

## Forward

Michael H. Tonry

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>

---

### Recommended Citation

Michael H. Tonry, *Forward*, 42 Md. L. Rev. 1 (1983)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol42/iss1/5>

This Editorial Section is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

# Maryland Law Review

---

---

VOLUME 42

1983

NUMBER 1

© Copyright Maryland Law Review, Inc. 1983

---

---

## FOREWORD

MICHAEL H. TONRY\*

This comparative criminal justice symposium offers readers of the *Maryland Law Review* an opportunity to learn more about the criminal process in three industrialized Western European countries—England, France, and West Germany—and perhaps thereby to gain new insights into our own institutions and practices. It also provides, in the first article, an overview of trends in the American criminal justice system, which informs our comparison.

The symposium contains four articles. The first, by Andrew von Hirsch, was originally written for a German audience and so reveals that extra caution and concern for clarity that often results when we try to describe our own institutions to people of other countries and languages. Von Hirsch's essay traces the development of theoretical and jurisprudential thinking in the United States about the purposes of the criminal law and punishment. Modern criminal laws and institutions, in most states, are premised on a rehabilitative approach to sentencing and the need to facilitate individualized punishment decisions. Maryland, for example, has an "indeterminate" sentencing system in which the lengths of prison sentences cannot be known until prisoners are released. Statutes often do no more than declare that sentences not exceed a maximum length, usually far above the sentences generally imposed or served, thus offering judges little guidance.<sup>1</sup> Although the prison sentence announced by the judge imposes some limits, it is typically the parole board that sets release dates. And prison officials, in a variety of ways, also can influence how long a prisoner remains a pris-

---

\* Professor of Law, University of Maryland.

1. See Weigend, *Sentencing in West Germany*, 42 MD. L. REV. 37, 45-46, 47 (Table I and Table II) (1983).

oner.<sup>2</sup> All of these discretions—judicial, parole board, correctional—were designed in part to permit each successive decisionmaker to tailor punishment to the offender's rehabilitative needs and to make predictions about the extent to which he has been rehabilitated and will desist from further crime in the community.

Von Hirsch describes the rise and fall of the rehabilitative ideal, and the development in the 1970's of several alternate rationales for punishment: a retributive "just deserts" rationale, with which von Hirsch himself is identified;<sup>3</sup> an "incapacitative" rationale, often associated with Harvard's James Q. Wilson;<sup>4</sup> and a "neopositivist" rationale, reflected in the writing of Norval Morris<sup>5</sup> and in the Sentencing Standards of the American Bar Association,<sup>6</sup> in which retributive considerations play some part in the determination of sentences, but not a major one.

Von Hirsch's article provides a useful introduction to those that follow, for it exposes the premises and principles that are presented when we think seriously about the roles of the criminal law and punishment in a free society. Dilemmas concerning the relations among an offender's moral culpability, deserved punishments, and crime control considerations reverberate through the three other essays. Conceptual and theoretical developments in the United States are paralleled by developments in France, England, and West Germany. The rise and fall of the rehabilitative ideal in the United States described by von Hirsch is not unlike the experience of the rehabilitative "social defense" movement in France and its displacement in recent years by a more punitive ideology. Changing views of the purposes of punishment also have shaped developments in England and West Germany.

The three essays on Germany, England, and France critically describe the criminal process in those countries. Thomas Weigend, an American law specialist at the Max-Planck-Institut for International and Comparative Law in Freiburg, West Germany, discusses the laws, practices, institutions, and theories that shape prosecution and sanc-

---

2. For example, by awarding, denying, or withdrawing good time (time off for good behavior), or by supporting or opposing prisoner parole applications, prison officials can significantly affect sentencing length. In addition, prison officials' power to authorize furloughs, participation in work release programs, and placement in local community facilities can affect a prisoner's stay of incarceration. See Note, 48 *FORDHAM L. REV.* 1067, 1083-86, 1091-92 (1980) (describing prison officials' discretion). See generally H. Hoffman, *PRISONER'S RIGHTS—TREATMENT OF PRISONERS AND POST-CONVICTION REMEDIES* (1976).

3. See VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976).

4. See J. WILSON, *THINKING ABOUT CRIME* (1975).

5. See N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974).

6. See AMERICAN BAR ASSOCIATION, *TASK FORCE ON SENTENCING ALTERNATIVES AND PROCEDURES, ALTERNATIVES AND PROCEDURES* (2d ed. 1979).

tioning in that country. David Thomas, of the Institute of Criminology at Cambridge University, discusses public prosecution, sentencing, and parole in England and Wales, reviewing also the historical origins of the modern English system and the range of sentencing choices available to judges. Edward A. Tomlinson, of the University of Maryland School of Law, takes a somewhat different approach in his description of the French system. He examines criminal investigation, public prosecution, and the trial of criminal cases in comparing the relative efficiency and justice of American and French practice.

These three essays demonstrate that countries with which we share fundamental political, moral, and philosophical values handle the problems of crime and punishment by means that appear to differ dramatically from our own. For example, plea bargaining, so common a feature in American criminal courts, is virtually non-existent in Germany and France, and exists in England only as a modest, judicially-recognized "guilty plea discount" and a pale analogy known as "fact bargaining." Additionally, parole release plays a much smaller role in Europe (England did not establish parole release until 1967) than in the United States. And constitutional and statutory protections of defendants' rights offer fewer constraints on investigation, public prosecution, and adjudication.

