Criminality & Imprisonment Policy Lessons from Across the Pond: Comparing Europe and the United States

Jonathan Link

Follow this and additional works at: https://scholarship.law.ufl.edu/fjil

Recommended Citation
Available at: https://scholarship.law.ufl.edu/fjil/vol33/iss2/3

This Note is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Journal of International Law by an authorized editor of UF Law Scholarship Repository. For more information, please contact rachel@law.ufl.edu.
INTRODUCTION

In the wake of the death of George Floyd and the national and international outcry for racial justice that followed, it seems inevitable that criminal justice reform in America is on the horizon. U.S. President Joe Biden has recognized that there “absolutely” is systemic racism in law enforcement. He went on to argue that the U.S. prison system should “turn into a rehabilitation system, not . . . just punishment.” In these interview statements and various other campaign speeches, Presidential debates, and Presidential press conferences since, the President has made clear that the way that the U.S. punishes crime needs revamping. As politicians of the highest office continue to advocate for diversion programs, alternative sentencing, and other policy revisions, it has become vital that an investigation be done into which policies have merit and which do not. To determine which policies best fit current American needs, politicians now must look outward to nations and regions that have faced similar policy shifts in the prison sector. The most palpable case study for the U.S. to learn from can be found in Europe, which will be examined throughout this Note. In understanding different policies and prison structures, it is crucial to first address the role that criminality plays within these systems.

* Jonathan Link is a Law Clerk at Ropes & Gray LLP in New York and previously served as the Executive Articles Editor of the Florida Journal of International Law.


2. Id.
I. DISCUSSION

A. Definitions: Understanding Criminality

Crime “is an act that the law makes punishable.” In discussing crime internationally, any blanket understanding of crime is increasingly difficult to find. Although humanity tends to agree on basic societal harms and actions that should not be tolerated, especially in recent history with the establishment and strengthening of the United Nations (UN), every individual government is enabled with nearly full discretion over what actions are deemed criminal. As long as societies have differing rules, regulations, and laws, crime too, will inherently hold varied meanings across time and nations.

However, criminality encompasses not just the illegal act itself, but the behavioral aspect of a crime and the environmental factors at play. Thus, in looking at criminality, this Note adopts a more wholistic conception of criminal activity and rejects the notion that crimes occur in vacuums. Importantly, “[f]ocusing on criminality rather than political-legal definitions also allows us to finesse the perplexing problem of why some acts . . . are defined as crimes while similar arguably more damaging acts are . . . not.” This is particularly important in a cross-nation analysis where different nations have different criminal laws. By looking through the context of criminality, we can understand the myriad personal and institutional relationships that form a criminal justice system.

Intuitively, two of the primary justifications of human imprisonment are deterrence of crime and incapacitation, also known as societal protection. Governmental bodies that tend to focus most strongly on these goals for incarcerating offenders, fall on the punitive side of the spectrum, meaning that they are less forgiving for people breaking the social contract of law. Conversely, governments that focus on two different justifications for imprisonment, namely: retribution and rehabilitation, are generally considered more forgiving, less punitive systems. In short, punitive policies tend to punish offenders or accused offenders in more stringent ways.

6. Id. at 286.
8. See Marson, supra note 7, at 24.
9. See De Luca et al., supra note 7, at 37; Marson, supra note 7, at 19.
The punitive nature of a criminal justice system within a nation or region greatly shapes the culture towards imprisoned populations and serves as the framework under which particular justice systems operate. This framework shapes policy decisions surrounding money spent per incarcerated individual, how equitably people are treated by the system, and the availability of services or alternatives to imprisonment. Therefore, the outcomes and success of each nations’ criminal justice system relies strongly on how punitive imprisonment policies are.

Many tools and statistics can be used to measure how punitive a justice system is, although there is no consensus among scholars on what those measurements should be. Similarly, the differences in criminality and the rates at which citizens report crimes makes it increasingly difficult to analyze statistical numbers in a vacuum without an understanding of the overarching guidelines and policies in place. Therefore, this Note will measure how punitive criminal justice systems are, comparing the U.S. to Europe as a whole as well as individual European nations, based on the availability and quality of services within prisons, the use of alternative paths to imprisonment for offenders, and the use of solitary confinement as well as the death penalty within these regions.

