

Free will for (almost) everyone? Problems of a restrictive normative approach to the insanity defense

Johannes Kaspar

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Law and Interdisciplinarity

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Mohr Siebeck

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Free Will for (almost) Everyone? Problems of a Restrictive Normative Approach to the Insanity Defense

Johannes Kaspar

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I. Introduction

The contribution of *Wojciech Zaluski* deals with a complex and controversial topic that relates to fundamental aspects of criminal law, both from a theoretical and a practical perspective – the “insanity defense”. Whether you call it a “defense” (like in the US) or an “excuse” or “exculpation” (like Poland and Germany) – either way, each legal order has to come up with an answer to the question of how to define and assess a potential absence of criminal responsibility due to mental disorder and to what extent an interdisciplinary approach should be followed in this context. Therefore, the topic is well chosen with respect not only to comparative law but also to this volume’s overarching theme of interdisciplinary approaches to law.

In German criminal law, there is a specific provision concerning the absence of “culpability” (*Schuldfähigkeit*) due to pathological mental disorders or comparable mental states.¹ § 20 of the German Criminal Code (*Strafgesetzbuch – StGB*) reads as follows:

“Ohne Schuld handelt, wer bei Begehung der Tat wegen einer krankhaften seelischen Störung, wegen einer tiefgreifenden Bewußtseinsstörung oder wegen einer Intelligenzminderung oder einer schweren anderen seelischen Störung unfähig ist, das Unrecht der Tat einzusehen oder nach dieser Einsicht zu handeln.”

“Whoever, at the time of the commission of the offence, is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a

¹ *R.E. Rauxloh*, Insanity in German Criminal Law, in: R. Mackay/W. Brookbanks (eds.), *The Insanity Defence: International and Comparative Aspects* (2022), 247–273. For a German-Anglo-American comparative summary, see *M.D. Dubber/T. Hörnle*, *Criminal Law. A Comparative Approach* (2014), 500 ff.

pathological mental disorder, a profound disturbance of consciousness or intellectual disability or any other serious mental disorder is deemed to act without guilt.”²

In these cases, punishment is not possible and one may only impose measures of rehabilitation or incapacitation (*Maßregeln der Besserung und Sicherung*), which are called the “second track” of criminal sanctions (*Zweispurigkeit*).³

The wording of § 20 StGB clearly shows that an absence of culpability can be alternatively based on two grounds in connection with one of the four deficient mental states specified above: either the offender is not capable of appreciating the unlawfulness of the act in question (*fehlende Einsichtsfähigkeit*) – which is often referred to as the cognitive component of the insanity defense; or the offender is not capable of acting in accordance with his (existing) appreciation of committing a wrongful act, or, to put it in more simple terms, he is not able to control himself (*fehlende Steuerungsfähigkeit*) – which is called the control component or (as termed by *Zaluski*) the volitional component.

In his contribution, *Zaluski* questions the latter on the basis of in-depth deliberations of a predominantly philosophical nature, also taking into account historical aspects. In his introductory remarks, he stresses that from a historical point of view, the volitional component has not always been acknowledged as being part of the culpability test and is by far more controversial than the cognitive component.⁴

As *Zaluski* rightly points out, this different acceptance of both components also shows in recent developments in the US, where the insanity defense was restricted in the aftermath of the famous *Hinckley* case.⁵ *John W. Hinckley, Jr.*, who had tried to assassinate former US president *Ronald Reagan* while he was in office in 1981, was acquitted based on the insanity defense and confined in a psychiatric hospital. Even though he ended up spending 35 years in this type of detention (i.e. much longer than he would have probably ever potentially spent in prison),⁶ the acquittal of *Hinckley* had produced public outrage and

² https://www.gesetze-im-internet.de/englisch_stgb/ (last accessed 28 November 2023).

³ For an overview of possible sanctions resulting from full, diminished or missing culpability, see *J. Kaspar/S. Stübner*, A German Perspective, in: M. van der Wolf (ed.), *Safeguarding the Quality of Forensic Assessment in Sentencing. A Review Across Western Nations* (2022), 146–174, 147.

