Sentencing *and* Sanctions *in* Western Countries

EDITED BY

Michael Tonry
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Preface

Because crime and punishment are basic human problems, policy makers and analysts charged with formulating better solutions ought to look widely for relevant knowledge both within and beyond national borders. In practice, barriers of language and parochialism have long been obstacles. But they should be no longer.

There has been little genuinely cross-national or comparative scholarship on sentencing and sanctions, though there are domestic literatures within countries that can be compared. Our aim was to contribute to the development of such a body of scholarship by persuading leading scholars in several countries to discuss sentencing and punishment in their countries and the causes and consequences of major recent changes, and by persuading others to look across national boundaries at international developments and at issues that arise in every country. In doing this, we follow the lead of Chris Clarkson and Rod Morgan, who edited a similar book, *The Politics of Sentencing Reform* (Clarendon Press, 1995), based on papers presented at a conference in Bristol, England, in 1993. We have extended their efforts by including more civil law countries within the scope of this volume and by commissioning essays on explicitly international subjects.

The chapters in this volume were initially prepared for a May 1998 conference in Minneapolis entitled "Sentencing Policy in Comparative International Perspective: Recent Changes within and across National Boundaries." The conference was sponsored by the University of Minnesota Law School and the Max Planck Institute for International and Comparative Criminal Law in Freiburg, Germany. The tactical aim was to bring together researchers from the United States and other Western countries to discuss current knowledge about sentencing and sanctions in individual countries, and also what is known or knowable about the effectiveness of particular practices. The strategic aim was to consider whether practices that appear to achieve important public purposes in some countries can or should be adopted by others and whether the spread of ineffective or failed practices can be prevented.

Preparation of a volume such as this involves much work by many people. The writers prepared initial drafts, willingly subjected themselves to public reaction and criticism, and good-naturedly accepted further suggestions from the editors. Barbara Damchik-Dykes put the manuscripts and references into standard formats, no small job with writers from several disciplines and six countries, managed the extensive communications over editorial questions and proofs that a multi-author volume entails, and in general coordinated its production. We are grateful to the writers, and to Barbara, and also to Dean E. Thomas Sullivan of the University of Minnesota Law School and Professor Hans-Jörg Albrecht, director of the Max Planck Institute, who provided the funding and institutional support that made the venture possible. Finally, we express our gratitude to all who attended the Minnesota conference. A not-so-hidden personal agenda was to bring together people whose work we knew and respected, so that we could learn from them. People argued, questioned, and explained, and all participants went away knowing more than when they arrived. The book is much the better as a result. These in addition to the authors of the essays in this volume were our instructors: David Boerner (Seattle University), Craig Bradley (Indiana University School of Law, Bloomington), Francis Carney (Massachusetts Sentencing Commission), Debra Dailey (Minnesota Sentencing Guidelines Commission), Nora Demleitner (St. Mary's University of San Antonio School of Law), Walter Dickey (University of Wisconsin Law School), Pat Dowdeswell (Home Office, England and Wales), J. Fiselier (University of Gröningen), Daniel J. Freed (Yale Law School), Richard Gebelein (Superior Court, Wilmington, Delaware), Sally Hillsman (National Institute of Justice), Neil Hutton (University of Strathclyde), James B. Jacobs (New York University School of Law), Michael Kilchling (Max Planck Institute), Roxanne Lieb (Washington Institute for Public Policy), Austin Lovegrove (University of Melbourne), Marc Miller (Emory University), Neil Morgan (University of Western Australia), Norval Morris (University of Chicago Law School), Stephan Parmentier (University of Leuven), Julian Roberts (University of Ottawa), Michael Smith (University of Wisconsin Law School), Edward Tomlinson (University of Maryland School of Law), Tom Vander Beken (University of Ghent), Anton van Kalmthout (Tilburg University), Dirk van Zyl Smit (University of Cape Town), Kate Warner (University of Tasmania), Edward Wise (Wayne State University), Ronald Wright (Wake Forest University), David Yellen (Hofstra University), Warren Young (Victoria University of Wellington), Li-ling Yue (University of Beijing), and George Zdenkowksi (University of New South Wales).

Our hope in initiating the venture was to continue the effort started in Bristol to build a genuinely multinational and comparative literature on sentencing and sanctions in Western countries. Whether this volume usefully advances that project, readers will decide for themselves.

