Types of Punishment

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Abstract and Keywords

This chapter discusses different types of punishment in the context of criminal law. It begins by considering the four most common theories of punishment: retribution, deterrence, rehabilitation, and incapacitation. Attention then turns to physical punishments, with an emphasis on the death penalty, and removal of an offender from a territory through banishment. It also examines imprisonment as a form of punishment, along with probation and community supervision, the establishment of drug courts aimed at rehabilitating instead of incarcerating (nonviolent) drug offenders, and financial sanctions or fines. The chapter concludes by explaining integrative and disintegrative sanctions, preventive sanctions, and collateral sanctions.

Keywords: punishment, criminal law, retribution, deterrence, rehabilitation, incapacitation, death penalty, imprisonment, probation, sanctions

I. Introduction to Types of Punishment

*THE punishment regime of a country tends to be closely connected to its political and economic structure. Neoliberalism, for example, has been tied to high imprisonment rates; high welfarism within a social democratic structure appears related to a less punitive penalty regime. While the former focuses on individual responsibility—for success and failure—and accountability, the latter has traditionally emphasized social conditions to a larger extent. Nevertheless, in many countries the fear of crime and a greater emphasis on the potential for crime, combined with widening social inequality and concerns about immigration and terrorism, have led to harsher penalties.

A host of individual, organizational, and governmental actors have imposed and executed punishments for actual or perceived rule violations. With the development of the modern state, the imposition of punishment has been centralized in the state (or state-like entities) and its agencies, though it may also emanate in a regulated manner from private individuals, such as parents; private organizations, including schools, companies, and nongovernmental regulatory bodies; and religious (p. 942) authorities, with the latter having played a crucial role in the infliction of punishment for centuries, either alone or in conjunction with worldly authorities.

State-imposed punishments following the commission of an offense have varied dramatically over time and in different societies, with countries adopting, rejecting, and refining types and structures of penalties. Criminal punishments follow on from conviction and are imposed at sentencing, which may take the form of a separate hearing or be an integral part of the conviction. The modern administrative state also allows for a wide array of civil and regulatory punishments, imposed for violations that do not amount to a criminal act. In some cases such sanctions may be imposed instead of a criminal penalty though long-term ramifications often differ dramatically, with criminal convictions frequently restricting an offender's post-sentence opportunities because of the existence of a criminal record, which is increasingly more difficult to conceal or erase. The primary focus of this chapter will be on criminal punishment, though some types of sanctions—fines, for example—may be identical in the civil, regulatory, and criminal context, albeit labeled and perceived differently.

In the criminal realm, not all sanctions will be imposed after a formal finding of guilt. Occasionally, sanctions may be negotiated between prosecution and defense counsel so that a case can be dismissed before formal adjudication, assuming the conditions of the sanction have been fulfilled. In many cases, such diversionary sanction takes the form of monetary payment or community service, and its fulfillment allows the offender to avoid any criminal record. Restrictions may also result from police action, such as the English "warning," which will generally be recorded but not be part of an official record unless a subsequent violation of the conditions or a further infraction ultimately lead to a formal judicial sentence. In domestic violence cases in which a civil court imposes a no-contact order, its violation may even automatically lead to a criminal justice sanction.

Over time and space different theories of punishment have animated the imposition of criminal justice sanctions. The four most prevalent such approaches are retribution, deterrence, rehabilitation, and incapacitation.

II. Punishment Theories

At least until the late eighteenth and even the early part of the nineteenth centuries, most punishment was designed to impact the physical body, usually through the public infliction of physical injury, or what we would today generally deem to be "torture."[1] (p. 943) These punishments included flogging, branding, quartering, tarring and feathering, and standing in the stockade. If not leading to a painful death, they were designed to scar and mark the offender permanently as a criminal. Executions were staged in the form of a public spectacle, often as a religiously motivated retributive sanction, combined with a deterrent function. The latter impact was doubtful, however, as the famous English painting of pickpocketing at a public execution of thieves implies.

Forfeiture usually accompanied other punishment, which included declaring someone an "outlaw," a status that virtually equated to death. This was inflicted on those who held landed property, especially in cases of treason and other high crimes. Punishment, therefore, directly and intentionally impacted not only the offender but also the offender's family (and community). Threat of that punishment, combined with religious condemnation, may have exerted social coercion and imposed social control well beyond the danger of excruciating physical punishment. Overall, these types of sanctions were designed to punish the offender and deter others; the governing assumption being that the offender was irredeemable. Even though the Biblical command of "an eye for an eye" was no longer in effect, retribution remained a governing approach. The king retained the royal prerogative, namely to dispense mercy in the form of a royal pardon.

With its origin in the Quakers' belief in redemption and the corrigibility of the offender, the prison began its ascent from the late eighteenth and early nineteenth centuries. It supported replacing the public spectacle of physical punishment with a more shrouded, more spiritually focused sanction.[2] Indicative of the change was the noticeable diminution of the application of the death sentence in Europe and the United States, and its abolition in Latin America in the late nineteenth century. At the same time, England pioneered the probation sanction which allowed for a prison sentence to be served within the community. Incapacitation was no longer the ultimate goal; a strong belief in redemption began to take hold.

Since World War II human rights conventions, explicating international and regional norms, have further limited acceptable types of punishment. They generally condemn physical punishments, albeit initially excluding capital punishment. Some religiously dominated countries, however, continue to use them—some schools of Islamic law, for example, permit select removal of limbs as punishment for theft and stoning as a punishment for adultery. Under strict religious interpretations, however, imposition of such punishment demands heightened evidentiary proof. Even though those proof requirements are frequently not met, the Islamic Republic of Iran and Saudi Arabia, for example, have reinstituted—or never abolished—such traditional Islamic sanctions.

