

INDEX

- abortion: *see* foetal life, termination of
- absolute liability: *see* strict liability
 - (criminal law) (England and Wales)
- abuse of process
 - stale prosecution, as safeguard against, 154, 156, 162
 - stay for as remedy for police misconduct and prosecutorial failings, 325–32, 325 n.117
- advertence/inadvertence, 56, 60, 61, 62, 67–8, 89–90
- Amtsermittlungsgundsatz* (state investigation) (StPO 244(2)), 103–4
- anthropocentric approach: *see* victim (homicide law) ('persons' vs 'humans': anthropomorphic approach)
- attacks vs endangerments
 - Anglo-American practice, 62
 - definitions, 62
- attempt liability
 - England and Wales, 84–5
 - Germany, 76, 87–8
- Australia
 - corporate criminal law, 190–1, 192
 - sentencing procedure, 376 n.113
 - ICRAs, 381–2
- Austria
 - intention, 80
 - statutory limitation, 160, 167
- Belgium
 - assisted suicide/euthanasia, 247
 - statutory limitation, 149, 150
- Bentham, J
 - intention, 63, 68, 70
 - limitation periods, 171–2
 - procedural safeguards, 340
- Binding, Karl, 26–7
- Birnbaum, Michael Franz, 26–7
- British Commonwealth: *see* statutes of limitation, general time-bars on prosecutions (Commonwealth)
- burden of persuasion
 - burden of production distinguished, 121, 289
 - 'clear and convincing', 123 n.95
 - legal sanity defence post-*M'Naghten*, 112, 121–3, 133–4
- burden/standard of proof: *see* burden of persuasion; confiscation and forfeiture of property (minimisation of the risk of injustice: adjudication of claims) (standards and burdens of proof); proof, burden/standard (defences)
- Canada
 - fair trial, 141
 - sentencing procedure, 364, 376 n.113, 378
 - ICRAs, 381–2
 - VISs/CISs, 382 n. 137
 - statutory limitation
 - special limitation provisions (treason), 161 n.111
 - waiver, 161
 - suicide, 244, 247

- Canon law (Germany), 79–80, 265
- charge bargaining: *see* negotiated agreement (StPO 257c)/civil law
- Chile ('victim'), 227, 230
- cognition (intention): *see also* *M'Naghten*/cognitive test (US use of)
 - England and Wales, 60–1, 67–8
 - Germany, 75, 76, 77–8, 80, 81 n, 116
- collective rights/interests, 38, 40–1, 42–3, 47
- examples, 42–3
- Commonwealth: *see* statutes of
 - limitation, general time-bars on prosecutions (Commonwealth); statutory limitation exceptions and waiver (Commonwealth)
- conditional intention (England and Wales)
 - binary approach, 73–4
 - difficulties with, 72
 - dolus eventualis* distinguished, 74, 77–9
 - German usage (*bedingter Vorsatz*) distinguished, 74
- confiscation and forfeiture of property (overview)
 - European and US law compared
 - issues to be explored, 434
 - same objectives, varying approaches, 433
 - shared data collection and transparency issues, 434
 - shared human rights concerns, 433–4
- EU's growing role, 398 n.8
- human rights concerns
 - fair trial/access to counsel concerns, 433–4
 - mission creep, 433
 - proportionality issues, 434
 - standards and burdens of proof issues, 434
- the issue, 9, 395
- procedural mechanisms
 - conviction-based, 396
- European vs US approaches/a
 - convergence, 396–7
- non-conviction-based
 - (administrative), 396, 403–4
- non-conviction-based (neutral adjudication), 396, 403
- scope
 - European jurisdictions
 - considered, 395
 - US (federal and state), 395–6
- the task
 - a critical consideration of the rules
 - in Europe and the USA, 9, 395–6
 - outline of the authors' approach to, 397–8
 - questions for consideration, 9, 395
 - scope/limitations, 9, 395–6
- terminology
 - 'confiscation'/forfeiture', 396
 - 'conviction-based', variants, 396 n2
 - crime proceeds and instrumentalities distinguished, 398
 - non-conviction based judicially monitored forfeiture (USA), 403 n.40
- confiscation and forfeiture of property (benefits and costs), 405–13
- overview
 - justification for (adverse effects of criminal wealth), 405
 - lack of reliable and detailed statistics, 405, 406
 - necessity of comprehensive cost/benefit evaluation, 413
- purported benefits (a tool for combating serious crime), 405–9
 - discouraging statistics, 407–8
 - disproportionate impact on the vulnerable, 408–9
 - a drop in the ocean, 406 n.51, 407–8
 - a lack of evidence, 406
 - mission-creep, 406–9

- confiscation and forfeiture (cont.)
 - modus operandi*, 405
 - poor public awareness, 406
 - purported benefits (revenue-generating potential), 409–12
 - perverse incentives, 410, 412
 - statistics, 409–10
 - use of confiscated/forfeited assets, 410–11
- confiscation and forfeiture of property (Europe) (crime proceeds), 398–400
- crime proceeds
 - direct and indirect (surrogate), 398
 - examples of legislation, 398
 - penalty vs deprivation of unjust enrichment, 398
- EU Directive 2024/1260 on asset recovery
 - extended criminal confiscation (Art. 13), 398
 - non-conviction-based confiscation (Art. 15), 399 n.18
 - ordinary conviction-based confiscation (Art. 12), 398
- extended criminal confiscation, 398–9
 - as remedy for strict nexus requirement, 398
 - a watering down of procedural safeguards, 399
- non-conviction-based confiscation, 399–400
 - civil recovery scheme, 400
 - definition, 399
 - EU Directive 2024/1260 on asset recovery (Art. 15), 399 n. 18
 - hybrid criminal scheme vs civil recovery scheme, 399–400
 - nexus with a criminal offence, 400
 - ordinary conviction-based confiscation, 398
- confiscation and forfeiture of property (Europe) (instrumentalities), 400–2
- confiscation from third parties, 401
- description of, 400–1
- judicial vs administrative confiscation, 401–2
- nexus requirement, 401
- confiscation and forfeiture of property (minimisation of the risk of injustice: adjudication of claims) (access to counsel), 418–21
- ECHR 6(3) (right to legal assistance), 418
- EU Directive 2024/1260 on asset recovery, 418–19
- importance of the right, 420–1
- legal aid considerations, 418, 419–21
- Norway, 418
- statistics, 420
- US federal/state practice, 419
- confiscation and forfeiture of property (minimisation of the risk of injustice: adjudication of claims) (access to a court), 413–18
- areas for attention, 418
- fair trial rights (ECHR 6(1)/ECHR-P1)/US Due Process clause, 413–14
- proper notice procedure
 - EU Directive 2024/1260 on asset recovery, 416, 417
 - Norway, 416–17
 - US practice, 416
- third party participation
 - ECtHR approach, 414
 - European state practice, 414–15
 - US federal/state practice, 415–16
- waiver of right
 - ECtHR, 416
 - US practice, 416
- confiscation and forfeiture of property (minimisation of the risk of injustice: adjudication of claims) (standards and burdens of proof), 421–5
- criminal responsibility and confiscation proceedings distinguished, 421

- ECtHR jurisprudence, 422
- European practice, variations in, 421–2
- European practice (criminal confiscation proceedings), 421–2
 - reversal of the burden of proof, 422
 - variation in/examples, 421–2
- European practice (non-conviction-based confiscations), 422–3
 - European practice, variations in, 422–43
 - reversal of the burden of proof/civil standard, ECtHR approval, 423
- reducing the standard/reversing the burden
 - concerns, 424–5
 - need for caution in any modification, 425
 - possible approaches, 425
- US practice
 - administrative forfeiture cases, 424
 - conviction-based forfeitures, 423
 - judicially monitored civil forfeitures, 423–4
- confiscation and forfeiture of property (minimisation of the risk of injustice: innocent ownership), 429–33
- conclusion/desiderata
 - access to counsel, 433
 - effective innocent party defences, 432–3
 - strict limitations on administrative forfeitures, 432–3
- ECHR-P1 (proportionality), 429–30
 - a substantive and a procedural requirement (ECtHR jurisprudence), 429–30
- EU Directive 2024/1260 on asset recovery (Art. 13(2)), 430
- European state practice
 - crime proceeds and instrumentalities distinguished, 430–1
 - non-conviction-based proceedings, 431
 - variety of, 430–1
- US practice (federal and state), 431–2
 - non-constitutional statutory defences, 432 n.197
- confiscation and forfeiture of property (minimisation of the risk of injustice: proportionality), 426–33
 - an underdeveloped area, 429
 - ECHR-P1 (right to peaceful enjoyment of possessions) (a ‘reasonable relationship of proportionality’), 426
 - ‘a wide margin of discretion’/high threshold, 426
 - a substantive and a procedural requirement, 426
- European state practice
 - instrumentalities, approach to, 426, 428
 - net vs gross principle, 427–8
 - variety of, 426–8
- US practice (federal and state)
 - constitutional basis (Excessive Fines Clause), 428–9
 - criminal and judicially monitored civil forfeitures as ‘fines’, 428–9
 - ‘grossly disproportionate’ test, 429
 - paucity of jurisprudence, 429
 - ‘punishment severity’, 429
- confiscation and forfeiture of property (USA), 402–4
 - administrative proceedings, 403–4
 - applicability, 403
 - limitations on government use of, 404
 - monitoring (prosecutors), 403–4
 - prosecutors’ preference for, 404
 - rejection of claims for technical reasons, 403–4
- criminal/conviction-based
 - forfeitures, 402 n.32
 - as a criminal punishment, 402
 - dependence on a criminal conviction, 402

