources rather than on specific expertise in law-and-order issues.

When asked about the place of crime and punishment issues in their work, both within the party and in parliament, French and German members of parliament perceive crime as less central than their counterparts in Anglo-American countries: they deny that these topics are a priority in political work on the national level. Based on the interviews with politicians, we identified a common model of (parliamentary) governance of crime in France and Germany which relies on a willingness to rationalize criminal justice, on the perpetuation of the ideal of rehabilitation, and at the same time on the temptation to be tough on crime. The representations of crime and punishment shared by French and German MPs continue to be marked by a balance between different penal philosophies.

Still, politicians are obviously more open in their opinions than in their actions. They feel bound by voters' expectations, the party line and current cases that they feel need to be addressed immediately. In fact, a shared belief among MPs is the perception of a constant punitive demand from the population. This perception is based on the media or more precisely on what politicians

believe the media reflect – even though the public and the (print) media do not display strong and clear law-and-order stances.

In both countries, there is an overall perception among MPs that there is an increase in symbolic laws in criminal matters, i.e., in the strategic use of criminal legislation in order to satisfy the alleged public demand for more harshness and to be seen as acting on it. They assume that people fear crime and therefore have punitive expectations, which are translated by the executive into draft laws with more punitive stances. Their labelling of such legislation as “symbolic laws” – having little consequence on how criminal justice actually performs – reflects their disapproval of what they consider as a change in their legislative work and almost an abuse of the power of the legislative, since it allegedly only produces more paper, not more security. In France, in particular, MPs are very aware that legislative changes are not backed by the financial means for their implementation.

As far as party programs and political competition are concerned, a clear moderating factor is the multi-party competition in both countries in contrast to the (mainly) two-party systems in the U. S. and the UK. The presence of green and radical left parties (*La France Insoumise* and *Die Linke*, respectively) in the French and German parliaments helps to maintain political forces favouring rehabilitative positions on crime and human rights. Interestingly, while these party positions mirror the views of the green electorate, they are not shared by the electorate of the radical left. However, these issues being of secondary importance for their parties and their voters, radical-left MPs feel no incentive to relinquish their liberal positions. The main conservative parties clearly diverge as far as criminal justice matters are concerned. In Germany, an overall homogenization within the Great Coalition under Angela Merkel (conservatives and social-democrats) during the time of data collection tended to moderate any

temptation toward further polarization of the political competition and of the implementation of public policies – including criminal policies. In France, by contrast, the conservative party traditionally offers more punitive attitudes and political responses towards crime, though according to many MPs, it has since departed from this tendency in the wake of former president Nicolas Sarkozy's fate. He promoted the focus on these issues and made extensive use of crime news to push legislative changes. His defeat in 2012 appeared to our interviewees as a sign that such positions can offer short-term benefits, but do not secure power in the long run, a finding which is consistent with the results of our career analysis.

The Media

The structure of media systems does not cut across the divide between continental Europe and the Anglo-American western world. France and Germany have different types of systems: a polarized pluralist model in which articles do not always separate facts and comments and place greater emphasis on confronting ideas (France) versus a democratic corporatist model with a strict separation of facts and commentary, and consensual journalistic writing (Germany), which are both opposed to the liberal U. S./UK model (Ch. 7.1).

The quantitative analysis of headlines (Ch. 7.2) included daily quality newspapers in France (*Le Monde*, *Le Figaro*) and Germany (FAZ – *Frankfurter Allgemeine Zeitung*, SZ – *Süddeutsche Zeitung*) from 1971 to 2017. The first lesson is, as expected, the low level (less than 10 percent) of coverage of crime news in the quality press. However, since 2007, crime news has increased significantly on the front pages: it is two to four times more frequent in *Le Monde* and FAZ than in the early 1970s, twice as frequent in the SZ. Thus, without being predominant and contributing to any punitive turn, this new interest in crime news testifies to

the tabloidization of these newspapers which target an educated readership from the upper strata of both societies.

A more detailed analysis of the nature of offences mentioned in the quality press shows that the main forms are offences against national security (30 to 40 percent). Over the long term, property offences make the front pages of the quality press in Germany very seldom, but far more frequently in France (1 percent vs. 15 percent). Since these differences are not mirrored in crime statistics, this suggests the greater permeability of the French press to tabloidization. That said, the comparatively high coverage of sexual offences in headlines in France (6.5 percent vs. 1 percent in Germany) is undoubtedly due to the importance of domestic violence in legislative discussions, but also to the mobilisation of journalists in newsrooms in the wake of the #MeToo movement. In this case, the coverage of crime news by the quality press demonstrates above all an awareness of the (gendered) power relations in society rather than an attraction to the sordid nature of sexual crime.

