BETWEEN CONCEPTS AND CONTEXT: PROTECTION OF "PERSONAL FREEDOM"
A COMPARATIVE CASE STUDY OF GERMAN AND CANADIAN CRIMINAL LAW

by

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Abstract

Due to its pervasive affinity for conceptual abstractions, German criminal law has been said to suffer from a rationalist hubris that leads to the formulation of artificial rules and lacks respect for the realities of life.

The following study will examine this hypothesis with respect to one area of German criminal law that is particularly characterized by an abstract, conceptual way of thinking: the area of what in Germany is called “offences against personal freedom”.

A case where a store detective suggested to a 16 year old female shoplifter that he would abstain from making a larceny report to the police if she engaged in sexual intercourse with him has caused a lot of debate in German criminal law as to the question of whether the detective infringed the shoplifter’s “personal freedom” in a way prohibited by criminal law. This debate will be presented and contrasted with the approach Canadian criminal law would be likely to adopt had the case occurred in Canada.

The thesis adopts a comparative, analytical approach that focuses on law reform:

- comparative, because the question of whether German criminal law does lack respect for the realities of life will be examined by comparing German legal reasoning with Anglo-Canadian legal reasoning.
- analytical, because when exploring what German and Canadian law regarding “offences against personal freedom” is, the focus will be on familiar, formal techniques of legal reasoning, such as those which draw on legislative texts, legislative history, underlying principles, academic commentary, fundamental values in the constitution, and theoretical concerns.
- law reform, because the question is explored of whether German criminal law can learn from Canadian criminal law how to be more open to taking varying social locations of people affected by criminal law into account. In particular it is asked whether one can reconcile the traditional German conceptual approach that promises certainty of the law and the Canadian contextual approach that is better able to be attentive to equality as a fundamental right.

It will be argued that such a reconciliation of approaches is possible and consists in a method that might be called egalitarian conceptualism. This approach unites the advantages of conceptual, abstract legal reasoning with the advantages of contextual thinking by merging equality as a fundamental concept with the existing conceptual framework of criminal liability. The principle “in dubio pro aequalitate” will be added to the principle “in dubio pro libertate”.

Table of Contents

Abstract .................................................................................................................. ii

I. Introduction ......................................................................................................... 1

II. Conceptual Framework and Methodology ....................................................... 6

   1. Comparative Law .......................................................................................... 6
      a) Comparative criminal law .................................................................... 7
      b) Microcomparison or macrocomparison? ........................................... 8
      c) Normative comparison or problem comparison? ......................... 10
   2. Law Reform .................................................................................................. 12
   3. Analytical Positivism .................................................................................. 17

III. The “detective-case”: BGHSt 31, 195 ............................................................. 24

   1. The facts ...................................................................................................... 24
   2. In which way is “personal freedom” concerned in this case? ............ 25

IV. The German approach ....................................................................................... 26

   1. The provision dealing with this issue: § 240 StGB .................................. 26
      a) Exact wording ...................................................................................... 26
      b) Translation ......................................................................................... 27
   2. Historical background of the debate ......................................................... 27
      a) Proponents of the so-called “duty-test” ......................................... 28
      b) Opposing opinions ............................................................................ 31
   3. The decision in BGHSt 31, 195 ................................................................. 34
   4. Reactions among academics ...................................................................... 35
      a) Academics that criticize the decision and hold to the duty-test ... 35
      b) Opinions that, like the BGH, reject the duty-test ......................... 39
   5. Discussion .................................................................................................... 41
      a) The theory that requires a duty to act as necessary element for
         the threat with an omission under § 240 StGB ............................ 43
      b) The theories that do not require a duty to act for the threat with
         an omission to fulfil the definition of § 240 StGB ....................... 52
   6. Own solution ............................................................................................... 57
   7. Application of this solution to the case ................................................. 60

V. The Canadian approach .................................................................................. 64

   1. Sexual assault ............................................................................................ 65
a) The mens rea requirement of the attempt ........................................... 66
b) The actus reus of attempted sexual assault ....................................... 93
c) Result ............................................................................................... 98

2. Extortion ........................................................................................... 99
   a) The mens rea of the attempted extortion ....................................... 99
   b) Result ............................................................................................. 109

3. Intimidation ....................................................................................... 109

4. Uttering threats ................................................................................ 111

5. Sexual exploitation .......................................................................... 113

6. Result of the Canadian approach .................................................... 114

VI. Comparative legal reasoning: Germany and Canada ..................... 115

   1. Observable differences ................................................................. 117
      a) Conceptual reasoning vs. contextual reasoning ....................... 117
      b) Deductive reasoning vs. inductive reasoning ......................... 137
      c) Focus on certainty, clarity (the objective being the prevention of abuses by authorities) vs. focus on reasonable outcomes (the objective being the protection of the society against the social danger presented by the criminal's behaviour) ........................................... 145

   2. Similarity to the debate between mainstream legal scholarship and critical legal theory (especially feminist legal theory) ..................... 155

   3. Implication: Canadian criminal law has more potential to be attentive to the social location of a given conflict than German criminal law ......................................................................................... 157

   4. Does Canadian criminal law make use of this potential? .............. 158

   5. Intermediate result for the discussion of whether German criminal law lacks respect for the “realities of life” ................................................................. 159

VII. Consequences .................................................................................. 160

   1. Is German criminal law incapable of being attentive to the “realities of life”? ................................................................. 160

   2. Limits for German law to be more attentive to the “realities of life”? ......................................................................................... 162

   3. Results ............................................................................................. 171

Bibliography ......................................................................................... 173
Between concepts and context: Protection of “personal freedom”
A comparative case study of German and Canadian Criminal Law

The [German] criminal legal theorists have occupied themselves mainly with the creation of dogmatic systems of concept jurisprudence, without allowing facts to distract them very much. The real being the rational, it is surely superfluous to investigate the real once the rational has been established by the infallible process of logical or dialectical reasoning. That such a procedure could result in spinning out nebulous nonsense and erecting castles of concepts in the air has not occurred to many […] ¹

I. Introduction

Professor Du Plessis’ view of German criminal law as expressed in this quotation may not be commonly held. Nevertheless, an argument can be made that German criminal law tends to suffer from a rationalist hubris which invites the formulation of artificial rules, and thus undervalues the social location of a given conflict.

The following study will examine this hypothesis by comparing German legal reasoning with Anglo-Canadian² legal reasoning with respect to one specific area that has long been


² This comparison focuses on Anglo-Canadian law. The fact that Québec is a civil law jurisdiction whereas all other provinces and the territories are common law jurisdictions may not make much of a difference in the area of criminal law, which is governed by federal law. However, the differences in the methods and techniques of legal reasoning is likely to also affect the field of criminal law and thus warrant confining this paper to a comparison between Germany and Common law Canada.
troublesome in German criminal law: the area of what in Germany is called “offences against personal freedom”\(^3\). The German debate over the protection of “personal freedom” is particularly characterized by an abstract, conceptual way of thinking, which arguably is a feature typical of German legal culture (again arguably fostering certainty of the criminal law). In contrast, it can be argued that Canadian legal method has adopted a more contextual approach (that is better able to make differences in social location visible and is thus more open to equality arguments). Therefore, exploration of this area of criminal law may shed light on the differences between German and Canadian methods of legal reasoning. The further objective of this examination is to explore whether and to what extent German criminal law should attempt to adopt a less abstract approach that is more open to taking the varying social location of the people involved in or affected by criminal law into account, and that is better able to be attentive to equality as a fundamental right. In particular it is asked to what extent a reconciliation of the different approaches is possible in order to be attentive to both values of equality and certainty.

The comparison first of all faces the difficulty that Canadian criminal law does not speak about a certain group of offences being “offences against the personal freedom”, which might lead to the assumption that the two systems are not “comparable” regarding that area of law. This, however, is not the case. Even without expressly purporting to protect the individual’s freedom against harm, Canadian criminal law implicitly does so. The mere fact that there is no classification of crimes called “offences against personal freedom” does not rule out the possibility that Canadian criminal law does protect this “right” under different headings.

The obvious question that needs to be posed when talking about protection of “personal freedom” is: How is this “legal right” called “individual” or “personal freedom” defined? What

\(^3\) Straftaten gegen die persönliche Freiheit.
kind of “freedom” do we expect or wish to protect by means of criminal law? This question could probably lead to extensive and very difficult philosophical discussions on what “freedom” means, whether human beings do have “freedom” at all or whether they are “determined” and do not really have a choice in forming their decisions and acting accordingly. In spite of these philosophical questions, the definition of “individual freedom” in the sense of criminal law is barely doubted in Germany: The “freedom” mentioned in the Strafgesetzbuch, which is Germany’s criminal code, is simply defined as the opportunity to build one’s own will free from external pressure and to act according to this will. My study adopts this definition without even discussing questions of determinism for one single but striking reason: Criminal law as such is largely based on the idea that one actually is free to choose how one wants to behave, what one wants to do, what sort of person one wants to be. Its basis is that human beings knowingly decide to either act in accord with the rules set up in society or to break these rules. Crime has always been regarded as a moral wrong and conduct demanding retribution. The law is therefore based on the assumption that, aside from doctrines relating to exceptional circumstances where the law recognizes a lack of free will (e.g. automatism), people are able to choose whether to commit criminal acts or not and that a person who chooses to commit a crime is responsible for the resulting evil and deserves punishment. Otherwise, one of the main functions punishment is said to have (both in Canada and in Germany), deterrence, could not be justified. Thus, unless one challenges the institution of criminal law itself (which is outside the scope of this thesis), there is no room for deterministic views on the term “freedom”. Consequently, whenever in this paper the word “individual freedom” or “personal freedom” is used, it means the opportunity to build one’s own will and act according to it as defined above.

This definition does – at first glance – not seem to be remarkable. But in fact, it is this

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4 Strafgesetzbuch (=StGB), current version from November 13, 1998 (BGBl. 1 S.3322).
simple definition that already shows the exceptional structure of a “legal right” called
“individual freedom”: Other rights enjoying legal protection are relatively clear-cut and well
defined, such as e.g. “life”, “property”, “privacy of post”. By creating criminal code provisions
to protect these rights, the legislative power shows its citizens that among the large field of
social life it is these rights that are considered inviolable. There are only very rare situations in
which these rights are allowed to be touched, for example in a situation of self-defence. These
rare situations are laid down in separate general provisions (in systems that belong to the civil
law tradition like Germany) or principles (in common law countries like English Canada). It is
the interaction of provisions that forbid certain behaviour on the one hand and exceptional rules
permitting the behaviour in exceptional cases (defences) on the other hand that makes up a
“criminal wrong”.

With a so-called right of “personal freedom” this interaction of rule and exception does
not work properly. It is out of the question that criminal law could ever protect the freedom to
do whatever one wants to do in every situation of his/her life. One just needs to imagine one's
own everyday-life in order to recognize that the situations in which one can decide
autonomously what one wants to do are really rare. Even in one's so-called “leisure time” one
is caught by well-worn pre-conceived behaviour patterns, as soon as one comes in contact with
the social environment. Briefly: Everybody usually is relatively secure to be able to enjoy the
rights of “life”, “property” and “privacy of post”, but will – particularly in the ordinary course
of living – enjoy the freedom to do whatever she wants to do only temporarily and only within
considerable bounds. This finding hardly needs an additional explanation: Social life is only
possible if there is a certain order between individuals. Society only works if it is possible that
everybody is – with more or less pressure – compelled against his own will and desires into a
direction that fits the social entity. That means: Violation of individual freedom is a basic
element of social existence. This does not mean that there cannot be any individual freedom at
all, but it means that this "freedom" is bound from the very outset. The specific tension lies in the fact that, by protecting the potential "victim's" freedom, criminal law necessarily has to restrict the "perpetrator's" freedom by prohibiting his conduct. The victim's freedom is the perpetrator's bondage and vice versa. If criminal law intends to protect the freedom of acting according to one's own will it has to consider this problem in order to preserve the balance between freedom and bondage. It has to demarcate the inevitable pressure that is always present if people live together – and therefore must be accepted – from pressure that exceeds that extent – and therefore cannot be tolerated but has to be punished.

Consequently, criminal law provisions aiming to protect individual freedom have to take this peculiarity into consideration: a legal right that bears a restriction in itself – How can criminal law effectively protect such a right against harm done from the outside, *i.e.* harm done by other human beings?

German criminal law tries to cope with this task. However, the German controversy over the sections of the Strafgesetzbuch that are meant to protect individual freedom shows that the task is far from being resolved satisfactorily.

Maybe it is this task that demonstrates that the pervasive conceptualism, a persistent feature of German legal thought, has its limits. Maybe it is this so-called "legal right to personal freedom" where German criminal law finally gets tangled up in its conceptual constructs. A glimpse at Canadian criminal law may reveal significant merits of a more contextual approach that follows the contours of society's needs, norms, goals, and practices, among others its openness to arguments regarding equality for women, people of colour, etc. Maybe different elements of both approaches might finally be reconciled in a method of legal reasoning that while being conceptual in nature is also able to pay attention to the social context of criminal law, and particularly to equality as a fundamental right.
II. Conceptual Framework and Methodology

1. Comparative Law

This study can be described as comparative in two respects: It makes an effort to compare the method of legal reasoning in German criminal law with that of Canadian criminal law, and within this framework it will compare how “personal freedom-cases” are dealt with in Germany and in Canada.

What sense is there in comparing two legal systems? Is it merely a chance to satisfy idle curiosity; is it just an amusing puzzle?\(^1\) Much has been written about the purpose of comparative law. In fact, there is not only one but several purposes, which can be subdivided into three major groups: (a) professional purpose, (b) cultural purpose, (c) scientific purpose.\(^2\)

By professional purpose it is understood that comparative law helps a lawyer or judge in one jurisdiction who needs to know what the law in another jurisdiction is regarding a specific problem. Further, it refers to legislators who want to learn from the experience of legislators in other jurisdictions. In terms of “culture” comparative law provides the opportunity to widen one's own perspectives, \(i.e.\) to better comprehend one's own legal system. The scientific purpose lies in making an effort to discern the general principles of law common to all systems, \(i.e.\) to seek harmonization of legal rules among different national systems. Generally speaking,

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\(^2\) The same subdivision is found in Glendon, Gordon & Osakwe, *Comparative Legal Traditions: Text, Materials and Cases on the Civil Law, Common Law and Socialist Law Traditions, with Special Reference to French, West German, English and Soviet Law*, 2nd ed. (Minnesota: West Publishing, 1994) at 3.
comparative law helps to make the world smaller by diminishing national isolationism. The international exchanges which comparative law requires procure the gradual approximation of viewpoints, the abandonment of deadly complacency, and the relaxation of fixed dogma. Finally, although it might – by revealing differences – also make us aware of (maybe proud of\(^3\), maybe critical of\(^4\)) our own distinctiveness, comparative law permits us to catch sight, through the differences in detail, of the grand similarities of legal institutions and thus may help strengthen our belief in the existence of a unitary sense of justice.\(^5\)

a) Comparative criminal law

Comparative law is not as common in the field of criminal law as it is in private law. Comparative criminal law, however, has its own specific value. The fact that a legal system cannot be isolated from its social context is particularly obvious in the field of criminal law: The most apparent thing a layperson associates with “law” is punishment – being an evil that those have to suffer who violate “the law”. Discussions about conditions and means of punishment meet with a much more lively response in public than problems in other fields of law do. This public sensitiveness concerning criminal law makes criminal law particularly interesting for comparative law purposes. It can be argued that the system of values in a society is to a very high degree reflected in this society’s criminal code – maybe even more than in its constitution: When looking at a society’s criminal code, one gets to know which actions this

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\(^3\) Grossfeld, *The Strength and Weakness of Comparative Law* [transl. by Weir] (Oxford: Clarendon Press, 1990) at 112: “[…] we discover not only the defects of our legal institutions, but also their merits.”

\(^4\) A comparative study like the one at hand is probably particularly educational for German jurists who might suffer from a “rationalist hubris” (see Introduction), as Grossfeld, *ibid.* at 12, notices: “But we also need comparative law as a stimulant, as a protection against the ormolu of doctrine, as an escape from occasional oversophistication. It tunes us in to [sic] other systems, and saves us from nationalistic narcissism.”

society regards as blameworthy and punishable. This knowledge makes it possible to draw quite distinct conclusions about the values that are considered important in the respective society. As Seaborne Davis put it: “The condition of a nation’s penal system, and the nature and spirit of its administration, provide a good reflection of the standards of its civilisation.”

Considering this, there is much reason to believe that a comparative study in the field of criminal law is particularly instructive as to the understanding of a society’s legal culture. It can be argued that German legal culture is generally characterized by a high degree of conceptualization, whereas Canadian legal culture can be described as more contextual and less abstract. It is the area of criminal law, however, where German conceptualism is found in its purest form. Thus, the contrast between Canadian and German legal method can be demonstrated best in this area of law.

b) Microcomparison or macrocomparison?

Comparative lawyers compare the legal systems of different nations. This can be done on a large scale or on a smaller scale.

To compare the spirit and style of different legal systems, the methods of thought and procedures they use, is called macrocomparison. Here, instead of concentrating on individual concrete problems and their solutions, research is done into methods of handling legal materials, procedures for resolving and deciding disputes, or the roles of those engaged in the law.

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8 Zweigert & Kötz, supra note 5 at 4-5.
Microcomparison, by contrast, has to do with specific legal institutions or problems, that is, with the rules used to solve actual problems or particular conflicts of interest. This approach is often said to be of an applied practical nature.  

This work cannot be exclusively assigned to one of these categories of comparative law. It will not only describe how “personal freedom” is or is not protected by criminal law in Canada and in Germany, and which jurisdiction provides for a more satisfactory protection, but it will go further. It will take this specific area of law as an example and put it into the bigger context of how criminal law in general is approached in both countries in order to find out whether German criminal law is lacking respect for the realities of life and whether in that respect it can learn something from a common law system like Canada’s.

Thus, this paper contains features of both the microcomparative and the macrocomparative approach:

The question of which behaviour that might violate another person’s freedom is prohibited by criminal law is a specific one and does not necessarily include a comparison of the Canadian and the German “law as a whole”, not even “criminal law as a whole”, and therefore can be described as microcomparative. Yet, when it comes to the question of what the overall method of German criminal law is as opposed to the method of Canadian criminal law, and the question whether the method of German criminal law does not pay sufficient attention to the reality of social differences, this paper is adopting a macrocomparative “large scale” approach.

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c) Normative comparison or problem comparison?

Within the category of “microcomparison”, some writers draw a further distinction between “normative comparison” and “problem comparison”\(^\text{10}\). Doing this, they refer to “normative comparison” as an approach that takes similar legal norms, institutes and other legal acts as the basis for comparison (tertium comparationis), whereas the “problem comparison” approach takes a specific social problem as the basis of comparison and then investigates how and with which legal (and possibly non-legal) means these problems are resolved in the jurisdictions in question.

Other authors claim that only the so-called “problem comparison” is a useful method in comparing different legal systems\(^\text{11}\) and I agree with them: Comparative law must not take the external similarity of legal institutions as a starting-point but rather the underlying social conflict. Since the legal system of every society faces essentially the same problems, but solves these problems by quite different means, \textit{i.e.} different legal institutions, principles, norms, etc. (though very often with similar results), the question to which any comparative study is devoted should be posed in \textit{functional} terms.

The question my thesis is going to deal with makes this issue clear: When talking about personal freedom, the German criminal lawyer will immediately jump on the term “Nötigung”, which can be translated as “duress/coercion/compulsion” and recall the various controversial issues this \textit{offence} raises in German criminal law. The Canadian criminal lawyer hearing about “duress” will immediately think of the \textit{defence} of duress, in essence meaning that a person who is forced to commit an offence under threats of severe violence is not to be held criminally accountable for his/her actions, provided that he/she had no reasonable way of avoiding the

\(^{10}\) \textit{Ibid.} at 75.

\(^{11}\) \textit{Zweigert & Kötz, supra} note 5, at 31; \textit{Koch, Magnus & Winkler von Mohrenfels, supra} note 1 at 237.
threatened harm.\textsuperscript{12} The external similarity of “\textit{Nötgung}” and “duress” (X is doing something he would rather not do because Y compels him to do so) veils the fact that the underlying social conflicts the respective legal institution tends to regulate are not the same: Canadian “duress” addresses the question whether somebody (X) who commits an act which, but for duress, would be a crime, is excused or justified because he/she did not act in accordance with his/her own will because he/she was threatened by somebody else (Y). German “\textit{Nötgung}” in contrast deals with the question whether somebody (Y) who compels somebody else (X) to do an act (not necessarily a criminal act) is to be punished pursuant to § 240 StGB, the section of the German Strafgesetzbuch that governs this offence. Briefly, Canadian duress asks if X is to be punished, German “\textit{Nötgung}” asks if Y is to be punished. This shows that a comparative study devoted to comparing “duress” in Canada and “\textit{Nötgung}” in Germany cannot be of any use simply because they are not comparable, for in law the only things that are comparable are those which fulfil the same function.\textsuperscript{13}

Thus, this study intends to pursue the so-called “problem-comparative” approach.

As the exemplary area this paper is going to explore can be described as “protection of personal freedom by means of criminal law” (in the sense of “To what extent does criminal law prohibit human behaviour that restricts the personal freedom of another?”) “duress” as a defence (which in Germany would be called “\textit{Nötgungsnotstand}”) is not going to be relevant. Rather the – functional, problem-oriented – question will be, how Canadian criminal law, that does not know any \textit{offence} of duress (as it does not know any “offences against personal freedom” as such), deals with cases where somebody violates somebody else’s “personal


\textsuperscript{13} Zweigert & Kötz, \textit{supra} note 5 at 31.
freedom", *i.e.* cases that in German criminal law would raise the question if the accused is to be convicted of “Nötigung”.

Among the wide field of cases in which one can imagine somebody violating somebody else’s “personal freedom” (as has been stated above: the violation of personal freedom is an element of everyday-life), I chose one of the most-discussed cases in the debate of the German offence “Nötigung”, a case where the underlying social problem of equality for women is urgent but mostly neglected. From the way § 240 StGB is applied to this case by German courts, and the debate among legal academics on this case (chapter IV), I will demonstrate the method of how German criminal law deals with cases where the underlying social conflict is of considerable importance. As the case might have happened in Canada just as well as in Germany and as there are similar cases that actually did happen in Canada, I will go on to examine how Canadian law would have “treated” the accused in question (chapter V). What follows is the “bigger context”, namely the actual comparison of how criminal law is approached in both countries, what differences can be observed between the Canadian and the German method of reasoning as well as what the common grounds are (chapter VI). Finally, the paper attempts to answer the question of whether German criminal law is really lacking respect for the realities of life and if in that respect it can learn something from common law Canada, *i.e.* whether a fruitful reconciliation of approaches is possible (chapter VII).

2. Law Reform

The comparative approach is usually not an end in itself. Usually the comparison of different legal systems results in the finding that one system provides for a “better” solution of a given problem than the other one. Given that both systems are not “too different” (regarding the entire legal system, as well as the political, social and cultural background), *i.e.* given that a
transplantation of that “better solution” to the country that does not come up with a satisfactory solution appears possible, a comparative legal study usually results in a suggestion for law reform.

As already mentioned above, the same is true for this paper, at least to some extent (in chapter VI and especially VII).

As far as my critique of the overall method of German criminal law is concerned, it may appear bold to come up with a reform suggestion and expect that it is going to bring about a profound change to a method that has developed over centuries. I still attempt – after describing the existing method, contrasting it with the Canadian approach to legal reasoning and pointing out existing weaknesses – to define a more appropriate method and hope that a change towards this suggested approach might be worth considering.

As far as the case I am going to discuss is concerned, I will show that German criminal law in the area addressed does not solve the social conflict satisfactorily. Here, the further goal is to find out whether Canadian law provides for a more appropriate legislative solution to that conflict and whether a suggestion can be made as to how to reform German criminal law.

Thus, this thesis is going to contain a law reform element in the two above-mentioned respects.

In this point, however, there might be some doubt about the effectiveness and consequently the value of such a study, as there is room for doubt about whether lawyers can sit in a room and simply think up better laws.

First of all, in the contemporary political state, law reform is not mainly produced by official bodies such as expert Law Reform Commissions or by the legal profession in general. The vast part of law reform rather operates at the level of individual and group conduct, through
normative beliefs and practices. The most powerful and therefore most important source of law reform is that of general public opinion. If this opinion is sufficiently clear and determined, it is likely to achieve the reform it desires. Does this circumstance make law reform done by the legal profession unnecessary and senseless? It does not. Powerful as the public opinion may be, it has only a limited effect, because it is not the norm that public opinion is so clear and determined. The general public is rarely much interested in legal reform. Often, it regards the law as a mysterious science, and sometimes it feels doubtful whether any change in it will prove of benefit. Furthermore, the public opinion’s demand for law reform often arises as a result of some dramatic incident or trial described in the media. However, law reform should not be a matter of temporary emotion but requires steady work. Recent examples in Germany have shown that law reform quickly made as a response to an outcry by the citizens ("There ought to be a law about it") is often unsatisfactory, if not harmful, for it does not provide regulations capable of practical enforcement but rather mere proclamation-like statements without real effect. Therefore, the fact that law reform often operates on a more informal level does not render law reform done by legal professionals, e.g. in commissions valueless.

Secondly, critique has been levelled against “legal law reform” as such, and the adoption of a new and different approach to law reform, called “social law reform” has been put forward. The differences between these two kinds of law reform have been summarized as follows: The starting point of “legal law reform” is dissatisfaction with some social situation, or with some technical aspect of the law. This dissatisfaction is articulated mainly through lawyers. Its object is to bring about changes in the law, worked out by lawyers, and its end product is a recommendation for legal implementation, i.e. for legislation. The work in this

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15 “Kampfhundeverordnungen” ~ Fighting dogs-regulations.
17 Ibid.
thesis as proposed so far appears to exactly fit this description and therefore is likely to meet with criticism from “social law reformers”: The starting point of “social law reform”, as Samek describes it, is dissatisfaction with a social practice, which is articulated mainly through spokesmen for the public. The object of “social law reform” is to bring about changes in social practices where they are considered warranted and its end product is a recommendation for implementing them in the most appropriate manner.\textsuperscript{18} The critique of “traditional” law reform mainly consists of the allegation that any “legal law reformer” bases his work on the assumption that the standard procedures of legal enforcement are appropriate for curing any and every kind of social ill.\textsuperscript{19} It has been said that the “legal law reformer” is so convinced of this assumption that he does not make any attempt to monitor the social effectiveness of legislation.\textsuperscript{20} The “social law reformer” on the other hand does monitor the social effectiveness of reform. Social law reform is conducted out in the open air of social reality, and not behind the closed doors of law.\textsuperscript{21}

With respect, one need not be a so-called “social law reformer” in order to take the social reality into account. So-called “legal law reform” that fails to do this is indeed harmful. However, this does not lead to the conclusion that “legal law reform” as such is to be rejected and “social law reform” as the “better” approach has to be pursued instead. In general, law reform in the traditional manner, \textit{i.e.} so-called “legal law reform”, does focus on the social reality. In trying to find a better legislative solution to a given social conflict, “legal law reform” inevitably has to and does take the “social ill” into consideration. It has to and does deal with issues like: “Is the alleged social ill in fact a social ill?” “Who should make the decisions as to whether the existing social situation is unsatisfactory and what the situation

\textsuperscript{18} \textit{Ibid.}
\textsuperscript{19} \textit{Ibid. at 4.}
\textsuperscript{20} \textit{Ibid.}
\textsuperscript{21} \textit{Ibid. at 9.}
should rather look like, and according to which values are these decisions to be made?” “Is it possible to accomplish this ‘better’ social situation by means of law?” “If yes, what must this ‘law’ look like?” Regarding this, the conclusion is obvious: To the extent that “social law reform” is only said to differ from “legal law reform” in that it does not assume that the standard procedures of law enforcement are appropriate for curing every social ill and in that it does attempt to monitor the social effectiveness of legislation, a distinction between these two approaches cannot seriously be drawn.22

The impression is, however, that this is not the only issue “social law reformers” criticize. Another claim is that “legal law reform” assumes that the law only needs to be tidied up, and doing this supposes that the system as such is sound, as opposed to “social law reform”: “Social law reform” goes further for it poses the question whether the system is really sound, “whether it is worth saving or patching up, or whether it is not badly out of touch and out of joint.”23 This indeed appears to be a remarkable difference between the two approaches. This contrast between “legal law reform” and “social law reform” is – on a broader basis – reflected in the well-known contrast between “internal legal thought” and “external legal thought,”24 whereby “internal legal thought” is characterized as a method that by implicitly defending the law as it is reinforces the general faith in law by implying the plausibility of aspiring to achieve its ideal form rather than questioning the law as such.25

My work clearly does not intend to query the soundness of the legal systems of either Canada or Germany as such. If one wants to put it that way, this study only tries to “tidy up the existing law”. Therefore it might be debatable whether it can be considered as a useful law

22 Samek himself admits on page 2 that the distinction is more or less only a model.
23 Supra note 16 at 7.
24 Compare Bakan, Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997) at 5-6.
25 Ibid., at 6.
reform piece. Even “social law reformers”, however, admit that tidying up the law is useful where the law in question is basically useful.\(^{26}\) I argue that criminal law in general is sensible and sound and therefore is worth being tidied up instead of being deconstructed altogether. I am aware that doing this I “implicitly defend the law as it is”. My argument, however, is not that the “ideal form” of law is indeed achievable. Rather I would say that even though this ideal form is maybe never going to be achieved it is worth pursuing the ideal and trying to get closer to it. Consequently, I pursue an approach that one might call an “internal” one, as opposed to an “external” one, or a “legal law reform approach” as opposed to a “social law reform approach”. This means that this work only tries to find a solution to the issue raised by the case I am going to discuss through criminal law \textit{within} the framework of criminal law as it is today.

3. \textit{Analytical Positivism}

So far, it has been stated that this thesis intends to do is to compare Canadian and German criminal law regarding the area of personal freedom, as well as – on a larger scale – regarding the methods of legal reasoning, and that it furthermore it intends to come up with suggestions for reform in those respects. The next question to be posed is the question of what perspective on law will be adopted when doing this. Here, the focus will be on the question of what \textit{approach} will be taken. However, this inevitably includes some indication of the study’s substantive content, too, for the approach one takes is affected by one’s convictions as to the substantive subject of the inquiry.

The study attempts to \textit{first} describe the law concerning the individual’s personal freedom \textit{as it is} in Germany and in Canada, as well as the method of legal reasoning \textit{as it is},

\(^{26}\) Samek, \textit{supra} note 16 at 8.
hereby including techniques of drawing on underlying legal principles, on the legislative history of relevant provisions of the German Strafgesetzbuch and the Canadian Criminal Code, on aspects of constitutionality, public policy and theoretical concerns. The normative issue of what the law regarding personal freedom and the methods of reasoning in criminal law ought to be will only be addressed separately, as the rather political question of law reform.

Such a proceeding implies that law as it is can actually be separated from law as it ought to be. Thus, the approach that will be adopted might be qualified as “analytical jurisprudence”, “legal positivism”, or “analytical positivism”. These terms are generally used to describe those schools of legal thought formed by scholars such as Bentham, Austin, Kelsen, and Hart, whereby the phrases “analytical jurisprudence”, “legal positivism” and “analytical positivism” are sometimes used interchangeably.\(^{27}\) This inaccuracy might seem superficial at times;\(^{28}\) for the purpose at hand it is not necessary, however, to illuminate the precise differences and interrelations. The main feature that unites these approaches through their differences in detail is the contention that there is a sharp theoretical line between jurisprudence and the science of ethics, between law and morality, between the “is” and the “ought”\(^{29}\) – a notion that largely underlies this thesis.

I am aware that the issue whether it is possible to draw a theoretical line between the “is” and the “ought” is hotly debated and that my work is likely to meet with criticism on the part of those who deny that the separation between “is” and “ought” can be maintained when applying the law. It is true that even with respect to those parts of this study that at face value claim to only state the (German and/or Canadian) law as it is (mainly chapters IV and V, but also parts of chapter VI), it would be dishonest to pretend that these parts are dealt with in a

\(^{28}\) Ibid.
wholly neutral, impartial, and objective way. Admittedly, they do to some extent include my (biased) idea of what the law ought to be. In that regard, Fuller has to be agreed with when he says that

[e]veryone who has attempted to write on the law of the cases must have been concerned by the possibility that his readers might pose this question to him: “Does this article state the law, or only your idea of what the law ought to be?”

a question that positivism demands to be answered, at the same time a question that is very troublesome because any writer has experienced that he/she cannot claim with a clear conscience that he/she is only stating the law without any bias, although he/she would like to make that claim in order to invest his/her findings with universal validity.

Therefore the perspective used in this study is not “strictly analytical” or “strictly positivistic”. It is acknowledged in this work that judicial decision-making is not akin to scientific work and that it cannot be objective in the way scientific work might be.

However, the study clearly shows features of analytical positivism, and in order to avoid the reproach of hiding the study’s methodological underpinnings (a reproach that is sometimes levelled against doctrinal scholarship), they shall be stated explicitly:

There is a focus on order that is aimed at the clarification of legal conceptions and their orderly classification, a feature commonly associated with positivism. In anticipation of possible objections it is to be stated that precision may be an elusive goal, but in my view “the striving towards it whenever possible is commendable and profitable.”

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30 Fuller, The Law in Quest of Itself (Northwestern University, 1940), reprint in D’Amato, Analytic Jurisprudence Anthology (Cincinnati: Anderson, 1996) at 116.


32 See Dias, supra note 29 at 351.

33 Ibid.
Another positivistic feature of this study's methodology, most clearly expressed in the writings of Jeremy Bentham, is the request that – at least in the area of criminal law – it be the legislative power that make the law and that the role of the courts be as constrained as possible. The role of the judge should as far as the open texture of language allows (i.e. as far as a separation between is and ought is possible) be constrained to enforcing the law as it is. He/she should not legislate, for this is the political task of the elected representatives of the people.\textsuperscript{34} Here, one might well raise the objection that lawyers should not be mere technicians who leave fundamental questions about justice to other disciplines.\textsuperscript{35} However, in my view it is in a more or less democratic political system with relatively stable social conditions (and I regard Canada as well as Germany as such) better that law-making be entrusted to the elected representatives of the people, “not usurped by non-elected and non-removable judges”\textsuperscript{36}, who are not directly responsible to the citizenry. Where perceived “injustices” might result from this application of the law as it is, cure can only consist of the public demand upon the legislature to amend or revise the law. Since the legislative power cannot act retrospectively, this means that any amendment will be too late to provide any cure in the case at hand. But I strongly feel that this is the only way to foster predictability and certainty of the law. This does not mean that I intend to reduce lawyers to “mere technicians”. Nobody can deny that legal rules have to be interpreted and that legal interpretation is and has to be a creative process to some degree, to wit to the degree that is determined by the framework of the legal rule. This interpretation includes e.g. the reference to underlying values, especially constitutional values (such as equality) and is in that respect certainly more than a technician’s work. However, the fact that judges and

\textsuperscript{34} See also MacCormick, \textit{Legal Reasoning and Legal Theory} (Oxford: Clarendon Press, 1978) at 63-64.

