

SENTENCING GUIDELINES

Expert Analysis

Tocqueville in Reverse: Looking To Europe in Reassessing U.S. Prisons

In 1831, Alexis de Tocqueville and Gustave de Beaumont received permission from the French government to travel to the United States to study American prisons. The United States had instituted new prison systems in Pennsylvania and New York, and the two Frenchmen hoped to provide their government with data that could support building American-style prisons in France.

After a nine-month journey, Beaumont and Tocqueville, who believed that the purpose of incarceration “is to reform,” or rehabilitate, found that although some states’ penal laws and prison systems were “ancient” and “barbar[ic],” the “cause of reform and of progress in the United States” seemed to them “certain and safe.”¹ Indeed, in Tocqueville’s more well-known book about his American experience, *Democracy in America*, he summed up his opinion of America’s prisons: “In no country is criminal justice administered with more mildness than in the United States.”²

Fast-forward 182 years. The U.S. prison system is vastly different and has become increasingly unappealing to other nations, who have by and large rejected American prison reforms of the past three decades.³

Since the 1980s, the United States has seen a drastic rise in its prison population, with many jurisdictions adopting mandatory minimum sentences, passing “three strikes” and “truth in sentencing” legislation, abolishing parole and promulgating



By
**Alan
Vinegrad**



And
**Jason
Levine**

sentencing guidelines. To quantify the change, there were about 500,000 people in U.S. prisons and jails in 1980; in 2010, there were almost 2.3 million.

The United States has the highest incarceration rate in the world, with 743 out of every 100,000 people in prison in 2010. Although the United States has less than 5 percent of the world’s population, it has almost 25 percent of the world’s prison population. The United States has a higher rate of incarceration than Russia (568 per 100,000), Iran (291 per 100,000), and China (122 per 100,000). A comparison of incarceration rates in the United States and countries in Western Europe is even more striking: only 153 out of 100,000 people in the U.K. are incarcerated; 85 out of 100,000 in Germany; and 94 out of 100,000 in the Netherlands.

As a result of this trend toward more and longer custodial sentences, U.S. prisons are overpopulated and prison costs are at an all-time high. It has become increasingly apparent that the U.S. corrections system needs to focus more on the stark fact that 97 percent of inmates will eventually reenter society. According to a former federal prison warden, our prison system has become one of “confinement rather than a correctional system.”⁴ As

a result, states and the federal government are reassessing their respective approaches to sentencing and incarceration. In so doing, they have begun looking at our allies across the pond.

European-American Project

The Vera Institute of Justice⁵ has initiated a project designed to do what Tocqueville and Beaumont came to the United States to do—learn about approaches of other countries to incarceration and corrections, with the goal of determining whether, and to what extent, those approaches could work in the United States. The purpose of the project is to expose U.S. prison officials to penal policies that rely more on intermediate sanctions (e.g., community service, fines, probation) and use incarceration primarily as a means to rehabilitate offenders.

Vera selected three states to participate in the project—Colorado, Pennsylvania and Georgia—that have diverse cultural and political populations, are viewed as open to reform, and have strong leaders in their respective departments of corrections. Vera also selected Germany and the Netherlands as the countries the U.S. officials would visit and learn about. These countries were selected because of their relatively low incarceration rates, widespread use of alternatives to prison, and intense focus on rehabilitation.

The project is divided into three phases. First, the state officials met with Vera staff to review their correctional systems and to tour their respective prison facilities. Second, the officials visited and observed correctional facilities in Germany and the Netherlands and met with corrections officers in each country. Third, as an ongoing step, the state officials will discuss with each

ALAN VINEGRAD, former U.S. Attorney for the Eastern District of New York, is a partner at Covington & Burling. JASON LEVINE is an associate at the firm.

other and Vera what they learned and what they think could work in the United States.

Tom Clements, the former executive director of the Colorado Department of Corrections, who was tragically murdered just a few weeks after visiting the prisons in Europe, said this about the project: "I believe this experience will prove to be a springboard for new ideas to improve correctional services in Colorado with a focus on efficiency and better public safety outcomes."⁶

Different Approaches

From the 19th century through the 1970s, America's penal system emphasized the rehabilitation of offenders in part through the imposition of indeterminate sentences and other means—such as good-time, furloughs and parole—to lower the amount of time actually spent in prison. Beginning in the 1970s, however, rehabilitation began to take a back seat as both federal and state governments became increasingly focused on incapacitation, deterrence and retribution.

In contrast, Germany, the Netherlands, and many other European countries continue to prioritize rehabilitation today. In Germany, for example, the primary aim of incarceration is to enable prisoners to lead a life of "social responsibility free of crime" upon release.⁷ Germany's Prison Act requires that prison life be as similar as possible to life in the community and facilitate the reintegration of prisoners into society.⁸ Relatedly, one of the guiding principles of the Netherlands' 1998 Penitentiary Principles Act is the re-socialization of prisoners.