For the shorter period of 2007-2017, we included the popular or tabloid press in our sample (*Bild* in Germany, *20-Minutes* and *Le Parisien* in France) as well as more quality titles (*Die Welt* and *Die Taz* in Germany, *Libération* in France). Broadening the spectrum confirms that France is more open to crime and punishment topics than Germany, even when the notorious *Bild* is included in the sample: these topics occupy 16 percent of the front pages in France and only 10 percent in Germany. Moreover, in some years, the quality press in France covers these themes even more often than *Bild*, while some popular press titles, such as *20-Minutes*, pay only little attention to the same issues. Crime and punishment topics, while still far from dominating the quality press in France and Germany, are certainly occupying an increasingly significant share of news coverage. In headlines about violence and crime, considerable space

is given to concerns about political violence, terrorist violence, and state security. Even when it comes to ordinary crime, our findings question the role of the popular press as a driver of the agenda. This highlights the value of more in-depth analyses of press coverage, including the role of investigative journalism, which is more important in France and often focuses on police investigations, or the role of political framing of news, as can be recently seen with the #Metoo movement.

In interviews with journalists and managers of the printed press and broadcast media (Ch. 7.3), we revealed a unanimous evaluation of their domestic criminal justice systems: too slow, too poor, too inefficient. This is independent of the kind of the media, its editorial line, its thematic specialization or even its main or frequent sources of primary information. It is worth noting that while the tone of the criticism expressed towards the criminal justice system is negative for all German journalists we interviewed, the opinions of French journalists are more diverse and strongly influenced by their sources. Journalists who mainly talk to the police are prone to hint at judges' alleged leniency and lack of common sense in sentencing; those dealing with courts and judges point out the meagre budget of justice administration in France to explain their critical perception of the functioning of the system. Therefore, the unanimity of the diagnoses does not imply any unanimity about the causes. Most editorial boards are indeed spaces for debate and contradiction as far as thematic framing is concerned. Punitiveness, harshness, or even the overall importance of crime issues are all far from building a consensus.

However, with the traditional media in crisis, the need to attract a loyal audience compels journalists from both quality and popular press to cover more crime stories, though our interviewees claim that they are responding to public demand on these topics. However, they almost unanimously stressed the importance of balanced reporting on crime in order to avoid

panic waves or support for radical political forces. In this, they resemble politicians *vis-a-vis* their electorate or the public in general – people are regarded as feeling insecure and having a tendency towards punitiveness and harsh reactions to crime, so they need to be educated and calmed down.

In addition, for most of the German journalists, the tabloid *Bild* serves as a counterexample that helps to keep the attraction for gore under control. They still do not consider crime topics as noble or a priority because they consider them as mere ‘faits divers’ or ‘miscellaneous’ individual stories which contribute nothing to the public debate. Here, we see a noteworthy difference between Germany and France. French journalists have more promising career prospects when specializing in these issues because crime is rarely sold as such but integrated into larger framings with societal implications. In Germany, by contrast, no correlation between a specialization in crime issues and a successful career is assumed – other than at *Bild*. Meanwhile, in both countries, quality media are lowering their standards of selection when it comes to *faits divers* for mainly commercial reasons. Popular media, which are historically more inclined to publish *faits divers* are benefiting from this legitimization and turning their editorial line – traditionally held in low esteem – into a new type of expertise. In conclusion, the media in our two countries today, under constant pressure from online resources, demonstrate a genuine capacity to resist the temptation to sell out their traditions and editorial choices and to take an editorial punitive turn.