B. Significance

First and foremost, the way that nations treat incarcerated individuals and the policies that are in place signifying how punitive their criminal justice systems are, have importance because they surround human rights issues. So important are these factors, that in 1957 the United Nations implemented human rights and minimum prisoner treatment regulations. At that time, many nations around the world were using torturous, inhumane treatment towards their prisoners that World War II helped to illuminate. Currently, the treatment of prisoners even in many western nations can still be viewed as violating human rights because of the removal of certain basic freedoms. For example, the right to vote, to governmental subsidies, to a public education, and to health care are some rights that are often withheld from incarcerated individuals. Moreover, studies have proven that no relationship between crime rates and imprisonment exist, making the removal of basic rights increasingly more suspect. Accordingly, many commentators view increases in incarceration rates as purely political decisions that have little or nothing

to do with crime. Thus, in understanding the punitive nature of a system, we can begin to reflect on how ethical governments are.

Additionally, the criminal sector, particularly in comparing the U.S. to Europe is important because of the historical similarities at play. In order to look forward, we must first look backwards at successes and failures of our own nations as well as others. While the U.S. has been deemed a “carceral state”\(^\text{12}\) with the highest incarceration rate in the world that peaked in 2007 and has not substantially dropped since,\(^\text{13}\) America is not the first nation to face the problem of mass incarceration. The U.S. has not been able to solve a problem over the last decade that Europe, on a grander scale, was able to resolve twice, in both the 1980s and early 2000s. In creating new policy and developing a more effective criminal justice system, the U.S. has much to learn from Europe’s successes.

C. Europe

While Europe is diverse and historically difficult to generalize, especially in a sector like criminality which differs largely from nation to nation, the Treaty of Amsterdam and the Council of Europe have begun to integrate European prison policy, making European analysis on the topic more manageable. In the 1980s crime rates increased to new levels throughout Europe.\(^\text{14}\) Still, crime prevention policy at the EU level was essentially nonexistent until the Treaty of Amsterdam was signed in 1999 which recognized “the importance of effective crime prevention policies in the [European] Union.”\(^\text{15}\) Not only did the Treaty of Amsterdam call for more effective policies, but it also established a cultural norm within the EU of “systematic cooperation between Member States.”\(^\text{16}\)

The Treaty “establishes a legal basis for crime prevention activities at the EU level,” enabling the emergence of programs and services directed towards the goal of combatting crime and imprisonment.\(^\text{17}\) Such

---

programs implemented at the EU level include the EU Youth Programme, the European Prison Education Association, the European Crime Prevention Network, and the Hippocrates Programme, all of which played a role in stabilizing the annual growth of crime at one percent until the early 2000s. These programs were expected to be transposed into national rules by EU member states along with preventative measures in order to reach the goals of the Treaty while recognizing the need to tailor the specific implementation strategies to the cultural differences among EU member states. Therefore, these programs do not look or function exactly the same in each member state, but the overarching view stays intact: encouraging cohesion and effectiveness in order to decrease incarceration.

Cultural values of caring for societal welfare and viewing offenses against law as a societal failure, not necessarily just an individual one, are the backdrop for these programs. Significantly, education programs like the European Prison Education Association that focuses on bettering incarcerated individuals and giving them the tools to become integral parts of society, prove a dedication to reintegration while not solely blaming the offender for their wrongdoing. Similarly, the Hippocrates Programme which co-funds cooperation projects between member states within the criminality sector, shows the willingness of Europe to work together to innovatively solve a problem while recognizing that criminal acts are more often than not a product of social conditioning or act of necessity. Most important, is the success that Europe saw for over a decade with these programs in place, both stabilizing crime and incarceration rates through a basic mindset that framed incarceration issues as a societal, not purely individual, problem.

Subsequently, a European institution outside of the EU assisted in solving a second wave of increased crime and incarceration rates in the early 2000s. The Council of Europe is separate from European Union institutions, and instead is a body that was founded by the Treaty of London in 1949 with the goal of upholding human rights within Europe. The Council of Europe began with only fifteen member states but today has spread to nearly all of Europe, consisting of forty-six states. In the face of this second wave of heightened incarceration rates, in 2006 the Committee of Ministers of the Council of Europe comprised a recommendation outlining European Rules on Community Sanctions and

Measures. “Community Sanctions and Measures” was defined within the recommendation as suspects or offenders in the community that face some restrictions to their liberty and the way that those individuals are punished. Essentially, this recommendation aims to provide alternatives to imprisonment by attempting to find a balance between protecting society and extending restorative justice.

Restorative justice is a rehabilitative process that involves all stakeholders by bringing “those harmed by crime or conflict and those responsible for the crime into communication, enabling everyone affected by a particular incident to play a part in repairing the harm.” Restorative justice often stands in conflict with common conceptions of safety and punishment and is viewed as being too heavy on the goal of perpetrator rehabilitation. However, there is a great deal of evidence that not only are offenders benefited by this system, but also that “victims of crime are more satisfied with restorative justice processes than they are with traditional criminal justice adjudication and sentencing.” The recommendation outlining European Rules on Community Sanctions and Measures was ahead of the curve in recognizing this shift in data and leaned into incorporating these processes within the European criminal justice system.

