Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion

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Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion

As is true of any other practice that involves the application of rules by social actors, sentencing practices are suffused with the exercise of discretion. In light of a range of permanent conditions that shape the setting in which sentencing decisions are being made - including, the indeterminacy of legal rules, differences of opinion among decision-makers regarding the aims of punishment, and uncertainty regarding prospective implications of the decision (e.g. the offender's prospects of reoffending) – it is clear that sentencing laws cannot totally control the way in which judges, prosecutors and juries exercise their discretionary powers. Nevertheless, a certain measure of success in structuring sentencing discretion through formal legal rules is widely believed to be achievable. Different legal systems employ different mechanisms in an attempt to structure sentencing discretion. These mechanisms include: laws stipulating mandatory penalties for particular offenses, sentencing guidelines (that may be formulated in a more or less binding fashion), statutory restrictions on prisoners' eligibility to early release and judicial review of decisions that affect the sentencing outcomes (e.g. review of the charging decisions of prosecutors by trial judges and review by appellate review of the decisions of lower instances).

As the contributions to this workshop demonstrate, nations differ in terms of their methods for governing sentencing discretion and with respect to how they design and implement these methods. In this paper, I shall elaborate on an important pattern that transpires when we examine recent legislative trends in this field from a global perspective. This pattern pertains to the exceptionally extensive use of determinate sentencing laws in the American legal system. In this paper, I examine the differences between the US, other common law systems (notably, England and Wales and Australia) and continental systems with regard to the extent, forms, and the effects of determinate sentencing laws. I then consider the political and institutional factors shaping these differences.

The extensive reliance on determinate sentencing in the US is a relative recent phenomenon. It has come about by the proliferation, since the early mid-1970s, of three interlocking legislative trends: the massive increase in the scope and range of mandatory sentences, the institutionalization of presumptive sentencing guidelines based on numeric grids and the spread of statutes limiting the eligibility of offenders to early release (e.g. “truth-in-sentencing” laws). In the second chapter of this article, I examine the differences between these three models of determinate sentencing legislation and parallel developments in European and British sentencing law. As a result of the departure of American sentencing law from the principles of indeterminate sentencing (that continue to dominate the sentencing structures of other Western legal systems), the US has become an outlier to the common practices by which liberal democracies seek to regulate the exercise of sentencing discretion. In essence, we may identify four distinctive characteristics of the American approach. First, the statutory tools used to govern sentencing discretion in the US are more formalized and restrictive than in other nations. Second, they seek to make sentencing not only more determinate but also more severe; American determinate sentencing laws attempt not only to enhance the uniformity and predictability of criminal sentences but also to ban judges from choosing lenient penalties. Third, sentencing law in the US aims to facilitate greater

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1 The term *sentencing discretion* is used in this article to refer to a situation in which a decision-maker can choose between two (or more) legally-valid options in a way that affects the penal sanction that may be inflicted on an offender upon his conviction. Sentencing discretion, to clarify, is used not only by judges but also by other actors whose decisions have an impact on the sentencing outcome (including prosecutors).
participation and influence of the citizenry on the design of sentencing policies. This pattern may be contrasted with the more centralized way in which sentencing policy is formulated in European systems, where the impact of professional and bureaucrat elites is much stronger. Fourth, the governance of sentencing discretion in the US focuses predominantly on structuring the decisions of judges and parole boards; American sentencing law has relatively little to say about the way in which prosecutors exercise their discretion while reaching charging and bargaining decisions, although such decisions have fundamental impact on the sentencing outcome. European systems utilize more extensive mechanisms of judicial oversight of the decisions of prosecutors as well as of lower judicial instances.

My analysis is a contribution to a growing body of comparative literature that contests the conventional thesis about the increasing influence of the US on the contours of criminal justice policy worldwide in the age of globalization. In light of the hegemonic role of the US in shaping the direction of globalization processes in economic, cultural and political contexts, it is often assumed that American policy models have gained an increasing international influence over the last decades. To be sure, the US has been a prominent exporter of policy models at least since the early nineteenth century (as exemplified by comparative law classics such as De-Toqueville’s The American Penitentiary and its Application in France). However, the conditions of globalization are argued to have increased the degree to which European systems are susceptible to American influence and tend to borrow policy models that have proliferated in contemporary American politics. In contesting the validity of the Americanization thesis, we should go beyond demonstrating that the new American models of determinate sentencing have not been extensively adopted by European and commonwealth legal systems; after all, their adoption may be a matter of time. In order to consider whether these disparities are likely to remain stable in the future, we need to gain a better understanding of the structural conditions that shape the processes of policy design and policy-implementation in different types of legal systems. The purpose of this inquiry is to consider whether the institutional and political barriers that hindered the reception of American models of determinate sentencing in other legal systems are likely to continue to produce similar constraining effects on their reception in the future. In the third and the fourth chapters of this paper, I analyze the political and institutional conditions that facilitated the spread of determinate sentencing laws in the US and hindered their reception in continental and commonwealth legal systems, and show that they have deep historical and ideological roots. This analysis helps to explain why these structural impediments to the Americanization of European and British sentencing policy are likely to remain in force in the foreseeable future.

2. **Laws Regulating Sentencing Discretion: The US as an Outlier**

The differences between the US and Europe with regard to the regulation of sentencing discretion have markedly widened over the last four decades. In large part, this has been a

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3 Gustave de Beaumont and Alexis De Tocqueville, The American Penitentiary and its Application in France across Europe (1979) [1833].

product of the proliferation in the US of the determinate sentencing movement, which did not gain similar influence in other national system. The mid-1970s signaled a notable shift in dominant ideas about the purposes and procedures of criminal sentencing in the United States. Over most of the preceding century, the sentencing structures of individual states and of the federal system were premised on the model of indeterminate sentencing, in which judges and parole boards were authorized to set the offender's penalty within a broad range of statutory options. In a system that defined the rehabilitation and social reintegration of offenders as its primary aims, indeterminate sentencing was perceived as a suitable tool to tailor the offender's penalty to his projected prospects of desisting from crime. The system of indeterminate sentencing came under fierce criticism in the 1970s, as part of a broader assault on the ideology of penal welfarism. In the criminological literature of the period, profound concerns were raised regarding the achievability of the prison's rehabilitative purposes and the rationale of incapacitation received renewed interest. Normative writers questioned the compatibility of indeterminate sentencing with basic notions of proportionality and equality before the law, as it failed to address the potential for arbitrary or discriminatory exercise of discretion by individual judges. In the political debate, liberal critics argued that indeterminate sentencing is prone to reinforce racial disparities in the administration of criminal justice in light of its failure to control racial biases, while conservative commentators stressed its failure to prevent undue leniency in sentencing.

