

1995

Sentencing Laws & Practices in France

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Recommended Citation

Richard Frase, *Sentencing Laws & Practices in France*, 7 FED. SENTENCING R. 275 (1995), available at http://scholarship.law.umn.edu/faculty_articles/514.

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SENTENCING LAWS & PRACTICES
IN FRANCE

Richard S. Frase*

The French make very sparing use of custodial penalties and punish most offenses with fines or suspended sentences. France's less punitive attitude is evident not only in its sentencing laws and practices, but also at earlier stages of the criminal process: in the legal definition of crimes; in the use of custodial arrest and pretrial detention; and in decisions about whether (and on what charges) to prosecute. As a result of these policies, incarceration rates in France are far lower than in the United States, not only when compared to population (inmates per 100,000 residents) but also compared to the volume of serious crime.

This article begins with a comparison of French and U.S. incarceration rates.¹ It then examines French sentencing rules and practices, as well as policies at each of the earlier stages, all of which contribute to the "bottom line" of low prison and jail populations. The article concludes with a discussion of the importance of viewing sentencing in a larger systemic context, in which rules and practices at different procedural stages (as well as even broader, societal factors) interact with and mutually reinforce each other.

I. FRENCH AND U.S. INCARCERATION RATES

American observers have long assumed that sentencing in Europe is less severe than in the United States.² It is difficult to statistically document that conclusion. To effectively measure sentencing severity in two jurisdictions, ideally one should compare the type and severity of sentences imposed as well as average time-served for comparable groups of offenders within fairly narrow and similarly-defined offense categories. Unfortunately, very little such comparable sentencing data exists for France and the United States.³

In the absence of adequate data, the only statistical basis for international comparisons of sentencing severity is data on the size of jail and prison populations in each country. International incarceration rates are usually expressed as the number of inmates "per 100,000 residents." But American crime rates *per resident* are much higher than French rates, especially for violent and drug crimes,⁴ and this difference may at least partially explain the much higher American per-resident incarceration rate. Nevertheless, as shown in Table 1, U.S. inmate populations are also much higher when compared to the volume of serious crime (weighted adult arrests).⁵

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Table 1
Incarceration rates in France
and the United States (1991)

| | U.S. | France | ratio |
|--|-------|--------|-------|
| Inmates per 100,000 residents | | | |
| Convicted inmates only | 409.1 | 50.1 | 8.2:1 |
| All inmates | 495.9 | 84.6 | 5.9:1 |
| Inmates per 100 weighted adult arrests | | | |
| Convicted inmates only | 24.1 | 7.2 | 3.3:1 |
| All inmates | 29.2 | 12.2 | 2.4:1 |

While the ideal crime-related base for assessing relative sentencing severity would be the number of criminal convictions per year in each country, weighted according to seriousness, no comparable nationwide data exists for France and the United States. American conviction statistics do not include misdemeanor cases, and it is impossible to identify and remove cases that correspond to U.S. misdemeanors from published French statistics.

The best available source for estimating the number of "custody-sentence candidates" in each country is police statistics on the number of persons arrested, cited, summoned, or otherwise charged by the police. Such data use offense categories which are reasonably consistent across jurisdictions, and also show the age of the offenders. (The large number of juvenile arrests in each country should be excluded in any measure of "custody candidates" since jail and prison populations in both countries consist almost entirely of adults.)

Next, it is necessary to weight the adult-arrests base according to crime seriousness. In particular, violent criminals are more likely to receive lengthy custody sentences; thus, the same number of adult arrests will produce a much larger inmate population if a high proportion of those arrests are for violent crimes. In Table 1, violent arrests are weighted, or multiplied, by a factor of ten.⁶

Cross-jurisdictional comparisons of inmate populations should include local jail as well as state prison inmates. Some American states make very heavy use of jail sentences in felony cases,⁷ and most other nations report only aggregate inmate statistics, without distinction as to place of detention.

Finally, it is risky to limit cross-jurisdictional comparisons to convicted inmate populations because different jurisdictions often use different standards for determining when an inmate is "convicted" — it might be as early as the entry of a verdict or plea of guilty, or after sentencing, or even after appeal, or expiration of the time to file an appeal.⁸ Another problem is that many "unconvicted" inmates are serving what will later be deemed their entire "sentence" or part of it. The frequent practice of granting credit for time spent in pretrial detention means that many defendants sentenced to custodial terms spend little or no time as "convicted" prisoners.