The recommendation is structurally laid out into ten chapters with basic principles regarding treatment and reintegration of offenders. The restorative justice that is recommended respects the human rights of all people by promoting offenders facing those that they harmed with a long-term view of reintegration. Here, European policymakers are making clear that they are not giving up on people who have broken the law, respecting their rights and dignity as human beings first and foremost, not merely viewing them as criminals. The chapters go on to lay out how restorative justice will be broadly implemented among member states. Crucially, the consent of all parties to partake in this process is

---


25. Salerno, supra note 22.
necessary. Therefore, if a victim is not able to face their offender, the process is stagnated, and restorative justice may not be possible or other society members may be called upon. This condition recognizes that social structures lead people down certain paths and makes it the job of the community to help mitigate those wrongs within their own community.

In 2017, the Committee of Ministers came out with a new recommendation that furthered this European commitment to restorative justice. With the mindset of enhancing international cooperation in meeting UN regulations of human rights and minimum prisoner treatment regulations from 1957, the recommendation set a lofty mission. The Committee called for imprisonment to be a punishment utilized only as a means of “last resort.” In this updated recommendation, only the most heinous crimes such as rape and predetermined murder are worthy of incarceration. Otherwise, if at all possible, criminal offenders should be funneled into a restorative program with a focus on the imposition of “community sanctions and measures.” “Community sanctions and measures” still place some restrictions on the liberty of offenders, but also works to keep “offenders in the community” and involved in the process of criminal justice. This system truly benefits all of society by encouraging people to take responsibility for their actions, discouraging recidivism, keeping people out of the prison system, and allowing offenders to continue producing economically and socially within their community. All citizens here are recognized as having unique potential to benefit society. “Crime countermeasures,” including this commitment to restorative justice in Europe since the early 2000s, has been credited as one possible reason for current diminishing trends in overall European crime rates.

Following these policy shifts, European prison populations have been decreasing since 2007. To put this decline into context, in 2012 there were 1.2 million fewer registered crimes in EU countries than there were in 2007. This anecdotal, but unmistakable, relationship between

26. Id.
28. Id.
29. Salerno, supra note 22.
31. Id.
33. Clarke, supra note 14.
34. Id.
restorative justice programs and decreasing prison populations gives reason for other regions to look to Europe as a model of criminal justice reform gone right. Today, Europe as a whole incarcerates 103.2 people per 100,000 inhabitants, which totals a prison population of 1,528,343 people living behind bars.\(^{35}\) This represents a further 16% prison population decrease from 2010, which was already at lower rates from the early 2000s.\(^{36}\) Even more curiously, criminal activity has also seen a dip since the shift towards greater restorative justice: “12% fewer crimes [were] recorded in the EU-28 in 2012 than nine years earlier.”\(^{37}\) Thus, it appears that while restorative justice programs may help keep people out of high-cost prisons, the investment in individuals and communities also have encouraging consequences on actual crime rates, keeping communities safer. This suggests that if a major goal of the criminal justice system truly is safety, greater attention and devotion to restorative justice is vital. Furthermore, Europe has simultaneously continued to greatly benefit in the criminality sector from the persistent promotion of more and higher quality services within prisons such as the European Prison Education Association (EPEA).\(^{38}\) The EPEA is concerned with “promoting and developing education and related activities in prisons throughout Europe in accordance with the recommendations of the Council of Europe.”\(^{39}\) Because education is highly valued in today’s labor market, the EPEA’s work, along with clear governmental support, has helped make it a “political tendency today[, in Europe,] to focus on making inmates employable, as a way of reintegration into society.”\(^{40}\) Again, this program depicts the community investments that Europe has been willing to make, recognizing criminality as a product of the intertwined institutions within an offender’s environment.


\(^{36}\) Key Findings, supra note 34.

\(^{37}\) Clarke, supra note 14.


