DETERMINATE SENTENCING AND AMERICAN EXCEPTIONALISM: THE UNDERPINNINGS AND EFFECTS OF CROSS-NATIONAL DIFFERENCES IN THE REGULATION OF SENTENCING DISCRETION

ELY AHARONSON*

I
INTRODUCTION

As is true of any other practice that involves the application of rules by human beings, sentencing practices are suffused with the exercise of discretion.[1] 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 regarding the aims of punishment, and uncertainty regarding the particular 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, there is considerable support for the view that some forms of legal regulation of sentencing practices may be effective in reducing unwarranted disparities and in reinforcing the legitimacy of the criminal justice system. Different legal systems employ different mechanisms, including mandatory penalties, system-wide sentencing guidelines, and different forms of judicial review of sentencing decisions, in an attempt to achieve these goals.

This article seeks to contribute to our understanding of the political and institutional factors shaping cross-national differences in the regulation of sentencing discretion. In particular, the article focuses on an important pattern that clearly emerges when we adopt a comparative perspective to examine current trends in sentencing law, namely, the exceptionally extensive use of determinate sentencing laws in the American legal system in comparison with

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* Assistant Professor, University of Haifa. I would like to thank Nicola Lacey, Oren Gazal-Ayal, Mordechai Kremnitzer and the participants in the international workshop on "The Effects of Different Sentencing Reforms" for their valuable comments on earlier drafts of this article.

1. "Sentencing discretion" exists when 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 exercised not only by judges but also by other actors whose decisions have an impact on the sentencing outcome, including prosecutors.

other central common law and civil law systems. Over the last three decades, determinate sentencing reforms have proliferated in American law. The scope and range of mandatory penalties increased dramatically.[2] Numerical sentencing guidelines were adopted in most of the states and in the federal system.[3] Many jurisdictions abolished their parole system or imposed statutory restrictions on the discretion of parole authorities.[4] Despite the growing Americanization of political debates over crime problems in various Western democracies, these models of determinate sentencing legislation did not find a market across the Atlantic. The number of offenses liable to mandatory sentences in other Western democracies has remained significantly lower than in the United States. European systems did not adopt "truth in sentencing" laws or similar statutory mechanisms to restrict the early release of prisoners. And no other country has imported the American version of numerical sentencing guidelines.

This article considers why the idea of determinate sentencing reform has gained such prominence in post-1970s American law but has not had a similar influence in other Western legal systems. This inquiry has important implications regarding two central topics in comparative law and criminal justice. First, the claim that the standard mechanisms serving to regulate sentencing discretion in the American legal system today are considerably more formalized, rigid, and restrictive than those operating in civil law systems (as well as in other common law jurisdictions) seems to be at odds with the conventional way in which the essentials of American and European conceptions of adjudication are characterized in comparative law scholarship. American conceptions of adjudication are usually associated with a pragmatist approach to judicial lawmaking,[5] a willingness to recognize the policymaking function of courts,[6] and a "jurisprudential style" that gives much greater weight to substantive values of justice than other legal systems are willing to provide.[7] The European legal tradition, by contrast, has long been famous for its striving to minimize the scope of judicial discretion and for its tendency to rely on codified legal norms for furthering that goal. In this context, both the proliferation of determinate sentencing mechanisms in American law and the resistance of European policymakers to adopt these mechanisms raise important questions for comparative legal scholarship.

The second context of comparative scholarship in which it is important to analyze the differences between American and European sentencing policies

2. *See* discussion *infra* Part II.A.

3. *See* discussion *infra* Part II.B.

4. *See* discussion *infra* Part II.C.

5. Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988).

6. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE (1998).

7. P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS (1987).

pertains to the debate about the impact of the United States on the policies of other national legal systems in the current era of globalization. The United States has been a prominent exporter of ideas in the criminal justice field since the nineteenth century. The attractiveness of America's penal innovations in the eyes of continental observers found a famous expression in Alexis De Tocqueville's classic study *The American Penitentiary and its Application in France*.[8] The English borrowing of the pioneering models of parole and probation originally developed in Massachusetts in the late nineteenth century provides another early example of the migration of American models of criminal justice across the Atlantic.[9] However, in light of the hegemonic role of the United States in shaping the contours of global economic, cultural, and political trends in the post-Cold War era, it is often argued that the impact of American political values, cultural attitudes, and models of legislation on the practices of other nations has increased dramatically.[10] As Michael Tonry and Kathleen Hatlestad summarize this conventional wisdom (with which they disagree),[11] "reformers in other countries are following a decade or more later in the American footsteps to the same destination and are at various stages along the way. Just as it was once often said that California's present was America's future, America's today could be other countries' tomorrow."[12]

Indeed, to examine whether the novel American models of determinate sentencing legislation are likely to spread globally it is not sufficient to demonstrate that they have not yet been widely adopted by other legal systems. After all, their global diffusion may only be a matter of time. Therefore, a comparative analysis of this question must be grounded in an understanding of the structural political and institutional features that have brought American and European policymakers to proceed along contradictory paths while designing their sentencing policy over the last decades. This article pursues this goal by examining two interlocking questions. First, what structural features of American law and American politics have stimulated the recent proliferation of determinate sentencing reform in the United States? Second, to what extent do the structural conditions shaping the contours of sentencing policy in contemporary European states enable and constrain the transplantations of

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8. *See* GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, THE AMERICAN PENITENTIARY AND ITS APPLICATION IN FRANCE (1979).

9. 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 29, 31 (Michael Tonry & Richard Frase eds., 2001).

10. *See, e.g.*, Ugo Mattei, *A Theory of Imperial Law: A Study of U.S. Hegemony and Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383 (2003); Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 (1991).

