THREE WORLDS OF WESTERN PUNISHMENT: A REGIME THEORY OF CROSS-NATIONAL INCARCERATION RATE VARIATION, 1960-2002

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ABSTRACT OF DISSERTATION

MATTHEW DEMICHELE

The Graduate School
University of Kentucky
2010
THREE WORLDS OF WESTERN PUNISHMENT: A REGIME THEORY OF CROSS-NATIONAL INCARCERATION RATE VARIATION, 1960-2002

ABSTRACT OF DISSERTATION

A dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the College of Arts and Sciences at the University of Kentucky

By
Matthew Todd DeMichele

Lexington, Kentucky
Director: Dr. Thomas Janoski, Professor of Sociology
Lexington, Kentucky
2010

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ABSTRACT OF DISSERTATION

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This dissertation offers an explanation of cross national incarceration rate variation for 17 industrialized countries for the second half of the 20th century. Both historical case studies and time-series cross-section analyses are used to provide an institutional explanation of incarceration rate differences. Borrowing from Weber’s Sociology of Law and comparative legal scholarship, it is suggested that three types of legal thinking exist among western democracies—Common, Romano-Germanic, and Nordic law. A regime approach commonly applied in political economic explanations of welfare state development is used to quantify the legal and criminal justice institutional differences between 1960 and 2002 to assert that there are ‘three worlds of western punishment’ in the post-War period. The countries used in this analysis are similar in numerous ways, but historically embedded legal differences have resulted in different trial structures, judge-attorney relationships, rules of criminal evidence, and lay participation that influence the amount of incarceration in each country. The historical case studies demonstrate how important events set countries on particular developmental paths such as the power of defense attorneys in common law, despite their original exclusion from trials; the choice of scientific legal principles as a basis for an objective law blending Roman and Germanic legal principles; and the Nordic’s amalgamation of common and Romano-Germanic legal principles. These legal institutions are complimented by political economic variables that suggest that the presence of more left leaning political parties, centralization of wage bargaining, and labor organization provide a further break on the drive to incarcerate. The quantitative findings support the legal regime approach as well as political economic variables while controlling for crime and homicide rates.
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DISSERTATION

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To my parents, Paul and Linda DeMichele
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Chapter One: Introduction

There is little known about the similarities and differences between the operation of the Common law, Romano-Germanic, and Nordic criminal justice systems. This gap in knowledge leaves many important questions unanswered. What accounts for the US system having between seven and ten times greater incarceration rate than Germany and Sweden, respectively (Nilsson, 2003; Oberwittler and Hofer, 2005)? Why does Germany have nearly 30 percent more incarceration than Sweden, and almost double other Nordic countries? Is it the amount of homicide? Is it the relative number of police (Kent and Jacobs, 2005)? Are structural inequalities to blame (Wacquant, 2000, 2005)?

This dissertation uses comparative-historical methods to explain variations in the use of incarceration in the west during the latter half of the 20th century. It begins with Weber’s Sociology of Law and then extends his types of legal thinking to suggest that they foster specific legal and criminal justice institutions that can be grouped into three distinct regime types of contemporary crime control. Other researchers (Cavadino and Dignan, 2006) have applied welfare state regime types to explain differences in criminal justice outcomes. This is the first time that punishment regime variables have been constructed and analyzed to reflect the durable yet dynamic nature of institutions.

Weber suggested that the western world was governed by two types of legal thinking, one formally rational and one substantively rational. The former was developed through legal research dating back to the Roman Emperor Justinian I, adapted by Napoleon, and reached its pinnacle with the development of the German Basic Law of 1900 (Dubber, 2005, 2006; Eser, 1995; Merryman, 1985). The latter type of legal thinking was founded in England and first established following the Norman Conquest of 1066 by William the Conqueror, and relies upon case law (Hogue, 1985; Kantor, 1997). Weber’s Sociology of Law demonstrated how these two rather different legal traditions resulted in a similar economic outcome—industrial capitalism. These ideal types of legal thinking are used to explain differences in the amount of formal punishment, which opens up the possibility of a Nordic type of legal thinking. The Nordic legal type is a mixture of civil and common law characteristics with a culturally specifically Nordic tone that uses the law to ameliorate social inequalities (Husa, Nuotio, and Pihlajamaki, 2007; Lappi-Seppala, 2007; Pihlajamaki, 2004; Takala, 2004; Zweigert and Kotz, 1998). The three legal regimes are:

1) Common Law Regime: The common law is founded on legal principles favoring non-academic approaches that limit judicial power in favor of prosecutors and defense attorneys. As lawyers became a common feature of trials, prosecutorial power and more complicated forms of criminal evidentiary rules emerged as a way to compensate for allowing non-legally trained individuals to pass judgment. Relative to the other regimes, common law judges are passive until the sentencing phase of a criminal trial.

2) Romano-Germanic Legal Regime: Roman-based legal practices are rooted in academic legal approaches. The law is considered a science in which the chief scientists are legally trained judges. The broad judicial power given to Romanic judges decreases the power of lay and defense participation, and prosecutors are closely tied to the judiciary. This produces highly bureaucratized forms of justice in which contextual features have little influence over legal decisions as Romanic law was developed by and for those
3) **Nordic Legal Regime:** This regime is an amalgamation of both common and Romanic legal principles, but it is infused with unique Nordic culture. The collectivist nature of Nordic social policies is well-documented as attached to the cumulative power of left political parties that drive up union density and governmental economic intervention to reduce social inequality. The Nordic legal regime uses punishment as a way toward social integration, not segregation.

This approach suggests that macro criminal justice outcomes are created by the often overlooked practitioners within the system. Central to this analysis is the distribution of discretionary power among judges, prosecutors, defense attorneys, and laymen. Essentially, there is only so much discretion to go around, so to speak, and these roles are enacted differently across the countries in this analysis. These roles come with different expectations for what it means to be a “good” prosecutor or a “successful” defense attorney. Judges are not measured on the same criteria in Germany, Sweden, or the US. Does it not mean something different to suggest that lay participation should be yielded through unanimous jury decisions as mixed courts with weak lay participation? These role expectations did not emerge as natural phenomenon. Instead, multiple social interactions took place in specific historical contexts to place each regime along a certain developmental course.

There is limited comparative-historical research and theory explaining criminal justice outcomes (Cavadino and Dignon, 2006; Sutton, 2004). Measures of criminal justice regimes are tested among 17 industrialized nations using a mixed method approach that combines historical, cross-sectional, and time-series cross-sectional (TSCS) analyses. Historical case studies of one country from each of the regimes are used to trace the historical trajectory underlying contemporary crime control practices within each regime (i.e., US, Germany, and Sweden). Investigating specific aspects of different types of legal thinking—Common Law, Romano-Germanic, and Nordic law—provides a way to uncover differences in criminal justice institutions. These criminal justice institutions are operationalized and included in models to explain the variation in incarceration rates.

Weber’s types of legal thinking and historical-institutionalist theories are used to develop *three worlds of punishment*, similar to Esping-Anderson’s (1990) explanation of welfare state differences as “Three Worlds of Welfare Capitalism.” It is argued that each of these types of legal thinking foster unique criminal justice institutional clusters that form specific punishment regimes. The punishment regimes are statistically related to incarceration rates. In fact, the quantitative analyses reveal significant and robust coefficients demonstrating that the Common law incarceration regime exacerbates incarceration and the election of judges is a specific institution increasing incarceration rates in the US. The Nordic and Romano-Germanic regimes are inversely related to incarceration, and union density significantly reduces the reliance on incarceration. These findings are significant, robust, and in expected directions while controlling for homicide rates.

**Macro-Explanations of Incarceration**

A defining feature of the modern nation-state is its monopoly over the legitimate use and threatened use of force to control the citizenry. Weber and others have
recognized this crucial element for preserving the existing social order (Garland, 1990; Sutton, 2001). Advanced capitalist societies rely upon the criminal justice and legal systems to carry out this form of domestic control with police forces apprehending suspected offenders, courts sentencing those deemed guilty and correctional facilities and services carrying out punishments, all in the name of enforcing the rule of law. One socio-political axiom is that laws and the criminal justice system change over time and space as dominate social definitions of appropriate behaviors and enforcement mechanisms shift.

The criminal justice and legal system in any society are the manifestation of dominant institutional practices rooted in traditions, values, and conventions (Garland, 2001). Certain institutional arrangements bring about policy adjustments and procedural changes that have long lasting effects on the number of individuals apprehended, sentenced, and incarcerated. The criminal justice system is a central organizational feature for socializing (and re-socializing) the populace, and yet there is little social scientific theorizing about the disparities in the use of incarceration among advanced capitalist nations.

The approach developed here borrows and expands upon Weber’s institutional analyses to integrate perspectives referred to as “new” institutionalism (Powell and DiMaggio, 1991; Steinmo, Thelen, and Longstreth, 1992). Legal regime variables, similar to that developed within the welfare state literature (Esping-Anderson, 1990; Huber and Stephens, 2001), are created to explain the differences in the use of incarceration in 17 advanced capitalist nations. This effort will bring together insights from several relatively divergent research traditions including political sociology (e.g.; Jacobs and Carmichael, 2001; Jacobs and Kleban, 2003; Savelsberg, 1994; Sutton, 2000, 2004), comparative-historical analysis (e.g., Mahoney and Rueschemeyer, 2002), criminology (e.g., Sampson and Laub, 2005), and criminal justice studies (e.g., Beckett, 1994; Christie, 2000; Garland, 2001; Rusche and Kirchheimer, 1968).

Criminal Justice Systems

Governments rely upon several formal and informal institutions (e.g., schools, prisons, the family, and so on, see Berger and Luckmann, 1966) to inform citizens of proper behavior and offer clear punitive mechanisms for failing to abide by the rules (Burchell, Colin, and Miller, 1991). Many societies have institutions that promote appropriate socialization, and have crime control agents enforce the laws, courts to decide on guilt and innocence and make punishment decisions, and places to segregate the law violators (e.g., correctional system, prison, work camps, etc.). Pierre Bourdieu (1999) recognized this multivalent system of control as the left and right hands of the state. That is, the left hand of the state seeks to control the citizenry through less overt forms of oppression such as the education system, welfare policies, and public health care (Sutton, 2004; Wacquant, 2000). Whereas the right hand of the state is prepared to deliver direct control through the police, courts, and prisons. This dissertation focuses on the variation among relatively similar countries’ willingness to use the latter form of control—the right hand.

Criminal justice research has identified changes in the criminal justice systems in the western world (Garland, 2001; Tonry, 2007; Tonry and Frase, 2003). One impetus motivating this dissertation is that the US penal system is said to be the most punitive within the western world (Wacquant, 1999, 2001, 2005; Whitman, 2003). The US is an
outlier in the use of formal penal mechanisms. Ironically, when the prison was first
developed it was seen as an **enlightened** way of enforcing social rules and ordering the
emergent modern industrial society. Now, the prison is a storage facility for those not
fitting into contemporary social, political, and economic structures (Beckett and Western,
2001; Feeley and Simon, 1992; Simon, 2007; Wacquant, 1999, 2001; Western and
Beckett, 1999). The bulk of incarcerated individuals come from socially disorganized
neighborhoods and they are disproportionately minorities, mentally ill, and substance
addicted (Grattet, Petersilia, and Lin, 2008). Inmates, quite simply, come from the
weakest strata of any society—this is even true within Nordic prisons that are known for
their egalitarianism and normality principle.

Consider the case of the US prison population during the 20\textsuperscript{th} century. It was
marked by stability, no doubt with some fluctuations, but nonetheless, stable (Blumstein
and Beck, 1999). The US penal system has grown from about 110 inmates per 100,000
people in the population between 1925 and 1973 to slightly over 700 per 100,000 in the
population by the end of the twentieth century. This growth places a significant burden
on government budgets as local, state, and federal direct expenditures for criminal justice
services totaled $35.8 billion in 1982 and climbed to nearly $204.1 billion by 2005, a
nearly six-fold increase (Bureau of Justice Statistics, 2006). When combining both
institutional and community correction figures, it becomes clear that nearly 7 million US
adults or about 3.2 percent of the adult population is under some sort of criminal justice
supervision (Glaze and Bonczar, 2007).

The US criminal justice system stands out from other nations’ crime control
mechanisms. In the US more people are (raw numbers and proportionately) arrested,
convicted (usually through a plea bargaining process), and incarcerated than any other
out that the US faces two serious problems that foster increased crime control policies:
(1) unequal distributions of material resources and (2) unequal access to paid work. In
*Crime Control as Industry*, Christie argued that US prisons have turned into a place to
store individuals not fitting into the labor market, while creating millions of jobs for
criminal justice system workers and fueling the economies of the mostly rural
communities in which prisons are tucked away (out-of-sight and out-of-mind).

The seriousness of the US penal system incarcerating such large numbers of
adults (and children as well) and the probation and parole apparatuses extending this
control into the community is more evident when considering that of other nations. The
countries characterized by Common law legal thinking are at the opposite end of a
punitive spectrum from those characterized as fitting into a Nordic legal regime. One
Nordic country, Norway, has nearly 3,000 inmates in the entire country—there are more
adults sentenced to life in the US—which is about 70 inmates per 100,000 people in the
population. The three other Nordic countries included in this dissertation also have
similar incarceration rates (Falck, von Hofer, and Storgaard, 2003; Lappi-Seppala, 2007).
Nordic countries may be low-end exceptions compared to their Continental and Common
law counterparts, but it is clear from Table 1.1 that none of the countries included in the
proposed analysis remotely approaches the U.S. incarceration rates.
Table 1.1: Ten Year Averages of Incarceration Rates per 100,000 population by Country and Regime, 1960-2002

<table>
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<tbody>
<tr>
<td><strong>Common law regime</strong></td>
<td></td>
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</tr>
<tr>
<td>Australia</td>
<td>75.07</td>
<td>71.25</td>
<td>68.12</td>
<td>121.11</td>
<td>149</td>
</tr>
<tr>
<td>Canada</td>
<td>99.67</td>
<td>91.92</td>
<td>102.50</td>
<td>118.19</td>
<td>124</td>
</tr>
<tr>
<td>Ireland</td>
<td>--</td>
<td>--</td>
<td>46.87</td>
<td>63.84</td>
<td>78.8</td>
</tr>
<tr>
<td>New Zealand</td>
<td>72.47</td>
<td>87.44</td>
<td>89.97</td>
<td>133.21</td>
<td>152</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>65.58</td>
<td>83.55</td>
<td>93.65</td>
<td>102.09</td>
<td>129</td>
</tr>
<tr>
<td>United States</td>
<td>179.67</td>
<td>185.57</td>
<td>307.18</td>
<td>575.76</td>
<td>690</td>
</tr>
<tr>
<td>Regime Average:</td>
<td>98.49</td>
<td>103.94</td>
<td>117.71</td>
<td>185.7</td>
<td>220.46</td>
</tr>
<tr>
<td><strong>Romano-Germanic law regime</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Austria</td>
<td>113.28</td>
<td>105.86</td>
<td>104.09</td>
<td>88.34</td>
<td>88</td>
</tr>
<tr>
<td>Belgium</td>
<td>66.42</td>
<td>65.13</td>
<td>64.44</td>
<td>74.47</td>
<td>82</td>
</tr>
<tr>
<td>France</td>
<td>63.10</td>
<td>57.09</td>
<td>73.57</td>
<td>83.07</td>
<td>83</td>
</tr>
<tr>
<td>Germany</td>
<td>94.81</td>
<td>79.24</td>
<td>82.60</td>
<td>85.21</td>
<td>94</td>
</tr>
<tr>
<td>Italy</td>
<td>68.63</td>
<td>52.35</td>
<td>60.85</td>
<td>74.53</td>
<td>97</td>
</tr>
<tr>
<td>Netherlands</td>
<td>25.83</td>
<td>18.89</td>
<td>30.15</td>
<td>60.56</td>
<td>89</td>
</tr>
<tr>
<td>Regime Average:</td>
<td>72.01</td>
<td>63.09</td>
<td>65.85</td>
<td>72.12</td>
<td>88.83</td>
</tr>
<tr>
<td><strong>Nordic law regime</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Japan</td>
<td>--</td>
<td>--</td>
<td>45.28</td>
<td>38.71</td>
<td>50</td>
</tr>
<tr>
<td>Denmark</td>
<td>69.99</td>
<td>64.18</td>
<td>65.74</td>
<td>66.20</td>
<td>62</td>
</tr>
<tr>
<td>Finland</td>
<td>145.33</td>
<td>109.42</td>
<td>92.06</td>
<td>60.22</td>
<td>59</td>
</tr>
<tr>
<td>Norway</td>
<td>45.59</td>
<td>45.04</td>
<td>48.18</td>
<td>58.80</td>
<td>58</td>
</tr>
<tr>
<td>Sweden</td>
<td>66.75</td>
<td>55.80</td>
<td>55.52</td>
<td>63.21</td>
<td>67</td>
</tr>
<tr>
<td>Regime Average:</td>
<td>--</td>
<td>--</td>
<td>65.36</td>
<td>57.43</td>
<td>59.2</td>
</tr>
<tr>
<td>(without Japan)</td>
<td>81.91</td>
<td>68.61</td>
<td>65.37</td>
<td>62.10</td>
<td>61.5</td>
</tr>
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</table>
Why do such stark contrasts exist in these penal approaches? Does the US have more violent people? Do Americans enjoy inflicting pain upon fellow citizens more than Swedes or Germans or the French? Is there something inherent or embedded within the American culture that causes these people to desire punishment? These issues are explored later, but suffice to say that the US has a moderate comparative crime rate despite a high homicide rate (Zimring and Hawking, 1997). However, it does seem that there are specific historically embedded social and cultural arrangements that make it easier in the US for laws and penal mechanisms to punish more people for longer periods of time (Whitman, 2003). Specific legal institutional differences allow specific criminal justice practices that bring about different penal outcomes.