Strained Restraint and Bifurcation in the Moderation

In this second part of our conclusion, we outline what, in our view, defines penal restraint as it can be observed on the western European continent. We then return to the 'ambivalence' which,

according to Loader (2010), characterizes penal restraint in essence, and to the tensions that are exerted on this restraint. In this context, the notable differences between the two countries, and in particular the more punitive course in France, show that the notion of 'bifurcation', developed some forty years ago by Bottoms (1977, 88), well describes the ambivalence of penal restraint that we observed in France and Germany. But this bifurcation or these ambivalences are undoubtedly distinctive on the Continent in that they do not lead to a general hysterization of penal policies, nor to the birth of an extensive “criminal law of the enemy”, to use the terms of a penal theory popularized by the German criminal law professor Günther Jakobs (Krasmann 2018), meaning a special law without the general legal boundaries that is applied to particular categories of the population. In Continental Europe, the “really serious offenders” – to use Bottoms’ term – or the “other” (Garland 2001, 133), may be subject to closer supervision and harsher sentences, but they are not banished from society. In a landscape of relative moderation, even the marks of excess are themselves still moderate.

Penal Restraint as a Persistent Feature on the Continent

In accordance with the expectations of the international literature, our in-depth study of German and French societies shows that there is a certain inclination towards penal moderation on the Western European continent. After further highlighting this, we will show what dynamics produce this moderation.

Where do we see Penal Moderation?

What unites journalists, parliamentarians and citizens in France and Germany is a consistently high or even priority consideration for the following dimensions. Firstly, the criminal act is examined with the classic lenses of modern penality, those that predate the “new penology” era

(Feeley and Simon 1992), the era of “managerial modernity” (Cavadino and Dignan 2006) and that of “the criminology of the other” which focuses on the “the threatening outcast, the fearsome stranger, the excluded and the embittered” (Garland 2001, 137). The latter positions are, in the eyes of colleagues writing about the U. S. or the UK, some of the main driving forces of the punitive turn they find at home. In Western Continental Europe, the criminal act is in contrast usually not associated with “aggregative categories of deviants” (Cavadino and Dignan 2006), but rather, as in classical penology, it is regarded with a strong concern for the individualization of the sentence and the examination of the individual. This concern often refuses to reduce the individual to a pathological impulse or trait, which would exclude them from the human community and expose them to a brutal deprivation of their basic rights. The offender is still the object of a diagnostic concern on the part of citizens, parliamentarians, and journalists. Moreover, this diagnosis is not made according to an actuarial process centred exclusively on the evaluation of individual risk, but is complemented by a holistic, and often social, explanation of the commission of the act. Secondly, the sentence is generally considered as a tool for rehabilitation and prison is seen as the last resort, in view of the costly ineffectiveness attributed to it by our interviewees. Finally, few respondents approached these questions from a pre-established philosophy or personal conviction, which would articulate general principles (punitive or minimalist) *in abstracto* that would have to be applied to all the acts observed.

With regard to the population, our mixed methods have made it possible to identify an everyday penal rationality (Pires 1998; Cauchie and Kaminski 2007), centred on the individualization of the sentence, the adjustment of the sentence to the seriousness of the act, the personality of the offender, the social consequences of their act and the risk of re-offending. On the other hand, a simple opinion poll of judges and citizens shows that the latter are not more punitive than the former, even though they consider justice to be too lax. This does not prevent them from opting

for sometimes excessively severe sentences or calls for therapies or treatments that are hardly compatible with respect for human dignity. But these harsh judgements (to which we will return below) do not conceal that the bedrock of penal moderation that lies at the core the French and German citizens' attitudes is yet unshaken.

With regard to politicians, the role of parliaments where the law is debated, written down and adopted, should be reconsidered. Firstly, they have the capacity to mitigate the hysterization of penal issues that is essentially generated by the executive. Secondly, there is the protective role of the justice committees in the parliaments, recalling the moderation principles of criminal law and procedure such as the search for alternatives to custody, the principle of parsimony of sentence options provided by the law and the individualization of sentences. The “governing through crime” hypothesis is deeply questioned by the actors themselves and in Germany in particular, by the analysis of the influence of issues of crime and punishment on the upward career mobility of top-level politicians. Many parliamentarians have demonstrated a respectful approach to the classic function of the law – which is to define the overall rules concerning crime, penalties, procedures, and the organization of the criminal justice system – and a mistrust of the symbolic role of the law – which is to use the criminal law for other means. This is either due to a deep-rooted conviction or to the certainty that the State, with its limited resources (particularly in France), would not have the means to implement a punitive law in practice. At first sight, this result is not entirely compatible with the analysis of the trend in legislative production in the two countries, which shows a constant (in Germany) or increasing (in France) production of more criminal law. We will come back to this, as this net-widening is often accompanied by temperance mechanisms introduced by parliamentarians and seems to be an often more symbolic dealing with crime issues that are discussed in public.