11. Indeed, Michael Tonry's comparative works offer some of the most important rebuttals of the tendency to generalize from the American experience on the future direction of other countries. *See, e.g.*, Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1 (2007).

12. MICHAEL TONRY & KATHLEEN HATLESTAD, SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 3 (1997).

these American models of reform?[13] A cluster of outstanding comparative works published over the last decade have helped us to develop a more profound understanding of the political, cultural, and institutional determinants that have shaped the contradictory trajectories of American and European approaches to criminal justice policy in the late-modern era.[14] This article draws on and seeks to contribute to this literature by illuminating the distinctive role played by sentencing reform within the larger terrain of criminal justice policymaking.

Part II of this article depicts the current differences between the United States and other central common law and civil law systems with regard to the forms, extent, and effects of determinate sentencing regimes. Part III discusses the political underpinnings of these differences. By analyzing the ideological and institutional conditions that shape sentencing policymaking processes in the United States, continental Europe, and England and Wales, the article explains the factors that have enabled and constrained the spread of determinate sentencing laws in different national settings. Part IV considers the influence of the institutional design of judicial and prosecutorial processes in the United States and Europe on the way in which sentencing discretion is being regulated, and on the ability of different legislative models of structuring sentencing discretion to achieve their intended aims. Part V summarizes the article's main arguments, and situates them within the wider context of the transformation of constitutional orders in contemporary democracies.

II
LAWS REGULATING SENTENCING DISCRETION: THE UNITED STATES AS AN OUTLIER

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

13. There might be a disagreement on how to position recent trends in English sentencing policy within the context of the widening divide between the United States and continental Europe. In my view, it is more accurate to describe the current American approach to the regulation of sentencing discretion as an outlier to the policy principles of other Western nations (which, in the European context, includes both the United Kingdom and continental nation-states) rather than as a variant of a broader common law approach. This view will be defended in part II by demonstrating that common law systems refused to adopt the American models of determinate sentencing legislation, a refusal grounded in a profound criticism of the assumptions and principles underlying these reforms. The following parts will shed light on the reasons for this reaction, highlighting some major structural differences in how sentencing policy is designed and implemented in the United States and in other common law systems.

14. *See, e.g.*, NICOLA LACEY, THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES (2008); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003); Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004); TONRY, *supra* note 12.

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 an era in which the social reintegration of offenders was perceived as the primary aim of the penal system, professional trust in the ability of judicial and parole authorities to tailor each offender's penalty to his individual prospects of desisting from crime led to the proliferation of indeterminate sentencing regimes. The dominance of indeterminate sentencing came under fierce criticism in the 1970s as part of a broader crisis of the ideology of penal welfarism.[15] Criminological literature of the period raised new concerns regarding the achievability of the rehabilitative aims of the penal system.[16] Normative writers questioned the compatibility of the indeterminate sentencing approach with basic notions of proportionality and equality in light of its failure to address the potential for arbitrary or discriminatory exercise of discretion by individual judges.[17] In the political debate, liberal critics argued that indeterminate sentencing was prone to reinforce racial disparities in the administration of criminal justice in light of its failure to control racial biases,[18] while conservative commentators stressed its failure to prevent undue leniency in sentencing.[19]

The convergence of these various strands of political and criminological critique created increasing pressures to transform the principles and procedures of American sentencing. 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: (1) the growing use of mandatory penalties, (2) the introduction of numerical sentencing guidelines, and (3) the imposition of statutory restrictions on prisoners' eligibility for 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 United States. As will be shown, continental systems and other common law systems have rejected these three major models of American sentencing reform. The determinants shaping the widening divide between the sentencing structures of the United States and those of other Western democracies will be analyzed in the following sections.

15. DAVID GARLAND, THE CULTURE OF CONTROL 8 (2001).

16. FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 61 (1995).

17. *See, e.g.*, MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

18. *See, e.g.*, AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971).

19. *See, e.g.*, JAMES Q. WILSON, THINKING ABOUT CRIME (1975).

A. Mandatory Penalties in the United States and in Europe

The first vehicle of determinate sentencing reform in American law has been the enactment of mandatory penalties. Until the mid-1970s, criminal codes in the United States included very few mandatory sentences. The existing provisions applied to a narrow class of offenses, such as murder, drunk driving, and drug trafficking.[20] 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 U.S. Congress in 1970 following a series of critical reports that questioned the utility of such measures.[21] As a result, 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.[22] In Florida, for example, the state legislature enacted seven new mandatory sentencing bills between 1988 and 1990 alone; the U.S. Congress enacted at least twenty new mandatory penalty provisions between 1985 and 1991.[23]

The massive expansion of mandatory penalties gained further momentum in the 1990s. Mandatory sentences began to be increasingly used to address the problem of repeat offending. Earlier provisions of mandatory sentencing laws sought to address the aggravated harmfulness or moral wrongfulness of particular criminal conducts. In the 1990s, however, such legislation began to target 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 (for example, in California, twenty-five years to life), no less than twenty-four states had enacted "Three Strikes" laws between 1993 and 1995.[24] 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;[25] it also created a range of fiscal incentives for the states to enact such laws.[26] As a result of the inflation of mandatory sentencing laws for repeat offenders, the ability of

20. MICHAEL TONRY, SENTENCING MATTERS 142 (1996).

21. *Id.*

22. Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 222, 229 (Michael Tonry & Richard S. Frase eds., 2001).

23. TONRY, *supra* note 20, at 146.

24. JOHN CLARK, JAMES AUSTIN & D. ALAN HENRY, THREE STRIKES AND YOU'RE OUT: A REVIEW OF STATE LEGISLATION 1 (1997).

25. 18 U.S.C. § 3559(c) (2006).

26. KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 59 (2d ed. 2004).

American judges to impose 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 fifty-seven percent of all felony offenders subject to mandatory sentence enhancement.[27]

The United States 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 rather than to recidivist patterns of milder offenses.[28] Determinate sentencing laws outside the United States are usually formulated in a more flexible fashion, typically leaving judges with discretion to consider mitigating factors to avoid unduly harsh sentences.[29] America's status as an outlier 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 the United Kingdom 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.[30] This strategy of severity bifurcation allows governments to respond to public pressures to act against the most widely censured types of crime while avoiding excessive increases in their prison population. By contrast, in the United States, 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 crimes, but also to low-level offenses.[31]

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.[32] 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.[33] By the mid-1990s, day fines were used to penalize about 25% of offenders sentenced for "aggravated theft" (including burglary),

27. TONRY, *supra* note 20, at 146.

28. WHITMAN, *supra* note 14, at 71.

29. *See, e.g.*, ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 226 (5th ed. 2010).

30. Anthony Bottoms, *The Philosophy and Politics of Sentencing*, *in* THE POLITICS OF SENTENCING REFORM 17, 40 (Chris Clarkson & Rod Morgan eds., 1996).

31. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 101 (2007).

32. SONJA SNACKEN & DIRK VAN ZYL SMITH, PRINCIPLES OF EUROPEAN PRISON LAW AND POLICY 86–98 (2009).

33. Cornelius Nestler, *Sentencing in Germany*, 7 BUFF. CRIM. L. REV. 109, 120 (2004).

50% of all drug offenders, and 85% of offenders charged with simple theft or assault.[34] These figures stand in sharp contrast with the penalties for comparable offenses in the United States. For instance, as of 1994, seventy-five percent of burglars were sentenced to either prison or jail in American state courts.[35] The War on Drugs, with its heavy use of determinate sentencing provisions for possession offenses, 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.[36] Various other examples can be drawn from increased American reliance on incarceration to enforce low-level, "quality of life" crimes.[37] Ultimately, 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 twenty-eight months, whereas in France it was eight months.[38]

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. 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 policies are unlikely to resemble their American counterparts because they operate within an institutional culture shaped by inquisitorial rules and values.[39] 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 shall continue to prevail.

In the United States, 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.[40] In a system in which ninety-five percent of criminal trials are concluded by a guilty plea,[41] one of the major effects of determinate sentencing laws is in how they affect the dynamics of charge

34. Hans-Jörg Albrecht, *Post-Adjudication Dispositions in Comparative Perspective*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 293, 310 (Michael Tonry & Richard S. Frase eds., 2001).

35. WHITMAN, *supra* note 14, at 72.

36. MARKUS D. DUBBER, VICTIMS IN THE WAR ON CRIME 6 (2002).

37. Reitz, *supra* note 22, at 241–44.

38. WHITMAN, *supra* note 14, at 70.

39. *See* Langer, *supra* note 14.

40. Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors and the Exercise of Discretion*, 117 YALE L.J. 1240 (2008).

41. Oren Gazal-Ayal & Limor Riza, *Plea-Bargaining and Prosecution*, *in* CRIMINAL LAW AND ECONOMICS 145, 148 (Nuno Garoupa ed., 2009).

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. 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 exercises of discretion. 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 prosecutor 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.[42] Even in England and Wales, where defendants can bargain with prosecutors over the charges but not over the penalties, the impact of mandatory penalties on the dynamics of plea bargaining also seems less consequential than in the United States. In part IV 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.

B. Sentencing Guidelines in the United States and in Europe

A second prolific avenue of determinate sentencing reform in post-1980 American law has been the introduction of numerical sentencing guidelines. The idea of introducing formal 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."[43] He argued that the creation of sentencing commissions and guidelines was necessary to eliminate the "unruliness" then pervading American sentencing.[44] Before long, the idea of sentencing guidelines began to be supported by conservative critics of the criminal justice system, who advocated their adoption as a means to prevent the imposition of lenient sentences by liberal, "soft on crime" judges.[45] Thus, 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 transparency, but also to perceived urgency of "getting tough" on crime.

42. *See* Langer, *supra* note 14.
43. FRANKEL, *supra* note 17, at 49.
44. *Id.*
45. GARLAND, *supra* note 15, at 59.

The predominant way of formulating the sentencing guidelines in the United States is based on a two-dimensional grid, with the seriousness of the offense on one axis and the criminal history score on the other axis.[46] 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. Sentencing guidelines in the United States typically require judges to provide "substantial and compelling reasons" to justify a departure from the presumptive sentencing range.[47] The standard of appellate review over these sentencing decisions varies from state to state. However, even in jurisdictions in which a more deferential standard is taken by appellate courts, American judges are more constrained than their peers in other common law systems with regard to their authority to consider case-specific circumstances as mitigating factors.[48] Alongside the mechanisms of appellate review, some states (such as Pennsylvania and Washington) publicize statistical data regarding the departure rates of individual judges.[49] In a system in which most of the judges are elected to office by public vote, the publication of such data serves as another tool to incentivize judicial compliance with the guidelines.

It is important not to lose sight of the different variants of sentencing guidelines systems that operate today in the United States. In some states, particularly those in which commissions were authorized to consider prison capacity when establishing presumptive sentence ranges, sentencing guidelines have had a moderating effect on the pro-growth tendencies of the prison population; in other states, the guidelines reinforced populist law-and-order crusades.[50] Still, the American experience with sentencing guidelines clearly continues to be regarded as unappealing by other nations.[51] To date, the idea of numerical guidelines has failed to find a market outside American borders. No continental system has adopted sentencing guidelines. Among common law systems, New Zealand is the only country that has introduced a system of numerical guidelines (itself structured in a more flexible fashion than the typical American model).[52] As Julian Roberts has shown in his contribution to this issue, the new system of sentencing guidelines introduced in England and Wales in 2009 vests English judges with a considerably higher degree of discretion

46. Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1201 (2005).