⁴ *Zaluski*, p. 398, above. See e.g. the criticism against the control element raised by *S.J. Morse*, Moore on the Mind, in: K. Kessler Ferzan/S.J. Moore (eds.), *Legal, Moral and Metaphysical Truths* (2016), 233–250, 243 ff.; see also *idem*, Against Control Tests for Criminal Responsibility, in: P.H. Robinson et al. (eds.), *Criminal Law Conversations* (2009), 449–459.

⁵ *Zaluski*, p. 398 f., above. See *S.J. Morse*, Before and After *Hinckley*: Legal Insanity in the United States, in: Mackay/Brookbanks (n. 1), 199–222.

⁶ This is an important aspect that is sometimes neglected in the discussion: With regard to potential preventive measures, exculpation is not always an advantage for the defendant. For the example of Canada, see *Dubber/Hörnle* (n. 1), 511. For an extreme case in Germany, where the detention of the mentally ill offender in a psychiatric hospital lasted much longer

ultimately led to various legal reforms restricting or even abolishing the insanity defense. Until then, federal as well as state provisions relating to the insanity defense had frequently contained both components. One of the reasons was that § 4.01(1) of the quite influential Model Penal Code published by the American Law Institute in 1962 included a test featuring both a cognitive and a volitional component, of which only one had to be fulfilled for acquittal.⁷ Following the *Hinckley* verdict, in order to restrict the insanity defense, especially the volitional component (if not the complete insanity defense as such) was abolished in many states.⁸ In a recent decision, the Supreme Court has confirmed the constitutionality of this development (including the total abolition of an insanity defense): The Court ruled that an affirmative defense of legal insanity was not constitutionally required in the US and that it would be sufficient if the defendant could introduce evidence of mental abnormality to negate *mens rea*.⁹ Four states have followed this approach and fully abolished the defense.¹⁰ One has to acknowledge, however, that even severe mental disorder rarely negates *mens rea*, so most of such offenders will be convicted.¹¹

The situation in continental European systems is different, as *Zaluski* points out:¹² Most countries, like Poland and Germany, acknowledge both components. With this in mind, it is interesting to note that *Zaluski*'s criticism is to a certain extent in line with the development in the US, even though he suggests applying the volitional component with caution rather than completely abolishing it. In Germany, the scope of § 20 StGB, including the volitional component, has not been the object of such controversy. Unlike in the US, both components are seen as independent and of equal value.¹³

Recent reforms have dealt only with changes in the (formerly rather outdated and stigmatizing) wording. Previously used terms like “*Schwachsinn*” (idiocy) and “*seelische Abartigkeit*” (psychological abnormality) were replaced by more neutral ones.¹⁴ There was, probably for two reasons, no serious

than a prison sentence could possibly have been for the same offence (intentional destruction of valuable paintings), see *J. Kaspar*, Aussetzung und Erledigung der Unterbringung in einem psychiatrischen Krankenhaus nach §§ 67b und d StGB, *Forensische Psychiatrie, Psychologie, Kriminologie* 1 (2007), 217–225, 225.

⁷ *Morse* (n. 5), 200; *Dubber/Hörnle* (n. 1), 509.

⁸ See *Morse* (n. 5), 201 f.; *Hörnle/Dubber* (n. 1), 515 f.

⁹ See *Kahler v. Kansas*, 140 SCt 1021 (2020). In *Clark v. Arizona*, 548 US 735 (2006), the Supreme Court had generally stated that the insanity rule was “open to state choice”. See also *Morse* (n. 5), 204 ff.

¹⁰ In a fifth state (Nevada), a similar reform was held unconstitutional by the State Supreme Court, see *Morse* (n. 5), 202.

¹¹ *Morse* (n. 5), 202.

¹² *Zaluski*, p. 399, above.

¹³ *Hörnle/Dubber* (n. 1), 517.