\(^{40}\) Lena Axelsson, European Prison Education Association, 63 J. CORR. EDUC. 78, 78 (2012).
community investments continue to keep European crime and incarceration rates down, as the U.S. watches from the sidelines.41

D. United States

Since the 1970s and 1980s, the rate at which the U.S. incarcerates people has risen to the highest in the world, above all prior rates both domestically and internationally, which has led many academics to deem the U.S. criminal justice system a carceral state.42 Social theorist Michel Foucault first coined the concept of a carceral state in his work Discipline and Punish, locating its inception at the opening of the Mettray Penal Colony in 1840.43 Mettray was a reformatory for young male “delinquents” in France.44 This new type of incarceration created a community prison, where all aspects of life were carried out within this space and all acts were under strict surveillance. Foucault saw this as the foundation for mass incarceration in the U.S., in which people are surveilled at higher rates within a particular system.45 However, Foucault recognized that the American carceral state had become a much more expansive system, where the prison is no longer the single institution that incarcerates people.46 Under this paradigm of criminality, a web of institutions and policies funnel people into prison and then keep them there, such as schools, public housing, and family courts, to name just a few. Today, U.S. policy decisions have created a new carceral state focused more intensely on punitive measures, landing unprecedented numbers of humans within the prison system.

While home to under five percent of the world’s population, the U.S. incarcerates nearly twenty-five percent of the world’s prisoners.47 This near twenty-five percent, totals a population of over 2.1 million

44. Id.
45. Id. at 308.
46. Id.
individuals behind bars. Even more alarming is the incarceration rate within the U.S. which has been calculated at 716 incarcerated per 100,000 people, the highest incarceration rate in the world. Importantly, the incarceration rate specifically evidences that “mass incarceration” in the U.S. is not only about the sheer number of people that this nation puts behind bars, but the relative percentages of people incarcerated against the population. This problem cannot be explained away as a larger nation incarcerating more people because its jurisdiction encompasses a higher population. This form of mass incarceration was driven not by an increase in actual criminal acts but by “tough on crime” legislation from the 1980s and 1990s. These policies have instituted more surveillance, enforcement, and longer sentences in an attempt to deter crime, but as we will see, these policies have had detrimental and disproportionate impacts on many disadvantaged groups, including racial minorities.

The first of these policies that is important in understanding how punitive the U.S. criminal justice system has become over the last half century is broken windows. The concept of “broken windows” started as a theory named after a 1969 study performed by Stanford Psychologist Phillip Zimbardo, with the goal of better understanding “vandalism”, a term that connotes that the act was devoid of “legitimate motives” and thus requires greater deterrents. However, Zimbardo did not believe that acts of “vandalism” were absent legitimate motives, and set out to prove so with “an old car, a sledge hammer, and the sanction to smash the car.”

For the experiment, Zimbardo had two cars of the same condition left abandoned simultaneously in two different areas, one in Bronx, New York, and the other in Palo Alto, California. The car parked in the Bronx was almost immediately vandalized, being stripped of all of its valuable

48. Walmsley, supra note 47.
53. Id. at 9.
54. The Human Choice, supra note 51, at 287.
parts, while the car in Palo Alto remained unscathed for over a week.\(^{55}\) One surprise to the researchers was that the individuals who stole the valuable parts from the car in the Bronx were “all well-dressed, clean-cut whites who would under other circumstances be mistaken for mature, responsible citizens demanding more law and order.”\(^{56}\) But the experiment did not stop there.

Zimbardo proceeded to provide a better primer for vandalism in Palo Alto by instructing his graduate students to begin destruction of the car.\(^{57}\) While attempting to initiate outside vandalism, unexpectedly, the graduate students themselves became enthralled with the destruction, providing the researchers with great insight into vandalism. Zimbardo noted, “the students got carried away temporarily. Once one person had begun to wield the sledge hammer, it was difficult to get him to stop and pass it to the next pair of eager hands.”\(^{58}\) After the graduate students had finished their own destruction, passersby later came to take their own shot at the car.\(^{59}\) The conclusion that Zimbardo drew from his study was that while areas like the Bronx might be more prone to crime and vandalism, anyone, including graduate students at one of the most prestigious universities in the world, could be lured into vandalism because “[i]t is pleasurable to behave at a purely sensual, physical, unthinking level.”\(^{60}\)

In 1982 social scientists James Wilson and George Kelling took the findings of the study and attempted to contort the results into a criminology theory deemed “broken windows.”\(^{61}\) “Broken windows” theory maintains that “if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken.”\(^{62}\) This reconceptualization of Zimbardo’s study is based on the fact that once some vandalism occurred, regardless of the environment, more vandalism followed. But this completely overlooks the fact that the graduate students were the ones who initiated this occurrence in Palo Alto. As one commentator put it, “[t]he problem is, it wasn’t a broken window that enticed onlookers to join the fray; it was the spectacle of faculty and students destroying an Oldsmobile in the middle of Stanford’s campus” and having fun while doing so.\(^{63}\)

\(^{55}\). Id. at 287–90.

\(^{56}\). Id. at 290.