The manner in which these countries select their criminal justice officials also differs markedly from that of the United States. Except at ministerial levels, public prosecution is largely divorced from elective politics in all three countries. Prosecutors in England are police department employees, national civil servants, or local lawyers engaged on a case-by-case basis. Also in contrast to the United States, where state judges tend to be selected in political elections and federal judges are appointed by the President according to traditions in which partisan politics play no small role, German and French judges are career civil servants. And English judges, although selected by officials who are political appointees, are neither subject to electoral approval nor so closely examined on political grounds as in the United States.

Whether the different institutions and traditions reduce crime, or whether they result in a higher or lower level of substantive justice, are matters of disagreement. Indeed, American commentators in recent years have debated whether these differences are only surface-deep. Former Yale Law School Dean Abraham Goldstein and colleagues have argued that French, Italian, and West German institutions only appear to permit judicial control of police investigation and to preclude the exchange of guilty pleas for sentencing leniency. Instead, they argue, the actual operation of the criminal justice systems in those coun-

tries closely resembles our own practices.<sup>7</sup> Professors Lloyd Weinreb of Harvard Law School and John Langbein of the University of Chicago Law School, on the other hand, have argued that French and West German institutions deliver justice promptly, efficiently, and at lower cost than in the United States and at a level of substantive justice at least as high.<sup>8</sup>

This foreword, of course, is not the place to resolve these debates. What is important is that these analyses of the criminal processes of these three liberal democratic countries are particularly pertinent to our consideration of the reform efforts and proposals to which the criminal justice system in America has been subject for at least the last twenty-five years. In the 1950's and 1960's the principal law reform efforts, inspired by the Model Penal Code, were addressed at modernization and rationalization of the substantive criminal law.<sup>9</sup> A majority of American states have adopted new criminal codes in the last two decades and efforts at federal criminal law codification have been under way since the late 1960's.<sup>10</sup> In the 1960's and early 1970's, the focus of reform efforts shifted to criminal procedure, as expressed by the Supreme Court's constitutionalization of state criminal procedure<sup>11</sup> and the American Law Institute's development of a Model Code of Pre-Trial Procedure.<sup>12</sup> In the mid-1970's the focus shifted again, this time to the institutions of criminal justice—the prosecutor's offices, the courts, the parole boards—and consisted of various efforts to limit or eliminate discretionary powers of public officials such as plea bargaining bans or guidelines, sentencing guidelines, mandatory and presumptive sentence laws, parole abolition and guidelines.<sup>13</sup>

Each of the articles in this symposium is relevant to thinking about modern reform proposals. Edward A. Tomlinson reviews how the French legal system accomodates the conflicting interests of the state in solving crimes and in protecting individual rights and liberties, and concludes that French efficiency may be purchased at too dear a price

7. See Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977).

8. See Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978).

9. See MODEL PENAL CODE (Proposed Official Draft 1962).

10. See Schwartz, *Reform of Federal Criminal Laws: Issues, Tactics, and Prospects*, 41 LAW & CONTEMP. PROB. 1 (1977).

11. See Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

12. MODEL PENAL CODE OF PRE-ARRAIGNMENT PROCEDURE (Proposed Official Draft 1975).

13. For a recent review, see von Hirsch & Hanrahan, *Determinate Sentencing in America: An Overview*, 27 Crime & Delinq. 289 (1981).

in terms of individual rights. Few who read the article will be able to avoid pondering its relevance to recent efforts to abolish or to modify the exclusionary rule and similar prophylactic rules designed to give meaning to American constitutional protections. The articles by Tomlinson and Weigend suggest (as does recent experience in Alaska<sup>14</sup>) that modern states can prosecute criminals without resort to plea bargaining and perforce present the question whether criminal law administration should be removed from partisan politics and placed in the hands of professional civil servants. The Thomas and Weigend articles describe systems in which announced prison sentences are not inflated to anticipate their later reduction by parole boards and pose the question whether parole boards are a necessary feature in a humane system of criminal law administration. Thomas's article describes a system of appellate sentence review that is among the most developed in the world and demonstrates (as does recent experience in Minnesota<sup>15</sup>) that appellate judges, given encouragement, effectively can review the sentencing decisions of trial judges to determine whether the sentences they impose are even-handed and reasonably consistent.

Many intriguing questions—and perhaps some answers—about American procedures are presented by these articles. For example, I favor retention of the exclusionary rule, the abolition of plea bargaining and parole, the professionalization of public prosecution, and the establishment of meaningful, non-deferential appellate sentence review. But where I see suggestions in these articles that other countries' experience supports my reform agenda, others may find cautionary indications. No reader who is interested in systems of criminal law, however, can fail to be stimulated by these articles to think about their implications for understanding our own institutions.

---

14. See M. RUBENSTEIN, S. CLARK & T. WHITE, ALASKA BANS PLEA BARGAINING (1980).

15. Knapp, *Impact of the Minnesota Sentencing Guidelines on Sentencing Practices*, 5 HAMLINE L. REV. 237 (1982).