Christie (2000), for one, identified an interesting feature about some Nordic countries’ penal systems that might shed light on why such regimes have less inclination to incarcerate. An interesting feature of the Norwegian correctional system is the use of waiting lists and nearly 4,500 adults are on such an incarceration waiting list. To this many US citizens may wonder how it is possible to have “offenders,” “deviants,” or “predators” roaming freely among the “law abiding” without chaos. In the case of prison waiting lists, these are individuals that have passed through the first two phases of the criminal justice system (i.e., the police and the courts), found guilty and sentenced to prison, but there was a lack of prison space. The waiting lists were used to prevent overcrowding.

That convicted individuals are able to wait to serve their sentence demonstrates that Nordic legal culture has a fundamentally different perception of crime and criminals. This raises the possibility that the Nordic type of legal thinking is distinct from that observed by Weber (1967) in Germany and England. Outside the Nordic countries, incarceration waiting lists are considered erroneous, dangerous, and potentially even neglectful on the state’s part as failing to protect society. This suggests that in the Nordic, unlike most other places, criminals are not viewed as a homogenous group of monsters, psychopaths, or misfits, but rather as normal people that have violated a legal code (Christie, 2000: 36). Christie’s analysis goes further to suggest that the use of a waiting list due to crowded facilities indicates an unwillingness to simply build more prisons or place more inmates in each cell.2

The Romano-Germanic regime falls somewhere between the Common law and Nordic regimes on a punitive continuum. Continental punishment is a bit more nuanced with the two leading legal models—Germany and France—rooted in Roman legal codes. Germany and France, not only have this legal tradition in common, but they also have (along with Italy and Japan) fascist pasts that may potentially affect penal practices. The German criminal justice system represents a more moderate model. Consider that the German government sentenced 136,000 adults to prison in 1968 and slightly fewer than 37,000 adults were sentenced to prison in 1996 (Weigend, 2001). This is roughly one third of the sentenced population of nearly thirty years earlier, something that could be explained easily if the German public indicated a significant decrease in reported crimes.

Simultaneous to a decline in sentenced offenders, Germany experienced significant growth in known non-traffic offenses. Weigend (2001: 192) reports that in 1968 there were roughly two million non-traffic offenses recorded by the German police and by 1996 this figure had climbed more than three-fold to 6.6 million recorded offenses.3 Why did Germany experience such a trend of increasing criminality and
decreasing punishment? The reform movement that took place in Germany during this
time worked to decrease the number of inmates—a similar reduction of imprisonment is
reported for Finland during the late 1960s through the 1990s (Lappi-Seppala, 2004).
Germany went through something of a loose paradigm shift in criminal justice ideology,
one moving away from a focus on individualistic blame and swift and severe punishment
to one focusing on rehabilitation and relying heavily on day fines, community service,
and shortened prison sentences (German Basic Law, 2000).

German criminal justice policy is once again going through a return toward more
severe prison sentences, not necessarily for homicide convictions which has remained
relatively stable around 600 annually, or rape convictions (remaining around 1,400), or
robbery convictions (remaining around 3,500), but rather enforcing drug offenses which
has more than doubled from about 12,000 convictions in 1986 to nearly 30,000 in 1996
(Weigend, 2001: 194).

Criminal justice policy decisions emanate, much as Durkheim recognized nearly a
century ago, from socio-historic exigencies, political forces, and the public’s and elites’
attitudes toward what are acceptable forms of punishment. The German government has
shifted recently its rehabilitative focus to one more concerned with organized crime and
drug offenses, both of which contribute to the growing numbers of incarcerated adults
with nearly 80,000 or about 97 per 100,000 adults in the population, in 2005.
The use of incarceration is highly variable among the sample of countries included in this
analysis. The intent is not to provide an in-depth study of each country; in fact, some
experts may feel that short shrift was given to a particular country. Contemporary
comparative-historical methods are applied to a Weberian theoretical framework of legal
types to develop three distinct legal and criminal justice regimes to offer an explanation
for the variation in incarceration rates in the western world during the post-WWII era.

Possible Explanations of Incarceration

In the US, the use of formal punishment has more than tripled and the number of
prisoners sentenced to death has grown nearly fivefold since 1980. Caplow and Simon
(1999) explained this shift as the result of three interactive trends: (1) growing use of the
criminal justice system to handle social problems, (2) drug war intensification, and (3)
 politicization of criminal justice practices. Christie (2000) suggested that crime control is
growing in the US as a result of bureaucratic efficiency and the need to incapacitate
crime rates—in the US and the UK—rose during the 1960s, the public shifted its
expectations of governmental solutions and demanded harsher punishments. Beckett
(1997) found that the highly televised nature of crime control and drug law enforcement
explain much of the recent growth in punishment. Others used quantitative methods to
test political sociological assumptions and found the presence of right parties and ethnic
or racial threat hypotheses to explain significant portions of prison growth (e.g., Helms
and Jacobs, 2002; Jacobs and Carmichael, 2001; Jacobs and Helms, 1996, 2001; Smith,
2004; Yates and Fording, 2005).

Archer and Gartner (1984) commented on the difficulty of finding consistent,
comparable measures of crime, victimization, and justice system practices when creating
their homicide dataset of 110 nations over 70 years. Lynch (1993) expressed a similar
obstacle when making cross-national comparisons of sentence length. The different
administrative and practical nuances between each country’s criminal justice systems
There are many decisions made at various administrative levels to determine an inmate’s time served including the point at which a sentence begins (e.g., arraignment, time awaiting trial), pardon and parole systems, early release decisions, and social meaning of crime and criminals, which all shape the administrative definition of length of time served (Farrington, Langan, and Tonry, 2004).

Jacobs and Kleban (2003: 725) used pooled time-series regression analyses to compare 13 industrial democracies between 1970 and 1995, and found that political structure is strongly related to more incarceration in federalist (decentralized) governments and those with more internal racial threats. Interesting about this research was not only the strong positive regression coefficients for federalist countries, but also the consistently significant negative relationship between countries with corporatist bargaining and incarceration. Kent and Jacobs (2004), with a fixed-effects panel time-series, compared the law enforcement presence in 11 industrialized nations, and, with the exception of the US, failed to find support for the racial threat hypothesis. They did find that income disparities were positively related to law enforcement presence, but they do not determine the effect of law enforcement presence on incarceration rates.

Sutton (2000) argued that traditional analyses explaining incarceration variation over time and between countries suffer from narrowly designed model specification problems, accounting for the inflation of significance tests in favor of business cycle hypotheses (e.g., Rusche and Kirchheimer, 1968). He used time-series cross-section models to test life-course hypotheses (e.g., proportion of young males 15-24 years old), “trade-off” effects between the labor market, the military (enlistments), and male school enrollment in secondary and tertiary institutions, welfare expenditures, public education expenditures, and right political party power. Sutton’s research focuses on the supply side of incarceration by looking at a series of alternative life-course paths. He suggested that being employed, in the military, or in school would steer people away from criminality, and hence a lower incarceration rate. His analysis concluded that between 1955 and 1985 in five common law countries “prison growth is driven not only by crime rates and unemployment rates, but also by welfare spending and the power of right parties” (Sutton 2000: 350). These structural effects far outweighed the life-course alternatives, with the exception of military enlistments, which were found to be a significant positive predictor of incarceration rates.

Sutton (2004) widened his analysis (N = 15) to incorporate diverse political regimes with pooled regression techniques between 1960 and 1990. He concluded that incarceration differences have less to do with labor supply and more to do with institutional labor market effects among governments with left political parties and strong unions. Sutton’s findings lend credence to the plausibility of the existence of such regimes as he found strong support for a diminished use of incarceration in countries with particular political and economic institutional arrangements (i.e., union density, left party cabinet dominance, inflation and neocorporatism).

Theoretical Explanations: Classical and Contemporary

Weber’s analysis of rational and substantive legal types is adapted to test explanations of cross-national differences in incarceration rates. Before moving to describe Weber’s sociological treatment of western legal thinking, it is important to briefly mention alternative explanations of legal thinking and behavior. Emile Durkheim
argued that the use of punishment is central to sociology as he proposed an emotionally driven, populist form of punishment that serves to legitimize and strengthen the collective conscience necessary for social solidarity. Marxist accounts of punishment focus more broadly on economic, political, and ideological oppressions operating through formal law and utilizing criminal justice mechanisms to support capitalist class structures (Harring, 1983; Lynch and Groves, 1989).

Michele Foucault provides a third explanation of punishment that focused little on aggregated sensibilities or mentalities, and nearly ignored issues of class conflict. Rather, Foucault offered, in Discipline and Punish (1977), an historical account of the modern prison in France, between 1750 and 1820. Modern punishment, according to Foucault, was fostered through slow moving social changes toward a rationalized, bureaucratic system of penal rules operating through hierarchical systems of surveillance and asymmetrical power-knowledge relations. This perspective is insightful, but fails to consider cross-national differences.

David Garland (1990) synthesized these perspectives when developing his account of modern punishment. He envisioned punishment as a Bourdieuan-type field, which brings together criminological theory and philosophy with policing, corrections, and other practical aspects of administering punishment “as interactive elements in a structured field of crime control and criminal justice” (Savelsberg, 2002: 686). The crux of Garland’s (2001) argument was to move the sociology of punishment away from explanations rooted in conventional accounts that reduce the sole function and origin of penal policies to responding to crimes. He envisioned the goal of the sociology of punishment to trace the political, social, and cultural functions and origins of punishment. Garland suggested that contemporary penal strategies are embedded within deeper structural changes taking place in the latter part of the twentieth century. These changes, Garland (2001) argued, provide the cultural preconditions necessary for societies to develop “cultures of control” characterized by a growing reliance on incarceration, longer sentences, and the normalization of police presence in new areas of society such as schools and shopping malls. The penal welfare model (Garland, 1985), emerging in the latter part of the 19th century, focused on rehabilitation, correction, reentry, and other attempts to utilize incarceration as a re-socialization process has been replaced with a more punitive, managerialist model (Simon, 2007). The normalization of high crime rates, growing polarization and distance between classes, the state’s inability to satisfy the public’s desire for safety, and other late modern shifts are some of the cultural preconditions necessary for contemporary forms of punishment in the US and UK (Garland, 1996). Although these theoretical perspectives offer much in the way of understanding formal social control mechanisms, they do not provide a systematic theoretical perspective to explain differences among legal and criminal justice institutions or their penal outcomes.

Weber: Institutional Variation

Weber investigated several of the world’s religious and economic systems. In The Protestant Ethic and the Spirit of Capitalism, he argued that Protestantism, specifically Calvinism, provided several “this worldly” institutional adaptations (e.g., usury) to open the door to a more acquisitive social order and social actor. In fact, individuals began to see themselves as capitalists as they were to be more industrious and accumulate wealth for its own sake. Weber also investigated Hinduism, Confucianism,
and Buddhism, among other religions, to demonstrate the emergence of quite different economic-religious connections across various parts of the world. However, it is in the West that he recognized the emergence of a unique character—rationalization—that ordered society.

Legal and religious thinking are central entities shaping modern society (and the individuals within these societies) (Kalberg, 1994; Savelsberg, 2004; Treiber, 1985). For Weber, the law, religion, and economy in the modernizing West could not be separated completely. These institutions “had the strictly systematic forms of thought, so essential to a rational jurisprudence, of the Roman law and of the Western law under its influence” (Weber, 1967, p. 14). Weber was interested in knowing why modern capitalism appeared in the Occidental world and not other places, with the implicit answer centered on a specific rationalizing process embedded within Protestantism, the economy, law, and society (Kalberg 1980; Kronman, 1983).

Rationalization of the West, according to Weber, not only occurred in religious or economic or legal institutions, but spread throughout all of these spheres of life to create a canopy of rationalized control structures—potentially forming a dominating “iron cage” --embedded within humane thinking and shaping social conduct. These rationalization processes did not happen simultaneously, nor did they produce identical outcomes across the West. Is Nordic capitalism, for instance, the same as that which exists in Germany, or, more starkly, that which exists in the Common law world? Similarly, do religious practices even of the same denomination come in various forms across the western world? The answers to these questions point to institutional variation across the western world, as well as over time within a single country.

A brief sketch of Weber’s research is in order to demonstrate the potential relationship between specific types of Western legal thinking and penal outcomes. This discussion lays the theoretical groundwork for a historical institutionalist perspective and regime type approach used to explain cross-national difference in the use of incarceration in the West during the post-WWII era.

**Weber’s Typologies of Legal Thinking**

Weber set out to explain the rationalization processes involved in the modernization of the western world. His research into economic action resulted in identifying four ideal types of economic action that parallel those he detailed in legal thinking (Feldman, 1991). These typologies are: formal rational, substantive rational, formal irrational and substantive irrational. Before discussing each of these types of legal thinking, it is important to consider how Weber defined a law. A law is an order that “is externally guaranteed by the probability that coercion (physical or psychological) to bring about conformity or avenge violation, will be applied by a staff of people holding themselves specially ready for that purpose” (Weber, 1967, p.5, emphasis in original). This definition does not mention the inherent rightness or justice of an act. It is predicated on the modern state’s ability to define, control and order human behavior; what is essential for the sociologist regarding the study of laws is to identify the ways in which laws are “actually determinative of conduct” (Weber, 1967, p.4).

That laws shape behavior may appear as a rather taken for granted social fact, but this became a fundamental characteristic of modern law’s ability to predict human action. Social actors do not arrange their behaviors according to laws for their own sake; it is the high probability of a formal response by others that sets laws apart from other types of
orders. Modernity is characterized by high rationality (Giddens, 1991), which brings with it a highly trained staff prepared to respond to law violations. Through the enforcement of law violations, the law’s legitimacy is reinforced in numerous social spheres (e.g., economy, politics) contributing to the semi-autonomous nature of modern legal forms.