- confiscation and forfeiture (cont.)
 - forfeiture of substitute assets or money judgments, 402 n.34
 - nexus between forfeited items and criminal activity/complexities of establishing, 402–23
- non-conviction-based forfeitures, 403–4
 - administrative proceedings: *see* administrative proceedings *above*
 - neutral adjudication, 403
 - nexus requirement, 403
 - procedural protections, 403
 - prosecutors' preference for, 404
 - rationale, 403
- proceeds and instrumentalities,
 - absence of a distinction, 402
 - reasons, 402 n.32
- constructive liability, 57–8, 83: *see also* strict liability
 - murder, 57
- conviction intime*: *see* reasonable doubt/*intime conviction*
- Core Concepts* (overview), 1–9
 - comparative conceptional analysis
 - exploring normative foundations, 2
 - impediments, 1
 - need for, 1–3
 - a shared grammar, 2–3
 - evolution of the project, 3–4
 - structure of the three volumes, 4–5
 - summary of Volume III contents, 5–9
 - working methods, 4–5
- corporate criminal liability (English and German approaches to) (overview), 7, 179–80: *see also* corporate criminal liability (England and Wales) (overview)
 - background
 - emerging problems, 179–80
 - re-evaluation of traditional systems, 7, 179–80
 - traditional approaches/key divergences, 7, 179
- conclusions, 214–15
 - deep flaws in both English and German approaches, 214
 - the *sui generis*/para-legal solution, 214–15
 - why hold corporations criminally responsible?, 214
- corporate criminal liability (a para-criminal law alternative), 210–15
 - general description of the proposed scheme, 211–12
 - general principle (answerability of company for acts of its employees)
 - for acts within their authority, 212
 - actus reus* and *mens rea* distinguished, 212
- objectives
 - attribution of social responsibility/criminal censure to corporations, 210–11
 - bespoke principles addressing the differences between corporate and human defendants, 211–12, 213, 214–15
 - isolation of bespoke principles from paradigmatic criminal law, 212, 213
 - specialised courts/procedures, 11–12, 213–14, 215
 - two-level culpability assessment mechanism, 212–13, 214
- corporate criminal liability (England and Wales) (overview)
 - aim (non-distinguishability of corporate crimes from 'true' crimes), 192–3
 - identification doctrine, 181–7: *see also* identification doctrine (England and Wales)
 - recent concerns
 - Corporate Criminal Liability: An Options Paper* (Law Commission) (2022), 180

- Corporate Criminal Liability: A Discussion Paper* (Law Commission) (2021), 180
- ECCTA 2023, 180
- Grenfell disaster (2017), 180
- strict and vicarious liability, 187–9:
 see also strict and vicarious liability
- tweaking the system, 179, 180–93
- corporate criminal liability (Germany), 179–80
- academic and political scepticism, 179–80, 193
- nulla poena sine lege*/dependence of criminal liability on [federal] statute (GG 103 (2)), 193
- a still-born Corporate Liability Act (Draft 2020), 179–80, 195: *see also* corporate criminal liability (Germany) (Draft 2020)
- recognising the problems, 179, 195–7, 204–5
- Siemens*, 179, 195–7, 204–5
- Volkswagen/Dieseldgate*, 179, 196–7, 204–5
- sanctioning mechanisms (OWiG) (criticism of)
- absurd regulatory fines (*Siemens* case), 195–6
- avoidance of the stigma of a criminal offence, 195–6
- conspiracy (StGB 30), inappropriateness, 186–97
- exclusion of more severe criminal sanctions, 195–6
- incompatibility of complex corporate crime cases with ordinary criminal law rules and processes, 196–7
- corporate criminal liability ('reactive fault'), 210, 213
- corporate criminal liability (*respondeat superior*), 207–10
- description of, 207
- Draft 2020, 207
- prosecutorial discretion, relevance, 208–9
- rejection of (England and Wales), reasons, 208–10
- US practice/justifying factors, 207–10
- as vicarious liability/weaknesses, 208–10
- corporate personality, 199, 205–7
- crimes against humanity: *see* war crimes/crimes against humanity, exemption from statutory limitation
- criminal liability (USA)
- law's concept of, 109–10
- control capacity, issues, 109–10
- folk psychology as tool, 109
- free will, relevance, 110
- rationality test, 109
- structure, 107–9: *see also mens rea* (USA) (MPC)
- affirmative defences, 108–9
- definition of the act doctrine, 108
- the elements of crime, 107
- felony offences/misdemeanours divide, 157: *see also* statutes of limitation, general time-bars on prosecutions (USA)
- sentencing practice, 109
- state/federal criminal jurisdiction, multiplicity of autonomous regimes, 107, 156
- criminalisation principles (overview), 5–6, 13–14, 42–3
- alternatives to criminalisation, 5–6
- alternatives to principles, 5–6
- German/Anglo-American differences of approach, real or apparent?, 13
- integration into constitutional theory (Germany), 38–9, 41–2: *see also Rechtsgut*
- a master principle, an elusive concept, 35–6
- formal vs substantive criminalisation, problems, 35–6, 45

- criminalisation principles (cont.)
 - lack of a firm political theory
 - grounding, 36
 - objections to all of them, 42–3
 - nineteenth-century approaches to, 19–28
 - England and Wales, 19–24: *see also* Harm Principle
 - Germany, 25–8
 - principles considered, 5–6: *see also*
 - Harm Principle; Legal Moralism; Proportionality Principle/ *Verhältnismäßigkeitsprinzip*; *Rechtsgutslehre*/Harm Principle
 - structure of the discussion, 13–14
- criminalisation (alternatives to)
 - distinguishing ‘violations’ from ‘crimes’, 17–18
 - ECtHR approach to, 18 n.17
 - English and German approaches
 - compared, 17–18
 - as part of the costs/benefits equation, 16–17
 - ‘rather than’/*pro tanto* alternatives, 5–6, 17–18, 35–6, 49
 - criminalisation as a last resort, 44–5
 - Mill/Stephen on, 19–22
 - tort/*Ordnungswidrigkeiten*, 17–18
- criminalisation (definition/processes), 14–16
- criminal enactments
 - civil law vs common law practice, 14–16
 - democratic considerations, 14–15
 - English practice, 14
 - formal vs substantive
 - criminalisation, 15–16, 25
 - German practice, 14
 - international and supranational enactments, 14
 - judicial development of the law/
 - non-statutory sources, 14–15
 - types of legislative act/authority to create a criminal act, 14
- definition, 14
- substantive decriminalisation/
 - prosecution rates, 15–16
- Legality Principle vs Opportunity Principle, 15–16
- prosecutorial discretion/
 - accountability, 15–16
- relevant factors, 15–16
- criminalisation (reasons for and against), 16–18
- reasons against (the costs)
 - burdens/harms imposed on
 - persons affected by, 16–17
 - resources needed to operate, 16
 - restrictions on liberty, 16, 19–20
- reasons for (benefits)
 - employment for criminal law
 - officials, 16–17
 - pacification of victims, 16
 - prevention/reduction of
 - criminalised conduct, 16
 - satisfaction of a vengeful/nervous public, 16
- weighing the costs/benefits: *see also* Harm Principle
 - alternatives to criminalisation as part of the equation, 17–18
 - dependence on the distinctive character and aims of the criminal law, 17
 - determining the relevant costs and benefits, 16–17
 - pro tanto* approach, 17
 - retributivist arguments, 16, 24–5, 110
- criminalisation (theory of/guidelines for legislatures), 43–9
- formal principles, 45–7
 - as a limitation on permissible
 - substantive prohibitions, 46–7
 - limitations of constraints, 45
 - as response to alleged lack of
 - substantive content, 45–6
- grounding in a political theory, 43–4
 - Anglo-American and German scholarship distinguished, 43–4
 - a political turn, 44
- negative principles

- examples, 44–5
- importance, 44–5
- Strafrecht/Ordnungswidrigkeitenrecht*
 - relationship as a model, 17–18, 47–9
- adjudication and sanctioning of
 - non-criminal regulatory violations, 48–9
- ECtHR views on, 48–9
- justifying a separate category of violations, 49
- Ordnungswidrigkeitenrecht*
 - (attribution of non-criminal law status), 48
- culpability principle (general): *see also* criminal liability (USA); *dolus eventualis*; Legal Moralism; non-intentional crimes
 - as basis for criminalisation, 24–5, 32, 33
 - defences, possible impact on, 62
 - description of/examples, 58–9
 - intentional vs inadvertent liability, 61
 - intentional vs non-intentional levels of liability, 60–1
 - intentional vs risk-taking liability, 61
 - knowledge as measure of, 62–3
 - responsive harm principle/retribution and, 32–3
 - risk-taking as the more culpable contact, 62–3
 - strict liability as potential breach of, 59–60
- culpability principle (Germany)
 - (*Schuldgrundsatz*), 58–9: *see also* ‘without guilt principle’ (*ohne Schuld*) (StGB 20) (procedural aspects)
- burden of proof issues, 58–9
- a complex normative concept, 107
- equality and legal certainty (GG 103 (2)), difficulty of compliance, 107
- nulla poena sine culpa* principle and, 58–9
- death, determination of, 250–4
- conceptual issues
 - asymmetry (‘born alive’ (US Dictionary Act)/‘dead’ (UDDA)), 252
 - distinction between acts and omissions (*Barber*/BGH Decision of 25 June 2010), 253–4
 - ‘forced symmetry’ solution, 252
 - interrelationship with other end-of-life doctrines, 252–3
 - ‘killing’ someone already dead (*Dlugash*/BGH Decision of 18 January 2006), 250–1
- modern medical techniques, impact, 251, 254
 - Eulo*, 251
- ‘whole brain death’ (US/Germany) vs ‘brain stem death’ (UK), 251–2
 - Germany (StBG 211 ff criteria), 251
 - UK (*Bland*), 251
 - US (Uniform Determination of Death Act (UDDA) criteria), 251
- deception in criminal investigations, regulation (overview), 8, 305–7, 336–44: *see also* police deception (Germany); police deception (USA)
- policing fundamentals
 - official illegality, running the gamut, 305–6
 - rule of law compliance as baseline, 305
- decision-making, research/recommendations, 372
- jury awareness of the sentence, impact, 372
- definition of the act doctrine (USA), 108
- detention in a psychiatric hospital (StGB 63), 105–6
 - circumvention of protective standards, 105–6: *see also* preventive measures (Germany) (*zweispuriges Sanktionensystem*)