The convergence of these various strands of political and criminological critique created increasing pressures to transform the guiding principles and procedures of sentencing policy in the US. The final decades of the twentieth century were marked by the emergence of new legislative trends which sought to increase the determinacy and severity of criminal sentences. Among these legislative trends, three have been particularly influential: (i) the growing use of mandatory penalties, (ii) the introduction of binding or presumptive sentencing guidelines, and (iii) the imposition of statutory restrictions over prisoners’ eligibility to parole (under the banner of “truth-in-sentencing” laws). I now move to introduce these three legislative trends, and to consider the extent to which they have had an impact on sentencing policy outside the US. As will be shown, legal systems in other Western nations did not adopt anything that resembles the American models of sentencing guidelines or truth-in-sentencing laws. Some of these systems have increased the use of mandatory penalties. However, they did so in a manner that is notably more limited than comparable American laws, and that ultimately retains the discretionary character of their sentencing procedures. The differences between the American approach and its continental and British counterparts will be analyzed in the following chapters.

2A. Mandatory Penalties In and Outside the US

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The first vehicle of determinate sentencing reform in the US has been the enactment of mandatory penalty laws. Until the mid-1970s, the criminal codes at both the state and federal levels included very few mandatory sentences. The existing provisions applied to a narrow class of offenses, such as murder, drunk driving and drug trafficking. Furthermore, the post-WWII decades have seen a constant decline in the number of mandatory penalties. This trend culminated with the repeal of nearly all federal mandatory penalties for drug offenses by the US Congress in 1970, following a series of critical reports that questioned the utility of such measures. The change of course taken by American legislatures since the early 1980s was dramatic. With the increasing politicization and more punitive tone of criminal justice policy in the 1980s, the idea of determinate sentencing enjoyed a notable renaissance. State and national legislatures began to introduce mandatory penalty laws to tackle an ever wider ambit of criminal offenses, including drug possession and aggravated forms of various felonies. In Florida, for example, the state legislature enacted seven new mandatory sentencing bills between 1988 and 1990 alone; the US Congress enacted at least twenty new mandatory penalty provisions between 1985 and 1991.

The massive expansion of mandatory penalties gained further momentum in the 1990s. In this decade, mandatory sentences began to be increasingly used to address the problem of persistent offending. Earlier provisions of mandatory sentencing laws sought to address the special harmfulness or moral wrongfulness of particular criminal conduct. By contrast, post-1990s legislation targeted the problem of recidivism per se, while setting a much lower threshold with regard to the severity of the offenses liable to such penalties. The most salient example of this trend has been the proliferation of 'three strikes and you're out' laws. Typically providing for an enhanced penalty on the second conviction and for a lengthy imprisonment on the third conviction (e.g., in California, 25 years to life), 'three-strikes' laws are in force today in 24 states. Congress supported the proliferation of this legislation not only by enacting a federal statute subjecting the perpetration of a third federal felony to life imprisonment; it also created a range of fiscal incentives for the states to enact such laws.

As a result of the inflation of mandatory sentencing laws for repeated offenders, the ability of American judges to impose intermediate (non-custodial) sanctions on convicted offenders has been significantly constrained. To use one salient example of this trend, in the state of Arizona in the fiscal year 1990, the expansiveness of mandatory sentencing laws made no less than 57 percent of all felony offenders subject to mandatory sentence enhancement.

The US has not been alone in expanding the use of mandatory sentences over the last decades. However, the extent of mandatory sentencing legislation is much narrower in other legal systems. Such legislation usually applies to a narrow class of severe offenses such as drug trafficking, human trafficking, organized crime, terrorism and sexual abuse of minors.

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11 Id. at 146.
12 18 U.S.C. 3559(c).
14 Tonry, supra note 10, 146.
rather than to recidivist patterns of milder offenses.\textsuperscript{15} Determinate sentencing laws outside the US are usually formulated in a more flexible fashion; typically leaving judges with discretion to consider mitigating factors to avoid unduly harsh sentences.\textsuperscript{16} The pattern of American exceptionalism with regard to the use of mandatory penalties can be most clearly understood when these laws are placed within the broader context of recent shifts in the philosophy of sentencing policy. As Anthony Bottoms has observed, in continental Europe as well as in Britain and Australia, the introduction in recent decades of mandatory sentences for the most severe offenses has coincided with a counteracting trend of the decreasing use of imprisonment for penalizing less serious crime.\textsuperscript{17} This strategy of \textit{severity bifurcation} allows governments to respond to public pressures to act against the most widely censured types of crimes while avoiding excessive increases in their prison population. By contrast, in the US, the proliferation of mandatory penalties has been a part and parcel of a broader shift towards a “zero tolerance” approach, which applies not only to severe offenses but also to low-level crimes.\textsuperscript{18} In the third chapter of this Article, I discuss how the political structure in which sentencing policy is formulated in the US impedes the reception of the severity bifurcation approach.