\textsuperscript{35} Boyle, Lunch Presentation at judicial conference “Surviving Commercial Litigation”, 2001, [unpublished].

\textsuperscript{36} MacCormick, \textit{supra} note 34.
legislators do change positions at times does not affect the importance of having some criterion with reference to which the whereabouts of the line between them can be determined.

This leads to another – positivistic – assumption that is part of the perspective of this study, namely the assumption that certainty of law is a virtue, which is best fostered when the positive law, i.e. the rules that are valid by the formal test of a legal system (i.e. have passed through certain established media), is applied by the courts. This includes the assumption that under normal circumstances a perceived conflict between positive law and material justice should be resolved in favour of the positive law; for I have not come across a universally accepted notion of “justice” so that I tend to agree with Kelsen in that “justice” should first and foremost be identified with legality (although he cannot be agreed with in that it is a scientific impossibility that the question of what constitutes “justice” will ever be answered\textsuperscript{37}). However, this is not to say that there might not be circumstances (abnormal circumstances, in particular in times of totalitarian regimes) where things might be different: “Where justice is not even striven for, where equality […] is constantly denied in the enactment of positive law, there the law is not only “unjust law” but lacks the nature of law altogether\textsuperscript{38} and is therefore null and void.

One might be surprised as this sounds rather like natural law than like legal positivism or classical analytical jurisprudence. However, the surprise should not be too astonishing given the fact that jurisprudence has seen a whole group of “new analytical jurists” (including e.g. Hart and Dworkin) who are much less positivistic than Austin and his successors\textsuperscript{39}, and who have made concessions to natural-law theory, e.g. in that “there are certain rules of conduct

\textsuperscript{37} And in fact I disagree with most of his ideas expressed in Die Reine Rechtslehre; in English: The Pure Theory of Law, 1967.

\textsuperscript{38} Radbruch, “Gesetzliches Unrecht, übergesetzliches Recht”, SJZ 1946, 105 at 107.

\textsuperscript{39} Summers, supra note 27 at 888.
which any social organization must contain if it is to be viable and that such rules do in fact constitute a common element in the law of all societies." 40

Therefore the approach taken in this study deviates from legal positivism and classical analytical jurisprudence in several instances: It concedes that there are limits to the separation between "is" and "ought". It concedes that to some extent courts do make law and that this is necessarily to be accepted. It further concedes that there are circumstances where a proposition is "law" not merely because it satisfies some formal requirement but by virtue of an additional condition which is that it must not deliberately defy the instinct for "justice" but that it actually does strive for "justice" as perceived at the time.

Despite these deviations, the basic positivistic attitude will be a visible thread in this study:

• In my discussion of the relevant law regarding the case that will be presented in chapters III, IV, and V, I will adopt a basically analytical approach including techniques of exploring the grammatical sense of legal rules, their purpose, their systematic and historical context, as well as underlying principles and aspects of constitutionality.

• When posing the question what the law "ought to be", i.e. in those parts of the thesis that might be described as law reform (chapters VI and VII), I will operate from a mainly "internal" position (see above at p. 16-17) that focuses on questions within the legal system, such as "what should courts do?" and "what should the law be?".

• This is closely connected with the general theoretical orientation of this work which is determined by the assumption that criminal law should be certain and that this certainty is best fostered if courts are constrained to apply the law, which includes interpreting it within the framework of legislative directives but is - theoretically - opposed to creating law. Certainty of

40 Hart cited in Bodenheimer, supra note 29 at 105.
the law is necessary to ensure reviewability of state decisions that concern the individual’s position. Protection of the individual from the power of the state is in my view of primary importance in criminal law. Thus, there is also a liberal element in this study’s approach, since it puts emphasis on classical liberal ideas like e.g. fair trial and fair notice: Not only must the individual be protected by criminal law, but also against criminal law, because criminal law is “the embodiment of state power at its most brutal”.41

I am aware that this approach bears a risk, especially as to the validity of the conclusions drawn from the comparison of German and Canadian legal reasoning. Since the study is aimed at the comparison of different methods of legal reasoning, best results would probably be achieved if the method applied while comparing were a neutral one that is not biased towards one or the other of the objects of the comparison. As shown, such an unbiased method will not be applied, however. I cannot claim to speak objectively or neutrally. But this is necessarily so, particularly because the study attempts to compare two legal systems one of which I as a matter of fact know better than the other. It is therefore very likely that my view – besides the positivist bias – is “culturally blinkered”42. Nevertheless I hope that my efforts will provide some food for thought in the areas addressed.

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42 Grossfeld, supra note 3 at 38.
III. The “detective-case”: BGHSt\textsuperscript{1} 31, 195

This chapter introduces the case that will serve as an example of the issue of “protection of personal freedom by means of criminal law” as well as an example of the methods of legal reasoning applied by Canadian and German criminal law.

1. The facts

16 year-old witness B purloined a shawl to the value of 40 DM\textsuperscript{2} in a department store at Stuttgart main station. After the larceny she was caught by private store detective P and taken to his office. Immediately the accused A, the second detective of the store, came there, too. P, the one who had witnessed the theft, was writing the larceny report to the police, while B was begging him not to make the report. Her parents would “beat her to death” and she might loose her position as an apprentice with a bank if the larceny became public. Both detectives declared, however, they would make a report at any rate. When detective P had briefly left the office, A, now, (who from the very beginning had been behaving as if he were the “boss”), said to the girl, there might still be a way to avoid a report to the police. If she slept with him, he would make the police report “go by the board”. The girl believed that A was able and willing to do so if she fulfilled his demand; she said, however, that she did not have time at the moment. They therefore made an appointment. In the meantime, however, B confided in a priest, who informed the police. The detective was charged with attempt of “Notigung” under § 240 StGB.

\textsuperscript{1} BGHSt = Bundesgerichtshof für Strafsachen = Federal Supreme Court in Criminal Matters.
\textsuperscript{2} Approx. CAD 30.--.
2. *In what way is “personal freedom” concerned in this case?*

The detective, had his plan been successful, would have made the girl act in contrast to her original will. If “personal freedom” is defined as the freedom to do whatever one wants to do, the detective might have violated the shoplifter’s personal freedom. If criminal law is supposed to protect the citizens’ personal freedom from violation by others, the detective might be criminally liable for attempting to press the shoplifter to do something she actually did not want to do. On the other hand, even if criminal law is aimed to protect the individual’s freedom of choice, it does not necessarily follow that the detective is ‘criminal’. One might address the issue that the detective is only to be punished if his behaviour fulfilled the definition of a crime, which might require more than the rather uncertain notion of ‘violation of personal freedom’. One might also argue that the detective did actually not violate the shoplifter’s personal freedom, as he arguably did not diminish the shoplifter’s scope of choices, but that he rather enlarged it by offering her an opportunity to escape criminal proceedings that she had no legal right to: There is no doubt that the shoplifter wanted to avoid the police report, but not necessarily by this means. Does this situation fall within the scope of the provision of the Strafgesetzbuch that protects personal freedom? The German debate mainly revolves around such questions. Canadian law, having only a rather hidden provision in the Criminal Code dealing with freedom of choice (extortion, CCC s. 346), would rather focus on the question whether the shoplifter’s sexual autonomy was encroached upon by the detective’s conduct and whether he might thus be convicted of sexual assault. These questions will be explored in the following chapters IV. and V.

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3 I assume, as did the courts without explicitly making any such findings of fact, that B did not wish to have sexual contact with A without the pending police report influencing her.
IV. The German approach

1. The provision dealing with this issue: § 240 StGB

In the German debate over the case and similar cases, the main focus is on the section on Nötigung of the Strafgesetzbuch, rather than on sex offences, because they, as will be shown later in this chapter, more or less obviously do not apply to the detective case in Germany. The duress offence, as pointed out above, has the purpose of protecting individual’s freedom of choice. Since a society where everybody has the freedom to do whatever he or she wants to do in every instance of his or her life is unthinkable, the provision against duress does not attempt to declare any conceivable conduct that interferes with somebody else’s freedom of choice criminal. It is restricted to criminalizing two means of infringing on another’s personal freedom. These two means are force and threat with a considerable evil. In spite of this restriction, the section is still fairly broad and one might have doubts whether it is sufficiently clear to avoid infringing notions of certainty in the criminal law, variably referred to, for instance, as the legality principle or the rule of law.

a) Exact wording

Having said that, the duress offence, in § 240 StGB reads:

§ 240 Nötigung.
(1) Wer einen Menschen rechtswidrig mit Gewalt oder durch Drohung mit einem empfindlichen Ubel zu einer Handlung, Duldung oder Unterlassung nötigt, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.
(2) Rechtswidrig ist die Tat, wenn die Anwendung der Gewalt oder die Androhung des Übels zu dem angestrebten Zweck als verwerflich anzusehen ist.
(3) Der Versuch ist strafbar.
(4) ...

1 Hereinafter “duress offence”.
b) Translation

It might be translated in the following way:

§ 240 Duress.
(1) Whoever unlawfully compels another by force or by threat with a considerable evil to any commission, toleration or omission of an act, will be punished by imprisonment not exceeding three years or by fine.
(2) The act is unlawful if the application of force or the threat with the evil is to be deemed reprehensible for the contemplated purpose.
(3) The attempt is punishable.
(4) …

2. Historical background of the problem that underlies this case

When applying the section to the detective case, the threat with a considerable evil seems to consist in the detective’s statement that he would not make the police report “go by the board” if the shoplifter did not have sex with him. Thus, what seems particular is that the content of the threat is an omission, to wit the omission to prevent the report being made to the police. In Germany, the question that was held to underlie this and similar cases has therefore generally been formulated in the following abstract way: Under which preconditions can the threat to omit an act that one has no legal duty to commit fulfil the requirements of the duress offence. Or: Does the duress offence require that somebody who threatens somebody else with the omission of an act has a (legal) duty to act, i.e. that the announced omission is in itself unlawful? Thus, the controversial issues of the case were quickly abstracted from the facts and details of the specific case and were debated in a generalizing way by asking what “principles” ought to govern case constellations alike the detective case. Several “principles” dominated and still dominate the issue and generate a lot of debate, particularly in the academic world. Even today the issue of “threatening with an omission” can not be considered as resolved.
a) Proponents of the so-called “duty-test”

Before 1983, courts held relatively uniformly that the announcement of the omission of an act (e.g. the announcement of a detective not to prevent a theft-report from being passed on to the police) could only be qualified as “threat with a considerable evil” if the commission of the act was required by law (which was not the case with the mentioned store detective: The detective does not have the duty to protect thieves from police reports – rather the opposite is the case: The detective has the contractual obligation arising from his contract of service with the store-operator not to do so but to make report to the police.)

The most significant example of court decisions of that time is the decision of the Higher Regional Court\(^2\) in Hamburg from 1980\(^3\) (the “prosecutor case”). The facts were almost the same as in the detective case: The police had launched investigations against a 16-year-old girl for shoplifting. The accused was employed at the public prosecution in Hamburg. He got to know about the case, phoned the girl, and explained that he wanted to talk to her about the larceny. The girl thought he was the store’s lawyer who was working on the case on the side of the store. The accused used this error and announced that he would withdraw the police report if she slept with him. Hoping to avoid a criminal process by doing so the girl allowed the accused sexual acts. The Higher Regional Court Hamburg held that the accused’s conduct did not fit the definition of the duress offence as set out in § 240 StGB. In its reasoning the court explained that there was no “threat” in the sense of § 240 StGB, because the accused only proposed to the shoplifter that he would not help her but would leave things as they were, i.e. would not avert the already pending “evil” (i.e. the criminal proceedings) if she did not fulfil his wishes. The court held that anyone who tried to influence another person by offering aid he

\(^2\) Higher Regional Court = OLG = Oberlandesgericht.

\(^3\) OLG Hamburg, NJW 1980 at 2592ff.
was not obliged to give only pointed to an “evil” that already existed and offered an escape route, but did not threaten with an evil as required in § 240 StGB.⁴

Among academics, the position that a threat with an omission could only be qualified as duress if there was a duty to act was prevalent, too.

Roxin, who fairly can be said to be one of if not the most important scholar in German criminal law today⁵, not least because of his famous book on the general part of criminal law, supported this position by an argument that he calls the “autonomy principle”: If somebody is not required by law to do something, i.e. if he is free to do it or not to do it, then the announcement of doing it only under certain conditions cannot be a crime.⁶ To illustrate this point, Roxin gives the following example: Somebody who used to accommodate a guest for free and “threatens” to accommodate him only for payment from now on, acts within the legally granted autonomy to dispose of his property. If he demanded “indecent services” instead of money this would not make any difference: Since he did not have a duty to give his house to anybody at all, he also did not have a duty to give it to anybody on “decent” terms.⁷ For the potential victim, this means that he/she has to accept the perpetrator’s actions as long as the perpetrator acts within this “autonomy”, as within the scope of this autonomy the perpetrator does not disappoint any legally protected expectations on part of the victim.⁸

Jakobs, another important scholar who also has written a well-known book on the general part of German criminal law, also comes to the conclusion that the elements of the

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⁴ Ibid.
⁵ At the moment, Prof. Claus Roxin is professor of law at the University of Munich, Germany. His book on the general part of criminal law is probably the most respected book among many on that topic, as is his book on perpetration and participation. His book on criminal procedure also enjoys much popularity. He has written extensively in all areas of substantive criminal law and criminal procedure.
⁸ Roxin, supra note 6 at 377.
duress offence can only be made out if the person who threatens with an omission has a duty to commit the act he threatens to omit. He develops a so-called “doctrine of spheres of freedom” and calls the duress offence a “crime of shifting legally granted freedom”\(^9\). The perpetrator’s freedom is the other side of the victim’s lack of freedom. Similar to the shifting of assets within the crime of extortion/blackmailling, freedom is shifted when somebody commits duress: The perpetrator gains a plus of freedom at the victim’s expense.\(^{10}\) The duress offence is only applicable if such a shifting of the victim’s legally granted freedom has taken place. As long as the perpetrator does not have a duty to act, according to Jakobs the following has to be held true regarding a threat of omission: As the perpetrator is acting within the scope of his legally granted freedom when omitting an act he is not obliged to commit, he does not gain a plus of freedom. As the victim does not have reason to claim the commission of the act, his/her freedom is not being unlawfully restricted, i.e. there is no shifting of freedom from the victim to the perpetrator, thus the crime of duress is not committed.

Ostendorf\(^{11}\) agrees with the decision of the Higher Regional Court Hamburg in the prosecutor case (see above).\(^{12}\) If somebody threatened to omit something he was not obliged to commit, the “victim’s” sphere of legally granted freedom is usually burdened with the “evil” of this omission from the very outset; i.e. the announcement to omit the desired act does not constitute an “additional” intrusion into the “victim’s” position. Only when the perpetrator has a duty to act is this different: In this case, the perpetrator’s obligation is part of the victim’s

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10 Ibid. at 78.

11 Heribert Ostendorf has been a public prosecutor for many years. He is now Honorary Professor at the University of Kiel. Numerous publications make him a practitioner as well as an academic at the same time.

sphere of freedom,\textsuperscript{13} which means that only in this constellation it is conceivable that the perpetrator fulfilled the elements of the offence of duress.

b) Opposing opinions

However, there is some authority from the time before the detective case decision that takes the opposite position, \textit{i.e.} that holds that a duty to act is not necessarily a precondition for the duress offence in cases where the perpetrator threatens with the omission of an act. The arguments for this point of view are also dominated by abstract principles that are designed to apply to an uncertain number of cases of threats with omissions relatively irrespective of differences in details of the facts of the case to be resolved:

Volk\textsuperscript{14}, \textit{e.g.}, rejects the strict distinction between threat with the \textit{omission} and threat with the \textit{commission} of an act altogether because in his view the borderline between omission and commission is too vague to justify a different treatment.\textsuperscript{15} He suggests a two-fold test: With both, threats with omission and threats with positive action, the first step has to be to exclude those cases from the area of applicability of the duress offence where there is an “internal connection” between the announced evil and the conduct demanded from the victim. He gives case examples in order to show what is meant by this so-called “internal connection principle”: An employer tells the applicant for a job as a secretary that he will only employ her a) if she is willing to learn French (because the company has to correspond with their French-speaking

\textsuperscript{13} \textit{Ibid.}

\textsuperscript{14} Klaus Volk is professor of law at the University of Munich. Among his numerous publications is the website “Strafrecht in aller Welt” (Criminal law around the world): <http://www.jura.uni-muenchen.de/einrichtungen/ls/volk/strafrecht_welt.htm> which contains information about German criminal law, as well as the criminal law of other countries and international criminal law.

\textsuperscript{15} Volk, “Nötigung durch Drohung mit Unterlassen”, JR 1981, 274 at 275.
business partners). b) if she is willing to have sexual contact with him. In the first case, there is an internal connection between the evil (not getting the job) and the demanded conduct (learning French). Therefore the employer is obviously not to be convicted of duress (which is in line with what one would expect as a matter of common sense). In the second case, however, there is no internal connection. Applying Roxin's autonomy principle one would have to say that the employer does not have a duty to give her the job, therefore he is free to not offer her the job at all or to offer her the job under whatever conditions – formulated from the victim's point of view: One has to bear to do without favours somebody else is not obliged to give. Volk, however, takes the view that this might be a correct insight in the end, but the question one has to ask with regard to the duress offence is whether one has to bear to be brought in a situation of pressure where one is forced to gain this insight. According to Volk, the victim that actually can be threatened with the omission of an act usually is in a difficult situation already. "Offering help" on "unconnected conditions" means putting a new burden on the victim. It does make a difference whether one leaves somebody who might need help alone, or whether one approaches him/her and offers help. Certainly, one may attach conditions to the offer. But if one decides to make an offer, one has to make sure that there is an adequate connection between the offered service and the service demanded in consideration. In a second step those cases have to be distinguished in which (although "bad inadequate conditions" might be attached to the offer) it lies within the area of responsibility of the person in distress to decide in how desperate straits he/she is and how helpful the offer is. This is referred to as the "principle of self-responsibility": In cases where one can expect the victim in his/her specific situation to

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16 Ibid. at 276.
17 Ibid. at 276.
18 Ibid. at 277.
resist the threat in "calm self-control", the elements of the duress offence are not made out even if "indecent" conditions are attached to the offer.19

Arzt, another famous scholar,20 took the viewpoint that a duty to act is not a necessary condition for the duress offence being made out in cases of threats with omission and that it is the "internal connection principle" that matters. He argues that the freedom protected by the duress offence contains a "procedural element": Generally, one is allowed to try to make somebody conduct himself/herself in a certain way. Generally, there are no explicit legal rules as to the procedure of this "trying to make somebody do something".21 But although no explicit rules exist, it is part of the "victim's" freedom to claim that a "correct procedure" is being pursued. The "correct procedure", in Arzt's point of view, is followed if the content of the threat is internally related to the desired victim's conduct. The "wrong procedure", which violates the victim's freedom, is applied if threat and demanded conduct are not connected with each other.22 Thus, he argues for the "internal connection principle" being the adequate test for threats with omission – the duty to act not being a decisive criterion.

Hansen23 also rejects the requirement of a duty to act for the threat with an omission24, but comes up with a different solution to the issue: In order to distinguish cases of "non-criminal" help offers he does not want to merely rely on the "principle of internal connection" but first of all the question should be whether fundamental socially ethical norms demand an

19 Ibid. at 277.
20 Gunther Arzt is nowadays professor of law in Switzerland at the University of Bern.
22 Ibid. at 836.
23 Uwe Hansen is professor of law at the University of Hamburg. In 1969 he wrote his dissertation on the issue of how to appropriately define the social wrong of "Nötigung" in a criminal law provision: "Die tatbestandliche Erfassung von Nötigungsunrecht".
unconditional commission of the act. In cases where fundamental moral norms demand that one sorts out another’s plight immediately and unconditionally, anybody who makes use of the other person’s dilemma by attaching “unrelated” conditions to the offered help, is committing the crime of duress. Thus, Hansen’s position is a combination of the “internal connection principle” and a reference to “fundamental socially ethical norms”.

3. The decision in BGHSt 31, 195

In this decision, the Federal Supreme Court, which is the highest German court in criminal matters with only the Federal Constitutional Court residing above it, moved away from the “duty-test” that in former times was regularly applied by courts in cases of threats with omissions: The detective was held to have committed the crime of attempt of duress. Instead of the duty-test the court developed three criteria to restrict the area of applicability of § 240 StGB:

(1) In order for the element of “threat with a considerable evil” to be made out, it is necessary that the perpetrator’s announcement appears capable of motivating the threatened person in the sense of the perpetrator’s demand. This is not the case if one would expect the threatened person in his/her situation to withstand the threat in calm self-control.

(2) Second, the perpetrator must be able – either factually or apparently (from the victim’s point of view) – to realize the evil; i.e. it must be within the scope of his/her capacity to make the

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25 Ibid.
26 Ibid.
27 This might be a possible translation for the German “Bundesgerichtshof”.
29 Ibid. at 333.
30 Ibid.
evil actually happen, or at least the victim must get the impression that this is the case.

(3) In a third step those cases must be distinguished where the victim’s scope of action is actually broadened instead of narrowed, i.e. the autonomy of his/her decisions is not encroached upon in a punishworthy manner.\(^{31}\)

Thus, as a result, the court followed the opinion of the Higher Regional Court Stuttgart that originally had to deal with the detective case. The Higher Regional Court Stuttgart wanted to convict the detective for attempted duress, but knowing the earlier prosecutor case decision by the Higher Regional Court Hamburg (see above) did not feel competent to do so without posing the underlying question to the Federal Supreme Court.\(^{32}\)

4. Reactions among academics

Although the Federal Supreme Court’s decision in the detective case constituted a turning point in the debate at least as far as the judiciary is concerned, that decision still did not gain general acceptance. Rather, the decision met with in part harsh opposition from the academic world. Thus, the debate continues until today.

a) Academics that criticize the decision and hold on to the duty-test

Horn\(^ {33}\) rigorously argues against the decision. He mainly bases his critique on two general arguments. First, referring to the Federal Supreme Court’s third criterion (see above),


\(^{32}\) A Higher Regional Court (OLG) that wants to deviate from another OLG’s decision or from decision of the Federal Supreme Court (BGH) has to lay the issue of the case before the Federal Supreme Court, who decides the underlying issue: § 121 I Gerichtsverfassungsgesetz (=Judiciary Act).

\(^{33}\) Eckhard Horn has been professor of law at the University of Kiel since 1977. For many years he has also been a judge in the Higher Regional Court of Schleswig. He is best known for his work in the systematic commentary on the Strafgesetzbuch, which is one of the major commentaries on German substantive criminal law.
he points out that the "threat" with the omission of an action one has no duty to commit is in fact always broadening the victim’s sphere of freedom instead of narrowing it. He argues that actually in these cases there is no threat at all, rather somebody is making an offer of help to the "victim" (certainly, there are conditions attached to the offer), which the victim can either accept or decline (and by doing the latter leave things as they are). Thus, the perpetrator’s "threat" enlarges the victim’s scope of conduct; the result is a plus of freedom, not a minus, because now the victim has a choice: an alternative is being added to the victim’s situation. It makes no difference whether or not the "conditions" of the offer are "decent"; a "connection" between condition and evil is of no influence to the question: It is the victim who decides whether he/she wants to accept the offer and thus establish the "connection" or whether he/she wants to stay in his/her present (distressed) situation. Horn goes even further by saying that it cannot be denied that many people that are in trouble often are not only grateful if they receive respective offers but even invite or provoke them: "How many shoplifters would love to give most 'indecent things' in order to avoid criminal proceedings!".

Second, he makes the following statement: "Whatever I am allowed to do to somebody, I necessarily must also be allowed to tell him/her in advance." Thus, the threat with an omission that is not contrary to a legal duty must not be prohibited, as it is nothing more than "telling" somebody something one is free to do to him/her. Further, this goes for every behaviour that the perpetrator could legally carry out, without drawing a distinction between positive action and omission, because – as Horn argues – an evil that one must accept for legal reasons because another is legally free to bring this evil into being cannot be called "considerable" in the sense of the duress offence.

35 Ibid.
36 Ibid.
37 Ibid.
Timpe\textsuperscript{38} also disapproves of the detective case decision and continues to favour the duty-test\textsuperscript{39} by arguing in a similar way as Horn does: If somebody is free to either realize the evil he announced in his “threat” or not to do so, then he must also be free to tell the victim the conditions under which he is willing to abstain from realizing the evil.\textsuperscript{40} It might well be true that such an announcement puts pressure on the “victim”, but this in itself is not sufficient to constitute the crime of duress.\textsuperscript{41} Rather, in these cases the element of “threat with a considerable evil” is not established.

In principle, Schubarth\textsuperscript{42} also falls within the scope of theories that only qualify a threat with an omission as a threat punishable under § 240 StGB if the person threatening has a legal duty to commit the act he threatens to omit. However, Schubarth argues that a threat with an omission that is not contrary to a duty may in some circumstances fulfil the elements of the duress offence, to wit in circumstances where the announced omission can be reinterpreted into a commission. This, in his view, is the case, if the perpetrator has created – by positive action – a “threatening situation of permanence” in advance. The announcement not to bring an end to that state of affairs, i.e. to omit bringing an end to that situation, in reality is nothing different than the threat to make this state of affairs continue, i.e. a threat with a positive action.\textsuperscript{43} In the case at hand, Schubarth would therefore argue that somebody who threatens to not withdraw a shoplifting report actually announces the threat to continue the proceedings that began with the detection of the larceny.\textsuperscript{44} The detective does not actually threaten the girl with an omission but

\textsuperscript{38} Gerhard Timpe has written a monography on Nötigung in 1989.
\textsuperscript{39} Timpe, \textit{Die Nötigung (Schriften zum Strafrecht)} (Berlin: Duncker & Humblot Verlag 1989) at 149, 153ff.
\textsuperscript{40} \textit{Ibid.} at 149.
\textsuperscript{41} \textit{Ibid.} at 150.
\textsuperscript{42} Martin Schubarth is professor of law at the University of Basel, Switzerland, and President of the Swiss Federal Court of Justice (“Bundesgericht”) (on leave).
\textsuperscript{43} Schubarth, “Anmerkung zu BGHSt 31, 195”, NStZ 1983, 312 at 313.
\textsuperscript{44} \textit{Ibid.}
with a positive action. As the omission can be reinterpreted into a commission, according to Schubarth the elements of the duress offence are made out and the detective has been convicted rightfully.

Roxin, in reaction to the detective case decision, has modified his position on the issue. Now his argument can be summarized as follows: The threat with the omission of a not legally required action usually does not fall within the scope of the duress-section, except when the threatening person uses – as means of the threat – an evil he/she or a third person got under way before the threat. Thus, the decisive question according to Roxin is whether “something bad” or just “nothing good” is going to happen if the victim refuses to obey the perpetrator’s demands.45 It is only in the first case that Roxin sees the elements of the offence of duress being made out.

Frohn harshly criticizes the Federal Supreme Court decision. According to him, by abstaining from the duty-principle, every reciprocal contractual agreement, as constantly happening in the everyday-market, becomes – at least in principle – subject to the duress offence as set out in § 240 StGB: Every offer that aims at a reciprocal contract implies that the offered service, payment, etc. will not be produced if no consideration will be furnished. According to the decision of the Federal Supreme Court, these offers could therefore be regarded as threat with a considerable evil.46 In Frohn’s opinion this cannot be correct as in cases where the “victim” is not entitled to the “perpetrator’s” action (and this is generally the case if the perpetrator has no duty to act) an announced omission of that action cannot be a considerable evil under § 240 StGB.47

47 Ibid. at 366.
b) Opinions that, as the Federal Supreme Court in the detective case, reject the duty-test

Other authors support the decision in principle and do not require a duty to act, while some differ considerably in detail.

According to Schroeder\(^{48}\), the discussion often gets unnecessarily complicated and unclear because in many cases it is only a juridical construction that turns the perpetrator’s announcement into a threat with an omission whereas “in reality” the announcement constitutes an offer of help.\(^{49}\) Schroeder argues that it is true that a conditional help offer always contains a threat not to help if the “victim” does not fulfil the conditions attached to the offer, but this “threat” is only the reverse side of the actual social event “help offer” and as such must not be made the object of the criminal-law-assessment.\(^{50}\) Rather, by applying a natural everyday-life’s conception, one must examine the perpetrator’s announcement in order to determine whether it is a threat with a disadvantage or an offer of an advantage. In order to answer the question under what circumstances the threat with an omission is punishable under the duress provision, one therefore has to first determine whether it actually is a “real” threat with an omission or whether it is rather an offer of a positive action.\(^{51}\) Schroeder enumerates three groups of cases where the threat with an omission is to be considered as a “real” threat: Firstly, the threat of breaking off behaviour one used to pursue in the past; secondly, the unforeseeable demand of additional conditions being met by the victim; and finally, the demand of consideration for an

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\(^{48}\) Friedrich-Christian Schroeder is professor of law at the University of Regensburg, Germany. His research interests include comparative law, particularly comparisons between eastern and western legal cultures.


\(^{50}\) Schroeder, supra note 49 at 286.

\(^{51}\) Ibid. at 287.
action one has a legal duty to commit without consideration. This means that according to
Schroeder a legal duty to act is of a certain relevance when determining the “true social
content” of an announcement, but, as the two other groups of cases show, there are also other
circumstances that can lead to an announcement constituting a “real” threat with an omission
punishable as duress.

Wessels, whose books on the general and special part of German criminal law are
found in almost every law student’s bookshelf, admits on the one hand that in most cases it is
the announcement to omit a certain act one has a legal obligation to perform or the
announcement to commit an act one has a legal duty to abstain from which constitute the crime
of duress. On the other hand, however, he shares the Federal Supreme Court’s point of view
in the detective case, as he does not consider the duty to act to be a necessary precondition for a
conviction under § 240 StGB. Rather, in cases where there is no such duty one has to determine
from the circumstances of the specific case at hand whether or not the announcement of
omission meets the requirements that are set up by the general definition of the threat element.
The decisive point for threats with an omission – as for “usual” threats with positive actions –
can only be whether or not the offender’s behaviour – regarded in its entire social context – is
aimed at putting pressure on the other person, intimidating him/her and breaking his/her will.
Thus, Wessels, as an exception, pursues a less abstract and more pragmatic approach to the
question.

52 Ibid.; Maurach, Schroeder & Maiwald, supra note 49.
53 Schroeder, supra note 49 at 287.
54 Johannes Wessels is professor emeritus at the University of Münster, Germany. He continued his father’s
work of writing books on criminal law that are mainly aimed at students and have advanced to the
standard books in legal education in criminal law. The “Wessels” on the general part of criminal law (now
written in part by Prof. Beulke) is now in its 30th edition.
55 Wessels, Strafrecht, Besonderer Teil/1, Straftaten gegen Persönlichkeits- und Gemeinschaftswerte, 19th
ed. (Heidelberg: Verlag Müller, 1995) at para. 401.
56 Ibid.
Klein bases her analysis in part on the Federal Supreme Court’s principle of self-responsibility according to which it must be determined whether one can expect the recipient of the threat to withstand the threat with calm self-control. Since this is a very vague criterion, Klein tries to concretize the victim’s situation that is necessary for the offender to be punished for duress. She does this by transferring the elements of § 291 I StGB, the provision that prohibits “Wucher” (=usury), to the offence of duress. The usury provision, as opposed to the duress provision does contain a description of the victim’s situation, and Klein suggests that this description be incorporated into the offence of duress. According to the description in the usury offence, one cannot expect the recipient of a threat to withstand the threat if he/she is in an exceptional situation that is characterized by either finding him/herself in a predicament, or by being inexperienced or by having a deficiency in discernment or by being considerably weak-willed. Klein argues that it is appropriate to consider these circumstances as transferable to the duress offence, as in her eyes, both provisions (duress and usury) are very similar.

5. Discussion

Today’s version of the duress offence as set out in § 240 StGB is the result of several amendments that occurred at various points in time. Earlier versions of the duress offence required the “threat with a crime”. Today, the wording “threat with a considerable evil”

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57 In 1988 Agnes Klein wrote her dissertation on § 240 StGB, with a particular focus on threats with an omission.
58 Klein, Zum Nötigungstatbestand – Strafbarkeit der Drohung mit einem Unterlassen (Gelsenkirchen: Verlag Mannhold, 1988) at 137, 144.
59 See supra note 29.
60 Klein, supra note 58 at 138 ff.
61 Ibid. at 145.
62 § 240 of the Strafgesetzbuch für das deutsche Reich, 1871, ruled that those commit a crime who unlawfully induce another to an action, toleration or omission by force or by threat with a crime.
describes a much broader area of applicability of the provision: The common definition of “evil” as found in all commentaries on the German Strafgesetzbuch says that an evil is any loss in values or causation of disadvantages. The evil is regarded as considerable if the pending loss or the feared disadvantage is suited to compel a level-headed person to act in the demanded way. This broad description of punishable conduct arouses concerns as to the provision’s constitutionality: In Art. 103 II, the German Grundgesetz codifies (and the provision is repeated in § 1 StGB) the “legality principle” (nullum crimen, nulla poena sine lege): No person may be punished except in pursuance of a statute which prescribes a penalty. This principle, which will be discussed in detail later, contains a corollary that is specifically important for the duress offence as formulated in § 240 StGB: It imposes a duty on the legislative body to formulate rules of criminal law with sufficient certainty (Bestimmtheitsgebot). Every person should be able to predict in advance whether or not and how his/her behaviour is punishable. This means that no act may be punished as a crime unless it is explicitly expressed to be a crime. It is this facet that explains what the various above-described theories on “threat with an omission” have in common: They are efforts to give § 240 StGB, a provision which arguably is on the edge of being in accord with the legality principle in terms of vagueness, more solid contours: Some try to keep up the traditional “contour” “duty to act”. Those who argue against a duty to act as an element to restrict the provision attempt to find other restrictive elements. The following paragraphs will explore to what extent these efforts are successful and convincing.

64 E. g. ibid.
65 The “Grundgesetz” (GG) is Germany’s constitutional document, although it is not called “constitution".
a) The theory that requires a duty to act as necessary element of the threat with an omission under § 240 StGB

First of all, one has to mention what all varieties of this theory have in common: they do not find any direct support for their argument in the wording of the section against duress, as the wording – at least at first glance – does not give reason to generally exempt threats with “permitted omissions” from the area of applicability of the duress offence. This explains why the various authors link the question with different elements of the provision’s wording.