- detention in a psychiatric (cont.)
 - 'dangerousness' test, 105–6
 - 'ex-post preventive detention'
 - (*nachträgliche Sicherungsverwahrung*)
 - (StGB 66b), 106
 - provisional placement (StPO 126a), 106–7
 - release in case of cure of the disorder (StGB 67(6)), 106
- Devlin, Patrick, 23–4: *see also* Harm Principle (Anglo-American approach)
- diminished responsibility (StGB 21)
 - (mitigation of penalty)
 - court's options
 - discretionary mitigation, 101–2
 - preventive measures, 101–2, 105
 - risk of a disproportionate 'sanction package', 101–2, 105
 - statistics, 102–3
 - text, 101
- dolus eventualis* (England and Wales)
 - conditional intention distinguished, 74: *see also* conditional intention (England and Wales)
- dolus vs culpa*, 60–1
- history
 - 'constructive malice'/'felony murder' rule, 66–7
 - Homicide Act 1957, 67
- dolus eventualis* (Germany), 58–9, 66–7, 78–83
- Canon law distinguished, 79–80
- 'conscious negligence' (*bewusste Fahrlässigkeit*) alternative, 81–3
- courts' preference for an open-ended definition/'volition'
 - element, 81
- definition, 78 n.103
- dolus vs culpa*, 64–5
- emotional attitude, relevance, 80
- as form of intention, 75, 78, 80
- 'mere hope' vs 'serious trust', 81
- double intent, 72–3
- Draft 2020 (concerns)
 - effects on individual criminal liability, 203–4
 - 'guilt transfer', 199–200
 - multiplication of criminal responsibility issues, 199–200
 - party political games, 179–80, 194
 - inequalities, 200–3
 - 'graduated incentive system', 201
 - mitigation factors/compliance undertakings, integration, 202–3
 - presumption of responsibility for employees' criminality, 200–1, 206–7
- obfuscation of the seriousness of corporate wrongdoing, 204–5
- Draft 2020 (key features), 197–9
 - a combination of models, 198
 - move away from focus on individual criminal liability, 197
 - a pragmatic approach, 197
 - reasonable precautions to avoid corporate offences (OWiG 130) as basis, 198–200
 - 'specific corporate injustice' as target, 197–8
 - summary of provisions, 198
- elements of crime (general): *see also* criminal liability (USA); culpability principle; *mens rea*
- England and Wales (*actus reus/mens rea*), 2–3
- Germany (*Tatbestand/Rechtswidrigkeit/Schuld*), 2–3
- endangerments vs attacks: *see* attacks vs endangerments
- England and Wales
 - abuse of process, 325 n.117
 - corporate criminal liability, 180–93: *see also* corporate criminal liability (English and German approaches to) (overview); corporate criminal liability (England and Wales)

- (overview); organisational fault approach to corporate criminal liability (England and Wales /Australia)
- decriminalisation of suicide, 247–8
- foetal life, 233–6: *see also* foetal life, termination of (Anglo-American jurisdictions)
- Harm Principle: *see* Harm Principle (Anglo-American approach)
- history of criminalisation, 19–25
- identification doctrine, 181–7: *see also* identification doctrine (England and Wales)
- infanticide, 228 n.32
- intention, 65–75: *see also* intention (characteristics) (England and Wales); ‘oblique’ intention (England and Wales); ulterior intent crimes and attempt (England and Wales)
- knowledge: *see* knowledge (England and Wales)
- mens rea*, 2–3, 55–6, 67–8: *see also* *mens rea* (England and Wales)
- police entrapment/deception, 326–32: *see also* police deception (England and Wales) (introduction); police deception (England and Wales) (entrapment)
- recklessness: *see* recklessness (England and Wales)
- risk-taking: *see* risk-taking/*mens rea* (England and Wales)
- sentencing procedure: *see* sentencing procedure (Anglo-American/common law (adversarial) vs German/civil law (inquisitorial)) (overview); sentencing procedure (Anglo-American/common law) (sources of information at sentencing); sentencing procedure, justification for bifurcation; sentencing procedure, justification for bifurcation
- statutory limitation: *see also* statutes of limitation, general time-bars on prosecutions (England and Wales); statutory limitation, special provisions (England and Wales)
- exemptions, 161: *see also* statutes of limitation, general time-bars on prosecutions (England and Wales)
- repose provisions, 167–8
- strict liability (criminal law), 57–8: *see also* strict liability (criminal law) (England and Wales)
- strict and vicarious liability (corporate criminal liability), 187–9: *see also* strict and vicarious liability
- entrapment: *see* police deception (England and Wales) (entrapment); police deception (Germany) (criminal complicity and incitement); police deception (USA) (entrapment)
- Estonia
 - statutory limitation, conditional waiver, 160 n. 106
- expert evidence (USA)
 - exclusion of expert evidence of mental disorder (*Clark*), 114–15
- experts (StPO 73): *see also* ‘without guilt principle’ (*ohne Schuld*) (StGB 20) (procedural aspects)
- choice of, 104
- court’s extensive discretion, 104
- defendant’s refusal to cooperate with, 104
- defendant’s right to suggest names, 104
- flawed or insufficient statement by (StPO 83(1)), 104

- experts (StPO 73) (cont.)
 - non-binding effect/judicial obligation to make independent judgment, 104–5
 - public prosecutor's right to assign (StPO) 161a, 104
 - written vs oral statement distinguished (StPO 251), 104
- factual approach (*Winship*), 290–1
- failure to perform statutory duty/organisational fault liability (risks common to both models)
- fair labelling issues, 189–90, 192–3
- obfuscation of the seriousness of corporate wrongdoing, 193
- potential problems of a bespoke system, 189–90, 192
- undermining of the law's sociological legitimacy, 186–7, 190, 192–3
- failure to perform/prevent non-performance of a statutory duty, 189–90
 - legislative examples of a failure to prevent, 189
 - reverse burden of proof, 189–90
 - a straightforward proposition, 189
 - switch from proof of *mens rea* to an un rebutted presumption of it, risks, 189–90
- Feinberg, Joel
 - on criminalisation, 20
 - on the Harm Principle, 21, 33, 34–5
- Feuerbach, Paul Johann Anselm
 - formal/substantive theories of criminalisation, 25
 - liberal/rights-based approach, 25–7
 - criticism of, 26–7
 - Polizeyvergehen*, attitude towards, 25–6
 - rejection of moral retribution and moral improvement, 25–6
 - role of the state, 25
- Finland (confiscation and forfeiture of property), 398, 399 n.13, 401, 407 n.55, 421, 426, 437
- Finnis, J, 60–1
- Fletcher, George P., 60–1
- foetal life, termination of (Anglo-American jurisdictions), 233–6
 - summary, 232
 - abortion (England and Wales, Canada and Australia), 235
 - abortion (US pre- and post-*Dobbs*), 222, 235–6
- foeticide (England and Wales)
 - 'child destruction'/'procuring a miscarriage', 234–5
 - 'procuring an unlawful abortion', 235
- foeticide (USA) (variants), 235, 242
- treatment of a non-consensual killing as homicide (USA)
- 'baby born alive' limitation, 234
- death in utero, 233–4
- infanticide/child destruction
 - alternative, 234
 - killing at 'any stage of development'/killing at a particular stage, 234
- foetal life, termination of (conceptual issues), 237–43
 - 'birth'
 - effect of German/US law compared, 239–40
 - German Law ('whole birth process'), 238
 - US ('born alive' (federal Dictionary Act)), 238–9, 252
 - 'born-alive' rule
 - German/US practice compared, 240–1
 - a preference for the German 'conduct' rule, 242
 - results vs conduct as determinant, 240–1
 - 'born-alive' rule (criticisms)
 - anti-abortionists, 241
 - modern evidentiary rationale, 241
 - moral luck, 241
 - a perverse deterrence structure, 241
 - a temporal disjunction with the *actus reus*, 242

- foeticide (Tuerkheimer's alternative ('assault on a pregnant woman')), 242–3
 - arguments against, 243
- linking liability to the identity of the actor, 246
- start of human life
 - a bright-line rule (German law)/ issues, 237–8
 - some fetuses as potential victims of homicide (Anglo-American approach)/ issues, 238
- foetal life, termination of (Germany), 236–7
 - summary, 232
- born/unborn divide, 232, 236–57
- irrelevant factors
 - means of termination, 232, 237
 - will of the woman, 232, 237
- medical exemptions
 - in case of sexual offences (StGB 218a(3)), 237
 - conditions (StGB 218a(2)/StGB 219), 237
 - jurisprudence, 73 n. 89, 236, 239–40
- forfeiture: *see* confiscation and forfeiture of property (overview)
- France
 - sentencing procedure, 356 n11
 - statutory limitation, 150–1, 158 n.95, 164–7, 170–1
 - US approach compared, 170–1
- free will as condition for criminal responsibility, 98–9, 110
- Germany
 - corporate criminal liability, 193–205: *see also* corporate criminal liability (Germany)
 - criminal vs administrative offences, lack of clarity, 195–6
 - culpability principle: *see* culpability principle (Germany) (*Schuldgrundsatz*); 'without guilt principle' (*ohne Schuld*) (StGB 20) (procedural aspects)
 - foetal life, 236–57: *see also* foetal life, termination of (conceptual issues); foetal life, termination of (Germany)
 - history of criminalisation, 25–8
 - intention, 75–6, 78–80: *see also dolus eventualis* (Germany); intention (characteristics) (Germany) (*Vorsatz*); purpose (of an offence) (Germany)
 - intention (*bedingter Vorsatz*), 74, 77–9
 - knowledge: *see* knowledge (Germany) (*Wissentlichkeit*)
 - legal insanity, 96–107: *see also* detention in a psychiatric hospital (StGB 63); diminished responsibility (StGB 21) (mitigation of penalty); legal insanity (Germany); preventive measures (Germany) (*zweispuriges Sanktionensystem*); 'without guilt principle' (*ohne Schuld*) (StGB 20)
 - Legal Moralism, 27–8: *see also* Legal Moralism
 - police deception, 315–22: *see also* police deception (Germany) *Polizeivergehen*
 - changing meaning of, 25–6
 - Feuerbach on, 25–6, 28
 - reasonable doubt: *see* reasonable doubt/*intime conviction* (overview); reasonable doubt (Germany)
 - Rechtsgut*: *see* *Rechtsgut*
 - sentencing procedure, 355–89: *see also* sentencing procedure (German/civil law (inquisitorial)); sentencing procedure, justification for bifurcation
 - statutory limitation: *see also* statutes of limitation, general time-bars on prosecutions (continental Europe); statutory limitation exceptions and waiver (continental Europe)