The differences between the European strategy of severity-bifurcation and the American strategy of “zero-tolerance” can hardly be overstated. In European sentencing law, new legal doctrines and institutional mechanisms were created over the last four decades to reduce the use of custodial penalties.\textsuperscript{19} In Germany, the “day fine” system – which allows judges to commute time servable into fines, tailored both to the defendant's earning power and to his degree of culpability – has expanded dramatically from the late 1960s to the present. The number of cases resulting in the imposition of fines in German courts has increased in more than 150\% between 1968 and 1996 (from 360,000 to 565,000).\textsuperscript{20} By the mid-1990s, day fines were used to penalize about 25\% of offenders sentenced for "aggravated theft" (including burglary), 50\% of all drug offenders, and 85\% of offenders charged with simple theft or assault.\textsuperscript{21} These figures stand in sharp contrast with the penalties for comparable offenses in the United States. For instance, as of 1994, 75\% of burglars were sentenced to either prison or jail in American state courts.\textsuperscript{22} The War on Drugs, with its heavy use of determinate sentencing provisions for possession offences, has extensively targeted drug users (rather than drug dealers), a class of offenders that in Europe is treated mostly through a combination of non-custodial sanctions and therapeutic measures.\textsuperscript{23} Various other examples can be drawn

\textsuperscript{15} James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe 71 (2003).
\textsuperscript{16} See, for example, with respect to recent English legislation in this field, Andrew Ashworth, Sentencing and Criminal Justice 226 (5\textsuperscript{th} ed., 2010).
\textsuperscript{17} Anthony Bottoms, \textit{The Philosophy and Politics of Sentencing}, in The Politics of Sentencing Reform 17, 40 (Chris Clarkson and Rod Morgan, eds. 1996).
\textsuperscript{19} Sonja Snacken and Dirk Van Zyl Smith, Principles of European Prison Law and Policy (2009) at 86-98
\textsuperscript{22} Whitman, supra note 15, at 72.
\textsuperscript{23} Markus D. Dubber, Victims in the War on Crime (2002) 6.
from increased American reliance on incarceration to enforce low-level, "quality of life" crimes.\textsuperscript{24} Eventually, these differences in sentencing strategies are pronounced in the marked gaps between the average imprisonment periods across the Atlantic. In 1996, the average time served in American state prisons was 28 months, whereas in France it was 8 months.\textsuperscript{25}

The differences between the American and European approaches to mandatory sentencing laws are pronounced not only in the extent of such legislation and in the sentencing philosophy underpinning its enactment. They are also likely to characterize the societal and institutional effects that these laws generate. Sentencing policies never operate in a vacuum. Their effects are determined by their interactions with prevailing institutional norms and practices that shape the manner in which they are applied by prosecutors and judges (as well as other institutional actors and lay citizens). Máximo Langer has demonstrated that, even in policy areas in which the impact of Americanization is noticeable with regard to the formal adoption of new policies, European institutional practices are unlikely to resemble their American counterparts because they operate within an institutional culture pervaded by inquisitorial rules and values.\textsuperscript{26} Accordingly, even in those foreign jurisdictions in which American models of mandatory penalties were or will be formally adopted, such reforms will not easily facilitate substantive policy convergence at the level of "law in action" as long as deep-seated differences of professional values and institutional practices continue to prevail. As will be shown in Chapter 4 of this Article, this reality seems to inhibit the convergence of American and European practices in particular (in light of the remaining divides in dominant conceptions on the role of the judge, the purpose of the trial process, and the ethical obligations of prosecutors) but it poses significant barriers with respect to the "Americanization" of sentencing policy in Britain and Australia as well. Nevertheless, as will be shown, the mere potential that determinate sentencing reform will bring continental and commonwealth systems closer to the American experience has been widely invoked by their critics and hindered the global spread of these legislative models.

In the US, it has been repeatedly shown that mandatory penalty laws did not eliminate the role of discretion in shaping sentencing outcomes. Instead, they shifted the control over the outcomes of the sentencing process from the judges to the prosecutors. In a system in which 95\% of criminal trials are concluded by a guilty plea, one of the major effects of determinate sentencing laws is in how they affect the dynamics of charge bargaining and fact bargaining between prosecutors and defense attorneys. In this respect, it is clear that the spread of mandatory sentences has substantially increased the leverage of prosecutors in plea bargaining negotiations, as these negotiations are now conducted in the shadow of more predictable and more severe penalties.\textsuperscript{27} Moreover, determinate sentencing laws have weakened the ability of judges to mitigate the consequences to the defendant of prosecutorial decisions that seem to be suspicious of discriminatory or arbitrary exercise of discretion.

\textsuperscript{24} Kevin R. Reitz, \textit{The Disassembly and Reassembly of U.S. Sentencing Practices, in Sentencing and Sanctions in Western Countries} 222 (Michael Tonry and Richard S. Frase eds. 2001), 241-244.

\textsuperscript{25} Whitman, supra note 15, at 70.

\textsuperscript{26} Langer, supra note 2.

\textsuperscript{27} Kate Stith, \textit{The Arc of the Pendulum: Judges, Prosecutors and the Exercise of Discretion}, 117 Yale L.J. 1240 (2008) .
However, when transplanted in the different institutional settings that prevail in European legal systems, mandatory penalties will not necessarily produce similar effects. Although many continental systems have recently moved in the direction of allowing the prosecution and the defendant to reach an agreement over the charges (and, in some jurisdictions, over the sentence to which they will appeal), judges in continental systems are much less constrained by such agreements, and they continue to have independent responsibility to determine the defendant's guilt as well as his sentence.\footnote{Langer, supra note 2.} In England and Wales, where defendants can bargain with prosecutors over the charges but not over the penalty, the impact of mandatory penalties on the dynamics of plea bargaining also seems less consequential than in the US. In chapter 4 of this article, I will analyze the institutional determinants that shape the patterns of divergence and convergence with respect to the effects of mandatory penalty laws in different jurisdictions.


A second prolific form of determinate sentencing reform in post-1980 American law has been the introduction of sentencing guidelines. In most American jurisdictions, the guidelines were drafted by sentencing commissions that continue to monitor their implementation and to advise on recommended reforms on a regular basis. The idea of introducing statutory guidelines into the American sentencing system was first advocated by liberal commentators in the early 1970s as a means of reinforcing values of legality, uniformity and transparency in sentencing. In an oft-cited statement of this liberal vision, federal judge Marvin Frankel criticized "the unbridled power of the sentencers to be arbitrary and discriminatory".\footnote{Frankel, supra note 7, 49.} He argued that the creation of sentencing commissions and guidelines was necessary to eliminate the "unruliness" then pervading American sentencing. Before long, the idea began to be supported by conservative critics of the criminal justice system. Gradually, sentencing guidelines were reframed as a means to curb the lenient inclinations of liberal judges. The system that emerged out of these converging concerns of liberal and conservative circles has given emphasis not only to the values of uniformity and predictability but also to the inexorable creed of “tough on crime” conservatism which gained prominence in the political discourse of the time.