The German and Dutch sentencing and incarceration systems are different from those in the United States in two key ways. First, far fewer persons convicted of a crime in Germany and the Netherlands face lengthy prison terms. Whereas less than 3 percent of federal prison sentences imposed in the United States are for one year or less, more than 40 percent of prison sentences imposed in the Netherlands and Germany are for a similarly short duration. Similarly, almost 70 percent of persons convicted of a crime in the United States are sentenced to prison and, when they are, the average sentence imposed is 63 months;⁹ in contrast, only 7.5 percent of individuals convicted of a crime in Germany go to jail,¹⁰ and the average length of incarceration in Germany is about one year.

In the Netherlands, the average length of incarceration is a mere 3.5 months. Germany and the Netherlands more often impose a combination of fines, community service and other non-custodial alternatives to incarceration.

Second, the respective purposes of incarceration are reflected in markedly different prison systems. To be clear, the U.S. "prison system" is actually 51 unique systems—the federal system and the 50 states—each with a variety of different types of prisons (e.g., high, medium, and minimum security prisons; prisons for women; jails; juvenile detention centers). But the average U.S. prison can be generally characterized by monotone jumpsuits; small cells with basic necessities (e.g., bed, toilet, sink); regimented schedules and minimal privacy. It is a system that prioritizes punishment over rehabilitation.

It has become increasingly apparent that the U.S. corrections system needs to focus more on the stark fact that 97 percent of inmates will eventually re-enter society.

In contrast, the German and Dutch approaches to incarceration are predicated on the fact that the majority of inmates will be released and return to the community. In Germany, to further the aim of keeping prison life as "normal" as possible, prisoners maintain more privacy and are given more opportunity for individual expression than prisoners in the United States. As a matter of general practice, prisoners have keys to their own cells, which have windows and are larger than most prison cells in the United States, and guards knock before entering.

Prisoners in both Germany and the Netherlands wear their own clothes; indeed, correctional facilities do not even purchase clothing for inmates. Instead of regimented, guard-directed schedules, German and Dutch prisoners can set their own schedules for when they eat, sleep and work. Of course, inmates have responsibilities, and they are disciplined when those responsibilities are disregarded; but by giving inmates a set of general tasks and having them shape the

way those tasks will be completed, German and Dutch prison systems try to make life on the inside approach life on the outside.

There are other significant differences between the prisons to which the corrections officials participating in the Vera project are accustomed and the German and Dutch prisons they visited. In Pennsylvania, Georgia and Colorado, prison officials complete a four-to-five-week basic training program;¹¹ in Germany, prison officials must undergo two years of theoretical and practical training. Moreover, to promote the rehabilitation of offenders, German and Dutch prisons establish comprehensive and targeted sentencing plans for each inmate from the day he or she is incarcerated. Finally, unlike in the United States, where long-term segregation is often used not only to protect against the most dangerous inmates but also to punish prisoners for non-violent rule violations, manage prison overcrowding and protect prisoners believed to be at risk in the general prison population, solitary confinement is seldom used and limited to between two weeks (Netherlands) and three months a year (Germany).

Can It Work in the United States?

To assess whether the German/Dutch approach works, one must first determine how the success of a corrections system should be measured. Although there are many cultural, moral and economic metrics one could use to evaluate a corrections system, we view recidivism and cost as the most important and objective ways to measure success.

Unfortunately, comparing recidivism rates of the United States and European countries is no small feat. In the United States, 43.3 percent of prisoners released in 2004 were back in prison within three years for either a new crime or a technical violation of their release.¹² In the Netherlands, 48.5 percent of adult prisoners released in 2008 were reconvicted of another crime (though not necessarily put in jail) within two years. Notably, this percentage drops to 27.5 percent of all Dutch adults initially found guilty of committing a crime, whether imprisoned or not.¹³ Recidivism data in Germany are more analogous to those in the Netherlands than in the United States: in Germany, 48.1 percent of prisoners released in 2004 were reconvicted of another crime, and only 32.7 percent of all persons initial-

ly convicted of a crime were reconvicted of another crime.¹⁴

Cost is equally difficult to assess. Large living quarters in German and Dutch prisons, more staff, and a tailored approach to each inmate are costly: Germany spends, on average, almost \$60,000 per year on each prisoner; the Netherlands spends a whopping \$95,000. The United States, on the other hand, spends, on average, only \$26,000 per prisoner per year.

