

## Why Aren't German Penal Policies Harsher and Imprisonment Rates Higher?

By Michael Tonry\*

### A. Introduction

It is common for reformist academics, human rights advocates, and political liberals to bemoan harsher public attitudes towards crime and criminals, populist posturing by politicians, and more repressive penal policies. Some years ago, sociologist David Garland, a leading scholar of this subject, described increasingly repressive strategies of crime control in contemporary Britain, Australia, and the United States, 'and elsewhere, too'.<sup>1</sup> Some years later Hans-Jörg Albrecht called Garland to task for that 'and elsewhere, too,' noting that what happens in English-speaking countries does not inexorably happen elsewhere and that penal policies in many Western countries were not becoming more repressive or more politicised in parallel with American and British developments.<sup>2</sup>

And so it is. Penal policies and politics vary widely between countries and have followed no consistent pattern over the last 30 years. It is customary, though not without many limitations, to use imprisonment rates per 100,000 population as a measure of both the severity of penal policies in a jurisdiction and of changes over time. Using that measure, since the early 1970s, the United States and the Netherlands experienced steadily rising imprisonment rates that were roughly four times higher, per capita, at the beginning of the twenty-first century compared with the early 1970s. At the other extreme, the imprisonment rates of Finland and Japan declined steadily from 1970 to 2000. Between those extremes, patterns varied widely. Imprisonment rates in the Scandinavian countries other than Finland re-

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<sup>1</sup> Garland, 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society', in 36 *British Journal of Criminology* (1996), p. 445-71.

<sup>2</sup> Albrecht, Hans-Jörg, 'Post-Adjudication Dispositions in Comparative Perspective' in *Sentencing and Sanctions in Western Countries*, (Michael Tonry/Richard S. Frase, eds.), New York: Oxford University Press, 2001, p. 294.

mained roughly stable, varying between 50 and 70 per 100,000 throughout the period. Imprisonment rates in France and Italy gyrated, moving up rapidly, falling abruptly, moving up rapidly again, and so on. Imprisonment rates in England were broadly stable from 1970 to the early 1990s after which they nearly doubled, rising to the highest level in the Western world after the United States.

So far I have not mentioned Germany. German imprisonment rates fell somewhat by the early 1970s from their average level during the 1960s and were broadly stable during the 1970s, 80s, and 90s. The question, accordingly, that this essay asks is, how come? While Garland is wrong in suggesting that penal policies and practices in Western countries generally parallel those of the United States and England, public attitudes towards crime and criminals do seem to have become harsher in most Western countries in recent decades and politicians have given the subject more polemical attention. What is it that, so far, has insulated much of Western Europe from the influences of public opinion and political populism that have transformed the criminal justice systems of the two English-speaking countries?

There is at present but an exiguous comparative literature on these matters. A growing comparative literature describes and tries to explain criminal justice system operations and changes over time,<sup>3</sup> but little comparative or cross-national work has been published that addresses the determinants of changes in public attitudes, political posturing, and penal policy in individual countries or offers generalisations across national boundaries. I am beginning to try to build up a body of evidence that could support generalisations and in this essay provide a quick overview of the relevant literature and conclude by offering speculation that might explain why, so far, Germany is not among Garland's 'and elsewhere, too'.

In the following, part B, with four graphs, makes a simple but important point: crime does not cause punishment or, more elaborately, changes in crime rates do not in any direct way lead to increases in imprisonment rates; increases are the consequences of political and policy decisions, not some inexorable mechanistic process. Part C, then, briefly summarises major recent explanations of penal policy changes in England and the United States, to provide a backdrop to consideration of developments elsewhere. Part D speculates about Germany and offers some suggestions for how this literature might move forward.

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<sup>3</sup> e.g. Tonry, ed., *Penal Reform in Overcrowded Times*, New York: Oxford University Press, 2001; Tonry/Frase, eds., *Sentencing and Sanctions in Western Countries*. New York: Oxford University Press, 2001; Whitman, James Q, *Harsh Justice: Criminal Punishment and the Widening Divide between American and Europe*, New York: Oxford University Press, 2003.

*B. Crime does not Cause Punishment*

While lay people, participants in cocktail party conversations and readers of mystery novels, might assume that increases in crime rates necessarily produce increases in imprisonment rates, they would be wrong, as comparison of punishment patterns in a number of Western countries demonstrates. From 1970 to the present, crime patterns and trends have been broadly similar in Western countries. The details have differed. For example, homicide rates typically are much higher in the U.S. than in Europe, but within Europe the homicide rates in Finland are typically considerably higher than those elsewhere, and gun use in crime is much more pervasive in the U.S. Nonetheless, when changes in rates per 100,000 of violent crime and homicide are calculated for Western countries, similar broad patterns hold everywhere for the period 1970 to the early 1990s (the peaks and subsequent declines vary by a year or two between countries). Homicide rates typically doubled or tripled and serious violent crime rates increased by a factor of three to five times.