The predominant way of formulating the sentencing guidelines in the US is based on a two-dimensional grid, with seriousness of the offense in one axis and criminal history score on the other axis.\footnote{Richard S. Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190 (2005) 1201.} Based on the intersection of these two parameters, the guidelines provide a presumptive sentencing range, within which the judge is expected to reach her final decision. This model – which seems to resonate more closely with the mechanistic conceptions of adjudication prevailing in late eighteenth century's continental Europe than with twentieth century American notions of adjudication as a form of policymaking - purports to ensure the simplicity and determinacy of the sentencing decision. The mechanisms used to ensure...
judicial compliance with the guidelines' recommendations vary from state to state. The most common mechanism has been the subjection of departures from the recommended sentence to appellate review. As Kevin Reitz has shown, different standard of appellate review are used in different jurisdictions in the US, ranging from the more deferential to highly restrictive levels of scrutiny. In some jurisdictions, as he notes, the standard of review is so strict that it practically precludes the authority of trial courts to consider case-specific circumstances as mitigating factors. Other jurisdictions have chosen to rely on popular mechanisms alongside appellate review to promote judicial compliance with the guidelines. In the states of Pennsylvania and Washington, for instance, the departures rates of individual judges are made public. This enforcement mechanism gains much of its bite from the fact that judges are elected to office in these jurisdictions.

It is important not to lose sight of the different variants of sentencing guidelines systems that operate today in the US. In some states, particularly those in which commissions were authorized to consider prison capacity when establishing presumptive sentence ranges, sentencing guidelines have had a moderate effect on the pro-growth tendencies of the prison population; in other states, they reinforced populist "tough on crime" crusades. Still, it is clear that the American experience with sentencing guidelines continues to be regarded as unappealing by other nations. Even legal systems that have adopted or seriously considered the introduction of sentencing guidelines – such as New Zealand, Canada, and England and Wales – eschewed designing it in accordance with the American model. Judges, scholars and policymakers who participated in the policy debates in these countries have widely criticized the crudeness of the American system of numerical grids, its failure to allow judges to recognize the factual variations between different cases and to adjust the punishment to the specific circumstances of the offender and the offense and its tendency to provide prosecutors with greater influence over sentencing decisions. The fact that the evidence on the negative consequences of the American grid-system was more consequential in inhibiting support for sentencing guidelines outside the US is telling. As I will argue in my analysis of the political and institutional determinants that have shaped these debates in different national settings, the resistance to the American model in continental and commonwealth legal systems is not only a product of ideological disagreement. It is also a result of the different degrees to which evidence-based arguments have an impact in sentencing policy debates. Policy debates in the US are receptive to popular participation (and are thus more vulnerable to the impact of populist punitive sentiments). In continental Europe (and to a lesser yet considerable degree,

31 Id., at 1219-1221.
33 Frase, supra note 30, at 1199.
36 Id, id.
37 For examples from England and Wales, see: Ashworth, supra note 16, at 418; for examples from Australia, see Arie Frieberg, Three Strikes and You're Out – It's Not Cricket: Colonization and Resistance in Australian Sentencing, in Sentencing and Sanctions in Western Countries (Michael Tonry and Richard Frase, eds.) 29 (2001)
in England and Wales and in Australia), sentencing policymaking is more insulated from popular pressures. This feature provides conditions in which judges can more effectively impede politicized reforms that strengthen the legislative control of the sentencing process.

While rejecting the American model of sentencing guidelines, many legal systems have introduced reforms over the last decades to enhance the consistency and predictability of sentencing decisions. For example, since the late 1980s, Sweden has been operating a system of "principle-guidelines". It defines the general principles that ought to inform different types of sentencing decision and provides judges with broad parameters to facilitate the application of these principles and to determine the "penal value" of the crime in individual cases (giving primary focus on considerations related to the offender's culpability). As Andrew Von Hirsch notes, compared with the American model of numeric sentencing guidelines, the Swedish model vests greater responsibility in the hands of appellate courts. Whereas in a numeric system of sentencing guidelines appellate courts are mainly required to monitor compliance with the tariffs specified in the grid, in the Swedish model they actively construct the penal standards by interpreting and applying these principles throughout the development of their case law. At this stage of this Article, my aim is not to evaluate the pros and cons of each model but mainly to pinpoint the relatively minor role played by judges (at both appellate and trial courts) within the American model of sentencing guidelines.

In England and Wales, the Court of Appeals has been promulgating "guideline judgments" since the 1970s. These judgments clarify the main aggravating and mitigating factors with respect to particular offenses and suggest an appropriate starting point or a range of sentences. English judges are expected to consider the guideline judgments while tailoring the sentence to the facts of the case. However, the Court of Appeal has repeatedly emphasized the non-binding nature of the guidance it provides in its judgments. The creation of the Sentencing Advisory Panel in 2004 (the tasks of which were assigned to the Sentencing Council since 2009) established a new advisory committee to prepare sentencing guidelines and to monitor their implementation. The extent to which the guidelines will be followed in the practice of English courts remains to be seen. It may be argued that their practical impact will be less significant than the Court of Appeal's guideline judgments in light of the higher prestige of the Court among trial judges.

2C. Laws Restricting the Possibility of Early Release in and Outside the US

One of the issues that attracted the fiercest criticism by the determinate sentencing movement was the discrepancy between the length of prison term imposed on convicted offenders by the courts and the actual times they eventually served. This discrepancy was a product of the extensive use of early release mechanisms in the system of indeterminate sentencing. In a system that defined the rehabilitation and social reintegration of offenders as central tasks of