¹⁴ For the background of the recent reform, see *A. Schieman*, Weg mit dem Schwachsinn – zur längst überfälligen Ersetzung der Begriffe “Schwachsinn” und “Abartigkeit” in

debate about restricting or abolishing § 20 StGB: First, there is a strong belief that mentally ill offenders should not be punished as they cannot be held accountable for what they did. This so-called “guilt principle” (*Schuldprinzip*)¹⁵ is based on the guarantee of human dignity in Art. 1(1) of the German Constitution (*Grundgesetz* – GG), i.e. on the most fundamental legal provision in German law. Second, in most of these cases, as a consequence of the previously mentioned two-track system German of criminal sanctions, a preventive measure of rehabilitation and incapacitation (see §§ 61 ff. StGB) is imposed by criminal courts, especially detention in a psychiatric hospital (§ 63 StGB). Even though these offenders go unpunished in a formal sense, their assumed dangerousness is dealt with by the criminal courts (which might be a relevant difference compared to the *Hinckley* case). As long as public safety is taken care of in this way, so it seems, there remains no further “need for punishment”.

In addition to these two primary explanations, it can be further observed that some recent (and critical) publications on culpability under § 20 StGB did not specifically focus on the volitional element, with the works by *Anja Schiemann* and *Gunnar Spilgies* being two examples. In her comprehensive and thorough analysis, *Schiemann* criticizes the vagueness of the criteria found in § 20 StGB in general with respect to legal certainty (Art. 103(2) GG).¹⁶ She also disapproves of their unclear (normative or rather empirical) nature and the difficult division of labor between courts and forensic experts in this field. In the end, however, *Schiemann* does not suggest removing the volitional component from § 20 StGB, favoring instead its rephrasing and a clarification of how it is addressed procedurally, just as is the case regarding the cognitive component.

In his discussion of culpability, *Spilgies* criticizes the indeterministic concept of guilt as well as “agnostic” positions dominating the German discussion.¹⁷ He claims (in this regard similar to *Schiemann*) that the assessment of culpability is unclear and possibly arbitrary – but again, his criticism is directed at both components simultaneously. *Spilgies* argues in favour of a reformed (deterministic) concept of guilt, without suggesting the restriction or abolishment of the volitional component in particular.

§ 20 StGB und der verpassten Chance einer umfassenden Reform der Schuldfähigkeitsfeststellung, *Kriminalpolitische Zeitschrift* (2019), 338–346.

¹⁵ See *T. Hörnle*, *Guilt and Choice in Criminal Law Theory – A critical Assessment*, *Bergen Journal of Criminal Law and Criminal Justice* 4 (2016), 1–24.

¹⁶ *A. Schiemann*, *Unbestimmte Schuldfeststellungen. Verstoß der §§ 20, 21 StGB gegen den Bestimmtheitsgrundsatz nach Art. 103 II GG* (2012).

¹⁷ *G. Spilgies*, *Über Schuld und Strafe auf deterministischer Grundlage. Mit einem abolitionistischen Epilog* (2021).

II. Wojciech Załuski's main arguments

In his contribution, *Załuski* argues that from a “personalist” or “anthropological” point of view,¹⁸ the volitional component is doubtful and should be applied cautiously, i.e. restricted to clear cases of severe mental illnesses like schizophrenia.¹⁹ Even though the term “anthropological” could point at something like a natural science approach, this is not what *Załuski* has in mind:²⁰ Biological or medical-psychiatric aspects do not play a central role in his argumentation. Instead, on the basis of philosophical considerations going back to *Thomas Aquinas*, a certain (normative) concept of “personhood” is developed. It relates to human beings’ capacity for abstract representation, their self-consciousness, their ability to make rational decisions and (as a consequence of rationality, which is defined as the “capacity to consciously search [...] for reasons for action”) to exercise free will.²¹ Summarizing this view at the end of his contribution,²² *Załuski* speaks of the “uniqueness of human beings” and their “spiritual side”, distinguishing them from other living creatures.

The classic controversy of determinism *versus* indeterminism in the context of criminal responsibility, including the question of whether new results of “neuroscience” and brain research support a deterministic view,²³ is not directly addressed. But it becomes very clear that *Załuski*’s position is an indeterministic one, as the existence of free will (i.e. “the power of initiating an action”²⁴) is assumed. He emphasizes the “active, sovereign character of will”, which would make actions “ours” – and, as a consequence, obviously also allows that we are held responsible for crimes we have committed; *Załuski* explicitly speaks of (legitimate) “responsibility attributions” based on his concept of personhood.²⁵ According to the author, an important argument supporting this view is the subjective experience of three “gaps” described by *John Searle*, i.e. the fact that human beings do sense a distinction between having reasons to act and actually deciding to act accordingly, and, in the next two steps,

¹⁸ *Załuski*, p. 398 and p. 401, above.