In highly industrialized countries, physical punishments are being replaced with other sanctions that allow for control over the offender even outside the (p. 944) direct supervision of the state, usually with the assistance of modern technology, including GPS systems. Concerns about recidivism and extensive demands for public safety, drive increased levels of supervision and control. Attempts to predict reoffending more accurately, often through actuarial risk assessments, have become more important as preventive efforts to proactively avoid victimization. Such risk assessments, however, may lead to a greater emphasis on incapacitation, especially when rehabilitative efforts appear ineffective or too costly.

Despite the increasing proliferation of sanction types, punishment theories have remained amazingly stable: retribution or desert (what the Canadians often call denunciation), deterrence, rehabilitation, and incapacitation remain the four dominant approaches, with restorative justice as a relatively new addition at least in most Western countries, though it has always been pronounced and important in more traditional societies.[3] Even though the overall explanatory constructs resemble each other, in different countries the same sanction may have very different penological justifications, depending on the way it is imposed and the type of offender upon whom such a sanction is inflicted. Perhaps even more importantly, the weight assigned to penological justifications will differ over time and between countries and sometimes perhaps even within a courthouse.

German legislation details which punishment purpose to privilege and how to evaluate the other purposes in similar cases. Canadian judges consider all sentencing purposes to be of equal value, generally assuring that sentencing remains relatively stable. Even though most U.S. sentencing legislation also lists all four purposes equally, changes in public opinion and political discourse and action have caused substantial differences in the approach to sentencing, especially in the last 40 years during which a noticeable shift from rehabilitation to a just deserts focus, with incapacitation as a secondary goal, has occurred. In addition, other goals may play a role in the approach to sanctions, such as a legislative desire for a decrease in judicial discretion, often to reduce disparities along racial and socioeconomic lines. This goal played a substantial role in the adoption of sentencing guidelines in the United States, on both the state as well as the federal level. In addition to public sentiment, budgetary considerations may drive sentencing options, often leading to a reduction in the more expensive imprisonment option in favor of community-based sanctions.

The array of available sanctions is generally determined legislatively, though it often leaves the court with broad discretion. That discretion may be limited when legislatures set out mandatory minimum sentences or provide guiding maxims, such as the German "Therapy before Punishment," mandating drug and alcohol treatment instead of imprisonment. Some sanctions or consequences may also flow automatically from a conviction without being imposed **(p. 945)** by the court. Those are considered collateral sanctions,[4] which often serve, though not always, an incapacitative function to protect the public. Additional punishment and restrictions may flow from judicially imposed sanctions, such as those levied by administrative agencies, civil courts, or regulatory bodies. Their functions tend to vary substantially but can include traditional punishment motives.

Punishment has moved on from the crude impact on the body to the heart and spirit and now focuses on control over movement and increasingly the mind. With a heightened emphasis on risk assessment, the likelihood of penalizing offenders for longer periods of time than necessary continues, especially when the hope is for the total exclusion of future offending—an illusory certainty. As technological advances facilitate supervision beyond incarceration, breakthroughs in biology and gene technology may lead to enhanced predictive capacities for future offending. Whether that will make for a better society, however, remains to be determined.

Punishment tends to center on the offender, with the goal of balancing the harm inflicted on society and perhaps avoiding future offending. However, other values outside the narrow focus on the offender may play a role in sanctioning. In some countries, the impact of a sentence on the family and the community of the offender will effectively play a larger role than in others, either with respect to the type of sentence chosen, the length of imprisonment, the start date of a prison term, or in other ways. Considerations of sentence ramifications on other family members, such as the German law's permission to delay the start date of a prison term, tend to be limited to extraordinary circumstances. In addition, in rare cases may they be formally included in law, such as the prohibition on the execution of a pregnant woman under international human rights treaties or the extension of such prohibition to a nursing mother in some countries.

Even though in some civil law countries the victim has her own representative and, therefore, can directly defend her rights, that is not the case in many other countries, including the United States. Here the state must represent the victim which has led to the creation of a victims' rights movement, with the goal of enhancing the influence a victim may have, among other things, on the plea negotiated, the sentence imposed, in part through direct participation in the sentencing hearing, or the parole release decision. The goal of such involvement is to change the focus from the offender back to the offense and the harm inflicted on the victim. Effectively, this emphasis may have led to greater harshness, often without enhanced emotional or financial satisfaction for the victim. (p. 946)

The discussion that follows will cover the panoply of sanctions widely available, starting with those considered the harshest. It begins with a focus on directly imposed sanctions but also includes so-called collateral sanctions.

III. Physical Punishments

In Western democracies most physical punishments have been outlawed in recent decades as formal sanctions, and many have been declared torture, and therefore violating human rights obligations. That is undoubtedly true for punishments that, not too long ago, were clearly permissible, including lashings and floggings. The use of torturous actions has recently been debated in the context of terrorist cases. Governments either tend to dissociate themselves from torturous conduct or declare it not punitive but rather investigatory or preventive.

Some forms of pure Islamic law, currently used by select states or state-like organizations in the Middle East and Asia, allow for the amputation of limbs upon commission of a crime of theft, often in medicalized procedures. Adultery has led to the imposition of stoning sentences. International human rights commentators have condemned such sanctions. Most of Islamic criminal law, however, is not religiously proscribed and therefore resembles that in other parts of the world.

The last remaining physical punishment that still remains in relatively wide use is the death penalty, with China as the likely leader in its application. In the United States, the method of the execution of the death penalty has changed over time, with a heightened focus on medicalized means, such as lethal injection, that has replaced hanging, shooting, and increasingly the electric chair. The change in methods partly resulted from litigation, which focused on the humane imposition of the death sanction, in part from pressures on those assisting, directly and indirectly, with the execution of this sentence. Recent challenges to the drugs used in lethal injections and the refusal of European pharmaceutical companies to provide U.S. states with these drugs has slowed down the number of executions in many U.S. states yet further.