- Germany (cont.)
 exemption (aggravated murder),
 159–60: *see also* Nazi
 prosecutions
 repose provisions, 167
 resetting the clock, 165–6
 Reunification Treaty provisions
 (1990), 166–7
 suspension, 165, 166–7
 strict liability, 59–60
 guilt, alternative paths to conviction,
 295–6
 German/US approaches
 compared, 296
 Germany (*ungleichartige*
Wahlfeststellung vs
(gleichartige)
Wahlfeststellung), 296
 USA (*Schad*), 295
 ‘guilt principle’ (*Schuldprinzip*) (GG),
 96–8: *see also* ‘without guilt
 principle’ (*ohne Schuld*)
 (StGB 20)
 an ‘untouchable’/‘holy’ principle, 96–7
 ‘guilt’
 absence of legal description/
 definition, 98–9
 courts’ margin of appreciation, 98–9
 free will, relevance, 98–9
 human dignity (GG 1(1)), 96–7
- Harm Principle (Anglo-American
 approach): *see also* *Rechtsgut*
 definition of ‘harm’, 29
 dependence on pre-legal, pre-
 political concepts/lack of a
 theory, 13, 36
 a master principle of
 criminalisation?, 42–3
 Mill/Stephen dispute, 19–24
 Mill’s formulation, 19
 conflation of two Harm Principles,
 20–1
 failure to answer ‘Why criminalise
 rather than?’, 19–20
 Feinberg’s approach compared,
 36, 49
 infringement on liberties, 19–20
 wrongfulness and, 67n63
 prevention of harm (Mill) vs
 gratification of rightful
 vengeful sentiments
 (Stephen), 19, 21–2
 Devlin and, 23–4
 Moore and, 24–5, 34. n.78
 Proportionality Principle and,
 29 n.56, 64n 56
 responsive vs preventive principle
 description of, 20–1, 29
 Feinberg on, 21, 33, 34, 35
 finding a normatively plausible
 Harm Principle, 29
 focus of both on harm to others,
 64n 56
 Mill’s conflation of, 20–1
 Stephen on, 21–2
 use of preventive principle in
 conjunction with a
 Wrongness Constraint, 34–5
 state’s duty to criminalise, 29: *see also*
 Legal Moralism, state’s duty
 to criminalise; Wrongness
 Constraint
 going too far, 29
 not far enough, 33–4, 35
 Offense Principle, 34
 possible constraints, 33–4
 preventive principle, 29
 responsive principle, 29, 35
 Stephen’s formulation, 19
 Wolfenden Committee, 23–4
- homicide law: *see* death, determination
 of; foetal life, termination of;
 victim (homicide law)
- homicide law (tentative conclusions/
 desiderata)
 adequate protection of animals and
 artificially intelligent
 being, 254
 burden of proof, 88
 protection of all ‘humans’ regardless
 of individual characteristics/
 status, 254
 rejection of differentiations based on
 the age, gender or occupation
 of the victim, 255

- human rights
 - formal principles as a protection of, 46–7
- Humboldt, Wilhelm von, 25
- Hungary
 - statutory limitation exemptions, 160
- identification doctrine (England and Wales)
 - introduction, 181–2
 - Lennard's*, 181
 - Nattrass*, 181–2
 - criticisms of, 182–7
 - certainty, predictability, and fair warning (*Meridian's* threat to), 183–4
 - confusion as to who thinks/acts for a company (*Nattrass*), 182–3
 - failure to generate labels reflecting public perceptions, 186–7
 - incentives to distort organisational structures to avoid criminal liability, 187
 - too narrow a net for catching corporal criminality, 185–7
 - unfairness to small companies, 187
 - divided judicial views
 - Bolton*, 182
 - Great North of England Railway*, 186
 - judicial preference for *Nattrass*, 183–6
 - Meridian* test/Law Commission's endorsement, 183
 - Nattrass*, 186
 - Redfern*, 185–6
 - 'split identification' (*Bolton*) vs 'unified identification' (*Nattrass*), 182
 - Zeebrugge disaster, 185–6
- ECCTA 2023 (s. 196)
 - as enactment of unified identification principle, 184
 - impact on common law approaches, 184
 - scope, 184
 - 'senior management' (s. 196(4)), lack of clarity, 185
- impersonality principle, 71
- India
 - decriminalisation of suicide, 244
 - fair trial, 141
 - statutory limitation, 155, 158 n.95, 161
 - condoning delay, 168–7
 - exemptions, 161
 - repose provisions, 167
 - special limitation provisions, 161
- infanticide, 228 n.32
- insanity: *see* intoxication; legal insanity; *mens rea*
- intention (overview), 6, 55: *see also*
 - conditional intention (England and Wales);
 - 'oblique' intention; ulterior intent crimes and attempt (England and Wales)
 - attacks vs endangerments, 62
 - culpability, enhanced level of, 60–1
 - differences between Anglo-American and German practice
 - agreement on principle vs translation into legal norms, 89
 - knowledge of legal prohibition, 60
 - recklessness as 'intention', 60
 - difficulty of comparison
 - authors' focus on substantive questions behind the legal terms, 6
 - overlaps and imperfections in terminology, 6
 - significant differences in application of the terms, 6
 - importance of intention, 55
 - mens rea*, relationship with, 63–4, 83–4
 - moral significance of, 60–5: *see also* culpability principle (general); Legal Moralism
 - non-intentional crimes, 55–7: *see also* knowledge; *mens rea*; negligence; non-intentional crimes; risk-taking

- intention (overview) (cont.)
 - ‘purpose’ as, 2–3, 56: *see also* purpose (of an offence)
- intention (characteristics) (England and Wales), 65–75: *see also* ulterior intent crimes and attempt (England and Wales)
- academic role in the development of, 67
- binary approach, 73–4
 - conditional intention, 73–4: *see also* conditional intention (England and Wales)
 - double intent, 72–3
 - influences affecting ability to reason, irrelevance, 74
- direct vs oblique intent, 67–8
- directions to the jury, 65–6
 - Crown Court Compendium (2022), 66
 - ‘purpose’ as intended clarification, 66
 - Woollin direction: *see* intention (characteristics) (England and Wales), jurisprudence Woollin
 - ‘golden rule’/ordinary meaning of the term, 65–6
 - differences of interpretation (unrecorded), 65–6
- impersonality principle, 71
- key developments in date order, 66–71
 - abolition of ‘constructive malice’ (Homicide Act 1957), 67
 - presumption of intent (Smith (1961)), 68–9
 - removal of presumption of intent (Criminal Justice Act 1967), 66–7
 - Lord Lane CJ’s model direction (Nedric) (1986), 69–70
- legal theory, 79
 - intending the unlikely, 72
 - unexplored concepts, 72
- minimalist approach, 65–6
 - role of lay people, 65–6
- missing the intended target, 71–2
- murder as a focus of attention, 65 n.49
- range of alternatives, 67–8
- threads
 - risk-taking and purpose relationship, 65
 - the role of evidence, 65
 - the tension between subjective and objective understandings of purpose, 65
- views of
 - Austin, 67–8
 - Bentham, 67–8
 - Clark, 67–8
 - Wright, 67–8
- intention (characteristics) (England and Wales), jurisprudence, 68–72
 - Charles, 70–1
 - Dixon, 66
 - Hyam, 61, 69–70
 - Jenner, 70–1
 - Matthews and Alleyne, 71
 - Moloney, 65–6, 69–70
 - Nedrick, 69–70
 - Re A (Conjoined Twins), 72–3
 - Scalley, 71
 - Smith, 68–9
 - Woollin (‘oblique intention’), 66, 72–3
 - ‘foresight of a virtual certainty’ test, 66, 69–70
 - rarity of use/examples, 70–1
- intention (characteristics) (Germany) (Vorsatz), 75–6
- culpability (Schuldfähigkeit) and, 102
- dual cognitive and volitional dimensions, 75
- English approach distinguished, 64–5
- forms of intention
 - conditional intention (*dolus eventualis*), 78–83: *see also* *dolus eventualis* (Germany)
 - knowledge (*Wissentlichkeit*), 76: *see also* knowledge (Germany) (*Wissentlichkeit*)
 - missing the intended target (*aberratio ictus*), 71–2

