

The Cruellest Irony: Monica Seles and Her Struggle With German Justice

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A Routine Beginning

It was supposed to be a just a routine drubbing. Beatdown. Thumping. Whatever cliché one prefers to use in describing a world class sports star dismissing an obviously overmatched opponent would be perfectly appropriate to characterize the beginning of Monica Seles's tennis match against Magdalena Maleeva on April 30, 1993. In the quarterfinals of the Citizen's Cup, a tournament in Hamburg, Germany, the young teenage sensation had already won the first set handily. The second set was closer, and Monica had lost the first three games before storming back to win four games in a row. Now with the score 4-3 and the end of the match in sight, she walked over and sat on her bench to take the standard 90 second rest every two games. No one could have predicted that the next few moments would bear witness to one of the greatest tragedies in tennis and sporting history.

Certainly Monica herself had no indication that something was wrong. Indeed, since having dominant 1991 and 1992 seasons, the 19 year old ranked #1 in the world had entered 1993 with few milestones left to accomplish. From the period of January 1991 to February 1993, Seles reached the final in 33 out of 34 tournaments she competed, winning 22 titles in the process. Along the way, she compiled an astounding 159-12 win-loss record (92.9%) that easily rivals Roger Federer's dominance today on the men's tour. Monica's performance when the stakes were high was even more impressive: at the most prestigious Grand Slam tournaments, Seles had won eight singles titles dating back to 1990, with a 55-1 Grand Slam record. Seles's record-setting \$2.6 million in prize money earned in 1992 was eclipsed only by her \$7 million earned in endorsement deals.

Despite these accomplishments though, the teenager believed only in continually improving her game. "I do hope this is not the height of my career yet," she said after winning a tournament in November 1992. At that point, there certainly was no reason to think Seles could not continue her domination of the women's tennis circuit for 1993 and beyond.

After all, long before the world heard of Lindsay Davenport and Venus and Serena Williams, Seles was working hard to redefine the traditional paradigms of the women's game. Women's tennis had already come a long way from the traditional image of well-to-do ladies dressed in long dresses and bonnets lazily batting a ball around. Indeed, the famous 1973 "Battle of the Sexes" match, in which pioneer Billie Jean King defeated former men's number one player Bobby Riggs on national television, granted a level of legitimacy to a growing sport that had previously been derided as so much fluff and no substance. But it was not until the late 1980s and early 1990s that the concept of a

“power player” started to creep into the lexicon of women’s tennis. Gone were the days when masters of finesse, control, and placement—the derisively called “moonballers”—could expect to rule the tennis court. The new generation scoffed at the traditionally feminine, and embraced the masculine. Those in its school simply worked on blasting the ball as hard as they could, pounding an opponent into submission with indisputable winners, and chalking up the inevitable errors that came with them to a mere unpleasant side effect on the road to victory by sheer strength alone.

Monica Seles was the face of this new breed of tennis. Emblematic of that was her trademark double-fisted forehand. While using two hands for increased power and stability had long been popular for backhands, Seles was the first, and arguably still the only, female player to enjoy success with a double fisted forehand. While her reach was necessarily limited by having to use two hands instead of one on her forehand, her court speed compensated for this, and the way she crushed forehands once she got to them suggested that the tradeoff was well worth it. Even beyond her physical talents however, Seles embraced the modern power player label by possessing a level of mental fortitude belying her young age. When youngsters have a breakthrough tournament and find themselves wide-eyed in their first Grand Slam final, they are all too often easily beaten by their more experienced opponents. The pressure of the moment gets to be too much, and at some point, the newcomer realizes she is happy just to have made it so far and is content to exit gracefully. Not so with Monica Seles. Even from when she was a child, Seles was known for her fierce level of competitiveness and her coolness on the “big” points. Already winning tournaments at age 8, legend told of how she did not even fully understand tennis’s scoring system. She would play her heart out on every point, with only a vague idea of whether she was actually winning or not. This attitude paid big dividends when Monica won the first five Grand Slam finals she competed in, shrugging off the international fame and accompanying pressure not with arrogance, but with a grim determination ever to improve.

But no discussion of Monica Seles’s unique attributes and playing style could be complete without mention of her infamous grunt. Contemporary tennis players of course, all have variants of a basic exhaling mechanism when they hit the ball. Commentators and sports doctors debate over the value of grunting at all, weighing the benefits in timing it confers versus the wasted physical exertion in doing so. For many players though, like today’s Maria Sharapova, grunting is not even a question of choice. When asked about her ever-present shriek, Sharapova only shrugs and says it is the way she has always played the game, and that it’s too late to change. Yet followers of tennis agree that it is Seles’s grunts that set the yardstick by which all others would or should be measured against. Seles was an equal opportunity grunter- her cries rang across the court regardless of whether she was hitting a thundering overhead, or a feathery drop shot.¹ One sportswriter recorded the noise level of Seles’s grunts at 93 decibels, and made the unflattering point that this was about the same amount of noise a diesel train produces.² During Monica’s run to the Wimbledon final in 1992, tabloids continually jeered

¹ *Stop That Grunt!*, TIME MAGAZINE, July 13, 1992, available at <http://www.time.com/time/magazine/article/0,9171,975996,00.html>.

² *Id.*

Monica's unceasing grunt. They started with the witty, dubbing her "Moan-ica", and then went to the outright mean, demanding on tabloid covers that she "Stop That Grunt!"³ Public teasing turned into professional controversy when numerous opponents complained that Seles's grunts were actively distracting and conferred an unfair advantage. Martina Navratilova, a respected player and an elder stateswoman of the game, went on the record saying that the screaming was so bad that she could not hear the ball come off of Seles's racquet, slowing her own reaction time.⁴ Whether opponents' complaints about Seles's excessive grunting were products of passive frustration at being unable to beat her on the court, a reaction against the decidedly unfeminine approach she took to the game, or a valid complaint against self-serving gamesmanship, Seles's grunting became as much of her legacy as the events about to unfold on that April day. When asked, her reply was always the same: "I don't think I'm going to win a match by grunting."⁵

So on the changeover, Monica towed off and sat on her bench. While never a player to look too far ahead, she could see the beginning of the end for this match, already ahead a set and a game. Her opponent, Magdalena Maleeva, a young and upcoming player herself at only 18, was visibly wilting and seemed consigned to her impending defeat before Monica's unrelenting onslaught. No one wanted to be done with this routine skirmish more than Seles herself, who looked forward to reaching the semifinals in Hamburg as a sign that she was fully recovered from a serious bout with the flu that had sidelined her for the previous two months. More importantly, even if she could not completely admit it to herself, success in the Hamburg tournament meant that Monica could put more distance between herself and her archrival, Steffi Graf.

In 1993, if Monica Seles could be called a young upstart to the women's tennis game, then Steffi Graf was the proven champion. As of today, Graf is routinely labeled as the greatest female tennis player in history, with domination unparalleled in either the men's or women's game at her height. Even in 1993, her place in history was secure. Already a ten-time Grand Slam singles champion, Graf had accomplished the remarkable feat in 1988 of winning all four Grand Slam titles⁶ and the Olympic gold medal-- a feat so dominating that it is likely never to be repeated in the Open Era. By the time she retired in 1999, Graf had won a record-setting 22 Grand Slam singles titles.⁷ From 1987 until 1991, she held a firm grip on the #1 ranking in the world—but it was Monica Seles who took that from her on March 11, 1991. From then until 1993, the two of them switched places twice, handily separating themselves from the rest of the women's field, though there was plenty of room for debate as to who was actually better between the two. Seles though, gained the upper hand in 1991 and 1992 with her breakthrough years. By sheer coincidence, the two managed to avoid playing each other at a Grand Slam until

³ *Id.*

⁴ *Id.*

⁵ *Stop That Grunt*, *supra* note 1.

⁶ The Grand Slam tournaments are the Australian Open, French Open, Wimbledon, and US Open. They collectively form the biggest and most prestigious tournaments in any given year, with a player's legacy often measured by success in these major tournaments.

⁷ The 14 Grand Slam singles titles by the record holder on the men's side, Pete Sampras, seem almost paltry by comparison!

the 1993 Australian Open final, when Seles beat Graf in three tough sets. Tennis fans and commentators salivated for the beginnings of a rivalry that could mirror that of Chris Evert and Martina Navratilova a decade before, and the burgeoning one on the men's side between a young Pete Sampras and Andre Agassi. Then Monica Seles caught the flu.

So if it seemed like Monica was playing with a special sense of urgency that day – if her strokes were hit deeper and harder than normal— if her grunts seemed even louder than usual--if she scarcely looked over to the beleaguered Magdalena Maleeva seated next to her at the changeover, the crowd could well have understood why. After all, tennis's ranking system had little sympathy for those who took breaks from the tour, even on account of illness. The ranking system is based on points earned from competing in tournaments. The deeper a competitor went into an event, the more points she earned. However, only the best results dating from a year back are counted. Rankings could therefore change from week to week as a player's triumph from a year's past "expired." The end result is that the system favored players who could stay healthy and compete week-in and week-out. By not factoring in individual head-to-head records or considering other subjective measures, the rankings system made the top players marked targets; they could either continue to compete prolifically to defend their ranking points, or suffer a drop to competitors with more stamina.

The rankings system always seemed more of an object of focus for commentators and fans, rather than the players themselves. Any player would rather take a Wimbledon triumph over an ephemeral top ranking any day, but for the most competitive players, like Monica Seles, Steffi Graf, and today's Roger Federer, the #1 ranking holds special significance. It is another milestone to achieve in the tennis world, and a justifiable source of unabashed pride to know that one is the best in the world at something. More pragmatically, of course, the #1 ranking opens opportunities for sponsorship and endorsement deals. There are many top 20 players, but there can only be one #1.

Seles's ranking that day was precarious enough, having been out of action for two months because of her illness. A poor showing in Hamburg would fuel Steffi Graf's relentless pursuit of the #1 ranking—the position, once conceded, that was unlikely to be relinquished easily. Such an eventuality was hardly unpalatable for the crowd that day in Hamburg. Steffi after all, was born and raised in Germany and was considered to be a favorite daughter, as evidenced by three straight German Sportswoman of the Year awards, from 1986 to 1989.⁸ Graf had also played for Germany in the Olympics in 1992, winning the silver medal. By contrast, though Seles was born in Yugoslavia, she moved to the United States when she was 13, and identified as much with the U.S. as with her Eastern European roots.⁹ The local partisans groaned to themselves in disappointment as the changeover began—with the end of the match in sight, Seles had an uncanny ability to elevate her game and finish a routine dismissal in rapid fashion. Magdalena Maleeva would need a lot of help to win.