¹⁹ *Załuski*, p. 407, above.

²⁰ See *Załuski*, p. 398 n. 3, above.

²¹ *Załuski*, p. 402, above.

²² *Załuski*, pp. 408 f., above.

²³ On this (complex) debate, see the recent summary by *V. Schrader*, Über Schuld und Durchschnittsmenschen – auch ein Beitrag zum Verbandsstrafrecht (2021), 27 ff.; see also *T. Hillenkamp*, Strafrecht ohne Willensfreiheit? Eine Antwort auf die Hirnforschung, JuristenZeitung 2005, 313–320 and *idem*, Hirnforschung, Willensfreiheit und Strafrecht – Versuch einer Zwischenbilanz, Zeitschrift für die gesamte Strafrechtswissenschaft 127 (2015), 10–96.

²⁴ *Załuski*, p. 403, above.

²⁵ *Załuski*, p. 403, above.

between having decided to act and actually starting the action and, then, in carrying the action through to a conclusion.²⁶

Zaluski's argument is based on a "volitional theory of action", with the direct cause of action being the will (and not "inner factors" like beliefs or human desires). Otherwise, he contends, the concept of "person" would be fiction;²⁷ *Zaluski* explicitly rejects a "naturalistic view" of human beings where people are seen as being moved only by the above-mentioned "inner factors" that can be analyzed by "methods of the natural sciences".²⁸ From his point of view, free will is necessary to generate an "action". Even though the existence of "weakness of will" is acknowledged,²⁹ as is the possibility of free will's "sovereignty" to decide against rational expectations, *Zaluski* argues that there is a general "tendency" of human beings to "comply with reason".³⁰

As a consequence, a "presumption" of the effectiveness of free will among offenders is formulated – meaning that an offender is generally held criminally responsible for his actions and the volitional component of the insanity defense can become relevant only under "exceptional circumstances", i.e. in "absolutely uncontroversial cases" of severe mental illnesses such as schizophrenia.³¹

In his concluding remarks, *Zaluski* discusses whether the volitional component could be totally abolished, as – one might argue – a relevant lack of control due to a severe mental illness necessarily also leads to a relevant cognitive defect.³² Even though, according to *Zaluski*, this is true in most cases (including cases of psychotic delusions), he argues that there might be constellations (like bipolar disorders) where there is indeed a relevant lack of control despite cognitive capacities still being intact. This uncertainty leads him to the conclusion that the volitional component should be retained but at the same time used in a very restricted manner by the courts: They should, as a start, work with a "strong presumption" in favor of full volitional capacity.³³ He adds the argument that free will is not only a "psychological fact" but also a "task" or a "challenge": "Each human being should seek to make their will the root of his actions"³⁴ – which could be classified as a criminal policy argument that is quite close to the slippery slope argument that he briefly mentioned earlier in his paper.³⁵ A final "pragmatic" argument in favor of a restrictive use of the

²⁶ *Zaluski*, p. 403, above.

²⁷ *Zaluski*, p. 404, above.

²⁸ *Zaluski*, pp. 406 f., above.

²⁹ *Zaluski*, p. 405, above.

³⁰ *Zaluski*, p. 406, above.

³¹ *Zaluski*, p. 407, above.

³² *Zaluski*, pp. 408 f., above.

³³ *Zaluski*, p. 409, above.

³⁴ *Zaluski*, p. 409, above.

³⁵ *Zaluski*, p. 400 n. 10, above.

volitional component is that a harmful self-fulfilling prophecy should be avoided, where offenders with mental problems are given the general impression that they are mere objects of certain circumstances and not responsible in any event for what they do, possibly contributing to future offences.

III. Comparative comment

Zaluski's contribution contains philosophical reflections on the concept of personhood which are used as an argument in a legal context, regarding the question of criminal responsibility and the scope of the insanity defense. Therefore, the two disciplines directly referred to are law and philosophy. It is not, however, an interdisciplinary approach where "extra-legal" findings in a strict sense are applied to legal questions; in our context, there is no clear-cut division between both disciplines, as concepts like "personhood", "action" and (even more so) "responsibility" are strongly related to the legal sphere and to classical topics of legal philosophy, where both disciplines converge.

