2007

Determinants of Penal Policies

Michael Tonry

University of Minnesota Law School, tonry001@umn.edu

Follow this and additional works at: https://scholarship.law.umn.edu/faculty_articles

Part of the [Law Commons](#)

Recommended Citation

Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1 (2007), available at https://scholarship.law.umn.edu/faculty_articles/497.

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Michael Tonry

Determinants of Penal Policies

Many of the generalizations bandied about in discussions of penal policy in Western countries are not true. If penal populism (Pratt 2007) or populist punitiveness (Bottoms 1995) exists at all, it is mostly as reifications in academics' minds of other academics' ideas. Imprisonment rates have not risen substantially everywhere in the last fifteen years. Penal policies are not becoming harsher everywhere. Some policies in some places have become harsher, but in most places this is offset by changes in practice that moderate and sometimes nullify the policy changes, and by other policy changes that move in the opposite direction. If a few governments are moving in illiberal directions in relation to the procedural rights of defendants, most are moving to strengthen their procedural rights and protections (Snacken 2005). If with things such as antisocial behavior orders (Morgan 2006) in England and three-strikes laws in America (Zimring, Hawkins, and Kamin 2001), some governments are adopting primarily "expressive" policies without concern for their iatrogenic effects, most governments are not. In countries in which most or some penal policies have become more severe, the reasons are not rising crime rates, increased awareness of risk, globalization, or the conditions of late modernity, but rather distinctive cultural, historical, constitutional, and political conditions. Tip O'Neill, for many years speaker of the U.S. House of Representatives, famously observed that "all politics are local." So are penal cultures and policies.

All Western countries in recent decades experienced rising then fall-

Errors of analysis or fact in this introduction are alas my own, but I am grateful to the following people who kindly read an earlier draft and helped me avoid some errors and tried to save me from others: Jean-Paul Brodeur, Anthony Doob, David Downes, Richard Frase, David Green, René Lévy, Sebastian Roché, and René van Swaeningen.

ing crime rates, major economic and social dislocations, and the congeries of anxieties and attitudes some associate with “late modernity” and postmodernist angst. Everywhere some political parties raised crime control as a campaign issue, and public attitudes toward crime and criminals at times hardened. Despite all those similarities, the determinants and characteristics of penal policies remain curiously local.

In the United States, crime rates rose from the late 1960s through the early 1990s. Then they fell substantially, and almost continuously, to levels not seen for a third of a century. Imprisonment rates began to rise in 1973 and have risen ever since. To many people, it probably appears obvious that those trends are connected. During the first period in which both crime and imprisonment rose, more crimes might be expected mechanically to have produced more arrests, prosecutions, convictions, prison sentences, and prisoners. It probably seems inevitable that policy makers toughened up by enacting mandatory minimum, truth-in-sentencing, and three-strikes laws in order to deter and incapacitate offenders and respond to heightened public anxiety.

After American crime rates began their steady decline in the early 1990s, to many it may have seemed self-evident that larger prison populations and tougher punishments caused crime rates to fall, that imprisonment use should remain high as insurance against a future upturn, and that policy makers, entirely sensibly, have kept in place the policies that drove crime down and filled the prisons. When comparisons are made between the experiences of the United States and those of other countries, however, it becomes obvious that what appears self-evident in recent American experience is not self-evident elsewhere.

Crime rates in the other English-speaking countries and most European countries also rose from the 1960s through the early to mid 1990s and after that fell, or stabilized, or alternated between decline and stability (van Kesteren, Mayhew, and Nieuwbeerta 2001; Tonry 2004*b*; Aebi et al. 2006; van Dijk et al. 2007). If the American conventional wisdom about relations between crime and imprisonment were true, the seemingly inexorable increase in imprisonment that the United States experienced should have occurred everywhere.

It didn't. Only in the Netherlands did imprisonment rates continuously increase after 1973, albeit from such a lower base (18 per 100,000 compared with 150–160) that a sevenfold increase produced a rate around 134 per 100,000 in 2004, well below the American starting point and less than a fifth of the then-American rate of nearly 725 per

100,000 (Downes and van Swaaningen 2007). England and New Zealand have followed the U.S. and Dutch pattern of continuous increase, but only since the mid-1990s (Newburn, in this volume; Pratt 2007).

In other countries, imprisonment rate trends varied widely. In Finland, rates fell by two-thirds between 1965 and the early 1990s and then stabilized; elsewhere in Scandinavia they fluctuated between 60 and 80 per 100,000 (Lappi-Seppälä, in this volume). In Japan, they fell steadily for decades but in more recent years have turned upward (Johnson, in this volume). In Germany, Canada, and Belgium, imprisonment rates were basically flat in the final quarter of the twentieth century (Weigend 2001; Snacken, in this volume; Webster and Doob, in this volume). In France they fluctuated between peaks and troughs caused by frequent use of pardons and amnesties (Lévy, in this volume; Roché, in this volume).

Any assumption or hypothesis, therefore, that there is a simple, common, or invariant relationship between the crime patterns that befall a country and the number of people it confines is wrong. Faced with similar crime trends, different countries react in different ways.

Even so capacious a scholar as David Garland in 1996 described developments in crime control policy in contemporary Britain “and elsewhere,” implicitly assuming that the crime trends, social forces, and political pressures afflicting England and the United States were affecting other developed countries in similar ways. Hans-Jörg Albrecht, the distinguished director of Germany’s Max Planck Institute on International and Comparative Penal Law, noted the “and elsewhere” and sardonically observed of such generalizations that they derived their strength solely from “forgetting about the ‘and elsewhere’” (2001, p. 294).

Garland pulled back in his magisterial *The Culture of Control* (2001) and observed that similar stressors need not produce the same results in different countries.¹ It was not, however, unreasonable in the mid-

¹ Not everyone has learned this: “Toward the end of the twentieth century, a clear pattern seemed to be emerging in crime control policy in modern society. On the one hand, the state had been prepared to respond to concerns about monstrous criminals and demonic others with increasingly severe penalties; on the other there was a strategy of ‘defining deviance down’ . . . [More recently,] the punishment of the monstrous . . . has become significantly more severe as liberal restraints . . . have been pushed aside. At the same time, ‘minor deviations’ are no longer ‘defined down’” (Pratt 2007, pp. 94–95). That is not the picture most of the essays in this volume paint of particular countries other than the United States and the United Kingdom (and, per Pratt, New Zealand). See, e.g., the essays by Green, Lappi-Seppälä, Roché, Snacken, and Webster and Doob in this volume.

1990s for Garland to have assumed that many or most developed countries would follow America's policy lead, as England as early as 1993 appeared to be doing and by 2004 transparently had done (Tonry 2004*a*; Newburn 2006; Morgan and Downes 2007). In the mid-1990s there was next to no comparative literature on crime control or penal policy. There were only two important works in criminology. David Downes's *Contrasts in Tolerance* (1988) compared Dutch and English postwar policies through the mid-1980s, arguing that Holland's more humane policies and practices resulted from differences in the views of national policy elites. Joachim Savelsberg (1994) compared German and American crime policies and politics and stressed the importance of German practitioners' greater insulation from public attitudes and emotions compared with their elected or politically appointed counterparts in the United States. Outside criminology, political scientists studying comparative political cultures occasionally mentioned crime in passing, but their principal interests were elsewhere (e.g., Lijphart 1984, 1999), and few criminologists were familiar with their work.²

Since the mid-1990s, however, a literature has begun to emerge. Garland gets part of the credit for this; his 2001 book attracted enormous attention and provoked many to try to refute, qualify, and amplify his analyses. Credit also goes to an increasingly international scholarly world in which more people are motivated to look across national boundaries in order to see more clearly what is happening within their own. The results include lengthening lists of comparative books (e.g., Whitman 2003; Tonry 2004*b*; Cavadino and Dignan 2005; Pratt 2007; Green, forthcoming), comparative collections (e.g., Clarkson and Morgan 1995; Tonry and Frase 2001; Tonry and Doob 2004; Pratt et al. 2005; Armstrong and McAra 2006; Newburn and Rock 2006) and numerous articles (many published in *Punishment and Society*). There are also a few books tracing policy developments in one or two countries (Windlesham 1987–96 [England and Wales]; Windlesham 1998 [United States]; Dunbar and Langdon 1998 [England and Wales]; Garland 2001 [England and Wales, the United States]; Faulkner 2002 [England and Wales]; Ryan 2003 [England and Wales]; Tonry 2004*b* [United States]; Tonry 2004*a* [England and Wales]; Boutellier 2005 [Netherlands]; Buruma 2005 [Netherlands]; Gottschalk 2006 [United States]; Jones and Newburn 2006 [England and Wales]; Roché 2006

² Green (in this volume, forthcoming) is a notable exception.

[France]; Simon 2007 [United States]). Others no doubt are on the way.

This essay takes stock of the literature as it now stands. The aims are to search for generalizations—there are some—that help explain national differences in penal policies and practices and to suggest ways to build on what we now (tentatively) know. Section I does some ground clearing, focusing on the dependent variable, the thing to be explained. Imprisonment rates per 100,000 population provide the usual metric. Whether such rates by themselves, however, are the only, the best, or even plausible measures of penal policy differences is doubtful.

Use of any single measure of punitiveness is incomplete and often misleading. A mix of policies, practices, procedures, and outcomes needs to be considered before generalizations about particular countries can sensibly be offered. Among important indicators are the promotion, enactment, and effectuation of harsher policies, whether harsher policies are broadly or narrowly focused, whether and in what ways practices change in response to new policies, and whether harsher policies and practices characterize both the juvenile and adult systems or only one of them. When multiple criteria are used, it becomes apparent that the United States and England are in a class by themselves in moving toward harsher penal systems across the board. Although many countries have recently adopted policies that are on their faces harsher than those they supplant, most have made comparatively fewer and much more tightly focused changes. In many countries, practices have not become conspicuously more severe.

Section II sets out a framework for thinking about the determinants of penal policies, stealing from developmental psychology the concepts of risk and protective factors. Few people disagree that some behaviors, such as childhood pregnancy, drug dependence, and serious antisocial behavior, are undesirable. Knowing what factors make their occurrence more likely and what factors protect against them may make it possible more often to prevent them. That something is a risk factor does not mean that the unwanted outcome is inevitable, but that the likelihood is greater than were the factor not present. The comparative literature on penal policy identifies characteristics of countries that make them more or less likely to adopt punitive policies or to adopt more or less punitive policies. It also identifies nonfactors, things that by themselves do not explain anything about penal policy.

The assumption underlying use of the risk and protective factors framework is that increases in punitiveness are generally undesirable. That may not always be true or widely agreed on. Reasonable people can, of course, disagree about the desirability of particular forms of punishment and whether punishments should be made severer in particular times and places for particular crimes and categories of offenders. Many American criminal justice professionals and scholars, however, believe that modern American imprisonment rates are highly undesirable, and that many punishment policies including capital punishment, life sentences without possibility of parole, three-strikes laws, and lengthy mandatory minimum sentence laws are unjust and unwise (e.g., Gottschalk 2006; Simon 2007). Many English criminal justice professionals and scholars feel the same way about English imprisonment rates and punishment policies (e.g., Morgan and Downes 2007). Situations elsewhere vary from country to country, as the essays in this volume demonstrate. Almost everywhere, however, many professionals and scholars believe that the use of imprisonment should be avoided to the extent possible and that punishments should be moderate, restrained, proportionate, and respectful of offenders' human rights.

The main section, Section III, distills a series of generalizations about national characteristics that increase risks of adopting (unnecessarily) punitive policies or protect against them and about characteristics that lack explanatory power. Prominent risk factors include "conflict" political systems, elected judges and prosecutors, sensationalist journalism, Anglo-Saxon political cultures, and a populist view that criminal justice policy should be strongly influenced by public sentiment and partisan politics. Other comparative risk factors are relatively greater income inequality, relatively weaker social welfare systems, lower levels of trust in fellow citizens and government, and relatively lower levels of perceived legitimacy of legal institutions.

Prominent protective factors include consensus political systems, nonpartisan judges and prosecutors, Francophonic political cultures, and a predominant view that criminal justice policy falls appropriately within the province of expert knowledge and professional experience. Among the characteristics that lack explanatory power are crime rates and trends, population heterogeneity, globalization, and existentialist angst.