⁸ She would win the award five total times, a record for a woman.

⁹ Seles would later play for the United States herself at the 2000 Sydney Games, winning the bronze medal.

One man in particular within the crowd wished for a Seles defeat more than anyone else. His name was Gunther Parche, and his face was soon to be forever branded in Monica's mind. A former lathe operator at a factory, Parche was unemployed at the time and a loner. The 38 year old man was stocky and balding, but otherwise had no distinctive physical features. He blended in easily with the throng of people getting up and moving about during the changeover to stretch, buy refreshments, and use the restroom. He made his way down to the set of seats closest to the court. If anyone noticed him, it was only to note with a twinge of jealousy that a man had snagged seats so close to the action. Those looking closely may have seen the sunlight reflect from the glint of something Parche was carrying in his hands.

With few friends and unsteady employment, Parche had few passions in life. In fact, he only had one: women's tennis, and specifically, the star he had never met-- Steffi Graf. Whether his admiration was a product of nationalistic sentiment (Parche was German too), romantic interest, or a simple appreciation for Graf's game is unclear. But the evidence would later reveal that Parche's admiration turned into adulation, and then into obsession, reaching the point where he adopted Graf's triumphs and tribulations as his own. 1990 and 1991 had been tougher years for Steffi, and a string of losses to rising stars like Arantxa Sanchez-Vicario, Gabriela Sabatini, and most of all Seles, had a profound effect on Parche. While Graf and Seles had exchanged the #1 positions twice in early 1991, Seles claimed the ranking on September 9, 1991 and on that April day, had held it for nearly two years. The realization that Graf might not ever regain the ranking sent Gunther Parche into a deep spiraling despair, culminating in his later admission that he had lost the will to live. That was when he decided to take matters into his own hands.

A Stab in the Back

Parche made his way down until he was separated from the court by only a three foot high barrier. Monica sat on her seat, her back turned to him and the rest of the crowd. She did not notice him coming. Parche revealed what he had been carrying: a ten-inch long boning knife normally used in kitchens. In one smooth moment, he grabbed the knife with both hands, leaned over the short barrier, and plunged it deep into Monica's back, right between her shoulder blades. Everything then seemed to happen at once. Monica recalled leaning forward, feeling something in her back, being covered with blood, and then turning around to see a man with a knife before herself collapsing onto the court.¹⁰ The whole stadium heard Monica give a scream and fall. Yulia Maleeva, the mother of Seles's opponent who had been sitting courtside, also gave a loud scream although Madalena Maleeva herself later recalled she had no idea what was going on.¹¹ Security, acting quickly, physically restrained Parche even as he was preparing to stab Monica again. The knife fell to the floor. The chair umpire, Stefan Voss, quickly ran for a towel and ice as spectators who had not seen the attack looked on in confusion, and those who had gasped in horror. Parche remained quiet the whole time and was taken into

¹⁰ *Seles Tells of Attack and Plans to Return*, N.Y. TIMES, May 6, 1993, available at <http://query.nytimes.com/gst/fullpage.html?res=9F0CE1DB143BF935A35756C0A965958260>

¹¹ Ravi Ubha, *Tours Still Feeling Effect of Seles Stabbing 15 Years later*, ESPN.com, April 30, 2008, available at <http://sports.espn.go.com/sports/tennis/news/story?id=3374766>.

custody without further incident, while medical personnel rushed Seles to the hospital on a stretcher. What had started as a routine tennis match had ended in one of the most infamous moments of sports violence in history. The magazines and tabloids calling for Monica to silence her grunting got their wish in the worst possible way.

Recovery

At the hospital, doctors discovered that the knife had gone in about one and a half inches into Monica's upper back, but had luckily missed the lungs, spine, and other vital organs. Indeed, the initial prognosis was quite good as Monica only spent two days in the hospital, suffering as much from shock as from her physical injury. Doctors were optimistic that, with no spinal or other nerve damage, Monica could be back in action in a month or less. She was expected to miss the French Open in May as the defending champion, but was optimistic she could return in time for Wimbledon in June. This optimism faded as her recovery dragged on. Soon after the attack, Seles made the decision to travel to the Steadman-Hawkins Clinic in Colorado, to expedite her return.¹² The clinic specialized in sports medicine, treating only athletes, and was fully equipped to address a variety of athlete injuries through surgery and physical rehabilitation.¹³ But even with the best available care, Monica's progress towards a return was halting. Though the only surgical procedure she underwent was two stitches to close the wound, she reported lingering pain and soreness. A month after the accident, she addressed the press, admitting that she would be missing Wimbledon that year and had so far been unable even to comb her hair, let alone pick up a tennis racquet.¹⁴ Rumors that the injury meant her impending retirement began to swirl.¹⁵

As it turned out, Monica's physical recovery was relatively quick, but the psychological scars from the attack would keep her from returning to the court for more than two years. By sheer coincidence, her father Karolj was diagnosed with prostate cancer within a week of the attack. As in the case of many teenage phenoms, Monica was extraordinarily close to her father, who had made many sacrifices to develop and manage her budding career. Karolj underwent immediate surgery, followed by a chemotherapy regimen that exhausted him. As his prognosis became increasingly bleak, he resisted additional surgeries and only consented when Monica told him how much she needed him.¹⁶ The turbulent events in Seles's life made her grow increasingly distant from her friends and loved ones. She disappeared on long car drives, and started visiting a psychologist in July of 1993, Dr. Jerry May. During this time, Monica shied away from the public eye, except for a status update interview in August and a quick appearance at the US Open in September.¹⁷ While she would regain her physical form by year's end, the feeling of anguish and injustice she felt coming from the rest of the tennis world, as

¹² 1993: *Tennis Star Stabbed*, BBC On This Day, [bbc.co.uk](http://news.bbc.co.uk/1/hi/dates/stories/april/30/newsid_2499000/2499161.stm), available at http://news.bbc.co.uk/1/hi/dates/stories/april/30/newsid_2499000/2499161.stm

¹³ The clinic's website is <http://www.steadman-hawkins.com/aboutUs.asp>.

¹⁴ *Tennis Star Stabbed*, *supra* note 12.

¹⁵ *Id.*

¹⁶ *Monica Seles Biography*, <http://www.geocities.com/andrewbroad/tennis/seles/biography.html>

¹⁷ *Id.*

well as the legal disposition of Gunther Parche, would combine to keep her off the court. At age 19, Monica Seles's career was at a standstill.

The Tour Moves On

The Hamburg tournament continued, with Magdalena Maleeva declared the victor due to "opponent injury." Steffi Graf, upon hearing of the attack and the motivations behind it, immediately visited Monica in the hospital. Together, the rivals shared a long and tearful conversation. But any thought that Steffi would relax her pursuit of tennis milestones out of deference to Monica was quickly dispelled when she went on to win the 1993 French Open, Wimbledon, U.S. Open, and the 1994 Australian Open, a string of four consecutive major tournament victories. Gunther Parche's dreams were realized when Steffi regained the #1 ranking on June 7, 1993, holding it for 20 months before dueling with Arantxa Sanchez-Vicario for it until 1997. Monica herself would never regain the #1 ranking.

While Monica received a huge international outpouring of support following the attack, the attention faded as she disappeared from the public view. Monica and her supporters soon expressed outright frustration at the Women's Tennis Association (WTA) over its unwillingness to give her extended ranking protection. As with the case of normal injuries, the organization had frozen Seles's ranking points where they were at the time of the attack for the purposes of calculating a ranking. Thus, she could temporarily avoid the expiration of points she had accumulated which were more than a year old. During the French Open of the year however, the WTA announced that it would offer no further protection for Monica Seles's ranking beyond the two months she had received for her illness and the additional month that had elapsed since the attack.¹⁸ When Seles complained, WTA defended its decision on the grounds that it had consulted with a majority of the top 25 players as well as its player board. For Seles, who previously had a strained relationship with the WTA arising from her surprise withdrawal from Wimbledon a few years before, this final ignominy was a hurtful symbol of the rest of the professional tennis world failing to sympathize with her pain and anguish over the traumatic attack.¹⁹ By then, the bizarre motive for Gunther Parche's attack had become public, and when Steffi Graf took the #1 ranking from Monica at the conclusion of the French Open a bare week later, the knowledge of Parche achieving his twisted goal after all became almost too much. That the other top players had voted against her amounted to a figurative backstabbing to accompany her knife wound.

A Risky Ploy

Parche was immediately arrested after the stabbing and detained by himself for his own protection. Prosecutors charged him with attempted murder, carrying the possible punishment of 20 years imprisonment or more. Parche was unable to afford a private legal team. For his public defenders, the realization came immediately that they

¹⁸ Robin Finn, *Seles Struggles with Injury and W.T.A. Decision*, N.Y. TIMES, May 30, 1993, available at <http://query.nytimes.com/gst/fullpage.html?res=980CE3D7163BF933A05756C0A965958260>

¹⁹ *Id.*

had a monumental task on their hands, and they would have to come up with something truly unorthodox to save their client. After all, there were more than 6,000 witnesses present at the stabbing, many of whom saw the event first-hand. The physical evidence with respect to the knife was indisputable, and even a perfunctory search of Parche's apartment revealed his obsession with Steffi Graf as a motive for the crime. But all of that became moot anyway, when Gunther freely confessed to the crime on multiple occasions and explained his motivations for doing so. The confessions were allowed to stand.

No, from the beginning, Gunther's defense lawyers knew they would have to hang their hat on winning due to a lack of mental capacity. They would need to argue that Gunther lacked the necessary *mens rea*, or culpable mental state, that was required to render him legally responsible for the crime. This they would have to do at trial—inherent in the German system of compulsory legal representation was also the concept that no accused person could be deemed unfit to stand trial, as they can in America and other Western countries.²⁰ Gunther would get his chance to take a huge gamble at trial for all the marbles: as an affirmative defense, a win based on lack of mental capacity could well allow him to walk away a completely free man. The downside was equally foreboding: presenting a failed mental capacity defense to the judge would logically and necessarily preclude the defense from arguing other defense theories to exonerate Parche; inherent in these kinds of defenses is an admission that the defendant in fact committed the guilty act in question.