A lay person with no contact with the criminal justice system might not unnaturally assume that a trebling of the violent crime rate necessarily would result in a substantial increase in the imprisonment rate. The logic is straightforward. More crime means more arrests means more prosecutions means more convictions means more sentences imposed, means more prison sentences. Such a lay person, when reminded that ours is a world of limited resources, would understand that greatly increased crime rates might make the system somewhat less efficient as, for example, by reducing the clear-up rate, making police and prosecutors more selective in choosing the cases they take forward, influencing judges to award less severe penalties in order to induce more people to plead guilty, and motivating prison and parole authorities to free up space by letting some prisoners out earlier. While those things might reduce to some extent the increase in the rate of imprisonment, it remains not unreasonable to expect that rate to increase substantially, even if less steeply than the violent crime rate.

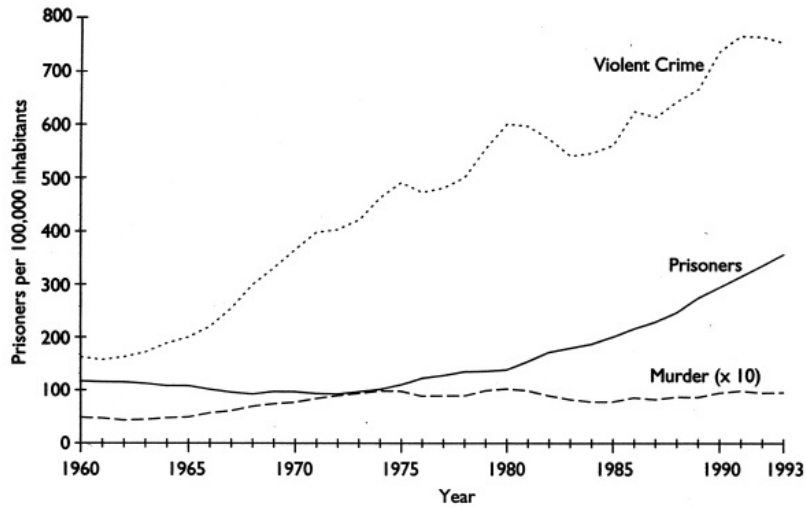


Figure 1 Imprisonment, violent crime, and murder rates in the United States, 1960–1993 (per 100,000 population).

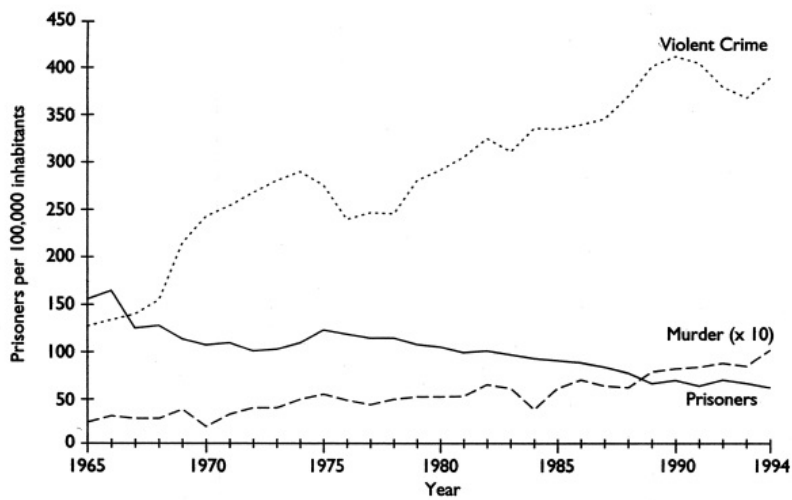


Figure 2 Imprisonment, violent crime, and murder rates in Finland, 1965–1994 (per 100,000 population).

Figure 3. Incarceration Rates in France, 1968-2002 (per 100,000 population)

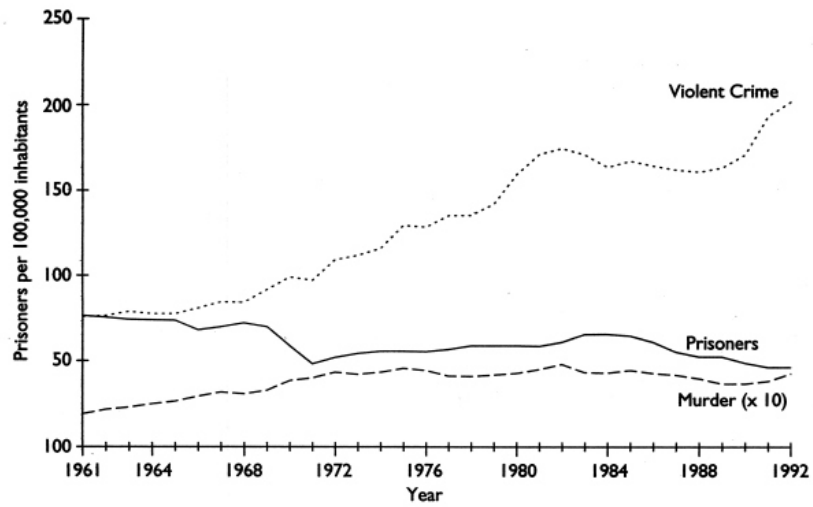
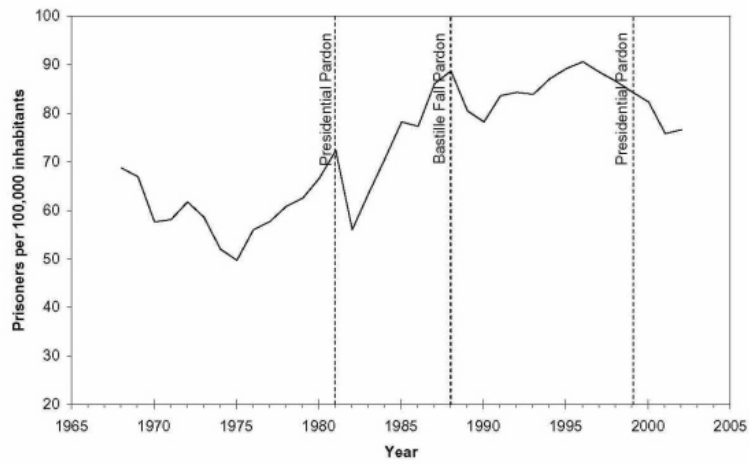


