Since 1992, the Basic Law: Human Dignity and Liberty has been in force in Israel. Its purpose according to sec. 1 is: “to protect human dignity and liberty, in order to anchor in a Basic Law the values of the state of Israel as a Jewish and democratic state”. In sec. 2 and subsec. it guarantees: preservation of life, body and dignity (sec. 2); protection of property (sec. 3); protection of life, body and dignity (sec. 4); personal liberty (sec. 5); leaving and entering Israel (sec. 6) and privacy (sec. 7). The guarantees in sec. 2 and subs. might thus be seen as a concretization of art. 1. Here we have already an interesting parallel to constitutional theory in Germany. Human dignity is the article with which our constitution begins. The following guarantees may be seen — as Dürrig already pointed out in the 1950’s¹ — as an emanation of human dignity with its main aspects of freedom/liberty (Art. 2 German Basic Law [GBL]) and of equality (Art. 3 GBL).

Human dignity is inalienable according to art. 1 GBL, however, it is very difficult to assess in an isolated way. We therefore have to work out human dignity elements which will be focussed when checking basic rights, i.e., art. 2 and subs. GBL to different questions. We thereby follow the pattern underlying the approach of Dürrig. The analysis in detail will mainly be based on the predominant views of the Federal Constitutional Court and the consequences which can be drawn

therefrom. It follows a pattern well recognised in German constitutional practice and the doctrine for checking the constitutionality of a given state’s act. This involves the following set of questions:

1. Identification of the state’s act;
2. Identification of the specific Basic Right(s) encroached upon by this act;
3. Purpose of the state’s act;
4. Effectiveness of the state’s act with regard to this purpose;
5. Necessity (i.e., is there a milder means which is effective to the same extent as the state’s act);
6. Proportionality of the state’s act.

This pattern is meant to answer the question: is a given legal norm unconstitutional in the very strict sense, i.e., is it valid or not. A different question is to what extent basic rights have a kind of guideline-effect for the legislator. If there is such an effect, it is, of course, a valid effect but its disregard does not have the consequence of unconstitutionality. Rather, it might influence the law-making-process as such. We will see that many questions remain in the sphere of such constitutional “soft-law”.2

I. State’s Action (Step 1) and Basic Right’s Scope (Step 2)

Step 1 shows that the main distinction as far as substantive criminal law is concerned, has to be drawn between the prohibition as such on the one side and the power to blame and to punish on the other.3 This has consequences for the basic rights at stake.

2 See infra Part IV.
3 For more details, see O. Lagodny, “Strafrecht vor den Schranken der Grundrechte” (Tübingen, 1996) 77-135; G. Staechelin, “Strafgesetzbgebung im Verfassungsstaat” (Berlin, 1998) 50 and 111 and subs.; I. Appel, “Verfassung und Strafe” (Berlin, 1998) 433 and subs. This article will not deal with the constitutionality of sanctions. With regard to the death penalty which was abolished in Germany by the constitution (art. 102 GBL), discussion was based on the question whether art. 102 GBL is a so-called “eternal” guarantee which may never be abolished according to art. 79, para. 3 GBL. As to life-long imprisonment, see (1978) 45 D.F.C.C. at 187 and subs.; (1993) 86 Decisions of the Federal Constitutional Court (hereinafter: D.F.C.C.) at 288 and subs.
A. Prohibition

As soon as it is in force, the prohibition touches upon either special guarantees of freedom or on the general freedom to do or not to do what one wishes (art. 2, para. 1 GBL). The prohibition has to be constitutionally justified as such before having to look at certain type of sanctions for violating the prohibition. This is necessary, because it is the prohibition which already allows for preventive (not repressive) police actions: Police organs in Germany may act pro futuro in order to prevent future dangers or damages. Such actions do not take care of questions like the principle of guilt of a possible perpetrator. The imminent or ongoing violation of a prohibition might be stopped by interference of the police. The task insofar is only prevention.