The death penalty, when used, is also no longer a public spectacle and is instead inflicted behind prison walls in front of a small group of spectators. In Australia, public executions were largely banned in the nineteenth century though they remained permissible for aboriginal offenders for longer periods, in part for deterrent, in part for "civilizing," purposes. In Japan even the offender's family tends not to be informed of the time of execution, shrouding the event in absolute secrecy, in conflict with human rights demands. (p. 947)

In many Latin American and European countries the death penalty fell into increasing disuse and was already outright rejected in the nineteenth century. The impact of human rights norms, accelerating after World War II, has led to growing restrictions and ultimately the abolition of the death penalty in scores of countries around the world, often mandated in new constitutions, or judicially or legislatively imposed. Regional and international conventions affirm the abolition of the death penalty the reinstatement of which, even in the wake of horrendous crimes, would come with a high international cost.[5] The growing international consensus against the death penalty has hampered international relations and cooperation in criminal matters with countries in which a potential offender might be threatened with death as countries have refused to extradite or deport offenders to such states and have even denied judicial collaboration in some cases.

In the United States and many other countries around the world, the death penalty remains, though the number of death sanctions imposed and executed has declined over the years. While in the nineteenth century a host of offenses required a death sanction, mandatory capital punishment is on the wane. National and regional tribunals, including the English Privy Council and the U.S. Supreme Court, have taken a strong stance against it, requiring that an individual's background and the facts surrounding the commission of the offense are carefully evaluated before the ultimate sanction is imposed. In addition, the scope of offenses for which capital punishment is an available sanction has narrowed. In the United States, for example, the death sentence is no longer available for rape, including child rape, and must always include the taking of life. However, other countries, such as China, have expanded the use of the death sentence to white-collar property offenses, generally in the corruption arena.

Other developments, especially in the United States, have most recently contributed to a stark decline in the imposition of the death penalty. One factor has been the availability of life-without-parole prison terms, another the perceived high litigation and imprisonment cost of such sanctions.

One of the starkest indictments of the death penalty stems from an inherent racial—and socioeconomic—disparity. In the United States, African Americans are overrepresented on death row and the same holds true for Native Americans. In Australia and New Zealand, historically aboriginal people were disproportionately subject to such sanctions; a disparity that continues to be reflected in imprisonment rates.

Most importantly, however, the innocence movement in the United States has highlighted serious concerns about the accuracy with which the sanction has been imposed. With the advent of DNA testing, a number of inmates have been released (p. 948) from death row after their claims of innocence were proven to be accurate, or at least their guilt could not be sufficiently proven in a court of law.

Ultimately, the death penalty has been a powerful indicator of the strongest disapproval of an offense but has also symbolized society's disbelief in an offender's ability to change. That belief in irredeemable moral failing is replicated in other ways throughout a criminal justice system, including often through banishment and other types of removal.

IV. Removal

The most direct form of removal of an offender from a territory occurs through banishment. Banishment had been a long-standing form of punishment which often turned the offender into an outlaw in his own country. Throughout the eighteenth and nineteenth centuries, many British colonies received offenders who had been banished from their homeland. This previously frequently used sentence is no longer available to countries because of the generally constitutionally guaranteed rights of citizens not to be removed from their home countries, which is also enshrined in modern human rights treaties. While banishment was a harsh sanction as it terminated all connections to an offender's family and community and often ended in death during transportation, many offenders established themselves successfully in the colonies where they provided needed labor. In the end, it allowed an offender to reinvent herself entirely.

While the old form of banishment no longer exists, modern societies have developed different forms of banishment, often even imposed before a criminal conviction occurs. Today many countries deport non-citizens back to their country of origin/citizenship upon commission of a crime, although the circumstances under which such deportations may occur vary. In European countries, long-time residency status, employment, and family status weigh heavily in favor of the offender's right to remain even if the crime(s) committed are relatively serious. The same holds true in Canada. Mandatory removal based on conviction for a specific crime is impermissible. The United States, on the other hand, currently requires such removal even for long-term legal residents who have committed specific crimes, including some relatively minor offenses. Discretionary removal is available for a more extensive array of crimes, with immigration courts having the authority to consider an offender's personal circumstances, at least to some extent.

Deportation may be part of the criminal court's portfolio and will then be treated as a sanction component. On the other hand, a decision on deportation may be (p. 949) made separately from the imposition of the criminal justice sentence even though it may flow directly from the adjudication of guilt or the type of sentence imposed. In the United States, the latter is currently the case, with deportation treated as a collateral sanction, which has traditionally not been subject to the attendant procedural protections in the criminal justice system. In its 2010 decision in *Padilla v. Kentucky*, however, the U.S. Supreme Court seemed to break with its prior case law when it required criminal defense counsel to inform her client of at least one collateral consequence—removal—when advising on whether to accept a guilty plea.[6] The Court singled out deportation as a particularly serious consequence as it would end a defendant's life in the United States and would separate the alleged offender, perhaps forever, from friends and relatives. This development appears to be the Court's (limited) reaction to the devastating consequences of criminal removal not only on the individual offender but also on her family and community.

Banishment historically pursued a twofold approach: it assured those left behind that the offender could no longer victimize them, while it allowed the offender a fresh start—assuming he or she survived the passage. Modern banishment may be less reassuring at least on the latter count as receiving countries are frequently unwilling to provide the deported offender with a fresh start, even putting aside the inability of the offender to avail herself of that opportunity, often in light of lack of relevant language skills, connections, or employability.

At least as practiced in the United States, imprisonment serves as an additional form of banishment, with prisons often located far from major metropolitan areas and with the offenders held there in many cases merely to incapacitate them until their (likely) release.

V. Imprisonment: Modern Banishment?

Prisons for purposes of punishment are a relatively new invention. Traditionally European governments had reserved this form of detention for high-status detainees until they were released or died. Today it has become a prevalent form of punishment in many countries, though some use it substantially more than others. Per capita, the United States is the world leader in imprisonment.