Rheinstein (1967), in his “Introduction” to Weber’s Sociology of Law, provides a systematic treatment of Weber’s four types of law. He reworks Weber’s incomplete legal analysis by first pointing to Weber’s central concerns of a sociological study of legal systems with two central items: law making and law finding. The first of these issues focuses on “the establishment of general norms which in the lawyers’ thought assumes the character of rational rules of law” (Weber, 1967, p. 59). Law making involves understanding how laws are made, who gets to make laws, and the specific procedures involved in law making. Law finding, on the other hand, “is the application of such established norms and the legal propositions deduced therefrom by legal thinking, to concrete facts which are subsumed under these norms” (Weber, 1967, p. 59). This latter issue is central to the study at hand, and focuses on the enforcement of laws, the juridical procedures involved, and the roles and expectations for the various bureaucracies in charge “of finding the law once created” (Rheinstein, 1967, p. xi).

Law making and law finding fit into either substantive or formal procedures and they are either rational or irrational. Formally irrational modes of law finding have official ways or individuals to carry out the task of legal decision making. These decisions, however, are not made according to any grand scheme of thought or general rules. An example is the resolution of law violations by oracles, or as was common in the West in pre-modern times, through an ordeal to determine guilt or innocence. Substantive irrationality, similarly, allows for legal actions without the guide “of general norms and proceed either in pure arbitrariness or jump to their conclusions in a completely…emotional evaluation of every single case” (Rheinstein, 1967, p. xi). Rheinstein suggests that substantive irrational legal types have “no counterpart in reality” but is most closely “approximated by the tyrant, as well as khadi justice” because these systems would lack any specific reference to detailed “rules or norms” used to render a legal decision. Substantively irrational law is epitomized by legal decisions decided “by concrete factors in the particular case, without recourse to general rules” in which “enforcement officials in this type make free decisions from case to case” (Marsh, 2000, p. 282). Khadi justice, for example, includes Moslem sharia law that Weber argued involved arbitrary decisions, which were determined according to the merits of each particular case by adherence to a particular value system.

The increasing rationalization of society can be understood as a greater opportunity to calculate another’s behavior according to specific means-end relationships. Weber perceived the western world slipping away from traditional norms that and had become “disenchanted, growing increasingly secularized; as humans are freed from the constraints of mysterious forces, they turn to technical mechanisms to understand their world” (Feldman, 1991, p. 208). Predictability is an essential feature of any rational economic system, and modern capitalism moved away from status contracts to purposive contractual law to establish predictable forms of social action through legal thought. This form of legal order pushed aside patriarchal discretion and established individual rights for citizens, no doubt rights that disproportionately benefited the economically powerful
bourgeois class.

Contractual arrangements are ordered by formal legal rationality to allow one person to predict with some level of certainty the behavior of another person. Modern capitalism, in essence, depended on rational legal procedures, which is not to say necessarily formal-rationality, as the substantively-rational legal order found in England is the place where industrial capitalism first emerged. Rational legal processes can be formal or substantive and the common law is a type of substantive-rational legal order. With that said, however, formal-rational law was considered the most rational type of legal thinking.

A point of clarification is needed regarding common law because at times Weber referred to common law as substantively-irrational in a juridical sense and substantively-rational in a sociological one. When analyzing the English common law as an empirical reality it should be considered as a form of rational law of the substantive type (Ewing, 1987; Kronman, 1983). Common law is rooted in the individual merits of each case, and civil law is determined through the application of an abstract legal science. Weber sought to demonstrate the affinities between a particular legal and economic system, and he argued that modern capitalism was predicated upon a formal-rational legal order. A problem emerges with his causal ordering because Germanic law was the most logically formal-rational type of law, but industrial capitalism first arose in England, the original common law country. How could it be that a substantive legal form fostered (or at least emerged alongside of) a formally rational economic order? Why is it that England, the founder of common law, was also the “birthplace” of modern capitalism? Many have seen this “England problem” as a deviant case refuting Weber’s Sociology of Law (Habermas, 1984).

Discussing the complete history of modern capitalism is well beyond the scope of this analysis. Modern capitalism is orchestrated by the bourgeoisie, and the English law was also established through an imbalance of power in favor of the owners of the means of production, most notably through the purposive contract, judicial training, and jury system. For these reasons, England, no less than Germany, fostered a legal system favorable to the needs, desires, and goals of the bourgeoisie by solidifying (through precedent) their rights over those of the working classes (Ewing, 1987). The common law should be understood as juridically irrational as it lacks a “gapless” system of scripted responses to law finding, but nonetheless it is characterized by rational administration of justice in practice. The administration of justice in common law systems represents bureaucratically organized substantively-rational legal systems in the sociological sense. Ewing (1987, p. 498) summarizes this point: “For Weber, the legal order that was relevant to the rise of capitalism was not a particular type of legal thought but a social order in which law facilitated capitalist transactions by contributing to the predictability of social action.”

Weber explained certain features of the logical formal-rational legal systems reliance on the purposive contract, displacement of traditional, communitarian based law with systematic national codes (and rules), and the advancement of a specialist staff of legal professions (Ewing, 1987; Kronman, 1983; Rheinstein, 1967; Trubek, 1985). The differences between substantive and formal legal types can be understood as a “tension between abstract calculability and the satisfaction of ultimate values and needs” (Feldman, 1991, p. 207). Logical formal-rational law accepts an epistemology that
eschews values understood in an ethical or political stance, but rather attempts to regulate law finding through strict application of abstract rules (Kronman, 1983).

The logically formal rational legal type is exemplified by five postulates that are worth mentioning here:

“first, that every concrete legal decision be the “application” of an abstract legal proposition to a concrete “fact situation”; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a “gapless” system of legal propositions, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be “construed” legally in rational terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an “application” or “execution” of legal propositions, or as an “infringement” thereof” (Weber, 1967, p. 64).

Typologies provided Weber, and sociologists working in his tradition, with effective methodological tools to identify the multi-causality of social phenomena. This approach seeks “…to understand society as resulting from a complex interaction of many factors, including law, religion, and economy” (Feldman, 1991, p. 210). The bulk of emphasis in the Sociology of Law centers on the difference between English common law and that of German civil legal systems. Three central features or differences can be discerned from these typologies:

1. **Procedural justice**: certain legal systems emphasize the adherence to a priori abstract rules (Romano-Germanic and Nordic law), whereas others emphasize characteristics of the case at hand to continually establish legal rules (common law);

2. **Social justice**: certain legal systems ignore social values when making legal decisions (Romano-Germanic law), while others continually adjust legal rules according to social values having nothing to do with legal rules per se (Nordic and common law); and

3. **Moral justice**: certain legal systems define legal rules by separating morality and law finding (Romano-Germanic law), but others intentionally blur the moral and legal spheres (Nordic and common law). (Kronman, 1983, p. 79-80; Trubek, 1985, p. 926-927).

Weber differentiated among common law and Romano-Germanic civil law systems by identifying procedural, social, and moral differences among these legal types. The former is referred to as an adversarial based system in which the judge lacks the power to directly question witnesses, but rather “the true facts are expected to emerge from the allegations and proofs of the parties without the active cooperation of the judge” (Weber, 1967, p. 225 footnote #7). Inquisitorial procedures, an established part of Germanic law since the middle Ages, in which “the ascertainment of the facts is regarded primarily as the task of the judge” (Weber, 1967, p. 225 footnote #7). This is an important distinction between these types of law finding in which common law affords the judge tremendous power in the sentencing portion of a trial. This judicial discretion allows for decisions based upon extra-legal information, not only the application of abstract legal rules developed beforehand.

Inquisitorial systems involve trials in which the judge has direct control over the
Lawyers are important actors in this process, but once the prosecutor turns over the dossier, lawyers are to respond to the judge. Law finding in Germanic law systems is a matter of compiling the “facts” and locating the relevant code to apply the decision—morality, ethics, and personal considerations are to be left aside (Dubber, 1997).

It is argued that by concentrating on the two poles of Western legal rationality, Weber missed a more balanced legal approach found in the Nordic countries. Weber’s legal typology is adapted to argue that a third type of legal thinking exists. The Nordic legal regime is described more fully in Chapter 3, but it is argued that the Nordic countries have blended the civil and common law approaches with their own unique cultural legal beliefs. This Weberian schema is joined with contemporary historical institutional theoretical perspectives described below.

Types of Institutional Theories

Historical institutionalists explain political outcomes by analyzing contingencies, unintended consequences of action, and the path dependency of institutional development and change (Hay and Wincott, 1998: 952). To date, historical institutional perspectives have yet to be used to explain variation in cross-national crime control policy outcomes (for use in legal studies, see Skrentny, 2006). Historical institutionalism is one variant of the “new institutionalism” that replaced the previous more individualistic and behaviorist movement throughout much of the 1950s and 1960s. This orientation focused on “the observed and observable behavior of humans” as the basic datum of social analysis (Immergut, 1998: 6). New institutionalist theories explain the relations between behavior and institutions, and the process of institutional development, durability, and change (Clemens and Cook, 1999; Hall and Taylor, 1996).

Immergut (1998) critiqued the dominant variants of institutional theory as rational choice, sociological institutionalism, and historical institutionalism, and she identified that each variant emerged to form different theoretical assumptions regarding the complex interaction between (a) institutional forces and (b) human preferences bringing about (c) policy changes. The argument revolves around the notion of whether social actors--as individual voters, bureaucrats, citizens--can express their real interests as opposed to socially constructed ones.

Institutions, according to rational choice theorists, provide rules and norms that serve to “lower the transaction costs of making deals so as to allow gains from exchange among legislators that make the passage of stable legislation possible…[and] solve many of the collective action problems that legislatures habitually confront” (Hall and Taylor, 1996: 943). Rational choice theories recognize the importance of efficiency, transaction costs, and institutionally enforced observance of rules. These rules make it difficult to determine the true preferences of individuals. However, political actors have information regarding these rules and can therefore take actions to maximize their personal interests, and “manipulate the rules in such a way as to achieve their most-preferred outcome” (Immergut, 1998: 13). This creates a situation in which political actors make decisions based upon a strategic calculation of the course of action that will benefit them the most.

Sociological institutionalism focuses on the affect and cognitive impact of various institutional arrangements such as Zucker’s attention to cultural categories (roles and hierarchies) or Fligstein’s explanation of changes to management styles, not as rational outcomes to maximize personal profit (broadly speaking), but as changes in perspective. DiMaggio and Powell (1991:8) summarized sociological institutionalism as:
“a rejection of rational-actor models, an interest in institutions as independent variables, a turn toward cognitive and cultural explanations, and an interest in properties of supraindividual units of analysis that cannot be reduced to aggregations or direct consequences of individuals’ attributes or motives.”

DiMaggio and Powell (1991:11) identified how sociological institutionalism eschews rational accounts of actors’ solutions to social, political, and economic life for attention to the process by “which institutions complicate and constitute the paths by which solutions are sought.” Social life is filled with assumptions that people make regarding “standard operating procedures”, rules of action, and common sense agreements that allow people to get on with everyday life. This is similar to Garfinkel’s notion of “socially-sanctioned-facts-of-life-in-society-that-any-bona-fide-member-of-society-knows” through intersubjective communications.

Historical Institutionalism

Historical institutionalism is most closely attached to the work of Max Weber and the interpretive framework in sociology. This approach explains the meaning of everyday practices, and how these meanings shape behavior in different historical times. A central difference between historical institutionalism and other forms of institutionalist theories is its emphasis on “themes of power and interests” (Immergut, 1998). Historical institutionalism emerged out of a dissatisfaction for the lack of macro-structural perspective in both rational choice and sociological accounts (see Evans, Rueschemeyer, and Skocpol, 1985), question normative and functionalist accounts (e.g., modernization) that skip over the importance of how power is structured and effects agents.

No longer are individual actions of policy makers, bureaucrats, or voters translated as the manifestation of autonomous beings putting their interests into practice. Rather, quite the contrary, social behavior is the manifestation of the myriad of institutional arrangements characterizing any particular historical time and imbued with uneven distributions of power and resources. Historical institutionalists identify complex causal configurations that make it difficult to determine the magnitude of historically contingent factors that drive particular policy outcomes. Often it is revealed that the specific arrangements or configurations of variables are influential in shaping policy outcomes (Ragin, 2000). These points fit nicely with Weber’s sociological framework. In the case of cross-national crime control, there may be variation across and within cases in regards to how legal institutions shape policy outcomes such as peculiarities of Romano-Germanic, Anglo-American common law, and Nordic legal regimes that place different power in judges, lawyers, and prosecutors, and how these features interact with other country-specific factors such as plea bargaining structures, the presence of lay judges vs. the use of juries, the role of attorneys, the use of open prisons, trial structures, and procedures of criminal evidence.

Historical institutionalists differ from sociological and rational choice institutionalists in their attention to historical luck, happenstance, and quirks of fate in shaping institutional development and change, which has a serious effect on social reality. This last point is similar to what Lieberman (2001) refers to as periodization when recognizing the significance of historical turning points, which are important or crucial events that set in place a series of beliefs, values, norms, and logics of appropriate
action that serve to shape social behavior. For example, felony voting restrictions—a peculiar US institution—have contributed to placing crime control policies on a particular path. These restrictions have been found to disproportionately favor the Republican Party which, in turn, has pushed for more stringent crime control strategies that have restricted more individuals from voting, not to mention the effect these laws have upon minority populations (Uggen and Manza, 2002).

These approaches are centered on the idea that social reality is a malleable entity that is the result of numerous complex interactions, decisions, judgments, and historically contingent experiences. Institutions are the result of “multiple conjunctural causation” and it is up to sociologists to research—through history—the possible causal configurations of institutions shaping crime control policy outcomes (Pierson, 2000a, 2000b, 2004; Ragin, 2000). Huber and Stephens (2001) summarize three interconnected theoretical mechanisms—policy ratchet effect, structural limitation, and regime legacies—that are helpful to identify and explain patterns of short- and long-term crime control strategies.

1. **Policy ratchet or legacy effect** suggests that once particular policy paths are set in motion they become increasingly hard to change. This is seen in crime control in the US by Democratic politicians supporting law and order politics such as the death penalty (namely Bill Clinton) following several consecutive conservative administrations. Altering these policies to a less law and order agenda would have appeared soft on crime as these policy shifts eventually alter the public’s consciousness and preferences—institutional inertia—regarding punishment policies (Pierson, 1996). One need only consider how difficult it is for policy makers to voice opposition to stringent drug enforcement policies, despite that these approaches are not the most effective strategy for combating drug addiction.

2. **Structural limitations** are such that certain policy alternatives are ineligible due to specific power constellations in a country at a given period. As Huber and Stephens (2001: 29) pointed out in regard to welfare state expansion that “if it is highly probable that a given [political] party will be returned to power time after time, societal actors will adjust their expectations about the feasibility of given policy alternatives.” This level of feasible policy options are needed to explain punishment policies and how certain power relations can create the context in which others are not able to espouse alternative policies. This is related to the use of amnesties, prison waiting lists, and widespread use of day fines and community service in Germany, Finland, Sweden, Norway, and other countries, which are relatively unthinkable punishment alternatives in many Anglo-Saxon common law countries.