B. Criminalization (Power to Blame and Punish)

A prohibition which is accompanied by a criminal sanction gives the state the power to blame and punish a person who violates the prohibition. It is important to analyse the two elements, i.e., to blame and punish, separately. Only this allows us to see that criminalization is more than providing for deprivation of liberty. The power to blame a person who has violated the prohibition means in terms of criminal procedure: The state and its organs may state that person A has committed a certain crime and is guilty thereof. The guilty-verdict as such is the finalization of the act of blaming. It has a lot of legal consequences. The most important one is that this person A — as a rule —
may be sentenced. But it is not necessary that in addition to the guilty-verdict a sanction also be imposed. German Criminal Law provides for such possibilities in many situations.6

The guilty-verdict encroaches upon a basic right which is constituted by human dignity: The right of human personality according to art. 2, para. 1 in connection with art. 1, para. 1 GBL ("allgemeines Persönlichkeitsrecht"). This right is mainly based on aspects of human dignity. The guilty verdict severely encroaches upon this right, because the verdict means that the person has acted in contradiction to the highest values of society and because — in addition — this verdict is made publicly. Therefore, human dignity is at stake, because this verdict is meant to stigmatize and to dishonour the violator.7 The inner legitimation of the criminal-law-verdict is the misuse of responsibility, the latter being one of the core aspects of human personality.

The protection of human personality involves the need for specific and high thresholds of constitutional justification. The second interference, the power to punish has to meet the thresholds of human liberty according to art. 2, para. 2 sentence 2 GBL ("allgemeine Freiheitsrecht") as far as the deprivation of liberty is concerned or art. 2, para. 1 GBL ("allgemeine Handlungsfreiheit") as far as fines are concerned. However, liberty must be taken into consideration as well because a guilty-verdict without (other) sanctions is not the rule rather it is the exception. When dealing with the constitutionality of norms, the rule has to be focussed. As far as criminal law in the strict sense is concerned, it is the rule that criminalization means deprivation of liberty in addition to the power to blame. Hence we have a reinforcement of protection: human personality and liberty are the two main thresholds in order to justify criminalization of a certain prohibition.

6 Sec. 60 Code of Criminal Law (hereinafter: CCL) in general; as one special example see sec. 314 a CCL. In common law systems, the separation between the guilty-verdict and the sentencing becomes obvious already by procedural structure. From a common law perspective it might sound strange that a guilty-verdict without sentencing is of relevance. However, the basic idea of the truth commissions for crimes committed in the Apartheid era in South Africa is to establish at least the truth by confessions of the perpetrators.

7 See O. Lagodny, supra n. 3, at 98-128; see also: G. Staechelin, supra n. 3, at 114; and I. Appel, supra n. 3, at 490 and subs.
II. Prohibition

Steps 3-6 have to be done separately first for the prohibition, then for the power to blame and to punish (infra III). The consequence is that a lot of questions which — at first glance — seem to belong to the power to blame and to punish from an understanding of criminal law have to be shifted to the prohibition.\(^8\)

A. Purpose of the Prohibition (Step 3)

In general, German constitutional law is very generous regarding the purposes of the legislator. It only excludes some purposes, especially those which contradict equality. Thus, the threshold offered by this step is not very high.

B. Effectiveness and Necessity for Prohibition (Steps 4 and 5)

Effectiveness (step 4), is also a weak criterion according to the practice of the Federal Constitutional Court, because it leaves a wide margin of appreciation ("Einschätzungsprärogative") as to the effectiveness of a certain means to the legislator. This margin depends on the specific requirements of the basic right at stake.\(^9\) Generally, scientific evaluations are not necessary. However, existing results have to be taken into consideration.\(^10\) As the necessity-test implies that milder alternatives have to be as effective as the means finally chosen by the legislator, the margin of appreciation is of major relevance also with regard to necessity (step 5). For example: A prohibition focussing on the creation of an abstract danger restricts the general freedom to a greater

\(^8\) Also I. Appel, supra n. 3, at 570 n. 137 observes this. Hence, his critics (at 569 note 133 and at 312 note 32) and that of Staechelin, supra n. 3, at 51, 164 and subs. that I deal too much with the prohibition resp. my proposal leaves to little specifics of criminal law, are not convincing.


extent than a prohibition of concretely dangerous behaviour. The legislator has — more or less — a very broad margin of appreciation as to the effectiveness of both ways of protection. The same is valid for prohibitions which start at an earlier stage. Of course, one should discuss alternatives to prohibition, such as a system of social self-control or a system of financial awards.11 Again: the margin of appreciation will come into play.