47. Kevin R. Reitz, *Sentencing Guidelines Systems and Sentence Appeals: A Comparison of Federal and State Experience*, 91 NW. U. L. REV. 1441, 1482 (1997).

48. Julian V. Roberts, *Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues*, 76 LAW & CONTEMP. PROBS., no. 1, 2013 at 1.

49. Frase, *supra* note 46, at 1199.

50. *See* Richard S. Frase, *Sentencing Guidelines in the States: Lessons for State and Federal Reform*, 6 FED. SENTENCING REP. 123 (1993).

51. Michael Tonry, *Parochialism in U.S. Sentencing Policy*, 45 CRIME & DELINQUENCY 48, 60 (1999).

52. *See* Warren Young & Andrea King, *Sentencing Practice and Guidance in New Zealand*, 22 FED. SENTENCING REP. 254 (2010).

than is provided under the American models.[53] In addition to England and Wales, public committees that considered whether to introduce and how to design new systems of sentencing guidelines in Canada, Western Australia, and Israel have all rejected the American model of numerical guidelines. Judges, scholars, and policymakers who participated in these public debates have widely criticized the failure of presumptive numerical guidelines 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.[54] The fact that the evidence on the negative consequences of numerical guidelines was more consequential in shaping the policy outcomes outside the United States is telling. As I will argue below, 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 on the policy choices that are eventually made. In continental Europe in particular, the policymaking process is more insulated from popular pressures and provides scholars and administrative elites with much greater influence over the design and institutionalization of policy reforms. This difference has provided judges and other professional groups outside the United States with more effective tools to resist reform initiatives that strengthen the legislative control over the sentencing process.

Outside the United States, two alternative models have emerged over the last decades to promote similar purposes to those pursued by the American guidelines movement. The first model is based on the development of clearer statutory statements of the principles of sentencing and of their proper application in individual cases. Since the late 1980s, Sweden has operated a system of principle–guidelines, clarifying the primacy given to considerations related to the offender's culpability over utilitarian aims and providing judges with parameters to determine the "penal value" of the criminal conduct in individual cases.[55] Different versions of this model subsequently developed in other Scandinavian countries over the next two decades. Interestingly enough, the Scandinavian model of principle–guidelines also grew out of an increasing criticism of the rehabilitative ideal,[56] and a rising consensus that retributive principles (as refined under contemporary theories of just desert) provide a more solid foundation to the legitimization of state punishment.[57] The fact that

53. Roberts, *supra* note 48, at 5

54. For examples from England and Wales, see ASHWORTH, *supra* note 29, at 418; for examples from Australia, see Freiberg, *supra* note 9, at 29.

55. Andrew Von Hirsch, *Numerical Grids or Guiding Principles?*, *in* THE SENTENCING COMMISSION AND ITS GUIDELINES 47 (Andrew Von Hirsch, Michael Tonry & Kay A. Knapp eds., 1987).

56. Tapio Lappi-Seppälä, *Sentencing and Punishment in Finland: The Decline of the Repressive Ideal*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 92, 107 (Michael Tonry & Richard S. Frase eds., 2001).

57. John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess, Part I: The Nature and*

the Scandinavian reaction against rehabilitation took a radically different trajectory than the American counterpart is intriguing. As Andrew Von Hirsch notes, compared with the American model of numeric sentencing guidelines, the Scandinavian model vests much greater responsibility in the hands of appellate courts. Whereas in a numerical system of sentencing guidelines appellate courts are mainly required to monitor compliance with the tariffs specified in the grid, in the Swedish model courts actively construct the penal standards by interpreting and applying these principles throughout the development of their case law.[58]

In other common law systems, the effort to develop more consistent and coherent sentencing standards has led to the development of "guideline judgments" by courts of appeal. The Court of Appeal Criminal Division in England and Wales has been issuing such guidelines since the 1970s.[59] Appellate courts in Western Australia and New South Wales adopted this practice in the 1990s.[60] Guidelines judgment usually seek to clarify the main aggravating and mitigating factors with respect to particular offenses and in some cases suggest appropriate starting points or a range of sentences.[61] Judges are expected to consider these judgments while tailoring the sentence to the facts of the case.[62] However, both in England and in Australia, the guidelines judgments are not considered to be formally binding, and appellate courts have emphasized the need to apply them in light of the general principles of discretionary sentencing inherent in the tradition of English sentencing.[63]

C. Laws Restricting the Possibility of Early Release in and Outside the United States

One of the issues that attracted the fiercest criticism by proponents of determinate sentencing reform in the United States was the discrepancy between the length of prison term imposed on convicted offenders by the courts and the actual time they eventually served. This discrepancy was a product of the extensive use of early release mechanisms in the system of indeterminate sentencing. In a political setting that defined the rehabilitation and social reintegration of offenders as central tasks of penal institutions, early release mechanisms such as parole and "time for good behavior" were perceived as important devices to tailor the actual prison term of every individual offender to his prospects of desisting from crime.[64] The increasing use of early release

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Roots of Scandinavian Exceptionalism, 48 BRIT. J. CRIM. 119, 133 (2008).

58. Von Hirsch, *supra* note 55, at 57–58.

59. Andrew Ashworth, *The Decline of English Sentencing and Other Stories*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 62, 73 (Michael Tonry & Richard Frase eds., 2001).

60. Freiberg, *supra* note 9, at 36–37.

61. ASHWORTH, *supra* note 29, at 36.

62. *See e.g.*, R v. Johnson, 15 Cr. App. R. 827, 830 (1994).