Figure 4 Imprisonment, violent crime, and murder rates in Germany, 1961-1992 (per 100,000 population).

**Risk and Protective Factors in Politicisation of Penal Policy, the U.S.,  
the U.K, Canada, and Germany.**

<b>Factors</b>	<b>U.S.</b>	<b>U.K.</b>	<b>Canada</b>	<b>Germany</b>
Effects of sensibility cycles	Yes	No	No	No
Taste for punishment/moralism	Yes	Yes	No	No
Debasement	Yes	Yes	No	No
Elite self-confidence	No	Unclear	Yes	Yes
Politically insulated policy processes	No	No	Unclear	Yes
Politically insulated practices	No	Somewhat	Yes	Yes
Meaningful separation of powers	Yes	No	Yes	Yes
Excessive crime prevention initiatives	No	Yes	No	No
Influence of tabloid newspapers	Unclear	Yes	No	No
Influence of Francophonic culture	No	No	Yes	No
American oppositionalism	N/A	No	Yes	Unclear

As figures 1 through 4 demonstrate, crime rate trends may be very similar among Western countries, but imprisonment rates are very different.

Figure 1 shows imprisonment, violent crime, and murder rates per 100,000 U.S. population from 1960 to 1993. The murder rate has been multiplied by ten to make eyeball comparisons easier. The data end in the early 1990s because U.S. crime rates began a steep fall in 1990-1992 which continues to this date. My interest in figure 1 was to compare imprisonment rate trends with crime rate trends to test the layman's hypothesis already described.

Violent crime in figure 1 consists of homicide, rape, robbery, and aggravated assault. The rate of violent crime, as recorded by the police, increased by nearly five times between 1960 and 1993. The homicide rate increased from about 4 per 100,000 to about 11 per 100,000, nearly three times. The imprisonment rate (here including only prisoners sentenced to state and federal institutions), though broadly stable from 1960 to 1973, increased thereafter by more than 300 percent.

Figure 1, thus, tells the story my hypothetical layman would expect.

Figure 2, however, tells a very different story. This figure also shows imprisonment rates, homicide rates, and violent crime rates for a Western country, Finland. As in the United States, the homicide rate (also multiplied by ten so that trends can be

compared) increased by at least a factor of three, and the violent crime rate by more than three times. The violent crime rate here too is composed of homicide, rape, robbery, and aggravated assault. Countries vary somewhat in precisely how they define these crimes, Finland, for example, includes attempted homicides among homicides, while the U.S. counts only completed homicides. My interest, however, is to compare what individual countries regard as the most serious violent crimes so those counting differences are not important for my purposes. In terms of the crimes that Finland regards as its most serious violent crimes, the key point is that the rate relative to population more than tripled. The Finnish imprisonment rate, however, fell steadily from 1965, when it was around 160 per 100,000, to 1994, when it was around 60 per 100,000.

Figure 3 provides a third imprisonment rate example, this time without crime rates. Figure 3 shows incarceration rates for France from 1969 to 1999. What is striking about figure 3 compared with the steady American increase in imprisonment rates and the steady Finnish decrease, is that France's imprisonment rates have zig-zagged.

How can the stark differences among the United States, France, and Finland be explained?

The answer is easy. Public officials in those countries chose the penal policies that figures 1, 2, and 3 demonstrate. Some people might say that politicians and public officials, acting in their own perceived political interests, or reflecting their own personal ideologies, made policy decision that importantly shaped penal practices. Others might say that the character of underlying public opinion in these matters, and changes in the character of public opinion, produced changes in attitudes and political concerns that, in turn, were reflected by policy makers and practitioners in their decisions.

Whichever account is true (no doubt both to some degree, with the comparative balance varying between countries, and over time), figures 1-3 make it clear that policy drives imprisonment rates. American politicians for thirty years competed with one another to show who was tougher on crime and in a wide variety of ways - requiring mandatory prison sentences, increasing the lengths of prison sentences, paying for a many-fold increase in the size of the prison establishment, campaigning for office on 'toughness' platforms - they favoured increased severity of punishment, increased use of imprisonment, and increasing imprisonment rates. The United States got what its policy makers wanted.

By contrast, in Finland, a broad agreement was reached among policy makers, practitioners, and academics in the mid-1960s that the Finnish imprisonment rate was

too high and should be reduced.<sup>4</sup> Through the beginning of the twenty-first century, over nearly four decades, Finnish policy makers stuck to that policy goal. Enacting a wide range of new policies and practices (reducing the lengths of prison sentences, creating new alternative prison sentences, creating many diversion programmes), Finnish governments remained true to course.