Section IV suggests ways we might test what we think we know and ways we might learn more. What is needed now is a combination of

genuinely comparative studies, in place of the single-country descriptions and analyses that constitute nearly all the existing literature, and studies that examine and try to explain a much wider range of penal characteristics than simply imprisonment rates.

I. Measuring Punitiveness

A modest but growing literature examines the determinants of penal policy or attempts to explain why punishment policies, practices, and outcomes have become harsher in recent decades or years in some countries, particularly the United States and England. The preceding sentence uses two phrases—"penal policy" and "punishment policies, practices, and outcomes"—to describe the phenomena to be explained. The second, which unpacks the first, is better, but in the interest of conciseness I mostly refer to penal policy.

Much current writing attempts to explain national differences in penal policy, generally taken to be represented by differences in imprisonment rates, or in "penalty," "punitiveness," "punitivism," or "punitivity." These are all ugly words.³ Usually the thing being described is left vague; what is usually meant is an unspecified mix of attitudes, enactments, motivations, policies, practices, and ways of thinking that taken together express greater intolerance of deviance and deviants, and greater support for harsher policies and severer punishments. The imprisonment rate, the number of people held in prison on an average day or an annual census count day per 100,000 population, is often used as a primary measure of punitiveness.

There are plausible reasons to use the imprisonment rate, though it is but one possible measure. Its advantages are that it is readily available,⁴ is calculated more or less consistently over time and space, and is a measure of diverse practices and policies that collectively result in a state imposing greater or lesser aggregate suffering on its residents in the names of deserved punishment and crime prevention.

³ Calling to mind C. S. Lewis's quip in "The Humanitarian Theory of Punishment" about "the 'expert penologist' (let barbarous things have barbarous names)" (reprinted in Lewis [1970]).

⁴ The Home Office for some years annually published rates for many countries; the series has been taken over by the International Centre for Prison Studies (ICPS) (e.g., Walmsley 2007). The ICPS publishes latest rates on its Web site (<http://www.prisonstudies.org>). The Council of Europe produces annual reports on prison use for countries belonging to the council. Forty-four of forty-six member states participated in the 2005 survey (Aebi and Stadnic 2007).

Despite this, care needs to be taken in comparing imprisonment rates. What look to be comparable rates often are not. Many countries, for example, include only imprisoned adults in their calculations. In Finland and Sweden, however, which have no separate juvenile justice systems, prison population totals include fifteen- to seventeen-year-olds. That does not distort their rates much because few young people are sent to prison. In the United States, where some states lowered the maximum age of juvenile court jurisdiction to fifteen, sixteen, or seventeen, and many juveniles in other states are transferred to adult courts to be tried, the adult prisons contain many thousands of juveniles. The Netherlands for some reason includes juveniles confined under both civil and criminal laws in the prison population it reports to the Council of Europe. As a result the "official" imprisonment rate in 2004 was 134 per 100,000; when juveniles and a few other nontypical categories are excluded, the 2004 rate was fewer than 100 per 100,000, which makes the increase in imprisonment in that country considerably less than is commonly recognized (Tonry and Bijleveld 2007). Whether immigrants confined for illegal entry (in most European countries not a criminal offense) are included can distort comparisons in similar ways.⁵

There are also things to be said against using the imprisonment rate. It combines figures for pretrial detainees⁶ and convicted, sentenced offenders. It obscures relations among convictions, prison admissions, and sentence lengths. An increasing imprisonment rate can reflect increasing numbers of people convicted, rising chances that convicted offenders are sentenced to imprisonment, lengthening prison terms, changes in release policies, or combinations of some or all of these. The overall imprisonment rate also obscures changes in sentencing patterns for different offenses: rape sentences might be becoming more severe and shoplifting less so, for example, a bifurcation some people

⁵ And at least at the margins, national imprisonment rates vary in their inclusion of particular categories of confined people: illegal aliens and others confined for noncriminal violations of immigration laws, mentally ill offenders, young offenders convicted in adult courts, and young offenders beneath the age of majority. Comparisons involving the United States are bedeviled by America's multiple levels of government. American and non-American scholars alike often compare the oranges of aggregate European imprisonment rates with the apples of American imprisonment rates for sentenced prisoners serving terms of one year or more in state and federal prisons, thereby disregarding the additional 30–35 percent of prisoners in pretrial detention or serving sentences shorter than one year.

⁶ Typically called "remand prisoners" outside the United States.

would celebrate. Data in most national statistical systems can be disaggregated in these ways, as many of the essays in this volume demonstrate.

A different critique of using the imprisonment rate as the primary measure of punitiveness is that gross imprisonment may be a misleading or even perverse measure. This critique takes two forms. The older one is that, especially in a time of rising crime rates, imprisonment rates per se may be importantly misleading (Pease 1991; Young and Brown 1993; Kommer 1994, 2004). A slightly rising imprisonment rate during a period of rapidly rising crime rates might indicate not harsher but softer average punishments. Other, better, measures might include the probability of imprisonment and average days of imprisonment served, in the aggregate or disaggregated by types of offense, relative to victimizations, recorded crimes, arrests, prosecutions, convictions, or (for sentence length) prison sentences.⁷ Were some of these indicators used, especially relative to victimizations and recorded crimes, especially in 1975–95, time series would show that many criminal justice systems became less punitive, not more (e.g., Young and Brown 1993).

International punitiveness rankings vary substantially depending on the indicator used. If annual prison admission rates per capita are the basis of comparison, for example, rather than imprisonment rates, rankings change radically. Max Kommer (1994) and Warren Young and Mark Brown (1993) some time ago showed that some European countries, which impose many short prison sentences, rather than fewer but longer ones as in the United States, top the international punitiveness league tables when annual admissions per capita are the measure, even though they are near the bottom when imprisonment rates per capita are the measure.⁸ Table 1 shows rankings by imprisonment (1990) and admission (1987) rates per 100,000 population calculated for seven Western countries by Young and Brown (1993). The Netherlands and Sweden had the lowest and second-lowest imprisonment rates in 1990 but in 1987 had the second- and third-highest rates per 100,000 of prison admissions for sentenced offenders. By a wide margin Sweden had the highest total prison admission rates of all seven countries

⁷ The essays in Tonry and Farrington (2005) report changes in many of these measures over twenty years for eight countries.

⁸ Among Western and developed countries, Scandinavian imprisonment rates, typically 60–80 per 100,000 in recent years, are high compared with the rates of 30–40 per 100,000 that characterize many Asian countries (Walmsley 2007).

TABLE 1
Imprisonment Rates, Sentenced, Remand, and Total Admission Rates per 100,000 in Seven Countries

Country Rankings	Imprisonment (1990)	Sentenced Admissions (1987)	Remand Admissions (1987)	Total Admissions (1987)
1	New Zealand (106)	New Zealand (190)	Sweden (405)	Sweden (583)
2	England and Wales (93)	Sweden (178)	Scotland (335)	Scotland (434)
3	Scotland (95)	Netherlands (137)	New Zealand (203)	New Zealand (393)
		England and Wales (137)		
4	France (82)		England and Wales (169)	England and Wales (306)
5	West Germany (78)	Scotland (99)	France (104)	France (168)
6	Sweden (58)	West Germany (84)	West Germany (78)	West Germany (162)
7	Netherlands (44)	France (64)	Netherlands (NA)	Netherlands (NA)

SOURCE.—Young and Brown (1993), tables 1, 3.

(Dutch remand admission rates were not available). Kommer's analysis (1994, table 1) also included Denmark, which then had an imprisonment rate lower than Sweden's, the second-lowest among eleven countries, but the third-highest total rate for prison admissions (after Sweden and Northern Ireland).

A newer critique is that imprisonment rates narrowly, or punishment policies and practices more broadly, are by themselves incomplete and often misleading. Sonja Snacken (2005) pointed out that, whatever their divergent recent imprisonment patterns, all European countries having the death penalty abolished it in recent decades and strengthened human rights protections of suspects and convicted offenders, suggesting that analyses of punitiveness that consider only imprisonment miss much that is important.

Sebastian Roché (in this volume) offers a similar critique of the imprisonment rate, demonstrating that French imprisonment rates have increased somewhat in the past twenty-five years and would have increased substantially more save for frequent large-scale amnesties and pardons. During the same period, however, France abolished the death penalty, established a wide array of diversion programs and alternative sentences, insulated juvenile offenders from increases in punishment severity, enacted no mandatory penalty laws, and held to a cross-party consensus view that imprisonment is an undesirable thing to be avoided to the extent possible.

In the Netherlands, the only country that increased its imprisonment rates as much as or more than the United States in recent decades, sentencing policies *per se* were not made harsher. Policies for dealing with young offenders, however, were toughened in the 1990s and waivers to the adult court were made easier. In practice, fewer young offenders were transferred to adult courts, and fewer young offenders were sent to prison (Junger-Tas 2004). Canada, likewise, made transfers of juveniles to adult courts easier during the 1990s only to see the incidence of transfers decline (Doob and Sprott 2004). Go figure.

Use of multiple measures gives a better basis for comparing national differences in punitiveness, or changes in punitiveness over time in a single country, than any single indicator does. The resulting comparisons, however, are more complex and conclusions harder to draw. In both France and the United States during the period 1990–99, prison admissions stabilized or fell, but average sentence lengths increased overall and when controlling for offense (Blumstein and Beck 1999;

Roché, in this volume). Reasonable people might disagree as to which approach is more punitive: sending more people to prison for shorter periods or fewer for longer.

So far I have described differences in policies (e.g., capital punishment, mandatory minimums, juvenile waivers, alternatives to imprisonment), practices (e.g., use of waivers, changes in prison admissions), and outcomes (e.g., prison population and admission rates, sentence lengths). Procedures also matter. In much of western Europe, under the influence of the European Convention and Court of Human Rights (Kurki 2001; Snacken 2005) and the Torture Convention (Morgan 2001), countries have been strengthening procedural protections afforded criminal defendants. In England, the Labour government has recently systematically weakened defendants' procedural protections, including abolishing the double jeopardy rule, weakening prophylactic evidentiary rules, and narrowing jury trial rights (Tonry 2004a, chap. 1). Likewise in the United States, the U.S. Congress and Supreme Court over the past thirty years have systematically reduced procedural protections (e.g., weakening controls over police searches and seizures, limiting or eliminating habeas corpus protections, weakening jury trial rights, greatly narrowing prisoners' ability to challenge prison conditions).

Finally, comparisons of changes in penal policy need to differentiate among their enactment, their implementation, and their practical use. Sometimes policies are enacted to send messages, to make expressive or symbolic statements with no clear expectation that they will be implemented. Conservative Republican Senator Alfonse D'Amato (NY), for example, in 1991 proposed changes to federal mandatory minimum sentence laws that professional prosecutors said were unenforceable. According to *New York Times* reporter Gwen Ifill, "Mr. D'Amato conceded that his two successful amendments, which Justice Department officials said would have little practical effect on prosecution of crimes, might not solve the problem. 'But,' he said, 'it does bring about a sense that we are serious'" (Ifill 1991, p. A6). David Garland (2001) has brought increased attention to expressive policy making. Sometimes, nothing more than expression is meant. This may be why waivers to adult courts of young offenders in Canada declined after the Canadian Parliament enacted laws making waiver easier (Doob and Sprott 2004). This may also explain the English practice in which new criminal laws

often do not take effect automatically; they take effect only if and when the Home Secretary of the day elects to put them into force.⁹

Even when new laws are implemented, sometimes they are not applied, or they are applied only occasionally. The history of mandatory sentencing laws in England and America is full of examples from the eighteenth century to the present of laws that practitioners declined to apply (e.g., Tonry 1996, chap. 5). Sometimes prosecutors exercise discretion not to file charges under new laws or to insist on the penalties they prescribe. Other times, lawyers, judges, and juries adapt their ways of doing business to avoid applying laws they believe to be unjust. Sometimes enactment and implementation of new laws, even laws policy makers want applied, make no practical difference in how the justice system operates.