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40 Ashworth, supra note 16, at 36.
41 E.g. Johnson (1994) 15 Cr App R (S) 827, at p. 830.
42 Ashworth, supra note 16, at 36-7.
penal institutions, early release mechanisms such as parole and "time for good behavior" served as major devices by which the officials of the correctional system could tailor the actual prison term of every individual offender to his prospects of social reintegration. The increasing use of early release mechanisms across Europe and in the US was part and parcel of the growing bureaucratic capacities and public legitimacy of welfare states, a historical process that culminated in the post-WWII era.\(^{43}\) Because the legitimacy of these early release practices depended on the credibility of the penal system's stated capacities to rehabilitate offenders (and, at a deeper level, it hinged on the depth of public trust in the capacity of the state to reduce crime levels through welfarist forms of supervision and intervention), these practices came under increasing criticism from the 1970s onwards, as part of the broader legitimation crisis of the modern welfare state. Indeed, in the 1970s, empirical studies were increasingly challenging the criminological foundations of rehabilitative policies and politicians effectively mobilized public outcry against the extensive use of early release in times of mounting crime rates.\(^{44}\)

With the entrenchment of law and order politics in the 1980s, laws restricting offenders' eligibility for early release became popular among American legislatures. Early legislation in this field focused on establishing parole guidelines in an attempt to structure the discretion of parole boards in setting release dates.\(^{45}\) Later on, legislatures in various states began to abolish parole altogether or to substantially restrict its scope. To date, at least 16 states and the federal system abolished parole release for all offenders. At least four other states abolished parole release for certain violent or felony offenders. Most of the states that did not abolish their parole system introduced new laws requiring offenders to serve a substantial portion of their prison sentence. These laws, which proliferated under the banner of "truth-in-sentencing" legislation, became widespread throughout the 1990s. To date, at least 27 states require certain types of offenders (not necessarily the most severe types of violent crime) to serve 85% of their prison sentences before obtaining eligibility for early release. The national administration played a key role in facilitating the diffusion of these laws. The Violent Crime Control and Law Enforcement Act of 1994 authorized the federal government to provide incentive grants to states which denied prisoners' eligibility to early parole before completing 85% of their sentence. In 1995 alone, 11 states adopted such legislation.

During the same period, no other legal system outside the US abolished parole. In several countries, legislatures required courts to take further considerations while exercising their discretion in early release decisions. For example, in Germany, the Penal Code was amended in 1998 to require judges to consider “the safety interests of the public” while determining parole eligibility;\(^{46}\) another amendment requires the court to hear an expert witness for assessing the offender’s continued dangerousness in cases in which his offense had caused

\(^{44}\) Garland, supra note 5, at 65-8.
bodily harm.47 These amendments are declarative. They change the normative framework within which European judges reach sentencing decisions. However, they steer clear of introducing specific numeric prescriptions with respect to the minimal time prisoners have to serve before obtaining eligibility to early release.

In France and many other European countries, judicial discretion with regard to the offender’s eligibility to early release has not been substantially constrained by legislation.48 However, there is evidence that the actual rates of conditional release have declined over the last two decades. One may be inclined to attribute this trend to the rise of a more punitive public attitude, to which judges and correctional officers are responsive. However, a plausible alternative explanation would link this development to recent changes in the composition of the prison population in light of the decreasing use of imprisonment to penalize low-level offenses. As the prison population becomes dominated by offenders convicted for serious offenses (as opposed to the current situation in the US),49 the rates of prisoners found eligible to early release is likely to decrease. In this respect, the declining rates of early release in European countries are rooted in institutional and political changes that are opposite to those fuelling the legislative restrictions on eligibility to parole in America.

In a trend that even more pronouncedly diverges from the American experience, some European systems have introduced mechanisms of mandatory early release over the last two decades. In 1998, Sweden instituted a system of nearly universal mandatory release in which all inmates sentenced to an imprisonment period of more than one month must be given conditional release once they have served two thirds of their sentence.50 English parole policy, following a reform that came into force in 1992, combines between mandatory regimes of early release for short sentences (less than four years) and discretionary regimes for long sentences (four years and more).51 This policy neatly fits into the broader strategy of severity bifurcation that seeks to relieve fiscal pressures on the correctional system through lenient treatment of low-level offenses.

3. The Political Underpinnings of Cross-National Differences in the Regulation of Judicial Discretion in Sentencing

Why, then, has the American approach to the regulation of judicial discretion in sentencing become an outlier to international standards? Why has it come to rely on more formalized statutory schemes for structuring the exercise of discretion and to establish penal standards that are much harsher than those prevailing in other Western legal systems? In this chapter, I argue that some of the major factors shaping the distinctive character of American policy in this field are found in the exceptional degree to which American sentencing policymaking

47 Para. 454, sec. 2, 3 CCP.
49 See the figures presented above, section 2.1.
50 Tournier, supra note 48.
interweaves with electoral politics. A set of interlocking constitutional and political arrangements that distinguish the US from other Western democracies makes American criminal justice policymakers more vulnerable to electoral pressures to adopt populist responses to crime. The discussion that follows considers how these constitutional and political arrangements have facilitated the mobilization of popular demand to the enactment of “tough-on-crime” determinate sentencing reforms and how they have incentivized policymakers to endorse (and in turn to nurture the further radicalization of) these demands.

As Carol Steiker points out, “In the United States… in comparison to the rest of the industrialized West… crime has a political salience that is extraordinary high, almost impossible to overstate. As a result, themes of law and order tend to dominate electoral battles at all levels of governments, and the designation “soft on crime” tends to be a political liability of enormous and generally untenable consequence for political actors at all levels of government”. The fact that crime policy issue loom so largely in electoral debates may explain why many recent forms of determinate sentencing legislation seem to emphasize sound-bite political slogans (e.g. “10-20-life”, “life means life”) that are often inconsistent with criminological knowledge on the marginal deterrent impact of penalty enhancements.

One of the factors that radicalize these tendencies is the widespread use of direct democracy tools such as referenda and citizens’ initiatives alongside the more established channels of parliamentary representation. Over 70% of Americans live in a city or a state that allows the initiative, a process by which citizens are able to draft new laws without the consent of their elected representatives. Many of the more populist versions of determinate sentencing legislation were enacted following successful initiatives. The proliferation of the “three-strikes-and-you’re-out” legislation, which is inspired by a famous baseball rule, provides a telling example. The idea of subjecting persistent offenders to life imprisonment upon their third conviction was mobilized by grassroots activists and adopted by a citizen’s initiative in the state of Washington in 1993. Over the next decade, more than twenty states enacted "three-strikes" statutes. The diffusion of this legislation exemplifies the spillover effect of direct democracy tools, which tend to radicalize more established forms of criminal lawmaking and to facilitate legislatures’ support of policy models that were originally unlikely to be approved in more conventional parliamentary channels. The agenda-setting power of initiatives is accentuated by the weak levels of party discipline characterizing American politics, which leads politicians to endorse single-issue policy platforms appealing to median voters.