Insane Insanity Defense?

The traditional insanity defense has long been rooted in legal systems throughout the world, with references to it found in ancient Greece and Rome. It is based on the premise that defendants should not be held criminally liable for their actions if psychological conditions had made an act involuntary or prevented the defendant from knowing right from wrong. Jurisdictions around the world however, have differed sharply on what mental deficiency is sufficient to meet this standard.

In the United States, a majority of jurisdictions have adopted the familiar M'Naghten rule, originally formulated by British Prime Minister Daniel M'Naghten. The rule states that a defendant can succeed with an insanity defense if “at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong.” As applied in most states, there is a presumption of sanity that can only be rebutted with specific expert testimony or other scientific evidence of the defendant's deficient state of mind.²¹

²⁰ GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* §10.4 (Oxford University Press 2000).

²¹ Over time, the insanity defense in the United States has become increasingly disfavored. Public opinions towards it are generally negative, especially in the wake of highly publicized acquittals because of a successful insanity defense. One significant example is the case of John Hinckley, who shot President Reagan and his Press Secretary James Brady in 1981 because of a delusional plan to impress actress Jodie Foster, whom he was obsessed with. Hinckley was found not guilty by reason of insanity, and has since

The history of lack of capacity doctrines in Germany is varied. Surprisingly, in the early part of the twentieth century, Germany was one of the easiest places to prove an insanity defense. A simple diagnosis of psychosis could be enough to prove a defendant's insanity.²² In the 1950s and 1960s, the prevailing view shifted to require a more careful and documented scientific analysis, with an expert psychologist's opinion required at trial. The culpability of the defendant would then be one of three outcomes: he could be found sane and fully culpable; he could be found to have diminished capacity that would lower his level of responsibility;²³ or he could be found insane and not have any legal responsibility at all.

By 1993, Germany had adopted a derivation of the traditional M'Naghten rule, as Section 20 of the German Penal Code.²⁴ As translated, that section read:

“Incapacity Criminal Capacity Because of Mental Disorder

A person is not criminally responsible if at the time of the act, because of a psychotic or similar serious mental disorder, or because of a profound interruption of consciousness or because of feeble-mindedness or any other type of serious mental abnormality, he is incapable of understanding the wrongfulness of his conduct or of acting in accordance with this understanding.”²⁵

From the text of Section 20, Germany has appeared to reject the first part of the M'Naghten, which absolves liability for defendants who had no idea what they were doing, but embraced the rest of the rule in declaring defendants not responsible if they were incapable of understanding right and wrong because of a medical condition. While some differences between Section 20 and the traditional M'Naghten formulation may be attributed to difficulties in translation, it is clear that Section 20 extends the insanity defense to certain individuals not covered by traditional M'Naghten. Specifically, Section 20 acknowledges mental disorders and defects, but also includes “profound interruption of consciousness”, “feeble mindedness” and a sort of catch-all “serious mental abnormality” as possible categories to raise a possible insanity defense.

Despite that however, the traditional M'Naghten formulation and Germany's modified version was extremely problematic as applied to Gunther Parche. The first part of the traditional rule, referring to an accused not knowing the nature and quality of the act he was doing, clearly did not apply.²⁶ This prong refers to a defendant who simply had no idea what he was doing. Classic examples include a person who stabs someone

remained under institutional psychiatric care. His acquittal was met with widespread disgust, leading to widespread federal and state reforms geared towards abolishing or restricting the defense all together.

Today, public skepticism towards the insanity defense remains in the United States. However, the public tends to overestimate the frequency of its use and its success rate. Statistics show that the defense is offered in less than 1% of criminal trials, and is only successful in a quarter of the cases in which it is offered.

²² Jocelyn Limburner and Ronald Roesch, *The Insanity Defense: Five Years of Research, 1993-1997*, 22 INT'L. J.L. & PSYCHIATRY 213, 226-27 (1999).

²³ Diminished capacity is a separate doctrine also in the United States. *See infra*, pp. 19-20.

²⁴ Penal Code of the Federal Republic of Germany, § 20.

²⁵ *Id.*

²⁶ Even if the first M'Naghten prong did apply, Parche's defense would have been unable to argue it because Germany has not adopted it.

else, thinking that he or she is merely chopping vegetables, or a defendant who cuts off a sleeping man's head, believing that the victim would have great fun looking for it when he woke up.

As things stood, there could be no doubt that Gunther Parche knew what he was doing. He specifically admitted that he stabbed Monica to hurt her and keep her from continuing to play tennis at a high level. This necessarily implies that Parche knew full well that a stabbing was used to wound. There could be no logical argument that he thought he wasn't stabbing anyone, or that he didn't think his victim would really get hurt, or that he himself thought he was doing something else. His intention from the beginning was to hurt, and that's exactly what he did.

The second part of the traditional M'Naghten Rule also did not serve Parche well. This allows a defendant to prove his insanity even if he knew what he was doing, as long as the result of his mental defect was that he didn't know what he was doing was wrong. Courts in the United States and throughout the world have long established that "wrong" in this situation refers to legally wrong, and not morally wrong. This is to say that defendants who know that their actions violate or are likely to violate the laws of their society can still be punished even if they claim that they were somehow following their own moral code or a moral paradigm imposed on them because of their belief systems. Intuitively, that makes sense—societies would well frown on obviously guilty defendants escaping punishment by reason of insanity, simply because they were doing what they themselves thought was right.²⁷ One exception to this is a long line of "deific decree" cases, where accused defendants claim they were acting in accordance to a command from God. In these cases, the defendants may admit that they knew what they were doing would break the law, but that the command of a higher power superseded the laws of man. One of the more infamous examples of this in recent memory is the case of Andrea Yates, a depressed and suicidal mother in Texas who drowned all five of her young children in a bathtub in 2001. Originally found guilty of first degree murder and sentenced to life in prison, she was granted a new trial because of unrelated errors at trial. At the new trial, her attorneys proffered the "deific decree" defense, as a psychologist testified Yates at the time fervently believed that her own evil nature had corrupted her children, and the only way to save them from hell was to kill them herself. The jury agreed and found her not guilty by reason of insanity.²⁸ Nowadays, when a deific decree defense is presented, the standard as embodied in jury instructions is that the command from God must have been so compelling as to completely destroy the defendant's free will. Germany's Section 20 has a nod to the deific decree doctrine within the phrase "[incapable of] acting in accordance with this understanding [of right and wrong]."

Parche would be unlikely to win on the second prong of the M'Naghten rule and even the laxer German Section 20 because there was more than enough evidence to show that he knew what he was doing would break the law. After all, he had taken steps to hide the knife until the proper time, and stabbed Monica at the perfect moment during the

²⁷ Of course, this hypothetical isn't entirely accurate because a defendant at any rate still has to prove in addition to his separate "moral code", that he was suffering from a mental defect through expert testimony.

²⁸ Yates is now at a low security mental hospital in Kerrville, Texas.

changeover. If he had believed stabbing Monica would not break the law, he would have openly carried the knife and simply gone for her right away.

A deific decree defense under M’Naghten would probably have been a loser also. Gunther never claimed that God or some other closely held religious belief system compelled him to do the stabbing. While he said that Graf’s loss of the #1 ranking had caused him to “lose the will to live,” there is still a distinction between one personally losing the will to live, and losing the ability to have free will entirely. Neither did he try to claim that Graf’s ascension to the #1 ranking, or Monica’s corresponding fall from that position, was part and parcel of any sort of religious or moral belief system that could plausibly buttress a deific decree defense.

Gunther Parche’s legal team was worried. It looked like it would not be possible to get him completely off the hook with any version of a traditional insanity defense.

Diminished Capacity: An Alternate Theory of a *Mens Rea* Defense

The legal theory of diminished capacity would prove to be Gunther’s only hope. Considered as a younger brother to the traditional insanity formulation, diminished capacity encompasses a wide variety of possible mental impairments that limit the extent of a defendant’s culpability. The rationale for a diminished capacity doctrine is similar to that for an insanity defense: it is not fair to punish a defendant as severely for conduct that is not entirely voluntary. One big difference between diminished capacity and a traditional insanity defense is that the former does not necessarily require an official and documented psychological condition. Some jurisdictions allow extremely low intelligence by itself to serve as evidence of diminished capacity. Others allow evidence of an “irresistible impulse” or any other extreme emotional state to support a diminished capacity defense. Critics of the doctrine claim that these definitions are far too imprecise and allow for escape from criminal liability on undeserving grounds. For example, the term “Twinkie Defense” has been pejoratively attached to any defendant’s suggestion that an unusual biological factor forced him to commit the crime, even if that factor’s link with criminal activity is tenuous. The term arose out of the famous 1979 trial of San Francisco Supervisor Dan White, who assassinated Mayor Moscone and another city official. At trial, a noted psychiatrist offered testimony that White was depressed and his consumption of twinkies and soda either caused or reflected uncontrollable mood swings. This resulted in a ruling of diminished capacity that eliminated the premeditation requirement requisite for a first-degree murder conviction. White was convicted of voluntary manslaughter instead.²⁹ Besides twinkies, more common reasons offered for diminished capacity include: Premenstrual Syndrome, Battered Woman Syndrome, alcoholism, chronic depressive states, mercy killings, and killings done by disappointed lovers or enraged spouses upon discovering adultery.

Another big difference between diminished capacity and traditional insanity defense doctrines is that diminished capacity in many jurisdictions is often offered as an

²⁹ The decision was unpopular, leading to California ballot initiative in 1982 that eliminated diminished capacity entirely.

excuse or evidence of mitigating circumstances, sufficient to reduce a sentence or charge but not to eliminate all punishment outright. This was what happened with Dan White as a result of his presentation of the original “Twinkie Defense.”

Unlike the insanity defense, which is cognizable in some form across almost all countries and jurisdictions, diminished capacity varies widely in its degree of acceptance and application. Some jurisdictions do not recognize it at all. Others, like Australia and England, only recognize it in murder cases and only then to reduce the offense to manslaughter.