3. **Regime legacies** are a theoretical mechanism suggesting that distinctive patterns of organizing punishment policies exists within specific types of crime control or legal regimes. Actors become conditioned to certain configurations or policy clusters within each country, and the regime legacy “affects the distribution of preferences as each actor takes the current situation as a given, or at least the new starting point, which forecloses some opportunities and opens others” (Huber and Stephens, 2001: 30; Esping-Anderson, 1990). The use of regime types suggests that countries can be grouped by policy clusters such as the Anglo-Saxon countries fitting into a common law regime, Continental Europe fitting into Romano-Germanic legal regime, and Nordic countries fitting into a Nordic legal regime. Grouping countries according to these regime types,
for example, one finds relative homogeneity among groups when comparing incarceration rates (Glendon, Gordon, and Osakwe, 1982; Zweigert and Kotz, 1998).

Hypotheses

Hypothesis 1: The common law punishment regime variable characterized by the presence of jury trials, broad prosecutorial discretion, exclusionary rules, and dual trial structures have a positive relationship with incarceration rates controlling for crime and homicide rates.

Hypothesis 2: The Romano-Germanic punishment regime variable characterized by little prosecutorial discretion, scientific legal approach, and limited lay participation has a moderate negative relationship with incarceration rates controlling for crime and homicide rates.

Hypothesis 3: The Nordic punishment regime variable characterized with open prisons and penal waiting lists has a strong negative relationship with incarceration rates controlling for crime and homicide rates.

Hypothesis 4: Left party power and union density have strong negative relationships with incarceration rates net of regime effects.

These hypotheses lend themselves to quantitative testing in both cross-section and time-series regressions. Further micro-level study is necessary to prove fully the mechanisms involved within each regime type. The focus of this dissertation is the differences in regime types and the basic causes of each one as described in hypotheses 1 through 4. The case study chapters focus on the nature of the regime types, and the underlying mechanisms involved in each one. The explanations of the mechanisms are highly informed suggestions of how the mechanisms within each regime operate to shape incarceration rates.

What’s to Come

This dissertation is a comparison of 17 countries’ legal and criminal justice systems to offer an explanation of incarceration rate variation from 1960 to 2002. The second chapter details the research plan and methodological strategy. In chapter three the descriptive statistics, cross-sectional analysis, and time-series cross-sectional analysis for two datasets (17 countries x 23 years and 15 countries x 43 years) are reported. The fourth, fifth, and sixth chapters provide a historical case study of the US, Germany, and Sweden as ideal types of the regimes they fit in. The US is an example of a common law system; Germany is an exemplar of the Romano-Germanic legal system; and Sweden is often said to be an example of the Nordic culture and way of life. These chapters provide brief review of the historical paths of each legal system before discussing the penal trends in the post-WWII era. Chapter seven concludes the dissertation with some discussion of the substantive findings, theoretical contributions, directions for future research, and policy implications.

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Chapter Two: Research Plan and Methodological Strategy

Science is rooted in comparisons, with the scientific method itself a standardized set of principles necessary to ascertain why certain outcomes occur as opposed to alternatives. This dissertation contributes to sociological theory and methods by adapting Weber’s (1967) ideal types of legal thinking to develop and test a regime type theory (Esping-Anderson, 1990; Huber and Stephens, 2001) to explain the variation in the use of incarceration in 17 industrialized countries during the post-WWII era.

Comparative-historical research is necessary to develop explanations of why some countries rely more heavily on incarceration than others (Bennett, 2004; Farrington and Tonry, 2004; Tonry, 2004a, 2007). The regime approach is used to group countries according to similar legal histories. Regime type construction goes a step further than ideal types (Esping-Anderson, 1990; Huber and Stephens, 2001). Weber’s ideal types point to an exemplar of a specific type of rationalization in law in an abstract way, whereas regime types systematically measure institutional change. Criminal justice regime type variables are created by summing the relative presence of regime characteristics for each country over time (Janoski, McGill, and Tinsley, 1997).

A unique feature of historical-institutional research is that its practitioners intertwine methodological and theoretical issues. Historical research is a dynamic process allowing one to interact with historical texts while attempting to trace the process by which social and political outcomes were instituted by social actors (Mahoney, 2000, 2004; Mahoney and Rueschemeyer, 2002). The researcher gains perspectives as he or she interacts with the historical data, and these new findings shape theoretical insights and guide further analysis. There is a gap in comparative-historical research and theory explaining criminal justice outcomes (Cavadino and Dignon, 2006; Sutton, 2004). The regime theory is tested with descriptive, cross-sectional, and time-series cross-sectional analyses. One country from each of the regime types is selected for an historical case study—the US, Germany, and Sweden—to identify critical points in history that resulted in the adoption or rejection of specific institutional arrangements related to penal outcomes.

Methods

The research strategy is similar to that applied by some welfare state theorists (Esping-Anderson, 1990; Huber and Stephens, 2001). Welfare state regime types were created by systematically measuring important welfare institutions that appear with some level of regularity among countries with similar political-economic structures. The welfare regimes are the Social Democratic, Corporatist, and Liberal (or wage earner), and it is argued that underlying politico-economic foundations are reflected in types of welfare practices. This approach, essentially, argues that despite the similarity among the west there is unique variance in welfare mechanisms that are supported by historically embedded political and economic structures (Soskice and Hall, 2001). Although these policy clusters have been tested empirically in the welfare state literature, there has yet to be a systematic application of a similar regime method using criminal justice institutions.

Regime Method

The regime method is a technique used to allow for uncovering short- and long-term patterns in social and political phenomenon. Each regime type is composed of several indicators that will be measured dichotomously. The countries within each
regime have a similar type of legal thinking. Table 2.1 provides regime characteristics to demonstrate the measuring process. The incarceration regimes are measured as follows:

1. The Romano-Germanic punishment regime (bureaucratic law) is composed of two institutions. **a. Lay judges:** the presence and use of lay judges were scored to indicate the control placed on lay judges—which is something of the inverse of judicial power—in which Germanic countries have tight control over lay participation (scored 1), the common law countries do not have lay judges (scored 0), and the Nordic countries fit in the middle as lay judges have more influence than in the former countries but not as much power as in the latter. **b. Lawfinding:** the second institution measures the shape of judicial review to reflect the role of judges as overseers of lawfinding, not lawmaking, as Weber stressed, the Germanic judge is myopically focused on applying legal codes to particular fact situations as laid out by the legislative and executive branches. Therefore, Germanic countries are scored 1 to reflect the centralization of the judicial role as one of lawfinding. The Nordic countries are scored .5 and the common law countries have broad judicial review powers were scored 0. This regime variable ranges from 0 to 2.

2. The Common law incarceration regime (punitive law) is composed of four institutions and ranges between 0 and 4. **a. Juries:** presence and use of juries are scored with a zero for the Germanic countries, with some countries allowing juries on appeals only or in highly restricted cases (e.g., France). The Nordic countries also have some minimal use of juries and these country-years were scored .5. The common law country-years were scored with a 1 to indicate the power given to juries in such times and places. **b. Prosecutorial discretion:** is routinely mentioned as an exceptional characteristic of the common law. Country-years having high prosecutorial discretion were scored with a 1, those with almost no discretion were scored 0, and those having some limited official discretion were scored .5. **c. Dual trial:** is coded such that countries having separate guilt and sentencing phases receive a 1 and those with unitary trial structures receive a 0. **d. Exclusionary rules:** countries with rules excluding evidence or hearsay were scored with a 1 and those without such legal institutions were scored 0. The country-years scores were summed to yield the Common law incarceration regime ranging from 0 to 4.

3. The Nordic incarceration regime (collective law) is composed of two institutions and ranges from 0 to 2. **a. Anti-prison groups:** country-years in which there was a strong and influential anti-prison group(s) received a 1 and all other country-years received a zero. **b. Open prisons:** country-years in which open prisons are used were scored 1 and zero when they are not used. The country-year scores were summed to yield a Nordic incarceration regime.
<table>
<thead>
<tr>
<th>Country</th>
<th>Jury</th>
<th>Exclusionary</th>
<th>Dual Trial</th>
<th>Prosecutor</th>
<th>Lay Judges</th>
<th>Review</th>
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<th>Open Prison</th>
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</table>

Parentheses indicate the year a change took place.
The goal is to derive theoretically viable and testable aspects of hypothesized regimes. Each of the items fitting into the index is traced for each of the country-year dyads, and these items are theoretically related to the outcome variable—incarceration rate. The jury, in certain contexts, is believed to infuse court processes with the popular punitivism identified by several criminologists during the latter 20th century. A central characteristic of the common law system is the use of lay juries that can determine disposition as well as sentence in some cases. This is not to neglect the lay participation found in other systems, but rather serves to highlight an embedded latent cultural characteristic. Consider that all the systems considered here include some lay participation, but that participation is distributed differently across regimes. The Romano-Germanic regime is a highly professionalized legal system respecting formal credentials, training, and diminished lay influence in decisions. The Common law regime, on the other hand, emphasizes lay jury participation with the use of jury trials. Common law was founded on the notion of peer-to-peer resolution of law finding, which does not relegate the judge to some backstage position as much as this solidified a certain relationship between judge, jury, and accused that structures the common law system. This may seem to be an insignificant institutional difference of how a regime incorporates lay participation, but it does point to different training and educational standards perceived as needed to make legal decisions. The common law legal system is predicated on the notion of social conscious legal rulings; in such cases the current trends and thoughts are considered in court cases. This is out of the question in a German trial that is to be ordered by attention to rules, laws, and formality.

Data

The data in this study come from a variety of sources. Formal data sources include the United Nations World Surveys on Crime Trends and Criminal Justice Systems (1970 to 1997), CIA World Fact Book, US Bureau of Justice Statistics, The European Sourcebook of Crime and Criminal Justice, World Health Organization, and International Labor Organization, and other sources. The following data sources were also used: the Database on Institutional Characteristics of Trade Unions, Age setting, state intervention, and social pacts (Visser, 2009), political variables were retrieved from Duane Swank’s Codebook for 21-Nation pooled time series data set: Political strength of political parties by ideological group in capitalist democracies, the Penn World Table Version 6.2 (Heston, Summers and Aten, 2009), probation and lawyer rates were found in Boyle (2000), and incarceration rates for 1960 to 1990 were found in Sutton (2004).

Operationalization of the Dependent Variable

The dependent variable is a common indicator of the relative use of incarceration, and is a figure routinely identified as the most accurate measure of relative incarceration use. These populations will be computed using the common rate figure of the number of incarcerated adults per every 100,000 people in each population. There is debate whether to use prison admission rates or incarceration rates to measure the relative use of incarceration in comparative research. Interestingly, Jacobs and Helms (1996) supported using admission rates, but they subsequently (Jacobs and Helms, 2001: 178) determined that analyzing annual prisoners per 100,000 adults in the population “is conceptually superior to the less comprehensive admission rates.” Incarceration rates are a preferable indicator of the probability of incarceration than admission rates, as this figure identifies (as best as possible) the rate by which adults are incarcerated within a nation. This is not
to suggest that other figures are not suitable measures of formal punishment, but rather the focus of this dissertation is to test a criminal justice regime theory using comparative-historical methods to explain the use of incarceration. Other researchers may wish to use an alternative criminal justice outcome as a dependent variable to explain broader relationships operating within the criminal justice systems in these different countries.

Quantitative Approach

Comparative researchers must confront several issues pertaining to small-N problems (Ragin, 1987) when estimating statistical inference. The time-series cross-section analysis (TSCS) is similar to panel studies in which researchers may have thousands of units (N) but only a few time periods (T). These are referred to as cross-sectionally dominant, and there has been much analytical development for these sorts of analyses (Stimson, 1985). Panel designs, however, are conceptually much different from time-series cross-section analysis. Large N panel designs are centrally concerned with generalizability of the findings, which is not the point of this dissertation. The intentions are to explain incarceration in the countries included in the analysis.

Comparative social science researchers often compare 10 to 50 countries over 10 to 30 years (Beck and Katz, 1995). This data creates potential for heteroskedasticity and correlation of errors with independent variables. Ordinary least squares regression (OLS) assumes that error structures are spherical—homoskedastic and independent. The first of these assumptions—homoskedasticity—is the presence of constant error variance between units, as it is an acceptable assumption that within unit error variance is constant. This is an important methodological point specific to TSCS analyses because this heteroskedasticity is usually the result of unmeasured unit specific factors that influence the dependent variable. This could be a political campaign bringing about significant policy changes in a single country. Correlated error processes, on the other hand, may arise in two ways. One type of autocorrelation is serial correlation due to correlated errors within one unit over time, and the other is the correlation of errors at any point in time between units (i.e., contemporaneous correlation).

TSCS data must be corrected for potential problems. The countries included in the analysis were selected because of their similarities in economic, political, social, and other fields. These similarities have the potential to create contemporaneous correlation in which the error structures of a nation correlate with another unit. These assumptions are more than a mere nuisance--error structures are important to consider in TSCS (Beck, 2001). Using OLS will lead to inefficient estimation, and most problematically, reduced standard errors that foster inflated significance tests (Type I error). It is difficult for comparative scholars to assume that cross-national data will be arranged such that error variances are constant and that all error processes are independent.

To adjust for these panel error assumptions, Parks (1967) developed an approach using generalized least squares regression (GLS) that adjusted for heteroskedasticity and autocorrelation. Beck and Katz (1995) proposed a critique and alternative estimator than the Parks method. In their critique, they describe the Parks-Kmenta method as two sequential feasible generalized least squares (FGLS) transformations. They point out that the Parks-Kmenta approach rests on asymptotic properties as T increases, and argued that T needs to be two or three times larger than N before using the Parks-Kmenta method. It is argued that the FGLS estimator provides significant underestimates of variability in finite samples. Beck and Katz (1995), in the end, suggest that researchers utilize panel
corrected standard errors (PCSE) and OLS estimation (now accessible in common statistical software, such as STATA).

Following Beck and Katz (1995), comparative researchers incorporated PCSE in their models. Wilson and Butler (2007: 110) argued that there is more to consider when using TSCS analysis than standard errors, as many researchers began including PCSEs but had few other considerations. Their analysis of 195 papers uncovered several problems with the application of the Beck and Katz (1995) method. They actually found that several findings in comparative politics were weaker than reported and some even had a reversal of sign.

A central concern when utilizing the common fixed effects model is that such models only use within unit variances and they ignore between unit variance (Baltagi, 2001; Hsiao, 2003; Wooldridge, 2002). This is especially problematic for comparative-historical researchers wanting to measure the between unit effects on time-invariant and slowly-changing variables. A key feature of institutional theory is recognizing that institutions once established are slow to change. That is, institutions become accepted as the appropriate way for doing things in different places and times, but for various reasons these processes can be challenged and altered. The death penalty makes for a good example as it was considered an acceptable form of punishment in the US nearly since the founding of the country and remained unchanged until the early 1970s. This is an example of an institution being firmly entrenched in the thoughts and behaviors of the US legal system, but the opposition (exogenous forces) upset the legitimacy of the death penalty causing a rapid transition. No doubt, the death penalty returned shortly after the moratorium, and it is a relatively engrained form of punishment in the US. The point here is that institutional variables are often referred to as time-invariant or constants when they are really slowly changing variables within units and potentially highly variable across units.

Recently Plümper and Troeger (2007) have developed a new technique that incorporates both between and within unit variance by separating and considering these effects separately. This is a three-stage fixed-effects vector decomposition model (FEVD). The FEVD model is particularly suited to this analysis because it differentiates between variables with considerable variability, and slowly changing or sometimes constant variables within each country which then vary more between countries. This is useful because the central slowly changing institutional variables in this study are the criminal justice regime variables. The equations for the three-stage FEVD model adjusting for only one time-invariant variable \((z)\) are:

1. \[y_{it} = \alpha + \beta_1 x_{it} + \ldots + \beta_k x_{kit} + \gamma z_{it} + u_i + e_{it}\]

The first stage estimates a standard fixed effect model with a time-invariant institutional variable \((z_{it})\), the fixed effects of the unobserved effects within specific countries \((u_i)\), and the independent and identically distributed error term \((e_{it})\). Plümper and Troeger go on to estimate two equations to estimate observed and unobserved unit effects.