Other types of facilities may increasingly resemble prisons, though they fulfill different purposes. Pretrial detainees are not under a formal criminal justice sanction but are held for preventive reasons or out of concern that they might otherwise (p. 950) flee. Immigration detainees include those presumptive non-citizens held subject to an assessment of their immigration status or held until they can be removed from the country because of lack of an official immigration status or because of an underlying criminal conviction. Mental health facilities, including those housing criminal offenders, are ostensibly focused on treatment and rehabilitation. The latter may, however, be an illusory promise as German psychiatric experts have found after offenders were sent to such facilities rather than being sentenced to prison. Over the last two hundred years, the growth of prisons for punishment purposes has accelerated, in part replacing other institutions, such as almshouses.

Prison construction and prison locations are indicative of the guiding philosophies behind them, with the United States having pioneered the building of so-called super-max prisons for the most dangerous offenders—facilities that are often considered inhumane. England, Australia, and the United States have turned not only prison construction but the management of prisons over to private, for-profit corporations. While the concept of prisons was originally religiously animated and grounded in theories of rehabilitation and redemption, over time prisons began to reflect different philosophies. In the Southern United States, for example, prisons began to resemble slave plantations; in England they often reminded one of workhouses for the poor; and in Germany they tended to be more similar to the fortress detention of high-status political offenders.

In the United States incapacitative concepts and just deserts seem to have replaced rehabilitative philosophies, which were prevalent up to the mid-1970s. The sole sentence limit is implicit in the Eighth Amendment, which prohibits cruel and unusual sanctions. European countries, however, remain governed by concepts of sentence proportionality requirements and the notion of human dignity, which have largely prevented the adoption of the same types of long sanctions so prevalent in the United States, and have kept prison populations in check. With time and in different societies, penological justifications for imprisonment have changed, resulting in widely different prison capacities. Even Canada, which had been contrasted with the United States, has noticed a marked stiffening of its penal climate. The adoption of actuarial risk assessments there has led to a dramatic increase in the prison population. In addition, some have argued that risk assessments further serve to exclude those already marginalized as some of the relevant risk factors, such as employment before commission of the offense, are closely tied to deprived life situations.

The imposition of a prison sentence and the way in which it is served may differ. Some countries have adopted mandatory (minimum) prison terms for certain offenses, while in others courts operate with discretion within a broad sentencing band. The sentence imposed and the sentence served may differ. German law connects early release to the type of offense committed, the offender's prior record, and the length of sentence imposed. In the United States, many parole boards consider the crime committed in conjunction with behavior while imprisoned and a set of risk-assessment factors to determine the specific release date. Generally, (p. 951) parole boards may consider an offender who has served one-third of his time and mandate release after no more than two-thirds of the sentence has been served. Indeterminate sentences allow for discretion at the back end, in addition to the judicial discretion at the time of conviction and sentence imposition. Such indeterminate regimes differ from determinate ones in which the length of the sentence imposed closely reflects the time served, perhaps subject to some limited deduction for good behavior.

The length of prison terms imposed in the United States may be misleading as the actual time served often resembles more that imposed in other countries. This is especially true in jurisdictions that have used so-called “good (earned) time” sentence deductions granted for good behavior to reduce their prison populations. Earned time and parole release, together and separately, can and have functioned as effective means to decrease prison overcrowding but have also triggered public and political backlashes when it became obvious that the sentences imposed and time served bore no relationship, and often the discount awarded was highly discretionary and not predictable to the prosecution or the court.

Many U.S. states and the federal system have replaced their indeterminate regimes, which were a product of a rehabilitatively based system, with determinate sentences and sentencing guidelines. Different jurisdictions have structured these in various ways but their core characteristic is that judges work with a much more limited range of sentences than statutorily permitted, must provide an explanation for the specific term chosen, and are subject to more searching appellate review. Frequently, the sentence range is determined through a grid system that considers offense characteristics and an offender’s prior criminal record. The former consists of a host of quantifiable factors, which appear, however, in some cases unrelated to the offender’s actual culpability. The goal of guidelines has been to cabin judicial discretion and to assure greater consistency to avoid inappropriate disparity, especially if based on an offender’s race.

U.S.-style guidelines have found few adherents abroad. While England also has a sentencing guidelines system, it has not adopted a grid and instead courts must follow a series of steps when determining a sentence and are granted relatively broad discretion to depart from a presumed sentence when it appears to be in the interests of justice to do so. This indicates that other countries appear either less concerned about judicial discretion or have developed different institutional mechanisms to restrict disparity. Narrower sentence ranges, more stringent appellate review, greater identical professional socialization of judges, may all contribute to these differences.

In addition to a straight prison term, courts may impose more targeted detention sentences. While used only rarely in some U.S. jurisdictions, courts may impose intermittent custody, including weekend incarceration, especially when a young nonviolent first offender might otherwise lose employment. Shock incarceration is also occasionally imposed, especially on younger offenders who should experience (p. 952) prison but should not be exposed to its degrading features and crime-generating potential for any length of time. In addition, the United States pioneered the boot camp concept, which was based on a military-style training model, generally designed for younger men. Despite initial enthusiasm, boot camps have increasingly fallen into disuse because of abuse that occurred in them and because of their limited impact on recidivism. In many countries, release from prison—or a prison-type facility—for the purposes of outside work or for weekend leave is possible toward the end of a sentence to facilitate reintegration and adjustment to life outside prison.

A combination of determinate sentencing combined with a proliferation of mandatory minimum sanctions for drug and weapons offenses and public demands for punitiveness led to the unprecedented prison built-up in the United States. The United States became the leader in imprisonment, although it remains disputed whether the increase was primarily due to longer sentences or to an enhanced number of prison admissions. In light of the economic downturn following the 2007/08 housing and financial crisis, many U.S. states had to develop alternatives to imprisonment to halt the growth in incarceration or decrease overall imprisonment numbers. While some states have experienced a dramatic decline in imprisonment, in others—and especially in the federal system—the number of inmates has continued to climb. Overall, prison population numbers are stagnant.

The length of prison terms as compared with the impact of the prison experience has been subject to dispute in European countries. During the 1970s Germany, for example, moved away from short prison terms because of their disruptive effect on the offender's work and family life. Instead such sentences were suspended. Other countries, such as the Netherlands, however, favor very short, six-month sentences, presumably because of their deterrent influence.