There are thus numerous ways in which a legal system can be said to be more or less punitive compared with other systems or with itself at other times.¹⁰ Informative comparative analyses would take account of them all. Table 2 lists a range of measures of increased (or decreased) punitiveness that a rich account of the evolution of penal policy in an individual country would at minimum incorporate.

II. Risk and Protective Factors

The development of problem behaviors and delinquency over the life course is often described as a function of interactions between risk and protective factors. Truancy and school failure, adolescent pregnancy and paternity, drug and alcohol abuse, and delinquency are things that nearly everyone considers unfortunate. Some characteristics of children (e.g., impulsivity, aggressiveness, low IQ) and their environments (e.g., criminal or abusive parents, inconsistent discipline, delinquent peers) make unfortunate outcomes more likely. These are called risk factors.

Other characteristics (e.g., good parenting, above-average household

⁹ Many people expected that the then-new Labour government would not put into force three mandatory minimum sentence laws enacted in the final days of John Major's last government. They were put into force (Morgan and Downes 2007).

¹⁰ There are other ways as well. Deeper functionalist analyses might look not at the imprisonment rate (however defined) but at the fraction of the overall population in some kind of confinement, including mental health and juvenile institutions of all kinds (e.g., van Ruller and Beijers 1995; Harcourt 2006). Nils Christie (1968) and Alfred Blumstein and Jacqueline Cohen (1973) developed arguments for Scandinavia and the United States that societies have natural levels of confinement that are stable over time, at least over the three-quarters of a century that preceded their articles' publication.

TABLE 2
Measures of Punitiveness

Policies:
1. Capital punishment (authorization)
2. Mandatory minimum sentence laws (enactment)
3. Laws increasing sentence lengths (enactment)
4. Pretrial/preventive detention (authorization)
5. Prison alternatives (creation)
6. Juvenile waiver to adult courts (authorization)
7. Weakened procedural protections (enactment)
Practices:
1. Patterns of use of policies 1–7
2. Adult prison population and admission rates over time
a. Disaggregated for pretrial and sentenced prisoners
b. Disaggregated by offense for sentence lengths and admission rates
3. Juvenile institutional population and admission rates over time
a. Disaggregated for pretrial and sentenced juvenile offenders
b. Disaggregated by offense for sentence lengths and admission rates
Procedures: Patterns of use of procedural protections

income, good schools, church participation) make undesirable outcomes less likely despite the presence of risk factors (Deković 1999). These are called protective factors. Protective factors have a positive effect under conditions of risk.¹¹

By analogy the risk and protective factors framework can be used to understand changes in punitiveness. David Green (in this volume) shows that sensationalistic tabloid newspapers have shaped public attitudes and knowledge in England and Wales in ways that conduce to adoption of more punitive policies and practices; sensationalistic media thus may be a risk factor. Green also argues that countries with “consensus” political cultures are less likely to adopt more punitive penal

¹¹ There are other factors that increase the chance of a positive outcome under all conditions. Sameroff (1998) proposed that these be called “promotive” factors. A promotive effect does not result from interaction, but lies in the positive end of a risk dimension (Stouthamer-Loeber et al. 2002). Because the comparative penal policy literature consists mostly of case studies, the distinction between protective and promotive factors is too elusive to be usable, even by analogy. Having noted the distinction, I set it aside and use the term “protective factor” to describe factors that might be one or the other.

policies than countries with “majoritarian” or “conflict” political cultures. Consensus political culture would thus be a protective factor. James Whitman (2003) and I (Tonry 1999, 2004*b*) have argued that constitutional structural arrangements that insulate practitioners from electoral politics and public emotion produce less punitive punishment systems and practices and would therefore count as a protective factor.

The risk and protective factors framework is probabilistic and dynamic. That a risk factor is present does not make an unwanted outcome inevitable; it means that the chances of an unwanted outcome are greater than they would otherwise be. The presence of a protective factor does not mean that an unwanted outcome will be avoided, only that its likelihood will be reduced. Risk and protective factors are identified so that they can be addressed, in order to change the likelihood of unwanted outcomes.

When one applies the framework to analyses of penal policy, it is important to note its probabilism and dynamism. That majoritarian political systems are risk factors does not mean that countries characterized by them will inexorably and inevitably be highly punitive. Canada, for example, has a majoritarian political system but has long had stable and relatively nonpunitive policies. Finland, by contrast, has a consensus political system but, despite its modern standing as an icon of humane and moderate policies, for half a century its policies were vastly more severe than those of other Scandinavian countries. Policies and practices change over time in reaction to many influences. Risk and protective factors affect how much they change and in what directions.

Every country experiences long-term developments (e.g., rising crime rates, changing public attitudes and opinions) and moral panics associated with sensational incidents (e.g., the James Bulger killing in England, the Dutroux kidnappings and murders of young girls in Belgium, the Polly Klaas kidnapping and murder in the United States). However, they respond in different ways over time and in particular times. Many people identify the Bulger case, and reactions to it, as heralding a sea change in English penal politics and policies (Newburn, in this volume). The Polly Klaas case led directly to enactment of California’s three-strikes law and indirectly to enactment of these laws in half the American states (Zimring, Hawkins, and Kamin 2001). The Dutroux case, although it brought hundreds of thousands of Belgians onto the streets, did not lead to fundamental changes in Belgian pol-

icies or practices (Snacken, in this volume). These different results illustrate differing degrees of national susceptibility to overreaction. Different mixes of risk and protective actors are a major part of the explanation.

III. Determinants of Penal Policy

The more closely we look at something, the more complex we usually realize it is. Evolving understanding of penal policy changes in Western countries is like that. At first, the reasons why American imprisonment rates rose rapidly and why policy makers adopted increasingly severe policies seemed straightforward: crime rates rose, the public demanded action, and policy makers and practitioners responded (e.g., Wilson 1983; Bennett, DiIulio, and Walters 1996). When it became apparent that those explanations were too simple, subtler and more complex analyses invoked deeper economic and social changes affecting modern societies (e.g., Garland 2001). Those explanations also came to seem too simple because they implied that ubiquitous structural changes (economic disruption, globalization, large-scale migration, increased population diversity, rising crime rates, increasing awareness of risks) should have produced comparable policy responses in all developed countries, and patently they had not (e.g., Tonry 2004*b*, chap. 2). The latest inquiries look cross-nationally at characteristics of particular countries that seem to have shaped the different ways they responded to long-term rises in crime rates and widely experienced structural changes in modern society. The risk and protective factors paradigm provides a framework for doing that. Candidate determinants of penal policy fall into three categories: nonfactors, risk factors, and protective factors.

A. Nonfactors

Most of the things commonly invoked to explain increased punitiveness—rising crime rates, harsher public attitudes, cynical politicians, ethnic tensions, rapid social and economic change, postmodernist angst, “penal populism” (Pratt 2007)—cannot sensibly be characterized as risk factors. Because every Western country experienced those developments, they cannot provide a basis for explaining widely divergent policy trends in different countries. Imprisonment rates climbed steeply over the past thirty years in the Netherlands and

the United States, held steady in Canada and Norway, fell sharply in Finland and Japan through the 1990s, and zigzagged in France. Risk factors in developmental psychology are characteristics of individuals or their environments that place them at higher risk of unwanted outcomes than individuals who do not share those characteristics. A risk factor that characterized every individual under study, for example, gender in a sample of men, could provide no guidance. That is why I describe developments that characterize all countries as nonfactors.

Though it might seem *a priori* that rising crime rates (and other things mentioned in the preceding paragraph) increase the likelihood that a country will adopt more punitive policies than theretofore, this is true only in a trivial sense. Whether countries adopt more punitive policies turns on country-specific characteristics. Some of these characteristics make increased punitiveness more likely. Others make it less likely. Still others make any simple generalization suspect.

The nonfactors include social and economic changes experienced by most developed countries since 1970 that are said to be associated with increases in "populist punitiveness" (Bottoms 1995), politicization of crime policy, adoption of more punitive policies, and increasingly punitive practices. They include steeply rising crime and victimization rates through the 1990s; social and economic changes associated with globalization and "late modernity"; increased population diversity and intergroup conflict; the effects of the women's, gay, and civil rights movements; and increasingly global and sensationalistic media.

The nonfactors can be thought of in two ways. The first, precisely because they affect all developed countries, and countries' penal policies and policy trends varied enormously, is that their invocation can explain nothing. They are background conditions, no more. The second is that they are necessary but not sufficient conditions, risk factors of a sort but that lack independent explanatory or causal power. Whether they influence policies depends on their interaction with other risk and protective factors. In either case, though they may be part of the story, they are not the important part.

B. Risk Factors

Knowledge about risk factors comes from two sources. The first is the growing number of case studies of the development of crime control and punishment policies in individual countries. The most prominent national risk factors include conflict political systems, elected

judges and prosecutors, particular forms of sensationalist journalism, Anglo-Saxon political cultures, and a predominant view that criminal justice policy falls appropriately within the province of public opinion and partisan politics. The second is a small number of statistical analyses that test hypotheses about correlations between punitiveness and national characteristics and policies not directly associated with crime and punishment. Comparative risk factors they identify are income inequality, weak social welfare systems, and low levels of perceived legitimacy of governmental institutions. Lesser punitiveness is associated with lower levels of income inequality, generous social welfare systems, and high levels of trust in fellow citizens and in government.

1. *Case Studies.* Case studies in Europe have been accumulating for a decade and are available for many countries, including Belgium, Denmark, England and Wales, Finland, France, Germany, the Netherlands, Norway, and Sweden. Case studies are also available for Australia, Canada, New Zealand, and the United States. The five national features they highlight are general political culture, constitutional structure, mass media characteristics, Anglo-Saxon culture, and simplistic conceptions of democracy.

a. General Political Culture. Political scientists interested in comparative studies of political systems have long distinguished between conflict and consensus political systems (e.g., Lijphart 1984, 1999). Conflict systems are typically characterized by two major political parties, first-past-the-post electoral systems, single-member electoral districts, and policy discontinuities. Parties define their positions by contrast with those of their opponents, devote continuous efforts when out of power to opposing the ruling party's policies, and campaign on the basis of those oppositional differences. Not surprisingly, when one party displaces another in power, it often rejects existing policies and attempts to enact or implement those on which it ran for office.

Five primarily English-speaking countries¹² have conflict political

¹² The "five primarily English-speaking countries" is an awkward phrase. It is meant to include the subset of more populated wealthy, developed countries that were formerly English colonies, in which English is the primary language, and which have common-law adversary legal systems. Each has sizable minorities who speak other languages (e.g., French speakers in Canada, Hispanics in the United States). Sometimes, as in countries with large Francophonic minorities, their presence may constitute a protective factor. There are certainly other countries besides the five that arguably meet all the criteria except "wealthy," such as India or some in the Caribbean and Africa.

systems. Coalition governments are rare, including in Great Britain¹³ and Canada, which have three major parties. In England, where the Liberal Democrats sometimes receive a fifth to a quarter of votes cast in national elections, the absence of proportional representation means that their percentages of the raw vote translate into much lower percentages of parliamentary seats and their influence is slight compared with that of the two major parties.

Consensus systems are typically characterized by numerous political parties, proportional representation, coalition governments, and policy continuity. The first three of these characteristics go together, and policy continuity is often a result. Where there are many political parties and proportional representation, coalition governments are almost inevitable. Coalition governments necessarily include parties and individual officials who subscribe to different views on major issues. Major initiatives to succeed must gain support from the parties in the ruling coalition. Because new elections may bring new parties into the ruling coalition, policy processes generally include participation by parties not in the coalition.

A new election may produce a new coalition including some parties from the previous government together with parties that were previously outside the government. These features make radical policy changes less likely than in conflict systems because some members of the new government will have participated in shaping existing policies and thus are likely to continue to support them. In addition, parties in power after one election realize that they may be out of power after the next one and have a continuing interest in policy processes that are primarily substantive rather than primarily adversary lest policies they support be quickly overturned.