It is important to note that the topic of criminal responsibility has an even broader interdisciplinary dimension, which is implicitly also mentioned by *Zaluski* – it is the fundamental question of how empirical facts are related to (normative) legal terms and categories. In our context this becomes relevant within substantive as well as procedural law. On the one hand, substantive law is touched upon when it comes to the question whether statutory prerequisites regarding an absence of culpability (or regarding legally relevant "insanity" for that matter) contain empirical facts, normative value judgments or both – for Germany, at least, the latter is the case, with a certain preponderance of normativity. On the other hand, the question of how and by whom these elements are to be assessed in court is, obviously, a question of procedural law. In Germany, there is a complex interplay between forensic (especially psychiatric) experts and the courts.³⁶ Whereas the final decision on culpability is up to the courts alone (as it is perceived to be a normative value judgement),³⁷ in practice the forensic expert's diagnosis seems to exert considerable influence.³⁸

Zaluski's point of view is predominantly a normative one, even though in a way he also argues with factual aspects of "human nature", e.g. with the subjective perception of free will³⁹ or with free will as a presumed "psychological

³⁶ See *Kaspar/Stübner* (n. 3), 154 ff.

³⁷ *Hörnle/Dubber* (n. 1), 512.

³⁸ There is not much empirical research regarding this question in Germany; for homicide cases, see *T. Verrel*, *Schuldfähigkeitsbegutachtung und Strafzumessung bei Tötungsdelikten. Eine empirische Untersuchung zur Bedeutung des psychowissenschaftlichen Sachverständigen im Strafverfahren* (1995).

³⁹ *Zaluski*, p. 403, above.

fact”.⁴⁰ But at the same time he dismisses what he calls a “naturalistic” view of human beings being dominated by desires and beliefs as measured by “methods of the natural sciences”.⁴¹ It is free will that constitutes “persons” in a normative sense, and therefore, according to *Zaluski*, criminal responsibility based on free will and sufficient control should be presumed and only in exceptional cases rejected.

From a comparative perspective, it is noteworthy that this normative, legal-philosophical “personalist” argument appears in the German discussion on culpability and criminal responsibility in a similar way, but it is usually used only to support an indeterministic concept of culpability as such and to defend this concept against its deterministic opponents – and not to criticize or restrict the widely acknowledged volitional component.

One famous example for this different use of the personalist argument is an early verdict issued by the German Federal Court of Justice (*Bundesgerichtshof*) of 1952. The court had to deal with the question of mistake of law (§ 17 StGB), which can – although rather exceptionally – exclude criminal responsibility. The court used this opportunity to make a general statement about the concept of “guilt” and culpability. A famous and frequently cited part of the verdict reads as follows:

“Strafe setzt Schuld voraus. Schuld ist Vorwerfbarkeit. Mit dem Unwerturteil der Schuld wird dem Täter vorgeworfen, daß er sich nicht rechtmäßig verhalten, daß er sich für das Unrecht entschieden hat, obwohl er sich rechtmäßig verhalten, sich für das Recht hätte entscheiden können. Der innere Grund des Schuldvorwurfes liegt darin, daß der Mensch auf freie, verantwortliche, sittliche Selbstbestimmung angelegt und deshalb befähigt ist, sich für das Recht und gegen das Unrecht zu entscheiden, sein Verhalten nach den Normen des rechtlichen Sollens einzurichten und das rechtlich Verbotene zu vermeiden, sobald er die sittliche Reife erlangt hat und solange die Anlage zur freien sittlichen Selbstbestimmung nicht durch die in § 51 StGB genannten krankhaften Vorgänge vorübergehend gelähmt oder auf Dauer zerstört ist.”

“Guilt is a prerequisite for punishment. Guilt is blameworthiness. With the judgment of guilt, the perpetrator is accused of not having behaved lawfully, that he has decided in favor of wrongdoing, although he could have behaved lawfully and could have decided in favor of the law. The inner reason for blaming the offender lies in the fact that man is destined for free, responsible, moral self-determination and is therefore capable of deciding in favor of the law and against wrongdoing, of adjusting his behavior to the norms of the legal “ought” and of avoiding illegal behavior as soon as he has reached moral maturity and as long as his disposition for free, moral self-determination is not temporarily paralyzed or permanently destroyed due to one of the pathological disorders mentioned in § 51 StGB.”⁴²

⁴⁰ *Zaluski*, p. 409, above.