C. Proportionality of the Prohibition (Step 6)

In general, proportionality means that the prohibition must be in adequate relation to the special importance and meaning of a basic law at stake.12 In constitutional theory, this approach has been expanded by Alexy who demands — on the basis of Dworkin’s theories — that adequacy-relations be formulated with a basis in the principles underlying the concrete basic right: The more a state encroaches upon a guarantee of freedom, the more conflicting interests are necessary to support the state’s action.13

With regard to the enlargement of criminal law we especially have to face — already on the level of prohibition — the following question: May “bad thoughts” that have received no external expression through conduct or otherwise (i.e., the mere intent to kill someone) be prohibited? Such a prohibition — as a basis for criminalization — might be justified under steps 1-5, because the prohibition encroaches on the freedom to do as one wishes,14 follows a legitimate purpose (protection of life) and might — on the basis of the practice of the German Federal Constitutional Court — be effective and necessary. However, it would not be proportional (step 6), because human thoughts as such belong to the core of personality and human dignity. The Federal Constitutional

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11 See (1988) 77 D.F.C.C. at 77, 84; 81, 70; see also G. Staechelin, supra n. 3, at 137 and subs.
14 As to the dispute on the scope of art. 2, para. 1 GBL, see (1990) 80 D.F.C.C. at 137, 153 and 169; see: O. Lagodny, supra n. 3, at 90-94; and also Appel, supra n. 3, at 319-328. See also G. Jakobs, “Bookreview”, (1998) 110 Zeitschrift für die gesamte Strafrechtswissenschaft (hereinafter: ZStW) 717-725, at 718 and subs.
Court consistently held that such a core exists, but barely indicated what belongs to it. However, one may conclude that the ability to think is one of the decisive features of human existence. Mere thinking does not create a visible danger to society. There must be a minimum of human activity implementing this thinking which could thereby create a minimum of danger. An example of preparation for the act of killing might be leaving home in order to buy a knife. This shows that already on the level of the prohibition, the intention to do something “bad” becomes decisive, because the plan to prepare a steak for example would not suffice to prohibit purchasing a knife.

Proportionality is not only meant to rebut excessive state acts, i.e., prohibitions, from the point of view of the person who might not act. In constitutional doctrine this is called “Abwehrfunktion” (rebutting-function). Proportionality in this respect establishes a “Übermäßverbot” (constitutional prohibition of excessive state actions). Proportionality must also be looked upon from the point of view of the person who is to be protected by a prohibition (“Schutzfunktion” = protective function). Proportionality from this view means “Untermaßverbot” (constitutional prohibition of lacking or insufficient state actions). The questions of these aspects of proportionality are: Which prohibitions have to be created by the state in order to protect the person and which exceptions to a prohibition have to be made. The first question is difficult to assess; the second requires justification like self-defence or justifying necessity at the very least. We see that questions of justification of a given behaviour have to be resolved already on the level of the prohibition, as it is impossible to criminalize an act which is not prohibited.

15 The decision (1990) 80 D.F.C.C. at 367 and subs. leaves some doubt whether the court regards notes in a diary as belonging to this nucleus. The background was that such notes were the only evidence in a murder case. Although this decision concerned a procedural question, one could draw consequences as to substantive law because it had to deal with the limits of a state’s intrusion into privacy.


17 See: O. Lagodny, supra n. 3, at 262 and subs.

18 One of the few consequences which may be drawn at this step is that it is not constitutional to punish behaviour which is justified by objective circumstances of which the actor is not aware, see: O. Lagodny, “Grundrechtliche Vorgaben für einen Straftatbegriff”, in J. Arnold, B. Burkhardt, W. Gropp and Hg. Koch, eds., Grenzüberschreitungen - Beiträge zum 60. Geburtstag von Albin Eser, (Freiburg, 1995) 27-37.
These considerations show us also the structure of basic rights tests. We have to discern the rebutting and the protective function in the triangle state — offender — victim:

\[
\text{State (action)} \\
\text{Offender} \uparrow \quad \quad \downarrow \quad \text{Victim}
\]

In the state-offender relationship we have to deal with the rebutting function; in the relation state-victim relationship, the protecting function is at stake. With regard to proportionality this involves the “Übermaßverbot” of the rebutting function and the “Untermaßverbot” of the protective function. Thus, we can see that there are three types of proportionality-answers:

I. “Übermaßverbot”
   protection of the offender: What the state (esp. the legislator is not allowed to do

II. “In-between-area”
   where the legislator has more or less discretion

III. “Untermaßverbot”
   protection of the victim the minimum which the state is obliged to do

Areas I and III are the limits which the legislator has to observe. Area II must necessarily exist, otherwise the legislator would have no room to employ legal creativity. However, when applying the full test (steps 1-6) to different prohibitions, the number of unconstitutional prohibitions is relatively small. This shows that area II is quite large.