In 1993, German law recognized the doctrine of diminished capacity and had codified it in Section 21 of the Penal Code. It reads in its entirety:

“Diminished Capacity

If, at the time of the crime, the capacity of the perpetrator to understand the wrongfulness of his conduct or of acting in accordance with this understanding is substantially diminished due to the existence of grounds set forth in § 20, his punishment shall be reduced in accordance with the provisions of § 49(1).”³⁰

Essentially, this section allows for the aforementioned “psychotic or similar serious mental disorder”, “profound interruption of consciousness”, “feeble-mindedness”, and “serious mental abnormality” to serve as grounds for lessening the punishment for a defendant. Notably, the doctrine is not limited to murder cases.

After reviewing all of their options, Gunther Parche’s lawyers prepared to argue that Gunther’s diminished capacity due to his obsession with Steffi Graf should mitigate the charge of attempted murder.

Trial

Gunther Parche went on trial in October 1993, some six months after the stabbing. Yet public interest in the event was relatively subdued. The initial outpouring of support for Monica had faded, and it didn’t help much that the young star had become a virtual recluse. At that point, Monica had yet to gain a widespread following in the United States, and even her most diehard fans would not have been able to observe the proceedings anyway, as they were not televised. This was not to be any sort of show trial.

Germany’s legal system also offered an advantage to Parche in that there was not then, nor is there now, trial by jury. Instead, criminal cases are all heard by judges who are ostensibly well-trained in the law and its application. One German legal commentator has likened German criminal law to a sort of “legal science”, reserved exclusively for scholars who can devote entire careers to its study.³¹ Consequently, there is no

³⁰ Penal Code of the Federal Republic of Germany, Section 21, *available at* <http://wings.buffalo.edu/law/bclc/germind.htm>.

³¹ Markus Dubber, *The Promise of German Criminal Law: A Science of Crime and Punishment*, 6 GERMAN LAW JOURNAL No. 7 1049 (2005), *available at* <http://www.germanlawjournal.com/article.php?id=613>

expectation of or right to participation by laypeople, whether in the jury box or elsewhere. For particularly sensational crimes like the Seles stabbing, this system offered a decided advantage to defendants like Gunther Parche. Parche could be confident that the judge would put aside his or her personal feelings and dispassionately consider his diminished capacity defense. An American jury would have been terrible for him, as unsympathetic as Parche and his crime appeared.³²

Another surprise that would turn in Parche's favor was Monica Seles's refusal to testify against him. While her family went on record in their condemnation of the attack and Gunther Parche himself, Monica was in no shape to return to Germany in October to testify against her attacker. At this time, she was having repeated nightmares about the attack and frequently dreamed of Parche, reliving the incident over and over in her mind. Rumors had begun to circulate about Monica because of her seclusion and the news that she had physically recovered from the attack. The most hurtful of them included the idea that she was somehow faking the extent of her injury for personal gain. Monica's absence from the trial would hurt the prosecution's case by not putting a face to the hurt that Parche had caused.

The trial began. German prosecutors presented a straightforward, if uninspired case that left no doubt as to Parche's guilt. Parche's team first put on an expert psychiatrist who had previously examined the defendant. She testified that Parche had a highly abnormal personality that affected his ability to reason. The obsession with Steffi Graf and her loss of the #1 ranking was introduced as evidence of his diminished capacity.

Next, Gunther himself took the stand. He admitted his guilt and showed remorse for the crime. He explained himself clearly: "I didn't want to kill her...I just wanted to hurt her slightly so that Monica wouldn't be able to play for a couple of weeks."³³

The Verdict

In a surprising decision, Judge Elke Bosse of the Hamburg District court dismissed the attempted murder charge and instead found Parche guilty of the lesser included offense of causing grievous bodily harm. Judge Bosse believed the psychiatrist's account and credited Parche's full confession and subsequent showing of remorse as genuine. She also believed Parche's claim that he had only intended to hurt Monica and not kill her, though she acknowledged Gunther had clearly been planning the attack for awhile. Altogether, Judge Bosse only gave the deranged stabber a 2-year suspended sentence as well as probation. The decision was made on October 14, less than five months after the stabbing.³⁴ Parche had been in jail during this time, as part of the

³² Even in the American system, Parche would probably have asked for a bench trial. Some jurisdictions, cognizant of general public skepticism towards mental capacity defenses, allow judges to rule on them as a matter of law.

³³ *German Tells Why He Stabbed Seles*. N.Y. TIMES, Associated Press, October 13, 1993, available at <http://query.nytimes.com/gst/fullpage.html?res=9F0CE0DD1130F930A25753C1A965958260>

³⁴ *Seles's Attacker Gets Suspended 2-Year Sentence*, N.Y. TIMES, Associated Press, October 14, 1993, available at <http://query.nytimes.com/gst/fullpage.html?res=9F0CE2DA1E3FF937A25753C1A965958260>

European system wherein pretrial detention is quite common.³⁵ He would spend an additional night in jail immediately after the verdict was announced, as much for his own protection as anything else—and that was all. The court did not even order the disturbed fan to seek psychological treatment. Gunther Parche was a free man.

To put into context, both attempted murder in Germany and the United States carry heavy sentences. However, the crime of inflicting grievous bodily harm and assault with a deadly weapon, its nearest U.S. counterpart, carries much more wide ranging penalties. In California, that crime carries a punishment of 3 years and a \$10,000 fine for the middle term.³⁶ By contrast, German judges have wide discretion to impose sentences and there are no sentencing guidelines to restrict their options.³⁷ Inherent in that is the ability to consider factors like contrition and potential for further danger to society, which Judge Boss evidently did in imposing her light sentence.

Nonetheless, international reactions were immediately negative, with howls of protest heard across the tennis and criminal law world. "You guys need some serious help with the laws here in Germany," put tennis legend Martina Navratilova bluntly. For her part, Monica expressed shock and huge disappointment, crying for days when she heard the news. Through her management group, she released a statement condemning the decision: "What kind of message does this send to the world? Mr. Parche has admitted that he stalked me, then he stabbed me once and attempted to stab me a second time. And now the court has said he does not have to go to jail for this premeditated crime. He gets to go back to his life, but I can't because I am still recovering from his attack, which could have killed me"³⁸ In her first interview since the verdict was announced, Monica further denounced the decision. "Everyone expected him to get at least 10 or 15 years. It was obvious what he did to me. It was on tape."³⁹ Monica's initial shock turned into sadness, and then a burning anger.

German Justice and the Rehabilitative Model of Punishment

As shockingly surprising the verdict was to Monica Seles's fans in the United States and around the world, it did not represent a miscarriage of German justice in the strictest sense. In other words, the lack of severe punishment for Parche as a first time violent offender was hardly out of the ordinary by German standards. To understand this, it is necessary to look at the German criminal justice system as a whole.

Germany has one of the most progressive prison and punishment systems in the world. The death penalty has been abolished and is never used under any circumstances since 1949 as a part of Germany's Constitution—a likely reaction to the horrors of the

³⁵ See Whitman, *infra* note 41.

³⁶ Cal. Pen. Code. § 245.

³⁷ See MICHAEL H. TONRY, SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 315-21 (Oxford University Press 2001).

³⁸ *Id.*

³⁹ *Seles Speaks Out*, N.Y. TIMES, Associated Press, December 10, 1993, *available at* <http://query.nytimes.com/gst/fullpage.html?res=9F0CE0DC103AF933A25751C1A965958260>

Nazi regime.⁴⁰ As far back as the 1960s, Germany initiated modern prison reforms that mirrored the rehabilitation movements in America and Western Europe. But while the rehabilitative ideals were abolished in the United States in the midst of the crime wave of the 1980s, Germany held true to its progressive stance. Significant criminal law reform in 1969 eliminated many morals offenses, culminating in a reformed Code of Punishment (*Strafvollzugsgesetz*) enacted in 1976, which is still in effect today.⁴¹ While the public attitude toward rehabilitation versus retribution has been cyclical, with enthusiasm for the former most diminished in the wake of publicized terrorist events, Germany has continued to lead the way towards prison reform and lenient ideals of punishment as a whole.⁴² This has manifested itself in several ways.

First, day fines as an alternative to incarceration have firmly established themselves in the German criminal justice system.⁴³ Defined as fines correlated to a percentage of an offender's daily personal income after consideration of any dependents, they are commonly applied to all but the most serious violent offenses.⁴⁴ Under a day fine system, an offender can pay a fine for each day that he would have spent in prison.⁴⁵ The extensive fine system is built on the premise that an offender will regret his act more by having to reduce his standard of living from paying the fine rather than just serving a brief prison term.⁴⁶

Germany has also embraced community service as an appropriate alternative sanction.⁴⁷ Such service usually encompasses maintenance, roadside work, and other public cleanup projects.⁴⁸ Introduced in France in 1983, community service has become more and more favored for property-offenders in that country, who are usually considered undeserving of imprisonment for first time or minor offenses.⁴⁹ As German criminal law has continued to reform over time, community service has become more and more common there.⁵⁰

Finally, there is probation, the sanction Gunther Parche received for the stabbing, is also a common German practice for first time offenders.⁵¹ The system in Germany mirrors that of the United States, whereby those on probation have restrictions on daily activities and where they can live. Central to the idea of probation is the concept of a

⁴⁰ Carol D. Rasnic, *Making the Criminal Defendant's Punishment Fit the Crime; The Contrast Between German and U.S. Laws of Sentencing*, 7 N.Y. Int'l L. Rev. 62, 66-67 (1994).

⁴¹ JAMES WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 74-75 (Oxford University Press 2003).

⁴² *Id.*

⁴³ *Id.* at 72.

⁴⁴ Rasnic, *supra* note 40, at 69.

⁴⁵ *Id.*

⁴⁶ *Id.* Of course, this begs the question of whether an offender will regret his wrong more when faced with the prospect of a *lengthy* prison term over a day fine; a question never properly answered by the German legislature.

⁴⁷ Whitman, *supra* note 41, at 72.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

meaningful liaison with a probation officer and other counselors to receive support for the offender to live responsibly and lawfully in society.