With regard to the media, the professional ethics embedded in Germany according to which journalists contribute to the moral and civic education of their fellow citizens and participate in

the stability of institutions, are to a large extent not foreign to French journalists either. Ethical standards still appear strong in both countries and help to cool down hysterical tendencies and inclinations for punitiveness. These ethical rules are particularly deep-rooted in Germany because, apart from the formal prescriptions engraved in the occupational culture strongly activated after the fall of the Nazi regime (the *Pressekodex*), the bad example of the *Bild-Zeitung* serves as a reminder to its competitors of the rules of good conduct. This contradicts the international literature on the punitive effects of the tabloid press. Our attention to journalistic practices and to the sociology of decision-making in newsrooms provides empirical evidence that contrasts with an international literature that is mainly focused on content. Thus, in addition to laudatory reports on the actions of police officers against crime, there are articles in which journalists explain to readers and listeners the legal and organizational logic behind decisions not to convict, to postpone, to continue investigations, etc. The logics of headlines were also taken into account, which led us to consider the editorial frameworks of crime or criminal justice news. This is usually not the case in comparative criminology which focuses solely on the decontextualized end product. As a matter of fact, the media-driven hypothesis of punishment is sustainable neither in France nor in Germany. All this should not distract from the fact that the rise of the online press and of social networks is putting the media under pressure (see also Ruffio and Hubé 2022; see also below).

The Dynamics of Maintaining Moderation: Interactions Between the Three Spheres

The movements observed in each sphere are not without ambivalence and tension. In this respect, it would be inaccurate to go as far as David Greenberg did some twenty years ago and say that everything we have observed is strictly in line with "corporatist and social-democratic countries", supposed to be "lenient in their penalty", "generous and supportive in other aspects of their social policies" and displaying "a high degree of empathic ideology and concern for the

well-being of others” (quoted after Cavadino and Dignan 2006, 28). Indeed, we have just mentioned many contradictions. People often express (especially in France) general opinions that call for greater severity and even while they are rather moderate when asked to judge concrete cases, prison sentences seem to be preferred in certain cases (mainly recidivism, sexual offences or, in France, domestic violence). Parliamentarians sincerely ascribe to themselves the task of moderating the passions they attribute to public opinion, but they have continued to inflate the German and French penal codes with new rules over the past 25 years, thus widening the penal net. Many journalists also see themselves as educators of the nation, but a persistent process of tabloidization of the quality press is undeniable, especially in France, and both social media influence and the “web-first pressure” are strong.

Our analyses show that it is precisely in these contradictions where the restraining force of the continental criminal justice system lies. Convinced that the other side is calling for more and more repression, each side feels it has a tempering role. Journalists and politicians are convinced that their readers and constituents are demanding ever more punishment, so journalists and politicians strive to offer them articles and laws that consist of more or less stable balances between a symbolic aim that can respond to social demand (as they see it) and an instrumental aim that can keep the symbolic function within the agreed limits of penal welfarism. Considered together in a configurational analysis inspired by Norbert Elias (see Ch. 1), these spheres of society produce a “configuration of moderation” which, of course, is not a production of minimalism, but rather a shifting and sometimes unstable equilibrium between the more and the less, to use Hayes’ (2019, 14) definition of penal moderation, as distinguished from penal minimalism.

There are two salient expressions of this temperate pattern. When thinking aloud with the interviewer about the appropriate punishment, people very rarely resort to examples from events recently dealt with by the media. The crime news that occupies so many column inches,

but also the articles by academics who want to document the punitive turn, occupy only a limited space in the penal rationality of the people. Parliamentarians, for their part, often share the conviction that their constituents expect a sharp penal response to crime and insecurity. But a significant number of them point out that it is not the fear of crime, but the fear of social insecurity (inflation, cost of living, employment, ...) that are at the heart of most of their voters' concerns. And many believe that it is not the law that should respond to people's security concerns but the local mayor and their administration, thus protecting the law from the assumed punitiveness that they attribute to people.