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Counting only the latter inmates thus substantially understates the true volume of custodial sentencing and may distort cross-jurisdictional comparisons. Therefore, one has to count *all* inmates regardless of their official legal status as "custody-sentenced." When all inmates are counted, the U.S. incarceration rate with regard to weighted adult arrests is still almost two-and-one-half times the French rate.

II. FRENCH SENTENCING RULES AND PRACTICES

A. Authorized Penalties

The basic parameters of the sentencing decision are the nature and severity of authorized sentences. In France, a very large number of minor offenses, which account for over three-quarters of all court-imposed⁹ sentences, are not subject to incarceration. These *contraventions* are punishable by a fine, forfeiture of objects or privileges, or up to 120 hours of community service.¹⁰ The range of objects or privileges subject to forfeiture is broader than in most American jurisdictions. In addition to surrender of weapons and the instrumentalities or fruits of the conviction offense, defendants may temporarily lose the use of their vehicle(s) and/or their driving, hunting, check-writing, credit-card-usage, or weapon-carrying privileges, even if the conviction offense did not involve the use of these objects or privileges. Ordinarily most of these sentencing options may not be combined with a fine. Some options must be specifically authorized for the conviction offense.

More serious, jailable offenses are of two types, *delit* and *crime*. The "middle" category of *delit* accounts for almost all of the remaining court-imposed sentences; it includes many offenses which would be misdemeanors under American law (such as minor thefts), as well as most of the cases which would be felonies, including aggravated assault, burglary, grand larceny, and most drug crimes. *Delits* are punishable with one or more of the following: imprisonment (up to ten years, for the most serious *delits*); fines or day-fines¹¹; up to 240 hours of community service; forfeiture of objects or privileges (for longer periods than the forfeitures allowed in *contravention* cases); closing of defendant's business; publicity of the sentence; and, if specifically authorized, loss of rights (such as the right to vote).¹²

A custody sentence may be combined with a fine, but not with community service, nor (absent specific authorization) with a forfeiture; community service and forfeiture may not be combined with each other or with a fine. Thus, courts may not "pile on" conditions of probation which guarantee failure, and cause defendants to prefer a jail term. These "either/or" rules also serve to emphasize the legislature's view that *each* of these alternatives can, in appropriate cases, be deemed a sufficient type and amount of "punishment."

The third category, *crime*, includes a few, extremely serious offenses such as murder, mutilation, armed robbery, rape, and very high-level drug trafficking. *Crimes* account for less than two tenths of one percent of all court-imposed sentences. They are punishable with fines and with imprisonment (offense maxima are 15, 20, 30 years, or life). Forfeiture, business closing, publicity, and loss of rights may also be ordered, if specifically authorized for a particular offense.¹³

B. Other Important Sentencing Rules

All of the penalties described above, except for prison terms of over five years, may be suspended.¹⁴ "Simple" suspension (with no conditions other than good behavior) is available to defendants who have not received a custodial sentence during the previous five years. Expungement occurs five years after the suspended sentence was pronounced, unless the defendant receives a new custodial sentence during that time.

"Suspension with probation" (for a term of 18 to 36 months) or "suspension with community service" (for up to 18 months) are available regardless of prior record. If the defendant complies with the conditions of probation or community service, and receives no new custody sentences during the period of supervision, his suspended sentence and conviction become void. If a new custody sentence is received during that period, the suspension would normally be revoked. However, the court can (if it states reasons) order that the suspension not be revoked; in that case, the suspension apparently remains eligible for expungement on the original schedule, i.e. five years from the date of the first sentence.