\(^{57}\). Id.

\(^{58}\). Id.

\(^{59}\). Id.

\(^{60}\). Id.


\(^{62}\). Id.

\(^{63}\). Bench Ansfield, How a 50-Year-Old Study Was Misconstrued to Create Destructive Broken-Windows Policing: The Harmful Policy Was Built on a Shaky Foundation, WASH. POST
Following Wilson and Kelling’s flawed logic, it becomes important to disincentive small infractions of disorder within communities to prevent crime from becoming more prevalent. Such a policy is blatantly punitive, hoping to stop crime by coming down more fiercely on all disorder. In practice, broken windows theory has not been implemented evenly across all spaces in the U.S. Instead, lawmakers executed higher levels of surveillance in communities such as the Bronx where the study was conducted. The increase in surveillance was seen most in low income, urban, and overwhelmingly minority neighborhoods in an attempt to undercut crime. Moreover, in recent years police-presence has spiked in mixed-race areas that are going through periods of gentrification, which suggests that police presence and surveillance continues to be used as a weapon, especially against minority communities.

Along with higher levels of surveillance in specific areas, lawmakers also made conscious decisions to criminalize certain actions by expanding what constituted a crime. One example of this is the policy change stemming from the War on Drugs, in which crack cocaine, a drug used at higher rates by minorities, was penalized one hundred times more harshly than the more expensive, powder form of the drug which was used at higher rates by whites. This change that was instituted by the Anti-Drug Abuse Act of 1986 is undoubtedly a shift to a more punitive criminal justice system. By intensifying punishments for certain wrongdoings, the system itself began to change, altering attitudes towards offenders. Furthermore, the reasoning for over sixty percent of the U.S.’s incarcerated population being made up of people of color becomes much clearer when looking at the way in which policymakers instituted increases in surveillance and harsher sentences. Evidently, the disproportionate effect on young, black males in the U.S. has not occurred...
coincidentally; rather it has been cultivated by policymakers in their push for a more punitive state, whether intentionally or otherwise.

The “tough on crime” era culminated in the Violent Crime Control and Law Enforcement Act of 1994.69 The U.S. rhetoric had become so consumed with “law and order” at this point, that policymakers and politicians were competing over who could be toughest on crime. Only out of such a national consensus over harsher punishment could a rule be born that required a state applying for federal prison funding to show that it:

(i) has increased the percentage of convicted violent offenders sentenced to prison; (ii) has increased the average prison time which will be served in prison by convicted violent offenders sentenced to prison; (iii) has increased the percentage of sentence which will be served in prison by violent offenders sentenced to prison.70

Therefore, not only was the U.S. government incentivizing putting people away by giving out federal grants for building prisons, but the requirements to get that money compelled states to adopt infinitely more punitive criminal justice systems—namely, those that increased both the “likelihood of imprisonment and . . . lengths of prison sentences.”71

Though these changes in policy reflect conscious decisions made by people in power that were clearly not inevitable, it is equally important to reckon with the underlying environment that permitted these increasingly punitive policies to brew. U.S. culture is founded on ideas such as rugged individualism and capitalism which pose the notion that everyone has an equal chance to work hard and succeed in life. Put another way, the U.S. purports to be a meritocracy. Meritocracy is based on the idea that “advantage [is] earned through ability and effort rather than inherited alongside caste” or bloodline.72 A major implicit premise to this notion is that everyone does in fact have an equal chance to succeed in life. Unfortunately, this is not the realistic truth for most Americans. With the odds stacked against some groups including minorities and low-income individuals, it is clear that U.S. culture is not as inclusive as many European cultures. For example, somewhat surprisingly, our system of meritocracy actually confines social mobility so that a “poor or middle-class child . . . faces longer odds against

71. Growth of Incarceration, supra note 46, at 71.
climbing the income ladder in the United States than in France, Germany, Sweden, Canada, Finland, Norway, and Denmark.”\textsuperscript{73}

Ironically, the system that promises greater equality in the U.S.—meritocracy—has become “the dominant cause of inequality.”\textsuperscript{74} Those with greater status, resources, and training, therefore, are able to leverage their past achievements for future achievements. In short, as it becomes harder and more expensive to attend elite universities, buy homes, and find promising long-term employment, “[m]eritocracy banishes the majority of citizens to the margins of their own society,” while the meritocratic elite “win” a disproportionate amount of the time.\textsuperscript{75}