If we add to this:

- the fact that the first concern of the Germans and the French is never crime (except for brief and quickly closed conjunctures), but poverty or unemployment,
 - that even a weak constitutional justice system, as in France, is in reality coupled with a strong European human rights regime, at the heart of Snacken's "resisting punitiveness" argument (2010; see also Cliquennois 2021, 34),
 - that prison retains, in public opinion as well as among politicians and journalists, the stigma of being an institution that produces delinquency rather than an institution of rehabilitation (Salle 2009);
 - that in these three spheres, there are strong reactions not only to crime but also to the tragedies of prison overcrowding or, especially in France, to the abuse of force by the police (even if not all the actors in these spheres react to the same themes), and
 - that the budgetary capacities of the states, particularly in France, do not allow for the development of a prison archipelago comparable to that which has developed in the U. S.,
- then Continental Europe remains, at least in its Western part, a place of penal moderation. This does not mean that this dynamic of moderation is unequivocal, as we have seen sufficiently in the book, noting in particular the numerous ambivalences of people, politicians or journalists

in the expression of what a just sentence is. It is therefore necessary to return to this last point: what is the meaning of the numerous expressions of penal excess?

Ambivalence and Bifurcation

In 2010, the British journal *Theoretical Criminology* published a special issue on 'reinventing penal parsimony' (Bosworth 2010). One of the authors, Ian Loader, defines the notion of 'penal moderation' as being based on the three pillars of 'restraint, parsimony and dignity'. However, he points out that the concept is somehow never pure. It is in fact dual or, in his words, 'ambivalent':

“The idea of penal moderation operates, first and foremost, in and upon public culture where it seeks to inculcate a sense of restraint in how English society talks about and delivers punishment. In doing so, it connects with and builds upon, the moral ambivalence that many citizens feel towards punishing (...). Punishment is capable of evoking anger, resentment and a passionate desire to inflict harm on the criminal wrongdoer (...). But punishment also calls forth feelings of shame, regret and forgiveness, invoking responses that view prison as futile and seek repair and reconciliation.” (Loader 2010, 353).

While our research has brought to light a continent of penal moderation exemplified by the two countries under study, it has also revealed numerous islands, or even sub-continent, of intolerance and a desire for vengeance or suffering. If, as Loader suggests, penal restraint is the fragile product of a compromise between opposing sentiments, a 'penal imaginary' (Bosworth 2010, 252) between reason and passion, then everything we have observed in our research appears to be a perfect illustration of this.

Citizens asked to decide about sentencing are generally moderate, but the same survey shows clear expressions of punitiveness, shared by the majority of respondents in both countries. The

case that elicits the highest prevalence of the imprisonment option is the case of drunk driving: almost 60 percent of the respondents want to punish the offender with a prison sentence. But this, as we have seen, was only because the defendant had already been sentenced to three years' imprisonment for a violent offence several years earlier, and despite him having been released early after serving only 22 months – something which, for criminal justice professionals, would have been considered a rather good sign (Chap. 5.1). Referring to Garland's (2001, 181) assessment of the vanishing figure of the 'ex-offender' in the U. S. and the UK (where "there is no such thing as an 'ex-offender'"), in France and Germany, there seems to be no such thing as an 'ex-prisoner'. For most of the respondents, the 'ex-prisoner' certainly belongs in prison if he catches the attention of the criminal justice system again, whatever the reason.

This clear sign of “ambivalence”, or in the words of Loader, of “anger, resentment and a passionate desire to inflict harm” hints at the prevalence or the persistence, among the people, of strong punitiveness beneath an overall climate of moderation. In France and Germany, it seems, this desire to punish is aimed at a former prisoner, not a former offender, which suggests a more restrained punitivity in Europe than in the U. S. or the UK, where it is aimed, apparently, at all ex-offenders.

All these expressions of ambivalence suggest a strong case for a vivid “bifurcation” in France and Germany, as if what Bottoms described already 45 years ago is still flourishing on the Western European Continent:

“put crudely, this bifurcation is between, on the one hand, the so-called ‘really serious offender’ for whom very tough measures are typically advocated; and on

the other hand, the ‘ordinary’ offender for whom, it is felt, we can afford to take a much more lenient line” (Bottoms 1977, 88).

Moreover, we also find numerous examples of ambivalences and tensions in our two other spheres of investigation, so bifurcation is definitely at work in continental Europe.

Where, then, does the difference with liberal or common law democracies come from? What remains of the supposed distinctiveness of continental Europe? What, ultimately, constitutes this difference? Our argument is that while this bifurcation eventually led to the punitive turn in common law countries or coincided with it, it has not driven continental Europe off the main pathway of moderation.