III. Power to Blame and to Punish

The criminalization of a prohibition requires that the prohibition as such be constitutional. Only then may the legislator choose either criminal law, administrative sanctions (in Germany: Ordnungswidrigkeiten-Sanktionen civil law sanctions (i.e., damages), or no sanctions at all. If the legislator chooses criminalization, the power to blame the individual has to be justified in light of art. 2, para. 1 together with art. 1, para. 1 GBL, the protection of human personality and in the light of liberty.
A. Purpose of the Criminalization (Step 3)

The purpose of a criminal provision consists of two elements: the necessary aspect should have justified the prohibition, i.e., protection of individual interests (life, liberty, estate, honour, secrets, etc.) or protection of goods of the society (independence of judges, etc.). The additional and necessary purpose has been discussed in criminal law thought for a long time (without result), deterrence, retaliation and normative integration. German constitutional law does not resolve this dispute. None of these different aspects is excluded as being unconstitutional as such. This means that steps 4-6 have to be applied for each of these aspects. If only one aspect were to "survive" in the end it would be sufficient to justify a certain provision on the constitutional level.19

The purpose of the prohibition is also the "Rechtsgut" of that norm. The notion(s) of "Rechtsgut" plays an important role in German discussions on criminal law.20 The contents of "Rechtsgut" vary in so many respects that it is simply impossible to translate it into English.21 From a perspective of constitutional law it may be translated as public values or interests which may either belong to the individual(s), to the community or to the state. They have to be strong enough to justify the specific demands of constitutional law under steps 4-6 as far as the prohibition is concerned as well as the second test (criminalization). The notion of "Rechtsgut" of a criminal law provision serves two main purposes in German criminal law discussion: Undoubtedly it provides the focus, the ratio, for interpretation when applying the norm. Whether the notion is then able to limit the legislator, is a highly questionable problem because this would mean raising legal discussion to a constitutional level and providing it with the status of basic rights.

In my view, the importance of arguments on the law-making-level (not on the level of interpretation) based on the notion(s) of "Rechtsgut" nowadays is over-estimated. It made sense to (try to) limit the legislator in the strict sense of the word by such arguments as long as the legislator was not legally bound by basic rights. As the German legis-
lator since 1949 is directly bound by basic rights (art. 1, para. 3 GBL), it is first a question of legal logic that restrictions have to start here. Secondly, it is no doubt possible to create marvellous systems based on a specific notion of “Rechtsgut”, but if the starting-point, i.e., the specific contents, meanings and consequences of the “Rechtsgut”, are not shared partially or wholly by constitutional law, such concepts per se may only be helpful in order to influence criminal policy but not the yes/no-question of constitutionality.22 Arguments based on “Rechtsgut” touch central substantive constitutional values, i.e., the protection of human personality and liberty, only indirectly.

B. Effectiveness and Necessity of the Criminalization (Steps 4 and 5)

The margin-of-appreciation-approach is valid also for the criminalization although one would expect a specification by the weight of the protection of human personality and of liberty: The Federal Constitutional Court in constant practice points out that the range of the margin depends on the concrete basic right at stake and on the quality and/or quantity of the encroachment.23 However, in the “cannabis”-decision of 1994,24 the court did not apply this approach very consistently. This may be due mainly to the fact that empirical evalu-

22 See O. Lagodny, supra n. 3, at 145-162 and 288-317, 424-445; and also I. Appel, supra n. 3, at 206-207, 336-390. G. Staechelin, supra n. 3, at 120 and passim, tries to lift the question of “Rechtsgut” to a higher level from a different constitutional concept (i.e., E. Grabitz, “Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts”, (1977) 98 Archiv des öffentlichen Rechts 568 and subs.), which has not been accepted in constitutional doctrine. Therefore, his approach to promulgate a concretization of the concept of proportionality which is specific for criminal law is not convincing as long as we analyse criminal law on the basis of accepted doctrine in constitutional law.