Most western European countries have consensus political systems. The Dutch for most of the twentieth century subscribed to the "polder system" under which all major parties, and therefore the religious and cultural groups they represented, participated in policy processes

¹³ Usually I refer in this essay to England and Wales or England. The reason is that England and Wales make up a legal system distinct from those of Scotland and Northern Ireland, and it is the legal system of England and Wales that has experienced rapidly rising imprisonment rates and extreme politicization of criminal justice policy. One of the anomalies of the British constitutional scheme, however, is that the Parliament legislating for England and Wales includes members from Northern Ireland and Scotland. Labour in recent years has won a huge majority of Scottish seats in the British Parliament, without which its control of Parliament would have been much less secure.

(Downes, in this volume).¹⁴ In Belgium, the mainstream parties in recent decades have sought consensus approaches to criminal justice issues, sharing a general ambition to avoid politicization of policy making, subscribing to widely shared views about humane policies, and combining forces to obstruct the influence of the Vlaams Blok, a radical right-wing party (Snacken, in this volume). In Sweden, Norway, Finland, and Denmark, policy processes are corporatist, involve wide consultation inside and outside government, and generally unfold over periods of years (Lappi-Seppälä, in this volume).

Arend Lijphart, a leading scholar of comparative politics, over nearly four decades has explored the nature and consequences of the consensus/conflict model. In a recent major book (Lijphart 1999), he develops two quantitative multifactor scales—a “parties-executives dimension” and a “federal-unitary dimension”—to characterize governments. The parties-executives dimension can be thought of as representing dispersion and concentration of political power. Thus one factor is “concentration of executive power in single-party majority cabinets versus executive power-sharing in broad multiparty coalitions” (p. 3). Others are strong versus weak executives and two-party versus multiparty systems.

Lijphart’s “federal-unitary dimension” is a measure of constitutional structures that disperse or concentrate authority. Factors include unitary and centralized versus federal and decentralized governments, unicameral versus bicameral legislatures, rigid versus flexible constitutions, and the presence or absence of independent central banks and judicial review of the constitutionality of laws.

The polar cases of majoritarian countries have highly concentrated systems of political power and governmental authority (e.g., England and New Zealand). The polar consensus countries have dispersed centers of political power and concentrated governmental authority (e.g., Sweden and Finland).

Lijphart tests whether governmental structures and political traditions conducive to consensus policy processes are likelier to achieve humane and democratic policy outcomes than conflict-model governments. Using a variety of quantitative outcome measures, Lijp-

¹⁴ A polder is an area of ground reclaimed from a sea or lake by means of dikes. Because much of the Netherlands consists of lands reclaimed from the sea and protected by dikes, a threat to the polders is a threat to everyone that requires that political and other differences be set aside to face the emergency. The polder system in politics, based on that metaphor, signified a view that group differences should be set aside in addressing serious common problems of governance.

hart concludes that consensus governments achieve greater gender equity, greener environmental policies, and more humane criminal justice policies (measured relative to imprisonment rates and the death penalty) than conflict-model governments do.

Figure 1, showing imprisonment rates for selected countries, is consistent with this. Numbers shown in triangles next to country abbreviations are imprisonment rates per 100,000 population in 1996–98; the parentheses show imprisonment rates in 2004–5. Locations of countries are taken from Lijphart's analysis (1999, fig. 14.1). Countries high on the "federal-unitary" vertical axis have relatively concentrated systems of governmental authority, with unitary political systems at the top and federal ones at the bottom. Countries falling toward the left end of the horizontal "parties-executive" axis tend to be characterized by dispersed political power and those on the right by its concentration.

Several patterns stand out. First, when one looks left to right, countries characterized by dispersal of political power, with only a few exceptions, have markedly lower imprisonment rates than those characterized by concentration of political power. Second, dispersal of political power is a better predictor than dispersal of governmental authority. Nearly all the high-imprisonment countries fall on the right side of the figure and nearly all the low-imprisonment countries on the left. Third, high-imprisonment countries are almost equally characterized by unitary and federal governmental structures.

Lijphart's model may appear static, but it is not. Political systems, constitutional structures, and political cultures change over time. Predictions about how particular countries will react to changed conditions also will change over time, depending on what the conditions are and on the presence and absence of other risk and protective factors. Finland, for example, an early twenty-first-century example of a country with a consensus political system, has had one of the lowest imprisonment rates in Europe since the early 1990s. For the fifty years ending around 1985, however, it had one of the highest (Christie 1968; Lappi-Seppälä, in this volume). Switzerland, an exemplar of prison rate stability and moderate penal policies in recent decades, had rates around 150 per 100,000 in the 1930s and 1940s (Killias 1991). The United States experienced broadly stable imprisonment rates from 1930 through 1973, with a gradual decline that began in the early 1960s (Blumstein and Cohen 1973). During most of the period

FIG. 1.—Two-dimensional conceptual map of democracy and imprisonment rates from 1996 to 1998 (triangle) and 2004 to 2005 (parentheses)

1930–73, American imprisonment rates were lower than Finland's. In many years in the middle third of the last century, America's were lower than Switzerland's. The Finnish and Swiss political systems, however, have proved much more resilient than the American in responding to recent pressures for harsher policies and practices. For the reasons given earlier in this subsection, there are plausible grounds for believing that Lijphart's model provides useful information to efforts to understand why countries have the penal policies they have.

*b. Constitutional Structure.*¹⁵ Politicization of criminal justice policy is directly related to whether prosecutors and judges are selected politically or meritocratically. It is also related to whether political and constitutional conventions allow elected politicians to participate in decision making about individual cases. Taken together, these two facets of politicization fundamentally differentiate the United States and England from other Western countries, and they result from the obsolescence of their constitutions. Almost nowhere in western Europe,¹⁶ Canada, or Australia are judges or prosecutors politically selected. And almost nowhere do prevailing conventions justify a direct political voice in punishment decisions.

i. Elections and Policy. The American Constitution dates from the late eighteenth century, reflects eighteenth-century ideas, and was written to address problems of that era. These were the colonists' major objections to British rule: governance by a distant Parliament, capricious actions by a distant government's imperious local representatives, and the inability of citizens to seek redress for grievances. The principal, Enlightenment, solutions in the Constitution centered on respect for individual liberty and insulation from the power of an overweening government. Protection of individual liberty was addressed by adoption of the Bill of Rights creating fundamental personal rights (speech, religion, redress for grievances) and entitlements (jury trials, no unreasonable searches and seizures, representation by counsel).

Protection from an overweening government was sought in two

¹⁵ Discussions of the origins and precipitants of the constitutional structure of the United States are based on Mullet (1966) and Wood (1969). Discussions of the origins and precipitants of the English Bill of Rights and the constitutional structure of Great Britain are based on Speck (1988), Williams and Ramsden (1990), and Cruickshanks (2000).

¹⁶ Switzerland, where prosecutors are locally elected, is the primary exception. In Switzerland, however, the principles that political considerations are irrelevant in decisions about individual cases and that cases should be resolved solely on their merits are strongly held and seem to have insulated the system from politicization.

ways. First, complicated systems of checks and balances were created to fragment governmental power, principally by creating a strong horizontal separation of powers among the three branches of the federal government, and by a vertical differentiation of the spheres of interest of the federal and the state governments (which in turn had their own systems of horizontal and vertical separations of powers). Second, provisions in the federal Constitution calling for frequent elections to the House of Representatives (two years)¹⁷ and presidency (four years), and in state constitutions for frequent elections at county levels for state legislators, judges, and prosecutors, were meant to push major elections to local levels, at short intervals, and thereby make officials accountable to local opinion. These structural arrangements also created a widespread democratic ideology about the legitimate voice of public opinion in relation to matters of policy.

The results more than 200 years later include in many states traditions of partisan election of judges and prosecutors who run for office on the basis of emotive appeals to the electorate.¹⁸ If the public is anxious about crime or angry at criminals, or if particular cases become notorious, there is nothing to stop prosecutors from seeking personal political benefit by posturing before public opinion or handling cases in particular ways only because they have become notorious. Because local prosecutors are accountable through elections and are in the executive branch of government, the U.S. Supreme Court has held that their discretionary decisions are effectively immune from judicial review (allegations of corruption are the principal exception) (*Bordenkircher v. Hayes*, 434 U.S. 357 [1982]). Judges also are elected in most states and know that decisions that are highly unpopular with much of the public can lead to their defeat. Most chief prosecutors and many judges aspire to be elected or appointed to higher political or judicial office, which means that they must be concerned about controversies that might diminish their future professional prospects, and they are no doubt sometimes tempted to deal with a particular case in a particular way to curry popular approbation or avoid popular condemnation.

¹⁷ Like the House of Lords, or the much more recent (1867) Canadian Senate, the U.S. Senate until 1913 consisted of senators who were not popularly elected (they were elected by state legislatures).

¹⁸ State laws, practices, and conventions vary widely, however. In a handful of states, chief prosecutors are not popularly elected and are organized at the state rather than county levels. In some states, judicial selection is handled under nonpartisan, merit selection procedures.

And, if criminal justice issues are openly politicized and polemicized in local elections of judges and prosecutors, it is not surprising that candidates for state and federal legislatures and governor and president do likewise.

The constitution of England and Wales dates partly from the Magna Carta (1215), when the central issue was the division of power between the monarchy and the nobility, and from the English Bill of Rights (1689) that punctuated the Glorious Revolution that brought William of Orange to the throne. Then the central issue again was the relative power of the monarchy and the political classes and the solution was Parliamentary Supremacy, the doctrine that the elected Parliament is supreme in all matters of governance. There is nothing in the Bill of Rights about fundamental liberties of citizens enforceable against the state, limits on governmental power, judicial independence, or separation of powers. The conventional theoretical justification given for Parliamentary Supremacy is that it effectuates representative democracy. The citizens elect the government, and to carry out its program, it must have unobstructed power. If the public disapproves, it can vote the government out of office in the next election.

The absence of a Bill of Rights or a system of separation of powers is not surprising. The main issue in contention in the Glorious Revolution was relations between the monarchy and the political classes 143 years before England established broad-based adult male suffrage in 1832. The revolution's aim was to confirm the power of the political classes by limiting the power of the monarch; the notion that the power of the political classes should also be limited was not on the agenda. The doctrine of separation of powers and the idea of an entrenched bill of individual rights were Enlightenment ideas that had not yet taken shape. As a result, there is neither in principle nor in practice a constitutional doctrine of separation of powers. The judiciary cannot review the constitutional adequacy of legislation or executive action.¹⁹ The Lord Chancellor (the incumbent early in 2007, Lord Falconer, a one-time university roommate of Prime Minister Tony Blair) is simultaneously head of the judiciary, a member of the legislature (the House of Lords), and a member of the prime minister's cabinet. The

¹⁹ Under the Human Rights Act 1998, the courts are empowered to decide whether British laws or practices comply with the European Convention of Human Rights, but not to issue remedial orders or strike down a law held to be not in compliance. Only the Parliament has power to revise or rescind noncompliant laws.

executive controls the House of Commons, and the highest court (also called the House of Lords) is part of that legislative chamber.

The problems of politicization and polemicization take a different shape in England than in America. The problem in America is that governmental structure was meant to tie officials closely to community needs and beliefs and democratic ideology celebrated the importance and influence of public opinion, even if it was ill-informed, mercurial, or mean-spirited. Drafters of the Constitution worried about the dangers of "mobocracy," but, with local notable exceptions, the problem did not fully take shape until late in the twentieth century when ubiquitous electronic and broadcast media meant that a horrible incident anywhere, and ensuing emotionalism, could sweep across an entire continent.

The situation in England is different. England and Wales suffers from having a unitary legal system, with the government, the bureaucracy, and the mass media in one place, London. A single horrifying incident anywhere in the country becomes a national cause célèbre, and government often appears to feel obliged to propose changes to national laws to assure that something similar does not happen again.