⁴¹ *Zaluski*, p. 406, above.

⁴² BGHSt 2, 194, 200. § 51 StGB was the former regulation on an absence of culpability due to mental disorders, which is now located in § 20 StGB. The translation is a modified version of that prepared by *Rauxloh* (n. 1), 247.

A similar understanding of human beings and their criminal responsibility also shows in a more recent verdict of the German Constitutional Court (*Bundesverfassungsgericht*), the so-called Lisbon Decision of 2009, where the importance of the principle of guilt (*Schuldprinzip*) and the underlying presumptions were expressed in the following manner:

“Das Strafrecht beruht auf dem Schuldgrundsatz. Dieser setzt die Eigenverantwortung des Menschen voraus, der sein Handeln selbst bestimmt und sich kraft seiner Willensfreiheit zwischen Recht und Unrecht entscheiden kann. Dem Schutz der Menschenwürde liegt die Vorstellung vom Menschen als einem geistig-sittlichen Wesen zugrunde, das darauf angelegt ist, in Freiheit sich selbst zu bestimmen und sich zu entfalten (vgl. BVerfGE 45, 187 227). Auf dem Gebiet der Strafrechtspflege bestimmt Art. 1 Abs. 1 GG die Auffassung vom Wesen der Strafe und das Verhältnis von Schuld und Sühne (vgl. BVerfGE 95, 96, 140). Der Grundsatz, daß jede Strafe Schuld voraussetzt, hat seine Grundlage damit in der Menschenwürdegarantie des Art. 1 Abs. 1 GG (vgl. BVerfGE 57, 250, 275; 80, 367, 378; 90, 145, 173).”

“Criminal law is based on the principle of guilt. This principle presupposes a human being’s own responsibility; it presupposes human beings who themselves determine their actions and can decide in favor of right or wrong by virtue of their freedom of will. The protection of human dignity is based on the idea of Man as a spiritual and moral being which has the capabilities of defining himself, and of developing, in freedom (see BVerfGE 45, 187, 227). In the area of the administration of criminal law, Article 1.1 of the Basic Law determines the idea of the nature of punishment and the relationship between guilt and atonement (BVerfGE 95, 96, 140). The principle that any sanction presupposes guilt thus has its foundation in the guarantee of human dignity under Article 1.1 of the Basic Law (see BVerfGE 57, 250, 275; 80, 367, 378; 90, 145, 173).”⁴³

It becomes apparent that both courts seem to share with *Zaluski* similar convictions concerning the nature of human beings and free will; interestingly enough, even the aspect of “spirituality” is mentioned both by *Zaluski* and the German Constitutional Court in our context. Consequently, we are left to – pointedly – ask why German discourse does not more frequently adopt the personalist argument in the (restrictive) way it is used by *Zaluski* – one rare example is a question which was posed (though not answered) by *Tatjana Hörnle* and *Markus D. Dubber* in their comparative discussion of insanity in Germany and the US. They ask whether “respect for the autonomy of accused persons” might “preclude rather than support the recognition of a broad insanity defense (and perhaps any insanity defense), and most particularly of an insanity defense that turns on a finding that the accused lacked the requisite capacity for autonomy”.⁴⁴

(1) A (legal) reason for this difference might be the previously mentioned guilt principle (*Schuldprinzip*) and its constitutional basis, the protection of human dignity (Art. 1(1) GG). The principle is considered to be a very important

⁴³ BVerfGE 123, 267, 413. The translation is a modified version of that prepared by *Hörnle* (n. 15), 1.