Some authorities seem to build their argument on the term “considerable evil” and draw the conclusion that this – in principle – requires the threat with an (active) creation of a situation that is negative for the victim. There is no other way one can understand the remark in the Higher Regional Court Hamburg’s decision on the prosecutor case, according to which it be necessary for the element “evil” to be made out that “the perpetrator announces the infliction of a disadvantage that is to be realized by himself (or by somebody he has influence on)”\(^66\). The consequence of this approach certainly would be that the “evil” could never consist in an omission.\(^67\) The court, however, does not draw this consequence but wants to give the threat with an omission parity to the threat with a positive action in cases where there is a duty to carry out the act. Why this should follow from the “language”\(^68\) and in particular from the element “evil” is not explained by the court and is not apparent either: In cases where the perpetrator has a duty to act, too, he does not himself turn the evil into reality, but the evil takes its course without the perpetrator having a hand in the matter. Therefore, the restrictive interpretation of the element “evil” in a way that considers only those evils relevant that are to

\(^{66}\) OLG Hamburg, NJW 1980, 2592.

\(^{67}\) Compare Volk, supra note 15 at 274 who announces the same criticism.

\(^{68}\) NJW 1980, 2592: “sprachlich” ≈ “linguistic”.
be realized by the perpetrator himself is not able to support the view that the threat with an omission only constitutes the offence of duress if there is a duty to act. Thus, this view ought to be disapproved of.

Horn wants to negate the "considerable-ness" of the evil in cases of a threat with a permitted behaviour, *i.e.* a behaviour that the perpetrator could legally perform, *without* drawing a distinction between positive action and omission, because – as he argues – an evil that one must accept for legal reasons because another is legally free to bring this evil into being can not be called "considerable" in the sense of the provision against duress.\(^69\) His opinion deserves approval in that the distinction between positive action and omission must not matter. The demarcation is often difficult and in the issue at hand does not justify a difference in treatment: The reason why one might think about requiring a duty to act in cases of omission while not requiring any kind of unlawfulness of the evil in cases of positive action seems to be a confusion with the standard rule in criminal law dealing with omission: offences are normally committed by positive action (*e.g.* killing somebody by stabbing him/her), but can also be committed by omission if – and only if – the perpetrator has a duty to prevent *e.g.* the victim from dying, *e.g.* a mother omitting to feed her child. At first glance, this rule might support the view that an omission is only "relevant" in criminal law if it contravenes a legal duty, from which one might draw the conclusion that with duress one has to deal the same way, *i.e.* regarding the threat with a positive action relatively straightforward (and not requiring the action being illegal in any way) while requiring a duty to act for the threat with an omission. This argument is invalid, however, as the question is not whether duress, *i.e.* a threat, can be committed by omission but whether/under which circumstances a threat *with* an omission is punishable as duress. With regard to personal freedom, it does not make any difference whether

\(^69\) Horn, *supra* note 34 at 499.
the employer tells the secretary he will only employ her if she has sexual contact with him (threat with an omission) or whether he threatens to dismiss her – given the dismissal would be lawful as a matter of labour law – if she does not (threat with a positive action). Therefore, the issue that at most (if at all) matters is whether or not the announced “evil” is “legal” and Horn is right if he does not draw a distinction between the two modalities “positive action” and “omission”.

Horn’s argument becomes questionable, however, when he goes on to say that an evil is never “considerable” if the victim had to accept it if it were realized, i.e. if the legal system tolerates the perpetrator’s actual infliction of the evil. The purpose of the duress offence – protecting the individual freedom – leads to a different assumption: In § 240 StGB the perpetrator’s conduct is not subject to punishment because he would claim a freedom that he is not entitled to if he actually carried out the (illegal) evil he threatens the victim with. Rather, this factor is already dealt with by the respective criminal code provisions (e.g. manslaughter, if the perpetrator threatens to kill somebody; battery, if the perpetrator threatens to inflict bodily harm etc.). The provision on duress, on the other hand, does not – at least not primarily – have the purpose to grant protection against the actual infliction of the announced harm, but to grant protection against the victim’s freedom of will being encroached upon in a punishworthy manner. Therefore, when posing the question under which circumstances an evil can be qualified as “considerable”, the answer cannot depend on whether or not the perpetrator would be legally permitted to do what he threatens to do. Rather, the answer has to depend on whether or not the victim can no longer be expected to withstand the threat in the face of the offered way out. Regarding this, Horn’s sentences “Whatever I am allowed to do to somebody, I necessarily must also be allowed to tell him/her in advance.” and “If I’m allowed to do
something to somebody I must all the more be allowed to tell him or her this\textsuperscript{70}, that sound so plausible on first glance, turns out to be not sound either. These statements imply that there is an “order of ranks” between doing something “unpleasant” (no matter whether legal or illegal) to somebody and telling somebody that one is going to do something “unpleasant” to him. It further implies that “telling somebody that one is going to do something unpleasant to him” is necessarily less “bad” than actually “doing something unpleasant to somebody” (from which Horn draws the conclusion that if the latter is not criminal the former can even less so be punished). These implications may be correct as long as one only considers the values and rights infringed when the actual infliction of harm takes place, i.e. it is of course true that the announcement “I’ll hit you on your head” is less “unpleasant” for the victim’s bodily health than actually hitting the victim. As stated above, however, the duress offence protects a separate different “right”, the right freely to form, and act in accordance with, one’s will. The announcement “I’ll hit you on your head if you don’t ...” may well encroach upon the victim’s freedom of will – and may therefore be punishable as duress under certain circumstances. The announcement “I’ll publish pictures that show you in the nude unless you...” does itself not violate the victim’s right to privacy or her right to protection of one’s own image, and may in that respect be considered as less “bad” than the actual publication of the pictures (be it lawful or unlawful). It does hit on a different right, however, to wit the freedom of choice, by putting pressure on the victim. Apart from that, it seems to be quite euphemistic to equate “threatening” with “telling somebody...in advance”, and it is not only euphemistic but it actually veils the – important – fact that pressure is put on the victim. Thus, the implication that “telling somebody that something unpleasant will be done to him” is necessarily less “bad” than actually “doing this unpleasant something to him/her” has proven to be wrong: “Telling somebody that

\textsuperscript{70} Horn, supra note 34 at 498.
something will be done to him” touches on a completely different right and may therefore be
“bad in another respect” and even “bad enough” to be punished as duress (given that all other
elements are fulfilled). Horn’s other thesis – the assumption that the perpetrator threatening
with an omission not contrary to a legal duty actually broadens the victim’s freedom – is not
convincing either. It seems far too theoretical (and sarcastic) to judge the choice between two
evils to be a gain in freedom. In reality, the burden to have to make a decision between two
evils puts additional pressure on the person in distress. As a result, Horn’s argument cannot be
agreed with.

Schubarth, Ostendorf and Frohn also regard the issue as a question of the element
“considerable evil” and argue that this element is not established if the threatened omission is
not contrary to a legal duty. 71

Schubarth’s argument is certainly to be agreed with as to the point that in cases where
the perpetrator creates a “threatening situation of permanence” and threatens to “not put an end”
to that state of affairs he might “in reality” have threatened with a positive action instead of an
omission. It is certainly true that there are cases where it is only a linguistic game that gives the
perpetrator’s announcement the quality of a “threat with an omission” whereas the real social
content may be a different one. The relevant concern, however, is not – as Schubarth suggests –
whether or not the threat with an omission is “in social reality” a threat with a positive action.
On the contrary – as I argued earlier, the distinction between “threat with omission” and “threat
with commission” is not an appropriate feature at all. Thus, the circumstance that “in reality”
the threat constitutes a threat with a positive action (to wit with the continuation of that state of
affairs), does not get us any further. Thus, Schubarth’s opinion is not convincing.

71 Schubarth, supra note 7 at 727-728; Ostendorf, supra note 12 at 2593; Frohn, supra note 46 at 366.
Frohn’s opinion – arguing that the evil is not considerable if the victim does not have a right to claim a certain perpetrator’s conduct\textsuperscript{72} – is acceptable as to the fact that it has to be the victim’s perspective that is decisive when examining whether an evil is “considerable”: As the right the duress offence intends to protect is the freedom of will, the effect of the threat has to be the decisive factor. One also has to acknowledge that Frohn is right by assuming that the abolition of the “duty-test” would have the result that in principle every reciprocal agreement could be subsumed under § 240 I StGB. It is in fact true that threats with an omission not contrary to a duty resemble an offer to contract. It is questionable, however, whether this supports the inference that threats with omissions that are not contrary to a duty must not be punished as a consequence of the contract law principle of liberty to contract. First, the liberty to contract is subject to limits, too (e.g. §§ 134, 138 BGB\textsuperscript{73}), second, nobody seriously intends to punish mere offers to contract as duress, because there is still the element of “considerable” that has to be met and subsection 2, according to which the act is only unlawful if the threat

\textsuperscript{72} Frohn, \textit{ibid.}

\textsuperscript{73} Bürgerliches Gesetzbuch = Civil Code:

\textbf{§ 134 [Gesetzliches Verbot]}

Ein Rechtsgeschäft, das gegen ein gesetzliches Verbot verstößt, ist nichtig, wenn sich nicht aus dem Gesetz ein anderes ergibt.

\textbf{§ 134 [Statutory Prohibition]}

A legal transaction which violates a statutory prohibition is void, unless a different intention can be taken from the statute.

\textbf{§ 138 [Sittenwidriges Rechtsgeschäft; Wucher]}

(1) Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig.

(2) Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausnutzung der Zwangslage, der Unerfahrenheit, der Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, die in einem auffälligen Missverhältnis zu der Leistung stehen.

\textbf{§ 138 [Immoral transaction; Usury]}

(1) A legal transaction which offends good morals is void.

(2) In particular, a legal transaction is void by which somebody, by exploiting the predicament, inexperience, lack of judgement or considerable weakness of will of another party, causes pecuniary advantages to be promised or conferred onto him or onto a third party in exchange for a performance, whereby these pecuniary advantages are clearly disproportionate to this performance.
with the evil is to be deemed “reprehensible” for the contemplated purpose. These criteria are likely to ensure that mere offers to contract will not be qualified as duress even if one rejects the duty test. Frohn’s argument is therefore not convincing either.

Ostendorf and Jakobs, asserting that the space of freedom of the threatened person is not encroached upon by a threat with a not-prohibited omission because the right the offence against duress intends to protect is not encroached upon, have to face a criticism similar to the one directed against Horn (see above): The assumption that the provision against duress only deals with and is concerned with the freedom that is (otherwise) legally protected is not cogent. The conclusion that whatever one is allowed to do one is also allowed to threaten with is not necessary, since – as stated above – the duress offence is intended to protect not so much against the actual infliction of the evil but against being put under pressure. Since the duress offence has an aim different from those norms that aim at the protection against the infliction of harm, it is not conclusive to argue that only the freedom protected by those norms is protected by the duress provision. The duress offence does not deal with what one is allowed to inflict on somebody but what one is allowed to threaten with. Another argument is of a historical nature: Whereas before 1943 only threats with a “crime” were subject to the duress provision, today’s version talks about a “considerable evil”. This change in wording shows that it was the legislator’s intention to no longer restrict criminal liability to threats with a prohibited evil.

Since Timpe also bases his argument on the assumption that only the freedom that is protected by other commission- or omission-offences is relevant to the duress offence under § 240 StGB, the same objections have to be raised against his view that had to be put forward against Jakobs and Ostendorf.

Roxin, as opposed to all other authors defending the duty-test, does not see the issue as a problem of § 240 subsection 1 StGB but argues that the “reprehensible-clause” in subsection 2 is the adequate “stage” to exclude threats with not-prohibited omissions from being punished as
duress.\textsuperscript{74} I agree with Roxin as to the assumption that subsection 2 needs some interpretatory concretization in order to satisfy the requirements of distinctness demanded by the \textit{nullum crimen, nulla poena sine lege} principle. It needs to be examined, however, whether this concretization can duly be found in Roxin’s autonomy principle. The question that spontaneously arises is where this “principle” comes from and whether the source is a legitimate one. Roxin indicates that it “can be extracted from the legal order in general”, but particularly from the “basic idea of the duress section”\textsuperscript{75}. \textit{How} this “basic idea” leads to the autonomy principle as advocated by Roxin remains open, however. This is hardly surprising when considering the “basic idea of the duress section”: The basic idea of the duress offence is to declare conduct that \textit{unbearably} harms another’s freedom of choice criminal. Regarding this; it becomes obvious that the “basic idea” itself simply does not say \textit{which} harm is bearable and which is unbearable. Apart from this general scepticism towards Roxin’s argument, there are other weaknesses. It is not convincing that supposedly the autonomy principle only covers threats with omissions. As argued above, the distinction between commission and omission is uncalled-for in the issue at hand. In particular, it is not comprehensible why the autonomy-principle should not be equally applied in cases of threats with a positive action, given that one is inclined to consider it being a correct criterion. This would mean that the autonomy principle not only demands that one bears to do without benefits that somebody else is not obliged to give (traditional autonomy principle as applied by Roxin) but that it also demands that one bears actions somebody else has a right to commit. I cannot see a difference between those two variants that renders the former legitimate, the latter, however, invalid. Roxin’s argument therefore appears to be inconsistent in itself. In addition, the same criticism comes into play.


\textsuperscript{75} Roxin, Jus 1964, 373 at 375.
here as with the above discussed approaches: The relevant question is not what one is allowed to do or to omit but what one is allowed to threaten. The autonomy principle is not to be queried as long as it is restricted to its original content: Everybody has to bear actions/omissions somebody else has a right to carry out. From this it does not necessarily follow, however, that everybody has to bear to be threatened with such. As Roxin tries to draw this conclusion, the autonomy principle as he understands it must not be pursued either. The question remains how one has to assess Roxin's modified approach. Just the fact that the modified version does not so much refer to the perpetrator's authority to act describing the effect the threat has on the victim as mere reflex, but that rather the victim's situation becomes the important criterion makes this approach preferable compared to the original autonomy principle. It is not the perpetrator's autonomy that matters but the victim's self-responsibility. Thus, Roxin's newer approach is a step in the right direction. It is dubious, however, if his argument can be considered as the concluding solution in the debate. The criterion whether in the case of the victim's refusing to follow the perpetrator's demand something bad or simply nothing happens seems very vague. Thinking of an example, one might consider the secretary again. She might have lost her former job a while ago; she might be a single-mother, living in an apartment the rent for which she will not be able to pay next month unless she finds a new job. The employer might offer her a job under the condition that she has sexual intercourse with him. Applying Roxin's approach, one has to ask whether, in the situation that she refuses to have sex with the employer, "something bad" or "nothing" happens. With equal legitimacy one might argue the one or the other: "Something bad" will happen – she won't pay the rent, her landlord will evict her etc. "Nothing" will happen – she won't get the job, she did not have a job before, so there's no change for the worse. This shows that the approach needs further concretization in order to become workable as to which circumstances have to be considered, which period of time has to be taken into account etc.
In conclusion, it has to be stressed that the diverse varieties of the duty-theories have shown a lack of conviction. Apart from the objections raised above, one also has to point out that the often-praised unambiguity of the results the duty-test comes up with is non-existent. I only want to mention, without explicitly discussing, the problem of fractional duties to act and the problem of threatening with an evil that is "prohibited/unlawful" on the one hand because it is contrary to a legal duty, that, were it realized, however, would be excused on grounds of the fulfilment of the duty being an unreasonable demand.\(^76\) Since the duty-test-theories leave it open which requirements have to be demanded for the "legal duty to act", they necessarily get into difficulties when cases with these problems occur.

Thus, a duty to act is not a necessary precondition for § 240 StGB being fulfilled in cases of threats with omissions.

b) The theories that do not require a duty to act for the threat with an omission to fulfil § 240 StGB

Arzt and Volk put much emphasis on the "internal connection principle". Again, the question arises, where this "principle" takes its legitimacy from. The wording of § 240 subsection 1 StGB does not indicate anything like an "internal connection" or its absence at all. One might argue, however, that the "internal connection principle" might find its legitimacy in subsection 2, \(i.e\). in the "reprehensible clause": The act is not unlawful if there is an internal connection between the announced evil and the demanded victim's conduct because in this case the threat is not to be deemed "reprehensible for the contemplated purpose". Admittedly, this argument sounds reasonable enough. Doubts remain, however. Doesn't it seem arbitrary to

\(^{76}\) In German law there exists a ground of excuse of "fulfilment of duty being an unreasonable demand" (Unzumutbarkeit der Pflichterfüllung) in the area of negligent offence and omissions.
equate “reprehensible” with “lacking an internal connection”? One might also think of cases where it is hard to decide whether or not an “adequate internal connection” exists, thus, this approach might well lead to new difficulties of distinguishing between “sufficiently related conditions” and “insufficiently related” ones. The “secretary” might clarify this: The employer does not demand that the woman applying for the job learn French or have sex with him, but that she daily take his dog for a walk (something she finds disgusting as she hates dogs). Internal connection? Inasmuch as Volk relies on the principle of self-responsibility, however, he can be agreed with. The argument that the elements of the duress offence are not made out in cases where one can expect the victim in his/her specific situation to resist the threat/indecent offer because the distress is not too intense for the victim to be able to reasonably decide in how desperate straits he/she is and how helpful the offer is compared to the conditions attached to it, does find some support when looking at the wording of the provision and by interpreting it in a teleological way: The element “considerable” in § 240 StGB is indubitably a normative one. Normative elements need to be interpreted by relying on a supplementary value judgement.\footnote{Wessels, supra note 55 at para. 132.}

The duress section has to demarcate between pressure that necessarily exists wherever human beings live together on the one hand and pressure exerted on somebody’s freedom of will that reaches such an extent that it can no longer be accepted on the other hand.\footnote{Roxin, supra note 75 at 374.} Interpreting the element “considerable” against this background, it becomes manifest why the victim’s self-responsibility is the issue that matters when demarcating between inevitable pressure and grave constraints of will: Evils that the victim can resist in calm self-control do not qualify as grave constraints of will but belong to the area of inevitable pressure in interhuman relations. They might be “evils”, but they are not “considerable evils” under the provision against duress. Therefore the principle of self-responsibility represents one appropriate feature in the
discussion at hand. The ongoing analysis will show whether it in itself can solve the question or whether there are other criteria necessary, especially in order to avoid the reproach of unconstitutionality due to vagueness.

Hansen’s way of giving the element “threat with a considerable evil” clearer contours cannot be considered appropriate. By relying on fundamental socially ethical norms he blurs the borderline between criminal law and morality.

The Federal Supreme Court’s decision as a whole is to be welcomed, as for the first time a superior court expressly recognized that the matter of interest is not what one is allowed or prohibited to inflict on somebody but what one is allowed or prohibited to threaten somebody with. The duty-test is abolished, and even though among scholars it is still alive and despite the fact that German law does not know a “stare decisis” rule, it is to be expected that in the practice of criminal law courts the duty-test will no longer be applied. One has to examine, however, whether the gap the duty-test leaves behind can satisfactorily be filled with the criteria developed by the court. The first criterion that refers to the element “threat with a considerable evil” and requires the evil to be of such a quality that one cannot expect the threatened person in his/her situation to resist the threat in calm self-control, represents what among academics is called the principle of self-responsibility. As discussed above, this principle appears to be a proper criterion as it takes the sense and purpose of the duress offence into account and thus is a legitimate interpretation. The problem, however, is that it does not provide a manageable scheme that is able to impede judicial arbitrariness: Without other criteria it would merely be the judge’s personal notion of “calm self-control” that decides over the perpetrator’s being convicted or not. The court’s second criterion does not contribute much to the problem: The feature that the perpetrator must be capable – either factually or apparently (from the victim’s point of view) – to realize the evil is nothing more than a repetition of the general definition of “threat” as opposed to a mere “warning”: In cases where the perpetrator does not describe the
“evil” as something he has control over, he is not “threatening” but only “warning”, which indubitably is not sufficient to trigger § 240 StGB. The third step according to the court is to exclude those cases from § 240 StGB in which the victim’s scope of action is broadened instead of narrowed, i.e. the autonomy of his/her decisions is not encroached upon in a punishworthy manner. This criterion is said to have its place in subsection 2, the reprehensible clause, and is supposed to serve as an additional filter to sift out less severe constraints of the freedom of choice. It is rather baffling, however, what relevance this criterion is still supposed to have at all in this stage, i.e. after having applied the first criterion: It is hardly conceivable that in a case where a threat with an evil has been so grave for the victim that one could not expect him/her to withstand the threat in calm self-control, one will find that the very same victim’s scope of freedom has in fact been broadened instead of narrowed. Rather, if the latter is the case then the victim would probably be expected to resist the threat in calm self-control. Since the reprehensible clause when understood in this way does not have any function at all, this criterion has to be rejected.

Schroeder has to be agreed with insofar as he says that every conditional help offer can be reinterpreted into a threat and the other way round. He is also right when he assumes that the perpetrator’s skills of phrasing his demand in one way or the other cannot be of any importance when assessing his conduct. Moreover, it is true that the difference between a threat with an evil and an offer of an advantage does not merely consist in the differing linguistic formulation but is based on a difference in substance: The “absence of an advantage” does not necessarily constitute a “disadvantage” but can also be “neutral”, which means that “not granting an advantage” does not necessarily equate with the “infliction of a disadvantage”. Thus, there is also a substantive difference between the announcement not to grant a certain advantage unless specific conditions are fulfilled (“offer”) and the announcement to inflict a disadvantage if the conditions are not met (“threat”). Schroeder’s thesis that without a legal duty to act the
perpetrator's announcement can only (and always) be qualified as a “real” threat if the perpetrator either threatens to break off a conduct he used to pursuing until now or if he requires the victim to fulfil additional (unforeseeable) conditions for committing an act that he had already “promised” in advance, is questionable, however. Admittedly – these groups of cases seem to represent a particularly grave burden for the victim and therefore seem appropriate. There are questions remaining, however, as to how Schroeder developed these criteria, whether the enumeration is exclusive or whether one might think of more cases or whether there is a more general description for cases where the real social content of the announcement is a threat as opposed to an offer.

Wessels' argument that in cases where the perpetrator has no duty to act the “individual circumstances of the specific case at hand” have to be examined in order to determine whether or not the perpetrator’s behaviour is aimed at putting pressure on the victim, is exposed to the criticism of being very vague and thus running the risk of being inconsistent with the nullum crimen sine lege principle. As long as there is an opportunity to develop more precise criteria to handle the duress offence this kind of argument that only refers to the specific case should therefore be avoided.

Klein's attempt to incorporate the elements of the usury offence into the duress section has to be rejected. It might be true that cases of usury and cases of threats with not-prohibited omissions have a great deal in common and sometimes a certain fact pattern might in fact trigger both the duress and the usury offence. On the other hand, however, there are also considerable differences, that speak against a transplantation of elements from one offence to the other; e.g. the fact that the usury offence requires a victim’s conduct that consists of “promising or giving of assets to the perpetrator”, whereas for the duress offence any kind of “commission, toleration or omission of an act” on the part of the victim is sufficient. Apart from that, the comparison of those two criminal code provisions shows that the legislator
unmistakably has described the victim’s situation in a very detailed way in the usury offence while not at all in the duress provision. Incorporating the elements that describe the victim’s situation in the usury section into the duress offence would therefore mean to insinuate that the legislator was not aware of this difference, rather that the difference was caused by an oversight. In view of the fact that concerns about the relative vagueness of the elements of the duress offence have been voiced for quite some time and the fact that a respective alteration of the duress offence would have been perfectly possible, this cannot be assumed, however. Rather one has to start with the assumption that the provision against duress has been deliberately formulated in a broader way than the provision against usury: The area of applicability of the duress offence is intended to embrace all social relations between human beings; the duress section, as opposed to the usury provision, does not “only” intend to grant protection against the lost of assets, but against unbearable constraints of the freedom of will in all fields of life, and therefore needs to be broader.

6. Own “solution“

When examining a perpetrator’s conduct as to whether he/she committed the crime of duress, one first has – as suggested by Schroeder – to determine whether his/her announcement really, i.e. in its social reality, constitutes a “threat with an evil” or if it has to be qualified as a conditional “help offer”. As opposed to Schroeder, however, I would apply a different method for drawing this distinction. This method has the advantage over Schroeder’s criteria of not consisting of more or less arbitrary groups of cases but of being of a more general applicability. Thus, it might be a better means to prevent judicial arbitrariness and grant certainty.

As discussed above, every threat with an omission can principally be reinterpreted into an offer of positive action. This means that every announcement that is aimed at motivating the
victim towards behaving according to the perpetrator's demands contains — at first glance — both an element of "punishment" for not-behaving in the desired way and an element of "reward" for carrying out the conduct desired by the perpetrator.\textsuperscript{79} We have already shown, however, that there is a substantive difference between the announcement not to grant a certain advantage unless specific conditions are fulfilled and the announcement to inflict a disadvantage if the conditions are not met, and it is the social context that determines whether it is one or the other. The duress offence as set out in § 240 StGB expressly demands a "threat". Therefore the promise of a "reward" is not caught by the provision and therefore cannot be punished as duress. To clarify this point, one might compare the duress provision with the provisions against bribery: In both constellations, the perpetrator equally demands a certain behaviour from the victim, the means used to demand the specific behaviour, however, differs: In bribery cases, the perpetrator offers to give a certain (financial) advantage that the bearer of the office is only able to achieve by carrying out or omitting a specific official action. The social meaning of the perpetrator's announcement is tantamount to a \textit{reward}. In cases of duress, however, the perpetrator induces his victim to act in a certain way by threatening him/her with a considerable evil. The social meaning of the perpetrator's statement in "typical" cases of duress is therefore tantamount to \textit{punishment}. Thus, in order to determine whether somebody committed the crime of duress one must test the perpetrator's announcement with a view to whether it contains a \textit{reward} or a \textit{punishment}. In cases where the announcement contains a reward, the perpetrator offers an advantage as opposed to threatening with a disadvantage as required for the offence of duress. Therefore the perpetrator has only committed a crime if the further elements of bribery are fulfilled. A conviction of duress is out of the question.

\textsuperscript{79} This has especially been pointed out by Pelke, \textit{Die strafrechtliche Bedeutung der Merkmale "Übel" und "Vorteil" – Zur Abgrenzung der Nötigungsdelikte von den Bestechungsdelikten und dem Wucher} (München: Verlag WF, 1990).
In order to find out whether the perpetrator in a specific case used a “lure” (“reward”) or “pressure” (“punishment”) in order to motivate the victim, one has to determine how the perpetrator would conduct him/herself if he/she had no interest at all in the behaviour he/she now demands that the victim carry out. Something that one would do anyhow/ordinarily/without trying to motivate somebody, one cannot effectively use as a “reward” or “punishment”. What matters is therefore the question of how the perpetrator would have behaved under the assumption that he/she would not have had the idea to motivate the victim to do/tolerate/omit a special act: In a case where he would – under this assumption – conduct himself in a manner that is advantageous for the victim, but now he only wants to do this if the victim fulfils his/her demands, he has a “punishment” in mind, i.e. he threatens with an evil. In a case where he would – under the above-mentioned assumption – conduct himself disadvantageously from the “victim”’s point of view, but now promises to change his/her behaviour for the benefit of the “victim” if the “victim” complies with his/her demands, he voices a “reward”, i.e. makes an offer and does not threaten. The question remaining is: Whose perspective is relevant in deciding this? This cannot be the perpetrator’s but has to be the victim’s one: Only if the announced reaction looks like a “punishment” from the victim’s point of view, can he/she have the feeling of being “compelled” to behave in the desired way. If he/she takes the perpetrator’ statement for a “reward”, he/she cannot be said to be put under the pressure of duress, because then he/she is not motivated by pressure but by a “lure”. Having established that the perpetrator in a specific case has in fact “threatened” the victim, this is not the end of the analysis.

The next step has to be the determination whether or not the evil the perpetrator threatened with is “considerable”. In accordance with the Federal Supreme Court decision in

80 The distinction between reward and punishment is also found by Pelke, ibid. at 125-126.
the detective case, the evil is not to be regarded as “considerable” if one can expect the victim in his/her specific situation to resist the threat in calm self-control. In order to establish this one has to pose the question whether the perpetrator demands relatively serious conduct by exerting relatively mild pressure, so that the victim him/herself is responsible if he/she does not resist this mild pressure. In addition, I want to note that possibly even if the perpetrator has a legal duty to carry out the act he threatens to omit he might not be convicted of duress, because the evil is not “considerable”: If the perpetrator merely threatens not to fulfil a contractual duty, one will – as a rule – be able to expect the victim to resist the threat as he/she has the possibility to launch civil proceedings against the perpetrator.

7. Application of this “solution” in the case BGHSt 31, 195

The store detective’s announcement to prevent the shop-lifting being reported to the police if the shoplifter had sexual intercourse with him, might constitute a threat with an evil. The “evil” could be “not to prevent the police report”. On the other hand, one might qualify the detective’s conduct as an offer with an advantage, the “advantage” being “to prevent the police report”. In order to find out which interpretation is in accordance with the “real social content” of the statement, one has to ask how the detective would have behaved if he had not had any interest in having sex with the girl. Had he not had any interest in having sex with the shoplifter he most probably would simply have acted in accordance with the contract of service he has with the store-management, i.e. he would have reported the larceny to the police, i.e. he would “not have prevented the police report”. Thus, he could not use this conduct (“not to prevent the police report”) as a means to motivate the girl, but used the other alternative (“to prevent the police report”) in order to motivate her, i.e. he offered her a reward instead of threatening her. He did not commit the crime of duress.
Admittedly, this result is hardly satisfying. When posing the question why one spontaneously wants to reject this result, one might find that it is the demand the detective makes, the “condition” he sets out for the girl to achieve the “reward”, the fact that he demands sexual intercourse, that makes us upset and causes us to feel that he should be punished. The quality of the “condition/demand” is, however, not of any relevance in § 240 1 StGB. It only becomes relevant in subsection 2 when the “contemplated purpose” of the threat comes into play. Without the elements of subsection 1 being fulfilled, however, one does not even get to discuss the reprehensible clause of subsection 2. The only interest of subsection 1 is – and the wording is unambiguous in that respect – whether the perpetrator threatens with a considerable evil. The statement not to prevent a well-founded and justified police report would probably not be qualified as a threat with an evil if one were asked to decide that question “spontaneously and lay-like unjuridically”, because one might be inclined to think that a thief first and foremost has got him/herself to blame for being reported to the police. If there is no threat, however, the “conditions” attached to the “offer”, however upsetting they may be, cannot lead to a conviction under the offence of duress. From the fact that the element of the perpetrator’s behaviour we consider punishworthy is the demand of sexual intercourse one might also draw the conclusion that the main point we reproach the perpetrator with rather lies in the area of sexual offences than in the area of § 240 StGB. Therefore it is necessary to examine whether the detective’s behaviour is punishable under these offences:

- § 174 StGB – Sexueller Missbrauch von Schutzbefohlenen: This section of the Strafgesetzbuch aims at the protection of juveniles against the abuse of parental, educational and job-training founded authority relationships. The elements of the first variant are not fulfilled in the detective case, as this variant requires the girl be under 16 years of age. The second variant requires a specific educational, traineeship-, care- or employee-employer
relationship. Such a relationship did not exist in the case at hand. The third variant requires that
the victim is the perpetrator’s own child, which was not the case either.

• § 174 a StGB – Sexueller Missbrauch von Gefangenen, behördlich Verwahrten oder
Kranken und Hilfsbedürftigen in Einrichtungen: § 174 a StGB makes it a crime for employees
of a correctional institution or hospital to perform sexual acts with persons who are committed
to the institution or hospital. As the girl was no “inmate” of an institution or patient in a
hospital, § 174 a StGB is out of the question, too.

• § 174 b StGB – Sexueller Missbrauch unter Ausnützung einer Amtsstellung: 174 b
StGB seems to fit our case best. It protects – among others – accused persons during criminal
proceedings against abuse of their “inferiority” resulting from the proceedings. However, the
detective did not commit this crime either: When the relevant conduct was carried out, no
criminal proceedings had yet been launched against the girl. Apart from that, the provision
requires that the perpetrator be a public official who is involved in the criminal procedure in a
way that gives him/her influence over the decision, which is not the case with a store detective.

• § 177 StGB – Sexuelle Nötigung, Vergewaltigung/ sexual abuse, rape: Whereas until
1997, sexual acts performed against the other person’s will were punishable only if the
perpetrator applied physical force or threatened to do so, the reformulation of § 177 StGB in
1997 had the effect that now sexual abuse or rape can also occur if the offender takes advantage
of a situation in which the victim is defenceless in the offender’s hands. Interpreting the crucial
phrases “powerless position” expansively, one could include situations where the victim
yielded to social pressure, so maybe this could provide a possibility of conviction in our case.
There are several reasons against this, however: First of all, it is unlikely that such a broad

reading will be adopted by the courts, as most commentators reject the notion of social pressure and reduce the definition of “powerless position” to physical circumstances that limit the victim’s ability to run away or fight the offender. Secondly, in our case, no sexual acts were performed yet and the stage of “attempt” had not yet been entered into according to the German principles governing the distinction between mere preparation and attempt. Therefore the detective is also not to be convicted for sexual abuse or rape.

Consequently, the detective’s conduct is not punishable under Germany’s sexual offences, either. Even the major reforms in that area (1997 and 1998), that generally extended the reach of criminal law, did not change this result. Thus, the heading of the German sexual offences section “offences against sexual autonomy” is somewhat misleading: Surely, there is no such thing as a comprehensive protection of sexual autonomy in German criminal law. Many acts, for example the conduct of the detective in the case at hand, that violate another person’s right to sexual autonomy are beyond the reach of criminal law. This may appear unsatisfactory in certain instances and the legislator is called upon to alter this state of affairs. The fact that even the Federal Supreme Court in BGHSt 31, 195 upheld the conviction of the store detective even though a “proper analysis” according to the methods of legal reasoning in German criminal law as illustrated above results in a different conclusion, makes it obvious that the “sense of justice” demands punishment. It is for the parliament, however, to change the law, not for the courts. The duress section must not become a “default-rule” for every behaviour considered worth punishment.

82 Ibid.
V. The Canadian approach

This chapter focuses on how Canadian criminal law would deal with cases like the store-detective case that caused the above-described debate in German criminal law.

The analysis has to start with the offences in the Canadian Criminal Code (or other statutory provisions) that might prohibit the detective’s conduct: As the legality principle, which will be discussed more fully in chapter VI, is a basic principle in Canadian criminal law (as it is in German criminal law), every offence, with the exception of contempt of court, must be found in a statutory form, CCC, s. 8 (1), (3), s. 9.

At first sight there are five provisions conceivably dealing with the perpetrator’s conduct in cases like the store-detective case: sexual assault (CCC, s.271), extortion (CCC, s.346), intimidation (CCC, s.423), uttering threats (CCC, s.264), and sexual exploitation (CCC, s.153). Is one of these provisions able to cover the store-detective’s behaviour?