63. ASHWORTH, *supra* note 29, at 36–37.

64. JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990 123 (1993).

mechanisms across Europe and in the United States 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. 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, hinged on the degree 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 as part of the broader legitimation crisis of the modern welfare state. Indeed, in the 1970s, the extensive use of early release mechanisms in times of mounting crime rates came to be seen as a telling symptom of the chronic failure of the welfare state to deliver its "social engineering" aspirations.[65]

With the radicalization of law-and-order politics in the 1980s, statutory reforms 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.[66] Later on, legislatures in various states began to abolish parole altogether or to substantially restrict its scope. By the late 1990s, fourteen states and the federal system had abolished early release based on the discretion of the parole board for all offenders, while several others abolished parole release for certain felony offenders.[67] 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 twenty-seven states require certain types of offenders to serve eighty-five percent of their prison sentences before obtaining eligibility for early release.[68] The federal government played a key role in prodding the spread 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 eighty-five percent of their sentence.[69] In the following year, not less than eleven states adopted such legislation.[70]

During the same period, no other legal system outside the United States abolished its system of early release. 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

65. GARLAND, *supra* note 15, at 65–68.

66. Keith A. Bottomley, *Parole in Transition: A Comparative Study of Origins, Developments and Prospects for the 1990s*, *in* 12 CRIME AND JUSTICE: A REVIEW OF RESEARCH 319 (Michael Tonry & Norval Morris eds., 1990).

67. PAULA M. DITTON & DORIS J. WILSON, TRUTH IN SENTENCING IN STATE PRISONS 3 (1999).

68. *Id.*

69. 42 U.S.C. § 13704(a) (2006).

70. *Id.*

1998 to require judges to consider "the safety interests of the public" when determining the prisoner's eligibility for early release.[71] Another recent reform in German law requires the courts to consult an expert witness to assess the offender's continued dangerousness in cases in which his offense had caused bodily harm.[72] These amendments change the normative framework within which European judges reach sentencing decisions. However, by steering clear of introducing specific numerical prescriptions regarding the minimum time prisoners must serve before obtaining eligibility for early release, they retain the discretionary framework that recent American legislation in this field has sought to curtail.

In France and many other European countries, judicial discretion with regard to the offender's eligibility for early release has not been substantially constrained by legislation.[73] True, there is evidence that the actual rates of conditional release have declined over the last two decades and it is possible to attribute this trend to the rise of a more punitive public attitude. 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 United States),[74] the rates of prisoners found eligible for 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 quite contradictory to those fuelling the legislative restrictions on eligibility for 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.[75] English parole policy, following a reform that came into force in 1992, combines mandatory regimes of early release for short sentences (less than four years) and discretionary regimes for long sentences (four years and more).[76] This policy is integrated into the broader strategy of severity bifurcation that seeks to relieve fiscal pressures on

71. *See* Thomas Weigend, *Sentencing and Punishment in Germany*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 188, 211–12 (Michael Tonry & Richard Frase eds., 2001).

72. *Id.* at 211.

73. *See* Pierre V. Tournier, *Systems of Conditional Release in the Member States of the Council of Europe*, 1 CHAMP PÉNAL (2004).

74. *See supra* Part II.A.

75. Tournier, *supra* note 73.

76. Stephen Shute, *The Development of Parole and the Role of Research in its Reform*, *in* THE CRIMINOLOGICAL FOUNDATIONS OF PENAL POLICY: ESSAYS IN HONOUR OF ROGER HOOD 377 (Lucia Zedner & Andrew Ashworth eds., 2003).

the correctional system through "decarcerating" the treatment of low-level offenses.

III
THE STRUCTURE OF THE POLITICAL SYSTEM AND THE REGULATION OF SENTENCING DISCRETION

Why, then, has the American approach to the regulation of sentencing discretion 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 section, I argue that some of the major factors shaping American exceptionalism in this field are found in the extensive degree to which sentencing policymaking is attached to ordinary politics in the United States. A set of interlocking constitutional and political arrangements that distinguish the United States from other Western democracies makes American criminal justice policymakers more vulnerable to electoral pressures to adopt populist responses to crime. The discussion that follows examines how these constitutional and political arrangements have facilitated the mobilization of popular demand and political support of the entrenchment of determinate sentencing reforms in the United States, and why the arrangements structuring sentencing policymaking in European democracies do not provide political openings to the mobilization of such reforms.

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 extraordinarily 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.[77]

Along with the increasing politicization of criminal justice policy over the last several decades, the traditional left–right ideological conflicts over the required responses to crime problems have weakened, as the policy frames of both major parties came to converge around a shared set of ultra-punitive assumptions and solutions.[78] These interlocking changes in the political salience and ideological orientation of criminal justice policy help to explain both the explosion of statutory sentencing reforms since the 1970s, and the more populist tone of that legislation. Indeed, many recent forms of determinate sentencing legislation seem to emphasize sound-bite political slogans that can hardly be squared with criminological knowledge on the actual impacts of such policies

77. Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OREG. L. REV. 97, 113 (2002).

78. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 236–41 (2011).