2. \[h_i = u^i - \gamma_1 z_{1i} \ldots \gamma_m z_{mi}\]

The second stage decomposes the unit effects into an unexplained \((h_i)\) and explained part by the slowly changing variable \((z_i)\).

3. \[y_{it} = \alpha + \beta_1 x_{it} + \ldots + \beta_k x_{kit} + \gamma z_{it} + \delta h_i + e_{it}\]

The third stage reruns the entire model omitting the unit effects \((u_i)\) but including the
unexplained part \((h_i)\) of the decomposed unit fixed effect vector obtained in stage two by estimating a pooled OLS (see Plümper and Troeger for the seven equation process). The results include \(\delta_i\) that indicates unit specific unobserved effects of each country.

**Case Studies: US, Germany, and Sweden**

One drawback to comparative research is that as the sample size increases, the level of within case specificity declines. A way to fill some of the gaps missed by the quantitative analysis is to conduct country specific case studies to delve deeper into the history for a particular country. Each of the three countries chosen is an ideal type representing an exemplar of a particular regime type. In this case, the US, Germany, and Sweden were selected as exemplars of the Common, Romano-Germanic, and Nordic law regime types. This is not to say that any of these countries is a pure type of the punishment regime they are placed in, but rather one can see relatively clear differences in the historical path to bring about divergent contemporary crime control outcomes among these countries. The data for these case studies is collected through historical sources, governmental reports, and email exchanges with scholars and justice professionals from several countries.

The case studies are used to accomplish three main goals. First, they offer a more in-depth explanation of each regime type by providing details of how legal and criminal justice practices changed over time. Second, the case studies demonstrate how the various institutional changes took place in these countries. This allows for exploring the influence of social changes on legal definitions and practices. For instance, the US case study demonstrates how the common law trial shifted from a judge-dominated procedure that excluded lawyers to one that relies on a passive-judge and powerful lawyers in an adversarial process. Third, the case studies are used to make the mechanisms of the regime type clearer than the regime type variable that measures each group of countries. This is the more challenging objective for the case studies. Using history to make causal statements about contemporary crime control requires understanding what changes occurred and how these changes came about. The ultimate purpose here is to understand why it is that the lawyerization of trials and jury presence increase the likelihood for more incarceration, whereas limited prosecutorial discretion, restricted lay participation, and open prisons have a dampening effect on incarceration rates.

**Expected findings**

All social research comes with strengths and weaknesses, and this dissertation is no different. It is hypothesized that the research findings will identify specific features embedded within the common law regime (i.e., Australia, Canada, Ireland, New Zealand, UK, and US) that promotes the use of prison as a way to handle marginal populations, and, conversely that there are features within the civil law tradition that prevent extensive use of prisons in countries fitting into a Romano-Germanic (i.e., Austria, Belgium, France, Germany, Italy, and Netherlands) incarceration regime, and little reliance on incarceration as a policy response in the Nordic (i.e., Denmark, Finland, Norway, and Sweden) countries that rely on an amalgamation of the common and civil law with a particular Nordic culture and politics. Japan is difficult to hypothesize fitting into one of these regimes, but they appear more akin to the Nordic regime with their low incarceration and blended civil and common law structures.

It is possible, however, that these expectations may not be supported by the empirical evidence. It could be that the known historical differences between these
countries may have little direct influence on criminal justice policy outcomes. It could be that the hypothesized incarceration regimes are not plausible. That is, there may not be an underlying type of legal thinking supporting rather coherent crime control responses over the long-term within the industrialized world that allows for collapsing these countries into regime types. One possible alternative outcome is that the common law regime does not exist. Instead, it may be that the US is an outlier, and that while Australia, UK, and New Zealand have experimented with similar practices (e.g., three-strikes, longer sentences, private prison operation, and prison construction) their incarceration rates are still much lower. The common law countries, nevertheless, have consistently higher incarceration rates than those found on the Continent or Scandinavia.

Welfare state literature and political sociological research presented earlier suggests that contemporary policy decisions are not the manifestation of instantaneous desires. Policy outcomes instead reflect underlying logics of how the state and individual relate to one another, and the criminal justice system is used to enforce this relationship. It is conceded here that no other country resembles the level of punishment used in the US, but previous actions in these countries suggest that the potential exists within other common law countries. Or, it is possible that some unknown factor(s) exist that separates the US legal system from other common law countries (e.g., the election of judicial actors).

**Independent Variables**

**Politics**
- **Election Year:** Election year dummy variables are coded 1 for years in which an election took place and 0 otherwise. For the US, Congressional and Presidential years are coded, and in France, Presidential and National Assembly election years are coded. In all other cases, national elections of lower chamber legislatures were coded as 1 (Swank dataset).
- **Left Power:** (is the factor score combining the following two variables): Left party legislative seats as a percent of all legislative seats and left party votes as a percent of total votes. Source (for seats): Mackie and Rose (1974; selected years). (For the United States, non-southern Democratic seats are reported for left seats) (Swank dataset).

**Bargaining structures and Union Density**
- **Intervention:** (is the factor score combining the following two variables): Coordination of wage bargaining is a variable ranging from 1 to 5 with higher scores indicated more centralized coordination of wage bargaining and 1 indicating completely fragmented company level bargaining. The second variable included is the level of government intervention in wage bargaining is a variable measuring the amount of government involvement in wage bargaining ranging from 1 to 5. Higher scores are indicative of more governmental intervention (Visser, 2009).
- **Union Density:** is the net union membership as a proportion wage and salary earners in employment (wsee) NUM*100/wsee, with higher values indicative of more union density.
Economic-Wellbeing
GDP-PPP: is Purchasing power parity over GDP. This measures currency units needed to purchase what can be bought with one unit of the base country. The Penn World Tables calculate the PPP as a country’s currency value of GDP divided by real value of GDP in international dollars (Heston, Summers, and Aten, 2006).

Gini Coefficient: is a common measure of inequality within a country. This coefficient ranges from 0 (indicating lack of inequality) and 1 (indicating complete inequality). https://www.cia.gov/library/publications/the-world-factbook/fields/2172.html

Human Development Index: Index is a normalized composite measure of life expectancy, literacy, educational attainment, and GDP per capita. The United Nations uses a natural logarithm of GDP per capita, life expectancy at birth, and two measure of education (literacy rate and an enrollment ratio of primary, secondary, and tertiary schools) (http://hdr.undp.org/en/statistics/).

Welfare
Decommodification: is a measure from Esping-Anderson representing the relative protection that workers have from shifts in the labor market updated by Kenworthy (http://www.u.arizona.edu/~lkenwor/data.html).

Conservative: regime is a measure of Esping-Anderson’s neo-corporatist welfare regime updated by Kenworthy (http://www.u.arizona.edu/~lkenwor/data.html).

Social Democratic: regime is a measure of Esping-Anderson’s Nordic welfare regime updated by Kenworthy (http://www.u.arizona.edu/~lkenwor/data.html).

Liberal: regime is a measure of Esping-Anderson’s liberal welfare regime updated by Kenworthy (http://www.u.arizona.edu/~lkenwor/data.html).

Criminal Justice
Probation is a measure of probationers per 1,000 in each population from Boyle (2000).

Lawyers is a measure of lawyers per 1,000 in each population from Boyle (2000).

Police: is a rate of police officers per 100,000 in each population from Barclay and Tavares (2003).

Judge election: scored 0 (no elections) or 1 (judicial elections).

Crime
Homicide: rate of homicides per 100,000 in each country (WHO).

Violent crime rate: is a rate of reported violent crimes per 100,000 in each population from Barclay and Tavares (2003).
Crime rate Police: is a rate of all reported crimes per 100,000 in each population from Barclay and Tavares (2003).

Conclusion

Comparative historical approaches focus on making causal statements that consider both time and space. This requires data collection and analytic strategies that also account for temporal and spatial dynamics. The methods described in this chapter rely on previous research to utilize quantitative and historical data to test the hypotheses presented. The quantitative analysis uses descriptive and correlational analyses provide tentative evidence that the 17 countries’ use of punishment cluster around three distinct legal regimes. Next, cross-sectional regression models are estimated that include social, economic, and political factors, while controlling for total crime rates, violent crime rates, and homicide rates. Following the cross-section analysis, the time-series analyses are presented for the 17 country 23 years and the 15 country 43 years data sets. The quantitative data allows for testing the plausibility of the influence of legal and criminal justice institutional variation with newly developed modeling technique to measure the effects of slowly changing institutional variables. Three historical case studies are presented to demonstrate the process by which each of the legal regimes was constituted over time. Reviewing the historical record of three distinct countries provides information regarding the path or trajectory by which each of these countries formed their type of punishment.
Chapter Three: Quantitative Analysis

This chapter reports the quantitative findings. First, descriptive statistics are provided for key criminal justice and structural variables. Second, cross-sectional correlations are reviewed. These correlations provide a validity check by measuring the correlations between the punishment regimes and welfare state measures before reporting the correlations of incarceration rate and the criminal justice variables. Third, OLS regressions are presented using cross-sectional data of incarceration rates on regime variables, while controlling for crime, politics, economics, and labor organization. Fourth, the correlations and time-series cross-sectional analyses are presented for the 17 country-23 year data set and the 15 country-43 year data set. The time-series dominant data set excludes Ireland\textsuperscript{vii} and Japan.\textsuperscript{viii}

Descriptive Statistics

Table 3.1 provides incarceration rates per 100,000 population for the countries and regime averages. Table 3.1 demonstrates that the US is not the leader in crime or violent crime rates despite being the leader in homicide and prison rates. Table 3.1 shows the latest year of data captured for each of the variables. This table makes clear the regime group differences with the common law regime having nearly 2.5 times the incarceration rate of the Romano-Germanic regime, and 3.5 times the rate of Nordic law countries and Japan. Common law countries have more than twice the rate of reported homicides, nearly identical crime rate with the Romano-Germanic regime, but much lower rate compared to the Nordic regime and Japan. Average violent crime rates are close between the Nordic regime and Japan and the Romano-Germanic regime, but the common law regime has between 33 and 50 percent more reported violent crime. The Romano-Germanic regime has, on average, greater police presence, but the common law regime had more probation officers and lawyers than the other regimes. No doubt these data provide only limited direction as it is difficult to compare crime rates given the variations in criminal definitions (see Barclay and Tavares, 2003).

The common law regime has nearly one-third more inequality than the Nordic regime and Japan, and has nearly 25 percent more than the Romano-Germanic regime, on average. The common law regime has a much lower rate of left party political power and governmental intervention in economic policies than the Nordic regime and Japan and the Romano-Germanic regime. The Nordic regime and Japan have more left party power and intervention than the other regimes. Union density is nearly 60 percent higher in the Nordic regime and Japan than the other regimes.
<table>
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<th>Police</th>
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Prison: for the year 2002, per 100,000 population gathered through country reports.

Homicide: for the year 2002, per 100,000 population from the World Health Organization Mortality Database.


Probation: found in Boyle (2000) who cites U.N. World Crime Surveys 1992, supplemented by national yearbooks. Data are probation officers per 1,000 population, with added constant to eliminate zeros, and logged.

Lawyer: found in Boyle (2000) who cites Pritchard (1991) for European countries and Ahmad-Taylor (1994) for other countries. Data are lawyers per 1,000 population, with added constant to eliminate zeros, and logged.
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Cross-Sectional Correlations: Punishment Regimes and Welfare State Regimes

The correlations between incarceration rates, welfare state variables, and punishment regimes are reported in Table 3.2. The incarceration and welfare state regime relationships are in the hypothesized directions. For example, the Nordic punishment regime variable is positively correlated with decommodification and the social democratic welfare state. The Nordic regime is negatively correlated with the liberal welfare state, and although not reaching significance the Nordic regime has negative coefficients with the common and Romano-Germanic punishment regimes, and incarceration rates.

Table 3.2 demonstrates that the common law punishment regime is correlated negatively with the Romano-Germanic punishment regime, the conservative welfare state regime, and the decommodification measure. There are negative coefficients between decommodification and the liberal welfare state and incarceration rates, and positive coefficient with the social democratic welfare state. The liberal welfare state and the social democratic welfare state have an inverse relationship. The social democratic welfare state and the incarceration measure are also negative. These findings suggest that the punishment regime variables measure three distinct regimes.
### Table 3.2: Cross Sectional Correlation Coefficients: Punishment regimes and Welfare State Regimes

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* < p = .05, ** < p = .01
Table 3.3 reports the cross sectional correlations for the political, economic, criminal justice, crime, punishment regime, and incarceration rate variables. Left party power is significantly related to one variable, negatively with homicide rates. Although not reaching significance, the punishment regime variables are in the hypothesized direction with left party power. Union density presents some interesting relationships. This variable is negatively related to incarceration rates and the Gini score, and is positively related to the Nordic punishment regime. The economic intervention variable has a negative relationship with incarceration rates, the common law punishment regime, violent crime rates, and the rate of probation officers and lawyers. GDP-PPP has weak coefficients with all of the variables except crime rates, which GDP-PPP has a robust positive relationship with the total crime rate variable. Similarly, the Gini coefficient has a strong positive relationship with the rate of probation officers and the rate of lawyers as well as with the common law regime and incarceration rates. Higher HDI measures are associated with fewer police officers. The rate of probation officers has several extremely high coefficients including the rate of lawyers, the common law regime, and incarceration rates. The rate of lawyers also has several large coefficients with incarceration rates, homicide rates, and the common law regime. Incarceration rates and homicide rates are positively related. And, although all of the coefficients are in the expected directions, only the common law regime is significantly correlated with incarceration rates.
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<td>.839**</td>
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*< p = .05, **< p = .01
OLS Regression: Incarceration rates and Punishment regimes

Table 3.4 reports eight OLS regression models using the cross sectional data to test the plausibility of the punishment regimes. Model 1 reports the control variables, and shows that economic intervention policies have a significant and negative coefficient. Judicial elections are a significant predictor of more incarceration. Models 1-4 incorporate the punishment regime variables one at a time. The findings are nearly identical in all three of these models with the regime variable not approaching significance, but in the hypothesized direction, and the judicial election variable is highly significant in all the models. Although the judicial election variable is not entered into the time-series models due to a lack of between country variability over time, the cross-sectional models suggest that the election of the judiciary is a significant driver of larger incarceration rates in the US. Judicial elections are not hypothesized to explain incarceration rate changes within countries as much as to identify a relatively unique US practice that potentially explains the vast difference between the US the rest of the countries in the analysis. Model 5 includes the Nordic regime and the Romano-Germanic regime variables, with only slight reductions in coefficients compared to the models these variables are in separately.