The structure of democratic politics in other national systems inhibits the capability of grassroots social movements to exert direct influence on the content of sentencing policy. In democracies such as Germany and England, strong degrees of party discipline and majority

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53 Garland, supra note 5, at 13.
57 Lacey, supra note 2, at 70.
support in the legislative house provide governments with firmer control over the policy agenda. Governments may, and often do face pressure to introduce popular "tough on crime" reforms, and they have electoral incentives to be responsive to such pressure. However, they operate within a constitutional setting that poses much stronger constraints on their capability to pursue electoral gains while making policy choices, particularly when their favored reforms face opposition from professional experts. Whereas the greater leverage of judicial elites and professional experts in other systems enable them to ensure better-informed and long-term-oriented processes of deliberation over the likely impacts of proposed sentencing reforms, the American political system is less capable of channeling policy proposals to nonpartisan forums.

Another catalyst to the politicized nature of sentencing policymaking in the US is associated with the procedures of selecting judges and prosecutors. As opposed to other Western nations, most of the judges and public prosecutors in the US are either directly elected by the public or are appointed by elected politicians. Over 95% of county and municipal prosecutors are selected by popular election.58 These selection procedures create a strong pressure on judges and prosecutors to be responsive to widespread popular resentment toward criminals. As Michael Tonry notes, “many American prosecuting attorneys appear constantly to be campaigning and often to formulate their general policies and their tactics in individual cases on the bases of how they will be reported by journalists and how these reports will be received by the general public on the evening news programs”.59 By contrast, in continental Europe and in England and Wales, decisions related to the appointment and to the tenure of judges are dominated by senior civil servants in the judiciary.60 As will be argued later, the continental model of hierarchic organization of the judiciary encourages the compliance of individual judges with the policy goals espoused by judicial and professional elites. In the context of the relationship between sentencing policy and electoral politics, we should note the contribution of these arrangements to relieving the pressure on judges to satisfy popular opinion in their rulings.

The claim that the politicized nature of judicial selection procedures in the US damages the public legitimacy of judges may be challenged by some comparativists on the ground that it espouses an external perspective and thus fails to comprehend why these institutional arrangements are found appealing by the American public. Indeed, from a functionalist perspective, these procedures gain public legitimacy because they symbolize some of the values most central to America’s democratic ethos, particularly, popular participation and accountability. This said, these procedures of judicial selection make it more difficult for judges to capitalize on the ethos of judicial neutrality and objectivity while opposing political reforms curtailing their discretionary powers. In a judicial system that involves so many visible elements of politicization, judges are less able to convince the public that the intensification of legislative intervention would encroach on their professional prerogatives. As Michael Tonry has noted, "judges everywhere oppose efforts to limit their sentencing

58 Steiker, supra note 52, at 119.
59 Tonry, supra note 35, pp. 61-3.
60 John Bell, Judiciaries within Europe: A Comparative Review (2006).
discretion but have been much more successful outside the United States than in…. Civil service and meritocratically selected judges may appear more professional, nonpartisan, and authoritative than elected and politically appointed judges, who may appear more political, partisan and ordinary”. 61

The differences between American and European approaches concerning the politicization of sentencing policy have deep historical and ideological roots. In the US, the mobilization of sentencing reform through citizens’ initiatives and referendums, the popular election of judges and prosecutors, and the weak influence of bureaucratic elites and the academy on the character of public policy - are all rooted in a distinctive creed of American political culture. American political culture is characterized by a strong preference to defer to clear majority sentiments rather than to intellectually-inspired bureaucratic elites. 62 Determinate sentencing laws have gained popular support in the US because they epitomize this deep-seated creed of American political culture. These laws were advocated as a means to reclaim the people’s role in shaping the standards of penal sentencing, so as to better reflect widely held views regarding the supremacy of crime reductive goals over due process principles. The people’s right to actively participate in determining criminal sentences, which in the colonial period was institutionalized through vesting with the jury with a sentencing function (independent of its fact-finding role) was presented by the determinate sentencing movement as a form of self-government gradually usurped by professional actors (judges and parole officers) throughout the entrenchment of the indeterminate sentencing era. 63 In this context, it is notable that the constitutional checks imposed on the implementation of determinate sentencing laws by the Supreme Court focused on strengthening the role of popular participation in the process (by requiring that any factor aggravating the defendant’s sentence under the sentencing guidelines must be submitted to a jury and proven beyond reasonable doubt). 64 By contrast, the debate over the constitutionality of determinate sentencing laws in other countries (including in England) 65 focused on their effect on the established principles of judicial independence and separation of powers.

The American mode of balancing between public participation and professional expertise is quite exceptional among modern Western democracies. In European and British political cultures, there is long-standing support of the view that professional experts and senior civil servants should play a proactive role in mediating the expression of the popular will throughout the policymaking process. 66 In Europe, particularly in Germany and other states that followed its expert-oriented model of codification, this conception harks back (at least) to the late eighteenth century. 67 Although the codification project was legitimated as a means to

61 Tonry, supra note 36, at 61
62 Steiker, supra note 52, at 116.
67 Arguably, scholars in the continental tradition played a prominent role in formulating legal codes already in the Roman period. The important parts of Justinian’s Corpus Juris Civilis were formulated by jurisconsults,
ensure judicial compliance with the popular will, in practice, the codes were formulated by an exclusive group of elite jurists.68

The emphasis given in American sentencing policy to ensure the responsiveness of judges to the popular will may have some normative appeal. However, this emphasis makes the American sentencing system vulnerable to a cluster of problems associated with the adverse effects of unbridled politicization on the legal process. Recent studies on the nature of public views regarding sentencing policy reveal that, although public opinion polls often reflect a widespread concern about judicial leniency toward criminals, these popular views are often based on overestimations of actual crime rates and on underestimations of the average severity of sentences69 (misjudgments that are routinely constructed by the exaggerated and sensationalist style of representations of crime in the mass media). When provided with more accurate and specific information about the particular circumstances of the offense in light of the legal framework, respondents are likely to support the imposition of penalties that are generally in line with and sometimes more lenient than average sentences.