A number of other features of French sentencing law serve to shorten or avoid the use of custodial sentences. First, in cases of *delit* or *contravention* courts have broad power to postpone or dispense with any penalty.¹⁵ Second, the maximum authorized prison terms for common property crimes such as burglary, larceny, forgery, and embezzlement are lower in France than in most U.S. jurisdictions. Absent unusual aggravating factors, the maximum French penalty for each of these crimes is three years imprisonment.¹⁶ Third, since there are very few mandatory minimum prison terms and no sentencing guidelines, judges normally retain and use broad discretion to impose less than the maximum authorized penalty.¹⁷

Fourth, French sentencing law generally forbids consecutive sentences; when a defendant is sentenced for several crimes (at a single hearing, or sequentially), he may not receive a sentence more severe than the maximum authorized for the most serious of those offenses.¹⁸ Fifth, the statutory sentence enhancements applicable to recidivists are based solely on the seriousness, not the frequency, of prior

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offenses for which the defendant has already been convicted at the time of the current offense.¹⁹ Finally, in addition to the expungement provisions implicit in the suspended sentence rules described earlier, most convictions are expunged automatically after a certain period of time as long as the offender does not have any new convictions for a *crime* or *delit*.²⁰ Convictions may also be expunged by a court order,²¹ or by broad statutory grants of amnesty which are typically issued following a presidential election.²² The first two procedures, known as "*rehabilitation*," erase the conviction record and all of its collateral consequences, including enhancement of any later sentence. Amnesty decrees also have the above effects, lead to the immediate release of an inmate, and additionally bar any ongoing or potential prosecution.

In addition to the penalties summarized above, French criminal courts often award compensation to crime victims.²³ Such awards require the victim to enter the criminal case as a "civil party." Issues of civil liability and damages are determined according to general rules of civil law in what is, in essence, a "pendant" civil law suit. Although the direct participation of crime victims and their advocates and the introduction of "impact statements" might be assumed to promote greater sentencing severity, often the opposite is the case. Since victims are mainly concerned with their damage awards, this often leads them to advocate for a *non*-custodial sentence — to ensure that the offender continues to work and earn the money needed to pay the award.

C. Sentencing Practices

Sentencing research must, whenever possible, go beyond formal rules to examine what courts actually do in practice. Empirical research is particularly important in comparative studies, since the meaning and practical importance of foreign laws and procedures may be quite different than is suggested by even a very skillful translation.

As shown in Table 2, the vast majority of French defendants receive a non-custodial sentence. When an executed custody term is imposed, its duration is usually less than one year, and rarely exceeds five years.

The table excludes sentences imposed for *contraventions* of the first four classes, because there is no detailed recent data on many of these sentences. In 1990, there were 1,480,325 court-imposed convictions for *contraventions* of the first four classes,²⁴ consisting of 1,102,870 "penal orders" (fines)²⁵ and 377,455 "trials." Although specific sentences are not reported for 1990, it is likely that almost all of the trials also resulted in a fine; in 1983, the last year for which sentence information was published for class 1 to 4 *contraventions*, less than two-tenths of one percent of such trials resulted in custody terms.²⁶

Table 2
Sentences imposed by French criminal courts in 1990
(excluding *contraventions* of the first four classes)^a

| | number | percent |
|---|---------|---------|
| Executed ^b custody sentences — | 106,576 | 18.3 |
| — of less than 3 months | 40,768 | |
| — 3 months to less than 1 year | 45,558 | |
| — one year to less than 5 years | 17,069 | |
| — five years or more | 3,181 | |
| Executed fines | 194,666 | 33.3 |
| Fully suspended and other — | 282,004 | 48.4 |
| — suspended, no special condition | 179,800 | |
| — suspended with conditions | 24,608 | |
| — community service | 12,234 | |
| — forfeiture or loss of privileges | 32,192 | |
| — "educative measures" | 22,295 | |
| — dispensed (no penalty) | 10,875 | |
| Total convictions ^c | 583,246 | 100.0 |

^a Source: Min. de la Justice, *Annuaire statistique de la justice*, 1989-1990 123, 133 & 151 (1992). 1990 is the most recent year for which detailed sentencing data is available.

^b In published French statistics, partially-executed custody sentences are lumped together with fully-executed sentences. Thus, the data on custody sentence length, shown in the table in text, overstates the duration of executed sentences.

^c 2,608 of these sentences were imposed for crime, 472,081 for *delits*, and 108,557 for *contraventions* of the fifth class.