Still, this is not the end of the story. Because meritocracy is more inclusive in the sense that more people are capable of competing for the limited resources, status, and success the society offers, one’s successes and failures relative to others’ is evermore paramount. Additionally, with the advent of television and the internet, people are increasingly aware of others’ successes.\textsuperscript{76} “Meritocracy thereby draws . . . the rich and the rest—into a close but hostile embrace.”\textsuperscript{77} This ever-present inequality “naturally breeds resentment and mistrust” within society.\textsuperscript{78} With such mistrust, less punitive alternatives to imprisonment, such as restorative justice initiatives, that require true community involvement are nearly impossible to implement.\textsuperscript{79} Unsurprisingly, restorative justice programs are few and far between in the U.S.,\textsuperscript{80} and when they do exist, often function as a piece of the carceral state. Examples of these programs may be Youth Courts, Family Courts, drug rehabilitation programs, and other strategic alliances between offenders and their community that allegedly help restore trust between society and offenders. Unfortunately, these programs that could transform the criminal justice system and help in reintegration are instead widely underdeveloped and underfunded in the U.S.\textsuperscript{81} Without the use of an effective restorative justice plan, a nation is...
clearly not forgiving towards offenders and instills a cultural norm that
deems incarcerated individuals as dispensable outsiders.

Moreover, meritocracy is not solely about advantage. If “advantage
[is] earned through ability and effort,” the flip side of that is that failure
is equally earned by one’s own inability or a lack of effort. 82 When failure
or breaking societal rules is viewed as one’s own fault, to support or help
that person who failed would conflict with the belief that personal success
is due to the work of that person. Therefore, once people are incarcerated
in the U.S., services such as health care and education become difficult
to receive, especially at a high quality. 83

For example, a recent report found that an “estimated 80 percent of
prisoners are poor” and in need of health services due to where the
government has decided to increase surveillance. 84 “Inmates may be on
the hook for copayments ranging from a few dollars to as much as $100
for medical care” which often serves as a deterrent to getting the care that
individuals in prison need. 85 Similarly, if hospitals in U.S. prisons
continue to be understaffed and incapable of dealing with issues such as
mental health conditions properly, there is no potential for rehabilitation
because people cannot get the necessary therapy and help that they
deserve.

Finally, harsher laws such as three strikes and mandatory minimum
sentences have increased how punitive the U.S. carceral system is and
has negatively impacted disadvantaged populations. Three strikes laws
were ostensibly implemented to deter repeat offenses by requiring
“minimum 25-year sentences for people convicted of a third felony.” 86
Unfortunately, three strikes laws have become a mechanism for mass
incarceration, as opposed to a deterrent of crime. Correspondingly,
mandatory minimum sentences, which are common for drug crimes,

Cardozo J. of Conflict Resolution, p. 618, https://www.researchgate.net/profile/Maria-Volpe-
2/publication/265740796_RESTORATIVEJUSTICEINPOST-DISASTERSITUATIONS-
UNTAPPED_POTENTIAL/links/54d32b5d0cf28e069727a868/RESTORATIVEJUSTICE-IN-
POST-DISASTER-SITUATIONS-UNTAPPED-POTENTIAL.pdf [https://perma.cc/Y6WS-
T89D]; Restorative Justice Responses to Post -September 11 Hate Crimes: Potential and
Challenges, p. 533.

82. Id. at xii.
83. See, e.g., Andrew P. Wilper et al., The Health and Health Care of US Prisoners: Results
84. Michelle Andrews, Even in Prison, Health Care Often Comes with a Copay, NPR (Sept.
30, 2015), https://www.npr.org/sections/health-shots/2015/09/30/444451967/even-in-prison-
health-care-often-comes-with-a-copay [https://perma.cc/6KYV-QB6L]; see also Lauren-Brooke
Eisen, Charging Inmates Perpetuates Mass Incarceration, BRENNAN CTR. FOR JUST. (May 21,
2015), https://www.brennancenter.org/our-work/research-reports/charging-inmates-perpetuates-
mass-incarceration [https://perma.cc/S4AY-D6X4].
85. Andrews, supra note 77.
86. GROWTH OF INCARCERATION, supra note 46, at 73.
require “minimum prison terms for people convicted of particular crimes.”

Mandatory minimum sentences have removed the possibility to personalize a situation and find the best solution for a particular individual and their community. For example, because “many drug defendants are using or selling to support an addiction,” referring a drug defendant “to treatment, rather than sending him or her to prison, may well be the most prudent choice – saving the government resources and potentially saving the defendant from a lifetime of addiction.” Prior to mandatory minimum sentencing laws, judges could consider addiction, poverty, experience of abuse, and other important life experiences to impose a lighter sentence. Conversely, mandatory sentencing laws “strip judges of their traditional role of considering all relevant circumstances in an effort to do justice in the individual case,” constructing a more punitive system where it is increasingly difficult to humanize a person or allow for restorative justice alternatives.