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1 BGHSt 31, 195, see chapter III. 16 year-old witness B purloined a shawl to the value of 40 DM in a department store. After the larceny, she was caught by the private store detective P and taken to his office. Immediately the accused A, a second detective of the store, came there, too. P, the one who had witnessed the theft, was writing the larceny report to the police, while B was begging not to make a report to the police. Her parents would “beat her to death” and she might loose her position as an apprentice with a bank if the larceny became public. Both detectives declared, however, they would make a report at any rate. When detective P was leaving the office shortly, A, however, (who from the very beginning had been behaving as if he was the “boss”) said to the girl, there might still be a way to avoid a report. If she slept with him, he would make the police report “go by the board”. The girl believed that A was able and willing to do so if she fulfilled his demand; she said, however, that she did not have time at the moment. They therefore made an appointment. In the meantime, however, B confided in a priest, who informed the police.

2 See also Stuart, Canadian Criminal Law, 3rd ed. (Toronto: Carswell, 1995) at 4-5.

3 If the detective is found to have committed more than one of these offences (at the same time), the doctrine of res judicata or the rule against multiple convictions will have to be considered. The rule against multiple convictions was first enunciated by the Supreme Court of Canada in R. v. Kienapple, [1975] 1 S.C.R. 729, (1974), 44 D.L.R. (3d) 351, 1 N.R. 322, 26 C.R.N.S.1, 15 C.C.C. (2d) 524, where Laskin J. wrote at 539 [cited to C.C.C.]:

64
1. Sexual assault

The most obvious offence is sexual assault, CCC, s.271. Assault (including sexual assault) is defined in s. 265 (1) of the Canadian Criminal Code.

265. (1) Assault – A person commits an “assault” when
(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

(2) Application – This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

(3) Consent – For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
(a) the application of force to the complainant or to a person other than the complainant;
(b) threats or fear of the application of force to the complainant or to a person other than the complainant;
(c) fraud; or
(d) the exercise of authority.

(4) Accused’s belief as to consent – Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused’s belief, to consider the presence or absence of reasonable grounds for that belief.

It is clear that there was no s. 265 (1) (a) assault. The detective did not actually touch the girl, there was no actual application of force. The detective’s behaviour is not covered by s. 265 (1) (c) either, as he did not carry any weapon or imitation thereof.

"If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in a second count, the situation invites application of a rule against multiple convictions."

Subsequent cases have attempted to clarify the scope of this rule, one of them being R. v. Prince, [1986] S.C.J. No. 63, [1986] 2 S.C.R. 480, (1986) 33 D.L.R. (4th) 724, 70 N.R. 119, 54 C.R. (3d) 97, 30 C.C.C. (3d) 35. In that case, the Supreme Court of Canada held that the rule against multiple convictions applies only where there is both a sufficient factual nexus between the charges and a sufficient legal nexus between the offences.
S. 265 (1) (b) seems to fit best as it deals with threats, but when taking a closer look at the definition it has to be realized that this is not unproblematic either. Although the detective can arguably be said to have threatened the girl, he did not primarily announce a threat to apply force, but a threat to not impede the police report. An interpretation that held a police report subsumable under the term “force” would go beyond the borders of possible meanings of the word “force”. On the other hand, one might consider the detective’s demand for sexual intercourse as an – additional – “implied” threat to touch her sexually, which would constitute a threat to apply force, provided that the shoplifter would not have legally effectively consented. This is a question of how to interpret the detective’s statement. One might argue he did only announce one threat, which is the threat to not prevent her from being reported to the police. The desired sexual contact itself is not threatened, but is given to her as an “opportunity” to avoid the threat becoming reality. Another interpretation would see the detective announcing two threats (or a “double-threat”) by putting two evils in front of the girl, the police report and the sexual intercourse, threatening both, whereby she is given the “opportunity” to choose between one and the other evil. This question can be left unanswered if there is another way the detective’s conduct might fall within the ambit of the assault provision:

The store-detective might have attempted, by an act or a gesture, to apply force, s. 265 (1) (b) second alternative. The elements required for an attempt can be divided into the mens rea element and the actus reus element, each of which causes specific problems in the case at hand and will be discussed separately:

a) The mens rea requirement of the attempt

As to the mens rea requirement of an attempted assault, one further has to distinguish between the first issue of what is the mens rea requirement for attempts in general and the second issue of what is the mens rea requirement for sexual assault. As to the first issue, today
the need for mens rea in attempts is universally accepted. It is defined as the intent to commit the desired offence. For the mens rea requirement to be made out in the detective case it is therefore necessary that the detective intended to commit the crime of sexual assault. The crime of sexual assault itself consists of an actus reus and a mens rea requirement. As to the actus reus element one can ask if he had carried out what he intended would this have been the actus reus of sexual assault. The answer is yes if the intended sexual touching would have happened without the girl’s consent. The crucial question therefore is: Had the detective been successful with his demand, i.e. had he “induced” the shoplifter to have sex with him, would the respective sexual intercourse have been consensual? At first sight one might negate the shoplifter’s consent because apparently she did not “want” to have sex with the detective in the sense that she would not have done it absent any pressure. On the other hand, it can be argued that in the actual situation (had it occurred) she might have “wanted” the intercourse (in order to avoid the police report), i.e. it would have been her choice to have sexual intercourse with the detective.

The question of consent generally is troublesome. In s. 273.1 (1), the Canadian Criminal Code defines consent for the purposes of sexual assault provisions as “the voluntary agreement of the complainant to engage in the sexual activity in question”. The detective case itself shows that it is not easy to determine when there is a “voluntary agreement to engage in the sexual activity”: The difficult issue becomes whether an “agreement” to engage in sexual intercourse is “voluntary” if it was effected by pressure such as applied by the detective. What would the shoplifter’s will have been given that the detective were successful and both had engaged in sexual activity? She would certainly have wanted to avoid the police report. Does this mean that she also “wanted” the sexual intercourse as it appeared to be her only means to avoid the police report? One might argue that her will to avoid the police report as her final goal does

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4 See Stuart, supra note 2 at 594.
inevitably include her will to achieve the necessary *interim goal*, i.e. the sexual intercourse with the detective, on the way to achieving the final goal. This, however, would neglect that it is the accused who linked those goals by his making use of his position. If it was not for the "final goal" of avoiding the police report, there is no doubt that the shoplifter would not have wanted to engage in sexual activity with the accused. The detective made use of his knowledge of her "final goal" by putting the "interim goal" of sexual intercourse with him before the final goal. Can it be appropriate to regard an "agreement" to the sexual activity that was effected by making use of the shoplifter's detriment "voluntary"? The definition of "consent" still does not tell us what state of mind is required for "consent", as Christine Boyle, a Canadian legal scholar who has written extensively on sexual assault, has illustrated vividly:5

The present law seems to make clear that there is no consent where the victim had a gun to her head (force or threat of force). On the other hand, it is also clear that there is consent where the only motive for engaging in sexual activity is self-gratification. There are many other motives falling on a spectrum between these two extremes: a desire to reproduce, to avoid hurt feelings, to get a job, to avoid losing a job, to avoid the circulation of embarrassing photographs, to avoid an undeserved 'F' in a course, to avoid a deserved 'F' in a course, to make money, to make enough money to feed one's children, to get medical treatment, to avoid rejection by one's therapist or spiritual adviser. Which of these situations should be legally stamped consent and which submission?

Boyle's "listing" also shows that the detective case certainly is not an isolated case in that it seems difficult to draw the line between consent and submission due to a certain amount of pressure put on the complainant. There are many situations where people can use positions of power to induce women in less powerful positions to engage in sexual activity they would not have wanted had there not been factual circumstances that render the perpetrator in a more powerful position than the complainant. Thus, the question whether the sexual activity can be

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5 Boyle, "The Judicial Construction of Sexual Assault Offences", in Roberts & Mohr, eds., *Confronting Sexual Assault, A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 137 at 140.
regarded as "consensual" in those cases is not new either. Even the drafters of the Canadian Criminal Code were aware of the problem that there is no self-evident line between situations of consent and situations of lack of consent, *i.e.* a line between a "voluntary" and an "involuntary" participation in sexual activity in situations where there is a certain power imbalance between the alleged perpetrator and the complainant. CCC, s. 265 (3) and s. 273.1 (2) deal with some of these situations, for example threats (s. 265 (3) (b)), or abusing a position of trust, power or authority (s. 273.1 (2) (c)).

These sections are often said to deal with circumstances that "vitiate consent". The wording does not use this expression, however, it rather rules that "no consent is obtained" in these situations. What is the difference in these formulations? The first seems to suggest that the act in question does occur *with apparent consent, i.e. voluntarily*, but that the consent (that is actually present) is *not legally effective* because of the specific circumstance, thus, this formulation suggests a two-step approach to the question of consent, the first step being "was there consent?", and the second being "was the consent vitiated"? The latter phrase rather seems to rule that in the specific circumstance *there is no consent at all, i.e. it conveys a one-step approach of asking whether there was consent, which is among others determined by CCC, s. 265 (3) and s. 273.1 (2). This differentiation, which is mirrored in the distinction between "consent" (in the sense of "apparent consent that might be vitiated by certain factors") and "true consent" (in the sense of "consent that is legally effective, *i.e. that is not vitiated*"), might seem idle and pointless, as the outcome is the same – the assault is to be considered "non-consensual". It is, however, not completely pointless. Regarding the circumstances enumerated

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7 Compare *Guerrero*: "It is common ground that the sexual acts that occurred were consensual. The issue, however, was whether the consent was a true consent in the sense that it was not vitiated by the act of the appellant in threatening [...]."
in CCC, s. 265 (3) and s. 273.1 (2) as factors that vitiate consent implies that those sections do not come into play unless it is established that there – apparently – was consent, i.e. a voluntary agreement. The other alternative does not require a voluntary agreement being established before consulting CCC, s. 265 (3) and s. 273.1 (2) but uses these sections as means to establish whether or not there was a voluntary agreement. It is the interaction of the definition of consent as a voluntary agreement and ss. 265 (3), 273.1 (2) which is not fully clear.

In a recent decision, R. v. Ewanchuk, the Supreme Court of Canada has addressed the meaning of consent, and it may have changed the law relating to consent quite substantially. In that case, the accused was charged with sexual assault, when a 17 year-old woman alleged that the accused made unwanted sexual touchings toward her after a job interview in the accused’s trailer. With each progressive advance, the complainant told the accused “no”, and the accused stopped but later continued with each advance becoming more serious and intimate. Because the complainant was frightened, she did not attempt to physically fight the advances. At trial, the accused was acquitted on the basis of the defence of implied consent. The Court of Appeal of Alberta upheld the acquittal. The Supreme Court of Canada unanimously overturned the acquittal and held that the defence of “implied consent” does not exist in Canadian law. In looking at the actus reus of the offence, the question of consent can only be viewed from the subjective perspective of the complainant. The accused’s perception of the complainant’s state of mind is not relevant at this stage. There are only two conclusions that a trier of fact can reach: the complainant either consented or did not. There is no third option of “implied” consent through the complainant’s actions. If it is determined that there was no consent, then the court will look to see if the accused had the necessary mens rea for the offence. Only then can the accused’s perception of the complainant’s state of mind be relevant and used for the

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defence of honest but mistaken belief in consent. Thus an honest but mistaken belief in consent could still be a defence. The court has confirmed, however, that a woman has either consented or she has not, and there is no in between.

The question remains how s. 265 (3) of the Criminal Code, which lists circumstances under which the law deems an absence of consent (or “vitiates consent”), fits into this understanding of consent. The Supreme Court of Canada argues with respect to that issue that the question whether one of these listed circumstances was present and renders the complainant’s consent ineffective is subjective\(^9\) and that “the trial judge only has to consult s. 265 (3) of the Criminal Code in those cases where the complainant has actually chosen to participate in sexual activity, or her ambiguous conduct or submission has given rise to doubt as to the absence of consent.”\(^10\) If the complainant’s testimony as to the fact that one of the facts enumerated in CCC, s. 265 (3) was present is credible, the absence of consent is established such that the trial judge then has to turn his attention to the accused’s perception of the encounter, i.e. to the question whether the accused possessed the requisite mens rea.

The *Ewanchuk* case thus seems to take the position that the listed circumstances only have to be consulted after it has been established that the complainant (subjectively) did voluntarily agree to the sexual activity in question (or if her ambiguous conduct has given rise to doubt), i.e. the here so-called two-step approach. This is not necessarily convincing. Neither the definition of consent in s. 273 (“voluntary agreement”), nor the *Ewanchuk* decision elucidates the question what state of mind is actually required for “consent”, i.e. for the first step in this approach.

It seems that this is no coincidence. Rather, this is necessarily so because it appears that “consent” can hardly be described in positive terms at all. This is particularly obvious in cases

\(^9\) *Ewanchuk* at 483.

of passive or silent complainants. A positive definition of consent has been suggested by proponents of the so-called affirmative consent model: Consent ought to be defined as the unequivocal communication of voluntary agreement to the sexual activity in question. However, in my view this definition misses the reality of communications in sexual contexts. Further, it is virtually impossible for courts to examine crucial non-verbal elements of communication such as facial expressions, body language etc. I am not aware of other suggestions for positive definitions of consent. Therefore a different approach has to be adopted, to wit an approach that describes the circumstances where there is no consent, i.e. a negative definition. This is the approach that has been adopted by the Code as can be seen in s. 265 (3) and s. 273.1 (2) and should be adopted by the courts, too. The so-called "vitiating factors" describe situations, as e.g. the application of force, where there regularly is no voluntary agreement. Thus, it does not appear appropriate to adopt a two-step approach of first examining whether there was apparent consent and then asking whether there was a vitiating factor. The listings should instead be considered as part of the discussion whether there is consent at all, not whether the (otherwise – however – established) consent is vitiated by one of the factors listed. There is no real use in distinguishing between "consent" and "true consent", as long as there is no positive definition of consent and the only thing that might be defined is the absence of consent. Furthermore, the insistence on the "two-step approach" to describe situations where e.g. force or threats of force etc. are applied reflects the stereotypical perception that a woman cannot really be sexually touched against her will: "She must somehow have consented, even if out of fear." This should be avoided – in such cases there is

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not only no legally effective consent but there is *no consent at all*. The question therefore simply is whether or not there was consent. CCC, s. 265 (3) and s. 273.1 (2) provide clues for answering this question, by enumerating situations where there is no consent.

The *Ewanchuk* case is debatable in another – interrelated, but distinct – aspect. It seems to adopt a somewhat hybrid notion of consent: First it suggests asking whether there was consent from the subjective perspective of the complainant; then, if this is so or if there are doubts, it proposes taking the list of vitiating factors, which describe the offender's behaviour, into account. Generally, there are two conceivable ways of analysing consent. The question every attempt to create a statute dealing with rape or sexual assault has to face is: Should the offender’s observable behaviour matter, or should the individual’s consent as a subjective issue be emphasized? The way s. 265 and s. 271 are phrased suggests that the first of these approaches has been adopted by Canadian criminal law. However, by adopting a subjective perspective as to the question whether the complainant’s choice was “voluntary”, *Ewanchuk* seems to point in the direction of transforming the structure of the offence towards a model where the behaviour of the accused is no longer the decisive issue. By ruling that “a trial judge need only consult s. 265 (3) of the Code where the victim i. has chosen to participate in sexual activity; or ii. by ambiguous conduct or submission, has raised doubt about the absence of consent”, on the other hand, it shows that it does not intend to do away completely with the approach that emphasizes the offender’s behaviour in determining the question of consent or absence of consent.

It is questionable whether this combination of approaches is an appropriate means to deal with the issue of consent. The detective case itself demonstrates the difficulties of the notion of consent promoted by the Supreme Court of Canada in *Ewanchuk*:

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14 Boyle, *supra* note 6 at 59ff.
15 See Boyle, *ibid.* at 61.
One can relatively convincingly argue that in the detective case, had the shoplifter participated in the sexual activity, her participation would from her subjective point of view not have been a free, voluntary action, but rather involuntary due to the pressure that was put on her. If so, one would not even have to consult CCC s. 265 (3) or s. 273.1 (2), i.e. one would not even have to argue whether one of the factors listed in these sections was present, or whether the listings are exhaustive, etc. This concept of consent raises doubts, however, as the factors listed in these sections describe situations where one regularly is able to argue convincingly that a sexual contact was subjectively regarded as not consensual. This approach would therefore in most cases render CCC, s. 265 (3) and s. 273.1 (2) superfluous: When force is applied to the complainant (s. 265 (3) (a)), the subjective test promoted in Ewanchuk itself will already lead to the result that there is no "voluntary agreement", thus, no subjective consent. Thus, according to Ewanchuk, s. 265 (3) need not even be consulted. When threats of force are applied (CCC, s. 265 (3) (b)), the subjective test would also yield the result "no consent", without CCC, s. 265 (3) (b) being applied at all, etc. It is difficult to imagine a case where at the same time the sexual activity was consensual from the complainant's subjective perspective, and one of the factors listed in CCC, s. 265 (3) or s. 273.1 (2) was present.

Thus, the Ewanchuk case\(^{16}\), if understood as described above, seems not only to adopt a hybrid combination of the approaches, but in essence appears to put an end to the model of consent set out in CCC, s. 265 (1) and (3) altogether by ruling that the question of consent and absence of consent is a subjective one, with the consequence that the listing in s. 265 (3) would no longer be crucial for answering that question: Consequently, one no longer has to utilize the principles set out in s. 265 (3) in order to establish the absence of consent.

\(^{16}\) Ewanchuk, supra note 8.
If the Supreme Court of Canada in *Ewanchuk* indeed did intend to promote such an understanding of consent, *i.e.* an understanding of consent that renders s. 265 (3) and s. 273.1 (2) widely superfluous, it is questionable whether it should be agreed with. The change towards an approach that does not so much regard the offender’s observable behaviour as the basis for the establishment of the absence of consent but rather the victim’s perspective may be welcomed as a matter of public policy. Simply asking whether the complainant’s will was overborne might have the positive consequence of discouraging any attempt to manipulate a person’s mind. On the other hand, this approach might bring evidential difficulties as well as it might – by focusing on the complainant’s state of mind – rather do harm by even intensifying the impression that it is the complainant (regularly, the woman), not the perpetrator (regularly, the man) who is put on trial.

This issue can be left open at this point, however, if both approaches yield the same result in the detective case.

The facts were undisputed: According to the detective’s plan, the shoplifter would have “chosen” to sleep with him. There would not have been any ambiguous behaviour nor any discrepancy between the accused’s perception of the encounter and the girl’s subjective view: The shoplifter would actually have chosen to participate in sexual activity, but she would have done so because she was afraid of the police report. (With regard to the mens rea, there was no question of honest but mistaken belief whatsoever, as the detective did not deny that he “suggested the deal” and that he knew that if the girl had chosen to have sex with him, she would only have done so because of the pressure she was put under.)

Adopting an approach that does not refer to the offender’s behaviour in order to establish the absence of consent, one might well argue that the subjective choice made by the

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Boyle, “The Judicial Construction of Sexual Assault Offences”, *supra* note 5 at 140.
shoplifter was not "sufficiently voluntary" to be regarded as consent. Rather, it was no real choice at all: The complainant was 16 years old; she was facing a police report with its negative consequences for her social environment, the relationship to parents, to teachers or employers, friends etc.; she was afraid of these consequences; she was confronted with the much older male detective who was not an indifferent and uninvolved person giving her a rational choice between two alternatives but who probably made her well understand which choice he wanted her to make. Considering this social location, one would not even expect an extremely stable person to withstand the situation in a calm and self-controlled manner. From the subjective perspective of the complainant, she would have felt *forced to agree to the sexual activity*, *i.e. forced to consent to the sexual contact*, which for policy reasons must be considered tantamount to being *forced to the sexual contact itself*. The girl’s will in this situation would not have been genuine. It was coerced and thus, the complainant would not have been in a state of mind that the law can call “consent” for the purpose of the sexual assault provision. The law’s purpose is to grant protection against the humiliation and degradation that results from unwanted sexual contact, which constitutes an unwanted intrusion into the most intimate sphere of personal life. For the shoplifter, the sexual intercourse, had it indeed occurred, would indubitably have been humiliating and degrading. She would have undergone the humiliating experience that she could be manipulated according to a man’s will, and there is no decisive difference between a direct manipulation of her body and the indirect manipulation through the roundabout way of manipulating her mind. The provisions against sexual assault are created to protect persons, especially women, against this experience. Thus, the law would not have called the sexual contact, had it occurred, “consensual”.
Adopting the approach according to which it is the offender’s observable behaviour that matters, one has to consult CCC, s. 265 (3) and s. 273.1 (2) in order to determine whether in this situation there was “consent” on the part of the shoplifter.\textsuperscript{18}

First, the consent could have been legally ineffective according to s. 265 (3) (d) of the Code. For this to be made out it is necessary that the girl’s consent would have been the result of the detective’s “exercise of authority”. It is questionable whether the relationship between the girl and the detective in this case can be qualified as a relationship of authority in the sense of the law. It is not the case that the detective has a right to issue orders and the girl a duty to obey these orders. According to Beauregard J.A. (in dissent) in \textit{R. v. Saint-Laurent}\textsuperscript{19} this rules out the possibility of the consent being vitiated by reason of “exercise of authority” within the meaning of s. 265 (3) (d). Beauregard J.A. took a very narrow view of the meaning of “authority” saying that the person who exercises authority is “one who has the right to issue orders and to enforce their obedience”.\textsuperscript{20} The prevalent view on this issue, however, is that “authority” is not limited to relationships where one can enforce obedience.\textsuperscript{21} This is convincing, as on a plain reading, “authority” does not signify the legal right to command obedience. The context of s. 265 of the Code seems to allow a broader construction without doing violence to the express language of s. 265 (3) (d). Thus, the fact that the detective had no right to command or power to enforce obedience does not itself rule out a conceivable “exercise of authority”. Obviously, there is a considerable power imbalance between the 16-year-old girl and the detective, who is able to lay a complaint which might lead to criminal proceedings.

\textsuperscript{18} As mentioned above, the \textit{Ewanchuk} case rules that the approach with regard to this question is subjective. This does not have significant consequences in the case at hand, however, because, as already argued, there is no discrepancy between a subjective and an objective approach in this case.


\textsuperscript{20} \textit{Saint-Laurent}, ibid. at 294-295.

against her. The question is, however, whether or not this is sufficient to establish a vitiation of consent within the meaning of CCC, s. 265 (3) (d).

“Authority” is defined in The Oxford English Dictionary\textsuperscript{22} as follows:

\textbf{authority}: 1. Power or right to enforce obedience; moral or legal supremacy; the right to command, or give an ultimate decision. 2. Derived or delegated power; conferred right or title; authorization. 3. Those in authority; the body or person exercising power or command. 4. Power to influence the conduct and actions of others, personal or practical influence. 5. Power over, or title to influence the opinions of others; authoritative opinion; weight of judgment or opinion; intellectual influence …

In \textit{R. v. Matheson}\textsuperscript{23} the Ontario Court of Appeal held that “what is relevant is whether the particular relationship has, rightly or wrongly, vested the accused with the ability to control the life of the victim in such a manner as to be able to extract his/her agreement to sexual activity.”

According to what Boyle wrote in 1984, there existed the possibility that an extremely broad definition of authority would be adopted by the courts.\textsuperscript{24} As to people who are most “at risk” of being said to exercise authority, she lists employers – including persons put in positions of authority by them –, teachers, police officers, immigration officers, judges, husbands who insist on being the head of the household, professors who engage in sexual activity with students, doctors who engage in relationships with nurses.

Regarding this list of authority relationships it becomes very questionable whether the shoplifter’s decision to have sexual contact with the detective would have been the result of a special relationship of authority. It has to be emphasised that the detective is not a police officer, but a private detective, hired by the department store management, acting in this capacity. He and the girl did not have any “relationship” at all until the shoplifting occurred. The “authority” the detective might have exercised over the girl was, firstly, the power of being

\begin{itemize}
\item \textsuperscript{23} \textit{Matheson}, supra note 21.
\item \textsuperscript{24} Boyle, \textit{Sexual Assault}, supra note 6 at 70.
\end{itemize}
able to inflict a special kind of detriment on her – the police report – and secondly, the power to arrest her, CCC, s. 494 (1), a power which is not specifically related to his capacity as detective but a power which every citizen has. In “typical” cases of CCC, s. 265 (3) (d), however, the “authority” results from a special relationship between the perpetrator and the victim that was present before the events in question occurred and that includes a more “general” and permanent power imbalance, as for example between a father and his minor son, between a psychiatrist and a patient undergoing psychiatry etc. There is no such special relationship between the shoplifter and the detective: Neither the power to launch police investigations and criminal proceedings, nor the power to arrest constitutes a “general and permanent power imbalance”. Furthermore, the purpose of s. 265 (3) (d) of the Code is to criminalize coerced sexual relations, and considering this purpose the exercise of authority requires a power imbalance of such an extent that it is able to deprive the victim of a true appreciation of all the risks involved. It requires that the victim’s consent is not based on his/her own decision made in accordance with his/her own will, but rather that the victim sets the wishes and demands of the person in authority in the place of his or her own decision. What the store detective had in mind was that the shoplifter would agree to have sex with him in order to avoid a police report and its unpleasant consequences. Had he reached his desired goal, i.e. had his attempt been successful, the shoplifter would have chosen to have sex with him, not so much because she set the wishes and demands of the detective in the place of his or her own decision, but rather because she would have weighed up the two “evils” and found one less grave than the other. She would have made a decision according to what she personally considered more or less grave (although she would have made this decision “under pressure”). Thus, she would not have completely replaced her own decision by mere compliance with the detective’s wishes. Therefore her

25 Matheson, supra note 21.
consent could not be said to mainly be the result of the detective's authority. This is rather a "threat-situation" than an "authority-situation", although both seem to be interrelated and partly overlapping.\textsuperscript{26} The detective's influence on the shoplifter's decision, had it taken place in the way the detective desired, therefore shows a considerably different quality from the characteristics of typical cases of exercise of authority, where there is a rather permanent relationship of authority that gradually diminishes the complainant's ability to act according to his or her own decisions.

As a result, CCC, s. 265 (3) (d) does not apply in this case, \textit{i.e.} the sexual activity, had it taken place, would not have been non-consensual by reason of exercise of authority.

Second, it has to be considered that the occurrence of the sexual contact would have been the result of a choice between two evils; it would have been caused by the detective's threat not to stop the report being made to the police. The issue therefore becomes whether there was no consent due to this "threat". CCC, s. 265 (3) (b) only refers to threats of the application of force. The threatened police report does not fall within the ambit of "force". Thus, s. 265 (3) (b) does not render the sexual intercourse non-consensual either.

Therefore, none of the circumstances that are enumerated in CCC, s. 265 (3) seems to fit the detective case. One can argue, however, that s. 265 (3) (b) is not exhaustive of the types of threats that render the sexual activity non-consensual, so that it could be possible to consider the store detective's threat as one having this effect, even though it does not explicitly fall within the ambit of s. 265 (3) of the Code. This is debatable, however. There is authority for the view that s. 265 (3) (b) is not exhaustive as well as for the opposed opinion arguing that it is.

\textsuperscript{26}Also see Coleman, "Sex in Power Dependency Relationships: Taking Unfair Advantage of the "Fair" Sex" (1988) 53 Alb. L. Rev. 95 at 97, where Coleman states that "dependency relationships" are characterized by an "implicit or explicit threat creating an apparent inability to reject the sexual advances of the powerful person."
In *R. v. Guerrero*[^27] it was common ground that the sexual acts that had occurred between the accused and the 14-year-old complainant were consensual, the issue however being whether the consent was vitiated by an act of the accused threatening to expose photographs taken of the complainant in the nude, in particular whether s. 244 (3) of the Criminal Code (today: CCC, s.265 (3)) is exhaustive. After having said that the threats referred to in s. 244 (3) (b) (today: s. 265 (3) (b)) are threats of the application of force and that the threat to expose photographs does not constitute such a threat, the court held that “under the provisions of s. 244 (3) of the Criminal Code, the vitiation of consent, if it occurs, must occur by reason of one of the enumerated sorts of behaviour.”[^28]

On the other hand, in *R. v. Jobidon*[^29] it was held by Gonthier J. that s. 265 (3) was not intended to oust the traditional policy limits on consent which had been developed in common law. He argued that the list of vitiating factors in s. 265 (3) for the most part “merely concretised, and made more explicit, basic limits on the legal effectiveness of consent which had for centuries formed part of the criminal law in England and in Canada. Their expression in the Code did not reflect an intent to remove the existing body of common law which already described those limitations and their respective scope. The Code just spelled them out more clearly, in a general form.”

In *R. v. Caskenette*[^30], the British Columbia Court of Appeal followed Gonthier’s reasoning in the *Jobidon* case and concluded that *Guerrero* is not the law as to the breadth of s. 265 (3).

[^27]: *Guerrero*, supra note 6.
[^28]: Per Krever J.A.
[^30]: *Caskenette*, supra note 6.
However, in the Newfoundland Court of Appeal decision of R. v. Davis the dissenting judge O'Neill J.A. relied on R. v. Guerrero and thus found that s. 265 (3) was exhaustive of the circumstances in which threats vitiate consent.

The majority in this decision held, however, that s. 265 (3) (b) is merely illustrative, and not exhaustive. Green J.A. for the majority found that although threatened exposure of nude photographs does not fall within the ambit of s. 265 (3), the threat in question did vitiate consent because s. 265 (3) was not exhaustive and because the threat was sufficiently coercive to do so. The Supreme Court of Canada in R. v. Davis did not decide that issue, as it held that the appellant’s conviction of sexually assaulting the complainant could be affirmed on the basis of another “independent” sexual assault apart from the sexual acts that had been performed under the influence of the threat of exposing the pictures.

For the position that CCC, s. 265 (3) is exhaustive of the circumstances that render a touching non-consensual it has to be said that the way subsection 3 is phrased does not seem to leave any space for additional reasons by which “no consent is obtained”. A clear expression of the legislator’s intent not to create an exhaustive enumeration would have been an insertion of a phrase like “for example” or “in particular”. As Parliament explicitly specified four factors that may vitiate consent, the argument can be made that any others, even though they may have applied according to common law doctrines prior to that codification, could no longer be drawn from common law.

The history of Canadian criminal law, however, points in a different direction. Codification of criminal law as it occurred for the first time in 1893 did not replace common

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33 Davis at 787-789.
34 This has similarly actually been argued by the appellant in Jobidon, supra note 29.
law principles of criminal responsibility, but in fact reflected them. The basic premises of Canadian criminal law – the necessary conditions for criminal liability – are at present – despite the existence of the Code – left to the common law. This is supported by s. 8 (3) of the Code itself. As Gonthier in *R. v. Jobidon* put it: “If s. 8 (3) and its interaction with the common law can be used to develop entirely new defences not inconsistent with the code, it surely authorizes the courts to look to pre-existing common law rules and principles to give meaning to, and explain the outlines and boundaries of an existing defence or justification, indicating where they will not be recognized as legally effective.” Considering this and the above mentioned development shown in *R. v. Ewanchuk*, which is a development towards a more open understanding of the consent/absence of consent issue, it seems reasonable to assume that under today’s Canadian criminal law, there is no exclusive list of the situations in which “no consent is obtained”. For the listing in CCC, s. 273.1 (2) this is now expressly stated in the Code itself. S.273.1 (3) reads:

“Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.”

Therefore, CCC, s. 265 (3) should be interpreted as providing clues for the determination of consent or absence of consent. The law rules out the possibility of legally effective consent in the situations listed, but there may well be other situations where there is no voluntary agreement that the law calls “consent”.

Thus, it is conceivable that the announcement the detective made to the shoplifter rendered her submission involuntary. This, however, is questionable. The finding that the list in CCC, s. 265 (3) is not exhaustive does not say anything about what quality is required of

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36 *Jobidon*, supra note 29 at 738.
circumstances not listed in the section. The Newfoundland Court of Appeal in *R. v. Davis*\(^{37}\) held that a threat to expose nude photographs of the complainant “was sufficiently coercive to vitiate the complainant’s consent”. Can the same be said about a threat not to protect the complainant against a well-justified police report? Knowing the German debate, one might argue that there is a significant difference between a threat to expose nude photographs and a threat to not avert a police report, so that *R. v. Davis* could be distinguished: Whereas the accused threatens an omission in the detective case he threatens a positive action in *R. v. Davis*. Whereas the accused had a perfect right to make a police report on the complainant’s shoplifting, things are not as simple when being asked whether the accused in *R. v. Davis* had a right to expose the pictures.\(^{38}\) These issues, however, have not been raised in the Canadian debate over cases like these. Rather, it is the underlying principle of CCC, s. 265 (3) that is considered in order to determine whether a circumstance can be held to be “sufficiently coercive to vitiate the complainant’s consent”: Section 265 (3) expressly specifies circumstances in which there is no consent on the basis of a coerced or ill-informed will, thereby rendering the consent legally ineffective.\(^{39}\) Thus, it seems fair to say that the criterion to determine whether a circumstance renders the consent legally ineffective is whether it can be


\(^{38}\) The protection of one’s own image can arguably be granted by a “tort of privacy”. At least in British Columbia, Manitoba, Newfoundland and Saskatchewan there is a statutory tort of privacy; the B.C. Privacy Act may serve as an example:

Privacy Act R.S.C. 1979 c. 336:

1. (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

The range of protection, however, is unclear. Whereas in general there seems to be a tendency towards a broader protection of privacy rights, the court in *Milton v. Savinkoff* (1993), 18 C.C.L.T. (2d) 288 (B.C.S.C.) found that the exposure of a photograph that showed the plaintiff topless did not infringe her privacy. Therefore, it is not clear whether the accused in *R. v. Davis* would have acted unlawfully had he actually exposed the pictures; after all the complainant had consented that the pictures be taken and had not generally refused a later publication of the pictures.

\(^{39}\) *Norberg v. Wynrib* (1992), 92 D.L.R. (4th) 449, [1992] 2 S.C.R. 226, 68 B.C.R. (2d) 29. Even though this case was a private law case where the victim of the alleged assault sought damages, La Forest J. referred to s. 265 (3) in his judgement and argued that “section 265 (3) expressly specifies the circumstances in which consent is vitiated on the basis of a coerced or ill-informed will.” (at 460).
said that the will was coerced or ill-informed. In the case at hand, the will was not ill-informed, as the complainant knew everything and even though she was only 16 years old she was capable of understanding all circumstances. Her will can be said to have been coerced, however. The threat not to avert the police report put the complainant in a position of having to decide which "evil" to choose. Even if one might argue that she has herself to blame for being in a position where she has to face a pending police report, as nobody forced her to steal the shawl, this still does not give the detective the right to make use of her distressed position and to put even more pressure on her by making her decide between two evils. As we have seen above, there was no actual relationship of authority in the sense of s. 265 (3) (d), but we have also seen that there was a significant power imbalance. We also have seen that the threat to make the police report was no threat of force, but it was a statement that had a comparable impact on the shoplifter's state of mind. Altogether, the pressure under which the complainant would have consented to the sexual activity the detective demanded is comparable to the pressure that is put on victims in circumstances that fit one of the situations listed in CCC, s. 265 (3). Her will would have been coerced. Thus, her consent would not have been legally effective.