(for example, "Three Strikes and You're Out," "10–20–Life," "Life Means Life," "Adult Time for Adult Crime," and "Hard Time for Armed Crime").[79]

At the institutional level, one of the distinctive features of American democracy that enables sound-bite political slogans to gain such an influence on sentencing policy has been the widespread use of direct democracy tools *alongside* the more established channels of parliamentary representation.[80] Among the different tools of direct democracy available in the contemporary United States (including popular referendum, legislative referral, and recall elections), the most consequential on the direction of criminal justice policy has been the ballot initiative. In force today in twenty-four states, the ballot initiative process provides a mechanism by which citizens, upon collection of a specified number of voter signatures, may propose new statutory or constitutional provisions for voter consideration.[81] Proposals that win the popular vote may be written into law without having to pass through the ordinary channels of parliamentary legislation. The use of direct democracy tools in American politics dates back to the 1890s.[82] However, the number of initiatives placed on statewide ballots as well as their impact on the policymaking process has increased dramatically since the late 1970s. In the 1980s and 1990s, American citizens voted on 271 and 389 statewide initiatives, respectively, compared with a comparable figure of less than 100 statewide initiatives conducted throughout the 1960s.[83] The growing prominence of initiatives has considerably supported (and was itself facilitated by) the expanding involvement of social movements in mobilizing sentencing reform. Many of the more populist versions of determinate sentencing legislation were enacted following successful ballot initiatives. The proliferation of the "Three Strikes and You're Out" legislation, a reform that redesigned state penal practices in accordance with the logic of a famous baseball rule, provides a telling example.[84] The idea of subjecting recidivist offenders to life imprisonment upon their third conviction was initiated by grassroots activists and adopted by a citizen's initiative in the state of Washington in 1993.[85] Within the next three years, twenty-four states had adopted such legislation.[86] The spread of this legislation exemplifies the spillover effect of ballot initiatives on

79. GARLAND, *supra* note 15, at 13.

80. *See* Caroline J. Tolbert & Daniel A. Smith, *Representation and Direct Democracy in the United States*, 42 REPRESENTATION 25 (2006).

81. Larry J. Sabato, Bruce A. Larson & Howard R. Ernst, *Introduction*, *in* DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA ix–x (Larry J. Sabato, Howard R. Ernst & Bruce A. Larson eds., 2001).

82. Howard Ernst, *The Historical Role of Narrow-Material Interests*, *in* DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA, *supra* note 81, at 1, 10.

83. Tolbert & Smith, *supra* note 80, at 26.

84. *See, e.g.*, FRANKLIN ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001).

85. VANESSA BARKER, THE POLITICS OF IMPRISONMENT 118 (2009).

86. CLARK ET AL., *supra* note 24, at 1.

the rhetoric and policy choices of legislatures.[87] By mobilizing grassroots activists, media attention, and funding in support of particular policy frames, the strategic use of initiatives by social movements often has a considerable agenda-setting effect, providing legislatures both with stronger incentives and with new opportunities to endorse populist policy reforms. In light of foreseeable budgetary implications and the weak criminological evidence in support of the rationale of "Three Strikes" laws,[88] it is highly questionable whether this policy model could have been originally passed into law by reasonably-informed legislatures. The passage of these statutes via plebiscite campaigns paved the way for a nationwide trend that would have faced much stronger professionalized and administrative resistance in the legislative processes of a pure representative democracy.[89]

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 support in the legislative house provide governments with firmer control over the policy agenda.[90] 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 and cultural setting that poses much stronger constraints on their capability to pursue electoral gains while making policy choices, particularly when these popular reforms face opposition from professional experts.[91] 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 United States 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 United States are either directly elected by the public or are appointed by elected politicians. Over ninety-five percent of county and

87. Elisabeth R. Gerber, *Legislative Responses to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99, 124 (1996).

88. Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on Three Strikes in California*, 28 PAC. L. J. 243 (1996).

89. Recent trends in Swiss criminal justice policy provide further evidence of the linkage between extensive use of direct democracy tools and the populist character of criminal justice policy. For example, in 2010, Swiss voters approved a new constitutional provision requiring the automatic expulsion of foreign nationals convicted of certain criminal offenses specified by law, including benefit fraud. In 2004, an initiative requiring the lifelong detention of dangerous sexual and violent offenders was approved. On the difficulties in reconciling the outcomes of recent initiatives in the field of criminal justice with fundamental constitutional rights, see Daniel Moeckli, *Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human Rights*, 11 HUM. RTS. L. REV. 774 (2011).

90. LACEY, *supra* note 14, at 70.

91. ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 69 (2001).

municipal prosecutors are selected by popular election.[92] 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."[93] By contrast, in continental Europe and in England and Wales, decisions related to the appointment and tenure of judges are dominated by senior civil servants in the judiciary.[94] 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.

It may be argued that the politicized nature of judicial selection procedures in the United States reinforces rather than damages the public legitimacy of judges because it symbolizes some of the values most central to America's democratic ethos, particularly the values of popular participation and suspicion of state authority. Nonetheless, these procedures of judicial selection make it more difficult for judges to capitalize on the professional values 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 in sentencing matters would encroach on their professional prerogatives. As Michael Tonry has noted, "judges everywhere oppose efforts to limit their sentencing 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."[95]

The differences between American and European approaches concerning the politicization of sentencing policy have deep historical and ideological roots. In the United States, 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.[96] American political culture is characterized by a strong preference to defer to clear majority sentiments rather than to intellectually-inspired bureaucratic

92. Steiker, *supra* note 77, at 119.
93. Tonry, *supra* note 51, pp. 61–63.
94. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 151 (1986).
95. Tonry, *supra* note 51, at 61.
96. Steiker, *supra* note 77, at 116.

elites.[97] Determinate sentencing laws have gained popular support in the United States 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. Proponents of these reforms presented the people's right to actively participate in determining criminal sentences (which in the colonial period was institutionalized through vesting the jury with a sentencing function, independent of its fact-finding role) as a form of democratic participation that was gradually usurped by professional actors (judges and parole officers) throughout the entrenchment of the indeterminate sentencing approach.[98] 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 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.[99] By contrast, the debate over the constitutionality of determinate sentencing laws in England, for example, focused on their effect on the established principles of judicial independence and separation of powers.[100]

The American mode of balancing between public participation and professional expertise is quite exceptional among modern Western democracies. In continental European and British political cultures, there is longstanding 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.[101] In Europe, particularly in Germany and other states that followed its expert-oriented model of codification, this conception harks back to at least the late eighteenth century.[102] Although the codification project was legitimated as a means to ensure judicial compliance with the popular will, in practice, the codes were formulated by an exclusive group of elite jurists.[103]

The emphasis given in American sentencing policy to ensure the responsiveness of judges to the popular will may have some normative appeal.