When sentences for all *contraventions* are included, fines represent the overwhelming majority of court-imposed sentences in France and custody terms are rare. The proportion of custody sentences is likely to drop further under the revised penal code (effective March 1, 1994), which eliminates the possibility of a custody term in all *contravention* cases. Applying the new rules to the 1990 data reported earlier would yield fines for at least three-quarters of the sentences, with only five percent involving an executed custody term.

The data presented above have no American counterpart. The available sentencing data for the United States as a whole are limited to felonies whereas the French data include a large number of minor crimes which would be misdemeanors in the United States. Fines are frequently used in American misdemeanor cases, at least for traffic violations. Nevertheless, in light of the much higher American incarceration rates per arrest, it seems likely that, overall, fines and other non-custodial sentences are used less often in the United States than in France. It may also be the case that custodial terms are, on the average, longer in the United States, although some states, such as Minnesota, make very frequent use of short jail terms.

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III. FRENCH SENTENCING IN A BROADER SYSTEMIC CONTEXT

Sentencing is only one stage of the criminal justice system, and cannot be fully understood without considering other parts of that system. As shown below, the French take a less punitive approach at all stages of the criminal process; this common theme helps to explain why so few French citizens end up behind bars.²⁷

A. Scope and Structure of the Criminal Law

The legislature exercises its sentencing power not only in setting penalty ranges and options, but also in deciding whether to define conduct as criminal, and at what offense level. The French have decriminalized a number of so-called "morals" offenses, such as private prostitution and consensual adult sodomy. In addition, many other high-volume, "public order" crimes may be prosecuted only as *contraventions* for which custody sentences are not authorized. Examples include public drunkenness and solicitation of prostitution, breach of the peace, lesser assaults, and minor invasions of property rights.

B. Arrest and Pretrial Detention

Legislators also make sentencing decisions in determining under what circumstances to authorize arrest and pretrial detention. This is true since pre-conviction custody is, from the defendant's perspective, not much different than a jail sentence. Pretrial detention also makes an eventual, formal custodial sentence much more likely to be imposed because of the defendant's resulting poor appearance in court, his lack of opportunity to demonstrate compliance with release conditions, increased pressure to plead guilty in return for release on a sentence of "time-served," and the court's desire to legitimate time spent in pretrial detention.

French law strongly discourages pre-conviction custody. In cases of *contravention*, arrest and pretrial detention are never permitted. When a *delit* or *crime* is charged, the police may hold the suspect for no more than 24 hours or, with approval of the prosecutor, 48 hours. Any further detention requires court approval and, in many cases, the opening of a judicially-supervised inquiry. Because of its formality and greater judicial scrutiny, the latter procedure is infrequently invoked. As a result of these rules and their practical application, it appears that custodial arrest and pretrial detention are used less frequently in France than in the United States.

C. Initial and Subsequent Charging Decisions

Prosecutors make important sentencing decisions, beginning with the decision whether and in what form to file criminal charges. Unlike in some other European countries, French prosecutors have been given — and in practice fully exercise — broad

discretion to decline or limit the severity of initial charges. Only about 20 percent of non-petty criminal matters are prosecuted, which is probably a lower rate than for American felonies and non-petty misdemeanors. On the other hand, French prosecutors have very limited power to dismiss or reduce charges once a case has been filed in court. In practice, this lack of the American prosecutor's *nolle prosequi* power appears to introduce a further element of leniency because it encourages French prosecutors to more carefully evaluate the decision to file any charges, as well as the number and severity of the charges.

D. Plea Bargaining and its French Equivalents

The most important sentencing decisions made by American prosecutors are in the context of plea negotiations. Plea-related decisions to reduce charges and/or recommend (or not oppose) sentencing leniency directly affect the type and severity of the defendant's punishment. The French rarely engage in explicit trading of charge and/or sentencing leniency in return for the defendant's confession, testimony, or other forms of cooperation. However, informal exchanges of leniency for cooperation do occur in a number of forms; such tacit plea bargaining, as well as unilateral grants of leniency in initial charging decisions and at sentencing, provide much of the mitigation that is extended via explicit plea bargaining in the United States.

