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Human Dignity, Crime Prevention, and Mass Incarceration: A Meaningful, Practical Comparison Across Borders

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I. Introduction

Articles and books on how foreign—usually European—legal systems address sentencing, corrections, and reentry abound.¹ They are deemed interesting theoretically but generally dismissed as inapplicable and irrelevant in informing U.S. sentencing and corrections practices in light of the differences between the United States and foreign countries.² Not surprisingly, these publications do not spark reform, in part because they have been unsuccessful in overcoming assumptions about irreconcilable differences and noncompatibility, and in part because often detailed proposals and insights for implementation of reforms derived from practices in a foreign jurisdiction are missing.

The project at the heart of this Issue is fundamentally different. Its comparative framework is based on a cross-national study visit by the corrections officials of three U.S. states, who were accompanied by other key players in the respective states' criminal justice systems and members of the Vera Institute of Justice. Together they visited prisons in two Central European countries and engaged German and Dutch corrections officials who share some of the same challenges, though their approaches are fundamentally different. The articles in this Issue reflect the deep impact the trip has had on all and discuss some of the changes officials have implemented in the wake of the European prison visits. The visits jump-started a cross-national dialogue, highlighted "what works in corrections" in different regimes, and ultimately influenced the belief set of the American stakeholders.

This article will discuss the origins of the project and concerns about incommensurability. It focuses on the concept of human dignity, a notion at the heart of European sentencing. The authors in this Issue note the preeminence of this concept and its practical application, not only in the form of substantially lower imprisonment rates but also within the corrections system. It is reflected in more limited collateral sanctions and in a genuine belief in giving offenders a second chance. The current plateau and even decrease in imprisonment rates in the United States raise the question, are we at the beginning of a sustained re-alignment, perhaps in conjunction with recognition of the value of human dignity? Or are we merely witnessing a short-term adjustment to budgetary realities?

II. Origins of the European-American Project

Following the litigation in *Brown v. Plata*,³ Don Specter and the Prison Law Office dedicated a part of the fees earned to this comparative corrections project to be directed by the Vera Institute of Justice. Despite their victory in the litigation, they had concluded that truly systemic change, to occur in a shorter timeframe and to bring about comprehensive change, requires tools other than litigation. As Don Specter indicates in his article, a trip to prisons in Northern and Central Europe immediately after *Plata* had been decided, surprised and deeply moved him.⁴ Therefore he hoped that this trip, with state corrections and criminal justice officials, would provide for cross-fertilization and open the door to approaches that would make the U.S. criminal justice system more humane and more effective by

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creating greater respect for human dignity. It has been his vision and commitment to systemic change that have made this project possible.

Criminal justice officials from three states—Colorado, Georgia, and Pennsylvania—ultimately participated in this project. As Don Specter noted, neither the project nor the changes the trip to Germany and the Netherlands has effected “could have happened if all of the participants . . . were not open to new ideas and actively searching for ways to improve their prisons and the lives of the thousands of men and women entrusted to their custody.”

Prior to the trip, designated officials from each state—including the leaders of the state corrections system, prosecutors, defense counsel, legislators, members of sentencing commissions, judges, and other stakeholders—met to create a baseline, in part through visiting some of their own prisons, in part through discussions and presentations of crucial issues in the respective states, and to outline their questions and goals for the Europe trip. As I personally participated in two of these meetings, I can attest to the earnestness and purposefulness of all the participants and to the deep knowledge they gathered from these preparatory meetings, which were designed to provide every player in the system with the same knowledge base.

Because of the diverse and different composition of the state teams, the project covered the continuum from charging through post-release efforts at reentry and rehabilitation. The visits themselves, however, focused exclusively on prisons.⁵ This may appear limited in scope and limiting in imagination for change. On the other hand, it may highlight the central importance of prisons in both the American public’s imagination and the criminal justice regime. It may also help illustrate the impact the treatment in prisons has on reentry, or perhaps more accurately on recidivism. In Germany the deprivation of liberty itself is viewed as the punishment; in the United States only the additional attendant restrictions and degradations are considered as such. Physical and sexual assaults appear to be accepted as a potential function of imprisonment, as are certainly all denials of everyday normality.⁶ Sentences to prison terms, therefore, may be much more than a deprivation of liberty; they may be a powerful societal statement of disregard and humiliation, with long-term ramifications for the offender—and for society. This seems disturbing at a time when a relatively large percentage of our population is behind bars, and most of them belong to the already most economically and educationally disadvantaged, least protected, and most abused.