The same result is achieved when looking at the specific sexual assault section's list of circumstances vitiating consent, which is even broader than the one in CCC, s. 265 (3):

271. (1) Sexual assault – Every one who commits a sexual assault is guilty of
(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.
[...]

Even before s. 265 (3) was added to the Criminal Code, this was the criterion to determine the absence of consent: In R. v. Lock (1872), L.R. 2 C.C.R. 10 the submission by eight-year-old boys to sexual acts with a grown man was held not to be consensual because "the consent would in all probability have been obtained under a coerced and ill-informed will."
273. 1 (1) Meaning of “consent” – Subject to subsection (2) and subsection 265 (3), “consent” means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

(2) Where no consent is obtained – No consent is obtained, for the purposes of sections 271, 272 and 273, where

(a) the agreement is expressed by the words or conduct of a person other than the complainant;
(b) the complainant is incapable of consenting to the activity;
(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Subsection (2) not limiting – Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

In this section, an actual exercise of authority as in s. 265 (3) (d) is not required, but an abuse of a position of power is sufficient. As argued above the detective had power over the complainant: He had the power to make a police report and he had the power to arrest her. By trying to make use of this situation for his own purposes he abused his position of power. Therefore the law deems that “no consent is obtained”, s. 273 (2) (c).

Thus, in this case, it does not make a difference which approach to analysing consent is pursued: Had the detective’s attempt been successful, the law would have considered the sexual activity non-consensual. This is not too surprising: The two approaches seem to have come closer to each other with the flexibility to broaden the list of offender’s behaviour having become settled law. In order to determine whether a specific factor not listed in s. 265 (3) or s. 273.1. (2) has the effect of rendering the sexual contact non-consensual one poses the question whether the factor is of a quality that the complainant’s will can be considered overborne by this factor. The question posed by the approach that focuses on the individual complainant’s

See above at p. 77-78.
state of mind rather than the offender’s behaviour would not differ to a great extent: “Was this person’s will overborne?”

This result is also consistent with an important development in Canadian criminal law regarding sexual assault, according to which sexual assault cases must be looked at in the context of today’s society which is characterized by a prevalence of sexual assault against women and children and the fact that fear of sexual assault affects the lives of people. Looking at the social context of a given case particularly includes exploring the social position of people affected by criminal law – offenders, as well as especially victims of crime. The legal analysis takes into account that people (victims, offenders) are not interchangeable autonomous individuals, but that there might be considerable differences in their social location due to e.g. gender, age, ethnicity. It acknowledges that people may have different experiences and that these differences may not be overlooked but should be responded to by criminal law, because they might influence the way people act, the way they perceive their environment, as well as the way criminal law affects them. Such a contextual analysis may also go beyond perceived boundaries of law in that it may rely on interdisciplinary findings on the issue in question, especially with regard to sciences as sociology and psychology, as those are able to reveal important factors of crime. When exploring the social context of legal disputes and the effects of the judicial decision-making on people’s social life, courts may rely on empirical data (see e.g. R. v. Osolin later in this chapter). The doctrine of judicial notice allows courts to draw on knowledge of social context without the need of evidence being offered for the specific finding. Where judges succeed in being impartial while taking judicial notice, the doctrine provides a beneficial means of including social circumstances into the process of judicial decision-making. Another tool for introducing social context into the analysis is the testimony of experts,

42 Boyle, “The Judicial Construction of Sexual Assault Offences”, supra note 5 at 140.
especially but not exclusively of experts from the above-mentioned disciplines (psychology, sociology). Furthermore, background information about social context may be brought to the courts' attention by intervenors, e.g. interest group intervenors. These intervenors are granted the right to file written materials and sometimes to make oral arguments on cases without being a party, if they can argue that they have an interest in the case and are likely to bring arguments to the court that are not being presented by the parties themselves. Although this kind of intervention might be questionable in the area of criminal law, because it may result in the accused individual not only being confronted with the state power but also with other groups and organizations that might intervene “against him/her”, it is nowadays quite commonly granted. In the area of sexual assault, intervenors from the Canadian women’s movement (e.g. Women’s Legal Education and Action Fund “LEAF”) have had significant impact in that they presented the Supreme Court of Canada with women’s perspective on sexual assault law and in that they broadened the court’s knowledge base as to the social context of sexual assault cases, which is largely characterized by a prevalence of sexual assault against women and children. In the light of this social context, it becomes apparent that the offence of sexual assault is at its core an equality issue and that legal analysis must include attention to the equality-dimension of this crime.

An early sign of this development was L’Heureux-Dubé’s J. dissenting judgement in R. v. Seaboyer\textsuperscript{43}, where she recognized that the issue of restrictions on the admissibility of evidence of the past sexual history of women who where sexually assaulted is a sex equality issue. In contrast to the majority judgement, which seemed to operate from a presumption of existing gender equality, L’Heureux-Dubé’s dissenting analysis flows from her recognition of gender inequality.\textsuperscript{44} While L’Heureux-Dubé’s contextualized gender analysis was not adopted


\textsuperscript{44} Majury, “Seaboyer and Gayme: A Study InEquality”, in Roberts & Mohr, supra note 5, 268 at 269.
by the majority at that time, it still seems to have initiated a growing awareness of the gender-based nature of the sexual assault offences and of the need to pay attention to women's right to equality, guaranteed in ss. 15 and 28 of the Canadian Charter of Rights and Freedoms\(^{45}\), when applying the law.

Those Charter sections read:

15 (1). Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

15 (2). Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

A very important point in the development towards an egalitarian approach to sexual assault law is marked by the Preamble to Bill C-49,\(^{46}\) which reformed the provisions regulating the admissibility of sexual history evidence in 1992. In this Preamble, which is intended to guide courts in their construction of the relevant Criminal Code provisions, Parliament explicitly recognized that we live in a society where there is a prevalence of sexual assault against women and children, and where fear of sexual assault affects the lives of people, thus, it recognized that sexual assault is a sex equality issue and directed judges to use an analysis which considers and fosters the constitutional values promoted by the Bill, including the constitutional guarantee of sex equality. The intention was stated to “promote and help to

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\(^{46}\) An Act to amend the Criminal Code (sexual assault) S.C. 1992, c.38.
ensure the full protection of the rights guaranteed under sections 7 and 15 of the Canadian Charter of Rights and Freedoms."

The finding of a prevalence of sexual assault against women was explicitly supported in \textit{R. v. Osolin} by referring to the statistics “which demonstrate that 99 percent of the offenders in sexual assault cases are men and 90 percent of the victims are women.”\textsuperscript{47} Although somewhat half-heartedly, Cory J. also stated that “in the context of sexual assault the rights of the complainant cannot be completely overlooked. The provisions of ss. 15 and 28 of the Charter guaranteeing equality to men and women, although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant.”\textsuperscript{48}

Another step of developing an approach that pays attention to the Charter guaranteed right to equality for women was \textit{R. v. O’Connor}\textsuperscript{49}, a case dealing with the permissibility of the disclosure of confidential therapeutic records. Here it was again explicitly acknowledged that “unlike virtually every other offence in the criminal code, sexual assault is a crime which overwhelmingly affects women, children and the disabled”\textsuperscript{50}, although it was still only the dissenting judgement that recognized that disclosure may affect equality rights: “Further, ample, and meaningful consideration must be given to the equality rights under the Charter of sexual assault complainants when formulating an appropriate approach to the production of complainant’s records” since routine disclosure “will have disproportionately invasive consequences for women, particularly those with disabilities and children...”\textsuperscript{51}

\textsuperscript{48} \textit{Ibid.}
\textsuperscript{50} \textit{O’Connor} per L’Heureux-Dubé J., at para. 120.
\textsuperscript{51} \textit{O’Connor} per L’Heureux-Dubé J., at para. 121, 128.
In *R. v. Park*\textsuperscript{52} Cory and L’Heureux-Dubé JJ. made it clear that “the primary concern animating and underlying the present offence of sexual assault is the belief that women have an inherent right to exercise full control over their bodies, and to engage only in social activity that they which to engage in.”

Finally there are signs of a majority acceptance of the recognition of sexual assault as an equality issue in *R. v. Ewanchuk*\textsuperscript{53}: “Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. These human rights are protected by ss. 7 and 15 of the Charter.”\textsuperscript{54} *Ewanchuk* also establishes the connection between traditional common law on assault that has always regarded the individual’s right to physical integrity as of fundamental importance and modern sexual assault law that ought to regard a woman’s right to have control over who touches her body as equally important:

Having control over who touches one’s body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the Code expresses society’s determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual’s right to physical integrity is a fundamental principle [...]. It follows that any intentional but unwanted touching is criminal.\textsuperscript{55}

In doing so it stresses the importance of equality for women: Just as traditionally the common law has considered even minor unwanted contacts significant with regard to the offence of assault, modern sexual assault law must treat any non-consensual sexual touching of a woman as significant instead of trivializing it.

Furthermore, the development of a contextualized equality-oriented approach can


\textsuperscript{53} Supra note 8.

\textsuperscript{54} *R. v. Ewanchuk* supra note 8, per L’Heureux-Dubé J. at para 69.

clearly be seen in *R. v. Mills* where the court held that “equality concerns must also inform the contextual circumstances in which the rights of full answer and defence and privacy will come into play. In this respect, an appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence.”

The examples above have shown that this contextual equality-attentive approach has mainly been developed with regard to procedural issues of e.g. admissibility of evidentiary material. At least *Ewanchuk* makes it clear, however, that it also has its place in substantive criminal law, where it is to be adopted when constructing respective provisions of the Criminal Code.

In the light of this development in Canadian criminal law, it is necessary to adopt a contextualized approach that pays attention to the equality dimension of the detective case: The detective case is a vivid example of women’s unequal status in today’s society and shows how this existing inequality is played out through male exploitation of women: The detective is a man who puts pressure on a woman as a woman, that is because she is a woman. It is a case where a man tries to make use of his more powerful position in order to sexually exploit a woman who finds herself in a distressed situation. It may be considered as a rather subtle kind of sexual exploitation, as it makes the woman appear to be willing to engage in the unwanted sexual activity. As argued above, however, it is the perpetrator who establishes the link between the woman’s aim to escape the distressed situation and the sexual activity. Without this link any sexual activity in these cases would without question be non-consensual. The link, being established by the perpetrator, must not make a difference, *i.e.* must not render the sexual

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contact consensual, since this would allow men to further use existing inequalities for the purpose of exploiting women.

Thus, criminal law that takes the order found in the Preamble to Bill C-49\textsuperscript{58} and especially the Charter to promote the actual implementation of equality for women and to eliminate existing disadvantages seriously must come to the result that there is no consent in cases like the detective case, for this is the only result that is in accordance with women’s right to equality.

The accused was aware of all factual circumstances and did not dispute any of them. He had the intention to sexually touch the complainant and he knew of the factual circumstances which raise the legal issue of whether she consented, \textit{i.e.} he “knew” of or was reckless as to her lack of consent. Consequently, the mens rea of attempted sexual assault is established. Therefore the above-raised issue of how to interpret the detective’s statement – only one threat not to impede the police report or an implied second threat of touching her without her consent – does not have to be decided (at least at this point).

b) The actus reus of attempted sexual assault

The actus reus of an attempt requires an \textit{act, more than merely preparatory}, taken in furtherance of the attempt. The accused stated the threat to not impede the larceny report. The question is whether this can be considered as more than merely preparatory to the actual touching. The question how to demarcate between preparation and attempt is troublesome.

A number of tests have been suggested. The \textit{remoteness test} tries to find a distinction between immediate and remote acts, regarding proximity in respect of time, distance, speed or number of acts remaining. According to the \textit{series of acts test} a person exceeds the stage of

\begin{footnote}{\textsuperscript{58}}Supra note 46.\end{footnote}
mere preparation and enters the stage of attempt the moment he/she commits an act that forms part of a series of acts, which would constitute the actual commission of the crime if it were not interrupted. The *equivocality test* sees the borderline between preparation and perpetration where an act is committed that is of such a nature that it is itself evidence of the criminal intent with which it is done.

In *R. v. Cline*\(^5\) the Ontario Court of Appeal stated that “a precise a satisfactory definition of the actus reus is perhaps impossible”, while concluding that “each case must be determined on its own facts, having due regard to the nature of the offence and the particular acts in question.” The Court of Appeal added that the actus reus for an attempt need not “be a crime or a tort or even a moral wrong or social mischief”, nor demonstrate by its nature an unequivocal intent.

In *R. v. Deutsch*\(^6\) the Supreme Court of Canada held that “no satisfactory general criterion has been, or can be formulated for drawing the line between preparation and attempt. The distinction, as it applies to the facts of a particular case, must be left to common sense judgement. It is a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the completed offence. Consideration should be given to the relative proximity of the act in question to what would have been the completed offence in terms of time, location, and acts under the control of the accused remaining to be accomplished. Relative proximity may give an act which might otherwise appear to be mere preparation, the quality of an attempt, but an act does not lose its quality as the actus reus of attempt simply because further acts are required to complete the offence or a significant period of time may elapse before the offence would be completed.”


To what result do these tests lead in the detective case?

Applying the remoteness test, the result would probably be that the detective’s statement is fairly remote an act to the actual touching. The detective and the girl agreed that the sexual activity should not take there and then, but later and somewhere else. A number of acts are remaining until the actual touching would have started. Therefore, according to the remoteness test, the detective did not yet enter the stage of attempt to sexually touch the complainant without her consent.

It is not clear which result the series of acts test would reach. On the one hand, one might argue that the detective did not yet commit an act that without interruption would have led into the actual commission of the assault, the touching: Without the girl appearing at the appointment the assault would not have taken place exactly in the manner (time and place) as intended by the detective. Therefore, one might say the events had not yet progressed that far that without interruption it would necessarily have resulted in the actual touching. On the other hand, one might argue the opposite by saying that the only circumstance that prevented the crime from being carried out was that the girl did not keep the appointment: Without this “interruption” the series of acts would have led to the assault.

Following the equivocality test, one would find the detective has entered the stage of attempt as his threat clearly stated the criminal intent to sexually assault the complainant.

According to the ruling in R. v. Cline one has to examine the facts and regard the nature of the offence and the particular acts in question. Thus, what is required is a contextualized contemplation of the situation. In the light of the above-described development towards an acceptance of the equality-dimension of sexual assault cases, the social context is determined by the empirical finding that women are especially vulnerable to being targeted for sexual
exploitation by men and that there several myths and stereotypes in the context of sexual violence that must be recognized as such in the legal analysis. The detective seems to act on the stereotypical assumption that women, especially in distressed situations, are sexually accessible for men; that women are willing to let themselves in for deals like the one suggested by the detective, i.e. that women are willing to engage in sexual activity in exchange for benefits such as not being reported to the police; that women are willing to give sex as a method of payment and that they can be bought easily by men, or – if not “easily”- they are at least purchasable when their situation is sufficiently distressed; and that there is nothing wrong with the man making the “offer to contract” if the woman does not make the “offer” of her own accord.

Against this background, the detective when speaking out what he was going to do, which is to have sexual intercourse with the shoplifter by abusing her distressed situation, committed an act more than merely preparatory. As argued above, he made this statement to her as a woman, i.e because she is a woman, which puts the gender-equality-issue at the centre of the analysis.

Regarding the nature of the offence, one has to consider that “a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault on human dignity and constitutes a denial of any concept of equality for women.” By the mere stating that he will pass on the larceny report to the police unless the shoplifter goes to bed with him, the detective has in fact already violated the girl’s dignity and his behaviour is the expression of an attitude that is far from respecting

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61 E.g. R. v. Osolin, supra note 47.
62 E.g. R. v. Mills, supra note 56 at para. 90.
63 R. v. Osolin, supra note 47, at para 165, per Cory J.
women’s right to equality. Without having actually touched the girl he has already realized the specific wrong that makes out the crime of sexual assault. Thus, regarding the nature of the offence of sexual assault, the accused did already enter the stage of attempt. His statement was not merely preparatory.

The application of the reasoning in the Deutsch case leads to the same result, although the act in question is fairly remote to what would have been the completed offence in terms of time and location. The court explicitly held that proximity as a factor that is to be considered is only able to make out the quality of an attempt in cases where one otherwise would be inclined to qualify the act as mere preparation, yet not the other way around. The main argument that gives the detective’s statement the quality of an attempt is again that of the nature of the offence, which according to R. v. Deutsch is one of the important factors that has to be considered. As “violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights”\(^6\), and as the detective’s statement was an explicit denial of the shoplifter’s human dignity, the nature of the offence of sexual assault clearly speaks for the accused having entered the stage of attempt.

As a result, it is only the remoteness test that clearly would lead to the result that the actus reus of attempted sexual assault is not established. Therefore, it is necessary to decide whether this approach is to be followed or not. A decision between the remaining tests is not necessary, however, as they do not lead to differing results. The remoteness test has been said to be arbitrary.\(^6\) I agree. No clear distinction can be drawn between immediate and remote acts. No guidelines can be given as to which acts qualify as “sufficiently proximate” and which do not. Therefore, the relative proximity in terms of time and location must not be the only criterion. Other aspects as for example the question of the nature of the offence and the question

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\(^6\) Ewanchuk, supra note 8, per L’Heureux-Dubé J.
\(^6\) Stuart, supra note 2 at 599.
whether the right/value protected by the specific offence-provision is already endangered by the act in question, need to be taken into account, too. This requirement arises from the function that any test for the distinction between mere preparation and criminal attempt has to carry out: Mere thoughts are not to be punished by criminal law. Therefore, those people who are only thinking of committing a crime have to be distinguished from those who have already taken sufficient action to show that they actually are dangerous, because they are willing to put their thoughts into action. The store detective did not only think of sexually assaulting the shoplifter. He actually did already act on this intent: His statement was an actual expression of denying women’s dignity and equality. Therefore, he already did infringe rights protected by the sexual assault provisions, and thus carried out an act that is beyond mere preparation. This clearly distinguishes him from those who are only thinking of committing a crime and thus are not to be punished. Consequently, the actus reus is established, too.

c) Result

The discussion above has shown that the question whether the detective’s statement contained only one threat not to impede the police report or whether it also contained an implied second threat of touching her without her consent, need not be decided at all. Independent from that decision, the detective’s statement, which unambiguously is an attack on the shoplifter’s dignity, can be punished as sexual assault pursuant to CCC, s. 271. This conclusion is consistent with the underlying purpose of the sexual assault provision of protecting not only against violence as other assault provisions do, but especially against gender based infringements of human dignity, especially women’s dignity, as women are particularly vulnerable to being targeted for sexual exploitation.66

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66 See again e.g. R. v. Osolin, supra note 47.
2. Extortion

Another offence the store detective might have committed is the offence of extortion, CCC, s. 346. The exact wording of that section is:

346. (1) Extortion – Every one commits “extortion” who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

(1.1) Extortion – Every person who commits extortion is guilty of an indictable offence and liable
(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
(b) in any other case, to imprisonment for life.

(2) Saving – A threat to institute civil proceedings is not a threat for the purposes of this section.

As he did not succeed in trying to make the girl have sexual contact with him, he did not actually “induce” her “to do anything or cause anything to be done”. He might, however, have attempted to induce her, a conduct which is also punishable under this section. This requires that he had the intent to have the external circumstances of the offence realized (mens rea of the attempted extortion) and committed (as actus reus of the attempt) an act or omission that goes beyond mere preparation of the commission of the offence.

a) The mens rea of the attempted extortion

For the mental elements to be fulfilled it is necessary that he i. intended to obtain anything, ii. intended to induce her to do anything and iii. intended to do so by means of threat.

i. The detective’s intent was to have sexual intercourse with the complainant. The issue therefore becomes whether sexual intercourse falls within the scope of what is meant by “anything” in CCC, s. 346. Although a natural understanding of the word “anything” might indubitably include sexual favours as being “anything”, the argument may well be made and
has been made\textsuperscript{67} that this is not the case, rather that “anything” within the meaning of extortion is limited to things of a proprietary or pecuniary nature.

The question was dealt with in \textit{R. v. Bird}\textsuperscript{68}, where the counsel for the appellant submitted that historically extortion sections had to do with the extortion or gain of some tangible or material thing, and that despite his diligent research he was unable to find a reported case in the annals of British jurisprudence where an intangible thing such as an act of sexual intercourse was the subject-matter of a charge under this or previous similar sections. The second argument he made was that as the section was included in Part VII of the Criminal Code (now Part IX), which is entitled "Offences against Rights of Property", Parliament intended that the word "anything" as used in s. 291 (now s. 346) should mean some tangible material thing related to property or things of that nature.

The Court in \textit{R. v. Bird} rejected these arguments, however, and held that the word "anything" used in the context is of wide, unrestricted application.\textsuperscript{69}

The decision was criticized by \textit{Mewett} and \textit{Manning}\textsuperscript{70} who take the view that “anything” within the meaning of s. 346 of the Code is limited to things or proprietary nature. They argue that the court’s analysis of this question seemed superficial as to that it simply stated that “the word is clear and unambiguous”\textsuperscript{71} Rather, they find that “this is not what is normally meant by ‘extort or gain’. It is true that, in isolation, ‘anything’ can be of the widest meaning, but in the


\textsuperscript{68} \textit{Bird, supra note 67}.

\textsuperscript{69} \textit{Ibid.} at 354.

\textsuperscript{70} \textit{Mewett & Manning on Criminal Law, supra note 67} at 833.

\textsuperscript{71} \textit{Bird, supra note 67} at 354.
context of 'extort or gain', one might have thought that it referred to something of some tangible proprietary or pecuniary nature."^{72}

In *R. v. Davis*^{73} the decision *R. v. Bird* was applied and supported by arguments considering the grammatical and ordinary sense of "anything", as well as arguments considering the purpose and nature of the offence of extortion:

The Oxford English Dictionary^{74} defines "anything" as "a combination of ANY and THING, in the widest sense of the latter, with all the varieties of sense belonging to ANY."

With regard to the purpose of the section, the court pointed out that extortion criminalizes intimidation and interference with freedom of choice. The offence is designed to protect the victim's freedom of choice by protecting him or her against being coerced into doing something he or she would otherwise have chosen not to do. A person's freedom of choice cannot only be encroached upon by pecuniary or proprietary extortion, but also by e.g. sexual extortion.

The opposing arguments that firstly historically, extortion or blackmail in English and Canadian criminal law was limited to extorting things of a pecuniary nature, and secondly, contextually, that the offence is located in Part IX of the Code under the heading "Offences Against Rights of Property", are remarkable, however. In the face of these opposing arguments, the question arises which arguments outweigh the others. Driedger's Construction of Statutes^{75} takes the approach that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." This "approach" is of little assistance, however, in cases where the "grammatical and ordinary sense" seems to clash with the "entire context" or "the

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72 Mewett & Manning on Criminal Law, supra note 67 at 833.
73 Davis, supra note 32 at 778ff.
74 Oxford English Dictionary, supra note 22, s. v. "anything".
intention of Parliament”. It does not show which arguments should be given priority in the construction of statutes. Although the historical development may give some hints on the intention of Parliament and although the intention of Parliament should not be left out when interpreting a statute, neither the historical development nor the intention of Parliament itself can be of more significance than the grammatical sense of the words of the statute: Generally, one has to assume that Parliament announces its intention through the wording and is capable of expressing itself in a way that makes sure that there are no clashes between the grammatical sense of a statute and the sense Parliament intended the statute to have. If there should be cases where Parliament in fact failed to do so, I argue that, unless other important arguments can be found, it is the intention of Parliament that should stand back. In the case of “anything” within CCC, s. 346, this means that the ordinary broad meaning of “anything” prevails. Apart from that, one cannot even be sure whether this really is a case where the historical development/the intention of Parliament and the grammatical meaning do collide: Until 1985 the extortion provision of the Criminal Code used the words “with intent to extort or gain anything”, whereas today it uses the words “with intent to obtain anything”. This difference seems to be quite subtle, it might, however, show that Parliament – by using the more neutral word “obtain” instead of the word “gain”, which seems to sound more “economic” – intended to make clear that the offence does not require the perpetrator to pursue any “gain” of pecuniary nature. Further, Parliament could have easily limited the scope of the word “anything” to things of a proprietary or pecuniary nature. As Lamer C.J. points out in R. v. Davis at p. 786, the offence of blackmail in Great Britain (defined in s. 21 of the Theft Act) as opposed to the Canadian law unmistakably does so: (1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces [...]. As to the fact that extortion is located in the Part of the Code entitled “Offences Against Rights of Property” it has to be said that even though headings may be used as an aid in
interpreting a statute, it should be obvious that they cannot outweigh arguments concerning the
natural sense of the words of the section and the statute’s purpose in cases where those
arguments point into the opposite direction.

Consequently, *R. v. Bird* and *R. v. Davis* should be followed, i.e. “anything” in CCC, s. 346 is to be understood as not being limited to things of a proprietary nature. Thus, the fact that the store detective tried to extort sexual favours from the shoplifter instead of money or other tangible assets does not hinder the application of CCC, s. 346. He “intended to obtain anything”.

ii. Correspondingly, he intended to induce her to do “anything”, which is to agree to have sexual intercourse with him. As a matter of coherence, this “anything” has to be interpreted equally broad as the “anything” discussed above.

iii. The question remains whether he intended to do so by means of threat. He made the shoplifter understand that the police report would be made unless she went to bed with him. He therefore might have threatened to make the police report, or rather, as the police report was already about to be made, not to stop the police report. Whether this conduct can be qualified as “threat” under CCC, s. 346 is the question.

One of the definitions of “threat” in the Shorter Oxford English Dictionary is:

“A denunciation to a person of ill to befall him; esp. a declaration of hostile determination or of loss, pain, punishment or damage to be inflicted in retribution for or conditionally upon some course.”

In Black’s Law Dictionary the definition of “threat” reads in the 6th edition:

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"The term ‘threat’ means an avowed present determination or intent to injure presently or in the future. A statement may constitute a threat even though it is subject to a possible contingency in the maker’s control.”

And in the 7th edition:

“A communicated intent to inflict harm or loss on another or on another’s property, esp. one that might diminish a person’s freedom to act voluntarily or with lawful consent.”

The ill the detective denunciated to the girl to befall her was the police report. The police report with its unpleasant consequences, the launch of criminal proceedings, probably a criminal trial and a conviction might constitute a “loss” or “damage”. The detective’s statement may also constitute an “avowed determination or intent to injure”. On the other hand one might argue that the “threatened” police report is nothing more than the ordinary consequence of a shoplifting that has been detected. It therefore is not a “loss” or “damage” and making a justified and correct police report does not mean to “injure” somebody. Thus, these definitions of “threat” alone do not give us an indubitable answer to the question whether or not the detective’s statement was a threat.

In R. v. Bloch-Hansen it was held that to constitute a threat within the meaning of the extortion provision of the Criminal Code the threat must be such as would raise sufficient fear to unsettle the mind and take away the voluntary action of a reasonably sound individual. In that case the complainant was stopped for a traffic violation when it was determined that there was an outstanding warrant for her arrest for failure to pay an outstanding fee. The accused, a police officer, was to take the complainant, to her knowledge, to the police detachment to be incarcerated until the fine was paid. However, he drove to a field and asked the complainant to perform an act of fellatio. When she refused he said that if she was not going to do it she would

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go “straight to the cells”. The complainant still refused and eventually the accused took her home. The complainant testified that she did not feel threatened by the officer’s remark as she expected to go to the cells anyway. The accused was acquitted because his statement was held to not amount to a threat. The District Court of Saskatchewan draw a distinction between a police officer threatening an unwarranted incarceration and the actual case where the complainant knew she was supposed to be going to jail on the warrant.\(^9\) Whereas in the first case the threat would be expected to overcome the will of an ordinary person, \(i.e.\) the threat would raise sufficient fear to unsettle the mind and take away the voluntary action of a reasonably sound individual, this is different in the latter case: Any ordinary person being held on a warrant under similar conditions would not be threatened by the suggestion that she would be taken to jail, and similarly, she would not be fearful of her predicament.\(^1\)

How does this case relate to the detective case?

Similarly to the complainant in *Bloch-Hansen* who knew that the police officer had the power and a perfect right to send her to jail, the girl in the detective case knew that the detective had the power and the right to arrest her and to make a larceny report to the police. Thus, the cases have in common that the accused is allowed to do what he threatens to do and the victims know this. Both cases also have in common that – had the threatening person no interest in any kind of sexual activity with the complainant – he would probably “inflict the harm” without hesitating: The police officer would have fulfilled his duty to take the complainant to jail, the detective would have fulfilled his duty to make the report. The difference between the cases, however, lies in the fact that in *Bloch-Hansen* the threat does not seem to have had any impact on the complainant’s state of mind at all. She testified that she was not frightened, that the detective’s statement did not unsettle her mind. In the detective case, however, the threat did


\(^1\) *Ibid.* at 147.
affect the shoplifter’s state of mind, she felt being put under pressure. How can this difference be explained? Was the girl in the detective case so much more sensitive or timorous than the complainant in *Bloch-Hansen* or than any “reasonably sound individual”? She probably was not. The fact that one threat did put pressure on the victim whereas the other did not does not have anything to do with degrees of intimidation or raising of fear. Rather, the pressure put on the girl in the shoplifter’s case was not so much the result of her being afraid of the police report but rather of her seeing that there is a way to avoid the police report but not wanting to go that way. The pressure that unsettled her mind was that of an “indecent offer”. Not that of a threat. The reason why the accused’s statement in *Bloch-Hansen* did not have any effect on the complainant was not so much that the complainant was not afraid of the incarceration (she probably did not like the idea of being put into jail), but rather that she did not receive an offer – indecent, but seductive enough to consider accepting it – of escaping the pending incarceration. The police officer obviously did not make any promise to her that he would save her from incarceration if she complied with his demand. Therefore, she was not put under pressure that unsettled her mind. Thus, the court’s decision to acquit the accused appears perfectly correct. However, the fact that – opposed to that – the shoplifter did feel under pressure that unsettled her mind, does not necessarily mean that the accused in this case can be convicted of extortion. The pressure that unsettled the shoplifter’s mind was that of an indecent but compelling offer, not so much that of fear.

The question is whether the extortion provision requires that the pressure put on the victim is a result of fear or whether it can also be the result of a “lure”. For the distressed situation of the victim it does not make any difference what kind of pressure is put on him/her. Regarding the behaviour of the accused, one is inclined to say that it is an equal wrong to put a person under pressure by intimidating him/her as it is to put a person under pressure by making an indecent offer to him/her. Both kinds of conduct seem to be equally condemnable. The
crime of extortion aims to criminalize interference with the victim’s freedom of choice.\textsuperscript{81} It is equally possible to interfere with somebody’s freedom of choice by intimidating him/her as it is by making a special kind of offer that puts pressure on that person, especially because there might be cases where it is not easy to draw a distinction between the two. Thus, one is inclined to hold the accused in the detective case punishable for the crime of extortion.

The question, however, is whether this way of interpreting s. 346 of the Criminal Code is permissible. It is conceivable that this interpretation neglects the fundamental principle of criminal law, the legality principle. This principle, which had already been mentioned above and which will be discussed in further detail later, demands that no person may be punished except in pursuance of a statute which prescribes a penalty.\textsuperscript{82} No conduct may be held criminal unless it is described in a penal law.\textsuperscript{83}

It is questionable whether or not putting pressure on somebody by making an “indecent offer” falls within the ambit of the conduct described as criminal in CCC, s. 346. This is an issue of the correct interpretation of statutes. This issue is dealt with in the Interpretation Act\textsuperscript{84}. Section 12 of the Interpretation Act reads:

\textbf{12. Enactments deemed remedial} – Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction an interpretation as best ensures the attainment of its objects.

The object of s. 346 of the Criminal Code is to protect the individual’s freedom of choice.\textsuperscript{85} The attainment of this object is best ensured by a broad interpretation of “threat”, including behaviour that infringes the victim’s freedom of choice not by means of intimidation

\textsuperscript{81} Davis, supra note 32 at 780.
\textsuperscript{82} \textit{Nulla poena sine lege}.
\textsuperscript{83} \textit{Nullum crimen sine lege}.
\textsuperscript{84} Interpretation Act, R.S.C. 1985, c I-21.
\textsuperscript{85} Davis, supra note 32 at 780.
but by means of indecent lures. However, the prevalent opinion in Canada today is that in the area of criminal law, s. 12 of the Interpretation Act is of rather little significance, since the construction of criminal statutes continues to be governed by the common law principle of strict construction of penal statutes.\textsuperscript{86} "[...] where real ambiguity exists, the accused must receive the more generous interpretation. [...] There is much to be said in favour of advancing the notion of strict construction of criminal statutes or, to phrase it positively, the presumption in favour of liberty."\textsuperscript{87}

If s. 346 of the Criminal Code only criminalizes the interference with the victim's freedom of choice by means of "threats, accusations, menaces or violence", then the interference with somebody's freedom of choice by means of 'indecent offers' does not fall

\textsuperscript{86} The question has been controversial, however. It has been, among others, dealt with by the Ontario Court of Appeal in \textit{R. v. Philips Electronics Ltd.} (1980), 55 C.C.C. (2d) 312; affirmed (1981), 62 C.C.C. (2d) 384. The dissenting judge Jessup was of the opinion that the common law principles applicable in construing penal statutes do not apply, but that it is the rule in s. 11 (now 12) of the Interpretation Act that determines how criminal statutes ought to be interpreted (at 316-317). Goodman J.A., however, writing for the majority, held that the common law principle of narrow construction in favour of the accused is still to be applied (\textit{R. v. Philips Electronics Ltd.} (1980), 55 C.C.C. (2d) 312 at 322). This point of view is preferable: It might be true that the rule which requires that penal and some other statutes shall be construed strictly was even more important in former times when the number of capital offences was very large (Maxwell on the Interpretation of Statutes, 9th ed. 1946 at 267). This does not mean, however, that it has lost its force and importance in recent times. Criminal law – regardless whether or not it provides for capital punishment – is "the embodiment of state power at its most brutal" (Boyle, "What Makes 'Model' Sexual Offenses? A Canadian Perspective" (2000) 4 Buff. Crim. L. Rev. 487 at 495). It can only be the ultima ratio and must be used with restraint. S. 11 of the Interpretation Act cannot overcome this fundamental rule of justice. And its history shows that it does not intend to do so: Before its amendment in 1967/68 the respective provision of the Interpretation Act read:

\begin{quote}
Every Act and every provision and enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of any thing which Parliament deems to be for the public good, or to prevent or punish the doing of any thing which it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.
\end{quote}

Particularly the phrase "punish the doing of any thing which it deems contrary to the public good" is no longer part of s. 12 of the Interpretation Act as it is today. The state must not punish the doing of things which are "deemed contrary to the public good" but only those which a criminal law provision explicitly and precisely describes as punishable. The rule that requires that criminal statutes be interpreted narrow is far from being ancient remains from a time when it was still punishable with death to cut down a cherry-tree in an orchard. It is one of the facets of the legality principle. It implies that there must not be any creation of charges for criminal offences by way of analogy with existing statutory definitions of crimes to the accused's disadvantage.