If the government of the day chooses to act illiberally and to politicize criminal justice policy, there are no competing governmental power centers to stop it. Of course, individual officials can speak out. Sometimes members of the House of Lords try to influence legislation, but the Lords' power is one only of delay. The House of Commons, controlled by the government, can always override the House of Lords. The Labour government, partly for cynical electoral reasons, chose in the early 1990s to politicize criminal justice policy (Windlesham 1987–96; Dunbar and Langdon 1998; Morgan and Downes 2007) and has adhered to that approach ever since. For reasons presumably ultimately known only to themselves, Tony Blair and a series of Home Secretaries (most radically David Blunkett and John Reid) have for a decade promoted unrelievedly repressive criminal justice policies in England (Tonry 2004*a*; Newburn, in this volume).²⁰ The centralization of governmental power in England, and the absence of competing

²⁰ Home Secretary David Blunkett, on learning that serial killer Harold Shipman had committed suicide in prison, commented, "You wake up and you receive a phone call telling you that Shipman has topped himself. And you think, is it too early to open a bottle?" (Charter et al. 2004).

power centers, make it possible for a determined government to do what it wants.

ii. *Elections and Individual Cases.* A second consequence of English and American constitutional structure is that politicians feel entitled to express views about the dispositions of individual cases. Sometimes, incredibly to lawyers in other countries, this extends literally to wanting to influence or make decisions about individual cases. The English Home Secretary, for as long as there has been a system of parole release, has claimed the right to decide personally when individual prisoners are released. During some periods since the 1960s, parole boards reviewed individual prisoners' petitions for release, but their decisions were recommendations to the Home Secretary, who could reject them. Probably most notoriously in recent years, until in each case the European Court ruled otherwise, both the Lord Chief Justice and the Home Secretary claimed the right to second-guess, and to increase, the sentences imposed by the trial judge on the two preteenage murderers in 1993 of two-year-old James Bulger (Green, in this volume).

More generally, legislators and executive branch officials in England and America (and less often those in Canada and Australia) feel entitled to propose and enact laws that prescribe sentences in individual cases, thereby removing the judge's authority to impose a sentence that is appropriate under all the circumstances. Such laws are much more common in America and include three-strikes laws in more than half the states, mandatory minimum sentence laws in all states (though they vary widely in scope), and mandatory sentencing guidelines in North Carolina (and until the U.S. Supreme Court held them unconstitutional, in the federal system). Such laws also exist in England, where two- and three-strikes laws were enacted in the Crime (Sentences) Act 1997 that prescribed mandatory minimum sentences for repeat burglaries, repeat violent crimes, and some drug trafficking offenses, and where murder is subject to a mandatory life sentence. Canadian and Australian legislators have dipped their toes in these waters, not deeply (Freiberg 2001; Webster and Doob, in this volume). Few other countries have.

Writing the preceding paragraph has led me finally to understand an argument that has heretofore escaped me. Andrew Ashworth (e.g., 2001) has several times attributed to English High Court judges the view that mandatory minimum sentence legislation is unconstitutional. Ashworth indicated his disagreement, arguing (inevitably, it seems to

me, in a country characterized by Parliamentary Supremacy) that legislators inherently have power to set maximum sentences, which they have long exercised, and minimum sentences if they so choose. Ashworth noted that enacting a law of general scope was different from telling a judge what to do in an individual case. That seemed right to me, and inexorable. I could not understand what the judges could have meant. Now I think I do, and I suspect that judges in many other countries would agree with their English peers. In a country with an independent judiciary, judges must have the authority, under law, to find the facts of individual cases and to apply the applicable law to those facts and to determine an appropriate remedy. For an executive branch official, or a legislature, to direct a particular factual determination or a particular remedy in a case *sub judice* would fundamentally undermine the institution of an independent judiciary, substituting possibly self-interested political or policy considerations for impartial judicial ones. The step from that to a mandatory minimum sentence law is but a small one. Such a law tells the judge precisely what he or she should decide, irrespective of case-level circumstances, and does not allow impartial consideration within a framework of law of the most appropriate sentence in a particular case. Ashworth, I now think, is surely right as a matter of English constitutional law, but wrong as a matter of post-Enlightenment constitutional values.

No other Western countries have constitutions primarily designed to address political problems of the seventeenth and eighteenth centuries. All include entrenched bills of rights, and all reflect the influence of eighteenth-century ideas about governmental separation of powers. Most reflect a pluralistic twentieth-century world and call for electoral systems of proportional representation. Most are generally governed by multiparty coalitions. Most in Europe, Great Britain (including perforce England) being the notable exception, accept the European Convention of Human Rights as part of their national constitutional law and accept decisions of the European Court of Human Rights as binding and self-executing.²¹ No major English-speaking or

²¹ See n. 19. Although England and Wales is bound by treaty obligation to accept the court's rulings, they can be implemented only if the English government affirmatively acts to do so. An illustration may make the importance of this clear. If an American court ruled that particular conditions in a prison were unconstitutional, it would issue an order so declaring and a remedial order; the prison would be obliged to act on the order, an obligation the court could enforce if need be by exercise of its contempt powers. Were the European Court to declare the same conditions in a British prison a violation of the European Convention, the individual prison would not be obligated to comply if the

western European country but Switzerland has popular elections for prosecutors, and none hold popular elections for judges. The constitutional features of American and English government make both countries particularly susceptible to the wholesale politicization of criminal justice policy.

c. Mass Media Characteristics. Ubiquitous mass media are part of the twenty-first century as, to some degree at least everywhere, are sensationalistic media. David Green (in this volume; forthcoming) shows the different ways that Norwegian and English print media characteristics affected how those countries reacted to notorious killings of small children by slightly older children. In England, where the tabloid media are highly sensationalistic and openly and vigorously promote populist approaches to crime, the James Bulger story received front-page coverage for many days, on anniversaries of his death, and whenever developments occurred in the cases of his killers, including their releases from prison at age eighteen. In Norway, after Silje Redergård's killing, the media covered the story only for a few days, in a manner that was not sensationalistic, and did not return to the story later on.

Among characteristics that might explain the difference is that most Norwegian newspapers are sold by subscription rather than, as in England, from newsstands. As a consequence, there is less of a premium on eye- and attention-catching headlines and front-page pictures. Another distinguishing characteristic is that the leading Norwegian tabloid is much less sensational than those in England. The English tabloids (the *Sun*, the *Daily Mail*, the *Mirror*, the *News of the World*), which, though published in London, have national circulations like those of all other major English newspapers, have much the largest circulations in the country. They dwarf those of the "quality" broadsheets (*The Times*, the *Guardian*, the *Independent*, and the *Telegraph*). Since the early 1990s, Labour Party leaders have made it clear that they pay greatest attention to the tabloid papers and often regard them as valid indicators of popular attitudes and beliefs (Green, in this volume²²).

contested conditions were in compliance with British law. As a practical matter, British governments do comply with European Court decisions, but carefully protecting the posture that compliance was a matter of choice.

²² Green relates two anecdotes, based on published sources, of occasions when Tony Blair indicated that government in making policy should treat as true things a media-influenced public believed to be true, even when government information established that it was not (e.g., that crime is increasing when both official police data and victim survey data show it to be decreasing).

Media characteristics vary widely between countries. The remarkable and pernicious influence of the English tabloids on crime policy results from an interaction between the tabloid media's sensationalizing style and the Labour government's decision to pay particular attention to the tabloids and to attempt to win their support (Morgan and Downes 2007). It is not a coincidence that Blair's primary media advisor for nearly a decade was Alistair Campbell, a former political editor of the *Daily Mirror*. Because, as discussed below, governments in most Western countries rely more heavily on expert and professional opinion in formulating policy than the English government does (Tonry 2004a), most would likely not be as influenced by sensationalistic media (were their media as sensationalistic as England's, which at least for the countries discussed in this volume does not seem to be the case).

d. Anglo-Saxon Culture. Although it is not at all clear what it is about Anglo-Saxon culture that makes predominantly English-speaking countries especially punitive, they are. Not only does the United States lead the international imprisonment rate league tables for western European and English-speaking countries by a factor of five (more than 750 per 100,000 in 2007 compared with runners-up), but the runners-up in 2005 were New Zealand (186 per 100,000) and England (148 per 100,000) (Walmsley 2007). Canada and Australia, typically around 100–110 per 100,000, are lower but well above the levels of 60–80 per 100,000 that have characterized the Scandinavian countries since 1990 and the 80–90 that has long characterized Germany, Switzerland, France, and Belgium. The punitiveness of the Anglo-Saxon countries is confirmed by International Crime Victims Survey findings that have consistently shown since the initial wave of data collection in 1989 that respondents in the United States, England, Scotland, and Northern Ireland are substantially more severe in their punishment preferences than other Europeans or Canadians (van Dijk et al. 2007).

Possibly what appears to be the influence of Anglo-Saxon culture is something about constitutional structures or residual influence of historical British penal culture on its former colonies. Or it could be related to economies that are more capitalistic and political cultures that are less social democratic than those of most European countries. Or, it could have something to do with the Protestant religions with strong Calvinist overtones that were long influential. In this they share a common characteristic with the Netherlands, which is rapidly achieving the highest imprisonment rate among Western countries after the

English-speakers. Whatever it is, it is most conspicuously present when comparisons are made with Francophonic cultures.

e. Populist Conceptions of Democracy. In England, Labour government spokesmen and policy statements in recent years repeatedly promised to “rebalance the criminal justice system in favour of the victim” and reestablish “public confidence” (e.g., Home Office 2002, p. 14). Implicit in these catchphrases are implications that public opinion should importantly shape both what general policies are adopted and what punishments offenders receive. These are very different assertions, which I consider below.

Anthony Bottoms (1995) is commonly credited with coining the phrase “populist punitiveness,” by which he seemed to mean to characterize a set of public attitudes that was more punitive toward crimes and less sympathetic toward offenders than in earlier times, and to which policy makers were, or at least felt, obliged to respond. More recently, other English-speaking academics (e.g., Ryan 2003; Loader 2006; Pratt 2007) have described an unbrave new world in which the public will no longer allow experts and professionals to play major roles in dealing with crime. The genie of populist punitiveness, “untutored public emotion toward crime and punishment,” is out of the bottle, they suggest, and will not be put back (Loader 2006, p. 582). Loader, in an article about “Platonic guardians,” his mocking term for liberal-minded English professionals who in earlier times played larger policy-making roles than they do now, suggests that populist policy approaches may not be a bad thing: “The idea that crime should be kept out of public life, safely handled by a coterie of experts, was and remains profoundly antidemocratic” (p. 582).²³

Several things should be said about populist conceptions of democracy. The first is that, at least in a European context, Bottoms, Ryan, and Loader describe a distinctively British phenomenon (assuming, as they argue, that it exists there²⁴). The practical import of populist views

²³ Strikingly, and oddly inconsistently, since the tenor of Loader’s article is disparagement of “liberal elitism,” and its efforts to insulate policy making from raw public emotion and electoral politics, in his penultimate sentence he warns that politicization of crime policy “is to play with passions that cannot easily be regulated, to foster expectations that are not easily sated, and to create spirals of outrage, desire, and disappointment that have the potential to overwhelm and undermine the institutional architecture of liberal democracy” (Loader 2006, p. 583).

²⁴ I provide evidence elsewhere that the Labour government’s preoccupation with crime prevention and antisocial behavior has heightened public anxieties and dissatisfactions (Tonry 2004a); English populist punitiveness may be no more than the unintended reified

of penal policy concerns the relative weight to be given in policy making to public attitudes and opinions compared with professional knowledge and experience. In most Western countries, with England and the United States being the closest to exceptions, professional views matter and are seen as a legitimate basis for formulation of policy. As the essays in this volume on Belgium (Snacken), Canada (Webster and Doob), France (Lévy, Roché), and the four large Scandinavian countries (Lappi-Seppälä) make clear, policy makers in all those places continue, seemingly comfortably, to set policies largely in accordance with their professional judgments.

Second, in thinking about the degree to which public opinion is an appropriate element in criminal justice policy making, an important distinction needs to be made between general policies and decisions about particular cases. Few officials in any Western country would argue that public attitudes and beliefs are inappropriate considerations in setting general policies, within certain limits. Concerning decisions about individual cases, by contrast, few officials in any country would argue that consideration of public attitudes and beliefs is appropriate (England being a possible exception, as the history of the Bulger case suggests). A primary purpose behind the historical creation of professional courts and impartial judges was to shelter decisions in individual cases from the influence of public emotion and vigilantism. Even if “populist punitiveness” exists in some meaningful new way, most policy makers and practitioners in most countries believe that it has no role to play in deciding individual cases.