Many European countries impose long sentences on those convicted of transporting and selling illegal narcotics and often these sentences seem comparable to those imposed in the United States. Nevertheless, the concept of average and median sentence length varies dramatically, and the sheer classification of short, medium, or long prison terms often conceals dramatic differences.

Life terms have increasingly come under scrutiny. Life sentences in Germany, for example, rarely mean a life-long sentence but presumptively end with release upon parole after 15 to 18 years. Most European and Latin American countries constitutionally reject the concept of life-without-parole sentences because of their deeply ingrained belief that even the most depraved offender can change and should such change occur must be rewarded with release. On the other hand, the United States has dramatically expanded life-without-parole sanctions. Juries tend to opt for this sentence as a safe and less costly alternative to the death penalty and prosecutors and judges favor it as it promises public safety. Recently the U.S. Supreme Court has held that it cannot be imposed on juveniles in non-homicide cases and cannot be mandatory in homicides committed (p. 953) by someone aged under 18.[7] International opposition to the sanction is increasing, and some have predicted that it will be the next frontier in the abolition of inhumane penalties. In the end this debate reflects a wider discourse on limits on punishment, a conversation in which the United States has not participated as the U.S. Constitution focuses on "cruel or unusual sentences" rather than on proportionality, a requirement the Supreme Court has not read broadly into the Eighth Amendment.

The Eighth Amendment to the U.S. Constitution has provided only loose guidance with respect to limits on punishment, with the Court focusing largely on specific population groups, such as juveniles, and the death penalty. In Europe the European Court of Human Rights has provided some guidance on sentencing as have various U.N. documents. Proportionality and human dignity are also enshrined in many countries' constitutions, thereby guaranteeing additional and more effective limits on excessively long prison terms.

Prison release may be a function of executive privilege and in common law countries takes the form of parole, a discretionary release with substantial obligations. Should the parolee violate the rules of parole or commit a new crime, the parole period may be rescinded and the offender will have to serve the remainder of his prison time. In civil law countries, the notion of parole also exists though it is often a judicial tribunal that oversees the execution of the sentence and ultimately determines release.

Prison release may also take the form of outright expiration of a sentence, in some cases with supervision to follow. Finally, and most rarely, prison release may occur as a result of executive clemency, which involves sentence commutation, or a pardon. In many countries this takes the form of a general "Christmas pardon"; in other situations it is more directly focused on individual offenders, perhaps because the sentence is now perceived as too long as a result of changes in the law or societal views or because doubts may have arisen about an offender's culpability. In the United States, at least one governor commuted the sentences of women convicted of killing an abusive spouse before the law had developed defenses or allowed for mitigation in such cases.

In many countries the prison population does not reflect the demographic make-up of the country. In Canada and Australia, for example, aboriginal groups are dramatically overrepresented, as are African Americans in the United States. In many Western European countries immigrants and/or their descendants, especially if they are non-white or Muslims, are often found in prisons in disproportionate numbers. In Eastern Europe, Roma and Sinti are incarcerated at a higher percentage than their representation in the population would indicate. Even though many (p. 954) countries note concerns about such disparities, they usually justify them because of differences in crime rates.

To address the high incarceration rate of Natives, Canadian sentencing legislation requires courts to consider aboriginal status in deciding whether to impose a prison term. This contrasts with the federal sentencing guidelines in the United States, which mandate that the court should not consider race in sentencing decisions. The impact of race and ethnicity in the criminal justice system remains disputed in most countries. The United States, in contrast to most other developed countries, generally fails to theorize and to consider socioeconomic status within the criminal justice system even though poor and un(der)educated offenders constitute the vast majority of prisoners.

The punitiveness inherent in U.S. sentences practices has been ascribed, at least in part, to the racism inherent in society and the criminal justice system.[8] Other explanations, however, are also viable, especially as other countries with demographic disparities do not display the same harshness that characterizes the U.S. sentencing regime in its entirety. Differences in political structure, combined with elections for district attorneys and trial-level judges, may contribute to this harshness. The impact of religion on public life, often played out in stark terms of "good and evil," may also play a role. One commentator has indicated that the perception of social status may be an important consideration, as

Germany elevated the status of all inmates to that usually given to political prisoners while the United States has instead chosen to degrade all those convicted, and perhaps even all those accused of offenses.[9] Likely it is a combination of such explanations that accounts for the virtually unique U.S. set-up.

In addition to supervision in prison, supervision can also occur in the community. Modern technology and the desire for cost savings have driven the demand for more extensive and intensive community supervision.

VI. Supervision in the Community

Prison sentences are not always executed and a court may instead suspend them for a period of time subject to good behavior. Alternatively, a probationary sentence can be imposed the violation of which may result in imprisonment. (p. 955)

Probation in the United States is usually imposed on first offenders and those responsible for minor, generally nonviolent, offenses. To what extent supervision occurs will depend on the probation office. Generally, probationers have to adhere to a catalog of standing requirements, such as no use of illegal drugs or alcohol and no affiliation with convicted felons. In addition, a court may impose tailored obligations, depending on the felon's specific situation. Convicted offenders frequently have to report to their probation officers and are subject to spot checks. The Fourth Amendment to the U.S. Constitution does not protect them against warrantless searches. Supervision may be enhanced through electronic means. Electronic supervision has become popular in some jurisdictions, though it carries with it relatively high costs because of the need to monitor potential violations. In addition, false positives may lead to an inability to detect actual violations. Electronic supervision is frequently tied to a sentence of "house arrest," which may be part of a probationary sentence or be a condition imposed on release from prison.

Probation may be revoked on conviction of a new offense or in the case of serious and/or repeat violations of probation conditions. The likelihood of incarceration for probation violations varies by state, with probation and parole violators constituting a relatively large percentage of the prison population in some states.