Moreover, when we bear in mind that political and legal discourses never simply mirror public opinion but also construct public views and sensibilities, another explanation of the feeble reception of determinate sentencing laws in Europe comes to mind. The mechanisms used by European systems to insulate sentencing policy from populist pressure not only set limits on the way in which punitive sentiments may be expressed by the law. They also shape public discourse about crime in a way that, in contrast to the American case, does not cultivate the radicalization of popular punitive sentiments. Political debates about criminal justice policy in Europe have exposed the public to much more critical and realistic views on the limitations of imprisonment. When we recognize that the relationship between public opinion and criminal justice policymaking in a democracy is constituted by a cycle of mutual reinforcement, in which politicians both respond to and simultaneously construct public demand to particular forms of policy intervention to reduce crime levels,70 we gain a better understanding of why, even in periods during which European democracies such as Germany have experienced rising crime rates, public opinion in these nations did not develop an appetite for determinate sentencing reforms of the type exemplified by initiatives-driven American models.71 In Europe, therefore, legislatures could accommodate popular demands to “do something” about crime by introducing severer mandatory sentences for highly publicized heinous offenses. They did not experience similar electoral pressure to expand the scope of such legislation to more ordinary crimes or to engage in symbolic displays of “legislative supremacy” by imposing strict restrictions on the discretionary powers of judges and early-release decision-makers.


70 Lacey, supra note 2, at 71.
71 Nestler, supra note 20, 119-120.
4. The Institutional Underpinnings of Cross-National Differences in the Regulation of Sentencing Discretion

When we address the problem of disparities in sentencing, it is important to recall that sentencing outcomes are shaped by a series of decisions made throughout all stages of the criminal process. These include not only judicial rulings, but also a wide range of decisions made by police officers, prosecutors and juries among others. To one degree or another, each of these decisions involves the exercise of discretion. Thus, a comprehensive framework for addressing the way in which abuse of discretion generates disparities in sentencing cannot exclusively focus on the final stage in which the judge chooses the penalty. It has to address the manner in which other legal actors, whose decisions construct the factual and legal grounds on the basis of which judges decide to impose particular sentences at the end of the process, exercise their discretionary powers.

In this chapter, I present a twofold argument. First, I argue that the more extensive use in the US of statutory tools to structure sentencing discretion is a product of the weakness of alternative mechanisms whereby the problem of sentencing disparities may be tackled. This argument is established by considering how the institutional design of the criminal process in the US and in continental systems enables and constrains the use of different mechanisms (statutory as well as judicial) to govern the exercise of discretion. The more hierarchical and bureaucratized structure of criminal justice institutions in continental systems enables them to marshal a wider array of tools to govern the way in which discretion is exercised by the various officials whose decisions have an impact on the sentencing outcomes. Second, I argue that even if the introduction of determinate sentencing laws has enabled the American system to better regulate an important aspect of the sentencing process – the aspect of judicial decision-making – it has simultaneously loosened the regulation of other aspects of the sentencing process. The introduction of these laws into a system in which prosecutorial discretion is very lightly regulated, and in which the vast majority of cases (approximately 95%) are concluded by guilty pleas, has created institutional conditions in which sentencing disparities are likely to grow in light of the shift of power (and of influence over the sentencing outcome) from judges to prosecutors.

European judges operate within an institutional setting radically different from that in which American judges perform their judicial functions. The judiciary in continental Europe is organized in a highly centralized and hierarchical structure. As noted earlier, in many American jurisdictions, judges and prosecutors are elected by the public or are appointed by elected politicians. By contrast, European judges and prosecutors are career civil servants, whose tenure and promotion are predominantly dependent on the evaluation of superior peers. Judicial systems in civil law systems employ more extensive and comprehensive mechanisms of appellate review over the decisions of lower instances and of judicial

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73 Lacey, supra note 2, at 94.
oversight of prosecutorial decisions.\textsuperscript{74} These features create a bureaucratic-styled organizational context in which judges are, on one hand, more insulated from political pressure, and on the other hand, more dependent on judicial elites and thus face a stronger pressure to conform with the organizational norms of the judiciary.\textsuperscript{75}

The greater degree of conformity that characterizes continental legal institutions generates both desirable and undesirable effects, and analyzing all of them here would be neither possible nor necessary. The important point for the purpose of my argument is that because of the more hierarchical and bureaucratic structure of the judiciary, and in light of the more proactive involvement of the judge in reviewing prosecutorial decisions, continental systems are equipped with tighter mechanisms to scrutinize various decisions that affect the defendant's sentence. The contrast with the US is particularly pronounced with respect to the regulation of prosecutorial power. In continental legal systems, prosecutors' charging decisions do not limit the jurisdiction of the court to particular offenses (the court can determine that the conduct corresponds to crime definitions different from those suggested by the prosecution)\textsuperscript{76} and they have much lesser impact over the judicial determination of a sentence. In most of these systems, the prosecutor is obliged to inform the court and to provide an assessment of any exculpatory evidence.\textsuperscript{77} Doubtless we should not assume that no departures are made from these obligations. However, the broad investigatory powers exercised by the continental judge in the inquisitorial model of criminal procedure provide tools for the judicial scrutiny of the extent to which prosecutorial discretion was exercised in conformity with the regular standards in similar cases. Arguably, the professional ideology shaping the manner in which prosecutors in continental systems perceive their role and duties also serves to standardize the way in which they exercise their discretionary functions. This professional ideology – which presents prosecutors as civil servants fulfilling particular roles within an official investigation into the truth - is to be contrasted with the conventional view of the prosecutor’s role in adversarial systems, that is, as a party responsible to presenting evidence favorable to its case.\textsuperscript{78} All in all, by providing judges with formal responsibility and with considerably fuller data to evaluate the prosecutor's decisions on whether to charge and for what offenses, continental systems subject to scrutiny a much wider array of decisions that may cause disparities in sentencing.