Collectively, day fines, community service, and probation all represent a distinctively European paradigm centered around punishing as mildly as possible.⁵² Inherent in that is the assumption that offenders can and must be rehabilitated, with the state having the burden to facilitate the transition of an offender back to a productive member of society as efficiently as possible. Indeed as one European criminal justice scholar points out, “In Germany...individualization, oriented toward treatment and resocialization, remains unchallenged orthodox doctrine in the practice of punishment, even if academics occasionally raise doubts about it.”⁵³

In other words, public support for rehabilitative and reentry programs is markedly higher in Germany than in the United States. In the former country, rehabilitation as the ideal pursued by any punishment system is simply accepted as given with no further debate. Punishment in Europe is never divorced from respect and regard for the individual being punished. By contrast, talk of rehabilitation in the United States seems to inevitably become enmeshed in political debates of “coddling criminals” and unduly becoming a welfare state, against the principles of individualization and self-determination that have formed the foundation American society.

Inherent in this is a sharp distinction between Germany and the United States in the way society views the rights of victims. In the United States, the plight of victims is often considered in the sentencing phase of trials, and a myriad of victims’ groups do everything from providing counseling and support to advocating for tougher punishments for criminals. Punishment in the United States is at least partly an acknowledgement of what a victim of a crime has suffered, and an implicit acceptance of retribution as a purpose of punishment. In Germany though, the victim is not considered to be a significant part of the criminal justice process.⁵⁴ For example, the above mentioned fines are paid directly to the state, and no mechanism exists for redistribution of monies as a way of restitution to victims.⁵⁵ Thus, the celebrity and general popularity of Monica Seles as Parche’s victim did not hurt him in the eyes of the German justice system. Rather, the German criminal code focuses almost exclusively on the defendant and practical means of preserving the peace rather than serving as a way to provide closure for victims. It firmly emphasizes deterrence over retribution.⁵⁶

Reasons for these differences stem from both historical happenings and modern cultural differences between the United States and Europe. One reason rehabilitation is more readily accepted in Europe than in the United States is because “public fear and outrage do not have the impact on continental politics that they do in the United

⁵² Whitman, *supra* note 41, at 72.

⁵³ *Id.* at 73.

⁵⁴ Rasnic, *supra* note 40, at 70.

⁵⁵ *Id.* Of course, a civil law system does exist for victims to collect from wrongdoers. In some cases under the civil tort system, an offender may be forced to *personally* restore what has been damaged, which may provide a level of satisfaction to victims not attained from mere monetary compensation. *Id.*

⁵⁶ *Id.*

States.”⁵⁷ This is to say that while Germany certainly has its share of axe murderers and other crimes of horror, there is a disconnect between the publicity of those events and their use in political discourse or rhetoric. Germans are just not as afraid as Americans. So while the infamy of Gunther Parche’s deed was as well publicized in Germany as it was elsewhere, the media attention stands on its own, and is not paired with a corresponding public cry for vengeance.

For the few who are actually incarcerated in Germany, conditions inside prisons are also generally better than in the United States. Germany is an unapologetic social welfare state. Inmates receive regular benefits, and even paid vacation.⁵⁸ There are fewer overcrowding issues and race-based violence.⁵⁹ Some of this may be offset by the tendency of the German and European systems to incarcerate during the investigative phase of crime, prior to adjudication.⁶⁰ But even if there was some debate over whether inmate experiences are better in German or American prisons, it is indisputable that the societal *desire* to improve such prison conditions in Germany and Europe as a whole vastly trumps the corresponding desire in the United States. In the United States, prison spending on facilities and guards may be grudgingly accepted by the public as a necessary evil to support an expressed desire to incarcerate criminals, but many conservatives and even moderates would balk at extending that spending into making general conditions more pleasant for inmates, let alone for complex rehabilitation or reentry programs.

As an example, in the summer of 2007, California faced the threat of federal judicial intervention into its prisons in the form of a population cap, as inmate population exceeded 172,000 in a system designed with a capacity for 100,000. Even though the prison population had long been projected to increase and effect severe overcrowding conditions, state lawmakers continued to do nothing.⁶¹ Finally, when a string of prisoner lawsuits drew federal attention, lawmakers came together in that summer to pass Assembly Bill 900, a \$7.4 billion dollar prison expansion bill designed to increase

⁵⁷ Whitman, *supra* note 41, at 76.

⁵⁸ *Id.* at 89. Inmates in German prisons also receive recognition of individual dignity unheard of in the United States. They receive health benefits, unemployment insurance, procedural protections from being fired from their jobs, and paid vacations of three weeks a year. Whitman suggests that the culture of insults from guards and arbitrary searches and the dehumanization of prisoners within the American system is just not present in Germany. *Id.* at 88-89.

Furthermore, “every German state grants regular Christmas amnesties, which free all inmates serving short sentences. German lawyers indeed can try to plan around these amnesties, in the effort to guarantee their clients the shortest possible stay in prison,...by delaying their admission to prison until one month before the effective date of the annual Christmas amnesty.” *Id.* at 93.

⁶⁰ Whitman, *supra* note 41, at 78-79.

⁶¹ Sonja Steptoe, *California’s Growing Prison Crisis*, TIME MAGAZINE, June 21, 2007, available at <http://www.time.com/time/nation/article/0,8599,1635592,00.html?xid=feed-cnn-topics>

capacity by 40,000.⁶² In defending the expenditure, Governor Schwarzenegger and other lawmakers characterized it as an issue of public safety: “This bill was crafted to prevent the early release of prisoners and stop the revolving door that the status quo represents.”⁶³ Nowhere in the political rhetoric was there mention that an improvement in inmate living conditions was any kind of impetus behind the bill’s passage; instead, by framing the issue as one of public protection from dangerous criminals, lawmakers were able to make the spending politically palatable. This of course, happened only after the specter of federal judicial intervention had risen and the accusation made that prison conditions did not even conform to a bare minimum Constitutional standard.⁶⁴

By contrast, German and other European politicians actually compete to distinguish themselves on who is more *humane* in the treatment of those in the criminal justice system.⁶⁵ After one prison abuse scandal broke in France in 2000, politicians all accused one another of lacking appropriate empathy for the dignity and rights of convicted criminals.⁶⁶ Societal consensus on a commitment to reform and rehabilitation, as well as recognition of the fundamental rights of prisoners as members of society, is as unquestioned in Germany and the rest of Europe as much as such commitment would be regarded with incredulity by many if not most of the American public.

Furthermore, Gunther Parche’s sentence must be understood in a broader German and European context of continually *downgrading* offenses and lessening punishment. The trend overseas since the 1970s has been to continually narrow down the definition of deviancy and eliminate many minor or status offenses entirely, while terms like “zero tolerance” and “war on drugs” have continued to dominate the American lexicon.⁶⁷ Where punishment is necessary, European courts look first toward the aforementioned alternatives, while many American jurisdictions have continued to pile on a plethora of sentencing enhancements over the years in the name of public protection.

California’s experience has been typical. Since its determinate sentencing law was enacted in 1975, more than 100 felony sentencing enhancements have been added to it.⁶⁸ These enhancements are frequently proposed by lawmakers after particularly horrific and well-publicized crimes have occurred. Eager to have their names associated with a new bill and be seen as having tough on crime stances, these lawmakers push for ever-increasing sentences for factors ranging from committing a crime on an elderly person to

⁶² Senate Rules Comm., Official Cal. Legislative Info., Assemb. B. 900 Assembly Bill Analysis, at 2--4, available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0851-0900/ab_900_cfa_20070426_103932_sen_floor.html.

⁶³ Press Release, Press Statement by Assembly Public Safety Committee Chairman Jose Solorio (D-Anaheim) on Governor’s Signing of Historic Prison Construction and Reform Bill (AB 900), May 3, 2007, available at <http://democrats.assembly.ca.gov/members/A69/newsroom/20070503AD69PR01.htm>:

⁶⁴ See U.S. Const. Amend. VIII, barring “cruel and unusual punishment.”

⁶⁵ Whitman, *supra* note 41, at 76.

⁶⁶ *Id.*

⁶⁷ Whitman, *supra* note 41, at 83.

⁶⁸ STATE OF CALIFORNIA LITTLE HOOVER COMMISSION, SOLVING CALIFORNIA’S CORRECTIONS CRISIS (2007) (hereinafter “LITTLE HOOVER”), pp. 33-34, available at <http://www.lhc.ca.gov/lhcdir/185/Report185.pdf>.

⁶⁸ *Id.* at 45-46

driving under the influence near the Golden Gate Bridge.⁶⁹ Little consideration is made that the existing laws usually already provide ample punishment for the crime.⁷⁰ In their defense, politicians point to the usual widespread voter support for such measures, as reflected by informal surveys and results when propositions are placed on the ballot.⁷¹ These enhancements, when considered with programs like the well-known Three Strikes law passed in California and other states in the 1990s, reflect societal exasperation with the criminal in a general focus on increasing punishment, for reasons of safety and, arguably, general vindictiveness⁷²

Thus, Monica's stabbing may have engendered enough outrage for a politician to intervene and suggest new legislation if it had occurred in the United States. "Monica's Law" could well have taken the form of increased penalties for everything from a crime perpetrated at a sporting event to a crime perpetrated to unfairly influence an athletic rivalry. As it was, the crime occurred in Germany and as such, was accompanied with a media spectacle, but not an indignant call to action nor widespread public fear.

Appeal

Those in the United States unfamiliar with the German criminal justice system were understandably dismayed by the sentence of probation for Parche in response to the stabbing. Whether it was in response to widespread international pressure or the realization that mildness and mercy within the criminal justice system could only go so far, German prosecutors expressed their frustration with the decision, and announced their decision to appeal the sentence. Fortunately for them, German law did not include prohibitions on double jeopardy. This allowed prosecutors to seek justice for Monica through the appellate court.

In addition, the surprise verdict finally spurred the WTA into action in support of Monica. It released a statement expressing outrage at the verdict on behalf of all tennis players: "Our players were outraged by the decision made in the German court, not only because of Monica but also because of their concern for worldwide security measures...Clearly the court's decision sends a terrible message with wide-ranging impact."⁷³ Consequently, the WTA hired a German lawyer to assist with the appeal, Dr. Hajo Wandschneider, and released a statement condemning the verdict. It declared its

⁶⁹ The fine for a DUI near the Golden Gate Bridge is doubled. See *DUI In Safety Enhancement Zone*, http://www.caduilaw.com/drunk_driving_laws/enhancements/safety_zone.html (last accessed March 27, 2008).