III. Commensurability: Is There Room for a Meaningful Cross-Atlantic Dialogue?

Europeans have been keenly aware of the differences between their respective sentencing regimes and correctional systems and those of the United States. Not surprisingly, Jörg Jesse, the Director of Prison and Probation Administration in Mecklenburg–Western Pomerania, wondered about the value of the visit. Were the systems even comparable? Curiously, I had not heard many such concerns on the U.S. side, though some were wondering whether there would be a discussion of the death penalty. That issue, however, is truly incommensurate. Richard Frase focuses on issues of comparability and the value of comparisons in his article, which centers on the severity of sanctions and mass incarceration, one component of the report the Vera Institute issued after the trip (reprinted in this Issue). Because of his concern that the critics will highlight the incommensurability of legal systems, Professor Frase suggests a greater emphasis on practices employed in the United States at a time of much lower imprisonment and on distinct policies and approaches in different jurisdictions around the country to decrease incarceration rates. He, therefore, focuses on differences between high- and low-incarceration rate states and ascribes some of this differential to the existence of sentencing guidelines and the abolition of parole, which allow for a more accurate prediction of needed prison bed space. In some states these practices have restricted, and perhaps even reduced, sentence levels.

The need for such mechanisms, however, seems to further highlight the philosophical differences between European countries and sentencing in the United States. Mandatory guideline regimes, which could allow for a quicker realignment of sentences and changes in sentencing policy, may also reify such policies. They can socialize new generations of judges into sentence levels no longer supported by the population, yet difficult to change systemically. Even as Professor Frase views guidelines as restraints on sentence levels, they have not been adopted in Central Europe and were not needed to bring down prison rates in countries such as Finland, which decreased its imprisonment rate drastically in the 1980s. As Professor Frase notes, the absence of relevant and detailed data sets in the United States—for example, on the percentage of criminal cases diverted or on the types and numbers of cases disposed of with fines in individual states—makes cross-jurisdictional comparisons challenging. Even though sentencing restraints through guidelines may have been helpful, some of the nonguideline states continue

to have among the lowest imprisonment rates.⁷ Some nonguideline states have seen the sharpest decreases in imprisonment.⁸ Although guidelines have increased transparency and equality, they may not have been equally successful in restricting the escalation of punishment.

Juliet Kamuzze's article, which is unrelated to the European-American Project, recounts the attempts of Uganda's Chief Justice to restrain unfettered discretion through the introduction of sentencing guidelines, and illustrates some of the difficulties in the creation, adoption, and acceptance of guidelines. Among the challenges is their location between the executive, the legislature, and the judiciary. Ultimately they will only be successful in increasing fair, transparent, and equal sentences if designed to emphasize these values and employed by the judiciary accordingly. The difficulties Juliet Kamuzze details may account in part for why guidelines have not been widely adopted in other countries. Other reasons may, of course, include lower sentence levels across the board, as is true in European countries, which perhaps lower the stakes of sentencing, and a more uniform training of the judiciary, which remains typical of judges in Continental Europe. Perhaps these comparisons further sharpen the question of why certain U.S. jurisdictions have adopted guidelines while others have eschewed them.

Professor Frase also advocates looking into the past to unearth practices that may help decrease incarceration. He reiterates how alike incarceration rates on both sides of the Atlantic had been before the mid-1970s. Although historical comparisons are certainly illustrative, they may evoke the same reaction as cross-jurisdictional comparisons, and be rejected as incommensurate. This may be particularly true if past practices were not evidence-based, as was likely the case for so many of them at the time. Perhaps more importantly, as Jörg Jesse noted, practices must come alive to be truly understood, embraced, and replicated.

Professor Frase's analysis nevertheless provides hope that punitiveness is not a deeply engrained U.S. characteristic but rather a relatively new phenomenon, caused by the unfortunate coincidence of a host of economic and social factors. In a time of heightened crime and resulting fear, localized decision making without attendant accountability for budgetary ramifications resulted in longer sentences and increased felony convictions. One of the major differences between the United States and Central Europe appears to be that the United States, whether intentionally or inadvertently, moved a host of social problems from other areas—mental health and drug addictions, for example—out of the health and social services systems and into the criminal justice system. Directly and indirectly that led to the growth of the criminal justice system and especially of prison expenses, which have become unaffordable.