- natural intention (*natürlicher Vorsatz*), 102
- purpose (*Absicht*), 75–6: *see also* purpose (of an offence) (Germany) (*Absicht*)
- separation of conjoined twins, 73 n.89, 239–40
- tendency not to distinguish between, 78–9
- presumption of intention, exclusion, 79–80
 - jurisprudence, 80
 - reasons for, 64
 - sentencing, relevance to, 64–5
 - as strongest type of *mens rea*, 64
- intention (characteristics) (USA)
 - awareness of a high degree of probability as knowledge (MPC), 75
 - ‘extreme indifference to the value of human life’ (MPC § 210.2(1) (b)), 72
- intention (finding facts), 88–9
 - English and German approaches compared, 88
 - German procedural practice, 88–9
 - modern English practice, 88
- intoxication
 - England and Wales
 - ‘basic intent’ crimes, 74, 85
 - fault or evidence?, 67 n.57, 74
 - Germany (20/21 StGB), 100–1, 131–2:
 - see also* legal insanity (Germany); preventive measures (Germany) (*zweispuriges Sanktionensystem*)
 - ohne Schuld* principle (StGB 20), applicability, 97
 - sanctions, 97
 - USA, 117–18, 131–2
- Italy
 - sentencing procedure, 356 n11, 369–70
 - statutory limitation
 - exemptions, 160
 - express waiver, effect/advantages of, 160
 - suspension, 165
- jury system (USA) and reasonable doubt (jury nullification), 296–8
 - confidentiality of reasons for a jury’s decision/lack of transparency, 296, 298
 - description, 296
 - jurisprudence
 - Cavazos v. Smith*, 297 n.182
 - Dougherty*, 297
 - Duncan* (Harlan J), 271, 296–7
 - Jackson*, 297 n.182
 - Martin Linen Supply Co.*, 297
 - Tanner*, 298
 - rule against setting aside acquittals, reasons
 - double jeopardy, 270
 - Federal Rule of Evidence 606 (b), 298
 - jury’s role in protecting the accused and an arbitrary government, 270
 - protection of jury deliberation against judicial intrusion, 298
- juvenile criminal law, 97–8
- knowledge (England and Wales)
 - certainty test, 61
 - culpability, as measure of, 62–3
 - Hart on, 61
 - Hyam*, 61
 - knowledge of the legal prohibition, relevance, 60
 - as *mens rea*, 2–3, 55–6
 - Criminal Law Commission (1843), 67
 - as purpose, 63
- knowledge (Germany) (*Wissentlichkeit*)
 - attempt liability, 76
 - cognition as key element, 76
 - criminal offences specifically requiring, 78–9
 - determining the defendant’s state of mind, 88
 - impact on punishment, 64–5
 - knowledge of the legal prohibition, relevance, 60
 - requirements, 76

- knowledge (USA (MPC)), 75
as *mens rea*, 108
- legal insanity (overview), 6, 96: *see also*
intoxication; *mens rea*
German and US approaches
compared
procedure, 133–5
substance of the defence, 131–3
- legal insanity (Germany), 96–107
burden of proof, 103–4
diminished responsibility (StGB 21),
101: *see also* diminished
responsibility (StGB 21)
‘guilt principle’ (*Schuldprinzip*)
(GG), 96–7
normative and empirical elements,
interplay issues, 99
sanctions, 97–8, 105–6: *see also*
preventive measures
(Germany) (*zweispuriges
Sanktionensystem*)
‘without guilt principle’ (*ohne
Schuld*) (StGB 20): *see*
‘without guilt principle’
(*ohne Schuld*) (StGB 20)
- legal insanity (USA), history (in
chronological order)
a long-established doctrine,
110–18
adoption by some states of a control
test, 110–11
M’Naghten rule (1843), states’
general adoption of,
110–11
early twentieth-century state
legislative challenges, 110–11
Leland (1952), 113
MPC test (1962)/as majority rule,
111–12
Powell (1968), 113–14
Hinckley (1981), 110–11, 112,
116
Insanity defence Reform Act 1984
states’ reactions to, 112
summary of, 112
Supreme Court decisions
immediately post 1984, 113
- Clark* (2006), 113–17
Kahler (2020), 115–17
- legal insanity (USA) (partial
responsibility), 124–8
comparisons
English approach, 124
German approach, 124
‘diminished capacity’ as basis, 124
mental disorder negating *mens rea*
distinguished, 108, 114–16,
124–5
as a partial affirmative defence, 124
rationale (common law/MPC), 124
sentencing, role in, 109, 124
- legal insanity (USA) (procedure)
advance notice requirement, 119
burden/standard of proof, 108, 112,
121, 122, 123, 126, 127, 128,
134, 135
cost implications, 119
decision to plead
competent defendant’s right to
decide, 118
importance to the defendant/
costs, 119
potential disadvantages, 118
- experts
getting the choice right, 119–20
prosecution’s right to appoint, 119
right to comment on the legal
sanity/insanity of the
defendant, 120–1
- federal vs state practice, 120
- jury
judicial instructions on the effect
of a finding of legal insanity
(*Shannon*), 120–1
as triers of fact, 120–1
- post-acquittal commitments
burden/standard of proof, 122
duration (*Jones*), 122–3
for evaluation followed by formal
commitment, 121
formal commitment without
evaluation, 123–4
justification (*Jones*), 121–2
termination of (*Foucha*), 122
rarity of success, 134

- legal insanity (USA) (substance of the defence), 107–28: *see also* legal insanity (USA) (partial responsibility); *M’Naghten*/cognitive test (US use of); *mens rea* (USA) (MPC)
- an affirmative defence, 108, 110–11, 114–17, 126
- a constitutional requirement?, 113–17, 119–20
- GBMI verdict, 117
- Legal Moralism, 5–6: *see also* culpability principle (general)
- Anglo-American approach
 - dependence on pre-legal, pre-political concepts/lack of a political theory, 13, 36–7, 43–4
- in Germany, 27–8
 - Criminal Code reflection of, 27–8
 - focus on normative arguments/functionalist reasoning, 27–8
 - post-WWII embrace of/but not *en vogue*, 27–8
- a master principle of criminalisation?, 42–3
- negative Legal Moralism, 31, 44–5: *see also* Wrongness Constraint
- positive Legal Moralism
 - Moore on, 24–25, 31, 32–3
 - Stephen on, 23–4, 31
 - wrongness, role, 32
- Rechtsgut* and, 27–8
- state’s duty to criminalise wrongful conduct: *see also* Harm Principle (Anglo-American approach)
- counter-/counter-arguments, 35–7
- harmful but not wrongful conduct, 34–5
- less than absolute/trying to justify, 32, 33
- retributive justice as justification (Moore), 32–3
- wrongful conduct not causing harm, 34–5
- life, definition of: *see* death, determination of; foetal life, termination of
- limitation periods: *see* statutes of limitation
- lying in wait, 66–7
- M’Naghten*/cognitive test (US use of), 110–18
 - control test
 - control capacity, relevance to criminal responsibility, 101, 109–10
 - inability to control oneself (*fehlende Steuerungsfähigkeit*) compared, 101
 - general adoption of, 110–11
- mala prohibita*, 21–2, 37, 47–8
- malice aforethought, 65 n.49, 224 n.14, 243 n.79
- mens rea* (England and Wales): *see also* ulterior intent crimes and attempt (England and Wales)
- actus reus* as a parallel requirement, 2–3
- development of concept
 - factors driving, 67
 - Law Commission’s draft Code (1989), 2–3, 55–6
 - nineteenth century, 67, 68
- Royal Commission on Criminal Laws (1839/1843), 67–8
 - splintering into ‘intention’ and ‘recklessness’, 68
- German practice distinguished, 2–3
- multiplicity of roles, 83
- presumption of requirement for, 55–6
- variants going beyond intention, 55–6

- mens rea* negation (USA), 124–8
 - introduction
 - as a ‘diminished capacity’ claim, 124
 - exclusion of expert evidence on (*Clark*), 124–5
 - relationship between *mens rea* and mental disorder, 124–5
 - reasons for denial/restriction
 - evidentiary problems, 125
 - risk to public safety, 126–7
 - ‘undermining the legal insanity defence’, 125–6
- mens rea* (USA) (MPC): *see also* criminal liability (USA)
 - ‘constructive malice’/‘felony murder’, 66–7
 - killing by lying in wait, 66–7
 - definition of the act doctrine
 - and, 108
 - mental disorder, relevance, 108
 - exclusion of expert evidence of mental disorder (*Clark*), 114–15
 - sufficiency to negate *mens rea*, 108
 - motivation, relevance, 108
 - terms
 - common law superfluity, 108
 - ‘intention’/‘purpose’, 56, 108
 - knowledge, 108
 - negligence, 108
 - recklessness, 108
- mental disorders: *see* legal insanity
- Mill, John Stuart: *see* Harm Principle
- Moore, Michael (on retributive justice), 16, 24–5, 31, 32–3, 34 n.78, 36
- motivation
 - assisted suicide, 247, 248
 - limited relevance, 296 n. 26
 - mens rea* and, 72–3, 108
 - purpose distinguished, 75 n.96
 - sentencing and, 231, 360
- murder (England and Wales)
 - absence of statutory definition/
 - judicial development, 14–15
 - constructive liability, 57
 - malice aforethought requirement, 65 n.49, 244 n.79
- National Socialism, 26–7
- Nazi prosecutions
 - difficulties, 144–5, 147 n.41, 166–7
 - lifting of statutory limitation
 - (Germany), 151, 159–60
 - suspension of limitation period
 - (Laws for the Punishment of Nazi Officials (*Ahndungsgesetze*)), 166–7
- negligence
 - overview, 55
 - England and Wales
 - examples, 56
 - as *mens rea*, 2–3
 - as a species of fault, 2–3
 - Germany
 - definition, 55
 - failure to recognize/take care to avoid risk, 58
 - express statutory provision, need for/examples, 58
 - a significant role, 55
 - inadvertence and, 56, 60, 61, 62, 67–8, 89–90
- USA
 - failure to perceive significant risk
 - as (MPC), 56
 - failure to perceive significant risk
 - as (MPC) English practice distinguished, 56
- negotiated agreement (StPO 257c)/
 - civil law
 - common law charge-bargaining distinguished, 172, 356–7, 361
 - culpability, exclusion, 134
 - obligation to hold a trial, 362
 - penal order (StGB 407–12), 357
 - sentencing procedure, 361–2
 - waiver of limitation, 172
- Netherlands
 - assisted suicide/euthanasia, 247
 - statutory limitation
 - exemptions, 160
 - suspension, 165, 166
- New Zealand
 - fair trial, 141
 - sentencing procedure, 365
 - ICRAs, 381–2