IV. CONCLUSION: THE IMPORTANCE OF SYSTEMIC ANALYSIS

Even with better sentencing data for each jurisdiction, there will always be a need for a broader, systemic analysis of the critical decisions which precede sentencing. A less punitive attitude at earlier stages of case processing sets a tone which encourages moderation at sentencing. Conversely, more punitive early decisions, such as the use of custodial arrest and pretrial detention strongly encourage more severe sentencing and, in extreme cases, render the sentencing decision itself moot.

Sentencing rules and practices in turn influence earlier decisions. If a custody term is not authorized, or if authorized is rarely imposed for a particular offense, much less justification exists for custodial arrest and pretrial detention. Indeed, if these peculiarly criminal law custodial measures are not available or are rarely invoked, there may be little reason to formally prosecute, or even to define the conduct as "criminal."

Thus, rules and practices at different stages of the criminal process mutually reinforce each other, and the same is true within each stage. For example, a tradition of using shorter custodial sentences makes substitution of fines and community service much more feasible because the latter can readily be viewed

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as equivalent to a custody term of a few months, while they would seem too lenient if the norm is a custody term measured in years.

Finally, in order to fully understand—and perhaps borrow—sentencing rules and practices from a foreign jurisdiction, one must also be sensitive to the broader societal context. For example, the availability of substantial welfare benefits that exceed bare subsistence levels in many European countries strongly encourages the use of fines.²⁸ Entitlement to such benefits means that almost everyone, even the impoverished citizen who is most likely to appear in criminal court, has something to lose besides his physical liberty. Another important feature of the European context is that criminal justice issues tend to be much less politicized. Judges, prosecutors, and law enforcement officers are almost all appointed, and legislators and other elected officials seem much less eager than in the United States to propose unrealistic and unnecessary “get tough” measures for short-term political gain.

In sum, there is much for Americans to learn from a study of how other countries define, prosecute, and punish crimes. At the same time, we must be careful to view seemingly desirable foreign rules and practices in their broader context, not only within the criminal justice system, but also in the society as a whole.

FOOTNOTES

¹ For a comprehensive study of French criminal justice, including sentencing data as of 1980, see Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 Cal. L. Rev. 539-683 (1990) [hereinafter “Frase 1990”]. For a convenient “nutshell” summary of the French system as of 1986, see Frase, *Introduction*, in French Code Of Criminal Procedure 1-40 (G. Kock & R. Frase trans. 1988) [hereinafter “Frase 1988”].

² See Frase 1990, *supra* note 1, at 648.

³ See generally *id.* at 651-55, 658-61. The limited available offense-specific data on homicide and drug trafficking suggest that French sentences are more lenient. *Id.* at 655.

⁴ See, e.g., FBI, *Crime in the United States, 1991: Uniform Crime Reports* 58 (crimes known to police) & 213 (persons taken into custody, notified, or cited); Direction Gén. de la Police Nat'l, *Aspects de la criminalité et de la délinquance constatées en France en 1991 par les services de police et de gendarmerie* 100-101 (crimes known to police) 108-9 (persons charged by police) (1992). These sources indicate that the rates for homicides (per population) and drug crimes (based on arrests) are four times higher in the United States; American rape and robbery rates are over two times higher.

⁵ Data sources: Institut. Nat'l de la Statistique, 97 *Annuaire Statistique de la France*, 844 (1993) (data as of year-end 1991, the most recent data year); U.S. Dep't. Just., Bur. of Just. Stat., *Prisoners in 1992*, table 2 (1993) (final state and federal prison population figures for year-end, 1991); *id.*, Jail

Inmates 1991, tables 1 & 2 (1992) (jail populations as of June 30, 1991).

⁶ In my previous study of French and U.S. sentencing, I used three different arrest weightings: 1) violent crime arrests multiplied times 10; 2) all arrests weighted by U.S. prison rate for that offense; and 3) all arrests weighted by U.S. average time-served for that offense. The three weightings produced fairly similar results. The total U.S. incarceration rate in 1980 was about 1.5 times the French rate; the U.S. rate for convicted inmates alone was about 1.9 times greater. See Frase 1990, *supra* note 1, at 657-58.