\textsuperscript{87} Stuart, \textit{supra} note 2 at 40.
within the ambit of that section and cannot be punished as extortion, even if this kind of interference resembles the interference prohibited by s. 346 CC to an extent that the difference between both seems to be outweighed and one might be inclined to equally apply s. 346 to that kind of behaviour.

Thus, the mens rea of attempted extortion is not made out, as the detective did not intend to induce the girl to have sexual intercourse with him “by threats” in the sense of CCC, s. 346.

b) Result

The detective cannot be convicted of extortion, CCC s. 346. Things would have been different if the detective would have threatened an unjustified larceny report. Then, he would not have made an “indecent offer” to help the shoplifter getting out of a situation she has to blame herself for, but would have announced a “real” threat and it would have been possible to find him guilty of (sexual) extortion. Whereas, as seen above, the pressure employed by the detective is sufficient to establish the absence of consent to the demanded sexual activity, thus, to result in a conviction of attempted sexual assault, the “pressure” is qualitatively different from the “threats, accusations, menaces” required for the definition of extortion being made out.

3. Intimidation

Further, the detective could have committed the offence of intimidation, s. 423 of the Criminal Code. The section reads:

**423. (1) Intimidation** – Every one who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he has a lawful right to do, or to do anything that he has a lawful right to abstain from doing, (a) uses violence or threats of violence to that person or his spouse or children, or injures his property.
(b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted on him or a relative of his, or that the property of any of them will be damaged,
(c) persistently follows that person about from place to place,
(d) hides any tools, clothes, or other property owned or used by that person, or deprives him of them or hinders him in the use of them,
(e) with one or more other persons, follows that person, in a disorderly manner, on a highway,
(f) besets or watches the dwelling-house or place where that person resides, works, carries on business or happens to be, or
(g) blocks or obstructs a highway,
is guilty of an offence punishable on summary conviction.
(2) Exception - A person who attends at or near or approaches a dwelling-house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section.

As seen above, the detective did not use violence (s. 423 (1) (a), first alternative) yet, as the intended touching of the shoplifter had not yet taken place. However, he might have threatened violence to the girl, if one assumes, as mentioned within the sexual assault discussion, that he did not only “threaten” to not impede the larceny report but that at the same time he – impliedly – threatened to touch the girl without her consent, i.e. to use violence. This threat of violence might make out the actus reus of the offence of intimidation according to s. 423 (1) (a), second alternative CCC. The intimidation provision requires that the accused carries out one of the various kinds of conduct enumerated in the section (a) to (g) for the purpose of compelling another person to abstain from doing anything (…) or to do anything that he has a lawful right to abstain from doing. The purpose the detective had when he told the girl that he would impede the police report if she went to bed with him was to compel her to have sexual intercourse with him, which is something she has a perfect right to abstain from doing. The threat not to impede the police report clearly aimed at that purpose. This threat, however, does not fall within the ambit of “threat of violence” as required in s. 423. (1) (a) CCC. The – arguably implied – threat of violence (i.e. the threat to touch the girl without her consent), on the other hand, did not serve the aim of compelling the girl to have sex with the
accused. Everything else would be a circular argument, because then every threat to use violence would immediately fall under s. 423 CCC, since the argument could be made that the threat was made for the purpose of carrying out the threat and compel the victim to tolerate that. Thus, the threat of violence – assuming there was one – does not meet the requirements of s. 423 CCC either, because it did not serve an independent purpose.

The detective cannot be convicted of intimidation, s. 423 CCC.

4. Uttering threats

Last, the detective might have committed the offence of uttering threats, s. 264.1 CCC.

The section reads:

264.1 (1) Uttering threats – Every one commits an offence, who, in any manner, knowingly utters, conveys or causes any person to receive a threat (a) to cause death or bodily harm to any person; (b) to burn, destroy or damage real or personal property; or (c) to kill, poison or injure an animal or bird that is the property of any person.

(2) Punishment – Every one who commits an offence under paragraph (1) (a) is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

(3) Idem – Every one who commits an offence under paragraph (1) (b) or (c) (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or (b) is guilty of an offence punishable on summary conviction.

The “threat” not to impede the police report (which, as seen above is no threat within the meaning of the extortion provision) does not qualify as a threat named in this section. Again, the question is whether the detective’s statement did at the same time contain a second threat, i.e. the threat to touch the shoplifter without her consent. This is not unproblematic. On first sight, the detective’s statement only contains the “threat” to make the police report, whereas the sexual contact does not appear as threat but as means to avoid the threat’s realization. Upon a closer look, however, a statement as the one avowed by the detective arguably constitutes a
“double-threat”: The detective denunciates (threatens) two evils, the police report and the sexual contact, leaving the choice to the complainant which of both is to be realized. The issue would be less difficult had the girl not stolen anything, i.e. had the detective announced a (real) threat to make an unjustified police report, saying that she can only avoid the report by going to bed with him. In this situation, his avowal would have been tantamount to the declaration “I am going to rape you or I am going to make a police report – what would you like better?” Here, the statement would probably include a threat to touch her against her will: The accused would want to intimidate her, he would want her to be afraid of both the police report and the sexual touching. In the original detective case, however, the victim does know that if she does not make a choice, she will not be raped, but will be reported to the police. The accused does not want her to be afraid of the sexual touching but rather wants her to “agree” to it. Thus, the avowal to either have sex with without her consent or to make a police report does have a different meaning in a different social context: In a social context where the denunciation to make a deserved police report unless the complainant engages in sexual activity with the accused constitutes an “offer” not to make a police report rather than a “threat” (see discussion on extortion), the announcement to have sexual contact with the complainant without her consent is part of the “offer” in that it constitutes the consideration demanded for impeding the police report. It is not a “threat”, however, because it does not constitute the “denunciation to a person of ill to befall him; esp. a declaration of hostile determination or of loss, pain, punishment or damage to be inflicted in retribution for or conditionally upon some course”: The detective did not present the realization of the “loss, pain, punishment” of sexually touching her against her will as exclusively dependant upon his will, but as dependant upon the complainant’s will. Not only does he leave it up to her to avoid the unwanted sexual contact (by accepting the police report) (which is usually the case with “threats”), but he even leaves it up to her to realize the “loss, pain or punishment”: He is not going to sexually touch her unless she
decides (although this is not a decision that constitutes consent within the scope of the sexual assault provision) that this is going to happen. Thus, the social context in this case is different from e.g. the social location of the case of R. v. McCraw88 where it was held that a threat to commit rape, depending on the context and circumstances, may contravene the section against uttering threats. Whereas in that case the accused intended to intimidate the complainant in that she should be afraid of the sexual touching, things are different in the detective case: The detective wants the shoplifter to be afraid of the police report and its consequences, not of the sexual touching. Rather, he wants her to see the sexual touching as “solution”, i.e. as less “unpleasant” than the police report. He would rather have her not being afraid of the sexual contact. He therefore did not threaten to sexually touch her against her will.

The detective cannot be convicted of uttering threats.

5. Sexual exploitation

Although the detective did arguably try to “sexually exploit” the 17-year old shoplifter, he did not commit the crime of (attempted) sexual exploitation as set up in s. 153 of the Criminal Code:

153. (1) Sexual exploitation – Every person who is in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency and who
(a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person, or
(b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person,
is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.
(2) Definition of “young person” – In this section, “young person” means a person fourteen years of age or more but under the age of eighteen years.

The detective did not have a position of trust or authority towards the shoplifter (see discussion on sexual assault), nor was the shoplifter in a relationship of dependency with him.

6. Result of the Canadian approach

According to Canadian criminal law, a conviction of extortion is, as a conviction of “duress” in German law, not possible because the pressure the detective exercises over the shoplifter in order to compel her to having sex with him does not constitute a “threat” but rather an “offer”, and the incentive he tries to use is not so much that of fear (although he certainly uses fear as part of the pressure) but rather that of a lure the complainant cannot withstand.

However, the detective would probably not go unpunished under Canadian criminal law, as he would have committed the crime of sexual assault, CCC, ss. 271, 265 (1) (b), although the question of consent in this case is not an easy one and there might be different opinions on the issue.

Thus, when comparing the results of the detective case in Canadian and in German law, both seem to have in common that the detective could be convicted (of duress in German law, of sexual assault in Canadian law) while that conviction is likely to be controversial in both systems. However, there seem to be considerable differences between the German discussion of the detective case in chapter IV, where the focus was on abstract reflections about threats and personal freedom and where the detective and the shoplifter were seen as more or less interchangeable individuals detached from their social location, and the Canadian discussion as presented in this chapter, where attention was paid to social context and where it was recognized that sexual assault has implications for women’s equality. The following chapter explores the common grounds and differences in detail.
VI. Comparative legal reasoning: Germany and Canada

This chapter focuses on comparing the methods of reasoning of German and Canadian criminal law in order to find an answer to the question of whether German criminal law – in comparison to other legal systems, as the Canadian – does really tend to undervalue the social location of a given conflict.

There are many factors that might have influence on the methods of legal reasoning in a given legal system.

Obviously, one of the most important factors is the civilian tradition of Germany as opposed to the common law tradition of English Canada. Thus, some of the differences between the German and the Canadian techniques of legal reasoning addressed in this paper are reflections of the general contrast between the civil law and the common law as to their approach, style, interpretation, etc.

There is also the fact that Canada has a relatively new constitutional document, the Charter of Rights and Freedoms (1982), whereas in Germany the corresponding document, the “Grundrechtskatalog des Grundgesetzes”\footnote{The German “Grundgesetz” is Germany's constitutional document, but is not called “constitution”. A literal translation would be “Basic Law.”}, – although it has been subject to several amendments – has been in existence since 1949, which might be an influential factor on legal thinking in general.

Another feature that might play a role in shaping the techniques of legal reasoning is the role of the judiciary, which appears to differ to some extent between Canada and Germany. From a Canadian perspective German judges (at least in the area of criminal law) may appear to be constrained to a rather mechanical, rigid application of fixed rules, whereas from a German
perspective Canadian judges (at least in cases without jury) may appear to be less constrained and seem to have a fairly political role. On the other hand, the academy plays a very significant role in creating the methods of legal thinking in Germany, whereas it is my impression that — although things might be changing — the role of the academy in Anglo-Canada still seems to be somewhat less significant. The chapter on the German discussion of the case almost exclusively consists of the arguments made by German academics, whereas cases, i.e. the opinion of judges, play a comparatively subordinate role.

Adopting a broader view, one might also speculate on a connection between the role of the media in a society and the method of legal reasoning: Compared to Germany, it is striking how much attention the Canadian media, be it newspapers or television, pay to court decisions keeping the public informed about what is going on in the courtroom and instigating public debate about legal issues.

One might even contemplate an influence of the language itself and the law, as some suggest:

One material difference [between English and German] is that German, unlike English, is an inflected language: the ending of one word often depends on what word follows it, and the endings of sentences determine their meaning, whereas in English sense depends on word order. [...] These characteristics require that the sentence [in German] be thought out in advance. As to law, one should note that Latin was the language used until the nineteenth century, and the method of legal thinking was also affected by the characteristics of that language, the 'logic of Latin' of which one sometimes speaks. No wonder, then, that our [German] law is more tightly constructed than English law, which strikes us as rather

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2 Compare Pound, “The Development of American Law and its Deviation from English Law” (1951) 67 L.Q.R. 49 at 49-50:

“In the first place, the common law is characteristically judicial. In England, America, and the British Dominions characteristically the prestige of the judge is very great. In the English or the American Who’s Who one will find the names of the judges of the higher courts. Continental law is characteristically administrative. The judges have no special prestige. In the Continental equivalents of Who’s Who one will scarcely find the name of a judge. Again, the Anglo-American common law is a law of the courts. Its oracles are judges. It was thought in the Inns of Court, societies of lawyers, by practicing lawyers and was developed in the courts. The Continental law is a law of the universities. Its oracles are professors. It has been taught and developed in the universities from the Middle Ages. In consequence, the common law is little systematized. Principles are cautiously and tentatively derived from details. On the other hand, Continental law is highly systematized. Details are subordinated to broad principles. [...]”
‘loose’.³

It is not the purpose of this piece, however, to illuminate the interaction between law and language, or between law and the media in Canada and Germany, or to determine the precise degree of constraint of judges in these countries, the role of the academy, or the impact of a new as opposed to a fairly old constitutional document on the culture of legal reasoning. Nor do I intend to elucidate the differences between the common law and the civil law tradition in general. Rather, the – narrow – focus is on observations about the techniques of legal reasoning in criminal law in Germany as opposed to English Canada, to the extent I myself, being trained for five years in the German system, was able to make those observations during my stay in Canada as a graduate student.

1. Observable differences

When exploring the differences of methodology in Canadian and German criminal law, it is important to keep in mind that “there is indeed within every legal system, and within the same one at different points of time, an observable common style of argumentation. There are from place to place and from time to time more or less noticeable differences of style, or differing ranges of style.”⁴ Several – connected – differences or “differing ranges” of style can be observed, many of which can be demonstrated using the example of the above-discussed detective case, although other examples are useful as well.

a) Conceptual reasoning vs. contextual reasoning

When looking at the German discussion of the detective case, the first striking feature is


the apparent desire to detach the discussion from the individual case in order to formulate and address the “underlying problem” in abstract terms. Obviously, German criminal jurists noticed that the case was somehow different from clear duress cases, e.g. cases where the perpetrator avows that he is willing to kill the victim if she does not have sex with him. Upon recognition of this “difference” the question was posed what the abstract qualitative difference is between clear cases and cases where we have doubts whether e.g. the detective committed a crime. The first abstract difference that was considered relevant obviously was that whereas “killing” is a positive action, “not impeding a police report that is already under way” is an omission. When it comes to omissions, it is to be expected that the principle that omissions are only punishable if contrary to a legal duty comes into play, too. This as well happened in the discussion over “threats with omissions” until it became accepted that these cases do not deal with “threats by omission” but with “threat with omission”, thus the principle is not applicable here (compare chapter IV). Still, as seen in chapter IV, the general rule that only threats with omissions contrary to a legal duty can constitute a crime became the prevalent opinion for quite a long time, as academics managed to defend this rule by different, more sophisticated, abstract arguments: Roxin argues in general terms; his autonomy principle claims validity in all conceivable situations where the perpetrator has the autonomy to do or abstain from doing something. Jakob’s “doctrine of spheres of freedom” is another example of very abstract thinking, as well as is Ostendorf’s argument of the “freedom that is burdened with the evil of the omission from the very outset”. Horn, too, argues in generalizations by stating that “the ‘threat’ with the omission of an action one has no duty to commit is always broadening the victim’s sphere of freedom instead of narrowing it”. Schubarth seems at first glance to be an exception within this stream of authors arguing in abstract, generalizing terms in that he – by stating that a threat with an omission that is not contrary to a duty may in some circumstances fulfil the elements of the duress offence – seems to shift the emphasis to the (specific)
circumstances of the individual case. Yet, it turns out that he as well strives for a more general solution of the issue by describing those "circumstances" in abstract terms: Circumstances where the announced omission can be reinterpreted into a commission.

The method of reasoning is the same when it comes to the opposing opinions. Volk as well tries to describe in abstract general terms what the distinction between "real" and "seeming/feigned" duress cases is by distinguishing between cases where there is an "internal connection" between the avowed evil and the demanded conduct and those cases where such a connection is lacking, as well as by distinguishing between cases where it is the victim's responsibility to choose whether or not to fall in with the perpetrator's demand and cases where this is beyond the victim's responsibility, as does Arzt. Schroeder's argument does in contrast seem to put emphasis on the social location, in that he argues that the real character of the "social event 'threat'" has to be determined. However, he cannot do without numerating groups of cases that in a general manner describe the situations where the "social event" is indeed a threat. Wessels therefore appears to be the only "real exception" as to the method of legal reasoning: He suggests determining "from the circumstances of the specific case at hand whether or not the announcement of omission meets the requirements of the duress offence."

According to Wessels, the offender's behaviour has to be "regarded in its entire social context". His viewpoint was hardly welcomed neither by the academia nor by the courts, however.

Thus it seems that one pervasive feature of German criminal law is its conceptualism. The emphasis in German criminal legal theory is on the description of criminal liability in terms of concepts that are universally valid, not confined to a particular place or time or social location. Criminal law itself is seen as a complex building, which consists of general rules, which is very theory rich, and where abstraction is considered a virtue.

To further illustrate this assertion one can turn to the central structural feature of German criminal law, which can be described as the "general system for analysing criminal
acts”⁵. This system is meant to define the manner that German lawyers adopt when examining whether particular conduct is criminal and ought to be punished: Not only must the particular conduct fulfil the defined elements of the criminal offence as it is described in the German criminal code,⁶ but it must also be wrongful/unlawful/illegal⁷ and culpable/blameworthy⁸. In the detective case for example, the question of whether the detective’s behaviour can be qualified as a “threat with a considerable evil” is a question of the first step in this “tripartite system”⁹, namely a question of whether the accused fulfilled all (objective) elements of the offence of duress as defined in § 240 StGB. In the next step a German lawyer poses the question whether the conduct that fulfils the elements of a definition is wrongful. Generally, the fact that a particular conduct fulfils the elements of an offence indicates, i.e. suggests, its wrongfulness. This is a logical conclusion because the definition of the specific crime describes a behaviour of which the legal order – generally – disapproves. There are exceptional cases, however, where this is not the case because the conduct may be found to be justified, for example in a case of self-defence. Self-defence is a classic ground of justification that negates the wrongfulness of a conduct that does fulfil all elements of the definition of a crime. In the detective-case there was no ground of justification that had to be considered, the accused did obviously not act in a state of self-defence, necessity etc. Thus, his conduct (given that it fulfilled the definition of § 240 StGB which is – as we have seen - debatable) was wrongful. The last step is to ask whether the conduct is also culpable. At this stage, the German criminal lawyer considers the culpability/blameworthyness of the accused by considering possible

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⁶ “Tatbestandsmäßigkeit”.

⁷ “Rechtswidrig”.

⁸ “Schuldhaft”.

grounds for *excusing* his behaviour, although it violates the definition of the crime and is wrongful. Culpability means that the accused can be held personally responsible for the relevant act (or omission). The accused must be "reproachable". A requisite for this is that the accused has the ability to comply with the law. He/she must be capable of understanding that what he/she is doing is wrongful and he/she must be capable of acting according to this insight. An example where an accused cannot be found reproachable is a psychological disease or intoxication. In the detective case there are obviously no grounds of excuse either. Consequently, the detective's behaviour was also culpable. The difference between *wrongfulness* and *culpability* corresponds with the difference between grounds of justification and grounds of excuse. If a conduct is justified, it is not wrongful, which means that the law does not prohibit the particular conduct in that particular situation, even though it violates the definition of the crime. "Normally" the law prohibits killing another person. There are situations, however, where the law *does not prohibit* the killing of another person, for example in a situation of self-defence. In these exceptional cases killing another person is – exceptionally – in accordance with the values of the legal system. Things are different with conduct that is wrongful but is not culpable. Here the law actually does prohibit the particular conduct, but at the same time recognizes that the offender found him/herself in a situation where the law *does not blame* him/her for the wrong, but excuses it. This "tripartite system"\(^\text{10}\) of fulfilment of the definition, wrongfulness and culpability forms the 'filter' every specific conduct has to go through before the offender can be punished. The stages of wrongfulness and culpability are, of course, not *explicitly* addressed in every case, but only in those cases where there are doubts about the conduct being wrongful and/or culpable. In the detective case, as we have seen, wrongfulness and culpability had not even been mentioned. But they – ideally – are

\(^{10}\) *Ibid.*
to be thought about for a moment in every single case that is to be solved, as it compels analysis of the accused's conduct from the standpoint of its potential being justified or excused. This "general system for analysing criminal acts" is applied to all crimes, whether it be damaging property, theft, murder, or anything else.

Thus, German criminal legal theory mainly seems to be concerned with the creation of vast and complete conceptual hierarchies of legal abstractions. The underlying assumption seems to be that once the conceptual hierarchy was constructed it would be possible for lawyers to deduce the necessary rules within the structure. Much effort is put on the attempt to create the overall system of concepts and principles in a coherent manner and to avoid contradictions. It seems that in Germany the insight that it might be impossible to interpret law as a coherent, non-contradictory normative field of meaning, is not widely spread.

Canadian criminal law has a somewhat similar structure that is common to all offences. First, the accused has to commit the elements contained in the definition of a given offence. These elements are composed of external as well as internal elements, commonly called elements of the actus reus and elements of the mens rea. The next step is to examine whether there is any defence that can be raised to the benefit of the accused. At this point, the Canadian criminal code does even use the terminology of justification and excuse known in German law: S.27 ("use of force to prevent commission of offence") for example speaks about being "[...] justified in using as much force as is reasonably necessary [...]". S. 17 ("compulsion by threats") on the other hand speaks about the specific person being "[...] excused for committing the offence [...]". It is not obvious, however, whether the Code follows a specific system when using the terms justification and excuse, or whether it rather uses those terms interchangeably. The terminology also appears in some case law, for example on necessity. In R. v. Perka\footnote{R. v. Perka, [1984] 2 S.C.R. 232.} the
Supreme Court of Canada adopted the distinction between justification and excuse. Doing so, the question, however, became whether the common law defence of necessity is to be qualified as justification or as excuse. The majority classified necessity as an excuse whereas the dissenting opinion would have classified the defence of necessity as a justification in those cases where the accused was operating under a conflicting legal duty. In *R. v. Latimer*¹² the Supreme Court of Canada addressed necessity as a ground of excuse. In the academic world, there is no agreement on whether the distinction between justification and excuse should be drawn at all. While Fletcher’s support for the distinction between justification and excuse¹³ does have some influence in Canada¹⁴, other authors reject the distinction as serving no purpose¹⁵, and some do divide defences up into different categories but use criteria different from those that distinguish between justification and excuse.¹⁶

In summary one might say that although Canada does have an overall system of principles that govern criminal liability, there is little overall agreement within the literature as well as the judiciary as to what the single facets of this system ought to look like, and – probably as a consequence – this system does not seem to always be applied in a conceptually tidy manner. At least in general (surely there are different views on that) Canadian criminal scholars and judges seem to be less concerned with a rigorous conceptual structure than is the case in Germany.

This can also be seen in the example of the detective case. The argument that a “threat

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¹⁴ An example is the above-mentioned case *Perka,* where Justice Dickson seemed to heavily rely on Fletcher in drawing a distinction between justification and excuse.

¹⁵ See e.g. Stuart, *Canadian Criminal Law,* 3rd ed. (Toronto: Carswell 1995) at 423.

with an omission" might conceptually differ from a "threat with a positive action" does not appear in the Canadian discussion, neither in the context of the extortion offence nor in the context of the question of consent within the sexual assault discussion. The case R. v. Bloch-Hansen\(^\text{17}\) where the accused announced an "ill" to the complainant that he was perfectly free to inflict, to wit putting her in jail, would have been a conceivable trigger for conceptual thoughts similar to those in the German discussion over the detective case. Yet, the question whether there was a \textit{conceptual difference} between the fact pattern of this case (threat with lawful disadvantage, self-responsibility of the complainant etc.) and "typical" cases of extortion was not raised. Rather, it was argued that in that specific \textit{context} the complainant was not intimidated by the accused's statement, because she expected "to go straight to the cells" anyway, thus, the accused's statement did not amount to a threat. Within the sexual assault discussion, the central issue is that of consent, and although efforts are being made to define consent in general terms, in the end, particularly since Ewanchuk ruled that the question of consent is subjective and that it is to be considered in light of \textit{all of the evidence}, everything comes down to examining the specific details of the individual case in order to determine whether the complainant's will was coerced or overborne. Thus, in Canada the detective case would not have been abstracted from its specific facts, but resolved by referring to these specific facts. There probably would have been no abstract discussion of an – however defined – underlying conceptual issue as was the case in Germany.

Therefore, rather than the conceptual approach, Canadian criminal law leans toward what may be described as a contextual approach, where the reasoning takes the facts of a given case as a starting point and looks for the reason in the facts themselves. This contextual approach, which may also be described as "empirical", is characteristic of the common law

approach in general. It confines the result of an inquiry to the particular context, i.e. the facts of a case. From a series of cases general principles are gradually built up. Canadian criminal law having a written code does slightly differ from this general common law approach, as at least with respect to fundamental principles it is no longer necessary to exclusively rely on lines of cases, because some principles are now laid down in the Code. Still, more emphasis seems to be put on the factual circumstances of a given case than in German criminal law. This, as well, becomes obvious in the detective case discussion. Emphasis has been put on the question of consent within the sexual assault provision. The specific facts of the case have been crucial in answering that question: The fact that the shoplifter was 16 years old does play a role in that it gives hints as to the power imbalance between her and the detective. The fact that she was afraid of the social consequences of a police report was not unimportant. Finally, the fact that she was a woman being particularly targeted for sexual exploitation was crucial in that it brought Charter considerations into play.

An emphasis on factual circumstances can also be seen from the number of cases discussed in court decisions. In the detective case discussion, not only Bloch-Hansen and Ewanchuk were addressed, but many more, as e.g. Guerrero, Caskenette, Saint-Laurent, Matheson, Davis etc., whereas almost no cases are discussed in the German debate.

An emphasis on cases, including particularly the facts of cases, typical of common law in general because of its very nature, can also be observed when looking at Canadian textbooks on criminal law. From a German perspective it is striking how many cases are analysed in these textbooks, and in what detail this is done. In German textbooks on criminal law, cases are – with some exceptions where authors try to imitate the “Anglo-American case method”\(^{18}\) – only reported in order to illustrate the general principles and concepts; and this is in the bulk of

books done after the principle has been discussed in the abstract and is only aimed to serve the better comprehension of the principle or as an exercise of applying the principle to specific facts. Yet, principles are not extracted from cases.

A higher degree of concern with facts in Canada can also be observed when reading court decisions. Canadian judgements appear to extensively expose the facts, compare or distinguish them from the facts of previous cases, and build up the specific legal rule relevant to the present facts. In German judgements the description of facts is relatively short, the main emphasis being to identify the sections of the Strafgesetzbuch and the legal principles that might be relevant. The task then becomes to verify whether the facts support the application of those sections and principles. Because of this comparatively constraint function of the facts of the case, only the facts relevant to the advanced principle are stated.

An example might illustrate this. A Canadian case with a fact pattern comparable to the German detective case might be the above-mentioned Bloch-Hansen's case. The facts in this decision are described as follows:

Marlene Green, the complainant, and her common law husband were stopped by the R.C.M.P. on a suspected traffic offence. In due course it was determined that there was an outstanding warrant for her arrest for failure to pay a nine-dollar balance of a fine.

The accused, then an R.C.M.P. constable on duty, was to drive the complainant to a detachment office where she would be incarcerated, to her knowledge, until the fine was paid. Rather than proceed accordingly, the accused drove the complainant out into a field. There is a disparity in testimony as to whether or not the complainant wished to go for a ride. She was in obvious error in some of her evidence as to what transpired a short while prior to the ride, particularly her evidence as to who was in the car when they went to the police station and who got in and out of the car, and I cannot rely on all that she said. On the other hand, I do not accept the full story of the accused as to how the ride came about. I find that the accused suggested the ride and, although the evidence is in conflict, there is a strong inference that the complainant did not particularly object. No doubt the complainant was intoxicated, and the accused, who admitted to be an alcoholic, had also been drinking.

Bloch-Hansen, supra note 17.
While the evidence of the complainant is mistaken on some points, generally I consider her testimony to be honest and credible. She swears, and I accept, that in the field the accused got out of the car, relieved himself and then came to the passenger side door where she was sitting. He opened the door and told her to “suck him off” and she declined. He got back into the car and said to the effect “if you aren’t going to do it Marlene you are going straight to the cells”. The accused then got out of the car again, went to the passenger door, made the same obscene demand of the complainant, and she again refused asking him “what kind of an asshole” was he.

In his testimony, the accused acknowledged that he propositioned the complainant in the aforesaid manner but he swore that he did not recall making the statement to the effect that he would take her to the cells. I find as a fact that he did make the statement. Accused at no time exposed himself to the complainant.

Complainant began to cry, asked to be taken home and the accused obliged. Upon arriving at her home, the accused said that he was going to come up with her to which she replied that “he did not have to”. She then walked up to her second story suite and heard him following. Complainant went into her bedroom fully clothed in her winter garments and lay down on her bed with her knees up. Accused came into the room, closed the curtains and asked her to “slip off her pants”. She declined asking “what the hell for?”. He then proceeded to leave and as he started to go down the stairs he told her, in effect, that if he “ever saw her on the street she would get it”.

Complainant admitted that she did not feel threatened when the accused said he would take her straight to the cells as that was where she expected to go anyway. This admission is not conclusive inasmuch as it is for the Court to determine if a threat was made. If the complainant had any great fear of the situation when she arrived at the home she could have gone into her sister-in-law’s suite on the main floor of the house rather than go to her own premises. Her actions throughout and her choice of words bear out her admission that she was not afraid and did not feel threatened.

Some weeks later the accused admitted to another R.C.M.P. constable that he had propositioned a girl while on duty and that he was being investigated for it. Subsequently, the accused was discharged from the force.

As I have stated, I consider the testimony of the complainant to be honest and for the most part reliable, but by the same token the accused was likewise a credible witness. He did not attempt to minimize his despicable actions nor to omit facts which were obviously against his best interests. His testimony was very damning to himself and in my opinion, truthful.

After the incident, the accused anonymously paid the complainant’s outstanding fine in order to justify his failure to lock her up on the warrant on the night in question.

A lot of facts concerning the wider circumstances of a case that are stated in a Canadian judgement would not be found in a German decision. For example the fact that Marlene’s common law husband was present when they were stopped by the police, the fact that Marlene
wore her winter garments, the fact that she lay down on the bed with her knees up etc. would probably been left out in the court decision had the case occurred in Germany. In the German detective case, e.g., the report of facts was confined to the short description given in chapter III:

16 year-old witness B purloined a shawl to the value of 40 DM in a department store at Stuttgart main station. After the larceny she was caught by the private store detective P and taken to his office. Immediately the accused A, the second detective of the store, came there, too. P, the one who had witnessed the theft, was writing the larceny report to the police, while B was begging not to make report to the police. Her parents would “beat her to death” and she might loose her position as an apprentice with a bank if the larceny became public. Both detectives declared, however, they would make report at any rate. When detective P was leaving the office shortly, A, however, (who from the very beginning had been behaving himself as if he was the “boss”), said to the girl, there might still be a way to avoid a report to the police. If she slept with him, he would make the police report “go by the board”. The girl believed that A was able and willing to do so if she fulfilled his demand; she said, however, that she did not have time at the moment. They therefore made an appointment. In the meantime, however, B confided in a priest, who informed the police.

Thus, the method of writing judgements seems to reflect the difference between the more conceptual German approach and the more contextual approach of Anglo-Canadian criminal law.

“Contextual” instead of “conceptual” reasoning also means paying attention to the facts that form the social context of a case and taking this social context into account when making the decision. Canadian criminal law, by generally putting more emphasis on facts and even things that from a German perspective might be called “details” is more attentive to the broader social aspect of an individual case. Thus, when dealing with the detective case in Canadian law, it would probably not appear as an irrelevant coincidence that it is a woman who is put under pressure by a man who tries to make use of his superior position, while one might get the impression that this is rather irrelevant in the German debate where one tries to develop concepts independent from the victim’s and/or perpetrator’s gender. Examples where Canadian criminal law pays attention to the social location of the people affected by its decisions are particularly striking with respect to the battered woman syndrome is relevant for e.g. defences
like duress (not to be confused with the German duress offence – in Canadian law duress is a defence) and self-defence: The Lavallee case\textsuperscript{20} is an important case where it was ruled that the battered woman syndrome is relevant to the issue of self-defence. The decision’s attention to the social context of the accused can be seen among others from its addressing elements of a woman’s social context which help to explain her inability to leave her abuser: “[...] environmental factors may also impair the woman’s ability to leave. --- lack of job skills, the presence of children to care for, fear of retaliation by the man, etc.”\textsuperscript{21} Great emphasis was also placed on social context in R. v. Malott\textsuperscript{22}, where L’Heureux-Dubé J. adds to the factors that might prevent a battered woman from leaving her abuser “a woman’s need to protect her children from abuse, a fear of losing custody of her children, pressures to keep the family together, weaknesses of social and financial support for battered women and no guarantee that the violence would cease simply because she left.”\textsuperscript{23} In this decision it has also been explicitly pointed out that women’s experiences and perspectives may be different from the experiences and perspectives of men, as well as that a woman’s perception of what is reasonable is influenced by her gender, as well as by her individual experience, and that both are relevant to the legal inquiry as to the element of the reasonable apprehension of a risk of death or grievous bodily harm in the context of self-defence. Thus, the case is another example for Canadian courts’ willingness to look at the whole social context of the people involved in the decision in order to inform the analysis of the particular events.

Having stated this difference between the Canadian and the German approach, which surely is rather a difference in shading than a stark contrast, the question arises what arguments

\textsuperscript{21} Ibid, at para. 55.
\textsuperscript{23} Ibid, at 472-473 (cited to C.C.C.).
speak for one or the other approach.\footnote{I will not explore in detail the specific question of whether or not the distinction between justification and excuse as applied in German criminal law is useful, since much has been written on this. Just one point: It is not true that the distinction does not have any effect at all. It does make a difference at least in the area of the law of self-defence and the law of participation: In German law, a conviction for participating (for instigating or aiding the actual perpetrator) in an offence presupposes that the offence committed by the perpetrator be an intentional and unlawful/wrongful one (§§ 26 and 27 StGB). Yet, there need not be "culpability" on the part of the perpetrator. Thus, participation is possible in a case where the actual perpetrator can raise a defence that qualifies as excuse, which is not the case where he/she can rise a ground of justification. The second area where the distinction has even more practical relevance is the area of self-defence/defence of a person. § 32 I StGB states that a conduct fulfilling the definition of an offence is not unlawful/wrongful when such conduct is required as a means of defending a person. According to § 32 II StGB, defence of a person is the defence that is necessary to avert another’s unlawful/wrongful and present attack from oneself or another. This means that the attack of another itself has to be "wrongful" but not necessarily "culpable". Thus, § 32 StGB allows one to defend oneself against somebody who is acting wrongful but whose conduct might be excused, whereas one may not defend oneself against somebody who’s attack is justified, e.g. if the attacker him/herself is acting in self-defence. The reason behind this is the generally accepted argument that one who defends himself or another person against an unlawful/wrongful attack does not only safeguard his/her or the other person’s legally protected interests, such as life, physical integrity, property, right to privacy etc., but also defends the legal order as a whole, which is violated by the attack. Somebody who acts while being justified does not violate the legal order because the legal order does not prohibit his/her behaviour in his/her exceptional situation. Thus, one has to bear his – justified – "attack". Somebody who acts while only being excused, on the other hand, does violate the legal order. The ground of excuse only says that the legal order does not reproach him/her for his/her conduct. Against these “attacks”, self-defence is permissive.}

The conceptual approach surely has advantages.