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97. *Id.*

98. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, Or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 692 (2010).

99. *See* United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004).

100. Ashworth, *supra* note 59, at 62.

101. Joachim Savelsberg, *Knowledge, Domination, and Criminal Punishment*, 99 AM. J. SOC. 911 (1994).

102. 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,* recognized experts on the law who formally had neither legislative nor judicial function. *See* JOHN H. MARRYMAN & REGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION 57 (3d ed. 2007).

103. *Id.* at 31.

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. 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 sentences (misjudgments that are routinely constructed by the exaggerated and sensationalist style of representations of crime in the mass media).[104] 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 often more lenient than the average sentences imposed by professional judges.[105]

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 limited 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 for particular forms of policy intervention to reduce crime levels,[106] 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.[107] In Europe, therefore, legislatures could accommodate popular demands to protect the public from the risks of crime by introducing more severe mandatory sentences for highly publicized heinous offenses. They did not, however, experience similar electoral pressure to expand the scope of such legislation to more ordinary crimes or to engage in symbolic displays of legislative control over sentencing matters by imposing strict restrictions on the discretionary powers of judges and early-release decision-makers.

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104. Julian V. Roberts, *American Attitudes about Punishment: Myth and Reality*, *in* SENTENCING REFORM IN OVERCROWDED TIMES 250 (Michael Tonry & Kathleen Hatlestad eds., 1997).

105. *Id.* at 253.

106. LACEY, *supra* note 14, at 71.

107. Nestler, *supra* note 33, 119–20.

IV
THE STRUCTURE OF LEGAL INSTITUTIONS AND 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.[108] 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 the exercise of discretion generates unwarranted disparities in sentencing cannot exclusively focus on the final stage in which the judge chooses the penalty. It must address the various ways 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, employ their discretionary powers.

Drawing on this basic premise, this part presents a twofold argument. First, I argue that the more extensive reliance on statutory tools to structure sentencing discretion is a product of the American system's insufficient use of judicial mechanisms by which the problem of sentencing disparities may be tackled. 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 various officials, whose decisions have an impact on sentencing outcomes, exercise discretion. Second, I suggest 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 (nearly ninety-five percent) are concluded by guilty pleas, has created institutional conditions in which sentencing disparities are likely to grow in light of the shift of power 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 evaluation by superior colleagues.[109] Judicial institutions in civil law systems employ more extensive and comprehensive mechanisms of appellate review

108. *See* Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124 (2005).

109. LACEY, *supra* note 14, at 94.

over the decisions of lower courts, as well as mechanisms of judicial oversight of prosecutorial decisions.[110] 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.[111]

The greater degree of professional conformity in continental judiciaries 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.[112] The contrast with the United States 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 and they have a much lighter impact on the judicial determination of a sentence.[113] The broad investigatory powers exercised by continental judges in inquisitorial systems of criminal procedure provide them with better tools than those available to their peers in adversarial systems to scrutinize the extent to which prosecutorial discretion was exercised in conformity with the regular standards in similar cases. In addition, 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.[114] 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 United States possess much weaker tools to review 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 charge to file . . . generally rests entirely in [the prosecutor's] discretion."[115] This highly deferential approach—which is

110. MIRJAN DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 48 (1986).

111. SHAPIRO, *supra* note 94, at 151.

112. KAGAN, *supra* note 91, at 79.

113. For instance, according to paragraph 249 of the German Strafgesetzbuch, the court may determine that the conduct corresponds to crime definitions different from those suggested by the prosecution.

114. DAMAŠKA, *supra* note 110, at 48.

115. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

rationalized by reference to separation of powers principles,[116] 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.[117] The reluctance of American courts to address the impact of prosecutorial charging decisions on the problem of racial disparities in sentencing is based on the request that the claimant present "evidence that similarly situated defendants of other races could have been prosecuted, but were not."[118] This requirement is virtually impossible to fulfill in the absence of available data on the evidence in light of which prosecutors decided to refrain from charging in other cases.[119]

In addition, the scope of issues examined in the appellate review process in the American system is considerably narrower than is the norm both in continental systems and in most other common law jurisdictions. 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."[120] Appellate review was developed in the American system much later than in other Western legal systems. Until the 1980s, only a minority of states vested their appellate courts with the power to review sentences for substantive propriety, and even in those states, courts were willing to intervene only in extreme cases of clear abuse of judicial discretion.[121] In contrast, in continental systems, the defendant's right to *de novo* consideration of his sentence has become an inherent aspect of the criminal appeal much earlier.[122] This aspect of European sentencing law can be well understood as a product of the structural characteristics of the inquisitorial culture of legal procedure. Appellate judges in civil law systems have long been provided with a fuller informative basis to review the decisions of lower courts (including a formal

116. *See, e.g.*, Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379–83 (2d Cir. 1973).

117. Stephanos Bibas, *Prosecutorial Regulation vs. Prosecutorial Accountability*, 157 U. PA. L. REV. 101, 112 (2009). For discussions of the need to strengthen judicial oversight of prosecutorial discretion so as to promote equality and prevent discrimination and arbitrariness, see Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After the United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071 (1996); Donald G. Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659 (1981).