The explanation typically given for the Finnish policy consensus was a shared belief in the mid-1960s that the Finnish imprisonment rate, then nearly three times those of Norway, Denmark, and Sweden, could not morally be justified. Finnish crime rates were then, as now, comparable to those of the other three largest Scandinavian countries and a widely held view took hold that Finnish policies were more punitive and repressive than those of the other Scandinavian countries for no good reason, and could no longer be justified in a liberal society. The somewhat different account is sometimes given that Finland, independent only since 1917, before that a Grand Duchy of Russia from 1809, and before that a part of the Kingdom of Sweden, wanted to be Western, not Eastern. The argument is that Finnish imprisonment rates, though much higher than those in the West, were lower than those in Russia, and, to some extent, could be seen as an indicator of Finland's presence in the Russian sphere of influence. By consciously deciding to emulate Scandinavian policies and imprisonment rates, thereby rejecting Russian policies and imprisonment patterns, Finland was declaring itself part of the West.

The explanation for the zigzags in figure 3 is simpler. They occur largely because of a French tradition of including prisoners among the beneficiaries of national celebrations.<sup>5</sup> France has adopted policy changes that could be expected to reduce the prison population, including changes in parole release policies and creation of new alternatives to imprisonment. The principal cause, however, of the occasional sharp falls in the sentenced prison population is that there are frequently amnesties, mass pardons, and mass commutations at the time of such national French celebrations as the inauguration of a new president or the 200th anniversary of the fall of the Bastille.

If we step back for a bit and think about the three imprisonment patterns, and what they might suggest about national culture and its attitudes towards criminals, very different inferences might be drawn. French political culture clearly can accept the whimsical good fortune of French prisoners who, unexpectedly, are released early.

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<sup>4</sup> Lappi-Seppälä, Tapio, 'Sentencing and Punishment in Finland: The Decline of the Repressive Ideal' in Tonry/Frase, eds, *supra* note 2.

<sup>5</sup> Kensey, Annie/Pierre Tournier, 'French Prison Numbers Stable since 1988, but Populations Changing' in *Penal Reform in Overcrowded Times* (Tonry, ed.) New York: Oxford University Press, 2001.



In the United States and England, the political culture could not and would not countenance wholesale releases of prisoners to celebrate a national holiday or a president's inauguration. Few elected politicians are likely to believe that they could survive politically were they to announce a 20 percent reduction in the prison population or that all prisoners within six months of termination of their sentences would be released immediately, or something equivalent. French political culture can countenance such decisions. Likewise, in America and England, politicians could probably not successfully carry out a long-term publicised policy of reduced use of imprisonment. Public anger and resentment towards prisoners, and a taste for punishment that exists in both places, make public objection and resistance likely.

To this point, I have demonstrated that crime rate patterns have not in any simple or mechanical way determined imprisonment rate patterns in three countries. What about Germany? Figure 4, paralleling figures 1 and 2 on the United States and Finland, shows violent crime, homicide, and imprisonment rates in Germany per 100,000 population from 1961-1992. The homicide and violent crime rate trends parallel those in the United States and Finland, but the imprisonment rate, after falling in the late 1960s and early 1970s, when the use of short prison sentences became disapproved, and the use of day fines was implemented, have remained more or less flat since then. What is the explanation?

I offer some speculative answers to that question in section 3. In anticipation, however, it is clear that nothing like the polar policies of the American or Finnish governments was adopted in Germany. No radical decisions were made to increase or decrease the imprisonment rate. German policies and practices have, however, been substantially more stable than those in France, so that the apparent stability, unlike the case in France, is not the product of a series of serendipitous decisions to reduce the prison population.

### *C. Conventional Explanations*

Most of the academic literature on changes in penal policy and practice concerns the United States and England.<sup>6</sup> Genuinely comparative work is in its infancy. Historian James Whitman's effort to explain differences in penal policies and practices in France, Germany, and the United States is the most prominent exception.<sup>7</sup> In this

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<sup>6</sup> E.g. Garland, *The Culture of Control*, Oxford: Oxford University Press, 2001; Tonry, *Thinking about Crime*. New York: Oxford University Press, 2004; Tonry, *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy*, Cullompton: Willan, 2004.

<sup>7</sup> Whitman, *supra* note 3.

section, I briefly summarise major accounts that have been offered for English and American policy patterns, concluding with a few comments on Canada.

David Garland's *The Culture of Control* (2001) is much the most ambitious and influential effort to explain changes over time in what he refers to as 'penality' or 'penal culture.' Garland suggests that four important social and cultural developments over the last 30 years have generated the crime policies that characterise early twenty-first century American and England. First, he argues that victimisation has become democratised, by which he means that secular changes such as increased female participation in the workforce and the ready availability of high-value consumer goods as objects of theft, made crime victimisation much more pervasive over time. By the 1990s, almost everyone had the experience of being victimised themselves or having second-hand knowledge of victimisation of others. This he contrasts with an earlier time when crime victimisation was more localised in poor and disadvantaged communities and when middle and upper middle class people, including particularly professionals, could afford to be humane and liberal-minded towards criminals because crime did not hit them very close to home. When, however, crime became a personal experience of everyone, the previously privileged classes became as concerned, intolerant, and punitive as anyone else.