IV. Decreased Incarceration: A Reflection of Fiscal Reality, or Recognition of Human Dignity?

One of the cardinal concepts in Central and Northern European sentencing and corrections philosophy is human dignity. Some European Constitutions guarantee that right broadly, as do international and regional human rights conventions, the latter of which are enforceable through the European Court of Human Rights. The concept itself has been deemed implicit in the U.S. Constitution, though its application in the criminal justice context has been most limited to “‘shock-the-conscience’ cases,” as Alison Shames and Ram Subramanian note in their piece on human dignity.

Don Specter writes in his article that much of the difference in the recognition of human dignity may be reflected in prison conditions and the role prisons play in society. As Shames and Subramanian confirm, during the trip the group “had the opportunity to witness the many different ways in which human dignity as a normative value finds real expression in German and Dutch criminal justice policy and practice.” One may add that the phenomenon of mass incarceration is perhaps not so easily imaginable in countries with a strong and constitutionalized concept of human dignity.

Even though prisons are not the most frequently used sanction in the United States, in the public's consciousness, discussions appear to center around and derive from imprisonment (and the death penalty, which is less relevant to this discussion as it has been abolished in all of Europe). Incarceration has become the baseline, the benchmark for sentencing and the treatment of offenders. Don Specter notes that European sanctioning systems start with the offender's “place in the community” rather than his relegation to a space outside society. Presumably that concept makes all actors in the criminal justice system more reluctant to remove the offender from the community by sending him to prison. In addition, if the offender's place is within the community, this mandates a greater emphasis on post-release reintegration to assure the offender can take her rightful place in that community. It also requires, as corrections philosophy and reality bear out, attempts to keep the offender in close contact with the community during imprisonment and to mimic life on the outside, inside of prisons. On the other hand, this conception may further exclude those who are already viewed as marginal members of

the community and allow them to be incarcerated in greater numbers.⁹ Looking at past sentencing practices, it is conceivable that the United States operated with the same assumption, though in the meantime the heavy focus on the offense (and prior criminal record), enhanced through guidelines that explicitly counsel against consideration of the offender's role within the family or community, has unmoored that understanding and facilitated incarcerative sanctions. This would imply that guidelines may have assisted in a dramatic change in sentencing philosophy.

The German understanding of human dignity and of the individual as a member of a larger community are reflected in the way in which prisons are operated and the atmosphere prevalent in them. Generally much lower levels of violence, fewer sanctions, greater calmness and cleanliness, and inmates dressed in "civilian" attire characterize German and Dutch prisons. Though some of those atmospheric differences can be ascribed to the separation of mentally ill inmates into psychiatric facilities, different underlying philosophies account for systemically distinctive approaches. Many of the prisons tend to be closer to the cities from which the prison population is drawn than is true in the United States. With public transportation denser, family visits, for example, are easier to facilitate. The cardinal theme of imprisonment is "normalization," the attempt to mimic conditions on the outside to the extent feasible, in part to limit punishment to the deprivation of liberty itself,¹⁰ and in part to facilitate reintegration upon release.

The background and training of prison staff differs dramatically—and perhaps curiously—from that in U.S. prisons. Many U.S. corrections officials have worked their way up through the system; many have joined laterally through prior service in the police or the military; only very few have a legal background. The opposite is true in Germany, where most prison directors and their deputies are legally trained. In contrast to six-month training periods, which are not uncommon in some U.S. states, as the Vera report outlines, in Germany prison officials are trained in theoretical concepts and their practical application for two years, at which point they have to take a set of mandatory exams. Because of educational requirements preceding the initial selection, potential corrections staff are at least in their early to mid-twenties when selected rather than eighteen, which is the minimum age requirement in some U.S. states.

Much of the emphasis of the training is on how to provide positive reinforcement, defuse tension, and model positive interactions, as Kelly Wasko outlines. The staff's self-understanding, as Jörg Jesse indicates and the Justice Minister of Mecklenburg–Western Pomerania reinforced in her dinner speech, is focused on preventing future crime and assisting in the offender's rehabilitation. The focus shifts from the U.S. emphasis on incapacitation, deprivations, and punishments to the use of incentives in the daily prison life.