Minneapolis, Minnesota M. T.
October 2000 R. S. F.

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SENTENCING AND SANCTIONS IN WESTERN COUNTRIES

MICHAEL TONRY

Punishment Policies and Patterns in Western Countries

We can learn things about crime and punishment by looking across national boundaries. For despite many important similarities in how Western nations respond to crime, and in the values that underlie those responses, sentencing and punishment policies vary greatly. U.S. Supreme Court Justice Louis Brandeis observed, in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), that "it is one of the happy incidents of the federal system that a single, courageous state may, if its citizens choose, serve as a laboratory and try social and economic experiments without risk to the rest of the country." Countries likewise can learn from one another's experiments if they will.

The formal similarities are great. Among the Western countries, at least, there is widespread commitment to democratic values and Enlightenment ideals, and the institutions of criminal justice are everywhere much the same. These include professional police, public prosecutors' offices, an independent judiciary, and reliance on imprisonment as the primary sanction for very serious crimes and chronic criminals and on various community penalties for others. There is much more similarity than difference in the content of criminal law doctrine, rules of evidence, and procedural safeguards.

Nonetheless, and despite broad similarity in most countries in crime trends over the past thirty years, sentencing and punishment policies and patterns vary enormously. In the United States, England, and the Netherlands and many other western European countries, crime rates rose rapidly from the mid-1960s until the late 1980s or early 1990s and have been declining since (see, e.g., Downes and Morgan 1997; van Dijk 1997; Mirrlees-Black et al. 1998; Pfeiffer 1998; Bureau of Justice Statistics 1999b). Similarity in crime trends, however, has not been paralleled by similarity in policy or institutional responses. At least four areas for comparison stand out.

First, prevailing beliefs vary greatly among policymakers about the causes of crime and the capacity of criminal justice policy changes to affect crime rates. In

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the United States and more recently in England and some Australian states, many policymakers believe that crime is primarily the result of bad or irresponsible people, not criminogenic conditions and inadequate socialization, and that harsher and more restrictive punishments will reduce crime rates through deterrent and incapacitative processes. As a result, as U.S. crime rates went up for two decades and penalties steadily became harsher, little thought was given to the possibility that crime rates may not be much affected by punishment policies. More recently, as crime rates have fallen in many countries, newly adopted harsh polices have been retained in the United States, England, and Australia, possibly because of a belief that declining crime rates are attributable to them. By contrast, the absence of steadily increasing imprisonment rates in many western European countries suggests that crime rates and patterns are not regarded as something easily controlled or necessarily much affected by punishment policies. The polar case is the widespread Finnish view that sentencing and punishment play an important backup role in norm-reinforcement, but that primary institutions, such as the family, the church, and the school, play the primary roles in socializing people into law-abiding habits. Accordingly, though punishment should be certain, it need not be harsh. Such premises, Patrik Törnudd observes, do not imply that "changes in policy, such as increases in the severity of punishment, would be widely seen as an appropriate or cost-effective means of controlling the level of crime" (Törnudd 1997, p. 190).

Second, relationships between crime and imprisonment patterns vary greatly. Against the backdrop of similar crime trends, imprisonment rates and prisoner numbers increased continuously in the United States after 1973 and in the Netherlands after 1975, decreased continuously in Finland after 1976, fluctuated widely in France and Italy, fluctuated slightly in Germany, Sweden, and Denmark, and followed other patterns elsewhere. In the 1990s, imprisonment rates have increased in many but not all countries. Whatever else these data show, they refute the existence of any inexorable or even general relationship between crime rates and imprisonment, directly, or, through intermediate effects on public fears, opinions, or policies, indirectly.

Third, policies governing types and amounts of punishment vary greatly. The most dramatic difference is between the United States, which continues to use the death penalty and life sentences without possibility of parole and where prison sentences exceeding ten years are common, and the rest of the Western world, which has renounced the death penalty and where prison sentences longer than a few years are uncommon. But there are many more differences than this. In some countries, for example, Germany and Austria, prison sentences shorter than six months are regarded as destructive and serving no valid penal purpose and are therefore strongly discouraged. In others, including Sweden and Finland, certainty of punishment is seen as important, but not severity, and as a result many sentences to days or weeks of imprisonment are imposed. And there are wide divergences in the use of community punishments. Community service is a commonly used prison alternative in England, Scotland, and the Netherlands, but is seldom used as a primary punishment in many other countries. Day fines are an oft-imposed punishment in Germany and much of Scandinavia but are used not at all in the

English-speaking countries and many others (e.g., the Netherlands) and only sparingly in still others (e.g., France). Electronic monitoring has been common in the United States for a decade but has only recently begun to catch on in most other countries (chap. 8, this volume).