Community supervision may also occur after an offender has served time. It may follow automatically after an imposed prison sentence has been served, as is the case in the federal criminal justice system where this is called "supervised release." Alternatively, offenders may be released discretionarily before they have served their entire prison term. Once parole is granted, the remaining prison term remains executable if a new conviction occurs or in the case of violation of parole conditions. California's prison system grew as dramatically as it did throughout the 1990s and the first decade of the new century in part because probation officers generally returned parolees to prison even for relatively minor offenses.

Starting in the 1990s, a few jurisdictions in the United States began to establish so-called drug courts. Their goal has been to avoid incarceration of (nonviolent) drug offenders in the hope of rehabilitating them. While the results of these drug courts have been mixed, the best research indicates that they may be more effective than imprisonment in avoiding recidivism and leading to rehabilitation. Similarly to drug courts, other specialty courts have also been established, including mental health and veterans courts. Their goal is to address either a particular (limited) set of offenses or to focus on a specific type of offender. Different jurisdictions set different rules as to offenses and offenders who may become subject to the jurisdiction of these courts, the function of which varies dramatically from that of mainstream criminal courts as they are based on regular attendance and ongoing monitoring of the offender. They require a team of experts, including prosecutor and defense counsel, to work together in a non-adversarial style toward the offender's rehabilitation. This approach has challenged assumptions of lawyering, including the attorney–client relationship, and the entire structure of the criminal **(p. 956)** justice system. Ultimately, these types of courts may lead to a change in the function of courts the dual goals of which may become protection of public safety and the offender's rehabilitation.

The development of such alternative courts has been greeted with some concern about "net-widening," which means the expansion of sanctions on a group of offenders who might either not have been prosecuted in the past or whose sentences would have been more limited and less onerous. This concern is of particular importance when failure or violation of conditions can or will lead to imposition of an incarceration sentence. In that case, an attempt at rehabilitation will lead to enhanced punishment. For that reason, some offenders prefer a determinate sentence over transfer to an alternative court. The latter, however, may hold out hope of expunging their criminal record or even dismissal of the case on successful completion of treatment.

Alternative courts have not been widely imitated outside the United States, perhaps because other systems already emphasize rehabilitative measures to a greater extent in their systems, perhaps because the particular population serviced by specialized courts is more limited in other countries and therefore can be easily accommodated within their existing structures.

We may witness the expansion of alternative courts, with their risk-assessment and rehabilitation approaches, but financial sanctions have already become widespread in all developed countries.

VII. Financial Sanctions: When Are They Too Much?

Among the most widespread sanctions in any criminal justice system are financial penalties, so-called fines. In addition, some countries, including the United States and Germany, ask the offender to contribute payments to cover some of the case-processing costs and part of the cost of incarceration. Fines are to be distinguished from restitution payments or so-called "compensation orders" in Britain, which are designed to alleviate some of the harm inflicted upon the victim.

Fines constitute the primary method of sanctioning in developed countries and may be assessed in the form of lump sum payments or levied as day fines, a system common in continental European countries. While the former are tied to the offense of conviction, the latter are based not only on the offense but also on the individual defendant's ability to pay. For the same offense, the number of days of payment will be identical for all offenders but the amount to be paid per day will vary based on (p. 957) the defendant's financial ability and income. Day fines have not caught on in the United States, in part because of different notions of equality, in part because of apparent concerns about the state's ability accurately to ascertain income.

In Germany once a fine is paid, the criminal record is usually expunged. The vast majority of criminal cases and of (traffic) violations are resolved through fines, with expungement as the incentive for payment. In the United States, on the other hand, the fine may be imposed as a free-standing sentence or as part of a more comprehensive criminal justice sanction. In many cases fines are mandatory, even though the offender may not, perhaps ever, be able to pay.

In addition to fines, courts may forfeit property. This can be done through civil—non-conviction-based—or criminal forfeiture, with the latter being subject to more stringent requirements. Criminal forfeiture, which occurs after a criminal conviction, applies to property illegitimately acquired, either directly or through payment from illegitimate sources. Property that has been used as a tool in the commission of crimes may also be forfeited. Forfeiture has proven particularly challenging, though legally permissible, in situations of co-owned property, such as a car or a home, where one owner is qualified as the "innocent spouse."[10] In many European countries forfeiture has been increasingly allowed even without a concomitant criminal conviction to fight organized crime and money laundering.

Even though financial sanctions remain the mainstay of sentencing systems, more creative sanctions have recently captured the public's imagination.

VIII. Integrative and Disintegrative Sanction: Rehabilitation or More?

When probationary or suspended sentences are imposed, courts frequently add to the standard probationary conditions additional conditions which may include a community service component or a shaming sanction. Among the former are situations where defendants have been asked to lecture to suitable audiences about their offenses to provide a cautionary tale. In other cases, defendants are required to donate their time to charitable organizations.

Shaming sanctions have been introduced in the United States largely from Australia and Canada where they have been built upon Indigenous approaches to crime, including sentencing circles. John Braithwaite has studied such sanctions in Australia where (p. 958) aboriginal groups have used them to allow for apology and, ultimately, community reintegration of the offender.[11]

In the United States, however, they may have had either a disintegrative effect or not been as impactful as urban communities in particular are substantially less cohesive, with people often less dependent on each other than in traditional societies. Among popular shaming sanctions have been identification of specific offenses on license plates or publication of the names of those seeking out the services of street prostitutes. The publication of the names of sex offenders is defended as a protective rather than a shaming measure. It is legally distinguishable as it is not court-imposed but, rather, is a corollary of the conviction.[12]

Another victim-centered approach that has been derived from these alternative forms of sanctioning is victim–offender mediation which is only available in select cases, with the consent of the victim. The goal is to bring offender and victim together to help each other to understand the situation and background of the offense and to allow for an apology. It is often effective as a rehabilitative measure for younger offenders and frequently proves more satisfying to a victim than the imposition of a sanction.