Second, the rising crime rates of the 1970s and 80s exposed the 'limits of state power' to control and reduce crime. By this, Garland means that the patent inability of government to do very much about increasing crime rates, whether it invested in expanded social welfare support for at-risk people, as does most of Europe, or whether it invested in substantially more repressive policies and practices, as in the United States and England, crime rates, seemingly inexorably, went up. Rather, however, than publicly acknowledge that the state could do relatively little about crime rates which were being driven by more fundamental economic and social forces, Garland argues, politicians pretended to believe they could affect crime rates by adopting 'expressive punishment' policies. Increased toughness, thus, could be seen as an effort to reduce crime and could also be seen as an expression of solidarity with a public which was angry and upset. Whether, in the end, the 'expressive punishments' accomplished very much was not very important, since their primary purpose was not to affect crime rates but to assuage public anxieties and win public confidence.

Third, Garland suggests that the advent of 'late modernity', which I prefer to refer to as existential angst, destabilised life in ways that made people both more conscious of and more unwilling happily to accept all sorts of risk. In almost all aspects of our lives since the 1970s, life has become more complicated and less certain. There have been a number of major economic recessions and downturns, and these, together with the forces of globalisation and economic restructuring, have

made jobs less certain, periods of unemployment and economic uncertainty more common, and life more anonymous. Population shifts and movements have made every Western society more diverse and heterogeneous ethnically, religiously, and culturally. Political movements such as the civil rights movements, the gay rights movement, the feminist movement, and others, have effected major changes in social interactions and behaviours. All of these things, and others, Garland says, have created conditions of existential uncertainty that leave people wanting easy answers.

Fourth, finally, Garland argues that one of the easy answers is to blame someone else. This he refers to as the 'criminology of the other,' by which he means that it is always easier to blame people we don't know very well for things we don't like. If life in general is uncertain and fraught with peril, crime can be made a metaphor for that uncertainty, and criminals can be blamed. For social, economic, and structural reasons we understand, violent and street offenders are disproportionately drawn from disadvantaged ethnic and racial minorities in most Western countries, making offenders easier for the majority populations to differentiate from themselves and to stereotype and blame.

Putting all of those things together, governments have responded to rising crime rates, democratisation of victimisation, existential angst, and the need for the mass public to find others to blame, by adopting expressive punishments that treat offenders more harshly and are seen to do so.

There is a serious limitation with Garland's explanation: 'and elsewhere, too.' All of the things that Garland described happened in England and Wales, and happened in the United States, but they also happened in every other Western country. Public attitudes towards offenders have become harsher, xenophobia has become more pervasive, right-wing fringe political parties have become more influential, crime victimisation has been democratised, populations have become more heterogeneous, and existential angst pervades. Yet in France, Germany, Italy, and Scandinavia, imprisonment rates have not skyrocketed and expressive punishments have not become the norm.

In a recent book, I surveyed all the alternate explanations that various people have put forward to explain why American penal policies became harsher. None of them, by itself, suffices as an explanation. That crime rates increased cannot be the primary explanation since they increased everywhere with different penal policies occurring.

That public opinion became more intolerant of crime and criminals cannot be the explanation because that too happened everywhere.

That politicians made partisan use of crime issues, particularly as a shorthand for raising but not explicitly addressing underlying racial resentments at a time of major changes in race relations, also cannot be the explanation. Populist politicians in every country expressed their disdain for liberal crime policies and xenophobic politicians engaged in the politics of ethnicity everywhere.

The democratisation of victimisation cannot be the answer since that occurred in every Western country, and nor can existential angst, for the same reason. All of these things occurred in the U.S., and can be documented, but they cannot explain why the U.S. (and the Netherlands), alone among Western countries responded to those economic and cultural changes with a four-fold increase in imprisonment populations and in the case of the U.S., adoption of substantially and incrementally more severe penal policies.

#### I. United States

What does explain the U.S. changes? Four things. First, work by American historians shows that there are distinct cycles in public tolerance and intolerance of deviant behaviours in the U.S. and that policy formulation and practical implementation vary substantially according to those cycles. Concerning drug use, for example, there have been three periods of peak intolerance of drug use in the U.S. – in the 1850s, from 1890-1930, and from 1970-2000. During periods after drug use has peaked and begun to fall, as happened in 1979-80, policy makers become steadily more harsh and practise becomes steadily more punitive. In the U.S., the harshest anti-drug policies in recent times were adopted in 1986 and 1988, nearly a decade after drug use began to fall. The drug tsar was appointed in 1988. The enormous increase in imprisonment of drug offenders, and steadily lengthening sentences, date from the mid-1980s.

Similar cycles apply to crime and, as a result, it could have been predicted, and occurred, that much the harshest anti-crime policies adopted in the United States happened in the mid-1990s, well after crime rates peaked and began to fall in 1990-91. Moralism, intolerance, and impatience with crime, the product of a period of steadily increasing rates in the 1970s and 80s, was not counterbalanced in the mid-1990s by more traditional liberal, social-welfarist beliefs that had been influential in earlier times. As time has passed, those views have begun more prevalent again, voices expressing them have become louder, and American crime policy had become more multi-faceted.