Compared with continental systems as well as with other common law systems, trial judges in the US exercise much weaker review of the charging and bargaining decisions of prosecutors. As the Supreme Court expounded, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charges to file…generally rests entirely in [the prosecutor's] discretion".\textsuperscript{79} This highly differential approach, which is rationalized by reference to

\textsuperscript{75} Bell, supra note 60.
\textsuperscript{76} See, e.g. paragraph 249 of the German Strafgesetzbuch.
\textsuperscript{78} Damaška, supra note 74, at 48.
\textsuperscript{79} Bordenkircher v Hayes, 434 US 357, 364 (1978).
separation of powers principles, as well as to practical and normative limitations that the adversarial process poses on the judge’s ability to evaluate the prosecutor’s charging decision in an informed and legitimate manner, inhibits judicial involvement in reviewing allegations to unconstitutional bias in prosecutorial decisions. De jure, selective prosecution based on race is forbidden in the American system. In practice, no claim of racially selective prosecution was accepted by the courts since the Reconstruction era. The reluctance of American courts to address the impact of prosecutorial charging decisions on the problem of racial disparities in sentencing is grounded – doctrinally – on the request that the claimant will present "evidence that similarly situated defendants of other races could have been prosecuted, but have not". This requirement is virtually impossible to fulfill in the absence of available data of the evidence in light of which prosecutors decided to refrain from charging in other cases.

The scope of issues examined in the appellate review process in the American system is considerably narrower than is the norm in continental systems. As William Pizzi points out, “…issues such as whether a particular sentence is consistent with the sentences received by similarly situated defendants…are not proper considerations for appellate review as long as the sentence is within the lawful sentencing range. While other common law jurisdictions rely on appellate review of sentences to ensure consistency and fair treatment in sentencing, the US has been slow to allow any substantive appellate review of sentences”.

This brief overview of some of the key differences between the institutional contexts in which American and continental judges operate helps to clarify both the conditions under which determinate sentencing legislation has proliferated in the US (but not in Europe) and the differences in how this legislation is implemented within these very different institutional settings. First, even under the assumption that American determinate sentencing laws are successful in bringing judges to comply with the sentencing standards they prescribe (an assumption that may be contested in light of a sizeable evidence that judges (as well as juries) employ a variety of adaptive strategies to circumvent the imposition of mandatory sentences that they perceive as too harsh), it is clear that the American approach to the governance of sentencing discretion is structured in a lopsided manner, with tight regulation of judicial discretion and weak checks on the exercise of prosecutorial discretion. The problem is not only that the exclusive focus on tightening the regulation of judicial discretion is too narrow – covering only a tip of the very big iceberg of “discretion in sentencing”. Also, the curtailment of the discretionary powers of judges loosens their ability to mitigate the abuse of

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83 Bibas, supra note 81.
85 Tonry, supra note 10, at 146-8.
prosecutorial discretion. Combined with the tendency of determinate sentencing laws to increase prosecutorial leverage in plea bargaining, there is reason to suspect that they have exacerbated the peril that sentencing disparities will be caused by the arbitrary, discriminatory or simply unsystematic use of discretion by prosecutors.

The tendency of determinate sentencing laws to shift power from judges to prosecutors is likely to be less pronounced in continental systems than it has been in the US. Although many European systems have recently adopted arrangements of 'negotiated judgments' that have some similarities with the adversarial model of plea bargaining, these arrangements retain a much greater level of judicial scrutiny over prosecutorial decisions and only a minority of criminal cases are settled by these methods. In addition, because European systems have adopted only one form of determinate sentencing legislation (mandatory penalties – applied to a narrow class of severe offenses), continental prosecutors are unlikely to gain influence over sentencing outcomes akin to the leverage of their American counterparts. In the US, the negative impact of determinate sentencing laws in this context has been particularly conspicuous because of their synergetic interactions with other institutional arrangements that also work to empower prosecutors. For example, as emphasized by William Stuntz in a series of seminal works, the breadth and depth of criminal codes in the US create a wealth of overlapping offense definitions and hence provides prosecutors with useful bargaining chips to extract guilty pleas. When a greater ambit of offenses are subjected to mandatory penalties, there is a synergetic interaction between these two symptoms of "the pathological politics of criminal law" as they work in tandem to enable prosecutors to exert greater control over the determination of sentencing outcomes.

Moreover, the ideological values that legitimate state punishment in continental systems have posed additional barriers to the reception of determinate sentencing laws in these systems. That legitimating ideology grounds the justifiability of state punishment on its being an outcome of a rigorous inquisition of the relevant facts. The authority of the judge to determine the penal sanction proportional to the perpetrator's proven guilt (within the broad parameters set by the legal framework) is intimately linked to the proactive role that he plays in earlier stages of the fact-finding inquisition, and to his professional commitment to protect the defendant against the excesses of state power throughout these earlier stages. Indeed, the power of inquisitorial ideals in shaping the practices and professional consciousness of European jurists is in decline. However, they probably still pose some significant barriers to the reception of the more stringent versions of determinate sentencing laws. Truth-in-sentencing laws, mandatory penalties and other schemes preventing the judge from being able to individualize the penalty pose a fundamental challenge to the way in which European jurists define the values and legitimate the authority of their criminal justice systems.

87 Langer, supra note 2.
In this regard, the limited reception of determinate sentencing laws in continental Europe reflects – and in turn reinforces – a profound difference in how each of these procedural systems seek to promote values of equality and to reduce sentencing disparities. European systems seek to tackle disparities by vesting with the judge broad powers to review the decisions of other legal officials and to consider whether these decisions are consistent with the manner in which similar cases are being administrated. The imposition of statutory constraints on judicial discretion in sentencing is likely to damage the effectiveness of these mechanisms of review. In the US, by contrast, the egalitarian ideal of *treat ing like cases alike* is pursued by means of establishing a standard of uniformity with respect to entire classes of offenders. These uniform standards are dictated by the legislature, which is presented as ideally positioned to guarantee the compatibility of sentencing rules with widespread public views of the relative gravity of different offenses. The problem is that, as the mechanisms used to ensure judicial compliance with these generalized prescriptions of required penalties take a more formalistic and binding character, the ability of the legal system to deliver the other dimension of Aristotle's egalitarian ideal - *treat ing unlike cases differently* – is being diminished.