⁴⁴ *Hörnle/Dubber* (n. 1), 517.

barrier against an excessive use of criminal punishment (being the state's *ultima ratio* and a grave intrusion into liberty rights).⁴⁵ It strictly forbids punishing a person who is deemed not to be criminally responsible due to a relevant (severe) mental disorder or a comparable deficient mental state like acute intoxication. Of course, the question as to which persons actually fall under this description is open to debate and cannot be answered just by taking into account quite abstract principles of constitutional law. But still, it would be a peculiar result to derive from human dignity and the embodied notion of human beings (in German: the *Menschenbild*) both the protection of mentally ill offenders against punishment as well as a restrictive use of the respective protective regulations (in our case: § 20 StGB). One probably has to distinguish between two dimensions here: It is one thing to argue with human dignity and the nature of human beings when it comes to defending free will and criminal responsibility in general, like the highest German courts do – but it is a different situation if the same argument is used in concrete cases to insist that a certain person should be punished because the insanity defense has to be used in a restrictive manner and therefore does not apply. Even if we accept the premise that persons in general share certain abilities making them criminally responsible, this premise itself (and the underlying concept of “personhood”) does not answer the question of how many persons lack the prescribed abilities and therefore have to be protected from criminal punishment due to the guilt principle and human dignity. A need for differentiation concerning the use of the personalist argument in different contexts is also expressed (though in a more general way) by Hörnle in her contribution on “Guilt and Choice in Criminal Law Theory”:

“It is one thing to consider the unique features of a human being in a philosophical discourse or within constitutional theory, but it is quite another to do so in a criminal verdict.”⁴⁶

(2) A legal-theoretical reason could be that in the German discussion many scholars would hesitate to draw far-reaching (restrictive) conclusions from a predominantly normative concept in a context that, according to the leading opinion, also contains factual elements – which is why the structure of § 20 StGB is often described as containing two steps or stages, with both normative and factual elements that cannot be entirely separated but instead interact with each other.⁴⁷ That leads us (again) to the difficult question of the relationship between normative value judgements and empirical facts, a question that is also relevant in *Zaluski*'s analysis. When he mentions a “subjective experience” of free will⁴⁸ or, following *Viktor Frankl*, a “preference” of offenders to be

⁴⁵ See *J. Kaspar*, Grundrechtsschutz und Verhältnismäßigkeit im Präventionsstrafrecht (2014).

⁴⁶ Hörnle (n. 15), 4.

⁴⁷ *Kaspar/Stübner* (n. 3), 154 f.; Hörnle/Dubber (n. 1), 512.

⁴⁸ *Zaluski*, p. 403, above.

responsible for their deeds,⁴⁹ he refers to factual circumstances that could be measured and confirmed by means of empirical research. But it is clear that these facts alone are proof neither of the actual existence of free will nor that it is justified to generally treat people as criminally responsible. First, because it is problematic to immediately draw normative conclusions from empirical facts (a false conclusion which is called a “natural fallacy”). And second, because the subjective experiences and expectations mentioned by *Zaluski* are probably also shared by many mentally ill persons who in the end are considered not to be criminally responsible – which indicates that subjective experience alone is not a good distinguishing factor here.

Apart from these factual elements of his position, *Zaluski* criticizes a “naturalistic view” of human beings. According to him, the latter are “spiritual beings, whose inner selves are beyond the reach of the natural sciences”.⁵⁰ But if this means that, in the end, natural sciences and their (e.g. biological or psychiatric) findings and results cannot meaningfully contribute to the question of criminal responsibility, then a number of questions arise: Why bother with forensic experts and their diagnoses at all? Why is, according to *Zaluski*, a diagnosis of a “severe mental illness” like schizophrenia supposed to be relevant, leading to one of the “exceptional cases” he identifies where the volitional component and as a consequence culpability are indeed missing? How (if not by the help of natural science) do we know that schizophrenia is one of these clear and uncontroversial cases? What other mental disorders – and according to what findings – should be included in this category? Why do we make exceptions at all for that matter? Couldn’t we attribute responsibility to all human beings just because they are human beings? And finally: how do we deal with the fact that legislators both in Poland and Germany obviously assumed that there was indeed a group of people not criminally responsible due to a relevant lack of control – and that the statutory terms are factual rather than normative ones? The wording of the relevant regulations in both countries relates to people who are incapable of controlling their conduct – which is the description of a factual circumstance, no matter if this circumstance contradicts our general view on human beings and their free will and no matter if it disappoints social or legal expectations.