⁷⁰ LITTLE HOOVER, *supra* note 68.

⁷¹ Of course, surveys rarely frame the question in terms of the cost of the additional sentencing enhancement. (e.g, if a voter would still support the enhancement if they knew the additional cost of incarceration would mean a corresponding cut in expenditures for education or healthcare).

⁷² The Little Hoover Commission refers to this effect as "drive-by" sentencing, where politicians ram through the enhancement and then forget about it, leaving it to languish on the books until the next well-publicized crime occurs and another enhancement made with its corresponding political capital. In the meantime, prisons continue to fill and the high rates of recidivism in the United States indicate that society may not be much safer once the inmates leave the system. See *id.*

⁷³ *WTA Hires Attorney*, N.Y. TIMES, Associated Press, November 12, 1993, available at <http://query.nytimes.com/gst/fullpage.html?res=9F0CE1D91431F931A25752C1A965958260>

intention to seek "a significant period of incarceration commensurate with the viciousness and lawlessness of [Parche's] act."⁷⁴

Seles's appeal as a co-plaintiff with the German prosecution was heard by a higher German district court in Hamburg on March 22, 1995-- nearly two years after the stabbing.⁷⁵ Once again, Seles did not testify, but she wrote a passionate letter to the court, read by her lawyer, Gerhard Strate. "I want proper justice...The attack tremendously and irreparably changed my life and stopped my tennis career...[It] destroyed my life."⁷⁶ Witnesses testified that Parche had been attempting to stab Monica again before he had been restrained at the Hamburg tournament.⁷⁷ Prosecutors hoped that this additional evidence would contradict Parche's claim that he had only attempted to hurt Monica and not kill her.⁷⁸ Parche's lawyers reiterated that he was no longer a danger, and if anything merely needed treatment rather than prison time.⁷⁹ Monica sought a 5-year prison term for Parche, while German prosecutors asked for 33 months. Here again, the distinction between American conceptions of punishment and the German bias towards mercy is apparent. Attempted murder in California carries a maximum sentence of life imprisonment, if it was willful, deliberate, and premeditated.⁸⁰ Otherwise, the middle term is 84 months imprisonment, more than double what the German prosecutors were asking for.⁸¹

Nonetheless, their pleas would not be answered. On April 4, 1995, appellate judge Gertraut Goring announced she was affirming the earlier court's decision. She expressed doubt as to the credibility of the witnesses presented on Monica's behalf⁸² and noted that Parche had given a full confession, had never been arrested before, and had an "abnormal personality structure."⁸³ "Our law does not function on the principle 'an eye for an eye,'"

⁷⁴ *Id.*

⁷⁵ In the meantime, Monica had also filed a civil suit against the German Tennis Federation, seeking at least \$10 million for its failure to provide adequate security measures that would have prevented the attack. This may have been inspired by a multi-million dollar contract suit filed *against her* by Italian apparel firm Fila, alleging that she had failed to live up to her promotional responsibilities after the stabbing.

Seles Seeks Money From Event Organizer, N.Y. TIMES, May 20, 1994, available at <http://query.nytimes.com/gst/fullpage.html?res=9D01E7DE1338F933A15756C0A962958260> ; *Seles is Sued By An Apparel Firm*, N.Y. TIMES, December 8, 1994, available at <http://query.nytimes.com/gst/fullpage.html?res=9800E1D61239F93BA35751C1A962958260>

⁷⁶ *Seles Is Seeking Retribution*, N.Y. TIMES, March 22, 1995, available at <http://query.nytimes.com/gst/fullpage.html?res=990CE0DD153BF931A15750C0A963958260>

⁷⁷ *Parche's Re-Trial Begins*, N.Y. TIMES, Associated Press, March 24, 1995, available at <http://query.nytimes.com/gst/fullpage.html?res=990CEFD7173BF937A15750C0A963958260>

⁷⁸ *Id.*

⁷⁹ *Retrial in Stabbing of Seles*, N.Y. TIMES, Associated Press, March 30, 1995, available at <http://query.nytimes.com/gst/fullpage.html?res=990CE0DE143AF933A05750C0A963958260>

⁸⁰ Cal. Penal Code § 664(a) (West 2007).

⁸¹ *Id.*

⁸² There was some evidence that the witnesses had given conflicting statements in police interviews after the stabbing.

⁸³ Stephen Kinzer, *Seles's Assailant Gets Suspended Sentence*, N.Y. TIMES, April 4 1995 available at <http://query.nytimes.com/gst/fullpage.html?res=990CE7DC1338F937A35757C0A963958260>

Goring declared.⁸⁴ Once again, there was worldwide disbelief. A New York Times article had to justify the verdict to readers by explaining Germany's low violent crime rate and pointing out that many first-time assault offenders received suspended sentences.⁸⁵ Monica's reaction was again of shock and disbelief. Both she and her supporters believed the question of whether Parche had the intent to murder her or not was irrelevant; the fact was he had deliberately stabbed her in the back and received only probation for it. Monica condemned the verdict and defended her decision not to testify in person at the retrial.

"I was not going to turn my back on this criminal again. I am still haunted by the memory of seeing him behind me as he attempted to stab me a second time in 1993. Why should I have to see him again just to try to see that justice is done? I continue to be unable to understand the court's decision to once again let this criminal go free."⁸⁶

An appeal for a third trial turned out to be fruitless, and it represented the end of legal proceedings against Gunther Parche arising from the stabbing. Monica vowed never to play tennis in Germany again, and she didn't. Meanwhile, Gunther Parche disappeared from the public eye entirely.

An American Comparison: Tonya Harding and Nancy Kerrigan

German mildness in punishment can be seen more clearly in context when compared to the aftermath of the well publicized Tonya Harding / Nancy Kerrigan saga in 1994. Tonya Harding was a young and promising U.S. figure skater, becoming the first American woman to ever successfully land a triple axel in 1991, when she also finished second at the prestigious World Championships.⁸⁷

In 1994, Tonya was involved in intense competition to qualify for the Winter Olympics that year, to be held in Lillehammer, Norway. At a practice for the U.S. National Championships in Detroit on January 6, 1994, a masked man attacked one of Tonya's main competitors, Nancy Kerrigan, by clubbing her in the knee with a police baton.⁸⁸ The injury kept her out of the championships, but the U.S. Olympic Committee nonetheless reserved a spot for Nancy on the Olympic team.⁸⁹

A police investigation first focused on the idea of a deranged fan akin to Gunther Parche. (The Seles stabbing had occurred only 9 months earlier)⁹⁰ However, the truth came out a short time later when a mercenary named Shane Stant turned himself in and confessed the act had been done under the direction of Jeff Gillooly, Tonya's ex-

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Fear of Attacker Remains for Seles*, NY.TIMES, Associated Press, April 13, 1995, available at <http://query.nytimes.com/gst/fullpage.html?res=990CEFDC113DF930A25757C0A963958260>

⁸⁷ *Bio: The Tanya Harding Website*, <http://www.tonyaharding.com/biography.htm> (last accessed March 29, 2008).

⁸⁸ *Skater Nancy Kerrigan Assaulted*, Mass Moments, Massachusetts Foundation for the Humanities, available at <http://www.massmoments.org/moment.cfm?mid=3>.

⁸⁹ *Id.*

⁹⁰ *Id.*

husband.⁹¹ Gillooly had been trying to effect a reconciliation with Tonya and lured others into the conspiracy with promises of money. While Tonya initially denied any knowledge or involvement, she later pled guilty on March 16 to hindering the investigation of the attack, as strong evidence linked her to the conspiracy. She was sentenced to three years' probation, 500 hours of community service, and a \$160,000 fine.⁹² The U.S. Figure Skating Association banned her for life from all future events.⁹³ Four others associated with the attack received jail sentences for the assault, including Jeff Gillooly, Shane Stant, the getaway driver in the attack, and Tonya's bodyguard, who had hired Stant.⁹⁴ They were sentenced to between eighteen months and two years after they pled guilty to racketeering and conspiracy to commit second degree assault.⁹⁵

Even though the true extent of Tonya Harding's involvement with the Nancy Kerrigan attack is still unknown, Tonya became reviled in the public eye after the attack. Newspapers and tabloids lambasted her while every TV commentator seemingly weighed in. Tonya's place on the Olympic team was reluctantly retained after Tonya threatened a lawsuit. Still, few people mourned when Tonya finished a disappointing 10th at the Olympics while a recovered Nancy Kerrigan went on to win silver, missing the gold medal by the slimmest of margins. Afterwards, Tonya remained banned for life from amateur figure skating and proceeded to dabble in modeling, celebrity guest appearances, and boxing.⁹⁶

Of course, the public hatred directed against Tonya Harding was likely a function of the perception that an athletic competitor would directly attempt to bring down her rival with violence. This seems to violate even the most basic tenets of fair play and sportsmanship. While the public felt an equal amount of horror at Gunther Parche and his crime, the fan was never subject to the same amount of scrutiny and criticism that Tonya Harding was, even years after the attack. When Parche's outrageous intentions behind the attack became known, it was almost easy to dismiss him as just a crazy fan. But if it had been discovered that Steffi Graf had any involvement, she would likely have had her career and legacy tainted as much as Tonya Harding has. In this way, there is a double standard in that the international public may be eager to label those like Gunther Parche crazy so as to better compartmentalize random acts of violence and avoid asking difficult questions about the sport; however, they do not want to extend that crazy label so far as to allow the perpetrator to escape legal responsibility and punishment through a diminished capacity defense.

It is telling that even after Tonya Harding's figure skating career ended, she has remained in the public spotlight for the attack and will be forever associated with Nancy

⁹¹ Bruce Lowitt, *Harding, Kerrigan Are Forever Linked by Skating Incident*, ST. PETERSBURG TIMES, November 29, 1999, available at

http://www.sptimes.com/News/112999/Sports/Harding_Kerrigan_are.shtml.

⁹² Mass Moments, *supra* note 88.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Figure Skating: Gillooly Sentenced to Two Years in Jail*, N.Y. TIMES, July 14, 1994, available at <http://query.nytimes.com/gst/fullpage.html?res=9B07E6DD103FF937A25754C0A962958260>.

⁹⁶ See Bio: *The Tanya Harding Website*.