A Strained Restraint: a Moderate way of Bifurcation

A crucial finding about German and French societies is that more and more laws have been passed in the criminal field over the past 25 years. These laws, in most cases, do not increase the penalties, but they expand criminalisation, punish more behaviours than before, and thus widen the penal net. But in neither of the two societies has this legislative over-activity led to what might be called a loss of control over the penal system. We might even say that this legislative passion has never had a lasting impact on the activity of the penal system, at least if the prison population rate is anything to go by. In France, the growth of the prison population is indeed ongoing, but it has never reached U. S. nor even British levels. Besides, the link with legislative developments is perhaps not obvious: the prison population rate has been increasing since the mid-1970s, and not only since the increased interest of politics for law-and-order issues from the mid-1990s onwards. In Germany, the evolution of prison population rates is even stranger and decoupled from the activity of parliament. Certainly, it also rose constantly

from the 1990s onwards, but has decreased since the early 2000s, with no observable fading interest of the legislator for law-and-order issues. Also, the orders of magnitude are still quite distinct today, even if the most recent trends in England and Wales make the U. S. even more unique. The prison population rate in 2018 in the U. S. was almost five times that of England and Wales, almost six times that of France, and more than eight times that of Germany.

Certainly, a multi-factorial approach to punitiveness – taking into account the whole range of coercive measures, and not just the prison population rate – would provide a more accurate picture here. But if we stick to this universal indicator, our findings support the hypothesis of the strong autonomy of criminal justice systems, as already recognized by many others in comparative criminology (Lacey 2008; Lacey and Soskice 2013; Savelsberg 1994; Whitman 2003). On the policy side, parliamentarians are fully aware that criminal law has two faces: symbolic or rhetorical on the one hand, instrumental on the other. Quite often, parliamentarians who adopt a repressive law with a symbolic purpose especially in France include mechanisms that allow judges to override the punitive spirit of the law. Some examples illustrate this perfectly. When Nicolas Sarkozy introduced a form of mandatory sentencing into criminal law to foster punitiveness in sentencing, parliamentarians gave judges the option of not imposing these automatic sentences, provided they gave reasons for their decision. The amendment was adopted (law 2007-1198) and many judges seized the opportunity: two-thirds of them continued the long-lasting practice of giving sentences based on the person of the defendant and the circumstances of his or her crime, condemning the law to be under-implemented. Nonetheless, this mandatory sentencing when it *was* applied according to the spirit of the law still contributed to an increase in average prison sentences for crimes perpetrated by recidivists from 8.2 to 11 months, resulting annually in an additional 4,000 years of prison (Jean 2013). When François

Hollande defeated Nicolas Sarkozy in the race for the presidency, he expressed his wish to abolish this law, which had been opposed in parliament by the Socialist Party he was then leading. After his election, the newly appointed Minister of Justice Christine Taubira formed a so-called “consensus conference”, a model of decision-making usually set up in order to reach an overwhelming consensus in scientific, mostly medical, communities (Lazerges 2013). Under the head of the former Belgian Vice President of the European Court of Human Rights, Françoise Tulkens, this conference comprised five academics from France, Belgium, Switzerland, and Canada, three members of NGOs, 12 professionals, and two mayors. The conference recommended that the minimum sentences should be “abolished”, a recommendation which was implemented under President Hollande the following year (law 2014-896).

This process is a clear example of 'policy history' (Tonry 2001, 531) where, as if in a parable of continental restraint, the attempt to import a policy from the United States is rejected: first by two thirds of professionals, then by politicians. But even the policymakers preferred to base their decision on an 'institutionalization of knowledge production' (Savelsberg 1994, 927), setting up a conference chaired by the very embodiment of the notion of 'resisting punitiveness in Europe', a former vice president of the European Court of Human Rights, and in which the place of elected representatives was limited to the bare minimum, to the great benefit of professionals and academics. Still, this movement also reflects the ambivalence of the notion of moderation: one third of the sentences handed down applied the law until its repeal, a sign that the professional field is divided on these issues.