⁷ See Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 Cornell J. L. & Pub. Pol. 279, 332 n. 120 (1993) (in Minnesota in 1988, jail terms of one year or less accounted for 73% of the custody terms imposed in felony cases; nationwide, jail terms comprised only 36% of felony custody sentences in 1988).

⁸ See Young & Brown, *Cross-National Comparisons of Imprisonment*, 17 Crime & Just. 1, 10-11 (1993); Frase 1990, *supra* note 1, at 657 n. 610.

⁹ As in the United States, parking and other very minor violations are charged by citation, and punished with pre-set or “scheduled” fines. These fines are normally paid without any court hearing or other case-specific court decision. See Frase 1988, *supra* note 1, at 31; Frase 1990, *supra* note 1, at 646-47.

¹⁰ The revised French penal code, effective since March 1, 1994, eliminated the possibility of a custody sentence in all contravention cases, except for willful non-payment of fines or non-performance of required community service. Code Pénal, arts. 131-12 to 131-18 & 131-25 to 434-42.

¹¹ The maximum number of day fines that may be pronounced is 360, and the maximum value of each day fine is 2,000 francs (about \$400, at current exchange rates).

¹² Code Pénal, arts. 131-3 to 131-11.

¹³ *Id.* arts. 131-1 to 131-2.

¹⁴ See Frase 1988, *supra* note 1, at 33.

¹⁵ Code Pénal, arts. 132-58 to 132-70.

¹⁶ See Frase 1990, *supra* note 1, at 649. Under the revised Code Pénal these property crimes are defined in arts. 311-3, 311-4 & 314-1 to 441-1. French prisoners are eligible for parole after serving half of their sentences (two-thirds, for certain recidivists), and both the minimum and maximum terms are reduced by good-time credits of up to three months per year.

¹⁷ Code Pénal arts. 132-18 to 132-23 (all penalties may be mitigated; life sentences may be reduced to as little as two years, which can then be suspended, with or without probation; sentences of ten years or more must include a “surety” period one-half the maximum term; 18 years for life sentences, during which defendant may not be paroled or otherwise released; in exceptional cases, however, the court may lengthen or shorten this period). Prior to 1994, the Code set presumptive minimum prison terms for crimes and délits, with enhanced minimums for certain recidivists. See Frase 1988, *supra* note 1, at 34-36.

¹⁸ See Frase 1988, *supra* note 1, at 32; Code Pénal, arts. 132-2 to 132-7. An exception to this rule permits cumulative fines for multiple contraventions.

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¹⁹ Code Pénal, arts. 132-8 to 132-11.

²⁰ Code Pénal, arts. 133-12 to 133-17 (fines are expunged after 3 years; most other penalties can be expunged after five or ten years, depending on the penalty).

²¹ Code de Procédure Pénale, arts. 782 to 799.

²² Code Pénal, arts. 133-9 to 133-11; *see also* Frase 1988, *supra* note 1, at 39-40. Amnesty statutes are no longer limited to political crimes or periods of unrest. Rather they cover a wide variety of minor crimes, and have a major, albeit temporary, impact on custody populations and court caseloads—the latter declined by over 35%, following the 1981 Presidential Amnesty.

²³ *See generally* Frase 1988, *supra* note 1, at 20-21; Frase 1990, *supra* note 1, at 669-72.

²⁴ In addition, an unknown (but probably much larger) number of traffic and other very minor violations were handled by the payment of a pre-set or "scheduled"

fine, without any court hearing or case-specific decision. *See supra* note 9.

²⁵ Under the penal order procedure, the defendant agrees to pay a fine set by the court, and the case is then closed without a trial. *See* Frase 1988, *supra* note 1, at 31.

²⁶ Min. de la Justice, *Annuaire statistique de la justice*, 1987 123 (359,533 defendants were fined and 613 (.17%) were incarcerated in 1983)(1989). Such custody terms could not exceed one month (two months, for certain recidivists). *See* Frase 1988, *supra* note 1, at 2.

²⁷ The subsequent sections draw heavily on Frase 1990, *supra* note 1.

²⁸ 35. Cf. Frase & Weigend, German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?, 18 *Bost. Coll. Int'l. & Comp. L. Rev.* at n.210 (forthcoming 1995) (generous welfare benefits encourage use of fines in Germany).