- statutory limitation, 141, 152–3, 155, 158 n.95, 168
 - repose provisions, 168
 - non-intentional crimes
 - England and Wales, 6, 55–7
 - mens rea* variants going beyond intention, 55–6
 - strict liability: *see* strict liability (criminal law) (England and Wales)
 - Germany
 - negligent conduct, 58: *see also* negligence, Germany
 - principle of culpability (*Schuldgrundsatz*), 58–9: *see also* culpability principle (Germany) (*Schuldgrundsatz*)
 - Nordic countries: *see* Finland; Norway; Sweden
 - Norway
 - confiscation and forfeiture of property
 - access to counsel, 418
 - extended confiscation 399, 407 nn.55 and, 56, 408
 - net vs gross principle, 427
 - notification of proceedings, 416–17
 - proceeds and instrumentalities, overlap, 398, 401–2
 - revenue generation, 408, 409, 410
 - standards/burden of proof, 400, 421, 422
 - third-party confiscations, 401, 430–1
 - third-party participation, 415
 - legal insanity, 106, 132
 - nexus requirement, 401
 - police deception, 341 n189
 - preventive detention, 106, 129
 - proportionality requirement, 426, 428
 - nulla poena sine culpa*: *see* culpability principle (Germany) (*Schuldgrundsatz*)
 - ‘oblique’ intention (England and Wales)
 - Bentham on, 67–8, 70 n.74
 - changing definitions, 70 n.74
 - defining features, 77
 - direction (‘foresight of a virtual certainty’), 90
 - overlap with ‘indirect intention’, 69–70
 - Woollin*, 66, 69–70
 - ‘oblique’ intention/knowledge (Germany), 70 n.75, 76 n.99
 - organisational fault approach to corporate criminal liability (England and Wales /Australia), 190–3
 - applicability to crimes of intent and recklessness, 192
 - CMCHA 2007 (‘a confused mixture of the organisational model and the identification doctrine’), 190–1
 - Criminal Code Act 1995 (Australia), 190–1, 192
 - dependence of liability on a generally culpable culture, 192
 - description, 190–1
 - as a parallel bespoke system, 192
 - risks: *see* failure to perform statutory duty/organisational fault liability (risks common to both models)
 - ‘senior management’, dependence of liability on act by, 191
 - strengths, 193
- PACE 1984 (s. 37(2): pre-charge questioning at a police station), 330–1
 - pre-PACE regime
 - Holgate-Mohammed v. Duke*, 330
 - PACE 1984 (s. 78: exclusion of unfair evidence), 329–30, 336
 - contextual proportionality judgements, need for, 336, 339
 - ECHR 6 (fair trial), relationship, 330, 332, 336
 - investigative interviewing vs post-charging interviewing
 - applicable rules, 330–1

- PACE 1984 (cont.)
 Christou and Wright, 331
 distinguishing between, 330–1
 ‘significant and substantial breaches’
 of the codes, dependence of
 exclusion on, 332
 status of suspect, clarification, 330
 text, 329–30
- PACE Code C (DTQ code), 333–6
 confessions, admissibility
 common law vs statutory test,
 333
 grounds for exclusion, 334, 336
Mason, 336
 deceptive interviewing,
 examples, 333
Foran, 333
 lawful deception, 335
 investigative interviewing,
 purpose, 334
 legal advice, detainee’s right to PACE
 58(1)/ECHR 6(1), 335–6
Alladice, 336
 misleading suspect’s lawyer,
 335, 336
Samuel, 335–6
- police interviewing practice
 case studies, 334–5
 College of Policing guidance,
 334–5
 examples, 333–4
 ‘PEACE’ investigative
 interviewing protocol, 334
 post-PACE professionalisation,
 334–5
 scope, 333
 ‘sufficient obligation’ obligation,
 333–4
- police deception (comparative
 reflections), 336–44
 classification
 ‘deception’ as a functional
 category, 337
 impossibility of neat pigeon-
 holing, 337, 341–2
 distorting factors
 lack of data, 340
 a narrow canvass, 336
 procedural system modelling, 337
 WEIRD comparators,
 dominance, 337
 integrity of process, dependence of
 criminal jurisdiction on,
 342–3
 macro-systemic focus on legal
 families/procedural models,
 338–9
 refocusing the analytical lens, 339
 points of alleged system-based
 difference
 approach to truth, 339–40
 confessions, 340
 deceptive interrogation, 340
 procedural divergence vs operational
 convergence, 337
 procedural norms and practices,
 rationales, 340–3
 a balance of epistemic and
 normative
 considerations, 340
 dynamic changes in policing and
 offending patterns, 340–1
 political heritage, procedural
 tradition and juridical
 culture, 340, 341
 similarity of approach
 Nordic criminal law, 341 n189
 nuanced differences, cause, 338
 shared antipathy to authoritarian
 police tactics, 337–8
 shared Judeo-Christian
 inheritance, 342
 striking consistency and
 convergence in applicable
 criteria and standards,
 341–2
- police deception (England and Wales)
 (introduction), 323–5
 pretextual arrest/proactive policing
 courts’ tolerance of, 324
 examples, 323–4
 public interest test, 324 n.114
- remedies
 exclusion of tainted evidence, 325,
 329–30
 stay of process, 325, 326–7, 328–9

- police deception (England and Wales)
 - (entrapment), 326–32
 - as abuse of process, 325, 326–9
 - drawing the line between acceptable and unacceptable proactive policing strategies
 - an elusive and controversial rationale, 328–9
 - bad/good faith, impact, 328
 - ‘disciplining the police’, rejection as a ground, 328
 - mixing and matching salient factors, 328
 - random virtue-testing vs well-founded suspicious, 329, 331–2
 - reservation of most dubious measures for most serious crimes, 342–3
 - sailing close to the wind, 327–8
 - tactics imperilling reliability of the evidence, vulnerability, 328
- exclusion of tainted evidence
 - courts’ traditional reluctance to disavow, 329
- PACE 78 (exclusion of unfair evidence), 329–30, 331–2: *see also* PACE 1984 (s 78: exclusion of unfair evidence)
- self-incrimination/‘fruit of the poisoned tree’ doctrine, 329, 331
- jurisprudence
 - Abu Hamza*, 329
 - Attorney-General’s Reference (No. 3 of 2000)*, 326
 - Colin Stagg*, 328–9
 - early authorities, 328–9
 - Foran*, 330
 - Holgate-Mohammed v Duke*, 330
 - Kuruma*, 329
 - Loosely*, 326–7, 329
 - Moon*, 326 n.123
 - Moore*, 326 n.123, 328
 - Syed*, 327–8, 330
 - Williams and O’Hare*, 324, 329
- stay for abuse of process, 326–7, 328–9
- ‘unexceptional opportunity’, 326–7, 328, 341–2
- police deception (Germany)
 - (introduction), 315–22
 - divided public opinion, 315
 - StPO 136a (prohibited examination methods; prohibited evidence)
 - fine-tuning between ‘means of deception’ (illegal) and ‘criminalistic ruses’ (unlawful), 316
 - limited applicability, 315–16, 318
 - prohibition of relevant evidence, 315
 - as protection against Nazi perversion of criminal procedure, 315, 340
- police deception (Germany) (criminal complicity and incitement), 321–3
- authorised police participation in crime, examples, 321
- jurisprudence (ECtHR), 322–3
- jurisprudence (German courts), 321–2
- legality principle (StPO 152(2)), 321
- risk of entrapment, 321–2
- police deception (Germany) (deceptive breach of trust or compliance), 318–21, 342–3
- designation of certain investigative measures as a breach of fundamental rights (Basic Law), 318
- balancing privacy and effective criminal investigation, 318
- relevant StPO provisions, 318
- extension of StPO 136a protections, 320–1
- police use of private citizens as informant/investigators, 318–19
- self-incrimination (*nemo tenetur se ipsum accusare*), 319
- unwitting communication with a law-enforcement agent, 320

- police deception (Germany) (deceptive interrogation (StPO 163a))
 - admissible/inadmissible approaches, 316–18
 - ‘means of deception’, a strict interpretation, 316
- police deception (USA) (introduction), 307–14
 - opposition to the light-touch approach, reasons, 314
 - impact on legitimacy of policing, 314
 - moral illegitimacy, 314
 - risk of false confessions, 314
 - widespread deception/minimalist regulation, 307–8
- police deception (USA) (entrapment), 308–11
 - early development
 - factors influencing, 311–12
 - uniqueness to the USA, 308
 - European adoption of US regime, 310–11
 - influence of the Supreme Court, 307–8
 - jurisprudence
 - Jacobson* (confirmation of *Sorrells*), 309
 - Russell* (predisposition as key element), 309
 - Sorrells* (subjective test/requirements), 308–9
 - justifications, 309–10
 - subjective test
 - academic hostility to, 309–10
 - an entrenched feature/statistics post 9/11 attacks, 310
 - MPC rejection of, 309–10
 - predisposition a ‘fictitious’ concept, 309–10, 341–2
 - Supreme Court’s support for, 308–9
- police deception (USA) (interrogations and confessions), 311–14
 - deceptive interrogations, 311–12
 - Due Process Clause, 312, 342
 - Fifth Amendment limitations: *see* Due Process Clause *above*
 - and* Self Incrimination Clause (*Miranda* warnings) *below*
- ‘pretextual’ stop and search/*Whren*, 311
- prohibition on involuntary confessions (*Bustamonte*), 312
- Self Incrimination Clause (*Miranda* warnings), 312–14, 340
 - admissibility of misrepresented statements, 313
 - unambiguous invocation, need for, 313
- Self Incrimination Clause (*Miranda* warnings), jurisprudence
 - Clarke*, 314
 - Davis*, 313
 - Edwards/Moseley*, 313
 - Frazier v. Cupp*, 313
 - Moran v. Burbine*, 313
 - Perkins*, 313–14
- preventive measures (Germany) (*zweispuriges Sanktionensystem*), 97–8, 105–6
 - applicability in case of ‘without guilt’ (StGB 20)/diminished responsibility (StGB 21), 105
- detention in a psychiatric hospital (StGB 63), 105–6: *see also* detention in a psychiatric hospital (StGB 63)
- ‘ex-post preventive detention’ (*nachträgliche Sicherungsverwahrung*) (StGB 66b), current status, 106
- non-punitive nature/non-applicability of protective standards
 - guilt principle, 105–6
 - non-retroactivity principle (GG 103(2)), 105–6
- public acceptance of the system, 98
- severity of criminal sanctions compared, 97–8
- statistics, 98
- US system compared, 98