On the German side, one is reminded of New Year's Eve 2015 in Cologne. What happened there? A large crowd of apparently mostly young men, described as “North-African” and

“Arab”, gathered on the square between the central station and the cathedral. They set off fireworks among the crowd, the atmosphere was described as aggressive and uninhibited. During the night, a growing number of complaints lodged by women reached the police, reporting thefts, verbal abuse as well as large scale sexual harassment. In total, the incident led to 1,200 complaints, 46 criminal trials and 33 convictions (Wolf and Bensch 2020). This was a major event in Germany and extremely significant in the public debate about sexual offenses, since it happened during the contentious policy led by Chancellor Angela Merkel of opening the country’s borders to Syrian refugees, but also against the backdrop of the #MeToo movement against sexual harassment. At the same time, an official committee commissioned by the Federal Ministry of Justice was reviewing the chapter of the Criminal Code dealing with offences against sexual self-determination, in response to the Council of Europe’s Istanbul Convention on Preventing and Combating Violence Against Women and Domestic Violence, which includes a specific provision considering any non-consensual sexual act as a punishable offence. Although rejected earlier by parts of the political sphere, this idea rapidly gained support after the Cologne incident and was included in the German Criminal Code. The event thus became significant in re-framing political debates and urged even the conservatives to adopt the implementation of the Istanbul Convention (Dietze 2019; Lembke 2020).

One could open a discussion here on the co-opting of women’s legal battles by conservatives and right-wing politicians to serve a racist and discriminatory agenda. For us though, the main point is the huge disproportion between the scale of the event and public debate – which deeply shook German society and resonated across Europe – and the not too big legal innovation that resulted from it. Two new offences were introduced into the Criminal Code one year later, in November 2016: sexual harassment by superficial physical contact (i.e., groping, s. 184i) and

being part of a group that crowds someone to commit sexual offences (s. 184j). One and a half years later, a regulation that somewhat resembles the German one on groping was adopted in France (art. 621-1 Code pénal; Gayet-Viaud and Dekker 2021). It consists of a new misdemeanour, the *outrage sexiste*, which criminalizes “cat-calling” (any behaviour with a sexual connotation like making noises, whistling, making comments about a person’s body, but also touching or following a person). Both in Germany and France, these laws are actually not implemented very effectively, mainly on the grounds that the criminal proceedings that would result are mostly seen by professionals as “unduly expensive, time-consuming, ineffective, inappropriate, or even simply unnecessary as a means of dealing with the low-level offending”, as expressed by Lacey and Zedner (2017, 69) regarding the situation in England. This does not mean that there is no change in that field. But it is contained and limited, to which the practice of the criminal justice system contributes.

Another example are the November 2015 attacks in Paris, where young men shot dead a hundred people in the Bataclan concert hall and others blew themselves up while mingling with people having a drink on the terraces of cafés. These events, the deadliest since the liberation of Paris in August 1944 from the German occupying forces, led to five laws establishing a state of emergency. In addition to these laws in 2015-2017, many politicians called for a law to be passed that would allow the establishment of camps or detention facilities to keep people under surveillance on the sole basis of suspicion. Such a provision had been implemented during the colonial war in Algeria between 1954 and 1962. But this time, Prime Minister Manuel Valls consulted the Council of State (the highest administrative court) to find out whether this solution was possible. The Council held that locking people up based on mere suspicion was contrary to fundamental rights, and the option was dropped. When in June 2016 two police

officers were gruesomely killed by an Islamic terrorist who had grown up in France, and a few weeks later, on July 14th, a Tunisian man drove a truck into the crowds gathered for the Bastille Day celebrations in Nice, the camp solution was not re-examined. Thus, penal institutions and, more broadly, institutions of confinement, remain in France under the tutelage of national or European human rights frameworks, which offer considerable resistance even in the context of crises of the greatest magnitude.

One of the major features of the response to terrorism lies in the fact that there was no Guantánamo, that never-ending extra-legal detention camp. The use of confinement has remained a prerogative of the judge, and the strictly penal consequences in contemporary France of the laws on the state of emergency remain very limited today (the "SILT" law of 31 October 2017), although a 2021 law provided for the extension of security detention measures to persons sentenced to at least five years' imprisonment for acts of terrorism and who are deemed to be "particularly dangerous" and present a "very high probability of reoffending" (Pugliese 2021). So far, the French Parliament has estimated that a total of 205 persons were subject to a special surveillance and control measure (restriction of freedom of movement) on account of suspicions of terrorism between the end of 2017 and the end of 2019, three quarters of them for a duration of less than six months (Sénat 2020, 35, 37).