Third, a tension between citizens’ rights and state powers has been evident since the Enlightenment, and most developed countries in many spheres are attempting to strengthen individual rights. The evolving role and broadening reach of the European Court and Convention of Human Rights exemplify this, as well as the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Morgan 2001), the International Criminal Court, and numerous efforts to develop international declarations and covenants of rights.

Those developments reflect a view that, at day’s end, the rights and interests of individual citizens should trump the political preferences

consequence of strategic political choices to make crime and punishment a government policy preoccupation.

of others who would disregard them. Just as policy makers in most developed countries had little compunction about abolishing capital punishment in the face of public opposition, there is no reason why government should rule by plebiscite when lesser but still inhumane penal impositions are in issue.

Rejecting the salience of plebiscite-type views of emotional subjects is not antidemocratic. Here is why. Ordinary citizens often see things in black and white that, had they more information, they would view in shades of grey. This is Dan Yankelovich's (1991) distinction between public opinion (top-of-the-head opinions elicited by pollsters' supper-time phone calls) and public judgment (what people believe when they have adequate information and opportunity to consider opposing viewpoints and arguments). Citizens' views about crime and punishment, often emotional, exemplify public opinion when public judgment is what is needed. This is a major justification for institutions of representative government. That many European countries, and Canada, have managed more successfully than the United States and England to insulate criminal justice policy making, and decisions in individual cases, from the force of raw public opinion is a major reason why their policies are less punitive and more humane.

2. *Statistical Analyses.* A different way to search for explanations is to develop plausible hypotheses of relations between national characteristics and differences in punitiveness and then look for quantitative measures of those characteristics. Ken Pease (1991) was one of the first to do this and concluded that higher national imprisonment rates were associated with larger degrees of income inequality. A later analysis by Katherine Beckett and Bruce Western (2001) reached similar results in comparisons of welfare spending and imprisonment rates of American states. A number of theories might support these findings: greater inequalities in income might produce greater status differentiation and with it greater selfishness among the privileged and less sympathy with people in socially distant social strata. Or, greater status differentiation might undermine social solidarity and thus produce a greater need to rely on legal threats rather than informal social control to regulate behavior.

Two more recent studies have tested a wider range of hypotheses and variables (Downes and Hansen 2006; Lappi-Seppälä, forthcoming). Both confirmed Pease's findings that greater income inequality within a country is associated with higher imprisonment rates. They also

found that higher imprisonment rates were associated with lower levels of welfare spending, lower levels of trust in fellow citizens, and lower public perceptions of the legitimacy of the legal system.

C. Protective Factors

Prominent protective factors include consensus political systems, nonpartisan judges and prosecutors, Francophonic political cultures, and a predominant view that criminal justice policy falls appropriately within the province of expert knowledge and professional experience. David J. Smith in personal communication has advised that developmentalists do not see risk and protective factors simply as reciprocals (as “having attention deficit disorder” and “not having attention deficit disorder” might be thought to be). The four protective factors I identify here do not fall prey to that objection. Francophonic and Anglo-Saxon cultures are patently not opposites: no one would regard “not Francophonic” and Anglo-Saxon as synonyms. Consensus and conflict political cultures and populist and expert-based policy processes are poles on continuums containing a range of possibilities. The difference between elected (or politically selected) noncareer officials and meritocratically chosen career officials is far from being the same as “*A*” and “not *A*.”

1. *Consensus Political Cultures.* No country offers a pure case of a consensus or conflict political culture, but as Lijphart’s (1999) descriptions of individual countries’ governmental arrangements make clear, some countries, especially in northern and western Europe, have much more consensus-based processes than others. In none of those countries has crime control become a recurring or defining partisan political issue, and in none has a felt need emerged as in the United States and England for major parties to address perceived popular anger by means of wholesale adoption of expressive tough-on-crime policies.

The Netherlands is the most interesting country along this dimension. It has long been an exemplar of a consensus-based political culture. Although governmental policy documents beginning in the mid-1980s regularly alluded to public anxieties about crime and public dissatisfaction with the criminal justice system’s “leniency” (Downes and van Swaaningen 2007), the imprisonment rate has risen steadily for a third of a century without enactment of new sentencing laws meant to accomplish that, and without crime becoming a major partisan political issue. Whatever has happened in the Netherlands has

operated osmotically. The criminal justice system has become incrementally more severe over an extended period. Practitioners at each stage appear to have become harsher: police more likely to refer cases for prosecution, prosecutors more often to insist on a negotiated settlement (a “transaction”) or to initiate court proceedings, judges more often to impose prisons sentences and for longer terms (Tak 2001). In contrast to England and the United States, where steadily harshening policies and practices produced steep increases in imprisonment, changed practices almost alone did the job in the Netherlands. No one has as yet fully and convincingly explained what happened (though Downes [in this volume] and Downes and van Swaaningen [2007] have made important beginnings).

A protective factor is not a guarantee, as the Netherlands case demonstrates. It makes an undesirable outcome less likely.

2. *Professional Cadres.* Only in the United States are judges and prosecutors elected or selected according to openly partisan criteria or are those roles structured in ways that make officials strongly susceptible to influence by public opinions and emotions. In most civil-law countries, judges and prosecutors are career civil servants who select those career paths while in university law schools and immediately upon graduation start work. Individuals may have careers as judges or as prosecutors only, or occasionally change track. The more talented or successful gradually move up career ladders and when they reach positions of substantial authority have spent a professional lifetime absorbing norms of professionalism, political nonpartisanship, and impartiality.

In European countries not following the professional civil servant model, conventions of political neutrality and professional impartiality are strong. In Belgium and Switzerland, for example, many judges are selected by the Parliament, but professional norms of independence and impartiality are strong. In Canada, judges are appointed according to meritocratic criteria in processes that include nonpartisan screening committees. In England, judges and prosecutors receive no specialized legal training in their university courses. Prosecutors are national civil servants who tend to enter the Crown Prosecution Service early in their careers. Judges are selected through nonpartisan screening processes. Both professions under the prevailing professional legal culture are rigorously nonpolitical.

Those nonpartisan, nonpolitical appointment processes conduce to

impartiality and independence. By contrast, the methods by which American judges and prosecutors are selected carry large risks of politicization. Chief prosecutors must always worry about the effects of notorious cases or controversial policies on their reelection prospects (lest their opponents have evidence to support charges of being soft on crime). Elected judges, usually less acutely, face similar risks. Many prosecutors and judges aspire to election or appointment to higher or more powerful roles and must be sensitive to the impressions they create in the minds of people in positions to advance or impede their upward progress. The dangers that prosecutorial policies will be based on election promises, opinion surveys, or focus groups are not small. Nor is the risk that decisions in individual cases will be affected by what the judge or prosecutor believes to be his or her professional or personal self interest.

3. *Francophonic Culture.* It is striking that the three French-speaking areas discussed in the essays in this volume (France, Francophonic Belgium, and Quebec) are all places characterized by comparatively mild penal policies. In none of them is populist punitiveness a force to be reckoned with, and none of them has adopted conspicuously harsh or primarily expressive policies.

Quebec's sentencing practices for adults are among the least punitive in Canada, and its practices toward young offenders are the least punitive (Doob and Sprott 2004; Doob and Webster 2006). Canada's relatively stable penal policies and imprisonment rates over recent decades are sometimes attributed in part to the influence in Ottawa of the Quebecois. Criminal and criminal procedure codes in Canada are national, though enforcement and implementation are provincial. Because they will apply to Quebec and Canadian national politics has been haunted for decades by the specter of possible Quebec secession, it is not hard to understand why strong Quebecois preferences are taken seriously.

The role of the French-speaking Walloons in Belgium is similar. Belgium is a country in which the roles of experts are large and in which policies have not become greatly more punitive. Within, however, that relatively benign climate, the Walloons appear to be less punitive than the Dutch-speaking Flemish. Sonja Snacken (in this volume) gives an example. When national law authorized and funded agencies to look after victims' interests, the Flemish created an agency in 1985 to address victims' services and needs. In 1989 the Walloons

created combined victims' and offenders' services centers. In 1994 the Dutch-speaking authority changed course and adopted the French speakers' more inclusive approach.

France, for another example, has adopted, though seldom applied, some tougher sentencing laws, but it has also developed a wide range of diversion and alternatives programs, abolished the death penalty, made its juvenile system less punitive, and experienced only a slight increase in its imprisonment rate over the past thirty years (Roché, in this volume). The best example, however, of French exceptionalism is the long-established practice of promulgation of wide-based amnesties and pardons at times of national celebration (presidential inaugurations; national holidays such as the 200th anniversary of the storming of the Bastille) (Lévy, in this volume). Sometimes thousands of people are pardoned or released from prison and the imprisonment rate falls by 10 or 20 percent in a short period. Such practices would be unthinkable in many countries. Some would condemn them for arbitrarily freeing offenders from the appropriate and morally deserved consequences of their crimes. Others would fault the unfairness of punishing some offenders less severely than their like-situated brethren. Presumably French men and women just shrug.

4. *Expert-Informed Policy Processes.* Criminal justice is a potentially more tumultuous policy subject than most. People have strong views about health, education, or transportation policies, of course, but usually for immediately self-interested or general disinterested reasons. Criminal justice is different because it involves horrifying incidents, innocent victims, and sometimes seriously unappealing or frightening offenders. Together these can provoke powerful emotions, moral panics, and waves of public vindictiveness and outrage. Everyone knows that people affected by powerful emotions sometimes overreact or behave in ways they later regret. Actions taken under the influence of vengeful or vindictive sentiments likewise, everyone knows, are often regretted. Moral panics produce everything from unjust laws to ill-considered practices to unjust actions. These are all reasons why every account of the development of state legal systems stresses their aims to remove cases from the immediate influence of private emotion and to assure that cases be dealt with impartially and dispassionately under established laws and procedures. That is why images such as blind justice and ideals such as impartial justice exist.

Vigilante justice is self-evidently wrong because its actions are too

often ill-considered, impulsive, and excessive. And when powerful emotions are let loose, the people punished by vigilantes are too often the wrong people. Lynch mobs seldom exercise due diligence.

The same logic applies to policy making. From Kai Ericson's (1966) classic account of the Salem witch trials through Stanley Cohen's (1972) account of the Clacton "riots" to Philip Jenkins's accounts (1998) of recurring panics about child sexual abuse, the literature on moral panics shows how overwrought lawmakers and officials sometimes act unwisely and unjustly under the influence of powerful emotion. Waves of emotion can pass through a community or a country and policy makers can lose their heads.

Countries in which experts and professionals play major roles in policy making, such as most of those in western and northern Europe, are less likely to adopt highly punitive policies in general or during waves of emotional reaction to a horrible incident, than countries in which expert and professional voices have become less influential.

IV. Learning More, Doing Better

The determinants of changes in penal policies are complex and contingent. Most broad explanatory claims are wrong. Most of what is said that is sensible, and can be said, however, is anecdotal and impressionistic. This final section suggests a number of things that might be done to make our inquiries more systematic and our generalizations better grounded.

First, the effort to explain the emergence of a ubiquitous, monolithic "new punitiveness" or "punitive turn" (Brown 2005, p. 282) needs to be replaced with efforts to explain many things. As most of the essays in this volume demonstrate, lots of different things pointing in different directions are happening in lots of places, and the explanations for them cannot be the same. However, several essays in a recent collection on "the new punitiveness" (Pratt et al. 2005) contain statements like this: "The most theoretically sophisticated explanations for this punitive turn and the rapid increase in imprisonment rates across the West have increasingly looked to more general changes in social, political, economic, and cultural organization rather than to any specific forces confined to criminal justice sphere, in short to the conditions of life in 'late modernity'" (Brown 2005, p. 27). As the essays in this volume, and several in the Pratt et al. (2005) volume itself (e.g., Bondeson 2005;

Meyer and O'Malley 2005; Nelken 2005) make clear, in many countries no dramatic "punitive turn" has been taken and imprisonment rates have not risen rapidly. Better answers are unlikely to emerge until we start to ask better questions.