As important as staff training and goals is the ratio of inmates to staff. Colorado's Kelly Wasko noted that those ratios are substantially lower in European prisons, with a relatively large number of social workers, mental health professionals, and psychologists on staff. In her opinion this comprehensive staffing transforms treatment from "attendance at a program [to] a way of living." The professional background of so many staff members reinforces a therapeutically focused atmosphere in prisons, with U.S.-style warehousing and punishment of offenders turned into support.

V. Next Steps—Already Initiated

Even though the trip left an indelible impact on all the participants, the proof of its success will be in the implementation of changes in the respective state systems. Kelly Wasko, Deputy Executive Director of Colorado's Department of Corrections, describes her and her corrections system's resolve to continue and emphasize three initiatives: improving reentry programs, approaching mentally ill offenders differently through insights gained in Germany, and limiting the use of segregation,¹¹ as modeled in German prisons. Although German corrections officials can use segregation as an ultimate sanction, it is narrowly circumscribed and limited to a maximum of four weeks. Sanctions generally tend to consist of lower-level deprivations and reprimands; positive reinforcement is favored. Colorado has used those insights to limit the use of segregation units to the most violent offenders.

Pennsylvania's Secretary of Corrections, John Wetzel, has focused much of his effort on the time when the prisoner reenters the community. As part of that effort, he has begun to normalize the prison environment. Perhaps most importantly, much of his emphasis has been on training prison staff. As Shames and Subramanian write about probation that surveillance will only lead to change if combined with treatment, that may also be a critical shift required within the corrections system. As such training programs exist for community supervision, why not extend them to corrections staff? A refocus on goals and enhanced training may have the salutary side effect of better retention of committed staff.

To address mass incarceration, change does not have to come only to corrections. Richard Frase points out that on the sentencing side, many of the means Europeans use—pretrial diversion, fines as the sole sanction, suspended sentences—are also at the disposal of U.S. prosecutors and judges but are presumably used less frequently. He ascribes low usage to lack of data about the frequency of such sanctions and resulting outcomes, and therefore concern about recidivism without an incarcerative sanction.

Shames and Subramanian state that existing research on successful criminal justice practices and the demands for fiscal constraint have already led “a majority of states over the last five to ten years [to] enact[] broad-based criminal justice reform.” The focus on evidence-based programs and services parallels their use in the German corrections systems. In contrast to Professor Frase, however, who advocates for the adoption of a guideline system to constrain imprisonment, Shames and Subramanian favor the opposite trend to more individualized, often community-based sanctions that respond “to an offender’s unique needs and circumstances.” Among the aspects they highlight are diversion, drug treatment probation, community service and training requirements, problem-solving courts, and the abolition of mandatory penalties.

The cardinal question looming in the background is whether the current modifications reflect a deeper change in attitudes, along lines prevalent in the past, or rather present merely short-term adjustments because of budgetary realities. Shames and Subramanian indicate at one point that “[w]hile reducing recidivism and improving public safety remain the prime justifications for supporting the transition and reintegration of offenders into the community, the effect is to humanize a returning offender’s experience.” This seems to imply that the effect of the changes is to restore human dignity, but that the underlying motivation of punishment remains unaltered. More encouraging may be the conclusions one can draw from the approach to collateral sanctions and consequences. The adoption of expungement and sealing remedies may reflect an enhanced focus on dignity, but at a minimum they recognize that criminal records hinder community reintegration and therefore heighten the risk of recidivism. An enhanced opportunity at reentry symbolizes acceptance of an individual’s ability to change and of the offender as part of our community rather than his rejection as an outcast. In the end, Shames and Subramanian see a greater recognition of the “individual circumstances and needs of an offender” as an acknowledgment of individual dignity, previously disavowed by mandatory sanctions, for example.