If this moderation – which is more prevalent in criminal justice practice than in legislation and public opinion – is indeed marked by a deep ambivalence and is therefore distinguished from penal minimalism, and if it leads to processes of bifurcation, the continental singularity is undoubtedly that these processes of derogation from penal moderation are themselves caught up in a dynamic of moderation between the different spheres. The anticipation by policymakers, such as parliamentarians, and opinion-makers, such as journalists, of the reactions of a public

opinion that they fear to be excessive plays a central role in this 'configuration of moderation', (see Ch. 1). This dynamic feeds and is fed by the temperance produced by national constitutional jurisdictions and by the European human rights framework as already documented by Dumortier and Snacken. We contribute to this idea of high-level temperance the effect of the interaction and the anticipation games between public opinion, journalists, and political figures.

Conclusion: Crime and Democracy on the Continent

The starting point of this project was the ambition to work on a sociology of penal restraint as a response to requests in the literature by the most productive observers of 'liberal' countries like the United States. In his 2012 presidential address to the American Society of Criminology, David Garland (2013) stated that "America's distinctive combination of liberal democracy and penal intensity seems anomalous and poses an explanatory problem of some importance". This "prompts comparative questions that have not been adequately addressed (...) The more sophisticated studies leave us with something of a black box when it comes to demonstrating how penal law and policies are shaped, and how penal decisions are made". This is what we set out to do.

Behind the calls for international comparison (see also Tonry 2001), one can read profound doubts about the normative foundations of penal policies. Indeed, in this international literature haunted by U.S. prison population rates, a nostalgia for the 'good old days' of penal welfarism has been maintained by many academics who plead for a watertight separation of passions and reason: for penal policy to be "insulated" from media, political and public pressures or for sentencing guidelines stated by an independent body of experts "fulfilling the penal equivalent

of the Bank of England's Monetary Policy Committee" (Lacey 2008). Based on a vision in which penal excess is inextricably embedded into populism, where "politicians tap into, and use for their own purposes, what they believe to be the public's generally punitive stance" (Bottoms 1995: 40), the most contemporary aspect of the "governing through crime" process (Simon 2007). On the other hand, most of the international comparative research has so far shown that centralization of political authority (i.e., distance from local passions and resentments) and autonomous penal bureaucracies decisively contribute to mildness of punishment and a balanced penal policy (e.g., Braithwaite 2005; Downes 1988; Garland 2013; Lacey 2008; Pratt 2006; Savelsberg 1994; Tonry 2001; Whitman 2013).

In recent years, this academic consensus has been challenged by the "democratic underlabouring" described by Ian Loader and Richard Sparks, who argue that democracy can reveal an unexploited resource for a better penal policy and who reprimand their academic community for allegedly displaying a "discomfort with democracy" (Loader and Sparks 2011, 115). More recently, they argued again for democracy as a "too-long untapped resource for better penal policy" and claimed that academic thoughts on crime and punishment need to break with "the orthodoxy of insulating criminal justice from political control" (Dzur, Loader and Sparks 2016).

In contrast to the prophecy that a "wave of populism (is) sweeping across the advanced democracies in the Northern hemisphere" (Lacey 2019, 4), our research shows that this populism has not infected the field of crime and punishment in Western Continental Europe yet. Our research actually extends observations on the fundamental role of constitutional courts and bureaucracies in defending penal welfarism (Snacken 2010; Wenzelburger 2020), and it contributes to the discussion on the role of democracy by showing how the 'configuration of moderation' is also dependent on democracy and its institutions. Our work, which focused

mainly on public opinion, parliamentarians, and the media, shows that the idea of penal moderation is deeply rooted in these different spheres of society and is renegotiated every day in the interplay between these spheres. For example, vague fears of a disruption of the balance between passions and reason lead parliamentarians as well as journalists to worry that they could set in motion a dynamic of a rise to extremes and a loss of control over the fundamental balances of our democracies in criminal matters. In a game of anticipating the deleterious effects of one's actions or words on a public that is – wrongly – perceived as following only its passions when it comes to crime, the French and especially the German society perpetuate penal moderation in spite of the profound crises to which they have recently been exposed. Thus, our work, which looks at these societies that are somewhat neglected by international research, makes a major contribution to the potential role of democracy, media and politics in how societies deal with punishment and crime.

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