E. Compare & Contrast Europe from U.S.

When policies such as broken windows and mandatory minimum sentences are stacked up against European initiatives such as punishing with imprisonment only as a means of “last resort,” no doubt the U.S. is more punitive in its approach to criminality. More pointedly, the U.S. falls behind Europe in prison services and alternatives to imprisonment. While Europe provides education to individuals within prison, the U.S. has refused to allow public mandated education systems, and incarcerated individuals rely on themselves or private donations and education programs to provide them with the number one tool towards a more productive life. Additionally, health care in U.S. prisons is often inaccessible and of a generally low quality in comparison to Europe as a whole, which continues to provide access to national health care within prison walls.

87. Id.
88. ALEXANDER, supra note 62, at 89–90.
89. Id. at 89.
90. Id. at 90.
Due to the differences in priorities and the allocation of services within prisons, the U.S. and Europe spend vastly different amounts of money on their criminal justice systems. After all secondary and tertiary costs of imprisonment are included, a recent study has found that the U.S. spends a total of $182 billion each year. Yet, when we look deeper and isolate incarceration costs, we find a very different story. In 2015, the U.S. only spent $87.61 per incarcerated individual each day on incarceration costs, while Europe spent an average of €101 per prisoner each day which converts to about $120. These distinctions imply that although European countries spend more money upfront on incarceration costs per inmate for higher quality services and programs, the total monetary burden on European society due to incarceration ends up far less than that on the U.S. Plainly, Europe is succeeding in spending its tax money more efficiently for incarcerated individuals.

Similarly, the COVID-19 pandemic is also illustrative of how the two prison systems are working or failing. In the U.S., as of April 16, 2021, “more than 661,000 people have been infected [with COVID-19 in prisons] and at least 2,990 inmates and correctional officers have died.” Notably, “incarcerated people are infected by the coronavirus at a rate more than five times higher than the nation’s overall rate.” At the same time, remarkably, in Europe, “[t]he pandemic seems to have spread among inmates and prison staff at a slightly slower pace than among the general population.” While it is not entirely clear what caused this miraculous phenomenon, two correlative factors appear to be releasing inmates at higher levels and preventative lockdowns. Regardless of what the direct cause is, the mere fact that Europeans are more vulnerable

---


100. Id.
to be infected by COVID-19 walking on the street than in a prison indicates the dignity and care that individuals are treated with in European prisons that is absent in the U.S.

Comparing punishment methods within prisons is equally revealing. Solitary confinement, for instance, isolates prisoners from the general prison population, either as punishment or because they are deemed dangerous to others. This form of punishment is a brutal experience that leaves lasting effects on those impacted and instills a sense of fear among the prison population. Reginald Betts speaks to these evils from his own experience:

I touched his arm, a childhood gesture. I was trying to say: I will move, no need for the handcuffs. But before I could speak, he slammed me against a brick wall. Handcuffed me. Dragged me to a cell in the hole for assaulting an officer. They tossed me in a cell with a door so thick that no sound escaped. I was sixteen years old.101

This traumatizing experience of solitary eats away at people’s minds and souls: what makes them human.

Solitary confinement as described by Betts is still widely used today in America. With the radicalization of many groups throughout Europe increasing the threat of terrorism, the use of solitary confinement has become somewhat more popular in Europe as a means of breaking these potential terrorist threats.102 Nations such as France, Belgium, and the Netherlands all instituted solitary confinement for this reason, yet, “the number of people held in solitary confinement in Europe is tiny compared with the U.S., where as many as 100,000 people are kept in segregated cells.”103 Shockingly, this U.S. population in solitary is larger than entire prison populations in European nations such as the UK.104 Furthermore, “prison isolation may not only be inhumane, but also ineffective” because it makes individuals even more prone to radical ideas while deteriorating mental states, harming any chance at future reintegration.105

Likewise, the death penalty has still not been outlawed by the U.S. national government and the decision to use this ultimate punishment is left to individual states to decide. Currently, twenty-seven U.S. states

101. Reginald Dwayne Betts, Only Once I Thought About Suicide, 125 YALE L.J. 222, 228 (2016).
103. Id.
104. Id.
105. Id.
permit the use of the death penalty. Contrarily, although there has been diversity on the topic and still is, all member states of the EU, and nearly all European countries more generally, have abolished the death penalty. In general, it is clear that under these measurements, the U.S. criminal justice system is significantly more punitive than Europe. Many scholars argue that the punitive nature of the U.S. criminal justice system may be due to the fact that the U.S. incarcerates a much higher portion of marginalized groups than does European countries. Where sixty percent of the U.S. incarcerated population is made up of people of color, only twenty-one percent of the European incarcerated population consists of the most marginalized group in Europe—immigrants. Because a higher portion of people with historically less social and political power in the U.S. make up the incarcerated population, there is less pressure on policymakers to institute a more reasonable, forgiving system. Regardless of the reason, the result remains the same—the U.S. criminal justice system is more punitive than its European counterpart.