The goal of reintegration is presumably more expansive than mere rehabilitative efforts that are solely designed to decrease recidivism. While most sanctions—other than the death penalty and life without parole—carry a rehabilitative hope, the focus of some is exclusively on rehabilitation as part of an offender's broader re-entry into society. Among those are drug, alcohol, and sex offender treatments which may be imposed as part of a sentence, in lieu of a sanction, or even as the sanction. While forced treatment has traditionally been rejected as ineffective, in recent years studies have indicated the effectiveness even of forced treatment. Some offenders may choose to undergo alcohol and drug treatment in particular even before a sentence is imposed in order to indicate their acceptance of treatment, but also in the hope of a more mitigated sentence. Such treatment may also be available in prisons where it could lead to early release.

Aboriginal offenders in Australia, New Zealand, and Canada have increasingly focused on "healing," as opposed to rehabilitation, to include the community as well as the individual in the aftermath of an offense and aim at the offender's restoration to full group membership. As aboriginal communities frequently deem crime and its resultant penalty to be a function of colonialism and racially based oppression, the focus on healing allows them to address those larger issues rather than merely the criminality of the offender. In this context, the offender's individual behavior is recognized as inappropriate but acknowledged within this wider framework of shared oppression. Among special aboriginal healing practices are sentencing circles and healing lodges, which are based on traditional knowledge. (p. 959)

In stark contrast to these efforts at reintegration and healing may be the expansion of preventive sanctions, imposed on offenders who are viewed as constituting a very special risk.

IX. Preventive Sanctions in a World of Risk Assessment

Some sanctions are explicitly imposed to prevent future offending, at least for some period of time. Those sanctions may be levied in different ways in different countries, though their goals are often similar. They have become increasingly popular as the fear of specific offenders has increased and the use of risk-assessment tools promises successful predictions of recidivism.

Likely the most prevalent preventive sanction is the suspension of a driver's license which may be imposed automatically after an offender commits particular types of traffic offenses, or commits them repeatedly. Obviously the goal is to disable the driver from committing more such infractions, which presumably endanger fellow citizens. Driving privileges may be restored automatically after a certain period of time; alternatively, a hearing may be required to regain one's license.

Preventive sanctions can also occur when offenders abuse their position to commit an offense, such as government officials or (high-level) employees in the corporate and not-for-profit worlds. As a result of an offense which was facilitated or made possible by the person's position, the court may impose a ban on specific employment or prohibit the offender from holding political office. Increasingly popular on both sides of the Atlantic are outright restrictions on employment or on specific employment functions, such as the ability to enter into contracts with a state government or the European Union. Such bars may make an offender effectively unemployable in certain industry sectors. In the United States, firearms restrictions have become widespread in response to convictions for potentially violent offenses, including misdemeanor domestic violence. Such a bar may have an impact on offenders whose employment otherwise requires them to carry such weapons.

In the case of sex offenders, prison terms have increased in the United States as well as in continental Europe and the United Kingdom, with sensational child abductions, rapes, and murders triggering these increases. Legislation allows for the addition of non-incarcerative sanctions so that courts are now often in a position to impose a select set of additional restrictions. In some countries courts can impose a form of non-criminal confinement on offenders who are assessed as posing an ongoing danger to the community. The specific requirements for such confinement **(p. 960)** vary between jurisdictions. In the United States, for example, the Supreme Court has determined that a mental defect is required to permit civil confinement of sex offenders. The Court also found most criminal procedural protections not to apply to this form of confinement as they do not include any retributory component and serve solely as an incapacitative function.[13]

On the other hand, the European Court of Human Rights has held that the German *Sicherungsverwahrung*—security detention—cannot be imposed retroactively and cannot look like imprisonment. This implies that a penal component had been an inherent feature of that sanction, especially as the location for those sentenced to *Sicherungsverwahrung* was generally part of a prison, though they were housed in a separate wing. The Court mandated greater markers of separation for those civilly and those criminally confined and at least implied that it might consider criminal procedural protections necessary for those under *Sicherungsverwahrung*.[14] Release from civil confinement or *Sicherungsverwahrung* has proven challenging for those confined. Proving the absence of dangerousness has been difficult, especially as experts have become increasingly risk-averse in their assessment of the potential danger an offender may continue to pose.

In the 1970s and 1980s Germany and other European countries also experimented with castration as a sentence mitigator. While it was not directly imposed as a sentence, at least one-high profile German offender chose to be surgically castrated to lower his likelihood of reoffending. When he died during surgery, surgical castration was no longer considered, although pharmaceutical castration remains a possibility in European countries as well as the United States.

In the United States many sex offenses also lead to mandatory registration requirements. Depending on the specific nature of the offense committed, they may be limited to a particular number of years, though in the case of some crimes, they are life-long, with imprisonment as a consequence should an offender fail to register. In addition to registration requirements, states have also adopted notification requirements so that select groups—schools and daycare centers, for example—and/or neighbors will be notified should a certain type of sex offender move into an area. Public notifications of this sort are not currently acceptable in continental Europe because of a different approach to the offender's right to privacy.

Banishment has seen a modern resurgence for some groups of offenders, including those convicted of sex crimes. In the United States, sex offenders, who generally suffer from the largest set of restrictions imposed on any group of offenders, may be barred from living near schools, daycare centers, churches, parks, and other areas in which children may congregate. Domestic violence offenders may not be **(p. 961)** allowed to return to their homes and be mandated to stay away from a particular person, such as a spouse. In Europe some soccer fans are prevented from leaving their home country during international matches to prevent hooliganism. Finally, some cities have attempted to impose curfews on juveniles to prevent them from getting together in known trouble spots. These types of banishments are generally not styled as punishments and are rarely imposed in the form of criminal sanctions. They are, however, part of the growing number of collateral sanctions, and sometimes even result without the (prior) imposition of a criminal sanction.

European sanctioning regimes allow for the separation of retributive and risk-based/preventive sanctions even though the sentencing court is permitted to assess both types of sentences. Such a regime allows for a limitation on retributive punishments while, at least ostensibly, still guaranteeing public safety. In the United States, on the other hand, criminal justice sanctions are expected to fulfill all sentencing goals. The Supreme Court has drawn what long seemed to be a clear line between civil and criminal sanctions, with sentencing courts imposing only the latter. Civil sanctions may result directly and mandatorily from a criminal conviction or may be imposed by an administrative tribunal.