23 See supra II B.

24 (1994) 90 D.F.C.C., at 145 and subs.. This was a landmark decision on the punishability of purchasing minor quantities of cannabis for personal consumption. The court held that punishing such special cases would be unproportional unless there were procedural solutions for dropping such cases. Before this decision, the Federal Constitutional Court practised a control of criminal law provision which was based on rather vague principles derived from a so-called principle of punishment according to the principle of guilt (“Grundsatz schuldangemessenen Strafens) which did not fit into the general practice of the court outside the area of criminal law (see: O. Lagodny, supra n. 3, at 66-70).
ation of the purposes and effects of criminal law are still not sufficiently explored.\textsuperscript{25}

One of the few constitutional consequences of step 4 (effectiveness) may be drawn with regard to crimes of possession of dangerous goods. "Possessing" something is not a positive action. This becomes apparent regarding art. 3, para. (a)(i) and (iii) of the United Nations Convention of 20 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.\textsuperscript{26} Possession has to be something different from purchasing drugs. Purchasing includes the act of acquisition. Therefore, possessing can not be equated with acquisition. Hence, possession can be interpreted only as an omission. But what constitutes the act which is omitted by the perpetrator: destruction of the drug? (How do we justify this if the drug belongs to, a chemist for example, who has been robbed?) Or the simple disposal of the drug in a rubbish bin on the street? (This would be contrary to the purpose of the Vienna Convention or national anti-drug-laws, for example, namely to avoid any access to drugs) or delivering the drug to the police? (How do we combine this with the freedom from self-incrimination?). As there it is not possible to identify human behaviour, the crime of mere possession is unconstitutional. This is valid for all dangerous goods, because the underlying legal problems are the same. However according to German law this does not exclude the prohibition of possession of such goods and to proceed by means of police law to confiscate such goods.

C. Proportionality of the Criminalization (Step 6)

Constitutional doctrine warns us not to shift too many questions to this step, because of the danger of restricting parliamentary freedom and enlarging (constitutional) judicial control by replacing different

\textsuperscript{25} See O. Lagodny, \textit{supra} n. 3, at 318-321, and I. Appel, \textit{supra} n. 3, at 175 and subs. 179.

\textsuperscript{26} Wording: "(a)(i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention; [...] (iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above; [...]."
subjective concepts of what is and what is not proportional. The foregoing steps (prohibition: steps 1-6; criminal law provision: step 1-5), however, have shown that their thresholds are not very high if we apply the practice of the Federal Constitutional Court. As a consequence, many questions are left to this final stage. However, the following conclusions may be drawn.

1. Principle of Guilt

We have to recall that one of the two basic rights at stake (protection of human personality) is constituted by human dignity. One would expect that at least here, we would find a core that could not be overcome by the legislator. The most important feature of human dignity in substantive criminal law is the principle of guilt ("Schuldprinzip"). With regard to our problems here, it can be understood in two different ways:

- guilt as ability to act in a legal way; this is a more formal understanding because it can be applied to any constitutional prohibition regardless of its content and impact.
- guilt as a legislative principle which looks in a material way for the gravity and the purpose of the criminalization at stake. The question arises as to alternatives hereto (i.e., administrative sanctions? civil sanctions? no sanctions?) which have passed the necessity-test and therefore must have been appreciated by the legislator as being less effective than criminalization.

The latter definition does not play a dominant role in the practice of the Federal Constitutional Court. It is generally taken into account in more general ways. The formal understanding, on the other hand, has been approved of as being part of the constitution. The ability to act within the law cannot be said to be present in one who suffers from mental illness or is ignorant of the law or in one who would suffer damage to important "Rechsgüter (i.e., life, body, liberty) were he to comply to the law.

2. Criminalization of Prohibitions of Mere Abstract Danger

Prohibitions of mere abstract danger cause only few problems on the level of the control of the prohibition as long as some danger is inherent in the human behaviour. It is out of the question that these prohibitions may be sanctioned by administrative fines (in Germany: "Ordnungswidrigkeiten"). The crucial question in German discussion therefore is to what extent such prohibitions may also be criminalized. According to the routine practice of the Federal Constitutional Court, three areas can be distinguished: Prohibitions which may only be sanctioned by administrative fines and those which — at least as a rule — may only be sanctioned by criminal law. The intermediate area is by far the largest; here again the legislator has a far reaching margin of appreciation. The consequence is that the legislator's choice between administrative fines and criminal law is hardly unconstitutional.