Kerrigan. By contrast, Gunther Parche has almost completely disappeared from the public consciousness; most people can remember the Monica Seles stabbing, but few can remember the name of the person who did it, even in Germany.⁹⁷ The stabbing seems to reside in the collective national consciousness as an incident so bizarre and random in nature such that overthinking and analyzing it would be pointless. In the competitive world of figure skating though, the relative increased rationality and self-interest inherent in Tonya Harding removing her rival from competition incites and arguably frightens the public even more. We know and can relate to what Tonya's camp was trying to do and why in a way that we will never know with respect to Gunther Parche.

For an additional note on comparisons between the Tonya Harding and Gunther Parche incidents, it is interesting to compare the punishment the perpetrators received in each case. Jeff Gillooly, as the mastermind behind the scheme to hurt Nancy Kerrigan, received a two year sentence, probation, and \$100,000 fine after cooperating fully with police and pleading guilty to a lesser charge of racketeering rather than criminal conspiracy.⁹⁸ Gillooly and his accomplices did not raise any sort of mental deficiency defense. This was after Nancy Kerrigan fully recovered and was back to skating less than a month after the attack. By contrast, several months earlier, Gunther Parche received a sentence of only probation after being found guilty at trial⁹⁹ of causing grievous bodily harm for stabbing Monica Seles in the back. Even on appeal, prosecutors had asked for no more than 33 months imprisonment. While it may not be entirely fair to accurately compare a club on the knee with a stab in the back, the latter on the whole does appear to be more serious. Doctors agree Monica Seles was extremely lucky not to suffer permanent disability from her wound. Her recovery, while mostly psychological, would take years. Based on these facts, the lesson of Tonya Harding is that it is very likely that Gunther Parche would have faced much more serious punishment, even with a successful diminished capacity defense, if he had committed the crime in the United States rather than Germany.

One final irony is that Gillooly was released after serving only six months of his sentence in an Oregon prison.¹⁰⁰ He had completed a "boot camp" program designed to rehabilitate inmates and teach them to make responsible choices.¹⁰¹ Despite this, he was

⁹⁷ Most media stories on the stabbing now refer to Parche as a "deranged fan" or terms of that sort rather than expressly by name.

⁹⁸ *Gillooly Sentenced*, N.Y. Times, supra note 86.

⁹⁹ While sentences in the United States are usually more harsh for those found guilty at trial than those who agree to plea bargains, that is not the case in Germany, where there is no functional equivalent of plea bargains because of the investigative role of the courts rather than the adversarial model used in the United States. Defendants can make confessions, but that does not absolve the prosecution of the duty to put on their case. Judges conduct direct and cross examinations of the defendants directly, and though they have the right not to answer, defendants usually do. John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 206 (1978). It is debatable whether a "clandestine" plea bargaining model exists whereby confessing criminals at trial may receive lesser sentences, but officially, this is considered improper. *Id.* at 217.

¹⁰⁰ *Sports People; Figure Skating; Gillooly Completes Sentence*, N.Y. TIMES, March 14, 1995, available at <http://query.nytimes.com/gst/fullpage.html?res=990CE4D7173AF937A25750C0A963958260>.

¹⁰¹ *Id.*

arrested twice on domestic violence charges between 2000 and 2003.¹⁰² For his part, Parche received no rehabilitative care whatsoever, but stayed out of trouble since the stabbing.

1972 Munich Massacre At the Summer Olympics

Another way to look at the appropriateness of Gunther Parche's diminished capacity defense is to examine another infamous attack on athletes in Germany, albeit in a different context. That attack was the killing of Israeli athletes at the Olympics by Islamic terrorists.

The 1972 Summer Olympics were held in 1972 in Munich, formerly in West Germany before reunification. Following an uneventful first week, fans, athletes and organizers alike rejoiced in an open and celebratory atmosphere in Germany. That atmosphere was sharply distinct from the pall of fascism which had permeated the competition the last time Germany had hosted the Games, under Hitler in 1936.

All of that came crashing down in the second week, when tragedy struck in what will forever be known as "The Munich Massacre." On the night of September 4th, eight members of the Arab terrorist group Black September snuck into the compound where the Israeli athletes were staying. Security was lax, and the terrorists simply hopped a chain link fence and used stolen keys to get inside, with assault weapons carefully hidden in athletic duffel bags.¹⁰³

Once inside, chaos ensued as the heroics of one alert weightlifting coach, Moshe Weinburg, delayed the terrorists' entrance and allowed other Israeli athletes to escape. All told, the terrorists killed two athletes outright and took nine more hostage, tying up the brawny weightlifters and leaving the bodies of their teammates in front of them as a warning.¹⁰⁴

For the next 18 hours, the Games were halted and a tense standoff began as the world watched in horror. The group demanded safe passage to Egypt, as well as the release of 234 Arab and non-Palestinian prisoners held in Israel, and two other German terrorists jailed in Germany.¹⁰⁵ They rejected German offers for an unlimited amount of money for the hostages' release, declaring that they were willing to die for their cause.¹⁰⁶

Deciding to attempt a hostage rescue operation, German police and negotiators convinced the terrorists to bring the hostages to the nearby Furstenfeldbruck airport, where police had arranged for a dummy Boeing 727 to wait on the tarmac, complete with

¹⁰² Jessica Bennett, *Closure: When Tonya Met Nancy*, NEWSWEEK, March 3, 2006, available at <http://www.newsweek.com/id/114735>.

¹⁰³ Munich Olympics Massacre. Black September Organization, Palestinian Hijackings, FBI - CIA - Department of State - Department of Defense Files, and White House Recordings, http://www.paperlessarchives.com/black_september.html (last accessed March 29, 2008).

¹⁰⁴ *See id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

police officers dressed as flight attendants and crew members.¹⁰⁷ The plan was to have hidden sharpshooters all open fire at the right moment to kill the terrorists before they could harm the hostages.

Unfortunately, the entire operation was poorly coordinated and the snipers did not even have radio contact with one another. Police had drawn up their plans contingent on their being no more than five terrorists—in reality, there were eight.¹⁰⁸ Some of the initial sniper fire missed, precipitating an outright movie-style gun battle lasting over an hour.¹⁰⁹ All the while, the Israeli captives sat helplessly bound in the transport helicopters that had taken them to the airfield.¹¹⁰ When the German police launched a final “infantry-style” full-scale assault, one terrorist threw a grenade into a helicopter with five Israeli athletes inside. It exploded, killing all five.¹¹¹ Another ran into the second helicopter and shot and killed four more hostages from close range.¹¹² By the time the battle was over, five terrorists were dead, along with all nine remaining hostages and one German policeman. The remaining three terrorists, Jamal Al-Gashey, Adnan Al-Gashey, and Mohammad Safady were captured, suffering only minor injuries.¹¹³

Collectively, the three Palestinians feared summary execution, but instead were treated with surprising dignity. They received medical treatment, and then intense questioning about the nature of the operation and the identity of its planners.¹¹⁴ They were not tortured.^{115 116}

¹⁰⁷ *Id.* It was decided that there was no way to accede to the terrorists’ demands or allow them to leave Germany.

¹⁰⁸ Munich Olympics Massacre, *supra* note 103.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Munich Olympics Massacre, *supra* note 103.

¹¹³ *Id.* All told, the botched rescue job stands as one of the worst crisis intervention attempts ever. See SIMON REEVE, ONE DAY IN SEPTEMBER, (Arcade Publishing 2000), for details of German incompetence in dealing with the situation. This included poorly trained and inexperienced crisis managers who did not fully consult with experts, the use of ill-trained and equipped German snipers, not enough snipers, the failure of the snipers to coordinate by radio, failure to bring in the German army, and numerous tactical errors like positioning and failure to arrange for clear lines of fire.

An almost unbelievable fact is how the gun battle managed to last over an hour. Most modern scenarios would usually provide for an immediate all out blitz at the first sign that the situation has gotten out of control. Instead, Reeve describes how no one had the authority to order an all out assault. Instead, the two side just continued to scream at one another, firing potshots as the terrorists raked the German buildings with fire while German police was unable to fully retaliate for fear of the hostages. *Id.* at 119-20.

In its defense, Germany, like many other countries, did not yet have dedicated counter-terrorism units in the early 1970s.

¹¹⁴ REEVE, *supra* note 113, at 155-56.

¹¹⁵ *Id.*

¹¹⁶ It is probably not appropriate to apply the previously mentioned German conceptions of rehabilitation and individual respect for offenders to the captured terrorists. First, in the 1970s, Germany had not yet fully committed to the rehabilitative ideal. Secondly, international attention on the incident and on Germany as a whole during the Olympics in the post-Nazi era probably kept the prisoners from suffering undue physical abuse. Thirdly, the agreement to release the terrorists was not borne out of a general desire of mildness or

But as Monica Seles would discover twenty years later, justice could not always be found in a German court. Only a few weeks after the Munich incident, two other Black September terrorist hijacked a Lufthansa Boeing 727 on its way from Syria to Germany.¹¹⁷ They threatened to blow up the plane unless their three captured comrades were immediately released.¹¹⁸ Without consulting Israel, the German government capitulated and arranged for the release of the trio. The ensuing fury of Tel Aviv was immediate, spawning two secret international assassination campaigns targeting the terrorists and others responsible for the massacre that became the subject of Steven Spielberg's 2005 movie "Munich."¹¹⁹

Because the terrorists were never subject to German legal proceedings it is difficult to draw straight parallels between the Munich incident and the stabbing of Monica Seles in Hamburg. While both crimes had been perpetrated on world class athletes and were subject to widespread international attention, the former was done entirely for a political purpose while the latter committed for a sick sort of personal gain. The Black September Organization did not seek to harm the Israeli athletes out of a desire to manipulate the outcome of the Olympics or shift an athletic balance of power. They chose their unfortunate victims simply to get the most attention for their cause. No one can definitively say if the demanded-for release of the political prisoners would have satisfied the hostage takers, or whether they were bent on killing the athletes anyway. Along that same vein, Gunther Parche's vendetta against Monica Seles did not come from any sort of personal animosity, but rather her role as the greatest challenger to Parche's idol, Steffi Graf. In that way, both the Israeli athletes and Monica Seles suffered as unlucky victims because of what they represented, rather than anything they had personally done.