A second major explanation of the American developments is that American constitutional arrangements not only do not insulate policy makers from shifts in raw public emotion but are designed to reflect it. Thus, unlike in Europe, where most

judges and prosecutors are career civil servants, self-selecting to those roles in university, and socialised into a set of professional, legal, and ethical values throughout their careers, judges and prosecutors in the U.S. are politically selected, often in partisan elections, and serve for relatively short terms. Most elections are local and candidates for prosecutors' posts and judgeships must compete with one another to demonstrate to the electorate that they reflect widely held views. If those views are angry, repressive, and moralistic, they will be reflected in the beliefs, policies, and actions of judges and prosecutors.

Other aspects of American constitutional arrangements and political culture tend to contrast with Europe, making policy more receptive to changes in public attitudes. There is much less confidence in the United States in elite opinion, and much less acceptance of the view that on important matters experts should have a major role to play in setting policy. Instead, the United States has a constitutional system with extensive separation of powers, with legislators often elected for short terms (the federal House of Representatives for two years), the executive separately elected from the legislature, and the judiciary either elected or appointed by elected officials. If politicians choose to campaign on what they see as passionate public beliefs, their opponents must typically respond in kind. If politicians campaign on toughness, their opponents are likely to appeal to the same emotion. Once in office, it should not be surprising that repressive policies are adopted.

A third difference with Europe is that there is a strong stream of moralism in American popular culture that manifests itself in attitudes of punitiveness towards offenders. This can be seen in the findings of the International Crime Victim Survey when responses to questions concerning the punishment of hypothetical offenders compared. Since the first ICVS in 1989, respondents in each country have been asked to indicate whether they would favour a prison sentence for a young burglar with two prior offences. Between 10 and 25 percent of respondents in European countries (other than the United Kingdom) typically indicate that they would prefer imprisonment. Nearly 60 percent of American respondents, in each of the successive waves of the ICVS, have indicated they prefer imprisonment.<sup>8</sup>

A fourth speculative, but creative argument has been offered by James Whitman. Whitman, a historian, struck by what seemed to him surface differences in how German and French prisons treated inmates, in comparison with the United States, looked to historical sources to try to find the origins of distinctive political cultures that might produce that difference. He was particularly struck that in French and

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<sup>8</sup> Van Kesteren/Mayhew/Nieuwbeerta, *Criminal Victimisation in Seventeen Industrialised Countries*. The Hague: Ministry of Justice, 2000.

German prisons, in a variety of ways, prisoners were treated as citizens behind bars rather than as outlaws or pariahs. For example, German and French prisoners wear their own street clothes, are allowed to vote while in prison, and are generally housed in cells without observation windows (this because a right of privacy is recognised as a basic human right). German and French prison guards are career civil servants who undergo extensive, long-term training. By contrast, in the United States, though it varies from prison to prison, prisoners traditionally wear stigmatising convict garb, are not allowed to vote in prison (or in many states after release), and the idea that prisoners should be spared the prying eyes of their warders would generally be seen as ridiculous. Prison officers, again subject to wide variation between states and prisons, often are hired off the street, are relatively poorly educated, and receive relatively little training. How could these differences be explained? Whitman looked to the eighteenth century for an answer. He observed that then in the United States, and England, on which its legal system and practices were based, France, and Germany, persons convicted of crime were treated in very different ways. In that more inegalitarian era, privileged defendants and offenders would be held in comfortable circumstances, accompanied by servants, entitled to visitors, and well-fed and well-housed, while ordinary prisoners were held in miserable conditions in overcrowded facilities, promiscuously intermingling men and women, adults and children, and having to pay the local jailor for their food.

The most dramatic form of upper and lower class differentiation in eighteenth century criminal justice systems concerned the manner of execution. Members of the elite typically had their heads cut off, by guillotine in France and by sword in Germany and England. Ordinary offenders were hung or strangled. There is probably no need here to explain how the body reacts to beheading and hanging but it can fairly be said that hanging is a much more squalid, and, to observers, revolting process.

All Western countries have attempted in various ways to 'level' status differentiation in the treatment of offenders. According to Whitman, France and Germany levelled up and, in non-trivial ways, now treat all offenders as people deserving of concern and respect and, accordingly, as citizens behind bars, entitled to exercise the rights of citizenship other than those that are inherently denied by imprisonment. In the United States (and by implication in England), Whitman argues that a levelling-down occurred, with all offenders being treated in the debasing, stigmatising, and unsympathetic ways that in earlier times characterised only the poor.

The United States is the quintessential levelling-down political culture. Although, of course, prison conditions vary between jurisdictions, and between the custody

and security levels of individual prisons, American prisoners typically are not treated as citizens behind bars.

Putting those things together, then, the United States has been at a stage in its cycles of intolerance towards crime and criminals that has made people especially susceptible to calls for repressive and punitive policies. American constitutional arrangements provide very little insulation from the influence of such calls, and such policies have been adopted. American moralism, manifesting itself in punitiveness towards offenders, has created a receptivity to calls for increasing harshness of penalties.

## II. England and Wales

England and Wales, since the early 1990s, has consciously emulated American crime control policies and the imprisonment population has nearly doubled in the past decade as a result.<sup>9</sup> If, as I argue above, Garland's general argument cannot explain enough, how are we to understand English developments? For starters, what needs explaining is not the period 1970 to the present, but the period 1993 to the present. Before then, despite Garland's focus on the U.S. and England in *The Culture of Control*, England was in the mainstream of Western Europe in its punishment policies, politics, and practices, and there is nothing particular to explain. Since 1993, however, the Labour Party and now government have consciously emulated American crime control policies to, so far as one can tell, the satisfaction of the English electorate. Why would the English electorate have been susceptible to those appeals? There appear to be four distinctive factors.