It is accepted that the criminalization of prohibitions of mere abstract danger is not unconstitutional per se. More concrete conclusions are not possible. Before the background of human personality and freedom we can only establish relations of inadequacy which have the character of legal principles rather than legal norms and therefore will not produce "sharp" results, such as:

32 Supra II B and III B.
34 As to the distinction between norms which have a clear-cut yes/no-answer based on a "if ... then ..." pattern and principles which are meant only to optimize conflicting interests in the sense of "more/less", see Alexy, supra n. 13, at 75 and subs.
35 See: O. Lagodny, supra n. 3, at 430-445, 480-488, 519-520. This is the result of bringing together again the control of the prohibition and the power to blame and to punish which Staechelin, supra n. 3, at 51, 164 and subs., misses. His critics might be influenced by the fact that these results are too "weak", i.e., not in the sense of clear-cut unconstitutionality, from the point of view of his "Rechtsguts"-approach (see supra n. 22).
It becomes more proportional to criminalize prohibitions of mere abstract danger the more
- is left for the individual’s risk-evaluation in self-responsibility;
- plausibility and weight an abstract danger and the protected interests\textsuperscript{36} have;
- important the interest of the victim is that certain conduct not take place regardless of the actor’s individual risk-evaluation;
- differentiated the prohibition is with regard to minima situations.

These thoughts can be modified for the enlargement of crimes “in time” (i.e., preparation, attempt):

It is more proportional, the more the prohibition
- requires the violation of a sensible object;
- is away from the — unconstitutional — prohibition of mere bad thoughts.

If the legislator has chosen criminal law, a second problem arises: Does the crime comprise every violation or does the legislator exclude for example minor cases by “minima-clauses”. This is necessary if the prohibition is so broad that with regard to minor cases the use of criminal law would be unproportional. The Cannabis decision\textsuperscript{37} gave an example in this respect.

In general, the main feature of any enlargement of criminal law in substance (abstract dangers or enlargement “in time”) is that it is no longer the individual who has to evaluate his or her conduct and the possible consequences thereof; rather it is the legislator who decides in a general way. To a certain extent this curtails the individual’s law-finding-process which is based on individual responsibility.\textsuperscript{38} The consequence thereof might be that the threshold for legitimation of such norms must be raised because the ratio essendi of criminal law is to be found in the misuse or non-use of such a law-finding-process. In such a situation, it seems understandable that arguments in criminal law grasp for reinforcement by constitutional law.

\textsuperscript{36} Special but not exclusive importance have interests which are directly protected by the constitution, i.e., the existence of the state as such etc.

\textsuperscript{37} See supra n. 24.

\textsuperscript{38} See G. Heine, “Die strafrechtliche Verantwortlichkeit von Unternehmen” (Baden-Baden, 1995) 27 and subs.
3. Objective Conditions of Punishability

German criminal law knows crimes which have so-called “objective conditions of punishability” (“objektive Bedingungen der Strafbarkeit”), i.e., a body fight (Schlägerei) which criminalizes mere participation in a body fight if someone is e.g., killed in connection with the fight. The death of that person is the objective condition for which no intent or even recklessness is required: The offender needs not be aware of those objective requirements. This is the explicit purpose of this legal construction. It is only reconcilable with the principle of guilt if the crime would be constitutional without such a condition. In other words, such conditions must reduce crimes which are constitutional even without the condition; they may not enlarge punishability. This is important, because these conditions are becoming a feature of “modern” crimes.

IV. Guideline-Function

There is a large “grey area” where the verdict of unconstitutionality is not yet possible. This is the area of criminal policy. Here, it depends on the quality of public (legal) discussion whether or not to make extensive or restrictive use of this grey area. However, especially the principle-relations mentioned above should play a role in the legislation process.39

V. Criminal Procedure

In order to control criminal procedure we will have to make a distinction between two kinds of acts: First, the act of blaming the suspect (which includes the question: Why do we need a suspect?) This act starts as soon as investigative measures are directed against an identified person. It lasts until the final judgment is delivered: The act of blaming will either be legally upheld in the case of the decision — “guilty” — or withdrawn in the case — “not guilty”. As shown above, this permanent act encroaches upon the right of human personality. This is the material reason why criminal procedure in general has to meet high thresholds.