A criminal law system gains in efficiency if recurrent issues are solved in the same way, in accordance with an overall principle. An example may be the German principle that the offence elements are divided into objective and subjective aspects and that the subjective elements – as a principle – must correspond with the objective elements, such that the offender must know and want every objective element as it is prescribed by the respective criminal code provision: § 15 of the criminal code states that intentional behaviour is punishable, whereas negligent behaviour will only be sufficient if the relevant substantive provision of the Code expressly says so. Thus, the specific offence provisions do not expressly need to contain a ‘mens rea’ requirement as provisions in the Canadian criminal code often do. Although it is not always clear how to deal with cases where the offender knows that his conduct may possibly materialize the facts described by a criminal statute (this is the well-known debate over the
distinction between ‘conditional intent’ and ‘advertent negligence’? The general principle is unambiguous: Intent consists of two elements: The offender must know that he fulfils the definition of a crime, and it must be his will to do so. In Canada, on the other hand, despite the general notion that mens rea, in the form of intent, has to correspond with every element of the actus reus, there is no written, irrevocable rule for this requirement. Thus, the courts are able to choose less rigorous mens rea requirements in certain instances and have in fact done so. Unlike in Canada, where the mens rea requirement may differ from crime to crime, the subjective requirement in German criminal law does generally not differ between crimes, unless the respective offence provision expressly provides for a deviation from the general rule. Consequently, a discussion similar to that in Canada about what mens rea element is required for sexual assault (see chapter V) or for attempt (see ibid.) would not be conceivable in Germany.

Having many general rules applicable to all offences is not only efficient; it also makes understanding criminal law easier and thus promises transparency. The ideal it strives for is that the average citizen is able to understand criminal law, so that the rule “mistake/ignorance of law is no excuse” can be justified. This rule can be found in Canadian criminal law, CCC, s. 19, although the Canadian Criminal Code is extremely complex, so that it seems illusionary to
assume the average citizen can understand it. Compared to the German code, which has about 358 sections, it appears to be very long (even though admittedly the German code does not contain procedural rules, which are stated in a separated code, whereas the Canadian Code contains both substantial and procedural criminal law). In the words of a member of the Law Reform Commission of Canada, the Canadian Criminal Code “is too complicated, it is too illogical, it is too poorly organized”. Rather than being a ‘real’ codification as understood in the civil law tradition, it does not appear to be organized around articulated rational principles that are adhered to consistently and coherently throughout the Code. Although it does have a set of guiding principles, the Canadian Criminal Code seems to be little more than a collection of case law principles, sometimes even of rules of immediate application, for example the offence ‘Towing of person after dark’, CCC, s. 250 (2). Therefore it does not seem to have the transparency and comprehensibility one might desire a criminal code to have. Transparency and comprehensibility are not an end in themselves. They are required by the legality principle: This fundamental principle requires that citizens be able to foresee which actions are going to be punished as criminal, so that they can conduct themselves in such a way that they do not transgress the norms of the criminal law.

It is questionable, however, whether the conceptual approach is really that more comprehensible and accessible to the layperson than the contextual approach. The concept of distinguishing between wrongfulness and culpability, for example, is not obviously understandable and convincing. The average citizen who – unlike a first year law student – does

28 Canada’s Criminal Code: A History, <http://www.wwlia.org/cacrchist.htm>. See also the National Criminal Justice Section of the Canadian Bar Association, Submission of Reforming Criminal Code Defences, Ottawa, Nov. 1998: “[...] It serves to perpetuate a Criminal Code which is archaic, incomplete, poorly organized and difficult to understand. [...]”. Or Stuart, supra note 15 at 29: “[...] the Code is long, often tortuous and contains inconsistencies and gaps which are the subject of intricate judge-made law.”

29 Compare Williams, Criminal Law (The General Part), 2nd ed. (London: Stevens, 1961) at 582: “A possible application of nullum crimen that has not received the attention it deserves is that penal laws should be accessible and intelligible. [...] Criminal law [...] is addressed to all classes of society as the rules that they are bound to obey on pain of punishment.”
not spend days, weeks or months of his time on exploring this concept might rather tend to take Du Plessis’ view and dismiss it as “nebulous nonsense” than accept it as an easy concept that helps him to understand what conduct the law forbids. Another example is the detective case. The average citizen, and even the first, second, maybe even third year law student, might not be able to immediately grasp why one might argue that there should be a conceptual difference between “threatening with the omission of an act one is free to abstain from performing” and “threatening with the omission of an act one has a legal duty to perform”. Rather, the discussion is only understandable at all if it is illustrated with specific cases, *i.e.* facts. The formulation of an abstract principle does not, at least in this case, necessarily clarify things. It rather appears a confusing play of words.

Thus, although it might be true that a system of abstract concepts has in general more potential to be transparent and accessible to the average citizen than a collection of rather narrow rules, the striving for principles and concepts ought not be exaggerated either, because this might lead to the opposite, *i.e.* a lack of transparency and accessibility.

The emphasis on general rules in the German tradition as opposed to the more narrow rules and holdings in a common law criminal law system like the Canadian bears another risk: Generality yields uniformity. Greater generality is purchased at the cost of difference. Loss of difference leads to loss of legal distinctions that are rooted in and reflective of society’s needs. The generalizations employed by German Criminal law sometimes rise very far above the particular facts of a given case. As social differences do not appear in the theoretical system of general rules, they do not have a place in the decision-making process.

The detective case is an example for this loss of legal distinctions. Whereas in Canada, as a result of the existence of a comparatively strong thread of critical legal scholarship, the case would at least cause debate over the issue of equality of women as the underlying social problem of the case and the question of how and to what extent the legal reasoning when
deciding the case has to take the equality issue into account, the question of equality does not appear at all in the German debate over the case. Rather, the German debate of the case quickly focused, as we have seen in chapter IV, on the very theoretical question: “Can the threat to omit an act one has a lawful right to abstain from doing be duress under § 240 StGB?” This was the only question the Higher Regional Court Stuttgart that had to decide the detective-case laid before the Federal Supreme Court in Criminal Matters. Reducing the issues of the case to this general question, it is obvious that some – arguably important – facts of the case, and surely the equality issue, disappear from the debate.

The fact that it is a woman who is “threatened” or “offered an advantage” by a man becomes irrelevant. The fact that it is sexual intercourse what the detective demands for impeding the police report becomes irrelevant. The fact that the detective’s statement itself is an attack on the shoplifter’s dignity and an expression of a disrespect of women’s right to equality becomes irrelevant.

Rather, as we have seen, the debate focuses mainly over the concepts of the words “evil”, “considerable”, “threat”, “reprehensible” and whether there had – generally – a distinction to be made between

- the threat to omit an act and the threat to commit an act
- the threat with a “permitted” conduct and the threat with a conduct that contravenes the law
- the threat with a disadvantage that has an internal connection with the conduct the accused demands from the victim and the threat with a disadvantage that has no such internal connection
- the threat with a conduct that the accused would carry out immediately if he

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30 Since the Higher Regional Court Stuttgart wanted to deviate from a decision of the Higher Regional Court Hamburg that had acquitted an accused in a very similar case (see above, chapter IV), it had to consult the Supreme Court.
were not interested in the conduct he now demands from the victim and the threat with a conduct he would “normally” not carry out.

In the light of this culture of legal reasoning it was rather surprising that the Federal Supreme Court actually did suggest the detective’s conviction of attempted duress, even though, as we have seen, a mechanical, analytical and doctrinal approach – as one is used to see in German court decisions – would have come to a different result. Doing this, the court in fact did show consideration for the social facts of the case. In its reasoning, it did not openly express so, however. It did not address the issue of equality for women, even though the German “constitution” contains a provision similar to the Canadian Charter of Rights and Freedoms. In Art. 3 GG the constitution provides:

Article 3 [Equality before the law]

(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.

(3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.

Hörnle finds that “in this case, the Bundesgerichtshof employed an unusually broad definition of punishable sexual conduct”; Hörnle, “Penal Law and Sexuality: Recent Reforms in German Criminal Law” (2000) Buff. Crim. L. Rev. 639 at 663. She also doubts “whether the department store detective case was rightly decided”, ibid. at 662.

Supra note 1.

Artikel 3 [Gleichheit vor dem Gesetz]

(1) Alle Menschen sind vor dem Gesetz gleich.

(2) Männer und Frauen sind gleichberechtigt. Der Staat fördert die tatsächliche Durchsetzung der Gleichberechtigung von Frauen und Männern und wirkt auf die Beseitigung bestehender Nachteile hin.

(3) Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden. Niemand darf wegen seiner Behinderung benachteiligt werden.
Although Article 3 expressly orders the state, including the courts (Article 1 provides that "[t]he following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law"), to "promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist", the equality issue was not mentioned at all in the reasoning adopted by the court, rather, it did not move away from the traditional method of conceptual reasoning not even mentioning "equality" as an issue in this case.

The Canadian contextual approach, on the other hand, appears more suited to pay attention to the social location of a specific case as already mentioned above. Being concerned with the context rather than the concepts of a fact pattern, it is easier to include varying social locations into the reasoning, as these are part of the context. In Canada courts have indeed shown consideration for the varying social location of people involved in or affected by the decision, e.g. women, people of colour etc., and have indeed included equality as a factor to be considered in criminal law, and this is why it is to be expected that a Canadian court would do so, too, if it had to deal with the German detective case. In addition the examples given earlier in this paragraph (Lavallee and Malott), there are examples for Canadian courts paying attention to equality as a norm applicable in criminal law issues, as e.g. Mills, where the Supreme Court of Canada balanced the female complainant’s Charter rights to equality and privacy against the accused’s Charter rights to a fair trial and full answer and defence with respect to the procedure for the production of private third party records. Another example is R. v. Gladue where the court interpreted s. 718.2 (e) of the Criminal Code with respect to

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sentencing principles in cases where the accused is aboriginal. It held that s. 718.2 (e) “[…] requires that judges pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders[...].”

This is not to say that in contrast to the German practice of not dealing with the social context or a crime there is an established tradition of Canadian courts paying attention to equality and the varying social location in their reasoning in criminal cases. Such an assumption might be rash given that the above-mentioned examples are relatively recent cases. However, one can see that compared to the German “principle-approach”, the Canadian contextual approach has more potential to make differences in social location visible and to take them into account.

b) Deductive reasoning vs. inductive reasoning

Deductive reasoning moves from general to specific concepts, from given premises to their necessary conclusion. Inductive reasoning, on the other hand, formulates general conclusions or inferences from particular instances and facts. Having a conceptual framework of general principles, German criminal lawyers tend to reason deductively (and this is what they are taught in law school). Anglo-Canadian law, on the other hand, – reflecting its common law tradition – seems to prefer the more inductive method of reaching a conclusion by beginning with specific series of observations, detecting patterns and regularities in these observations and finally ending up developing some general conclusions or theories. A similar form of reasoning that also is more common in Anglo-Canadian criminal law than in German criminal law is

36 Ibid. at para. 37.
analogical reasoning, which means to draw analogies from a number of given concrete particulars, especially in the form of precedents. Here the inference depends not so much on the number of instances as on the resemblance of the compared items.\footnote{See also Snyman, “The Attack on German Criminal Legal Theory – A Retort” (1985) 102 S.A.L.J. 120 at 128, who compares German and English criminal law: “[T]he Germans tend to reason deductively, whereas the English are traditionally sceptical of reasoning from the general to the particular and prefer the more inductive method or reaching a conclusion by reasoning by analogy (a dangerous method in the law!) from a number of given concrete particulars, usually in the form of precedents.”}

The detective case and \textit{Bloch-Hansen} may again serve as examples: As illustrated above, the German debate over the detective case was characterized by conceptual, abstract arguments. The aim, however, although it sometimes appeared to have got out of sight, was to find a concrete solution for the specific detective case (for the Court) or to find whether the detective case was rightly or wrongly decided (for academia). The process of reasoning was characterized by deduction: First, one was occupied with establishing or defending an abstract principle, \textit{e.g.} the principle that a threat with an omission can only amount to a threat under the duress offence if the threatened omission is contrary to a legal duty. The next step was to subsume the fact pattern of the detective case under this general principle: The avowal to not impede the larceny report arguably is a threat with an omission. Thus, the next question was whether the announced omission would be contrary to a legal duty. The answer is no, as the detective did not have a duty to prevent the shoplifter from the deserved police report. Thus, the detective threatened with an omission not contrary to a duty. Consequently, his avowal does not constitute a threat under the duress offence. As a consequence, the detective cannot be convicted of duress.

In \textit{Bloch-Hansen} it is first noticeable that after reporting the facts and finding that the complainant was not afraid and did not feel threatened because she expected to go to jail anyway, the court describes the issue of the case as follows:

“Based upon my findings of fact, I consider the issue in this case to be very narrow. Was
the complainant threatened or menaced by the statement of the accused that he would take her straight to jail? So far as she knew she was going to jail anyway for non-payment of the fine and was not in any state of fear in the circumstances in which she found herself.\footnote{38}

Thus, the issue of the case was perceived as a concrete issue, \textit{i.e.} the question whether the complainant, \textit{not a person that does not feel threatened}, was facing a threat that constitutes the crime of extortion. It is true that in the following the court notes several general principles, including the general notion that a threat needs to raise sufficient fear to unsettle the mind and take away the voluntary action of a reasonably sound individual. Yet, when it comes to the question how the circumstance that the complainant did not feel threatened because she was going to jail anyway has to be dealt with, the court does \textit{not}, as a German court would do, argue in the abstract whether it does make a difference that the “threatened” person expects the threatened “ill” anyway, in order to deduce the solution for the instant case from the abstract finding, but argues directly with the specific case:

“\textbf{In the instant case, however, the fact cannot be ignored that the complainant knew she was supposed to be going to jail on the warrant. [...]}”\footnote{39} 

and later:

“\textbf{It appears to me that Miss Green’s complaint is not that she was threatened but that she had been treated in such a reprehensible manner by an R.C.M.P. officer. Most probably she would have complained because of the offensive action of the accused even if he had not made mention of taking her to the cells. I am convinced this is a case of a well-founded annoyance with a police officer, but there is much doubt in my mind that a threat as contemplated by s. 305 was established. The accused must have the benefit of this doubt and the charge against him is,}

\footnote{38} Bloch-Hansen, supra note 17 at 145.
\footnote{39} Ibid, at 147.
therefore, dismissed.”

Thus, the Canadian court in this case did not pursue a deductive way of reasoning where the solution of the case at hand follows cogently from the applicable general concepts, but rather solves the case by induction without establishing a general principle as to threats with an evil that the victim expects as inevitable anyway.

This is not to say, however, that reasoning in German criminal law is purely deductive, whereas reasoning in Canadian criminal law is purely inductive and analogical or precedential. In fact, most reasoning processes contain inductive as well as deductive elements. Inductive reasoning for example is permanently being used in German law without being mentioned: It is necessary in order to formulate a hypothesis for the decision in a given case that is afterwards “proven” by using the deductive method. The detective case is no exception. One starts by thinking about what crime the detective might have committed, and when doing this one thinks about previous similar cases. In the course of this process one comes to the more or less strong suspicion (though there is no absolute logical certainty) that the detective might have committed the crime of duress and/or some sex offence. This suspicion becomes the hypothesis in the following reasoning process. It is reached by an exploratory process, i.e. by inductive or rather analogical “reasoning”. Deductive reasoning is the method that is used in the following process of demonstrating with – ideally – logical certainty that the hypothesis is true or is not true, i.e. that the detective did commit those crimes or that he did not. But even within this proving process, it is not always possible to exclusively rely on deductive arguments. This is so because the legal rules and principles applicable can prove to be ambiguous or unclear in the

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40 Ibid. at 147-148.

specific instance.\textsuperscript{42} Thus, before a conclusion can be found by deductive reasoning, a decision has to be made as to the interpretation of the ambiguous or unclear rule. This decision can hardly be made by applying an exclusively deductive method.

The Canadian way of reasoning bears a significant similarity with this method. The decision's hypothesis is equally found by inductive and precedential thinking. Deductive reasoning is used to some extent when "proving" the hypothesis. However, the difference lies in the fact that the "proving-process" in Anglo-Canadian criminal law seems to be even "less deductive" than the German one, but rather to a large part inductive and analogical: The hypothesis is discussed by relying on principles that have been found by way of induction, \textit{i.e.} by looking at isolated incidents of experience (cases) that show patterns that lead to general theories. Applying an analogical way of reasoning, precedents are discussed in order to find out whether they resemble the case at hand sufficiently to justify making the same decision, which is not done in German criminal legal reasoning. Thus, it is fair to say that reasoning in German criminal law puts more emphasis on deduction than reasoning in Anglo-Canadian criminal law, which is "more inductive".

The advantage of deductive reasoning is obvious: It is logically valid whereas inductive reasoning is not. There is no certainty that the generalization derived from cases is correct. The general principle is derived from isolated instances, thus it relies on empirical evidence that may be incomplete or incorrect.

To some degree it, however, appears to be wishful thinking that the deductive method enjoys logical validity, especially in the area of law. The logical validity of a deductive argument stands or falls by the correctness of the general concept. Not seldom it occurs that a specific instance makes one wonder whether the general concept is "true", and this is when the

\textsuperscript{42} MacCormick, \textit{supra} note 4 at 65-66.
strictly deductive method gets into difficulties. Again, the detective case is an example. Roxin,
one of the most respected authorities in the academic world of German criminal law, was
supposedly convinced that his so-called “autonomy-principle” (according to which one has the
autonomy to threaten with the omission of acts on has the autonomy to commit or abstain from,
see Chapter IV) was true and valid, and applicable to any conceivable case where somebody
threatens with an omission. Yet, in his comment on the detective case, he did not seem
completely convinced of this principle any longer, but reversed it in view of the specific case
that actually could have been perfectly subsumed under the autonomy principle with the result
that the detective would have been acquitted. Thus, how logically valid can one deem
arguments that were made in earlier cases relying on the autonomy principle as “true and
valid”? The disadvantage of devoting oneself to deductive reasoning therefore lies in the
“vulnerability to counterexamples”43 that question the logical validity of the argument and may
even question the utility of this method of reasoning altogether.44

What, as well, might speak in favour of the inductive and analogical way of reasoning is
that it is the way of reasoning we are used to in our everyday lives. Small children learn that
fire is hot and they do not need to touch all fires to come to that conclusion. If I say that I like
Italian food this does not mean that I have tasted all Italian dishes. Rather my generalization is
based on induction. When dealing with the detective case I asked eight people, who do not have

43 Fletcher, supra note 13 at 402.
44 Fletcher, ibid., lists four strategies of responding to counter-examples: 1. Denial that the counter-example
is a case of crime. 2. Pushing and pulling on the general proposition to make it fit the counter-example, 3.
Retreat by saying that all we mean by our proposition is that typically or paradigmatically it is valid. 4. As
the last resort claiming that the counter-example is simply wrong. Several of these strategies can be
observed when looking at the German debate over the detective case. The principle that only threats with
omissions contrary to a legal duty are subject to punishment was challenged by the counter-example of the
detective case where one “felt” that the detective ought to be punished. Roxin applied the second strategy,
by “modifying”, i.e. pushing and pulling, the autonomy principle. Horn arguably denied that the detective
committed a crime, thus, applied the first strategy of denying that the counter-example is a case of crime.
Wessels argument fits in the third category of retreat by arguing that typically it is required for a threat
with an omission to be punishable that the omission contradicts a legal duty, that there might, however, be
special circumstances were this is not the case.
any training in law, whether or not they would convict the detective. Only one out of these eight persons said that he could not answer this question because he did not know what specific crime the detective could have committed and what the law requires for this crime to be committed, thus revealing his inclination towards a deductive method that moves from general rules to specific cases. All others did without asking for any instructions as to general principles that might be applicable. Rather, they argued that the detective had to be convicted because

- what he had done resembled blackmail, the only difference being that he did not want money but sex. This did not make much difference in the asked persons' point of view. Thus they concluded that because blackmail is criminal, the detective's behaviour is criminal, too, and he ought to be convicted. (Two people made this kind of argument.)

- they remembered a case where the male accused was convicted for having threatened to send pictures that showed the victim posing in the nude to her parents, her employer etc. if she did not have sex with him. They argued that the pressure put on the shoplifter in the detective case was not less considerable than the pressure in that case. (Two people made this kind of argument.)

- he remembered a case where the accused threatened the victim to make a report to the police for the victim's tax evasion if the victim would not pay the accused a certain amount of money. He argued that supposedly the victim in that case had in fact evaded taxes, so that the police report would have been correct, but still the accused had been convicted. Thus, the same thing ought to be true for the detective case, where it also was clear that the girl did actually steal something.
[what the detective had done was “mean” and “immoral”. Later, the person got doubts, however, whether “immoral” necessarily means “criminal”.

One person argued in favour of the detective. She remembered the movie “Indecent Proposal” (USA, 1993), where Robert Redford as a lonely billionaire businessman offered a struggling architect (Woody Harrelson) $1 million to spend one night with his wife (Demi Moore). The person argued that the offer to help avoiding the police report in the detective case is not very different from the offer to pay $1 million to a financially distressed couple in the movie. In both cases the “accused” has a perfect right “not to help”, i.e. not to pay $ million or not to impede the police report. In both cases pressure is put on the woman. In both cases the man uses this pressure to compel the woman to have sexual contact with him. Nobody would think that Robert Redford alias John Gage did commit a crime although there is no doubt that his conduct was “indecent”. Thus, the detective’s behaviour, which undoubtedly was “indecent”, should also not be considered as being “criminal”.

I am aware that what I am trying to show with this “study” is an induction itself: From the fact that six out of eight persons tended to reason inductively or analogically, whereas only one argued in a deductive manner, I try to reach the conclusion that it is more “natural” to argue inductively than to argue deductively. This induction is – like any induction – not designed to produce mathematical certainty. Still, my argument is that in everyday life we are more used to reach conclusions by induction than by deduction and that this is a point that speaks in favour of a more inductive way of legal reasoning as opposed to a strictly deductive method. The reason for this is that a “natural” way of reasoning potentially fosters the acceptance of judicial decision-making among citizens.

However, the problem with this “more natural” approach is that it runs the risk of relying too heavily on intuition. This might at least seem naïve compared to the standards of
reasoning in other disciplines\textsuperscript{45}; at worst it leads to a lack of predictability of the outcome of the reasoning process, which brings it in conflict with the legality principle. On the other hand, it is not appropriate either to transfer \textit{e.g.} purely mathematical logic methods without any modification to the area of legal reasoning, in an effort to formalize the reasoning process for the sake of the legality principle. The peculiarities of legal reasoning as opposed to mathematical reasoning are that legal reasoning needs to have a “connection with the world of flesh and blood”\textsuperscript{46}, whereas mathematics does not. Legal reasoning always includes the weighing and balancing of competing interests, which in the end comes down to a more or less evaluative judgement that is not necessarily conceivable in logical terms. Both extremes ought to be avoided, and both the Canadian and the German method of reasoning are successful in finding a middle course between those extremes. What can be observed, however, is a tendency of Anglo-Canadian law towards the “intuitive” approach, whereas German law tends towards the “mathematical” approach.

From this it follows again that Canadian criminal law has a closer “connection with the world of flesh and blood”, \textit{i.e.} it is better able to closely follow the contours of society’s needs than German criminal law.

c) Focus on certainty, clarity (the objective being the prevention of abuses by authorities) vs. focus on reasonable outcomes (the objective being the protection of the society against the social danger presented by the criminal’s behaviour)

When reflecting the German analysis in the detective-case, it seems to mainly if not exclusively be concerned with the question of whether the detective’s behaviour fits the

\textsuperscript{45} Brkić, \textit{Legal Reasoning. Semantic and Logical Analysis} (New York: Peter Lang, 1985) at 3.

\textsuperscript{46} \textit{Ibid.} at 6.
definition of the duress offence, because otherwise the legality principle might be infringed by convicting him. Even in arguments where the definition of the crime is not the main concern, it is still noticeable that the silently assumed reason for focusing on finding an abstract general solution of the case is to ensure certainty of the law and prevent arbitrariness, which again is a legality concern. The main reason why Wessels’ argument that the crucial point for threats with an omission can only be whether or not the offender’s behaviour – regarded in its entire social context – is aimed at putting pressure on the other person, intimidating him/her and breaking his/her will,\(^\text{47}\) met with disapproval (even in my own discussion, see chapter IV), was that it is very vague and thus runs the risk of being inconsistent with the nullum crimen sine lege principle because it allows arbitrary decisions. Thus, there was a high – although not always explicit – concern about eventual infringements of the legality principle by convicting the detective, although there was little doubt that as a matter of “output-orientation” one would want the underlying social conflict be resolved to the disadvantage of the detective and to the favour of the girl.

Canadian law, on the other hand, includes as a possibility the analysis of the underlying social conflict, \(i.e.\) the issue that equality for women is still far from being reality in contemporary Canadian (as well as in German) society. The reasoning in Canadian criminal law, at least that of critical Canadian scholars, seems to be rather “output-oriented”, as the underlying questions seemed to be “Do we want detectives (men) to be allowed to act like this?”, “Is to find the detective ‘not guilty’ consistent with the rights to security of person and equality for women, who are particularly vulnerable to being targeted for sexual exploitation?”, “In cases of power imbalances that do clearly put considerable pressure on the complainant but do not clearly vitiate consent, don’t we want to put the risk of unclarity on those putting

pressure on others rather than those vulnerable to being put under pressure?" "Output-orientation" and policy considerations would certainly have a place in the Canadian discussion over the detective case: within the sexual assault discussion on the question of consent as well as the distinction between acts that constitute a criminal attempt and acts of mere preparation; within the extortion discussion on the issue whether the extortion offence is restricted to prohibiting extortions of a pecuniary or proprietary nature or whether it embraces other kinds of extortionate behaviour.

Thus, the main objective in German criminal legal theory and methodology seems to be the prevention of abuses of criminal law by authorities. There seems to be a stronger focus on the *nulla poena sine lege* principle in Germany than in Canada. The principle is stated at the very beginning of the German code, in § 1 II StGB, which itself is a repetition of Art. 103 II of the German Grundgesetz. In Canada, the principle is recognized at subsection 6(1) (Presumption of innocence) and at section 9 (Criminal offences to be under law of Canada) of the Criminal Code and also at article 11 of the Charter.

The legality principle is generally said to have several distinct but related corollaries. The first of these corollaries prohibits vagueness: Criminal statutes must be drafted in a precise manner. The second prohibits retroactive punishment: Criminal statutes must not be given retroactive effect. Then, there is what in Germany is called the "analogy-ban".\(^{48}\) This corollary prohibits the judiciary from punishing new and ingenious forms of antisocial conduct not expressly prohibited by existing statutes by way of analogy. It is this facet of the legality principle where I see a difference in shading between Germany and Canada.

The essence of the German discussion is that there is a difference between the "interpretation or construction of a statute" and "analogy". The borderline between those is
considered crucial. Interpretation/construction is sound and permissive; analogy to the
disadvantage of the accused on the other hand violates the nullum crimen, nulla poena sine lege
principle and thus is prohibited in the area of criminal law. The borderline is drawn by the
boundaries of the possible literal sense of the wording of the statute that describes the offence.
Any kind of interpretation that is sensibly possible within the range of meanings of a statute’s
wording is “o.k.” with regard to the legality principle. It is only at the point where the
“interpretation” leaves the range of possible meanings of a statute’s wording that the
construction is considered an analogy and thus prohibited.

In the Anglo-American world, including Canada, this issue is dealt with slightly
differently. It seems to be undisputed that, like in German criminal law, creating offences by
analogy is prohibited by the legality principle: One expression of this is the Canadian Criminal
Code abolishing common law offences. Thus, it is agreed upon that any enlargement of crimes
by the courts is prohibited. Insofar, the German and the Canadian way of understanding this
feature of the principle seem – at least in theory – to be identical.

It is the question of proper construction within the boundaries of several possible
meanings of a statute’s wording, where there seems to be a difference. Whereas, as stated
above, in Germany any interpretation – that does transgress the borders of an interpretation, i.e.
that is not an analogy – is regarded as being in accordance with the legality principle, in the
Anglo-American criminal law, including Canada, the majority of authorities claim that the
principle of legality requires “strict construction” of criminal laws.49 As we have seen in
chapter V, this means that any ambiguity and uncertainty in the application of criminal laws
must be resolved in favour of the accused. When reasonable persons might differ about the
meaning, scope, or application of a criminal statute, that interpretation most favourable to the

49 E.g. Stuart, supra note 15 at 40: “There is much to be said in favour of advancing the notion of strict
construction of criminal statutes or, to phrase it positively, the presumption in favour of liberty.”
defendant has to be adopted.\textsuperscript{50} Yet there is, in view of s. 12 of the Interpretation Act (see chapter V), some debate within the common law world as to whether the principle of strict construction is actually a consequence of the \textit{nullum crimen} principle\textsuperscript{51}, as well as it is contested by some that the principle of strict construction is still vital\textsuperscript{52}, some at least have doubts\textsuperscript{53}. The prevailing opinion, however, appears to be that just as extending penal statutes by means of analogy, construction that is not “strict” is not permissive, thus, that only “strict construction” is in accordance with the legality principle.\textsuperscript{54}

This finding, admittedly, does not support my argument that the legality principle is taken more seriously in Germany than in Canada at all, it rather seems to speak against this argument. It has to be considered, however, that it is illusionary to assume that there is a strict borderline between the extension of penal statutes by analogy and a “fair, large and liberal construction“ that “best ensures the attainment of its objects“\textsuperscript{55}. Although in theory the German understanding of the principle allows large and liberal interpretations (as long as they stay within the possible meaning of the statute’s wording), whereas according to the prevalent opinion Canadian law does not, German courts are nowadays very careful and do avoid getting even close to this borderline because they fear the reaction of academia especially, which is not hesitant at all to reproach the court for violating the legality principle, which indeed is the worst reproach that can be voiced to a court. And it is of course not only the control of the academia that makes courts risk averse in their interpretation of penal statutes, there is also the (realistic)

\textsuperscript{50} See \textit{e.g.} Husak, \textit{Philosophy of Criminal Law} (Totowa: Rowman & Littlefield, 1987) at 9.

\textsuperscript{51} Williams doubts this: \textit{Supra} note 29 at 586: “It is sometimes thought that \textit{nullum crimen} involves the strict construction of penal statutes, but this does not follow. What \textit{nullum crimen} forbids is the analogical extension of penal statutes.”

\textsuperscript{52} \textit{Supra} chapter V footnote 86.


\textsuperscript{54} See \textit{supra} note 49.

\textsuperscript{55} S.12 Interpretation Act.
possibility that the Bundesverfassungsgericht (Federal Constitutional Court) may be called on.\textsuperscript{56}

This was done in the street-blockers decision.\textsuperscript{57} In this case people had blocked a military base to prevent the stationing of missiles. Their action forced other road users to make detours. Therefore they were convicted of duress under § 240 StGB for having unlawfully compelled another person to a commission, toleration or omission of an act, to wit the commission of making a detour, or the omission to take the blocked road, by means of force. The duress provision prohibits the compulsion of others by way of two different means: The \textit{threat with a severe evil} (which was the relevant alternative in the detective case) and \textit{force}, which was in question in this case. The lower courts interpreted the pure sitting on a road as “force”. After a series of appeals the case ended up before the Federal Constitutional Court where the appellants argued that the lower courts “interpretation” of “force” as “including psychological violence” is contrary to the analogy-ban as one facet of the legality principle laid down in Art. 103 II of the constitution. The Federal Constitutional Court found in favour of the appellants. It declared the interpretation of “force” as including cases of merely psychological violence without any signs of physical force as unconstitutional.

Another case that dealt with the analogy-ban was a relatively recent decision by the higher regional court of Bavaria.\textsuperscript{58} The accused had sent emails containing child pornographic material to five email-addresses. The lower court convicted the accused of dissemination of pornographic publications contrary to § 184 StGB, subsection 4, child pornography. The higher regional court quashed this decision on the grounds that it violated the legality principle in the form of the analogy-ban: Dissemination means, according to the generally accepted definition,

\textsuperscript{56} The Federal Constitutional Court (\textit{Bundesverfassungsgericht}, or \textit{BVerfG}) is Germany's Supreme Court, and its role is essentially “Guardian of the Constitution”. A brief introduction to the role of the Bundesverfassungsgericht provided in English by the University of Saarbrücken can be found at <http://www.jura.uni-sb.de/english/Publications/bverfg.html>.

\textsuperscript{57} “Sitzblockadenentscheidung” des Bundesverfassungsgerichts, BVerfGE 92, 1ff.

\textsuperscript{58} Bayerisches OLG, Beschluss vom 27.06.2000 5 St RR 122/2000.
the action of “making accessible for an uncertain number of people”. The accused had only sent
the material to five addresses and there was no evidence available for the fact that these email-
addresses actually owned by more than one person each, as well as there was no
evidence that the material had been spread further from these addresses. I would argue,
however, that in this case the lower court’s interpretation of “dissemination” as including
sending an email to five addresses did not in fact constitute a prohibited form of enlarging the
criminal code provision by means of analogy, but rather was still covered by the possible literal
meaning of the word “dissemination”. It might not have been the “most strict construction” of
the statute, however. Therefore this case is an example of a court being very concerned about
even coming close to the borderline between permissive interpretation and prohibited
enlargement of statutes.

This is not to say that one might not find an example where the legality principle had
been neglected. Cases like the child pornography case however show that in practice the
principle is taken very seriously, some courts even extend the principle by construing statutes
“strictly”, although in theory there is no rule of strict construction in the German version of the
nullum crimen sine lege principle. The validity and correctness of the principle is not doubted
and the principle enjoys great attention in both the academic world and the judiciary.