First, England's tabloid media are more rabid about crime issues than are mainstream newspapers anywhere else in Europe, and continually, on their front and editorial pages, and in their headlines, adopt angry and punitive stances, blaming the government for insensitivity to the victims of crime and unacceptable tolerance of crime and social disorder.

Second, British crime prevention initiatives have been pervasive over the last twenty years, manifesting themselves as such things as more CCTV cameras per capita than any country in the world, a larger DNA database for criminal investigation purposes than anywhere else in the world, more speed cameras for traffic offenders than anywhere else in the world, and a steady drumbeat of government proposals for repressive policies. There is evidence that one effect of this continu-

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<sup>9</sup> Tonry, *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy*, Cullompton: Willan, 2004.

ous concentration on crime prevention has been to raise public anxieties rather than to assuage them, making English citizens more fearful, not less, and accordingly more receptive to appeals by the tabloids and the government for harsh policies.

Third, as in the United States, there is a taste for punishment in England and Wales, a moralism that calls for much harsher penalties than the public expects in other European countries. Earlier I pointed out that, among ICVS respondents, Americans are much more punitive than Europeans except for the U.K. That pattern recurred in each of the four ICVS waves. In 2000, for example, among sixteen countries, U.S. respondents were likeliest to favour prison sentence (56 percent), compared with rates between 12 and 21 percent among respondents from continental European countries. The three ICVS jurisdictions from the United Kingdom, however, closely resembled the United States in preferring a prison sentence: Northern Ireland (54 percent), Scotland (52 percent), and England (51 percent). And, among European countries, English respondents would have imposed the longest sentences. By preferring prison sentences at a rate three to four times higher than those of any continental European country, English respondents in effect call for prison for a much wider range of burglars including, as a consequence, many less serious ones. For English respondents to call for a higher average sentence for burglaries that are less serious than those punished by imprisonment elsewhere, is in effect a second comparative increase in punishment.

Fourth and finally, the current English government is highly authoritarian and operates in a constitutional framework that imposes few limits on authoritarian policy making. England is a national constitutional system, with one legal and governmental jurisdiction, not a federal one like Germany or the U.S. More importantly, under the doctrine of Parliamentary Supremacy, the legislature is not constrained by a written constitution. Although Parliament has adopted legislation bringing the European Convention of Human Rights into force in England and Wales, it has done so in terms that allow courts to declare English laws incompatible with the ECHR but not to strike them down. Because the prime minister is also the leader of the majority party, and there is no effective counterweight in the legislature to executive policy preferences, accordingly, if the government decides to adopt repressive and punitive policies, there are few centres of governmental power to oppose it. With all criminal justice agencies part of nationally administered centralised systems of police, prisons, and probation, little stands in the way of implementation of policies the government of the day prefers.

### III. Canada

Canada is an interesting contrast to England and America because it shares a common legal system, like the United States, but much more recently broke away from



the United Kingdom, shares a language, educational systems, and much else, and yet has radically different crime policies. Although Canadian violent crime rate trends and homicide trends parallel those of England and the United States since 1970, the Canadian imprisonment rate has been flat since 1980. There appear to be four major explanations.

First, unlike in the United States or in England, but as in Europe, there remains considerable confidence in both the appropriateness and the competence of professionals to determine policy in general, and practitioners to make individualised decisions in individual cases.

Second, prosecutors and judges are not elected in Canada, as in the United States, but are selected in what are ideally non-partisan, selection processes, though no doubt politics creeps in around the edges. Thus, unlike America's elected practitioners, or England's bureaucratic practitioners subject to nationalised policy control, Canadian practitioners are relatively insulated from politics.

Third, because of the linguistic fissure that has bedevilled Canadian politics for the past 50 years, francophonic influence on criminal justice policy is powerful. Just as France's political culture happily lives with rapid rises and falls in the imprisonment population, without political heads rolling, Quebec's criminal and juvenile justice policies are less punitive than those in most of anglophonic Canada. At a national level, insiders openly acknowledge the francophonic influence as a moderator of criminal justice policy.

Fourth, American oppositionalism is ever-present and very powerful. The wish, among elites, to maintain a distinctive Canadian, as opposed to American, culture and policy manifests itself in crime policy, an area in which the vengefulness and mean-spiritedness of American policy can comfortably be contrasted with the decency and liberality of the Canadian.

What the English, American, and Canadian stories tell us, despite Garland's suggestion that common explanations may characterise all Western countries, is that understanding of changes in penal policy and practices depends on understanding of distinct local characteristics.

#### **D. Germany?**

As table 4 made clear, the German imprisonment rate was broadly stable during a period when those in the U.S. and the Netherlands rose steeply, that in Finland's declined steeply, and that in France zigzagged. This section is in the nature of things speculative since I have very little first-hand knowledge of German penal

policy on which to draw. What I do, instead, is briefly summarise what seem to be risk and protective factors that appear useful in understanding what has happened in the U.S., the U.K., and Canada, and then hypothesise their possible effects in Germany.