Fourth, though nearly all Western countries attempt to insure use of fair procedures for determining guilt or innocence at and before adjudication of guilt (see, e.g., Weissbrodt and Wolfrum 1997), they vary greatly in whether, how, and how seriously they try to achieve just outcomes at the sentencing stage. Put differently, countries vary greatly in what they do to minimize unwarranted disparities in sentencing and to insure horizontal and vertical equity among sentences imposed. The approaches range from use of numerical guidelines for sentencing in many U.S. jurisdictions (and for prosecutors' sentence recommendations in the Netherlands), guideline judgments in England issued by the Court of Appeal, sentencing information systems in Scotland and New South Wales (and earlier in several Canadian provinces), and statutory sentencing principles enunciated in the Finnish and Swedish criminal codes to the approach of most European countries, Canada, Australia, New Zealand, and large parts of the United States that leaves the matter in the hands of sentencing judges.

Most of the chapters in this volume concern sentencing policies and practices in individual countries, and a few concern more general cross-cutting issues that arise in all countries. The chapters speak for themselves and I see no point in summarizing them or in commenting on them except in passing. Instead, I approach the subject from the back, from punishment policies and patterns, and suggest some of their implications for thinking about sentencing policies in individual countries and comparatively.

Some might think this gets things backwards, since punishment is the outcome of sentencing, and the populations and flows of offenders in prisons and subject to other criminal penalties are merely the outcome of sentencing in the aggregate. Many judges and prosecutors firmly assert the irrelevance to them of such things as prison capacity and correctional resources. Their jobs, they say, are to see that just punishments are imposed and public safety interests are advanced; handling sentenced offenders is someone else's business. In a small minority of jurisdictions in the United States, legislators and corrections officials believe that correctional resources and capacities should influence sentencing policies, and a few jurisdictions have incorporated "prison capacity constraints" into their sentencing policies and required that sentencing commissions develop guidelines whose application is not projected to produce larger numbers of inmates than can be housed within the jurisdiction's existing prison capacity. That is important and has helped shape the details of sentencing policy in those jurisdictions (chap. 6, this volume), but it reflects the wholesale views of people with systemic interests and not the retail views of front-line practitioners.

Several lessons for comparative understanding of sentencing stand out if one thinks from punishment to sentencing rather than from sentencing to punishment. First, the punishment backdrop has important implications for assessing the merits of proposed innovations in particular places. In countries, such as Finland and Sweden, with relatively low incarceration rates and a tradition of imposing

sentences measured in days or months, strong sentencing standards are less desirable than in countries, such as the United States, eastern Europe, and increasingly England and Australia, with higher incarceration rates and a tradition of imposing sentences measured in years and decades. Sentencing standards must try to reconcile both parts of the equality principle. That is, they must be concerned to treat like cases alike and to treat different cases differently. U.S. federal guidelines, three-strikes laws, and mandatory sentences, for example, prescribe sentences for offenders who are like situated in terms of their crimes, but at the cost of ignoring differences in their lives and circumstances that many judges (and others) believe ethically relevant to thinking about just punishments. Indeterminate sentencing, as in Australia and Canada and some U.S. states, by contrast, allows ample latitude to differentiate sentences to take account of offenders' biographies, but critics argue that they often produce unwarranted disparities in relation to offense severity. No system of sentencing standards can perfectly reconcile the two parts of the equality principle, but approaches can make one or the other kind of injustice more likely. Concerns about unwarranted disparities, for example, may be less important in Scandinavia, and hence the case for detailed sentencing standards less strong, than in the United States. When judges' human idiosyncrasies result in disparate two-, three-, and four-month sentences for like-situated offenders in Sweden, the stakes are much lower than in the United States, where the same idiosyncrasies might yield one-, three-, and five-year prison sentences. Many U.S. sentencing policies, in Arie Freiberg's terms (chap. 1, this volume), risk unwarranted parities in the interest of treating formally like cases alike, and Sweden may risk unwarranted disparities in the interest of treating factually different cases differently. Against their different punishment backdrops, both those acceptances of risk may make sense, and the cases for Swedish adoption of numerical guidelines or U.S. adoption of Swedish-style statutory sentencing principles be correspondingly weak. Thus one major implication for sentencing policy of comparisons of punishment polices and patterns is diagnostic: one size does not fit all. Sentencing reforms need to be sensitive to the problems to which they can serve as (partial) solutions.