Although it is common to explain the use of incarceration with crime indicators, the homicide rate is consistently weak and never approaches significance, but does remain positive throughout the eight models reported in table 3.4. When testing the cumulative effects of the regimes, the Romano-Germanic variable did change signs and became positive, but this variable never reached significance. The R-squared coefficients never dipped below explaining 92 percent of the variance, and judicial election is a powerful predictor of incarceration for the models in which it was able to run. It appears that there is a long-term political effect explaining incarceration for the Nordic and Romano-Germanic regime.
Table 3.4: OLS regressions of Natural Log Incarceration rates and punishment regimes, 17 countries

<table>
<thead>
<tr>
<th>Model</th>
<th>Nordic</th>
<th>Common</th>
<th>RG</th>
<th>Union</th>
<th>HDI</th>
<th>Left</th>
<th>Intervention</th>
<th>Judge Election</th>
<th>Homicide</th>
<th>Constant</th>
<th>R squared</th>
<th>Adj. R squared</th>
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<td>(1.55)</td>
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<td>.095</td>
<td>-.079</td>
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<td>(-.332)</td>
<td>(-.398)</td>
<td>(.656)</td>
<td>(-.904)</td>
<td>(.491)</td>
<td>(-2.14)*</td>
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* < p = .05, ** < p = .01, *** < p = .001
Table 3.4 (continued): OLS regressions of Natural Log Incarceration rates and punishment regimes, 17 countries

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<td>.063</td>
<td>.065</td>
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<td>(.601)</td>
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<td>Adj. R squared</td>
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* < p = .05, ** < p = .01, *** < p = .001
Time-series cross-sectional correlations

Tables 3.5 and 3.6 report correlation coefficients for several variables for the 17 countries-23 years and 15 countries-43 years data sets, respectively. While correlations do not provide conclusive evidence for the hypotheses, they do show interesting relationships. The punishment regime variables measure distinct qualities. The Nordic regime is negatively correlated with the common law regime, and has a non-significant negative relationship with the Romano-Germanic regime. Homicide rates, GDP, and incarceration rates are negatively correlated with the Nordic punishment regime. Union density, economic intervention, left party power, and GDP change are positively correlated with the Nordic regime.

The common law punishment regime has negative and significant relationships with the Romano-Germanic regime, union density, GDP, left party power, and economic intervention. Homicide rates and incarceration rates are significantly correlated with the common law punishment regime. The Romano-Germanic regime has positive and significant relationships with economic interventionism, left party power, and GDP. Similar to the Nordic regime, the Romano-Germanic regime has strong negative correlations with homicide rates, and incarceration rates.

These correlations suggest that certain combinations of criminal justice institutions and political structures are related to higher or lower incarceration rates are more common in different punishment regimes. The common law regime variable has a robust relationship with incarceration rates, and it has strong relationships with the characteristics most related to incarceration—homicides and weak unions and left parties. The Nordic regime and the Romano-Germanic regime have strong unions and left parties and little homicide.
Table 3.5: 17 countries over 23 years Correlation Coefficients: Incarceration regimes

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<th>2.</th>
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<th>4.</th>
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<td>-.045</td>
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<td>-.032</td>
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<td>--</td>
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<td>6. GDP-PPP</td>
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<td>-.232†</td>
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<td>-.065</td>
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<td>.100*</td>
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<td>.329†</td>
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<td>-.236†</td>
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<td>.128*</td>
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* < p=.05, † < p=.01, ‡ < p=.001
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<td>.251†</td>
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<td>-.055</td>
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* < p = .05, † < p = .01, †† < p = .001
Time-Series Cross-Section Analysis

Table 3.7 reports the findings from the time-series cross section regression analysis for the 17 countries over 23 years. The incarceration regimes coefficients support the hypotheses. Specifically, the Nordic and Romano-Germanic regime variables are negative and significant, and the Common law regime variable is significant and positive. The first three models in table 3.7 report random effects (GLS estimation) models with panel corrected standard errors and the remaining models report results with FEVD estimation. The Nordic and Romano-Germanic regime variables are significant and negative, and the Common law regime variable is significant and positive. Left party power and union density have a dampening effect on incarceration, but these effects do not consistently reach significant levels. The amount of homicide does not have much effect on incarceration over this time period, as the coefficients are insignificant and several are negative. This is not to refute the importance of levels of homicide on criminal justice policies, but rather to use a stringent control of the amount of violence in each country. No doubt, homicide is not a perfect measure of violence or crime, but is it the most accurate available, and the regime variables have strong effects net of the rate of homicides.\textsuperscript{i9}

Table 3.8 provides mixed support for the hypotheses. Similar to the analysis in table 7, the first three models used a GLS estimator with panel corrected standard errors. These models supported our general hypothesis regarding the effects of the incarceration regimes, judicial elections. Left party power remained negative, but was only significant in model 2 when ran with the Nordic regime. However, union density has a strong negative effect on incarceration rates over the 43 year timeframe. All seven models support the incarceration regime hypotheses. Homicide maintains its insignificant and mostly negative influence on incarceration rates. GDP-PPP and election year continue to have negligible effects, but they remain consistent throughout all seven models. The R-squared coefficients are large for all the models with models 1-3 ranging between 97 and 98, and the FEVD models much lower, 61 to 62. These coefficients indicate that underlying legal approaches are highly influential on the incarceration rate, net of political, economic, and crime effects.

The political variables—union density, left party power and interventionism—receive mixed support throughout the analysis, with union density emerging as a significant negative predictor of incarceration. This suggests that countries in which workers have greater protections from markets there is less government reliance on incarceration. Previous research has found that left party power, union density, and neo-corporatist measures have been found to be significantly related to lower incarceration rates (Sutton, 2004). The punishment regimes are supported in all the models.
Table 3.7: Time-Series Cross Section: 17 countries 23 years regressed on Incarceration rates

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<th>Model 1</th>
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* < p = .05, ** < p = .01, *** < p = .001

Models 1-3 use a Prais-Winsten regression estimator with panel corrected standard errors and autoregressive adjustment (Stata command xtpcse). Models 4-6 use a fixed-effects vector decomposition model with panel corrected standard errors and autoregressive adjustment (Stata command xtfevd). Durbin-Watson adjusted statistics ranged between 1.77 and 1.78.
Table 3.7 (continued): Time-Series Cross Section: 17 countries 23 years regressed on Incarceration rates

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<td></td>
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<td>ElectionYear</td>
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* < p = .05, ** < p = .01, *** < p = .001
Models 1-3 use a Prais-Winsten regression estimator with panel corrected standard errors and autoregressive adjustment (Stata command xtpcse). Models 4-6 use a fixed-effects vector decomposition model with panel corrected standard errors and autoregressive adjustment (Stata command xtfed). Durbin-Watson adjusted statistics ranged between 1.77 and 1.78.
### Table 3.8: Time-Series Cross Section: 15 countries 43 years regressed on Incarceration rates

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<td>Wald/AdjR</td>
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* < p = .05, ** < p = .01, *** < p = .001

Models 1-3 use a Prais-Winsten regression estimator with panel corrected standard errors and autoregressive adjustment (Stata command xtpcse).
Models 4-7 use a fixed-effects vector decomposition model with panel corrected standard errors and autoregressive adjustment (Stata command xtfed). All models had Durbin-Watson adjusted statistics in the 2.00 range.
Table 3.8 (continued): Time-Series Cross Section: 15 countries 43 years regressed on Incarceration rates

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<td>RG</td>
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<td>.008</td>
<td>.008</td>
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<tr>
<td></td>
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<td>(257.05)***</td>
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<td>.618</td>
<td>.617</td>
<td>.616</td>
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* < p = .05, ** < p = .01, *** < p = .001
Models 1-3 use a Prais-Winsten regression estimator with panel corrected standard errors and autoregressive adjustment (Stata command xtpcse).
Models 4-7 use a fixed-effects vector decomposition model with panel corrected standard errors and autoregressive adjustment (Stata command xtfevd). All models had Durbin-Watson adjusted statistics in the 2.00 range.
Conclusion

The punishment regimes measure unique groupings according to legal institutions. The descriptive statistics suggest that specific crime, criminal justice, and social variables cluster. The common law regime has high incarceration, high levels of homicide, moderate crime, but high violent crimes. The presence of criminal justice officials is different across these regimes with the Nordic regime and Japan having the fewest police, probation officers, or lawyers, and the common law regime has the greatest proportion of probation officers and lawyers, but the Romano-Germanic regime has the highest rate of police officers. The cross-section correlations point out that the punishment regimes correlate with welfare state regime variables in the hypothesized directions.

The relationship between the state and citizen is central to the amount of reliance countries place on incarceration. Previous research supports the political variables tested here. Long-term left party power provides the political structure needed to foster powerful unions and high involvement in domestic economic policies. Union density had the most robust findings in the longest time-series suggesting that unions are a powerful mechanism by which incarceration rates are kept lower in certain countries. It is possible that countries with long-term patterns of high union involvement seek out alternative control mechanisms than incarceration. That is, governments have an assortment of control mechanisms at their disposal, with incarceration being only one, and it could be that in countries with long-term left party power that economic interventionism occurs to redistribute wealth to reduce inequalities with union membership essential to organizing the citizenry.

The regime and political effects are found while controlling for crime measures. The total crime and violent crime measures potentially suffer from definitional and measurement problems due to different legal definitions and recording procedures across these countries. These variables are used only in the cross-section analysis whereas the homicide rates are available longitudinally allowing for controlling for the effects of homicide in the time-series regressions. Homicide rates are believed to be the best crime measure for comparative purposes due to fewer definitional issues and the high rate of reporting this crime. Interestingly, homicide rates never approached significance in the regression analyses. That the regime and political variables have statistically significant relationships while controlling for homicide suggests the plausibility of underlying legal and political cultures shaping penal outcomes.

This chapter provides descriptive, correlation, and regression analyses that offer some support for the existence of underlying punishment regimes to contribute to explanations of the differences in approaches to formal punishment in the West. The common law regime received the most support for driving incarceration rates upward, with judicial elections potentially contributing to the exceptionally high incarceration rates in the US, but measures picking up more cross-country variation are needed. These findings suggest that there are unique features within common law countries that support higher relative incarceration rates, whereas the Nordic and Romano-Germanic regimes rely upon strategies that maintain lower amounts of punishment.

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Chapter Four: The Common Law Punishment Regime: The United States

The common law punishment regime has the most punitive mechanisms to respond to law violators. This regime is characterized by high prosecutorial discretion, lay participation in legal processes, complicated trial structures, and strict procedures of criminal evidence. Much has been said about the US pattern of incarceration as a system of racial segregation (Wacquant, 2000; Western, 2006), warehousing those not fitting in (Simon, 1993, 2000), and as a neo-liberal system of control (Cavadino and Dignan, 2006). This chapter reviews the historical trajectory of US incarceration patterns. The common law system is predicated on lay participation, privatization of law enforcement and court practices, and disregard for overly pedantic legal views. With that said, the common law type of thinking, as Weber recognized, is much different from the Romano-Germanic civil law that spread throughout much of Europe and Latin America.

The US is the most punitive incarceration system in the western world (Christie, 2000). In *Harsh Justice*, James Q. Whitman (2003) compared the French, German, and US models of incarceration from the 18th century until the present day. His analysis suggested that the continental systems of punishment have experienced a “leveling up” of punishments that took place within highly stratified status based societies by which he argued that punishments reserved for elites replaced the more stigmatizing forms of punishment used for the lower classes. This leveling up of punishment did not happen in the US. Rather, an opposite process took place in which punishment leveled down. To be sure, while French and German citizens during the late 18th and early 19th centuries could be certain they would receive punishments similar to the more humane types inflicted upon the nobility and aristocracy, US prisoners could expect the opposite. Punishment in the US persisted toward the more severe.

Why does the US incarcerate so many people? The US is free from a feudalist past, lacks a monarchical history, and is predicated on liberal political-economic views. It seems strange that the US would have such high levels of punishment. One might think the US would have the least amount of punishment of all the countries given its strict reliance on liberal economic and social thinking. However, when peeling back some of the institutional layers embedded within contemporary crime control practices in the US, history reveals a common law system that increasingly came to rely on the lawyer centered trial. The central arguments in this chapter follow those put forth by comparative legal scholars studying the historical roots of the common law system, moving from England to the US and other common law countries (Alschuler, 1979; Beattie, 1991; Cockburn and Green, 1988; Langbein, 1996, 2005; Shapiro, 1991). The crux of this research is to explain how a system of law that originally sought to limit formally educated individuals from trial processes came to be wholly dominated by and shaped by lawyers. Besides explaining the historical path from lawyer free trials dominated by judges and self-informing juries, this chapter demonstrates the relationship between the emergence of for-hire lawyers and the extensive rules of criminal evidence that are unique to the common law.

The US is often referred to as an exceptional case by social scientists (Soskice, 2009). Many political philosophers have commented on the exceptional nature of the US political and social landscape characterized by libertarian ideals of individual autonomy and localized political competition (Chase, 2002). This autonomy fostered a preferred
mode of material exchange and economic performance rooted in individual responsibility, enterprise, and profiteering. These American ideals were legally ordered by an inherited version of the English common law system. Lipset (1967, p. 1) recognized not only the existence of “American exceptionalism” but he went on to mention that the US, since its inception, is characterized by two prominent values of “equality and achievement.” Equality can be seen as the diminution of state barriers between classes to ease “class mobility.” Achievement is something of an outcome of equality in which moving away from rigid class hierarchy’s commonplace to the Continent created opportunity structures that fostered individual achievement. Lipset’s (1967, p. 7-8) approach followed Weber’s attention to the deterministic importance of social values by stating that “…historical events establish values and predispositions, and these in turn determine later events.” This suggests that values become determinants of the direction of social change, and the common law system experienced a lawyerization of practices and procedures beginning with the Treason Trials Act of 1696. Langbein (2005) writes of a time when lawyers were not an institutionalized force within the common law system. In fact, lawyers were not allowed to speak for defendants, but rather they emerged as protection for elites during trials for treason, and over time lawyers pushed for evidentiary rules that moved trials away from focusing on finding the truth to one in which private entrepreneurs sought to make their case regardless of the facts of any situation.

This chapter sketches the development of the modern common law system with an historical case study of the US system of incarceration. Similar to the other case studies on Germany and Sweden, attention is paid to tracing the historical roots of this unique type of legal thinking. In the case of the common law, this historical journey is one in which important differences will become clear between the common and civil law types of thinking. The presence of jury trials and the inclusion of lawyers in criminal trials represent a major rupture with previous legal practices. The common law originally was not based on abstract theories, pedantic rhetoric, or highly involved formal agents. The common law that exists today demonstrates specific concerns with formal legal agents, which allowed for private lawyer dominated trials that replaced once active judges with a judiciary content to act more as a referee among two competing parties. Following this discussion, contemporary incarceration trends within the US are reviewed. These trends are situated within social, political, and economic shifts that continue to shape US incarceration patterns. With that said, the purposes of this chapter are to demonstrate the importance of certain critical junctures that placed the US (and common law countries) on a specific path toward increased domination by lawyers, rules of criminal evidence, jury trials, and passive judges. It is argued that these institutional differences lay the groundwork making possible an overly punitive type of criminal justice system. To borrow from Nils Christie (2000), the common law system lacks the needed breaks to slow US incarceration.

A brief methodological comment is in order before moving to present the case study. Some may question why the US would be selected as the exemplar for the common law legal regime. The common law is known to have originated in England, not the US. A central reason for studying 20th century incarceration differences is to understand why the US incarcerates so many people, relative to our Western counterparts. Contemporary crime control policies in the US have focused on adding

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more police to the street, criminalizing more acts, and exacting very long sentences. Others have followed the US with increased punitiveness, the bulk of these countries have common law legal systems. Many countries throughout the world mimic US culture, politics, and crime control. England is the originating country of the common law system, but it is important to trace the historical path of US punishment. This is a path that starts in Medieval England before settling the US and the development of a distinctively American form of punishment.

**Early Common Law History**

The common law system places distinct divisions separating judicial and legislative sovereignty. This separation provides judges with discretion when ruling on cases through the unique principles of *stare decisis*. To trace the historical path of the common law, it is necessary to start in England where it was originally developed and transported to the US and other Anglo-Saxon countries. Early common law started with Henry II in 1154 as a simple form of law so that those without legal training could understand and practice it themselves. England, of course, was agrarian and dominated by landed aristocracy during the 12th and 13th centuries, and the common law system competed with other types of conflict resolution including canon law and local courts enforcing local laws (Hogue, 1966).