Table 1 shows, for the U.S., the U.K., and Canada, explanatory factors that help us understand recent policy developments there, and speculatively identifies their likely high or low relevance for understanding German developments. Some of the factors shown in table 1 are idiosyncratic for particular countries. These include, for example, the influence of sensibility cycles on penal severity in the United States, the influence of francophonic culture, political culture, and American oppositionalism in Canada, and the influence of tabloid newspapers on English crime policy. Others, notably confidence in elites and the presence of a professionalized career cadre of judges and prosecutors, appear to operate negatively and positively, depending on circumstances in individual countries.

A number of these factors seem particularly apposite to Germany. These include a taste for punishment/moralism, debasement, confidence in elites, and a politically insulated cadre of career officials. Others that may possibly be relevant are the lesser influence of tabloid and other populist news media than in, for example, England, and, conceivably, American oppositionalism.

Since all of these hypotheses are speculative I do not discuss them at great length. The evidence concerning a taste for punishment/moralism can be found in basic stability of German imprisonment rates, the startling effectiveness of the effort in the early 1970s to reduce use of prison sentences of less than six months and its perpetuation ever since, and the success of various German initiatives, including expansion of prosecutorial diversion programmes, and reducing court case loads and controlling the prison population.<sup>10</sup> Supporting evidence can be found in ICVS results that show, in relation to responses to questions about the use of imprisonment for a young recidivist burglar, that German respondents fall well within the middle of the 12-25 percent positive response rate that characterises continental Europe, in contrast to the 50-60 percent response rates that characterise the United States, England, Scotland, and Northern Ireland.<sup>11</sup>

Second, German political and popular culture appear considerably more prepared than in the United States and England to defer to professional expertise, in relation

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<sup>10</sup> Weigend, 'Sentencing and Punishment in Germany' in *Sentencing and Sanctions in Western Countries*, supra note 2.

<sup>11</sup> Van Kesteren/Mayhew/Nieuwbeerta, supra note 8.

both to policy making and policy implementation. This has partly to do with the historical tradition in Germany that prosecutors and judges are members of a career cadre, implying that the notion that individual decisions should be protected from political influence is strongly supported by professional values, and that judges and prosecutors will be positive influences on policy processes. It may also have to do with the absence of elected judges and officials.

In any case, a number of bits of evidence document the hypothesis that Germany accords considerably higher status to elite opinion than do some other places. Joachim Savelsberg (1994), a decade ago in contrasting American and German policy processes, fixed on differing attitudes towards the views and beliefs of professional elites in the two countries as a major explanation for the contrast between American politicisation and German insulation. Another, longer-ago example, well-known in Germany, is the influence demonstrated by a group of German law professors in drafting a model penal code in the 1960s.<sup>12</sup> In England or America, the idea that policy makers would regularly consult the views of laws professors, and even give deference to them and their authority, would startle most observers. Over the past 30 years there appears to have been a consistent pattern of resort by legislators and policy makes to the views of senior academics in considering policy options. Professor Franz Streng, in private communication at the University of Erlangen-Nürnberg, where I gave the talk on which this paper is based, suggests that the professoriate now has much less influence and that things are changing.

Third, as Whitman's historical account of the evolution of penal policies and practices in France, Germany, and the United States, demonstrates, the Germans are the paradigm case of a society which responded to the inegalitarianism of earlier centuries by 'levelling up' in its treatment of offenders, rather than, as in the United States and England, levelling down, with the result that all offenders are treated as citizens whose interests warrant respect and whose human rights warrant attention. It is plausible to imagine that this different set of attitudes, which manifests itself in other things such as a fuller and more supportive system of social welfare programmes than in England or the United States, helps explain why German penal policy remains premised on the idea that offenders are individuals and not stereotypes.

Finally, in contrast with England and America, but much less so with Canada, Germany is an exemplar of 'consensus' as opposed to 'adversary' policies of democratic governance.<sup>13</sup> In countries characterised by adversary political cultures,

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<sup>12</sup> Baumann et al. et al., *Alternativentwurf eines Strafgesetzbuches*. 2<sup>nd</sup> edition. Tübingen: Mohr, 1969.

<sup>13</sup> Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-six Countries*. Newhaven: Yale University Press, 1999.

often embodied in the existence of two major political parties, controversial political choices are generally posed as strongly delineated contrasts, and one position wins or loses. By contrast in consensus political cultures, important policy decisions often result from extensive forms of consultation, brokering of differences between effected interests in political parties, and the development of relatively moderate, mainstream policies that are not rapidly changed. Consensus political cultures are often characterised by multi-party governments. Although Germany has two primary political parties, in recent decades governments have usually been coalitions, and policy making at least on the area of crime appears to have been much more consensual than adversary.

How can understanding of these matters in general, and in Germany, be advanced? A variety of kinds of research are imaginable. Some, such as macro-political quantitative analyses of various factors that may or may not influence the nature of penal policy or the level of prison populations, are no doubt worthy but beyond my competence. In the short-term, and in the longer-term to provide a basis for more quantitative studies, what is needed is a series of rich case studies that combine historical sensitivity, empirical data analysis, and social theory, and attempt to tell the penal policy stories of individual countries over time. Taken together, such policy histories from a number of countries would allow us to look across national boundaries in search of patterns and generalisations.