In the Anglo-American tradition, on the other hand, there are at least some authors who
regard the principle more critically. Although in the 1955 Revision of the Canadian Criminal
Code, parliament in s. 9 abolished common-law offences, there still seems to be remains from
the debate of whether elasticity or certainty in the administration of criminal law ought to be the
ideal and whether it is acceptable or rather regrettable that the principle of nullum crimen sine

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59 See the article by Wolf, “Befreiung des Strafrechts vom nationalsozialistischen Denken?”, Humboldt
poena principle is not applied strictly enough in German criminal law.

60 E.g. Williams, supra note 29 at 600ff.: “The principle critically considered”.

151
lege impedes criminal law’s elasticity.\textsuperscript{61} The case \textit{R v. Pare}\textsuperscript{62}, for example, is a case where I argue that the court did not only choose a “wide and liberal construction” instead of a strict one, but rather that the conviction of first degree murder instead of second degree murder was reached by way of analogy: It was argued that the wording “while committing an indecent assault” in – at that time – CCC, s. 214 (5) does not necessarily require that the death and the underlying offence occur simultaneously. Rather, it should suffice that the murder was temporally and causally connected to the underlying offence. The main arguments provided for this “construction” concerned “the policy reasons that underlie the provision”. With respect, I cannot find the word “while” meaning anything else than “at the same time as”, \textit{i.e.} “simultaneously”. Events that happened in a “temporally and causally connected” manner might appear equally blameworthy and policy considerations might suggest treating those cases the same way as cases where both events actually happen simultaneously. However, this does not change the fact that they did not happen simultaneously, which is required by the wording “while”. The policy considerations do not change the finding that what was done here was not a (permissive) interpretation of the word “while” but an analogy: What the court argued was that “the crime is no less serious” in the case where assault and murder occur shortly after each other each other than in the case where they occur simultaneously. This is an argument that might justify drawing an analogy, did not the legality principle prohibit this way of enlarging the scope of criminal offences. \textit{R. v. Jobidon}\textsuperscript{63} is another example where I argue the legality principle had been neglected. I agree with Sopinka J’s minority opinion and the comment given by S.J. Usprich\textsuperscript{64} that by treating consent \textit{as a defence} to assault rather than treating the absence


of consent as an element of assault, "a new offence has been added to the Code by judicial fiat contrary to both the letter and spirit of s. 9 (a)."

There is another point to be made regarding the construction of criminal statutes by Canadian courts. Although, as stated above, it is the prevailing opinion that the rule of the strict construction of penal statutes is not overruled by s. 12 of the Interpretation Act, i.e. that the rule is still vital, recent approaches to the question of strict construction take a somewhat less "strict" approach to the rule. They claim that purposive construction that poses the question on the legislative purpose of the respective Criminal Code provision has priority over the strict construction, in that the rule of strict construction only applies if after applying the purposive construction there is still room for different interpretations as to the meaning or scope of a criminal statute. In German law, purposive construction plays a significant role as well. Not seldom it is considered the most important method of interpreting statutes. The emphasis is slightly different, however, in the field of criminal law. In that area it is commonly held that purposive interpretation has to be applied very cautiously, being mindful of the requirement

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65 Ibid. See also Stuart, supra note 15 at 17-18: "Five justices of the present Supreme Court however placed little or no stress on the value of certainty. Mr. Justice Gonthier for the majority decided that, notwithstanding section 9, it was open for a court to turn to the common law for policy-based limits on the role and scope of consent for the crime of assault on a case-by-case basis. The effect of the majority interpretation was to create a new crime contrary to s. 9 and to read the words "without the consent of another person" out of the assault definition in s. 265 of the Criminal Code. The majority could surely not legitimately rely, as they did, on the existence of common law defences in section 8 (3). This new common law principle was not a defence but the basis for a conviction!" [emphasis in original].

66 In R. v. Clark, [2000] A.J. No. 1099, (2000) 148 C.C.C. (3d) 132 at para. 45, the court lists cases where the rule of strict construction had been rejected. "In recent years, this rule has attracted critical attention largely because it is difficult to reconcile with federal and provincial Interpretation Acts that deem legislation to be remedial and to require a liberal and purposive approach to interpretation. The strict construction rule has been rejected by the Supreme Court of Canada on many occasions. See for example R. v. Ogg-Moss, [1984] 2 S.C.R. 173 at p. 183; 14 C.C.C. (3d) 116; R. v. Pare, [1987] 2 S.C.R. 618 at pp. 329-33, 38 C.C.C. (3d) 97; R. v. Lightfoot, [1981] 1 S.C.R. 566 at p. 575, 59 C.C.C. (2d) 414; R. v. B. (G.) (No. 1), [1990] 2 S.C.R. 3, 56 C.C.C. (3d) 161." See also Colvin, supra note 16 at 22-23: "In practice, moreover, the doctrine [of strict construction] is subordinated to considerations of legislative intent, policy and principle. It is brought into play only after those other aids have been considered and in the rare instances where they have failed to yield answers." See also Roach, Criminal Law, 2nd ed., (Toronto: Irwin Law, 2000) at 70: "The purpose approach to statutory interpretation has been reconciled with the doctrine of strict construction by holding that the preference for the interpretation that most favours the accused applies only if, after consulting the purposes of a statute, reasonable ambiguities remain in its meaning. Thus a criminal law should first be given a purposive reading and the doctrine of strict construction only applied if there are still reasonable ambiguities after such a broad interpretation."
that the interpretation must be in accordance with the range of possible literal meanings of the wording of the statute. Thus, it seems that whereas in Canada purposive construction comes first, purposive construction plays a rather subordinate role in German criminal law to the benefit of the grammatical meaning of the statute.

These examples show the tendency that "judicial creativity" is not as frowned on in Canadian criminal law as it is in Germany. This can also be seen from the fact that "policy considerations" do appear very often in Canadian criminal judgements, whereas this is not the case in German criminal law. Giving reasons of public policy in a criminal law case is an expression of the attitude that the law – including the criminal law – ought to promote the achievement of higher values. Giving public policy reasons and by doing this relaxing the requirements of the legality principle demonstrates a tendency of rating the pursuit of social gain higher than individual rights. Another expression of this might be found in *R. v. Welch*:

"Although the law must recognize individual freedom and autonomy, when the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, the personal interest of the individuals involved must yield to the more compelling societal interests which are challenged by such behaviour."

The idea of criminal law as an instrument of social control seems to enjoy less acceptance in Germany than in Canada. In Germany, criminal law is only indirectly considered as a means of social control and social engineering: By accepting the concept of *guilt* it is implied that legal norms can reach the human will and thus influence human behaviour in a social context. It is thus accepted that in this way social control can be achieved by

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67 Usprich, *supra* note 64 at 236.
68 See e.g. again *Paré* and *Jobidon*.

154
criminalization of undesirable human actions.\textsuperscript{70} However, the still prevailing view in Germany seems to be that only the protection of human interests or ‘legally protected interests’\textsuperscript{71} may be the justification for the state’s imposing a criminal sanction. Punitive sanction that has (only?) social ideology as its aim is widely considered illegitimate. The idea of carrying through desired social change by the application of criminal law provisions is not accepted.

In Canadian criminal law the emphasis seems to be slightly different. Anglo-Canadian criminal law seems to stand in line with most of the English-speaking countries of the common law tradition in that it tends to “approach the law in a more pragmatic way, balancing pain and pleasure in an utilitarian search for a criminal justice system that most effectively achieves community perceived penal-correctional goals.”\textsuperscript{72} Jurists of the common law world including English Canada seem to be most concerned with the question “will it work to produce desired criminal correctional results?”\textsuperscript{73} Generally, Canadian law, as has been seen in the detective case, seems to be more output-oriented, \textit{i.e.} more concerned with the effect legal decisions have on society. More emphasis is put on the weighing of interests; decisions are more flexible and may well have the function of securing and maybe even carrying through a desired social change. In that way, the Canadian approach may even be described as “consequentialist”.

2. \textit{Similarity to the debate between mainstream legal scholarship and critical legal theory (especially feminist legal theory)}

Some of the differences about the way in which criminal law is dealt with in Germany


\textsuperscript{71} “Rechtsgüter“.


\textsuperscript{73} Compare \textit{ibid.}
as opposed to Canada may appear familiar from another context: In the debate over the
structure or methodology of mainstream legal thought as opposed to critical legal scholarship,
especially feminist legal theory\textsuperscript{74}, catchwords are heard that are very similar to the features
described in the foregoing chapter.

Some feminist scholars argue that the process of reasoning in modern law is
characterized by ‘masculinity’.\textsuperscript{75} The features that are said to be ‘male’ resemble the features
that in this paper have been found to be ‘German’:

Conceptualism that does not pay enough attention to the social context is what I found
to be more pervasive in Germany than in Canada. Feminists (at least scholars that belong to the
so-called “difference feminism” school of thought\textsuperscript{76}) disapprove of mainstream legal thought
not dealing with questions of inequality and power\textsuperscript{77} because of its very conceptualised
nature\textsuperscript{78}. They consider the “faith in the capacity of the conceptual framework to generate
determinate answers to substantive questions of law” is one of the “inadequacies of orthodox
rationalisations of legal doctrine”.\textsuperscript{79}

Focus on deductive reasoning and abstract thinking is another feature that I found to be
more present in Germany than in Canada. Some feminist legal scholars talk about and criticize
the “‘male’ deductive model”\textsuperscript{80} and the “‘male’ model of abstract thinking”\textsuperscript{81} as opposed to

\textsuperscript{74} I do not intend to pose the question whether feminist legal theory should be considered as a branch of
critical legal studies or whether it is ‘something different’, see Bauman, \textit{Critical Legal Studies, A Guide to

\textsuperscript{75} Gilligan, \textit{In a different voice: Psychological theory and women’s development} (Cambridge, Mass.: Harvard University Press, 1982).

\textsuperscript{76} I adopt this label from Lacey, “Feminism and Conventional Legal Theory”, Humboldt Forum Recht 1996, Beitrag 11 at 1; <http://www.humboldt-forum-recht.de/11-1996/Seite1.html>.

\textsuperscript{77} Lacey, \textit{ibid.} at 2; <http://www.humboldt-forum-recht.de/11-1996/Seite2.html>.

\textsuperscript{78} Gilligan, \textit{supra} note 75.


\textsuperscript{80} Bartlett, “Feminist Legal Method”, (1990) 103 Harv. L. Rev. 829 at 855.

\textsuperscript{81} \textit{Ibid.}
(female?) contextualized reasoning.

The persistent strive for internal coherence and consistency typical of reasoning in German criminal law, seems to be based on the idea that law is a unitary and a coherent system of rules and norms. The belief in law’s coherence is one of the ideas that critical legal scholarship attributes to mainstream legal thought and disapproves of: “Feminist scholarship, like much other critical legal theory, is concerned to unsettle this belief in law’s coherence [...]” \(^82\)

This parallelism suggests that German legal reasoning is more ‘male’ than Canadian legal reasoning. Whether this be true or not (I do not explore whether abstract reasoning is indeed ‘male’, whereas women’s thinking is more characterized by exploring the context, relationships etc.), this has shown once more that German criminal law is closer to what can be described as “black-letter law” than Canadian law.

3. Implication: Canadian Criminal Law has more potential to be attentive to the social location of a given conflict

The foregoing observations have shown that Anglo-Canadian criminal law, given its methodology, does at least have more potential to respect the realities of life than German criminal law.

As reasons for this finding we have observed the following: The first important reason is that in spite of the codification of criminal law, Anglo-Canadian law has still preserved its common law tradition. The common law approach itself is more contextual than the civil law approach. Being “contextual” means paying attention to the context, \textit{i.e.} to the facts. Thus, it is relatively easy as a matter of methodology to include such facts into the process of legal

\(^{82}\text{Lacey, supra note 76 at 5; \langle http://www.humboldt-forum-recht.de/11-1996/Seite5.html\rangle.}\)
reasoning that relate to social location. As a second reason we have discovered that Anglo-
Canadian criminal law puts less emphasis on strictly deductive reasoning than German law. The
intuitive, analogical, inductive way of reasoning provides more room for arguments as to the
social location of a given conflict than the deductive way of reasoning, because it is more open-
ended and exploratory in nature than the deductive method, which is more narrow. The third
reason is that the notion of criminal law as a means to promote social change is less accepted in
Germany than it is in English Canada. In a system where this idea is well-accepted, arguments
as to the underlying social conflict of a case have more chances to be heard than in a system
where this idea does not enjoy much support.

4. Does Canadian criminal law make use of this potential?

The interesting question then becomes whether Anglo-Canadian criminal law has
actually made use of this potential. Views on this question are likely to differ a lot. Some
“radical” feminist scholars for example might say it has not, expressing thereby their opinion
that e.g. the woman question is still not paid enough attention to in Canadian criminal law. Some “radical” blackletter-jurists, however, might say it has a lot, while maybe regretting this
development.

From a German perspective, Canadian criminal law definitely has made some use of this
special potential. In paragraph 2 we saw that there is a parallelism between German as opposed
to Canadian and mainstream as opposed to critical criminal legal theory. Critical, especially
feminist, legal theory finds it essential to recognise the social location of the individual and to
put emphasis upon the social context. Canadian criminal law seems to be more receptive to
these kinds of arguments. We have seen that equality arguments have more effect in Canadian
than in German criminal law. Feminist perspectives on criminal law, for example, do have a voice in Canada, in law schools, in the literature (standard textbooks on substantive criminal law at least mention feminist perspectives, e.g. Stuart, Criminal Law, 3rd ed., 1995), and to some extent in court decisions, at least at the Supreme Court of Canada level. In Germany, on the other hand, very little is heard of feminist perspectives on law, and even less is heard of it in the area of criminal law. As Canadian criminal law is at least less ignorant towards challenges to conventional legal theory than German criminal law, arguments promoted by e.g. feminist schools of legal thought have had more influence on the generally accepted legal reasoning in Canada than in Germany.

Thus, it seems fair to say that Anglo-Canadian criminal law does not only have more potential to be attentive to the social location of the people involved in or affected by its decisions, but it also does actually pay more attention to those issues than German law. In other words, it does have more respect for the realities of life than German law.

5. Intermediate result for the discussion whether German criminal law lacks respect for the realities of life

As an intermediate result to the question whether German criminal law lacks respect for the realities of life, it can therefore be stated that, if Canada is supposed to serve as the model/standard, the answer has to be yes, German criminal law does lack respect for the realities of life.

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83 That equality arguments should have a place in criminal law has not occurred to many German scholars. As an exception one might cite Kaiser, “Recent Developments in German Penal Policy” (1976) Int. J. Crim. Pen. 193 at 195: “[...] Together with the gradual abolition and loss of significance of traditional informal control structures within family and environment, and the growing complexity and anonymity of modern society, a control function is primarily expected from law itself. It will make provision for openness, rationality and equality. Criminal law is thus used as a legislative means to secure and carry through the desired social change.[...] Thus, it is the need to bring to bear the principles of humanity and equality, and the duty of the state to create or maintain a social order in which the benefits of welfare are distributed as equally as possible among its subjects.” [emphasis added].
VII. Consequences

1. *Is German criminal law incapable of being attentive to the realities of life?*

I shall continue by asking whether this means that German criminal law – as an inevitable result of its methods of legal reasoning, *i.e.* its conceptual, deductive, certainty- and guilt-oriented principle-approach, – is necessarily incapable of being more attentive to the social differences that underlie a given conflict than it is at the moment. Although, as we have seen, one reason for German law having less potential to make social differences visible is Germany’s belonging to the civil law tradition as opposed to the Anglo-Canadian common law approach, a fact that cannot be changed, this is not the case:

First, the differences between the German approach and the Canadian approach are only differences in shading instead of stark contrasts.

We have seen that there are “concepts” in Canadian law, too, and that “facts” do have a function in German criminal law. Abstraction is not a feature exclusively found in German blackletter-jurisprudence. Rather, no legal reasoning can do without abstractions. Even Canadian feminist practical reasoning, which one might consider to be the polar opposite of German conceptual reasoning, “admits” that it cannot do without abstraction¹: “Feminist methods require the process of abstraction, that is, the separation of the significant from the insignificant. Concrete facts have significance only if they represent some generalizable aspect of the case.”² Canadian criminal law does not make an exception. Like every form of legal reasoning it uses generalizations and abstractions. On the other side, no legal reasoning can do

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¹ See Bartlett, “Feminist Legal Method” (1990) 103 Harv. L. Rev. 829 at 856ff.
without dealing with facts, which to some extent always includes "details", depending on what one defines and comprehends as "detail", and thus also might include "details" that relate to the social location of a given conflict.

As already shown above, the contrast between German deductive and Anglo-Canadian inductive reasoning is not as stark as one might imagine at first sight, either. German judges would probably not deny that they reach their conclusions to some degree by intuition rather than by deduction, and that their use of deductive reasoning rather serves to support their findings than to actually make the decision. Canadian courts on the other hand do not reason exclusively inductively or by analogy but use the deductive method as well (see above).

The difference as to the foundation of criminal law is also not as harsh as it might have sounded in the description above: Canadian criminal law does focus on moral blameworthiness as does German criminal law. Canadian criminal law does pay attention to the legality principle, especially since the Charter has come into force. German law does to some extent accept the notion of criminal law as a means of bringing about social change in that it nowadays defines "guilt" in a normative way as "socially harmful conduct", instead of morally harmful conduct. Thus there is some influence of utilitarian rationales in German criminal law, too.

The second argument to support the idea that German law could also pay more attention to the social location is that the "German (male?) features", i.e. conceptual reasoning, deductive reasoning and certainty-oriented reasoning, do not per se exclude the ability to address these instances at all. It is simply a question of the content of the concept, the principle, the abstract rule. The concept might prescribe that the differing social location of the people involved in the case has to be paid attention to. And this is not even something wholly unknown to German criminal law. There are situations where the social circumstances of e.g. the offender are to be

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3 Shteir, "Positivist Roots of Criminal Law and the West German Criminal Law Reform" (1979) 10 Rut.-Cam. L.J. 613 at 629.
considered, as for example in the area of self-defence. When posing the question whether the act committed by the accused was a defence that was necessary to avert another's unlawful/wrongful and present attack from oneself or another (§ 32 StGB), one has to consider what means of defence have been available to the accused. At this point the individual is looked at in his/her very specific situation. A disabled person, sitting in a wheelchair, can more easily be justified for using a firearm to avert an attack than a non-disabled person. A heavily built man may be required to first try to use his fists, where a relatively small woman facing the same attack may already be justified for using a weapon to defend herself. Thus, it is possible to pay attention to people's social location without necessarily giving up the generally applied method of conceptual, deductive, principle-focused reasoning. It is the substance of these principles that can make the difference. In summary, German criminal law is capable of being more attentive to the social location of the people than it is at the moment.

2. Limits for German law to be more attentive to the realities of life?

If the above-developed argument is true, i.e. if German criminal law is factually not incapable of making the social differences between people involved in or affected by its decisions visible, then the question becomes whether it is desirable for German criminal law to make a step in that direction.

On the surface, the answer to that question seems to be easy. Of course it is desirable for law to have respect for the realities of life. Law should pay attention to social circumstances. And if one poses the question that has been asked by Barbara Wootton “Is the law for purposes of social control and social engineering, or for the purpose of moral condemnation and revenge?” one might probably answer to the disadvantage of “moral condemnation”. It surely seems desirable to have laws that follow closely the contours of society's needs, norms, goals
and practices. And it also sounds reasonable to ask that law should be adaptable to fit the changing needs of society.

There is, however, a counterargument to this. It is the demand that penal law should be certain in the interest of the individual's right not to be punished unless in accordance with the *nulla poena* principle. Certainty and adaptability to social change conflict each other.

As we have seen, much emphasis is put on certainty and predictability of criminal law in the German debate. Even in cases like the child pornography case, where there is no doubt that it would contribute to the benefit of society if forms of conduct like that performed by the accused were punished, the legality principle has been considered more important.

Thus, some might also argue that the German method as described here does tend to sacrifice material justice to the benefit of arguments that might seem rather technical, as for example in the above-mentioned child pornography case, where one might argue the "material justice" demands conviction of the accused.

This focus particularly on the analogy-ban facet of the legality principle in Germany might be more understandable, however, if one considers the historical background.

In 1935, the analogy-ban was formally abolished and replaced by an explicit command to apply penal statutes by way of analogy to acts that are not declared to be criminal by a specific statute but deserve punishment according to the underlying purpose of a criminal statute and according to the "public feeling". Without going into details of national-socialist law, several features, including collectivism, dynamicism, teleology and disregard of the separation of powers, can be pointed out as characteristic of the national socialist notion of

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4 "Gesundes Volksempfinden".

5 Gesetz zur Änderung des StGB vom 28.6.1935 (RGBl. I, S. 839). Also see §§ 170a, 267 a StPO i.d.F.v. 1935.
Collectivism found its expression in the idea of “not starting out from the individual any more but starting out from the community and regarding the individual’s meaning of life in his/her living for the community”, in short the slogan: “You are nothing, your people is everything.” An expression of the national socialist emphasis on law being dynamic is Freisler’s writing that “there can be no finished German law once and for all. The law is in a permanent stage of development, and everything must be done in order to prevent it from solidifying.” The announcement that “law is what is useful” demonstrates the focus on teleology and utility. Finally, the disregard of the separation of powers is expressed by Freisler’s sentence that “whether the decisions are in accordance with material justice is much more important than who makes the decisions and how they are made.”

This background might shed some light on the reluctance found in German criminal legal theory to adopt a more open-textured, output-oriented approach to criminal law that is better able to include reasons of public policy in the decision making process and thus is better able to reflect and react to the differences in social location, e.g. with respect to women, people of colour etc. Having a history of a perverted rule of law where rights of individuals were denied for the benefit of the “Volk”, makes it hard to adopt a method of legal reasoning that puts more emphasis on considerations of public policy and the pursuit of social gain than on the

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7 Freisler, Nationalsozialistisches Recht und Rechtsdenken, Berlin 1938 at 53. Freisler was one of the most important jurists in the nazi regime. He became state secretary in the department of justice in 1934. He was president of the “Volksgerichtshof” (National Socialist People’s Court) from 1942 until his death in 1945. Under Freisler, the Volksgerichtshof convicted thousands for political actions, speech and expressed thought that it considered treasonous. The definition of treason was flexible and, in most cases, defence in the courtroom was futile. Guilty verdicts were generally a foregone conclusion and death sentences (which were prevalent in these cases) were carried out within hours of the verdict. Compare <http://www.jlrweb.com/whiterose/freisler.html>.

8 “Du bist nichts, dein Volk ist alles.”

9 Ibid. at 54.

10 Ibid.

11 Ibid. at 73.
individual's right to not be punished unless in accordance with the *nullum crimen* principle, no matter how noble the considerations of public policy may appear. The fear of abuse is omnipresent. The anxiety to slip again to a state where there is no clear separation of powers between the legislative and the judiciary may be another reason for German criminal law being averse to public policy reasoning. The attempt to get as close as possible to the ideal that it is Parliament, not the judges, who have to consider public policy, very often governs the legal argument in Germany. Closely connected with this aspect is the "dynamicism" issue. There is no question that law is changing. It is, however, against the background of German history, important that the ideal that it is Parliament who changes the law is pursued strictly, and that the courts role in promoting changes to the existing law is limited.

Thus, the argument can be made that it is the anxiety that a more contextual and utilitarian approach to criminal law contains a higher risk of being abused, the fear of a repetition of the emergence of a state without a rule of law, what prevents German criminal law from being less "blackletter-legal".

It is true that one might at this point pose the critical question whether holding on the perceived methods of conceptual, deductive, formal reasoning, and the emphasis on law being certain, clear and consistent, really does constitute a means to prevent the risk of another state of injustice. If there is one thing a law student learns in his first year, it is the fact, that there are always different decisions to a specific case and that with a certain expenditure of argument one can justify almost any result. Thus, it seems to be an illusion that law can ever be clear, certain, and consistent in every instance. It is always to some degree indeterminate. Since law is made, taught, applied and obeyed by human beings, my assumption is that it can only be stable as long as those human beings' assumptions are more or less stable. If court decisions are consistent, then this is more likely to be a result of the judges who deliver them reflecting the attitude of contemporary society, than of the legal rules being clear and determinate. When a society
changes dramatically, then it can be doubted whether a set of principled, structured and coherent legal rules will be able to keep this change back.

One might even argue that rather than a constrained judiciary bound by certain legal rules it is a less constrained judiciary that might – by being concerned about possible legislative injustices – be a safeguard against totalitarianism, and the fact that the judiciary has, in Canada (s. 52 (1) of the Charter, “supremacy clause”) as well as in Germany (Art. 93 I Nr. 2 GG, Art. 100 I GG, “abstrakte und konkrete Normenkontrolle”), the power to declare laws void for being unconstitutional shows that there is a common conviction that the judiciary should have some control over legislation, i.e. that to some extent it should have the role of a safeguard against tyranny and injustice. However, in my view judicial control over the legislative power should be constrained to the formal and transparent procedure of explicitly declaring legal rules void, whereas courts should not be allowed to replace Parliament’s policy considerations by their own ones on a case-to-case basis. In particular, the power of courts may not go as far as to relax the nullum crimen principle. Even if it might only be an ideal and never fully realizable, even if it might not be capable of saving a society from slipping towards a state of injustice as happened in Germany in the Third Reich, it is still worth striving for. Resignation to the fact that it may not have this capacity must not result in paying all the less attention to the principle. Keeping the principle vital and not stopping to touch on the sore point makes it at least more difficult for antidemocratic currents to take over, for antidemocratic movements become at least more visible by holding on to a formal theoretical separation of state powers. Not least, the symbolic value of norms may not be underestimated.

I also do not share the point of view that “technical” rules should necessarily be considered as less important than the result, which ought to be “material justice”. I am not confident enough to think I am able to determine what “material justice” is and I am sceptical about anybody who does claim to know what “material justice” demands in a specific case, no
matter if this "anybody" be a heterosexual white male or a homosexual woman of colour or a homosexual male of colour etc. As long as there is no consensus on what "material justice" is, it is important to at least strive for "procedural justice", as expressed by Luhmann's formula\textsuperscript{12} of the "legitimation by procedure" which is not only to be understood in the sense of "trial procedure" but includes the procedure of decision-making by those who apply the law.

It is true that paying attention to social location as aspect of legal reasoning itself does not dictate specific legal outcomes, \textit{i.e.} promoting a method of legal reasoning that does pay attention to social location does not necessarily include claiming to know what "material justice" is.

However, critical legal scholars, especially feminist legal scholars, who legitimately claim that legal reasoning should pay more attention to the varying social context of legal issues, especially to the woman question and equality concerns, do sometimes go beyond this legitimate claim and in certain instances deliberately cross the line drawn by the legality principle by urging women to renounce traditional notions of rights and justice that are viewed as perpetuating male dominance. Accepting that the battered women syndrome may have the effect that killing a sleeping husband is justified by self-defence runs the risk of allowing women to take the law into their own hands and thus removing the state's monopoly to criminal prosecution. Dworkin's appeal to "stop men who beat women - get them jailed or get them killed [...] When the law fails us, we cannot fail each other"\textsuperscript{13} is an vivid expression of this tendency. The affirmative consent model in the area of sexual assault might be regarded as touching upon the principle that the crown has to prove the accused's guilt beyond reasonable doubt as it may be said to shift the burden of proof to the accused, thus taking away part of the individual's protection against the state power. The demand that criminal laws should be certain

\textsuperscript{12} Luhmann, \textit{Legitimation durch Verfahren}, 2nd ed. (Frankfurt, 1989).
\textsuperscript{13} Quoted in Jones, "Feminists Call to Kill Men is Outrageous", Toronto Star, May 16, 1991, at S1.
has always been regarded as an important feature of the legality principle that ensures fair notice to the citizenry and serves to their protection against state power. A feminist perspective on criminal law explicitly, although cautiously, questions the importance of criminal law being certain:

"Arguably it is unjustifiable for the State to punish someone for behaviour not clearly defined as criminal in advance. [...] A related argument is that where s. 1 of the Charter is being used [...] limitations must be 'prescribed by law' and thus could well be attacked on the ground of vagueness. This issue has not yet been subjected to feminist analysis, but women could develop an interest in vagueness in criminal law for two reasons [...]"\textsuperscript{14}

The tendency found in German criminal law to put concerns as to social context behind concerns regarding the rule of law and the tendency of some feminist scholars to put concerns regarding the legality principle behind e.g. the woman question, seem to reflect a tension between legality concerns according to which the vulnerable individual needs to be protected against the state power as expressed by liberal traditional scholars on the one hand and equality concerns meant to protect women (as a class) as expressed by feminist scholars on the other hand.\textsuperscript{15} There seems to be a conflict between the notion of criminal law being about the rights of an accused person measured against the state's interest in law and order and the idea of criminal law having the function of supporting women's fight to equality.

The two are not incompatible, however. As already indicated above\textsuperscript{16} both concerns can be reconciled in a method of legal reasoning which one might call \textit{egalitarian conceptualism}.

\textsuperscript{14} Boyle, et. al., \textit{A Feminist Review of Criminal Law} (Ottawa: Minister of Supply and Services Canada, 1985) at 24.

\textsuperscript{15} This tension is also indicated by Boyle, "Recent developments in Canadian law", in Jagwanth, Schwikhard & Grant, eds., \textit{Women and the Law} (Pretoria: HSRC Publishers, 1994, 178 at 193: "A constitutional document which fundamentally reflects the need to protect the vulnerable individual from the power of the state, may not be suitable for the complex task of harnessing state power to redress inequalities among individuals."

\textsuperscript{16} Above, paragraph 1: "It is possible to pay attention to people's social location without necessarily giving up the generally applied method of conceptual, deductive, principle-focused reasoning, for it is the substance of these principles that can make the difference."
Conceptualism as an approach that attempts to organize the criminal law, which is – preferably – written down in an intelligible criminal code, in a systematic, widely consistent manner, while keeping in mind that the “system” is an ideal, not necessarily the reality, and that the reality must not be sacrificed for the sake of the system, is best able to meet the requirements of the rule of law: It guarantees accessibility, transparency, predictability, and reviewability of judicial decisions, and thus it prevents arbitrariness in the decision making process for the sake of protecting the individual against the state.

Egalitarian conceptualism is conceptualism that is not blind to existing inequality regarding for example but not exclusively women, people of colour, homosexuals, but includes equality and the task to eliminate existing disadvantages as one of the most important “concepts” within the conceptual structure that governs criminal liability.

Just as one of the principles of criminal law is that where there are two possible ways of construing a statute, the accused must receive the more generous interpretation (in dubio pro libertate), another principle must be that where there are two possible interpretations that meet the requirements of the legality principle, the one that is more suited to promote equality must prevail: In dubio pro aequalitate.

It is important to notice that this egalitarian element cannot be rejected as a “policy consideration” or “judicial creativity” that unduly blurs the proper line between courts and legislatures. Rather has the legislative power in both Canada and Germany set the frame for courts applying an egalitarian approach: In Canada this has been done in ss. 15 and 28 of the Charter as well as in the Preamble to Bill C-49 (see chapter V for details), in Germany in Art. 3 GG and the rule that statutes have to be constructed in a way that best fosters constitutional values. There is no reason to refrain from applying this rule in the area of criminal law where the grammatical sense of the statute allows different interpretations.
Applying this egalitarian conceptual method of reasoning to the main issues of the detective case, the following can be observed:

In German law, the detective can still not be convicted of the duress offence, as the *nullum crimen* principle forbids this (see chapter IV): *In dubio pro libertate*. Within the discussion of the offence of rape/sexual assault, however, there are two ways of interpretation as to the wording “powerless position” that are within the boundaries of the wording: It might be limited to a “powerless position” due to physical force, or it might include social and psychological pressure. The interpretation that includes “positions” that are powerless due to social or psychological circumstances is more suited to assist the elimination of existing disadvantages for women, as women are especially targeted for being sexually exploited by means of physical as well as social pressure. Therefore this interpretation is preferable: *In dubio pro aequalitate*. Thus, the suggestion is that German rape law be revisited and reformed as to include instances where the victim (be it a man or a woman) is in a “powerless position” due to reasons beyond physical force, *e.g.* psychological force. The detective’s behaviour is likely to be caught under the sexual assault section then.

In Canadian law there are probably two tenable solutions as to the issue of consent in the detective case (see above, chapter V): The position according to which the shoplifter did not legally effectively consent due to the pressure the detective put on her is better suited to promote equality: This interpretation has to be adopted *in dubio pro aequalitate*. Regarding the offence of extortion, one interpretation might include motivating somebody by means of *lures* to the area of applicability of the offence, whereas the opposing view restricts extortion to cases where the victim is motivated to do what the perpetrator demands by ways of *threats*. According to the *nullum crimen* principle, the latter has to prevail:17 *In dubio pro libertate.*

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17 See above chapter V at 107ff., 109.
Thus, the detective could be convicted of (attempted) sexual assault, but not of (attempted) extortion.

3. Results

The comparison of German and Canadian criminal law reasoning has shown that there is at least a grain of truth in Du Plessis' critique on German criminal law. German criminal law is highly systemized, abstract and theoretical, and does not provide much room for arguments as to the social location of the people effected by or involved in its decisions. Thus, it can indeed be criticized for being somewhat remote from the realities of life. We also have seen that German methodology is not per se incapable of adopting a more down to earth approach to criminal law, and in that respect Canadian criminal law might serve as an example for German law. There is a limit, however, to Germany's adopting an approach that is more attentive to social differences and public policy considerations: It is the legality principle, especially the notion of fair notice to citizens, which includes the requirement that criminal law ought to be certain and predictable. Only as far as this principle is not encroached upon can German criminal law alter its method of reasoning towards an approach that pays more attention to the realities of life.

A possible solution to the tension between the legality principle and the demand to pay attention to the social context is an approach which might be called egalitarian conceptualism. This approach does pay attention to equality concerns without neglecting the requirements of the rule of law by embracing equality as a main principle into the overall conceptual structure. This model of reasoning has a striking advantage over both conceptualism that is not egalitarian, as widely practiced in German criminal law today, and contextualism, as widely practiced in Anglo-Canadian criminal law: It takes the requirement that criminal law above all
has to be consistent with the constitution seriously, for it reconciles the two constitutional demands found in Canada’s as well as Germany’s constitutional document, the principle of *nullum crimen, nulla poena sine lege*, and equality regardless of gender, race, sexual orientation etc.

With regard to the more narrow issue of this paper, *i.e.* the question of how to deal with cases like the detective case, German law is well capable of adopting a more satisfactory approach. I argue that the sexual assault provision, § 177 StGB, with its phrase “powerless position” is open for an interpretation that is not restricted to physical domination but can also include domination that results from psychological pressure if it reaches the degree where the victim’s position can be qualified as “powerless”. The German word in its literal meaning is able to embrace situations of social pressure, thus, such an interpretation would not conflict with the legality principle. It would better serve the constitution’s demand to promote equality and to eliminate existing disadvantages and therefore should be adopted – *in dubio pro aequalitate.*
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