Second, comparative assessment of punishment policies and patterns supports a strong case for development of international and cross-national human rights conventions concerning sentencing and punishment. The enormous differences in punishment patterns in Western countries cannot be justified in human rights terms. International human rights conventions have long enunciated minimum standards concerning defendants' pretrial and trial rights but not concerning sentencing and punishment. In Europe, the European Convention on Human Rights increasingly is being used to override national laws and practices in trial and pretrial settings (Weissbrodt and Wolfrum 1997) but so far only at the furthest margins of sentencing and punishment (chap. 9, this volume). The European Torture Convention is increasingly effective as an extra-legal device (i.e., acting through moral suasion and publicity rather than court orders) for improving conditions in prisons, jails, and police lockups (chap. 10, this volume). There is, of course, a chicken-and-egg problem that the cultural and political forces that pro-

duce inhumanely harsh practices also prevent countries from subscribing to international conventions that ban or repudiate such practices (e.g., the U.S. and Chinese refusals to ratify without qualification international conventions against the death penalty [see chap. 8, this volume] and the same two countries' opposition to creation of an International Criminal Court to handle war crimes, genocide, and crimes against humanity). However, moral example and suasion often matter. Many eastern European countries have abolished the death penalty in order to join the Council of Europe, and the United States continues to try to influence the development of the International Criminal Court. Widely endorsed international human rights standards, even if they are solely precatory, can in the long term influence the evolution of sensibilities, policies, and practices in all countries, including those that initially reject them.

This introduction consists of three main sections. The first looks at crime and punishment trends in many countries to ask and answer the question whether differences in crime rates and patterns explain punishment differences between countries. Because imprisonment is the punishment everywhere mostly used for serious crimes, the focus is on imprisonment. Somewhat parochially, the issue is approached by using claims about U.S. experience as an example, and using data from other countries to test those claims. The evidence is clear; national differences in imprisonment rates and patterns result not from differences in crime but from differences in policy.

The second section accordingly looks at national differences in policies about crime. The major differences relate to whether crime policy has become a major contested issue in partisan and ideological politics, whether moral notions about the need to punish wrongdoers are dominantly influential, and whether policy makers appear to believe that punishment policies and practices are likely importantly to influence crime rates. The answers to these questions provide explanations for punishment trends and also set the conditions that determine what sentencing injustices—unwarranted disparities or parities, "undue leniency," racial, class, or gender-bias—are perceived as important problems. Here, too, the evidence is clear: there are stark differences in the political salience of crime and punishment issues in various countries and those differences fundamentally shape sentencing policies and punishment practices.

The third section then surveys approaches taken in various countries to achieve consistency in sentences imposed. Discussions are short since many of the chapters in this volume discuss developments in particular countries in detail. Approaches vary, but their value and significance also vary greatly depending on punishment politics and conventions. The overriding lesson to be learned is that the feasibility and desirability of a system of sentencing standards depends crucially on the environment in which it is introduced. U.S.-style numerical guidelines, for example, may be the best among several undesirable choices in a punitive country like the United States but would likely do more harm than good in a northern European country in which crime policy has not been heavily politicized and in which punishment severity is restrained.

I. Comparative Imprisonment Trends

The relations between crime and imprisonment are complex and diverse. Stunning dissimilarity in imprisonment trends between countries becomes apparent when longitudinal data are examined. This dissimilarity is not as widely recognized as it might be because longitudinal data are generally well known only within countries and international comparisons are typically based on cross-sectional data on prisoners per 100,000 population in a given year. Thus, in the United States, it is well known that imprisonment rates have been increasing for twenty-five years, (see figure I.1) and that the United States has imprisonment rates four to twelve times those of other countries with which it is ordinarily compared (see table I.1). From these comparisons come arguments over whether the U.S. rates are too high, whether rising crime rates justified the initial increased use of imprisonment, and whether subsequently declining crime rates justify continued increased use of imprisonment. These, however, are at best oversimplified arguments, and at most naive, as quickly becomes evident when better international comparisons are made.