Central to 13th century legal proceedings were the ordeals. The ordeals were banned in 1215 by the Catholic Church. Roger Groot (1988, p. 5) identified the original jury trial in common law around 1220, and claimed that “King Henry ordained, in the Assize of Clarendon, that twelve lawful men of each hundred, and four of each vill, should report to the royal justices or sheriffs those persons reputed to have committed certain serious crimes.” The jury, essentially, replaced the need for the ordeal and “physical proof” of divine assessment.

Early common law relied upon private prosecution of cases. While prosecutions often were conducted by the victim or their family, a public prosecutorial system emerged. England lacked the elite universities that existed in France and Germany to train a legal workforce needed to translate a complicated form of law. Common law legally training started in a rather informal manner through the Inns of Court. There is little detailed history of the Inns, but they were known to function as “hostels, clubs, chambers as well as schools of legal education” (Hogue, 1966, p. 246). These training facilities were private corporations that provided a gathering place close to the courthouse so that as people traveled to court they had a place to stay and prepare for the upcoming case. The Inns of Court provided legal education by supplying statutory books, counsel with others learning about the law, and a place to stay. Much of the learning took place during dinner table discussions arguing points of law, and later more formal processes involving lectures emerged (Hogue, 1966).

Early common law development relied upon lay participation. A defining feature of the common law system is the use of a lay jury. The original juries were self-informing as they were preferred to be knowledgeable of the facts of the case. Jurors were to be witnesses, neighbors, and in general people familiar with what took place. Being informed with the case or a witness to the events was a common selection criterion to serve on a jury. Jurors conducted their own private investigations by determining as best they could the character and habits of both the plaintiff and the defendant. If the jury
did not feel they received enough information they could get more information “by consulting informed persons not called into court” (Wigmore, 1940; found in Langbein, 1996, p. 1170). Langbein (1996) reported an interesting situation about the medieval jury trials, the jury did not come to court to listen to testimony or hear evidence but rather came to give their “rough verdict” that they formed beforehand through their own investigations within the community.

Early common law trials involved little precise legal rhetoric or debate, but rather are described as bickering among parties. These trials were nothing more than an accuser appearing in court to voice his or her complaint against another person(s). Lawyers were rarely included. In fact, Langbein (2005) refers to this period of common law trial as the “accused speaks trial” because the accused individual(s) were expected to talk during their trial. The argument was that no one else had as much knowledge about what had happened, and relying on a lawyer was seen as a sign that the accused was guilty. The accused speaks trials involved the accused, accuser (or prosecutor), jury and judge, and they were fast and simple. There were few administrative or procedural rules, juries were self-informing, which limited the need for the presentation of evidence, and trials were opportunities for each party to present their testimony. The speed and simplicity of criminal trials allowed juries to rule on several cases in a single day, which accommodated the judge’s traveling schedule.

Accused individuals could not compel witnesses to appear, nor were they able to be sworn under oath. This made it more of an uphill battle for the accused to prove his or her innocence, especially since the accuser was able to call witnesses and be sworn under oath. The ability to swear to the veracity of one’s testimony was a significant factor for juries, as this strengthened the believability of the accuser at the expense of the accused. These restrictions made it difficult for the accused to defend himself or herself, which the central purpose of the trial was for the jury to determine the facts of the case derived mostly from the accused.

**Treason Trial Act of 1696: From Accused Speaks to Adversary Trial**

The accused speaks trials were structured to encourage defendants to speak on their own behalf in court, and lawyers were prohibited from speaking for those accused of felonies. Instead, lawyers were seen as experts of law, so they could be helpful in handling some of the legal issues, but they were not in charge of the facts of the case. The accused was thought to have the best information regarding his or her innocence or guilt. Legal counsel was allowed in less serious cases such as misdemeanors but not felonies because these often carried the potential for a death sentence, which was believed too important to trust to lawyers. Lawyers were not seen as the best way to determine if a person was innocent or guilty because lawyers were inherently self-interested in achieving a certain verdict, not uncovering the truth.

The Treason Trials Act of 1696 allowed those accused of treason to have a lawyer present during trial and pretrial, and opened the way for those accused of regular felonies to have legal counsel at pretrial and trial. The Act of 1696 was “a turning point in the history of Anglo-American criminal procedure. Adversary criminal trial traces to the 1696 Act” (Langbein, 2005, p. 68). This act came at the end of the Glorious Revolution of 1688-9 in which rules were emerging to foster a lawyer centered trial and the development of complex rules of evidentiary procedure. There were several treason trials
between 1678 and 1690 that prompted the Act of 1696 and later legislation that shaped the lawyer-judge trial relationship.xii

Private citizen participation was central at all levels and phases of the criminal justice system, with the exception of the judge. This model of criminal justice practice fits with the liberal political economy noted for common law countries in which there is high level of government suspicion and reliance on the private sphere. Specifically, prosecutors, defense attorneys, law enforcement, and jailers were all private individuals working for profit, and paid piecemeal (see Rothman, 1971). The more arrests made and defendants brought to court, the more potential profit, and this self-interestedness is part of what lead to the suspicion surrounding lawyers.

The Treason Trials Act of 1696 brought about many changes to the common law trial through the shift in power in favor of lawyers. These changes took place over time and they came in the form of technical evidentiary rules used to control the untrained jury. Essentially, as the common law became more complex, it was argued that an untrained jury member could not be expected to make decisions objectively. For this reason, defense counsel argued that rules were needed to prevent unfair prosecutions (e.g., exclusionary rules). Defense lawyers gained power as other legal reforms started to take place, namely increased judicial independence from the monarchy. Throughout much of English judicial history, judges were appointed at the behest of the crown. Judges could be removed by the monarch at his discretion with no verifiable justifications given. The 1701 Act of Settlement established that judicial appointment and removal procedures were changed so that judges had to demonstrate “good behavior” to maintain their position. This legislation did not revolutionize the entire process over night. Rather, successive regimes would appoint new judges upon taking the thrown, but in 1761 this was changed to provide judges with life tenure (Langbein, 2005, p. 82). Prior to the Treason Trials Act, the judge acted as the defense counsel, but in reality the judges’ were beholden to the king and were known to shape cases to receive the king’s approval. The common law judges from at least the fifteenth through eighteenth centuries were political actors—a fact that was transported to English colonies. They were not the formally trained legal professionals that emerged in the Roman law influenced countries. Rather, they served on the front lines of social control for the crown or other political leaders of the time. The common law system was (and is) a highly political occupation.

Rules of Criminal Evidentiary Procedure

Common law trials are known for their reliance on complex evidentiary rules. These rules can be traced to shift to a lawyer centered trial and an untrained jury. The common law that developed in England was designed for an emerging industrial society, whereas colonial America was characterized as enclaves of small rural communities. For the most part, early American law was a mixture of rules adopted from England. Codification began in 1634 (Massachusetts) and 1682 (Pennsylvania), and it is at this time that the colonies incorporated statute or written law (David, 1972).

Few Americans were trained in the law. In fact, few judges even had any formal legal training. In 1811, the English legal philosopher, Jeremy Bentham, assisted President Madison in steering US legal development. During this time, there was concern about whether the US should remain a common law country or develop a code law system as existed in France and Germany. The country adopted common law with
the exception of what became the State of Louisiana in 1812. American law formed after
the Revolution, but continued to take direction from England, and continued to rely on
lawyers trained in England, with the first US law school, William and Mary, opening in
1779 (David, 1972). Legal training in America developed much different from England.
The English Inns of Court were rather informal training environments, whereas American
law schools developed with universities and were dominated by the Langdellian case
method or Socratic approach.xiii

The process or conduct of fact-finding in Anglo-American law differs from
Continental law. Fact-finding in civil law traditions is led by judicial inquiry, with some
assistance from legal counsel. Anglo-American fact-finding process involves three
groups of actors: lawyers, judges, and laypersons as jurors. The courtroom procedures
emphasize strict rules of criminal evidence—each side tries less to refute the actual
evidence but is more concerned to identify weaknesses in how the evidence was obtained
or presented in court (such as hearsay objections, opinion objections, and leading
witnesses). The series of evidentiary objections do not exist in non-common law
countries, and are lawyers’ inventions to steer the jury (Langbein, 2005).

Many of these rules emerged with the lawyer centeredness of the common law
taking off in 18th century England. Objections were focused on the presence of the jury
because a professionally trained jurist could use his or her reason to nullify any subjective
potential of hearsay and other evidentiary issues, but an untrained, lay person could not
be expected to do that. Why did a large body of criminal evidence emerge? Wigmore
places the emergence of common law criminal evidence law as starting to form in the late
18th and early 19th centuries as rules began to be recorded in written form and passed on
in law schools.

A central reason for the exclusion of hearsay is that the person attributed to such
statements is not placed under oath. The person speaking is under oath in court, but he or
she cannot testify to the veracity of the information, but other reasons include the lack of
cross-examination. Hearsay evidence was first only admitted to court if it was
corroborated by others, but this too was changed such that common law forbids hearsay
testimony. The common law trial was an overwhelmingly oral process, with very little
written down. Langbein (1996) tells how judges would often take notes during trials to
write down important pieces of evidence and point to issues that needed addressed before
the jury—which is in direct conflict with the Roman based legal systems reliance on
formal written records.

As the adversary process became more entrenched, the judge became more
passive at trial. Instead, lawyers took over the trial process and the jury became less
influenced by the judge. At one time, the judge and jury worked somewhat in tandem.
The common law judge would talk with the jury, give them instructions (about fact
finding, not matters of law), and even force them to reconsider their verdict before
accepting it. Early American jury decisions often were collaborative products negotiated
with the judge (Langbein, 1996). The judge was viewed as representing the accused by
conducting cross-examination of witnesses—although the lack of written record made it
impossible for the judge to prepare beforehand as in the Continental model. The initial
modern common law was concerned with hearing direct testimony and cross-examination
of witnesses with the oath used as a safeguard against perjury.

Eighteenth century legal changes made further allowances for lawyers during
regular felonies, and these lawyers pushed for additional evidentiary rules. Defense lawyers argued that additional evidentiary rules were needed to educate the lay jury. Jurors were untrained and lawyers argued that this reduced objectivity to rule on the facts of the case. During late 18th and early 19th centuries there was an increasing complexity to the common law that was not possible without an emerging reliance on professionally trained legal professionals.

Permitting defense counsel fostered a series of procedural changes that moved away from the spontaneity of the altercation process in which the accuser and the accused argued or bickered in court. In its place emerged methodical adversarial court room procedures in which the prosecutor and defense counsel challenge each other and typically do not question the truth of the evidence or facts of the case but rather debate the legality of how the evidence was collected and presented. The prosecution was required to disclose evidence to the defense counsel (directed verdict) prior to defense counsel presenting evidence. No longer was the prosecution able to have the defendant talk and incriminate himself or herself as protections against self-incrimination emerged (Helmholz, 1990). The burden of proof was shifted to the government and the beyond reasonable doubt standard was developed (Shapiro, 1991). The law of criminal evidence emerged through written reports and treatises. These rule changes altered the role of the prosecutor as they were forced to improve their cases due to the ferocity of defense counsel to disprove the case against their client. The judge became a more passive courtroom participant. The prosecutor was in charge of gathering and presenting the issues for the accuser, and the defense attorney took over gathering and presenting evidence for the accused. Courtroom trials were shifting to recognize the need for the accused to compel witnesses to testify and to have themselves and witnesses sworn under oath during testimony and cross-examination. The relationship between the judge and the jury changed. No longer did the judge and the jury engage in a relatively congenial manner nor could the judge coerce the jury to find a certain way (Langbein, 1994, p.1068-71).

US Criminal Justice Emerges

The Colonial Period: Privatized Justice

English legal thought serves as the springboard from which American law was developed. This influence can be seen as institutional mimicry, rejection, and adaptation. This chapter follows previous American criminal justice historians identifying three eras from which crime control policies and practices can be understood: the colonial era (beginning in late 17th century and lasting until around 1820); the modern era (1820 to 1920); and the contemporary era (starting in the 1920 till today) (Walker, 1998).

The colonial era was ruled by private justice and informal social control through the church, family, and neighbor to reprimand inappropriate behavior. Initial crime control strategies took on a unique American style that was “informal, often rough, and highly democratic” (Walker, 1998, p. 15). Whereas the Germanic law traditions were based on abstract and scientific principles, colonial rule was highly localized and based on community norms, not general principles. It should be pointed out that during this time, English legal procedures were typically used to lead courtroom processes. Initially, there were only small enclaves of people living in colonial America, with many seeking religious freedom. Colonial crime control used day and night watchman, groups of men
that observed the town to protect against fire, riot, and crime. In southern parts of the US, slave patrols developed to control slaves, locate runaway slaves, and provide order maintenance. Prisons had yet to emerge and jails were used as places to detain individuals waiting to see a judge or execution.

Colonial Americans did not view crime as a “basic flaw in community structure or expect to eliminate it” (Rothman, 1971, p.15). Eighteenth century Americans did not consider incarceration as a form of punishment. Punishment came in the form of a fine or it was physical or some combination of both; jails were reserved for those “caught up in the process of judgment, not those who had completed it” (Rothman, 1971, p. 48). Many of the punishments were designed to shame offenders through branding, pillory, the stocks, and other punishments that ridiculed someone, which was especially important in such small and interdependent communities. Colonial perceptions of crime and criminals were much different from 19th century views that designed policies to eliminate crime from society. Colonials saw crime, and other forms of deviancy (e.g., poverty, insanity) as natural parts of social organization that needed to be controlled, deterred, and contained, but never thought it would be eliminated (Rothman, 1971).

Criminal justice officials did not receive any special training. Instead, justice officials either volunteered or were elected, with few judges having any formal legal training, which resulted in a system reliant on local elites. At one point, appointments were determined by the King of England, which eventually fell to the Governor, and finally shifted to local county officials. Similar to England, prosecutions were handled by private individuals—victims or kin of the victim—through the mid-19th century, with colonial punishment remaining a highly public event that relied on shaming and scorn. Not only was colonial America reliant on informal social control, but it should be noted that there is little record of what would today be considered predatory crimes—rape, robbery, and murder. The typical recorded crimes for this era involved blasphemy, cursing, fornication, adultery, and drunkenness (Walker, 1998). A modern US society grew out of these small communities, with the emergence of industrial development and urbanization, new forms of criminality, narrowed social networks, and limited social trust coalesced to foster formal types of social control.

Religious influences were important to colonial punishment. The Puritans condemned Quakers, forced them to convert, or exiled them from certain areas. Where the Quakers were strong, most notably in Pennsylvania, they opened the Walnut Street Jail in 1790. Early American jails and prisons were predicated on hard labor, shaming, disgrace, and stigmatization. However, colonial sentiment shifted regarding the death penalty, with many seeking to curb its use for all crimes except murder, marking a significant break with its broad use in England. An enduring element of American punishment is the centrality of shaming and humiliation. No doubt there is talk of rehabilitation and proportionality, but the crux of punishment was to cure laziness, enforce capitalist modes of production, support community norms, and deter future crimes through fear of public humiliation (Walker, 1998).

While the English legal and criminal justice system provided many opportunities of mimicry for American colonists looking to control the citizenry, it also provided a point of departure. The early colonists were in America typically due to some dissatisfaction with English rule. Therefore, colonists were keen on protecting against many of the abuses of the English law, which fostered protections against searches, cruel
punishments, need for speedy trials, and due process, and limiting the use of the death penalty. American crime control relied on an informal network of surveillance, apprehension, and enforcement. The American colonists adapted English common law procedures to fit small rural communities in which crime and other forms of deviancy were to be dealt with locally by the family, the church, and neighbors.