- preventive proceedings (Germany) (*Sicherheitsverfahren*) (StPO 413), 105
- prior convictions, disclosure, 359, 363, 370–1
- proof, burden/standard (defences), 287–9
 - Germany
 - burden of presentation/production (*Behauptungslast*) vs burden of persuasion (*factische Beweislast*), 288–9
 - burden of production and burden of persuasion distinguished, 121, 289
 - USA (affirmative defences)
 - dependence on the jurisdiction, 287
 - German practice distinguished, 288–9
 - Patterson*, 287
- proof, burden/standard (elements vs sentencing factors), 289–90
 - Germany (StPO 261 standard), 290
 - USA
 - additional fact-finding at the sentencing stage, 296
 - Alleyne*, 290
 - Apprendi*, before, 289
 - Apprendi*, post, 289, 290–1
- proof, burden/standard (factual vs moral elements), 290–5
 - Germany (StPO 261 standard), 294–5
 - USA, 290–4: *see also* reasonable doubt (USA), ‘elements’, susceptibility to the reasonable doubt standard
- Proportionality Principle/ *Verhältnismäßigkeitsprinzip*, 5–6, 13–14, 38–41
 - in German and Anglo-American theorising, 5–6, 13–14
- Harm Principle and, 29 n.56, 64n 56
- a negative principle, 44–5
- prongs of the test, 40
 - aim of the prohibition, 39–40
 - Anglo-American and German approaches compared, 40
 - a balance between the intrusion and the justifying purpose, 39–40
 - individual rights to be protected, 39–40
 - jurisprudence, 39–40
 - necessity of prohibition (*erforderlich*), 39–40
 - suitability of prohibition (*geeignet*), 39–40
 - scholarly and political approaches to, 40
 - shortcomings
 - lack of substantive guidance, 40
 - method and structure but no goals, 40–1
 - universal recognition of, 39
- public interest test, 15–16, 142, 357
 - Code for Crown Prosecutors* (England and Wales), 15 n.9, 154
- purpose (of an offence) (England and Wales)
 - as alternative for ‘intention’/clarification, 2–3, 56, 66
 - knowledge as, 63
 - punishment, relevance to, 64–5
- purpose (of an offence) (Germany) (*Absicht*)
 - an intermediate purpose, 79 n.107
 - attempt liability, 75–6
 - definition, 75–6
 - expectation of desired result, relevance, 75–6
 - motivation distinguished, 75 n.96
 - volition as key element, 75–6
- purpose (of an offence) (USA/MPC)
 - definition, 76 n.97
- purpose (of criminal law)
 - criminalisation theory, importance to, 17, 31
 - Feuerbach on, 25, 40–1
 - Mill/Stephen on, 19–20
 - Moore on, 24–5
 - protection of civil order, 45–6

- rape (victim)
 - changing approaches to, 220
- reasonable doubt/*intime conviction*
 - (overview)
 - introduction, 263–5
 - applicability of both concepts to the criminal trial phase, 264
 - civil/common law practice, 263: *see also* reasonable doubt (USA)
 - co-existence within one legal system, 263
 - concepts distinguished, 263
 - convergence, 265
 - definitions, 264–5
 - key issues, 265
 - conclusion, 298–9
 - essential agreement on the required standard, 298–9
 - history-based challenges (Whitman), irrelevance, 299
 - widespread/growing acceptance of the ‘reasonable standard’, 299
- reasonable doubt/*intime conviction*
 - (historical background), 8, 265–70
 - civil law/inquisitorial system (factors influencing)
 - English adversarial/jury system, 266
 - from legal proof to free evaluation, 265–9
 - jury role, differing perceptions, 266–7, 269
 - Livingstone’s ‘Code of Evidence’, 268
 - tension between inquisitorial and adversarial approach, 266–7
 - civil law/inquisitorial system
 - (scholarly contributions)
 - Feuerbach, 267 n.21, 268
 - Mittermaier, 267, 268, 271 n.43, 281, 289
 - von Justi, 266 n.14
 - von Savigny, 268–9
 - civil law/inquisitorial system
 - (timeline), 265–9
 - Carolina system (1532), 265
 - French Revolution (1789), 265–6
 - reintroduction of the inquisitorial system (1795–1808), 266–7
 - German debate (1825 et seq), 267
- reasonable doubt/*intime conviction*
 - (justifying the standards), 270–2
 - criticism of the ‘beyond a reasonable doubt standard’/defences of, 272
 - German approach, 270–1
 - US approach (*Winship*/Blackstone), 271–2
- reasonable doubt, defining, 272–286
 - introduction (unknowability of truth), 272–4
 - conceptualising the standard and explaining it to lay people distinguished, 273–4
 - from legal proof to free evaluation/circumstantial evidence, 272–3
 - from ‘truth’ to high ‘probability’, 272–3
 - medieval awareness of, 272–3
 - procedural truth, 272–3
 - ‘doubt’ (Whitman), 278 n.94
 - moral certainty, 283–5
 - continental approach, 285
 - definition, 283–4
 - philosophical and legal interpretations distinguished, 283–4
 - US approach, 283–5: *see also* reasonable doubt (USA)
- numerical interpretation, 274–5
 - Germany (general rejection from both academics and the courts), 275
 - US (academic approval vs judicial resistance), 274–5
- ‘pause and hesitate’, 285–6
- subjective interpretation (*intime conviction*)
 - an extreme trust in the rationality of the professional trust, 281
 - characterisation of the process of evaluating the evidence, 281–3

- criticism of the jury, 281
- presumption of the association, 266–7, 280
- tempering factors, 289
- Totaleindruck ohne Reflexion*, 266–7
- subjective interpretation (*intime conviction*), rationalisation
 - addition of objective criteria, 281–3
 - BGH's development of
 - sophisticated rules, 282–3
 - developing jurisprudence, 282–3
 - intersubjective plausibility, importance, 275, 278 n.94, 281–3
 - judge-made rules of evidence (*richterrechtliche Beweisregeln*), 281–3
- subjective vs objective interpretations
 - FJC definition/endorsement by *Victor*, 278 n.94
 - German approach, 278 n.94
 - US approach, 277–80
- suggested definitions and instructions
 - German academics, 277
 - US academics, 275–6
- reasonable doubt (Germany)
 - challenge to the idea of standards (Kunz), 264 n.5
 - defining 'reasonable doubt'
 - as an abstract theoretical exercise, 273–4
 - defining 'doubt', 277
 - moral certainty, 285
 - numerical interpretation, 275
 - subjective vs objective interpretations, 278 n.94
 - factual approach, 264–5
 - 'free conviction derived from the totality of the trial' (StPO 261), 263–4, 281
 - probability bordering on certainty/*Wahrheitswahrscheinlichkeit*, 264–5
 - Reichsgericht/Bundesgerichtshof decisions, 264–5
 - reasonable doubt (USA)
 - capital punishment cases
 - Carr*, 294
 - Ring*, 292–3
 - unique issues, 292–3
 - as a constitutional requirement (*Winship*), 263, 299
 - definition
 - 'doubt', 275–6, 278 n.94
 - Winship*, 264
 - 'elements', susceptibility to the reasonable doubt standard, 290–2
 - Addington*, 292
 - Apprendi*, 290–1
 - Gaudin*, 291–2
 - mixed questions of fact and law as, 291–2
 - explaining 'reasonable doubt' to a jury, difficulties, 273–4
 - courts' abdication of responsibility for, 272–3
 - 'pause and hesitate', criticism of, 285–6
 - factual approach (*Winship*)
 - continuing use of, 290–1
 - Court's formulation, 290
 - historical development (Whitman), 269–70, 299
 - justification (*Winship*/Blackstone principle), 271–2
 - moral certainty, challenge to
 - Cage*, 284
 - Victor*, 284
 - Victor* (Blackman J), 284–5
 - Victor* (Ginsburg J), 284–5
 - moral certainty, definitions/use of
 - as certainty less than absolute, 283
 - a high degree of certainty, 283–4
 - Webster* (Shaw CJ), 278, 283
 - numerical interpretation, 274–5
- Rechtsgut*
 - alternatives to
 - constitutional rights, 41–2
 - Harm Principle, 13
 - proportionality test, 38–41
 - definitions, 26–7
 - difficulty of defining a 'good', 38

- Rechtsgut* (cont.)
 heuristic/descriptive use and critical function distinguished, 39
 ‘rights’, 41–2
 Roxin, 38
 history
 Bindung’s nineteenth-century popularisation of, 26–7
 challenge to constitutionality, 38–9
 continuing impact on German criminalisation theory, 26–7
 late twentieth-century repopularisation of, 27
 National Socialism and, 26–7
 Roxin and, 27–8
 as indicator of object of legislative protection, 37
Rechtsgutslehre/Harm Principle, 5–6, 13: *see also* Harm Principle; Proportionality Principle/*Verhältnismäßigkeitsprinzip*
 a master principle of criminalisation?, 42–3
 recklessness (England and Wales)
 as default standard (Law Commission’s draft code (1989)), 55–6
 deliberate risk-taking as, 55: *see also* risk-taking/*mens rea* (England and Wales)
 Draft Criminal Code 1970, 68
 Law Commission (*Codification of the Criminal Law* (1970)), 68
 subjective foresight of risk combined with unreasonably taking that risk, 68
 retributionist arguments
 on the costs/benefits of criminalisation, 16, 24–5, 110
 stale prosecutions, 142, 148
 state’s duty to criminalise, 32–3
 tension with preventive motives, 32–3, 372–3
 rights and criminalisation
 collective rights/interests, 38, 40–1, 42–3, 47
 constitutional rights, value, 41–2
 German and Anglo-American approaches distinguished, 42
 types of (pre-legal rights/‘natural rights’/rights granted by law), 41–2
 risk-taking/*mens rea* (overview), 6, 55
 culpability principle, 61
 degree of culpability, 62–3
 English and German practice compared, 55
 English practice: *see* risk-taking/*mens rea* (England and Wales)
 German practice, 58
 US practice, 56–7
 risk-taking/*mens rea* (England and Wales)
 as ‘acting knowingly’, 61
 jurisprudence
 Saik, 77
 Stephenson, 77
 level of certainty, relevance, 61
 moral distinguishability, 61
 purpose–risk-taking equation/degrees of culpability, 77
 removal of ‘risk-taking’ out of intention (twentieth century), 76–7
 unreasonable risk-taking as recklessness, 76–7: *see also* recklessness (England and Wales)
 rarity of use, 77
 Roxin, Claus, 27, 38
 rule of law, 141
 Scotland
 courts’ supposed power of criminalisation, 15
 suicide in, 245
 sentencing procedure (Anglo-American/common law (adversarial) vs German/civil law (inquisitorial)) (overview), 353
 conclusions, 386–9
 authors’ recommendation, 389