However, one must compare not only the cost per prisoner in absolute terms, but also the likely effect of incarceration on prisoners, crime rates and society and, to the extent possible, value those effects. Up-front costs for more prison staff, educational programs, treatment centers and reentry programs could result in future savings (e.g., less crime, fewer prisoners and prisons). As an example, the Washington State Institute for Public Policy conducted a comprehensive cost-benefit analysis of multiple corrections programs, including drug treatment, vocational training and counseling, to determine the likely effect on crime and cost in Washington.¹⁵ It found that many, but not all, programs would result in a positive return on investment for the state's taxpayers and that an aggressive implementation of such programs would yield \$1.9 to \$2.6 billion in savings by 2030 as well as a reduction in crime rates. Other states have implemented programs intended to increase the use of parole and improve parole services, as well as treat substance abuse and mental illness, in order to better assess risk, cut prison costs and reduce recidivism.

Assuming that the European approach to sentencing and corrections "works," would it work in the United States? To answer this question, one must account for key differences between Europe and the United States. First, although the U.S. crime rate has declined in the past two decades, countries in Europe—Germany and the Netherlands included—still have lower rates of the most serious and violent crimes (e.g., murder, rape). Second, there are more collateral consequences of conviction in the United States than in European countries. Former felons in the federal system and many ex-inmates in state prisons cannot vote, serve on a jury or run for certain public offices; they may lose their professional licenses, the ability to receive welfare benefits or live in public housing, and access to federal financial aid

for higher education, particularly when they are convicted of drug-related offenses. At least some of these collateral consequences make it more difficult for ex-offenders to reenter society, earn a living, and lose the stigma associated with having served time.

If criminal justice experts conclude that the European model could work (in whole or in part) in the United States, their next challenge will be implementation. The somewhat political nature of the U.S. criminal justice system—with elected judges and prosecutors in many states and legislative-driven determinate sentencing—may make it more difficult to change the penal system in the United States than in Europe, where criminal justice policies are more insulated from the political process.¹⁶ Nonetheless, departments of corrections are doing what they can with the funds and power that they have. Some states already have implemented reforms that prioritize rehabilitation and take a more individualized approach to incarceration—for example, by developing case management plans for specific prisoners to address mental health issues and drug abuse, two of the major conditions affecting inmates in U.S. prisons.

Whereas less than 3 percent of federal prison sentences imposed in the United States are for one year or less, more than 40 percent of prison sentences imposed in the Netherlands and Germany are for a similarly short duration.

For Colorado, Pennsylvania and Georgia, the Vera European-American Prison Project is not finished. Each state will now assess what it can do to tailor its correctional system to the European examples. John Wetzel, the Secretary of the Pennsylvania Department of Corrections, said this upon returning from Europe: "The project has caused us to take a step back and look at our purpose—i.e., to correct people—and will prompt us as an organization to assess whether our practices are leading to that."¹⁷

Whether European-style practices will work in the United States is still to be determined. But at least some U.S. correc-

tions officials, and experts, are dedicating themselves to finding out the answer.

.....●●.....

1. GUSTAVE DE BEAUMONT AND ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 17-18 (Francis Lieber, ed. and trans., Philadelphia, Carey, Lea and Blanchard 1833).

2. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 203 (Henry Reeve, transl., New York, The New Century Co. 1898) (1840).

3. See Ely Aharonson, "Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion," 76 LAW & CONTEMP. PROBS. 161, 165 (2013).

4. Percy Pitzer, "Federal Overincarceration and Its Impact on Correctional Practices: A Warden's Perspective," CRIMINAL JUSTICE, Spring 2013, at 42.

5. Co-author Alan Vinegrad is a member of Vera's Board of Trustees. Any views expressed in this article are the author's own.

6. Press Release, U.S. Corrections Leaders Tour Prisons in Europe in Effort to Advance Reforms (Vera Institute of Justice), March 12, 2013, available at <http://www.vera.org/news/us-corrections-leaders-tour-prisons-europe-advance-reforms> [hereinafter "Vera Press Release"].

7. See Germany Prison Act §2 (1977).

8. *Id.* at §3.

9. See Finding Direction: Expanding Criminal Justice Options By Considering Policies of Other Nations (Justice Policy Institute), April 2011, at 1, 3 (percentage of convicted adults sentenced to prison from 1995-2000; average sentence length in 2006).

10. See *id.* at 1 (percentage of convicted adults sentenced to prison from 1995-2000).

11. Pennsylvania has a four-week training program and then a year of on-the-job training.

12. State of Recidivism: The Revolving Door of America's Prisons (The Pew Center on the States), April 2011, at 2.

13. B.S.J. Wartna, et al., Recidivism Report 2002-2008: Trends in the Reconviction Rate of Dutch Offenders (Fact Sheet 2011-5a, Research and Documentation Centre, Ministry of Security and Justice), December 2011, at 2.

14. Jörg-Martin Jehle, et al., Non-Recidivism By Criminal Sanctions (Federal Ministry of Justice, Berlin), 2010, at 29 tbl. 3 (English translation of title).

15. Steve Aos et al., Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs and Crime Rates (Washington State Institute for Public Policy), October 2006, at 8-11, 14.

16. See Aharonson, *supra* note 3, at 177-79.

17. Vera Press Release, *supra* note 6.