Second, much of the armchair "theoretical" writing on changes in penal policy is useless, assuming that a "punitive turn" has occurred, which it then tries to explain without bothering to establish whether policies and practices have changed and in what ways. David Garland's work (e.g., 2001) has inspired much armchair theorizing. While no informed person would deny that Garland's writing is insightful and provocative, there are few David Garlands. A recent exchange in *Punishment and Society* between Bryan Hogeveen (2005, 2006) and Anthony Doob and Jane Sprott (2006a, 2006b) is illustrative. Hogeveen discussed "how the [social construction of the] punishable young offender has been manifest in, and governed through, increasingly harsh penalties, austere punishments and high rates of incarceration" and how the Canadian government in the late 1990s sought to denounce "youth crime through tougher youth justice legislation (the Youth Criminal Justice Act)" (2005, p. 73). Hogeveen made a number of empirical claims: "The punishable young offender was manifest in harsher sentences meted out for juvenile deviance" (p. 80); "throughout the 1980s and the 1990s Canada's rate of incarceration for young offenders continued to climb" (p. 81); "from 1991 to 1997 while American rates for incarceration were remaining relatively stable, Canadian rates were steadily increasing" (p. 81); "with few exceptions, during the 1990s Canadian youth justice moved in the direction of greater punitiveness as reflected in increasing rates of imprisonment and harsher penalties for the most serious and violent young offenders" (p. 86). None of those assertions is empirically demonstrable, raising some question as to what exactly it was that Hogeveen attempted to explain.

Doob and Sprott showed that none of Hogeveen's empirical assertions were accurate: "Hogeveen's empirical assertions were without empirical foundation. There are no data in either of his two articles (Hogeveen 2005, this issue [2006]) (or anywhere else that we know of) that support his assertions that sentences got harsher during the late 1990s or that the rate of incarceration of youth increased during this period for offenders generally or for the most serious and violent offenders" (2006a, p. 478). Time, energy, and paper would be much bet-

ter expended on trying to understand and explain real developments in the real world.

Third, if we want to understand why particular policies and practices emerge in particular places at particular times, we will need much more nuanced accounts of what has happened and much more imaginative efforts to explain why (e.g., Brodeur, in this volume). Explanations will not be found in rising crime rates, globalization, ontological insecurity, late modernity, or postmodernist angst. They explain too much and therefore too little. Adequate explanations will need to look at a wide range of developments that need explaining (table 2 includes many candidates). When a wide range of factors is taken into account, differences between countries become clearer. When incarceration rates are used as the sole indicator of increased punitiveness, the United States stands alone with New Zealand (Pratt and Clark 2005; Pratt 2006), England, and the Netherlands far behind but still well above the rates of most of western Europe.²⁵ When all the factors in table 2 are considered, however, England²⁶ stands alone after the United States in increasing punitiveness by nearly every policy measure except capital punishment—mandatory sentences, longer sentences, more pretrial detention, increased processing of young offenders in adult courts, more punitive alternatives, and weakened procedural protections (Tonry 2004a). Canada and the Netherlands, by contrast, have adopted fewer punitive policies, and some of those adopted—for example, concerning juveniles—have not produced more punitive practices.

A new generation of comparative studies will have to go deeper in trying to explain why countries differ in important respects that seem to shape their penal policies. Matters of constitutional structure, for example, partly explain why the United States and England have adopted much more repressive policies than many other countries. In times of recurring moral panics about crime and drugs, America's system of dispersed governmental powers, election of judges and prosecutors, and frequent legislative elections made policy makers susceptible to powerful influence by transient but widely shared public

²⁵ Because most of the exiguous literature concerns western Europe and the Anglo-phonc common-law countries, and because they share many common cultural, economic, and historical characteristics, the text of this essay is limited to them. In recent decades, Russia and South Africa have had imprisonment rates from 350 to 550 per 100,000; eastern European rates generally vary between 150 and 300 per 100,000; and those in most Asian countries vary between 20 and 50 per 100,000.

²⁶ New Zealand possibly also, it appears (Pratt 2006, 2007).

emotions. Thirty-five years of "law and order" and an imprisonment rate of 750 per 100,000 are among the results. Switzerland, however, also has a system of widely dispersed governmental authority, elects prosecutors at local elections, and holds frequent legislative elections and policy referenda, but has experienced broadly stable penal policies and practices over several decades

The English Labour government's decision to adopt and implement a wide range of increasingly punitive policies and practices over the past decade was made much easier by the concentration of political power in England and Wales. That, however, cannot be the whole answer. If a concentrated system of political power is part of the English explanation and dispersed political power is part of the American, other important influences must be at work.

The Netherlands and Belgium provide a similar contrast. In neither country has law-and-order politics had powerful influence and in neither country have policies become pronouncedly harsher. The two countries share similar distributions of political power and governmental authority. Yet imprisonment rates, in particular, and a wide range of practices became progressively harsher over three decades in the Netherlands, and imprisonment rates rose as much in percentage terms after 1973 as in the United States. Belgium, by contrast, maintained broadly stable penal policies and practices.

Cultural and other normative explanations must explain why the United States and Switzerland have adopted such different policies and experienced such different practices, and why the Dutch and Belgian penal policy stories are so different. Explanations may be found in distinctive features of national history and culture, in the influence of particular systems of religious belief, or, following Lijphart (1999), in political culture.

Risk and protective factors are no more destinies for countries than for individuals. Distributions of political power and governmental authority, constitutional structure, media characteristics, career professionals, and deference to expert knowledge do not produce particular results. They make them more or less likely. We could understand a good bit more about these things than we now do.

Winston Churchill nearly a century ago (in 1910) observed:

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country. A calm, dispassionate recognition of the rights of the accused

and even of the convicted criminal, . . . tireless efforts towards the discovery of curative and re-generative processes; unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols which, in the treatment of crime and the criminal, mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue within it. (Quoted in Radzinowicz and Hood 1986, p. 774)

Countries differ widely in how they respond to crime and criminals. We can learn much more about why they differ and maybe provide insights that may help some countries better mark their stored-up strength and better prove their living virtue.

REFERENCES

- Aebi, Marcelo F., Kauko Aromaa, Bruno Aubusson de Cavarlay, Gordon Barclay, Beata Gruszczyńska, Hanns von Hofer, Vasilika Hysi, Jörg-Martin Jehle, Martin Killias, Paul Smit, and Cynthia Tavares. 2006. *The European Sourcebook of Crime and Criminal Justice Statistics—2006*. The Hague: Boom Juridische uitgevers.
- Aebi, Marcelo, and Natalia Stadnic. 2007. *Council of Europe SPACE 1: 2005 Survey on Prison Populations*. Document PC-CP (2007) 2. Strasbourg: Council of Europe.
- Albrecht, Hans-Jorg. 2001. "Post-adjudication Dispositions in Comparative Perspective." In *Sentencing and Sanctions in Western Countries*, edited by Michael Tonry and Richard S. Frase. New York: Oxford University Press.
- Armstrong, Sarah, and Leslie McAra, eds. 2006. *Perspectives on Punishment: The Contours of Control*. Oxford: Oxford University Press.
- Ashworth, Andrew. 2001. "The Decline of English Sentencing and Other Stories." In *Sentencing and Sanctions in Western Countries*, edited by Michael Tonry and Richard S. Frase. New York: Oxford University Press.
- Beckett, Katherine, and Bruce Western. 2001. "Governing Social Marginality." In *Mass Imprisonment: Causes and Consequences*, edited by David Garland. London: Sage.
- Bennett, William J., John J. DiIulio, and John P. Walters. 1996. *Body Count: Moral Poverty and How to Win America's War against Crime and Drugs*. New York: Simon and Schuster.
- Blumstein, Alfred, and Allen J. Beck. 1999. "Population Growth in U.S. Prisons, 1980–1996." In *Prisons*, edited by Michael Tonry and Joan Petersilia. Vol. 26 of *Crime and Justice: A Review of Research*, edited by Michael Tonry. Chicago: University of Chicago Press.

- Blumstein, Alfred, and Jacqueline Cohen. 1973. "A Theory of the Stability of Punishment." *Journal of Criminal Law and Criminology* 64:198–207.
- Bondeson, Ulla V. 2005. "Levels of Punitiveness in Scandinavia: Description and Explanation." In *The New Punitiveness—Trends, Theories, Perspectives*, edited by John Pratt, David Brown, Mark Brown, Simon Hallsworth, and Wayne Morrison. Cullompton, Devon, UK: Willan.
- Bottoms, Anthony E. 1995. "The Philosophy and Politics of Punishment and Sentencing." In *The Politics of Sentencing Reform*, edited by Chris Clarkson and Rod Morgan. Oxford: Oxford University Press.
- Boutellier, Hans. 2005. *The Safety Utopia: Contemporary Discontent and Desire as to Crime and Punishment*. Dordrecht: Kluwer.
- Brodeur, Jean-Paul. In this volume. "Comparative Penology in Perspective."
- Brown, David. 2005. "Continuity, Rupture, or Just More of the 'Volatile and Contradictory'? Glimpses of New South Wales' Penal Practice behind and through the Discursive." In *The New Punitiveness—Trends, Theories, Perspectives*, edited by John Pratt, David Brown, Mark Brown, Simon Hallsworth, and Wayne Morrison. Cullompton, Devon, UK: Willan.
- Buruma, Ybo. 2005. *De dreigingsspiraal: Onbedoelde neveneffecten van misdaadbestrijding* [The spiral of threat: Unintended consequences of the war on crime]. The Hague: Boom Juridische uitgevers.
- Cavadino, Michael, and James Dignan. 2005. *Penal Systems: A Comparative Approach*. London: Sage.
- Charter, David, Stewart Tendler, Greg Hurst, and Michael Horsnell. 2004. "Blunkett's Early Joy on Shipman Suicide." *The Times* (January 17).
- Christie, Nils. 1968. "Changes in Penal Value." In *Scandinavian Studies in Criminology*, edited by Nils Christie. London: Tavistock.
- Clarkson, Chris, and Rod Morgan, eds. 1995. *The Politics of Sentencing Reform*. Oxford: Oxford University Press.
- Cohen, Stanley. 1972. *Folk Devils and Moral Panics*. New York: St. Martin's.
- Cruikshanks, Eveline. 2000. *The Glorious Revolution*. New York: St. Martin's.
- Deković, M. 1999. "Risk and Protective Factors in the Development of Problem Behavior during Adolescence." *Journal of Youth and Adolescence* 28(6): 667–85.
- Doob, Anthony N., and Jane B. Sprott. 2004. "Youth Justice in Canada." In *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives*, edited by Michael Tonry and Anthony N. Doob. Vol. 31 of *Crime and Justice: A Review of Research*, edited by Michael Tonry. Chicago: University of Chicago Press.
- . 2006a. "Assessing Punitiveness in Canadian Youth Justice." *Punishment and Society* 8(4):477–80.
- . 2006b. "Punishing Youth Crime in Canada: The Blind Men and the Elephant." *Punishment and Society* 8(2): 223–33.
- Doob, Anthony N., and Cheryl Marie Webster. 2006. "Countering Punitiveness: Understanding Stability in Canada's Imprisonment Rate." *Law and Society Review* 40(2):325–68.