118. United States v. Armstrong, 517 U.S. 456, 469 (1996).

119. Bibas, *supra* note 117, at 112.

120. William Pizzi, *A Comparative Perspective on the Sentencing Chaos in the U.S*, 6 GLOBAL JURIST TOPICS, no. 1, 2006 at 27–28.

121. Reitz, *supra* note 47, at 1444.

122. Richard S. Frase, *Sentencing and Comparative Law Theory*, *in* CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOR OF MIRJAN DAMASKA 351, 354–55 (John Jackson, Maximo Langer & Peter Tillers eds., 2008).

requirement upon judges to provide written reasons for their sentencing decision—a requirement that did not have a parallel in the United States in the pre-guidelines era).[123] In England and Wales, the defendant's right to appeal his sentence has been recognized since the enactment of the Criminal Appeal Act 1907.[124] The corpus of case law developed by the Court of Criminal Appeal over the last century has served as a major tool to establish standards of uniformity and coherence in English sentencing.

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 United States (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,[125] 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") but also that the curtailment of the discretionary powers of judges restricts their ability to mitigate the abuse of prosecutorial discretion. Combined with the tendency of determinate sentencing laws to increase prosecutorial leverage in plea bargaining,[126] there is reason to suspect that these laws have exacerbated the peril that the arbitrary, discriminatory, or simply unsystematic use of discretion by prosecutors will cause sentencing disparities.

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 United States. 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.[127] In addition, because European systems have adopted only one form of determinate sentencing legislation—mandatory penalties, applied to a narrow class of severe offenses—prosecutors in continental systems are unlikely to gain similar degrees of

123. *Id.* at 355.

124. *See* Ashworth, *supra* note 59, at 73.

125. The accuracy of this assumption is far from certain. As Michael Tonry has shown, a sizeable bulk of evidence demonstrates that judges, juries, and prosecutors employ a variety of adaptive strategies to circumvent the imposition of mandatory sentences that they perceive as too harsh. *See* TONRY, *supra* note 20, at 146–48.

126. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancement in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1151–70.

127. Langer, *supra* note 14.

influence over sentencing outcomes to those possessed by American prosecutors. In the United States, 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 United States create a wealth of overlapping offense definitions and provides prosecutors with useful bargaining chips to extract guilty pleas.[128] When a greater ambit of offenses is subjected to mandatory penalties, the impact of the mutually reinforcing institutional deficiencies identified by Stuntz is exacerbated, and prosecutors are provided with greater control over the determination of sentencing outcomes.

Moreover, the ideological values that legitimize state punishment in continental systems have posed additional barriers to the reception of determinate sentencing laws in these systems. These values ground 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 is inherently linked to the proactive role that he plays in earlier stages of the fact-finding inquisition, as well as 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.[129] 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 that prevent the judge from being able to individualize the penalty pose a fundamental challenge to the way in which European jurists define the values and legitimize the authority of their criminal justice systems.

In this regard, the failure of determinate sentencing laws to gain momentum in continental Europe reflects 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 have been administrated. The imposition of statutory constraints on judicial discretion in sentencing is likely to damage the effectiveness of these mechanisms of review. In the United States, by contrast, the egalitarian ideal of *treating like cases alike* is pursued by means of establishing a standard of uniformity with respect to entire classes of offenders. These uniform standards

128. William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 506, 512–13 (2001).

129. Thomas Weigend, *The Decay of the Inquisitorial Ideal*, *in* CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOR OF MIRJAN DAMASKA, *supra* note 122, at 39.

are increasingly 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—*treating unlike cases differently*—is being diminished.

V
CONCLUSION

The massive expansion of determinate sentencing legislation in contemporary American law has been a part and parcel of the broader restructuring of American law and politics following the demise of New Deal liberalism. The liberal procedural reforms introduced by the American Supreme Court in the post-WWII era symbolized the culmination of a decades-long historical process by which the role of courts in shaping criminal justice policy had grown significantly. This growth was a result both of the expansion of judges' discretionary powers throughout the entrenchment of the indeterminate sentencing approach and of the constitutionalization of criminal procedure. Reflecting the broader decline of public faith in the power of government to solve the nation's major social problems, the determinate sentencing movement adapted the deep-seated American creed of "distrust of government" to the modern reality of criminal justice governance, in which courts play a highly visible role in shaping and implementing public policy.[130] Paradoxically, the liberal concerns regarding the excesses of judicial power under the indeterminate sentencing approach initiated a reform movement that both facilitated and legitimized the massive expansion of the state's reliance on its most repressive apparatuses—its carceral institutions.

The fact that determinate sentencing models of legislation were not widely adopted outside the United States was explained in this article as a result of the structural conditions shaping the processes of criminal lawmaking and the institutional processes of reviewing sentencing decisions in both civil law and common law systems. The combination of constitutional arrangements insulating legislative processes from populist pressures with a robust ideological commitment to the values of individualized sentencing poses structural impediments to the ability of these formalized and harsh models of sentencing legislation to pass through the legislative channels. This ideological commitment is reinforced by the primacy attached to the values of dignity and proportionality in contemporary European constitutionalism. The doctrinal frameworks developed in European constitutional law to consider the compatibility of sentencing practices with the values of human dignity and

130. FEELEY & RUBIN, *supra* note 6.

proportionality offer a compelling alternative to the American jurisprudence of sentencing and punishment, with its focus on considering whether the minimal threshold of "cruel and unusual punishment" was violated and on the guarantee of due process.[131] The established mechanisms built into inquisitorial procedural systems to review the decisions of trial courts and of prosecutors continue to enjoy the trust both of professional actors and of the public at large in European systems. In light of some troubling evidence provided by the recent American experience, the resistance of European policymakers to adopt these models of regulating sentencing discretion seems to be well grounded.

131. Markus Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L. J. 509 (2004).