- bifurcation vs unification as key distinction, 353
- importance of efficiency and speed, 387
- just sentences, 386–7
- summary of the two approaches, 386
- the task, 387–9
 - expectations for a comparative study, 354, 388–9
 - paucity of literature/empirical research, 353–4, 387–8
 - possible areas for exploration, 387–9
- Procedural Justice* (1975) (Thibaut and Walker), 388–9
- sentencing procedure (Anglo-American/common law)
 - (sources of information at sentencing), 380–4
- post-conviction adjournment as chance to collect, 365–6, 380
- growing resort to ‘on the day’ reports/managing without, 366, 380
- PSRs (parallel reports), 380, 381
- IRCAAs (Impact of Race and Culture Assessments), 382
- special category reports, 381–2
- PSRs (probation services) (content/use of), 380–2
- advice on suitable sanctions, 380–1
- as a legal requirement (CJA s.156), 380 n.129
- as principal source of information about the offender, 380
- use by defence in mitigation plea, 381
- PSRs (supplementary information)
 - offender’s views, 381
 - prosecution/defence submissions, 381
- VISs, 382–4
 - adoption by all common law jurisdictions, 382
 - advantages of bifurcation, 382–3
 - as aid to determining the level of seriousness, 382
 - CISs, 382–3
 - obligation on prosecution to seek (Canada), 382 n.137
- sentencing procedure (England and Wales) (adversarial)
 - features shared with other common law jurisdictions/variables, 363–4, 376 n.113
- sentencing hearing
 - adjournment of hearing, duration, 366
 - contested facts/gaps in matters relevant to sentencing, 365–6
 - different routes to conviction, impact, 356–65
 - magistrates’ courts/Crown Court practice distinguished, 364–5
 - preference for the same adjudicator at trial and sentencing, 366, 385
- sources of information at sentencing: *see* sentencing procedure (Anglo-American/common law) (sources of information at sentencing)
- timing considerations (sentencing ‘as soon as possible’ following conviction)
 - deferred sentencing, 364
 - legislative examples, 364
 - post-conviction pause, reasons for, 364
- sentencing procedure (German/civil law (inquisitorial))
 - overview, 362–3
 - Germany as exemplar, 356
- aggravating/mitigating circumstances
 - admissible evidence, 360
 - an imbalance between, 376
 - double-counting issues (StGB 50), 371–2
 - in dubio pro reo* rule, 360
 - need to establish during the trial, 360
 - potential impact of prior convictions, 371

- sentencing procedure (cont.)
 - prosecution/defence approach to, 360–1
 - court's options
 - refusal of application for a 'penal order', 357
 - right to depart from prosecution's sentencing
 - recommendation, 360
 - right not to accept prosecution's charging decision, 357
 - historical background/ongoing debate, 354, 355 n.10
 - police investigation report (*Ermittlungsbericht*)
 - as basis for further action by the prosecution, 356
 - scope, 356
 - prosecution's options/tasks
 - application for a no-trial 'penal order', 357
 - charge on basis on the alleged events, 357
 - decision not to prosecute/conditions, 357
 - sentencing considerations
 - assemblage of mitigating and aggravating circumstances, 358
 - dependence of courts' jurisdiction on the expected sentence, 358
 - offender's prior history, 359
 - orality principle (*Mündlichkeitsgrundsatz*), 358
 - as part of every phase of a unified criminal procedure, 355–6
 - permeation of every phase of the procedure, 355–6, 358–9, 362
 - police investigation report, 356–7
 - pre-trial Court Assistance Agency (*Gerichtshilfe*) reports, 358–9, 383
 - prosecutor's draft penal order, 357
 - sentencing decision
 - criticisms of the procedure, 361
 - obligation to set out circumstances determining sentence, 361
 - prosecutor's recommendation (non-binding effect), 360
 - special negotiated judgment procedure, 361–2: *see also* negotiated agreement (StPO 257c)/civil law
 - trial court
 - composition, 359
 - final pleadings (prosecution/defence), 360
 - hearing of evidence/scope, 360
 - obligation to investigate all relevant facts (*Aufklärungspflicht*), 359, 360
 - prior convictions, pre-conviction disclosure of, 359, 363, 370–1
 - use of the case file, 359
 - unified procedural approach
 - benefits (efficiency/holistic approach), 363
 - criticisms (including risk to presumption of innocence), 359, 363
 - impact on the handling of sentencing considerations, 355–6, 358–9, 362
- sentencing procedure (Germany/civil law) (sources of information), 383–4
- court's duty to investigate pre- and during the trial (*Aufklärungspflicht*), 383
- pre-trial Court Assistance Agency (*Gerichtshilfe*) reports, 358–9, 383
- victim's role, 383
 - disadvantages of the unified system, 383–4
- sentencing procedure, justification for bifurcation
 - benefits of a time for reflection, 376–7
- counter-arguments (disadvantages of extended criminal proceedings)
 - disadvantages to the victim, 385
 - scheduling difficulties, 366, 385
 - statistics, 384–5

- threat to the right of a speedy trial (ECHR 6/Sixth Amendment), 141, 363–4, 384–5, 387
- decision-making benefits
 - avoiding the ‘noise’, 372
 - jury awareness of the sentence, impact, 372
- fair trial considerations, 367, 368
 - avoidance of unfair trial strategy traps, 375
 - rebalancing the aggravation/mitigation arguments, 375–6
 - right to a speedy trial, 363–4, 384–5, 387
- fundamental differences in the
 - approach and purpose of the two stages, 367–8
 - difficulty of juggling distinct legal thresholds in a single hearing, 373–4
 - focus on the past vs focus on the future, 372–3
 - rebalancing the focus from the offence to the offender, 374
- fusion between verdict and sentence, bifurcation as a response to the risks of
 - contamination of the decision-making process, 368–70
 - double-counting issues, 371–2
 - examples, 368–70
 - prior convictions, potential prejudice/benefits of disclosure at sentencing hearing, 370–1
- offender agency/participation at sentencing
 - denial of opportunity to speak as a reversible error in law, 378
 - effective representation of the offender, importance, 377
 - German system compared, 378–9
 - offender’s opportunity to make a favourable impression, 378
- time to obtain information/prepare defence, 379–84: *see also* sentencing procedure
 - (Anglo-American/common law) (sources of information at sentencing); sentencing procedure (Germany/civil law) (sources of information)
 - civil law system compared, 379, 383–4
 - principal sources of information, 380–2
- Simester, A. P.
 - knowledge distinguished, 68 n.63
 - on *mens rea*, 55–6, 61, 63–4
 - on moral primacy of intention, 61
 - on negligence, 55–6
 - on official incitement to law-breaking, 306
 - on regulatory offences/quasi-crimes, 18
- Spain
 - fair trial, 141
 - statutory limitation, 143 n.18, 151, 158 n.95, 165, 166, 167
- standard of proof: *see* proof, burden/standard (defences)
- statutes of limitation, overview: *see also* statutes of limitation, general time-bars on prosecutions (Commonwealth); statutes of limitation, rationales; statutory limitation exceptions; statutory limitation postponement and repose provisions
- introduction, 6–7
 - civil limitation laws compared, 138
 - definition, 138
 - a principle of law?, 167
- outline of discussion
 - i. review of the rationales, 139
 - ii. comparison of European, Commonwealth and US practice, 139
 - iii. exceptions to the general limitation periods, 140
 - iv. postponement of limitations, 140
 - v. overall comparisons, 140

- statutes of limitation, overview (cont.)
 - conclusions/comparisons, 170–3
 - civil and common law systems, a nuanced relationship, 172–3
 - French and US approaches compared, 170–1
 - limitations of laws of limitations, 173
 - mandatory vs discretionary
 - approach to prosecution, relevance, 170–1
 - retroactivity, 172–3
 - seriousness/gravity as universal criterion, 171
 - start date, variety and inconsistency of practice, 171–8
 - values driving civil law and common law systems distinguished, 170
 - waiver, diversity between civil and common law approaches, 172
- constraints
 - infinite variety of the jurisdictions considered, 138, 140
 - limitation of discussion of penalty to imprisonment, 141–2
 - limitation to statutory time limits on bringing a charge, 141
- legal certainty and, 143–4, 151–2
- omissions
 - constitutional protections, 141
 - post-charge delay limits, 141
- summary, 149
 - McHugh J (*Taylor*), 149
- terminology
 - ‘limitation exemption’, 138–9
 - ‘limitation period’, 138–9
 - ‘limitation postponement/extension/suspension/tolling’, 138–9
 - ‘repose provision’ (or ‘ultimate’, ‘long-stop’ or ‘absolute’ limitation provision), 138–9
- statutes of limitation, general time-bars on prosecutions (Commonwealth), 152–6
 - summary, 156
 - adoption of English practice, 152–3:
 - see also* statutes of limitation, general time-bars on prosecutions (England and Wales)
- alternatives to statutory limitation
 - abuse of process, 154, 156, 162
 - discretionary approach to charging, prosecution and trial, 154
- indictment proceedings, 153–4
 - statutory limitation provisions, rarity (*nullum tempus occurrit regi*), 153
 - summary proceedings distinguished, 153
- ‘offence’