VI. Conclusion

The open question remains whether the current changes reflect a reconsideration of the underlying sanctions philosophy toward one more focused on human dignity, or whether greater financial stability will reinscribe imprisonment. Ultimately the issue is whether rehabilitation and treatment are merely instrumental goals to prevent crime and benefit society, or whether they are employed to focus on the individual to restore her rights and position in the community. If the former, the striving for “efficiency and efficacy,” which Shames and Subramanian acknowledge, may quickly lead us to further incarceration, should the modified new approach not enhance public safety. Even though the long-term trajectory remains open to speculation, at a minimum it may be time that we take responsibility for the prisons we have created by treating the people in them as fellow human beings and members of our larger community.¹²

Notes

- ¹ See, e.g., Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions*, 18 Boston Coll. Int’l & Comp. L. Rev. 317 (1995), <http://lawdigitalcommons.bc.edu/iclr/vol18/iss2/2>; Tatjana Hoernle, *Moderate and Non-Arbitrary Sentencing Without Guidelines—The German Experience* (Dec. 18, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2041979.
- ² For details on the differences in incarceration rates between the United States and two Central European countries, see Ram Subramanian & Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States* (Vera Institute of Justice October 2013) (reprinted in this Issue).
- ³ 563 U.S. ___, 131 S. Ct. 1910 (2011).
- ⁴ While disparities between Europe and the United States are often noted, there are also substantial differences between different parts of Europe with respect to imprisonment rates, prison conditions, and prisoners’ rights, among other matters. See Susanne Karstedt, *Europe as a Normative Power: Cultural Peers and Penal Policies*, 73 Proc. Criminology (Hungarian Society of Criminology) 89 (2014) (distinguishing between Northern, Southern, Eastern, and Western Europe).
- ⁵ European and U.S. practices also differ substantially with respect to the number of individuals under the supervision of the criminal justice system outside of prison, and with respect to the extent and magnitude of the

- collateral consequences of a conviction. See, e.g., David Garland, *Cultures of Control and Penal States*, 73 Proc. Criminology (Hungarian Society of Criminology) 60–61 (2014).
- ⁶ Recent guidelines implemented for the 2003 federal Prison Rape Elimination Act (PREA), P.L. 108-79, which went into effect in 2013, promise change. Some states have, however, already announced that they will opt out. See Rebecca Boone, *Some states opting out of federal prison rape law* (May 23, 2014), <http://bigstory.ap.org/article/some-states-opting-out-federal-prison-rape-law>.
- ⁷ Compare state guideline systems, at National Center for State Courts, *State Sentencing Guidelines: Profiles and Continuum* (July 2008), available at http://www.ncsc.org/media/Microsites/Files/CSI/State_Sentencing_Guidelines.ashx, with state imprisonment rates, E. Ann Carson, Bureau of Justice Statistics, *Prisoners in 2013* (Sept. 30, 2014), NCJ 247282, available at <http://www.bjs.gov/content/pub/pdf/p13.pdf>.
- ⁸ See, e.g., Marc Mauer & Nazgol Ghandnoosh, The Sentencing Project, *Fewer Prisoners, Less Crime: A Tale of Three States* (July 2014), available at http://sentencingproject.org/doc/publications/inc_Fewer_Prisoners_Less_Crime.pdf (spotlighting California, New Jersey, and New York, but also a group of additional states with double-digit decreases in their respective state prison populations).
- ⁹ See Statistisches Bundesamt, *Rechtspflege—Strafvollzug: Demographische und kriminologische Merkmale der Strafgefangenen zum Stichtag 31.03.2013* at 12-13 (2014) (data on the incarceration of non-citizens), available at https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/Strafvollzug2100410137004.pdf?__blob=publicationFile.
- ¹⁰ It appears a conundrum that the United States, whose constitutional history and values have been driven by the strong belief in individual freedom, does not deem the sheer deprivation of liberty a heavy sanction but instead feels the need to layer humiliation and additional sanctions on top.
- ¹¹ See James Austin & Emmitt Sparkman, *Colorado Department of Corrections—Administrative Segregation and Classification Review* (National Institute of Corrections, Oct. 2011) (analysis of Colorado's use of administrative segregation to assist in its decrease), available at http://www.ccjrc.org/pdf/2011_Solitary_Confinement_Report.pdf.
- ¹² That concern also extends to those in immigration detention, who are treated similarly to those incarcerated and may be even more easily characterized as outside the community. See, e.g., Mary Bosworth & Sarah Turnbull, *Immigration detention, punishment, and the criminalization of migration*, in *The Routledge Handbook on Crime and International Migration* (Sharon Pickering & Julie Hamm eds., 2014) (indicating how “immigration detention reflects the broadening reach of penal power . . .”).