39 See Lagodny, supra n. 3, at 519 and subs.
Secondly, there are investigative acts. They serve as a means to prove that the facts assumed by the authorities are sufficiently true to overcome the presumption of innocence. The inner connection between investigative acts and the act of blaming shows that the presumption of innocence itself is an emanation of human dignity. It is the procedural side of the same medal. In addition, many investigative acts like search and seizure require special constitutional justification insofar as they additionally encroach upon other basic rights, i.e., privacy in case of search; property in case of seizure; telecommunication in case of wire-tapping, etc.

However, German legal practice and theory have been aware for a long time of the relationship between criminal procedure and constitutional law. This was due to the fact that the investigative acts obviously had to be justified in light of the constitution. But only now is discussion becoming more intensive with regard to the act of blaming as such.

The relevance of the distinction becomes apparent when looking for instance, at under-cover-methods. The examples of a private person as well as a disguised policeman interrogating a suspect without unveiling their identity as acting in the course of an investigation show that it is the freedom from self-incrimination which is at stake. Like the presumption of innocence this freedom is a procedural branch of the person’s protection under the right of human personality. Under-cover interrogations are acts of state which encroach upon the right of human personality. They are explicitly meant to circumvent the freedom from self-incrimination. There are various attempts to ignore this starting point. The crucial question is: How can these exceptions to a principle based on human dignity be justified? Generally speaking, they have to be confined to investigations concerning very severe crimes.

VI. Poor Results of Strict (Un)Constitutionality?

When looking at the few results in the area of substantive criminal law, one could be disappointed, especially when recalling that constitutional control in other areas of German law is quite strict. And Jakobs seems to be right when he raises the question whether the present state

40 As to this problem see in general: T. Kleinknecht and L. Meyer-Goßner, Strafprozeßordnung (Munich, 44th ed., 1999) annotation 1-5 to section 110 a with further references.
of constitutional doctrine (Alexy) should be compared to an “inflatable beach toy” ("aufblasbares Strandspielzeug") which totally depends on how much air is in it. And who blows the air into it, the Federal Constitutional Court? Constitutional doctrine? Criminal law doctrine? Or is substantive criminal law immune to any (or at least too much) interference by constitutional law, as the limits are inherent in the subject?42

Therefore, criminal law creates a real test to the abilities of constitutional doctrine. No doubt the legislator of criminal law — as the legislator in general — is bound by the basic rights according to art., 1 para. 3 GBL. Surely, the solution can surely not be to change the general requirements of basic rights control in order to adapt basic rights doctrine to the very needs of criminal law. This would lead — amongst other things — to frictions in other areas of law to which constitutional law must apply as well. One possibility could be to accept that in the special case of criminal law, there are too many loopholes — like the empirical question of the effects of criminal law — for achieving more concrete results. Criminal law doctrine may either repeat already existing concepts or develop new ones, being aware of the fact that they lack constitutionally binding character. This will be a more “Sysiphean game”, especially the less the legislator takes into consideration what was once a culture of criminal law discussion in Germany. Another option is that legal discussion between criminal and constitutional law be intensified in order to avoid more bulging oedema of a legislator captured in pure activism.43 To conclude: Criminal law might stimulate rethinking of at least part of legal thought in constitutional law — or vice versa.

41 G. Jakobs, supra n. 14, at 719 and subs.
42 See W. Schild, supra n. 4, at 290 and subs. who explicitly denies that punishment ("Strafe") may be justified in the sense of constitutional law by the principle of proportionality. See also I. Appel, supra n. 3, at 48 and subs., 305 and subs., reporting comparable tendencies in criminal law.
43 As to the ignorance of the present legislator, see the realistic and frightening mirror which M. Hettinger, “Entwicklungen im Strafrecht und Strafverfahrensrecht der Gegenwart” (Heidelberg, 1997) shows us. In addition, actual changes in the criminal law by the "6. Strafrechtsreformgesetz" (6th law of criminal law reform), Federal Law Gazette [Bundesgesetzblatt], 1998 Volume I, pages 164 and subs., have caused a tremendous wave of critique because it was passed nearly out of the blue with enormous incoherency due to the lack of sufficient analysis, see K. Lackner and K. Kühl, “Das Sechste Gesetz zur Reform des Strafrechts - Eine kritische Einführung” (Munich, 1998) VI-IX with further references.