F. Differences Within Europe

Still, the data and conclusions drawn for Europe are based on averages among European nations. Being that there is not full integration within Europe, the diversity among European nations’ criminal justice systems is crucial to acknowledge. Along with the increased crime rates of the 1980s in Europe, came the first major expansion of the Council of Europe. With the edition of Eastern and Central European nations to the original fifteen founders from Western Europe, this institution began to see substantial criminality diversion for the first time. The Eastern and Central European countries had anywhere from five to six times the rates of imprisonment as the founders did, with major overcrowding within prison walls. Moreover, sanitation and disease surfaced as a major problem, where ten percent of incarcerated individuals in these newly added countries suffered from tuberculosis.

110. Id.
111. Id.
Today, as we’ve seen founding countries push for more services and restorative justice programs, Eastern European countries continue to lag behind which is evidenced by the fact that they “spend fewer resources (most of them under 50,00€) per detainee per day while . . . northern European countries . . . spend between 180,00€ and 380,00€.”112 To put this in context, some Nordic countries invest up to five times the amount that the U.S. spends in incarceration costs per prisoner per day. These monetary investments are further reflected by Nordic countries’ higher quality services within prisons. Furthermore, excluding countries with less than three hundred thousand inhabitants, Nordic countries have some of the lowest rates of imprisonment in the world, with Iceland leading the way at only forty-five people per one hundred thousand inhabitants.113 Accordingly, it is not contended that Europe is a monolith, always leading the way in prison reform. However, it is the case that Europe, as a whole has set up institutions and a culture that have allowed, on average, a less punitive and more effective criminal justice system to flourish.

CONCLUSION

It is time for the U.S. to put its money where its mouth is and end mass incarceration as we know it. The U.S. should, therefore, follow the lead of European nations and learn from past failures in the use of punitive policies. Ultimately, it is recommended that a change in prison health care systems, a ban on certain harsh punishments within prisons, and mass investment in education programs among all community stakeholders by following leading European nations in this sector. If implemented together, the U.S. can foster a more comprehensive understanding around what this country considers “criminal” and how those criminal acts should be punished.

Because punitive measures are almost always linked to longer prison sentences, it is common for nations, like the U.S., to see increasing incarceration rates due to these longer sentences even as crime rates are decreasing. Since there is a lack of connection between crime and incarceration, these punitive measures have little success for nations implementing them. Less punitive measures which have proven most effective in Europe such as restorative justice alternatives, greater social interaction, and higher quality services, should be used to encourage social rebuilding between offenders and the community. Moreover, higher integration within the criminal justice sector is vital to decrease

individual nations’ ability to deem people socially dispensable for the use of political gain. When peoples’ lives and futures are at stake, a basic level of human rights must be applied.

Specifically, to end mass incarceration as we know it, the U.S. must first abolish mandatory minimum sentences, potentially going as far as to create maximum terms that cannot be exceeded in sentencing. In turn, this would also eliminate three strikes laws because three strikes laws are in essence minimum life sentences for people who commit a third felony. Acting together, these two policy changes would have the potential to decrease the number of people in prisons as people are released earlier. Shorter sentences would also signal an acceptance and a willingness of society to offer second chances to people who commit crimes. This signaling will inevitably have a positive effect on prisoners’ views of themselves and in all likelihood have rippling effects, such as decreased recidivism rates. Lastly, broken windows must be executed equally among all neighborhoods. The increase in surveillance that has become the norm over the last half century, currently has too much popular support to be effectively reversed. Therefore, the best way to amend broken windows is to demand equal patrol by police in all areas. In total, all U.S. criminal justice policy changes moving forward must be backed by fact-based evidence to be effective and to cease incarcerating the highest numbers of people in the world.

These changes in policy will signal a greater understanding and willingness to see other’s talents as opposed to their downfalls, creating a society that is both more inclusive and increasingly safe. If society helps those that need help the most instead of locking them away in underfunded and underdeveloped prisons, people would be less likely to commit crimes in the first place. In short, a less punitive criminal justice system both in the U.S. and around the world will be the most effective in reaching societal goals of lower crime rates and greater productivity.