Zaluski’s argument goes in a different direction. For perfectly understandable reasons, he speaks of the “task” of human beings to act according to their free will,⁵¹ and he warns that a too generous exoneration of mentally ill offenders might lead to unfavorable consequences.⁵² But is that supposed to mean that we should also punish people who actually could not control themselves

⁴⁹ *Zaluski*, p. 407, above.

⁵⁰ *Zaluski*, p. 407, above.

⁵¹ *Zaluski*, p. 409, above.

⁵² *Zaluski*, p. 410, above.

because they failed to fulfill the above-mentioned task or because we are afraid of the consequences for society as a whole if we refrain from punishment? Wouldn't it be a "normative fallacy"⁵³ to ignore an existing lack of control because it does not align with a certain philosophical (idealistic) image of how persons "should be"? And wouldn't this restrictive normative approach also affect the use of the cognitive element, as one could easily argue that it is at the same time a "task" of everyone to apprehend the wrongfulness of one's actions?

(3) Finally, a simple (practical) reason might be that there does not seem to be a need for (further) restricting the application of § 20 (absence of culpability) or § 21 StGB (diminished culpability) in Germany because courts use both regulations quite cautiously anyway.⁵⁴ The legislative framework in § 20 and § 21 StGB as such is understood as a presumption that adults are generally responsible for their crimes and only exceptionally exculpated⁵⁵ – this understanding resembles the restrictive approach by *Zaluski*, but it relates both to the volitional component and the cognitive one at the same time.

In 2021 (the last year with available data), 815,199 persons were dealt with by German criminal courts.⁵⁶ Of these defendants, only 1,147 (0.14 %) were fully exculpated due to a mental disorder according to § 20 StGB. Unfortunately, these data do not show if culpability was denied with regard to the cognitive or the control element. But it is a fair assumption that (unlike in the US⁵⁷) the control element plays a significant role in German judicial practice as cases of acute intoxication are acknowledged as a potential case where culpability is absent.⁵⁸

Even diminished culpability according to § 21 StGB, which does not exclude criminal responsibility but solely allows for a facultative mitigation of punishment, was found rather sparingly: only 15,120 persons (1.85 % of all defendants in court) were considered to have fulfilled the prerequisites of § 21 StGB. This explains why the fear of a "slippery slope" or of an overly generous exoneration of many offenders, which had played a considerable role in the German discussion before the introduction of today's culpability regulations in

⁵³ *T.D. Campbell*, *The Normative Fallacy*, *The Philosophical Quarterly* 20 (1970), 368–377.

⁵⁴ *J. Kaspar*, in: H. Satzger et al. (eds.), *Strafgesetzbuch* (5th edn., 2021), § 20 paras. 7 ff.

⁵⁵ *Schrader* (n. 23), 20 ff.

⁵⁶ See *Statistisches Bundesamt*, *Rechtspflege. Strafverfolgung* (2021), 370, available online: https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/_publikationen-innen-strafverfolgung.html (last accessed 1 March 2023).

⁵⁷ For a comparative discussion, see *Dubber/Hörnle* (n. 1), 506 and 511.

⁵⁸ On this complex topic (including the legal construction of an *actio libera in causa* in cases of negligent or even intentional intoxication), see *S. Gless/N. Jain/ A. Loughnan*, *Imputation of Responsibility and Intoxicated Offending*, in: K. Ambos et al. (eds.), *Core Concepts in Criminal Law and Criminal Justice*, vol. 2 (2022), 95–131.

1975, is no longer part of the current debate. Furthermore, as mentioned above, acquittals due to the insanity defense rarely become scandals, as in many cases other stationary measures of rehabilitation and incapacitation are imposed, such as detention in a psychiatric hospital (§ 63 StGB) or detention in an addiction treatment facility (§ 64 StGB). In 2021, for example, of 1,147 persons who were acquitted due to an absence of culpability under § 20 StGB, only 125 (10.85 %) were not sanctioned at all, whereas 922 (80.38 %) were detained in a psychiatric hospital and 100 (8.72 %) in an addiction treatment facility.⁵⁹ Against this background one can understand why a further restriction of the application of § 20 StGB is not on the agenda in Germany.

⁵⁹ See *Statistisches Bundesamt* (n. 56), 370.