- Downes, David. 1988. *Contrasts in Tolerance: Post-war Penal Policies in the Netherlands and England and Wales*. Oxford: Clarendon.
- . In this volume. "Visions of Penal Control in the Netherlands."
- Downes, David, and K. Hansen. 2006. "Welfare and Punishment in Comparative Perspective." In *Perspectives on Punishment: The Contours of Control*, edited by Sarah Armstrong and Leslie McAra. Oxford: Oxford University Press.
- Downes, David, and René van Swaaningen. 2007. "The Road to Dystopia? Changes in the Penal Climate of the Netherlands." In *Crime and Justice in the Netherlands*, edited by Michael Tonry and Catrien Bijleveld. Vol. 35 of *Crime and Justice: A Review of Research*, edited by Michael Tonry. Chicago: University of Chicago Press.
- Dunbar, Ian, and A. Langdon. 1998. *Tough Justice—Sentencing and Penal Policies in the 1990s*. London: Blackstone.
- Ericson, Kai T. 1966. *Wayward Puritans: A Study in the Sociology of Deviance*. New York: Wiley.
- Faulkner, David. 2002. *Crime, Citizen, and State*. 2nd ed. London: Waterside.
- Freiberg, Arie. 2001. "Three Strikes and You're Out—It's Not Cricket: Colonization and Resistance in Australian Sentencing." In *Sentencing and Sanctions in Western Countries*, edited by Michael Tonry and Richard S. Frase. New York: Oxford University Press.
- Garland, David. 1996. "The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society." *British Journal of Criminology* 36:445–71.
- . 2001. *The Culture of Control*. Chicago: University of Chicago Press.
- Gottschalk, Marie. 2006. *The Prison and the Gallows: The Politics of Mass Incarceration in America*. New York: Cambridge University Press.
- Green, David. In this volume. "Comparing Penal Cultures: Child-on-Child Homicide in England and Norway."
- . Forthcoming. *Political Culture and Penal Populism: When Children Kill Children*. Oxford: Oxford University Press.
- Harcourt, Bernard. 2006. "From the Asylum to the Prison: Rethinking the Incarceration Revolution." *Texas Law Review* 84:1751–85.
- Hogeveen, Bryan R. 2005. "If We Are Tough on Crime, if We Punish Crime, Then People Get the Message': Constructing and Governing the Punishable Young Offender in Canada during the Late 1990s." *Punishment and Society* 7(1):73–89.
- . 2006. "Memoir of a/the Blind: A Reply to Doob and Sprott." *Punishment and Society* 8(4):469–75.
- Home Office. 2002. *Justice for All*. Cm 5563. London: H.M. Stationery Office.
- Ifill, Gwen. 1991. "Senate's Rule for Its Anti-crime Bill: The Tougher the Provision, the Better." *New York Times* (July 8; national ed.), p. A6.
- Jenkins, Philip. 1998. *Moral Panic: Changing Concepts of the Child Molester in Modern America*. New Haven, CT: Yale University Press.
- Johnson, David. In this volume. "Crime and Punishment in Contemporary Japan."

- Jones, Trevor, and Tim Newburn. 2006. *Policy Transfer and Criminal Justice*. Milton Keynes, UK: Open University Press.
- Junger-Tas, Josine. 2004. "Youth Justice in the Netherlands." In *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives*, edited by Michael Tonry and Anthony N. Doob. Vol. 31 of *Crime and Justice: A Review of Research*, edited by Michael Tonry. Chicago: University of Chicago Press.
- Killias, Martin. 1991. *Introduction to Criminology*. Berne: Stämpfli.
- Kommer, Max. 1994. "Punitiveness in Europe: A Comparison." *European Journal of Criminal Policy and Research* 2(1):29–43.
- . 2004. "Punitiveness in Europe Revisited." *Criminology in Europe* 3(1): 1, 8–12.
- Kurki, Leena. 2001. "International Standards for Sentencing and Punishment." In *Sentencing and Sanctions in Western Countries*, edited by Michael Tonry and Richard S. Frase. New York: Oxford University Press.
- Lappi-Seppälä, Tapio. In this volume. "Penal Policy in Scandinavia."
- . Forthcoming. "Explaining National Differences in Punitiveness." In *Crime and Justice: A Review of Research*, vol. 37, edited by Michael Tonry. Chicago: University of Chicago Press.
- Lévy, René. In this volume. "Pardons and Amnesties as Policy Instruments in Contemporary France."
- Lewis, Clive Staples. 1970. *God in the Dock*, edited by Walter Hooper. Grand Rapids, MI: Eerdmans.
- Lijphart, Arend. 1984. *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries*. New Haven, CT: Yale University Press.
- . 1999. *Patterns of Democracy: Government Forms and Performance in Thirty-six Countries*. New Haven, CT: Yale University Press.
- Loader, Ian. 2006. "Fall of the Platonic Guardians: Liberalism, Criminology, and Political Responses to Crime in England and Wales." *British Journal of Criminology* 46(4):561–86.
- Meyer, Jeffrey, and Pat O'Malley. 2005. "Missing the Punitive Turn: Canadian Criminal Justice, 'Balance,' and Penal Modernism." In *The New Punitiveness—Trends, Theories, Perspectives*, edited by John Pratt, David Brown, Mark Brown, Simon Hallsworth, and Wayne Morrison. Cullompton, Devon, UK: Willan.
- Morgan, Rod. 2001. "International Controls on Sentencing and Punishment." In *Sentencing and Sanctions in Western Countries*, edited by Michael Tonry and Richard S. Frase. New York: Oxford University Press.
- . 2006. "With Respect to Order, the Rules of the Game Have Changed: New Labour's Dominance of the 'Law and Order' Agenda." In *The Politics of Crime Control: Essays in Honour of David Downes*, edited by Tim Newburn and Paul Rock. Oxford: Oxford University Press.
- Morgan, Rod, and David Downes. 2007. "The Skeletons in the Cupboard: The Politics of Law and Order at the Turn of the Millennium." In *The Oxford Handbook of Criminology*, 4th ed., edited by Mike Maguire, Rod Morgan, and Roy King. Oxford: Oxford University Press.

- Mullet, Charles F. 1966. *Fundamental Law and the American Revolution 1760–1776*. New York: Octagon Books.
- Nelken, David. 2005. "When Is a Society Non-punitive? The Italian Case." In *The New Punitiveness—Trends, Theories, Perspectives*, edited by John Pratt, David Brown, Mark Brown, Simon Hallsworth, and Wayne Morrison. Cul-lompton, Devon, UK: Willan.
- Newburn, Tim. 2006. "Contrasts in Intolerance: Cultures of Control in the United States and Britain." In *The Politics of Crime Control: Essays in Honour of David Downes*, edited by Tim Newburn and Paul Rock. Oxford: Oxford University Press.
- . In this volume. "'Tough on Crime': Penal Policy in England and Wales."
- Newburn, Tim, and Paul Rock, eds. 2006. *The Politics of Crime Control: Essays in Honour of David Downes*. Oxford: Oxford University Press.
- Pease, Ken. 1991. "Punishment Demand and Punishment Numbers." In *Policy and Theory in Criminal Justice*, edited by D. M. Gottfredson and R. V. Clarke. Aldershot, UK: Gower.
- Pratt, John. 2006. "The Dark Side of Paradise: Explaining New Zealand's History of High Imprisonment." *British Journal of Criminology* 46(4):541–60.
- . 2007. *Penal Populism*. London: Routledge.
- Pratt, John, David Brown, Mark Brown, Simon Hallsworth, and Wayne Morrison, eds. 2005. *The New Punitiveness—Trends, Theories, Perspectives*. Cul-lompton, Devon, UK: Willan.
- Pratt, John, and Marie Clark. 2005. "Penal Populism in New Zealand." *Punishment and Society* 7(3):303–22.
- Radzinowicz, Leon, and Roger Hood. 1986. *A History of English Criminal Law and Its Administration from 1750*. London: Stevens & Sons.
- Roché, Sebastian. 2006. *Le Frisson de L'émeute: Violences urbaines et banlieues*. Paris: Seuil.
- . In this volume. "Criminal Justice Policy in France: Illusions of Severity."
- Ryan, Mick. 2003. *Penal Policy and Political Culture in England and Wales*. Winchester, UK: Waterside.
- Sameroff, A. J. 1998. "Environmental Risk Factors in Infancy." *Pediatrics* 102(5):1287–92.
- Savelsberg, Joachim. 1994. "Knowledge, Domination, and Criminal Punishment." *American Journal of Sociology* 99(4):911–43.
- Simon, Jonathan. 2007. *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. New York: Oxford University Press.
- Snacken, Sonja. 2005. "Reductionist Penal Policy and European Human Rights Standards." Paper presented at the fifth annual meeting of the European Society of Criminology, Krakow, August 31–September 3.
- . In this volume. "Penal Policy and Practice in Belgium."
- Speck, W. A. 1988. *Reluctant Revolutionaries: Englishmen and the Revolution of 1688*. New York: Oxford University Press.

- Stouthamer-Loeber, M., R. Loeber, E. Wei, D. P. Farrington, and P. H. Wikström. 2002. "Risk and Promotive Effects in the Explanation of Persistent Serious Delinquency in Boys." *Journal of Consulting and Clinical Psychology* 70(1):111–23.
- Tak, Peter J. 2001. "Sentencing and Punishment in the Netherlands." In *Sentencing and Sanctions in Western Countries*, edited by Michael Tonry and Richard S. Frase. New York: Oxford University Press.
- Tonry, Michael. 1996. *Sentencing Matters*. New York: Oxford University Press.
- . 1999. "Parochialism in American Sentencing Policy." *Crime and Delinquency* 45(1):48–65.
- . 2004a. *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy*. Cullompton, Devon, UK: Willan.
- . 2004b. *Thinking about Crime: Sense and Sensibility in American Penal Culture*. New York: Oxford University Press.
- Tonry, Michael, and Catrien Bijleveld. 2007. "Crime, Criminal Justice, and Criminology in the Netherlands." In *Crime and Justice in the Netherlands*, edited by Michael Tonry and Catrien Bijleveld. Vol. 35 of *Crime and Justice: A Review of Research*, edited by Michael Tonry. Chicago: University of Chicago Press.
- Tonry, Michael, and Anthony N. Doob, eds. 2004. *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives*. Vol. 31 of *Crime and Justice: A Review of Research*, edited by Michael Tonry. Chicago: University of Chicago Press.
- Tonry, Michael, and David P. Farrington, eds. 2005. *Crime and Punishment in Western Countries, 1980–1999*. Vol. 33 of *Crime and Justice: A Review of Research*, edited by Michael Tonry. Chicago: University of Chicago Press.
- Tonry, Michael, and Richard S. Frase, eds. 2001. *Sentencing and Sanctions in Western Countries*. New York: Oxford University Press.
- van Dijk, Jan, Robert Manchin, John van Kesteren, and Gegerly Hideg. 2007. *The Burden of Crime in the EU*. Tilburg, Netherlands: Tilburg University, INTERVICT.
- van Kesteren, John, Pat Mayhew, and Paul Nieuwebeerta. 2001. *Criminal Victimisation in Seventeen Industrialised Countries: Key Findings from the 2000 International Crime Victims Survey*. The Hague: WODC.
- van Ruller, Sibo, and Guillaume Beijers. 1995. "Degerangenisstatistiek in het licht van de geschiedenis" [Prison statistics in historical perspective]. *Justitiële Verkenningen* 21:35–52.
- Walmsley, Roy. 2007. *World Prison Population List*. 7th ed. London: International Center for Prison Studies.
- Webster, Cheryl Marie, and Anthony N. Doob. In this volume. "Punitive Trends and Stable Imprisonment Rates in Canada."
- Weigend, Thomas. 2001. "Sentencing and Punishment in Germany." In *Sentencing and Sanctions in Western Countries*, edited by Michael Tonry and Richard S. Frase. New York: Oxford University Press.
- Whitman, James Q. 2003. *Harsh Justice*. New York: Oxford University Press.

- Williams, Glyn, and John Ramsden. 1990. *Ruling Britannia: The Political History of Britain 1688–1988*. New York: Longman.
- Wilson, James Q. 1983. *Thinking about Crime*. Rev. ed. New York: Basic Books. (Originally published 1976.)
- Windlesham, Lord David. 1987–96. *Responses to Crime*. Vols. 1–3. Oxford: Oxford University Press.
- . 1998. *Politics, Punishment, and Populism*. New York: Oxford University Press.
- Wood, Gordon S. 1969. *The Creation of the American Republic 1776–1787*. Chapel Hill: University of North Carolina Press.
- Yankelovich, Dan. 1991. *Coming to Public Judgment: Making Democracy Work in a Complex World*. Syracuse, NY: Syracuse University Press.
- Young, Warren, and Mark Brown. 1993. “Cross National Comparisons of Imprisonment.” In *Crime and Justice: A Review of Research*, vol. 17, edited by Michael Tonry. Chicago: University of Chicago Press.
- Zimring, Franklin E., Gordon Hawkins, and Sam Kamin. 2001. *Punishment and Democracy: Three Strikes and You’re Out in California*. New York: Oxford University Press.