X. Collateral Sanctions

The United States has a wide array of collateral sanctions, some of which are governed by state law, others by federal law.[15] While some of these sanctions are intimately connected to the offense, others seem to have no or only a most tenuous connection to the conviction.

Among the most discussed collateral sanctions in the United States is the denial of voting rights. With the exception of two states, prisoners are excluded from the ballot box. Whether probationers and parolees are barred from casting their ballot depends on state law and varies widely. Most disturbingly, in some, largely Southern, states even those released from any criminal justice sanction may remain disenfranchised unless they receive a gubernatorial pardon or relief through another often difficult to navigate process. Because of the highly racialized criminal justice system, African Americans are disproportionally disenfranchised. Despite recent efforts to reinstate voting rights for those released from criminal justice sanctions, the number of those disenfranchised appears to have barely moved. (p. 962)

Between European countries, disenfranchisement of those imprisoned appears to vary dramatically. Continental Western European countries seem more likely to allow prisoners to vote while Eastern European countries and the United Kingdom are substantially less receptive to prisoner enfranchisement. In recent decisions the European Court of Human Rights has addressed whether disenfranchisement during imprisonment is a violation of the European Convention on Human Rights. The Court has concluded that under certain circumstances an offender may lose the right to vote during the entire term of his imprisonment; the state, however, must be able to provide more than a generalized explanation for such disenfranchisement.[16]

Other restrictions may also flow automatically from a conviction. In the United States, for example, an offender can be banned from receiving student loans upon multiple drug convictions and even be barred from welfare benefits. These consequences flow largely from drug convictions, presumably indicating the seriousness with which the state takes such crimes but otherwise unconnected to them. In some states, for example, drug offenders lose their driver’s license for a limited period of time, clearly not a preventive but apparently a punitive sanction. Only some of these types of sanctions would be permissible in European countries where they would generally be more limited in length and scope. Another example of the different approaches taken in Europe and the United States is the availability and use of deportation resulting from a criminal conviction.[17]

Many of these collateral sanctions raise questions regarding their penological justification. They are often overbroad in light of the underlying offense or individual offender characteristics. In the United States, for example, because of the classification of sex offender registration and notification statutes as non-criminal the ex post facto clause of the Constitution does not apply. Therefore, even those who have lived crime-free lives for many years after such a conviction may be subjected to registration and notification requirements. In those cases, the preventive impact of such requirements appears marginal, and may even be counterproductive as it may lead to the exclusion of such offenders from society, including their job loss. Nevertheless, the U.S. Supreme Court has continued the fiction that such requirements do not serve any retributive or punitive function, rendering criminal procedural protections inapplicable.

In addition to sanctions that result directly, whether automatically or not, from a criminal conviction, others may flow more indirectly from a criminal conviction, often imposed through semi-private or professional entities. For some offenders, a criminal conviction may lead to action by a professional licensing body, such as medical or bar licensing authorities. While those are entirely independent decision-makers, certain convictions or the facts underlying a conviction will lead to the loss of a professional license, therefore making it impossible for an individual (p. 963) to exercise such a profession. Non-governmental as well as governmental agencies may therefore dramatically restrict an offender's employment options based on a criminal conviction. Such ramifications may go well beyond the sanction contemplated by the legislator or the offender.

XI. Conclusion

Despite broad international agreement about the rationales for punishment and widespread availability of the same or similar sanctions around the world, state reaction to different types of offenses and punitiveness vary widely. Criminal punishment does not occur in a vacuum but rather reflects the political attitudes, social mores, and economic characteristics of the broader society. For those reasons, sentencing and penality are of crucial importance not only for those interested in matters of criminal law and procedure but also for those deeply interested in law and society.

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(1) Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1975), 3 ff.

(2) See generally Foucault (n. 1).

(3) Markus D. Dubber, "Comparative Criminal Law," in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (2006), 1287 ff.

(4) "Standard 19: Collateral Sanctions and Discretionary Disqualification of Convicted Persons," in American Bar Association, Criminal Justice Standards (3rd edn, 2004), available at: <http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_collateral_toc.html>. See Section X.

(5) See Protocol Nos. 6 and 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (1989).

(6) *Padilla v. Kentucky*, 559 U.S. 356 (2010).

(7) *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455 (2012) (prohibiting mandatory life-without-parole sanctions to be imposed on those who committed homicides while under the age of 18); *Graham v. Florida*, 560 U.S. 825 (2010) (prohibiting life term without the possibility of parole for a juvenile who committed a non-homicide offense).

(8) See e.g. Michael Tonry, *Punishing Race: A Continuing American Dilemma* (2011); Michael Tonry, *Malign Neglect—Race, Crime, and Punishment* (1995).

(9) See James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between American and Europe* (2005).

(10) See e.g. *Bennis v. Michigan*, 516 U.S. 442 (1996).

(11) John Braithwaite, *Crime, Shame, and Reintegration* (1989).

(12) See Sections IX and X.

(13) *Kansas v. Hendricks*, 521 U.S. 346 (1997).

(14) *Kallweit v. Germany*, App. no. 17792/07, *Mautes v. Germany*, App. no. 20008/07, *Schummer v. Germany*, App. nos. 27360/04 and 42225/07, ECtHR, Judgment of 13 Jan. 2011; *M. v. Germany* App. no. 19359/04, ECtHR, Judgment of 17 Dec. 2009.

(15) Margaret Colgate Love, Jenny Roberts, and Cecelia M. Klingele, *Collateral Consequences of a Criminal Conviction: Law, Policy and Practice* (2012).

(16) *Scoppola v. Italy (No. 3)*, App. no. 126/05, ECtHR, Grand Chamber, Judgment of 22 May 2012.

(17) See Section IV.

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