Looking only at one country's trend data misleads because it invites parochial reactions either that local experience is "normal" and need not be examined closely or critically, or that unique local crime problems and trends explain local differences (e.g., Wilson and Herrnstein 1986; Bennett, DiIulio, and Walters 1996). Both of these claims are made in explanation of why U.S. imprisonment

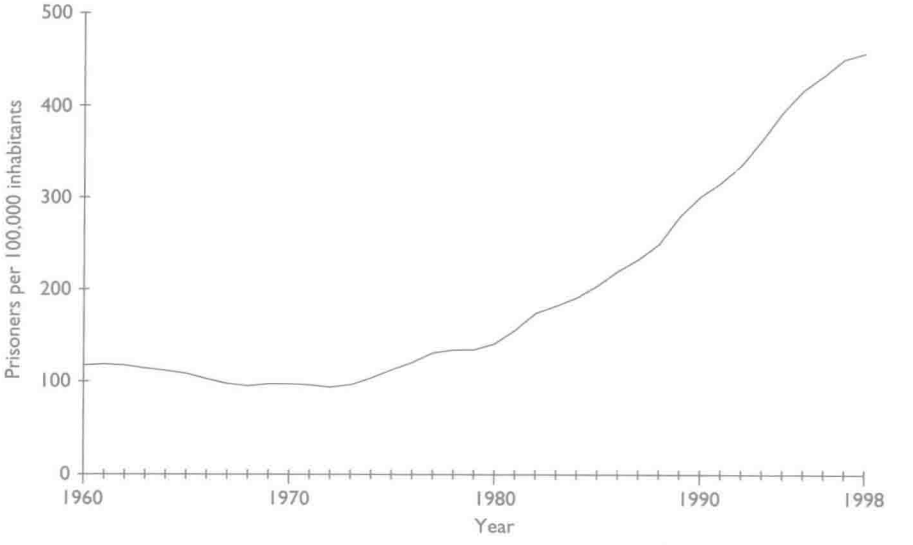

Figure I.1. Combined federal and state prisoners in the United States, 1960 to mid-year 1998 (per 100,000 population). *Sources*: Maguire and Pastore (1998); Bureau of Justice Statistics (1999c).

Table I.1: Various Western Countries Ranked by Incarceration Rate per 100,000, 1997–1998

	Total in Penal Institutions (Including Pretrial Detainees)	Date	Prison Population per 100,000 National Population
United States	1,725,842	6/30/97	645
New Zealand	5,236	1997	145
Portugal	14,336	3/15/98	145
England and Wales	65,906	9/30/98	125
Canada	34,166	1997–98	115
Spain	42,827	9/1/97	110
Australia	17,661	1997	95
France	53,259	10/1/98	90
Germany	74,317	9/1/97	90
Austria	6,946	9/1/97	85
Italy	49,477	9/1/97	85
Netherlands	13,618	9/1/97	85
Belgium	8,342	9/1/97	80
Denmark	3,508	11/6/98	65
Sweden	5,221	9/1/97	60
Greece	5,577	9/1/97	55
Finland	2,798	9/1/97	55
Norway	2,318	9/1/97	55

Source: Walmsley (1999).

rates are so much higher than in other countries: U.S. crime rates are higher and long rose more sharply than other countries' and higher imprisonment rates are the result; or U.S. crime is more serious than elsewhere and that explains the difference. Both of those assertions could be true. However, the first is completely untrue and the second is mostly untrue but with an important qualification.

A. Do Imprisonment Rate Changes Track Crime Rate Changes?

There is nothing inherently implausible in claims that rising crime rates drive rising imprisonment rates and that crime rates in the 1970s and 1980s rose faster in the United States than elsewhere and imprisonment rose with them. Without international comparisons, there is no way to assess those claims. But international comparisons can be made that shed some light on both crime rate trends and absolute levels. The available data, of course, are not perfect but they are good enough to undermine the crime-driven explanations for U.S. imprisonment patterns.

Because countries define and record crimes differently, statements about absolute differences in rates based only on official crime data inevitably are suspect. In figures I.2, I.3, and I.4 for example, U.S. homicide data include completed murders and non-negligent homicides, while the Finnish data also include at-

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