However, one can still speculate about whether there are similarities to be drawn between Black September and Gunther Parche's twisted objectives, to better evaluate the relative propriety of Parche's successful diminished capacity defense. Given the longstanding refusal of the Israeli government to accede to terrorist demands, it is highly unlikely that the Munich group would have been able to secure the release of over 200 Palestinian prisoners held in Israel, many of them extremely dangerous criminals in their own right. Even if one assumes that the prisoners were held unjustly, the means of securing their release, by perpetrating violence and cruelty on innocent victims, would

mercy, but rather under the direct coercive influence of the subsequent hijacking of the Lufthansa airliner. Finally, none of the terrorists were German citizens, which meant that the desire to reintegrate offenders into society was not present.

The fact that the rehabilitative purposes of punishment do not necessarily apply to foreigners may be surprising to those in the United States, which does not have to deal with as much xenophobia as in many European countries. In addition, the Equal Protection clause prohibits institutionalized unequal treatment absent compelling justifications, even as applied to non-citizens.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Speculation exists that Jamal Al-Gashey is still alive today, hiding underground. He gave an interview for a documentary with his face obscured in 1999. It is uncertain whether the other two hostage takers were killed in Israel's retaliatory operations or died of natural causes.

seem at first glance to be a measure of human depravity that the M’Naghten Rule and its progeny had intended to address. Perhaps one could argue that the perceived injustices that the Palestinians had suffered at the hands of Israel had so thoroughly corrupted the hostage takers’ minds that they no longer could tell between right and wrong. Here again, it bears mentioning that “right and wrong” under insanity defense calculations refers to *legal* and not *moral* right and wrong. Thus, though the terrorists may well have felt a moral imperative to do what they did because of the perceived wrongs their people had suffered, the criminal law does not absolve their responsibility unless they could show they could no longer distinguish legal right and wrong either. Given the facts, this appeared unlikely. The terrorists had been well-armed and well-financed. They planned meticulously and had arranged to sneak into the athletic compound with stolen keys in the dead of night to evade detection. Throughout the crisis, their negotiation demands, while unrealistic, were presented clearly and rationally. They executed the hostages out of retaliation for perceived betrayal by German police and negotiators. From all this, it is hard to see how an insanity defense could have been successful.

Yet the facts of Gunther Parche’s plan are not completely distinguishable from the Munich Massacre. His plan to return Steffi Graf to #1 may have been more bizarre than the desire to free prisoners, but also probably more achievable. While the Black September terrorist may plausibly have had more of a direct stake in achieving their goal by seeing their comrades released than the random desire of a fan to see an unrelated idol ascend to a coveted #1 position, it is certainly a slippery slope for the law to definitively decide whether one group’s desire to achieve its goal is more sincerely held than another’s. Nor is the objective “lunacy” of a group or individual’s abnormal thoughts or goals a good indication of whether the insanity defense should succeed. Courts are ill-equipped to decide, as between a deific decree, desire to elevate an idol to #1, or desire to free criminals, which of the three is truly emblematic of a mental defect and which is not. As previously described, Parche’s execution of his plan also reflected a period of planning, as evidenced in his attack at just the right moment during the changeover in Hamburg.

All of this is to say that the Munich Massacre casts serious doubts on the appropriateness of Parche succeeding on a defense of diminished capacity. Unless German society would have been at ease with reducing the punishment for the three surviving terrorists had they been tried on a diminished capacity theory, that society will be forced to make exceedingly fine distinctions between the two incidents. Both involved international attention, sympathetic victims, radical agendas, well-executed plans, and unprovoked brutality. The most cynical might say then, the only difference left is finding the right psychiatrist to testify in front of a sympathetic court.

Justice Served or Not?

Analysis of the “justice” of what happened with Monica Seles depends on one’s own conception of controversial topics like the diminished capacity defense and the American vs. European views on punishment. If rehabilitation and prevention of recidivism is the goal, then it appears the German court scored a victory in that Parche never again committed another crime—itsself a laudable accomplishment given the

unworldly recidivism rates in the United States. Yet at the same time, some amazement must be expressed at the German trial court's decision to accept the testimony of Parche's psychiatrist in its entirety and not even order a period of observation or mental treatment. Such a move can only be seen as extremely risky and would have been condemned in hindsight if the deranged fan had managed to claim another victim.

The mark of any civilized society includes the recognition that punishment can not be inflicted on those who did not know what they were doing. But acceptance of Parche's diminished capacity defense also requires acceptance that his plan and means of executing it were emblematic of someone suffering from a mental defect serious enough to destroy the perception of the difference between right and wrong. A premeditated stab in the back that accomplishes the very goal of the stabber, however deranged, is powerful evidence casting doubt on acceptance of that defense.

Also, even putting aside debates about diminished capacity debates still leaves the question of whether vengeance or mercy should be the lens through which society views its wayward citizens. Certainly much can be said for Germany and other countries in the European system, which as explained are unabashedly welfare states in valuing the contributions of every citizen while remaining committed to ensuring that no one is left behind in society's fringes. By contrast, the deplorable conditions in American prisons, high recidivism rates, and the perceived racial and economic inequities that lead to crime in this country can make one wonder whether continual and widespread incarceration of a country's own citizens is a sound policy at all. Most people believe that offenders deserve second chances, or at least the opportunity for redemption away from a system of bars, guards, and strip searches. Still, even the most apologetic rehabilitationalist may have trouble finding justice in the decision to let Gunther Parche walk away from the crime. One must acknowledge that in the end, he accomplished the very twisted goal he set out to do, and was not punished for it. For Monica Seles and her fans around the world, that is the cruelest irony of all.

A Bittersweet Comeback

In September of 1995, nearly 28 months after she was stabbed, Monica Seles returned to the court. The WTA relented on its earlier position and conferred the #1 ranking on her, to be shared with Steffi Graf for the duration of six tournaments. Any doubts that she could successfully return after such a long layoff were quickly dispelled when she won the first tournament she entered in and sailed through the beginning rounds of the U.S. Open. This time, you could hear sighs of relief when she emitted her trademark grunt at the tournament. Monica rode an 11 match win streak straight into the US Open final against a storybook opponent – none other than Steffi Graf. It was there that Graf ended the feel good story by defeating Monica in three sets to win her 4th US Open. The two shared an emotional moment, linked as they were by dreams of what could have been; by their love of a game that surpassed all else; by the indelible mark left by a disturbed man who had sought to change history, and succeeded.

Monica continued to play competitively for the next few years, crowning her comeback with another Grand Slam win, in Australia in 1996. But hampered by a foot injury, her continued sadness at what had happened, and the emergence of a new generation in the form of Martina Hingis, Jennifer Capriati, and the Williams sisters, she never regained the #1 ranking, or her dominance over the rest of the tour. In February of 2008, she officially announced her retirement from the sport while also declaring her intention to focus more on her charity work with children.¹²⁰

For its part, the WTA tour significantly improved its security at events after the Seles stabbing. In the immediate aftermath, a wave of paranoia swept the tour as a veritable army of security officers patrolled the courts during changeovers, and tennis players turned their chairs around to face the umpire and audience.¹²¹ Over time, these extreme measures were relaxed as security improvements focused on better barriers and improved surveillance.¹²² Security personnel nowadays are better trained, with between 300-400 officers on site for a major tournament.¹²³ Player guest lists are carefully scrutinized to determine who has access to restricted areas, and the WTA also retains the services of an independent outside consulting firm to give advice on strategic risks.¹²⁴ It is a shame that it took a tragedy like the Monica Seles stabbing to spur the tennis tours into taking serious measures to protect their players and fans.¹²⁵ The true question though, is whether these additional measures can really prevent another similar incident from taking place again. Fortunately in the 15 years since the attack, no fan besides the occasional harmless streaker has seriously disrupted a tennis event or injured a player. Still, as Magdalena Maleeva, the immediate beneficiary of Parche's attack that day has commented, "When someone is so crazy, I don't know if anything can stop them."¹²⁶

Conclusion

Monica Seles's determination and incredible comeback from a stab in the back to another Grand Slam victory will remain in tennis and general sports lore forever as an inspirational story of triumph over adversity for generations to come. Seles continues to play tennis for fun, and enjoys the public spotlight from her charitable works. The memories of the attack begin to fade, but the physical and emotional scars will remain forever. In spring of 2008, she appeared on ABC's *Dancing With The Stars*, but was the first female contestant voted off the show.¹²⁷ "I'm not used to losing," she said.¹²⁸ One of

¹²⁰ *After 9 Grand Slam Titles, Seles Officially Retires from Tennis*, ESPN.com, Associated Press, February 14, 2008, available at <http://sports.espn.go.com/sports/tennis/news/story?id=3246427>.

¹²¹ Ravi Ubha, *Tours Still Feeling Effect of Seles Stabbing 15 Years later*, ESPN.com, April 30, 2008, available at <http://sports.espn.go.com/sports/tennis/news/story?id=3374766>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ In one interview on the 15th anniversary of the tragedy, WTA Board of Directors member Micky Lawler compared the way stabbing changed tennis to the way September 11th has changed airline security. *Id.*

¹²⁶ Ubha, *supra* note 121.

¹²⁷ Christopher Rocchio, *Monica Seles, Penn Jillette Talk About 'Dancing With the Stars' Stint*, Reality TV World, March 26, 2008, <http://www.realitytvworld.com/news/monica-seles-penn-jillette-talk-about-dancing-with-stars-stint-6794.php> (last accessed March 30, 2008).

the judges celebrated her legacy, but remarked candidly, “You’re not a performer, and it’s [dancing] hard for you.”¹²⁹ That’s certainly true—on the tennis court and in life, Monica Seles does what she loves to do, grunting and all, with nary a thought on the theatrical aspects of her craft—and that is what her fans love best about her. Regardless of how one feels about diminished capacity defenses or German versus American conceptions of punishment, it’s hard not to look in Monica’s eyes and empathize with the permanent, unanswerable twin questions burning within: “why me?” and “what could have been?”

¹²⁸ *Monica Seles, Penn Jillette Dumped on ‘Dancing With the Stars’*, Freep.com, Detroit Free Press, <http://www.freep.com/apps/pbcs.dll/article?AID=/20080326/SPORTS18/80326019> (last accessed March 30, 2008).

¹²⁹ *Id.*