Modern Criminal Justice Control: Responding to Rapid Social Changes

Social changes contributed to replacing communal forms of control with more formal practices to respond to mob violence, distrust, and growing heterogeneity in ethnicity, race, and religion. The inevitable and accepted role of crime within the colonial world shifted to become a problem facing a changing social landscape in which there was a growing lack of norm agreement. As modern society was growing out of the small communities, new theories and explanations for crime and social problems surfaced. In Rothman’s (1971) historical treatise, *The Discovery of the Asylum: Social Order and Disorder in the New Republic*, he explained the shift from accepting crime, poverty, and insanity as natural elements of the community to the emergence of scientific understandings and interpretations of these as social problems that demanded a social response to protect society. What is most interesting about his account is that these individual issues became defined nearly simultaneously as social problems that required large scale formal responses. No longer were neighbors to be responsible for orphans, the family to care for the insane, churches and charities to provide for the poor, or private criminal justice mechanisms to control crime. Instead, Rothman (1971) recognized that the prison, asylum, and orphanages were places to separate social outcasts and force individuals not willing to work—policies meant to exclude certain social groups.

Crime, insanity, and poverty were not perceived as social failings during colonial America. This perspective changed during the 19th century as crime and poverty became viewed as reflecting community disorganization in the face of growing distrust and individualization. The prison, orphanage, and asylum were to cure individuals and return them to society as functioning members “…to promote the stability of the society at a moment when traditional ideas and practices appeared outmoded, constricted, and ineffective” (Rothman, 1971, p. xviii). For Rothman (1971) it was not so interesting that these various ways of controlling deviancy and delinquency emerged. Rather, his research uncovered why Americans in the Jacksonian (c. 1828-1850) era suddenly began to construct and support institutions for deviant and dependent members of the community. This was a crucial time for American crime control development, namely in that formal mechanisms of control gained legitimacy in their ability to define certain conditions and behaviors as deviant and institute ways for controlling that deviance.

The prison and the formal police force were adapted from previous control mechanisms (e.g., night watchmen, jails). The initial mechanisms to control and punish became outdated as industrial production fostered urbanization and industrialization, which lead Walker (1998, p.82) to posit that: “Imprisonment was not invented or discovered in the 1820s. Instead, the prison was an expansion of earlier practices and the result of a series of experiments” (Walker, 1998, p.82). Walker (1998) referred to the houses of corrections and almshouses and used hard labor to break criminals that existed in England and colonial America, but these institutions were different from the control mechanisms that emerged later.
The first US prisons were located in New York and Pennsylvania. In New York, the Auburn prison mandated complete silence and was opened in 1819. Prisons opened in 1826 and 1829 in Pittsburgh and Philadelphia, respectively, and they enforced strict inmate separation (Rothman, 1971). The prison model spread to other states quickly. The prisons became popular tourist attractions. The central concern among prison developers was which model to follow—Auburn or Pennsylvania. The Auburn system was known as the congregate or silent system in which inmates slept in individual cells, but worked together during the day in silence. The Pennsylvanian prisons were more concerned with separation and introspection, including inmates never seeing other inmates. Inmates worked in solitude in their cells and only spoke with guards and chaplains. Crime was the result of poor upbringing and inmates lacked discipline. Prisons were to instill in inmates the needed discipline that their childhoods’ lacked. The silence of these early prisons is remarkable when considering the extreme noise and congestion which marks contemporary prisons. Rothman (1971, p. 97) quotes Tocqueville and Beaumont after their visit in 1831: “Everything passes in the most profound silence, and nothing is heard in the whole prison but the steps of those who march, or sounds proceeding from the workshops…We felt as if we traversed catacombs; there were a thousand living beings, and yet it was a desert solitude.”

The police were created through a consolidation of functions from the day and night watchmen, sheriffs, and constables. The modern police were developed along the lines of the English Bobbies, named after Sir Robert Peel, the person responsible for designing the London Metropolitan police force. A significant difference between the London police model and that which emerged in 19th century America is the former was administered through a centralized national system, whereas the latter was locally controlled. As is well-known about 19th century American political development, most jobs were predicated upon political connections and patronage through the ward system. This resulted in urban police forces known for their corruption and ineptness as peace keepers, but instead they were used for order maintenance such as strike breaking and enforcing norms (Harring, 1983; Walker, 1998). The American police force reflected the unique political culture of the time, and allowed police much leeway in how they conducted themselves when on duty. The London Bobbies were agents of the national government and centrally administered, which protected them from local politics and greater level of professionalism. This is contrasted with early American police forces that were known for their corruption and graft as they operated with little direct oversight. American police were a product of the dominant political party and economic interests of the time (Harring, 1983).

Contemporary Criminal Justice Development

Social theorists suggest that crime control practices reflect dominant socio-cultural values (Garland, 1990). Just as colonial America was organized in small, interdependent communities reliant on informal control mechanisms and the Jacksonian era shifted towards more urban and heterogeneous societies, the early 20th century bought with it new issues to be controlled. Race riots, labor strikes, political oppression, fear of communism, crime waves, and gangs were problems facing America during the first half of the 20th century (Walker, 1998). Crime control began to take on a new scientific focus through the development of the Federal Bureau of Investigation. This era fostered a
professional and bureaucratic form of crime control to reduce the corruption and overt violence common during previous eras.

Unique to America was the widespread media attention given to crime, the potential for crime, and the need for crime fighters. That is, J. Edgar Hoover was adept at using the media to shape a perception of crime that benefitted him and the FBI, which did not always fit with empirical realities. For instance, during Hoover’s control of the FBI, he promoted the idea that crime was increasing throughout the country and that the FBI was needed to respond. However, criminal justice historians have suggested that crime actually remained stable during this time and did not increase until the early and mid-1960s.

The desire for a more professional criminal justice system brought new attitudes toward training, education, and regulation of officials. No longer were police and correctional guards able to operate in complete autonomy from oversight, something that often fostered corruption. Instead, there were several congressional commissions (e.g., Wicksham, Kefauver) that investigated the national crime picture and responses to crime throughout the country. Walker (1993) explained the modern criminal justice system as evolved through a series of decisions about discretionary power of criminal justice officials. He posited that discretion was a relatively under thought of concept for pre-1950s America that emerged as a response to racial and economic unrest. There were questions of the constitutionality of common criminal justice practices.

The American Bar Foundation (ABF) investigated how criminal justice officials carried out their jobs on a daily basis. How did police officers spend their time? How did correctional guards maintain order? There was little knowledge about what criminal justice actors were doing on a regular basis, which resulted in a comprehensive field survey, in 1956, in which the ABF asserted that “the administration of criminal justice can be characterized as a series of important decisions from the time a crime is committed until the offender is finally released from supervision” (Walker, 1993, p. 6). Although this finding is not surprising to contemporary criminal justice scholars, this was an insightful and somewhat surprising finding during the 1950s, as it demonstrated the importance of official discretion in determining criminal justice outcomes. The ABF also highlighted the influence of overt corruption, political ineptness, and untrained and unqualified criminal justice officials.

During the early 1960s, civil liberty issues and law enforcement and correction practices were changed to incorporate due process, including search and seizure and interrogation rules (Walker, 1993). There were also important court rulings, namely Mapp vs. Ohio that set limits on the exclusionary rule, Miranda vs. Arizona that placed limits on police arrest practices, and Garner vs. Tennessee that altered the use of deadly force. These court rulings instituted new views on bail, plea bargaining, sentencing, prisoner rights, and police practices.

The federal government and nearly every state made significant adjustments to their sentencing rules (Walker, 1993). In few places in the American criminal justice system was discretion as central as with sentencing. The American prison model was founded on the notion of indeterminate sentencing, placing a range of years that a person was to be incarcerated. These minimum and maximum terms allowed prison and parole officials to determine when an individual was ready for release. In theory this system worked to maximize the behavior changing features of prison to encourage pro-social
While some may argue that indeterminate sentencing was a break from 19th century procedures, Walker (1993, p.116) pointed out that American justice has always involved a large amount of discretion. This discretion may not always have been sanctioned officially, but was nonetheless present, and indeterminate sentencing policies merely institutionalized practices that were common place.

Throughout the 1970s, indeterminate sentencing was replaced by determinate sentencing. Determinate sentencing limits discretion for prison and parole officials to make determinations regarding when a prisoner is prepared for release. This means that when a judge sets a prison term an inmate must serve the entire term (or nearly the entire term). Mandatory sentencing also hit most states during the latter 1970s. Conservative views spread through American academic and policy environments. Many officials, in the late 1970s and 1980s, were feeling the sting from the exposure of ineffective correctional policies, rising crime in the 1960s, and influx of Republican Party power. Therefore, the bulk of crime control policies, during this time, focused on longer sentences, stricter prison environments, and faster revocation from community sanctions.

US Incarceration Trends

Has the US always incarcerated such a large proportion of its citizenry? Since 1973, the US incarceration rate has grown by nearly fivefold. To put it another way, the US has about five percent of the world’s entire population, but incarcerates about 25 percent of all prisoners (Gottschalk, 2006). Of course, the 2.2 million adults in jails and prisons across the country only tell part of the formal social control story. That is, there are another five million adults on some form of community supervision. This resulted in about 3 percent of the adult population in the US is under correctional supervision.

One would expect that such a shift in punishment would be the result of an increase in crime. This is not the case, however. In fact, criminological research routinely finds that incarceration has little to do with crime commission. Vanessa Barker (2009), points out that crime and incarceration rates are as related as homelessness and the availability of homes. The question still remains: why do we incarcerate so many people in the US? Caplow and Simon (1999) argued that the criminal justice system is being used to handle a broader range of social problems and that crime control policies have become overly politicized which prevents objective decision making. Nils Christie (2000) suggested that crime control is growing in the US to incapacitate marginal classes. David Garland (2001) argued that as crime rates—in the US and the UK--rose during the 1960s, the public shifted its expectations of governmental solutions away from welfare and demanded harsher punishments. Others found that political expectations, demographic and economic shifts, and limited power of minority groups explain why incarceration rates have skyrocketed over the past three decades—not crime rates (Jacobs and Helms, 2001; Western, 2006; Yates and Fording, 2005).

Some suggest the 1960s crime spike offers an explanation for increasing incarceration rates (Garland, 2001). However, the greatest increase in crime was in the 1960s; simultaneous to a significant downturn in the incarceration rate. Crime rates continued to grow in the 1970s before receding in the early 1980s. As the drug war ramped up, in the latter 1980s, crime rates also grew, but decreased in the 1990s and into the early 2000s. Despite these fluctuations in crime rates, the US incarceration rate
moved in only one direction. From the mid-1970s, the US incarceration rate has maintained a steady line of growth, which is not to say that crime and incarceration are not related at all, but rather to highlight that incarceration is an independent social phenomenon resulting from a myriad of macro-sociological factors (Gottschalk, 2006).

Other evidence refuting the crime-incarceration link comes from the variability within the US. There, of course, are states that have high crime and incarceration rates, but there are also many examples in which this correlation is inverse. The Dakotas serve as an interesting example. North and South Dakota are similar in many ways, but South Dakota has an incarceration rate about two times that of North Dakota, despite similar geographical, economic, demographic, and crime rates (Barker, 2009; Gottschalk, 2006).

Gottschalk builds upon the work of Beckett (1997) and Caplow and Simon (1999) by recognizing the emergence of a more conservative political tone around social control strategies. But she asks “why didn’t political elites face more countervailing pressures and opposition?” Why was it so easy for elites in the US to move forward with the prison build-up of the past 30 years? There was a lack of opposition that exists in institutional and popular form in the other case studies (e.g., left political parties, strong unions).

It is argued that the US lost confidence in state mechanisms to deliver social control. The public welfare system was a failure and with the release of Martinson’s (1974) study that “nothing works” in correctional rehabilitation the policy environment was prime for a conservative turn. Garland (1985) argued that the penal welfare model shaped penal policies to transform inmates into productive citizens. However, this model was overturned in the face of growing neo-liberal shifts within the US and UK emerging.

**Conclusion: Mechanisms of a Punitive System**

Common law countries have the most punitive criminal justice systems in the west. This chapter identifies historical patterns demonstrating how the common law became dominated by lawyers, especially defense lawyers. This lawyerization of the trial transformed a system of law that had little need for legal science, but rather was concerned with discovering the truth through direct and simple adversarial processes. There are three unique and interrelated characteristics of the common law regime contributing to the high incarceration rates—defense attorney power, prosecutorial discretion, and juries. A fourth characteristic is unique to the US and provides some explanation for the US being an incarceration outlier—judicial elections. The transformation to a lawyer centered trial within common law countries paved the way for shifts in power among courtroom actors that allowed for numerous evidentiary rules and procedures that strengthened defense attorneys’ place in the courtroom.

Why is the lawyerization of the common law important to incarceration rates? The shift in power among courtroom actors appears to significantly affect penal outcomes. The common law, unlike Roman law principles, is rooted in allowing peers to make legal decisions through juries. Originally, this system worked by having the defendant and the plaintiff come to court to lay out their arguments in what Langbein referred to as “bickering.” These early trials were characterized as being legally unsophisticated and relying on facts. Juries were selected based upon their level of knowledge about the case before trial and juries were to conduct their own informal investigations. Then, however, a shift began during the 18th century that served to
strengthen defense attorneys and weaken the judiciary. These changes started with the Treason Trial Act in England, and took some time to become institutionalized in the common law. By the 19th century, defense attorneys were strong criminal justice actors that were successful at shaping trial and evidentiary rules. These rules were argued to protect juries from making overly subjective decisions as they were not trained legal professionals.

Originally the adversarial nature of the common law required the judiciary to be a prosecutorial restraint in the courtroom. If a defendant relied upon the voice of an attorney during a trial it was considered a sign of guilt. An innocent person should be able to reasonably discuss the events surrounding an accusation to demonstrate his or her innocence. Therefore, most defendants of serious felonies did not use attorneys—until the 19th century—instead they relied upon the judge to assist them during the trial by questioning witnesses and providing legal direction.

First, defense attorneys utilize criminal evidentiary rules to free their clients. The trial has become a competition or a sport for attorneys. Defense attorneys are pitted against prosecutors in a legal arena, not to demonstrate the truth or veracity of witness statements, defendant alibis, or the connection of evidence to the defendant. Rather, the trial is a game in which attorneys typical argue on legal grounds, not factual ones. There is little pursuit of truth or justice in the trial. Instead, common law trials have become bogged down by what are typically called “technicalities” or simply legal rules that prevent the use of certain pieces of evidence or witness statements due to violations of specific legal rules. A most famous case in the US involved the former professional football player, O.J. Simpson, who was accused of killing his ex-wife and her boyfriend before leading police on a highly televised chase. This trial ended with one of Simpson’s lawyers arguing that if a glove believed to be worn by the killer “did not fit, then the jury must acquit.” Johnny Cochrane was the lawyer that made this famous statement in court and eventually helped win Simpson his freedom in the double murder case. This sort of legal maneuvering enrages the public by demonstrating that trials are really little more that fancy legal shenanigans.

Second, juries became seen as overly emotional, subjective, and needing to be restrained due to their lack of legal knowledge. For common law countries, juries are to ensure that behavior meshes with social norms. When serious crimes occur the public becomes enraged and wants punishment. Essentially, there is a social need to see certain wrongdoers receive punishment. Consider the importance of public executions which, no doubt, satisfied a governmental need to appear strong, but also allowed the public to seek revenge against those that were believed to have violated norms. More recently, the media is quick to pick up on horrendous crimes and beam images of violated children, attacked elderly, and other crimes involving weak victims. These crimes feed public images of definitions of what a criminal looks like, how they behave and the potential for growing victimization if a harsh response is not handed down. One need only recall how Michael Dukakis’ presidential election bid, in 1988, was devastated by the perception that he allowed a convicted rapist—Willie Horton—to be released from prison on furlough, and while on furlough Horton committed another rape and murder. Dukakis’ opponent used images of the Willie Horton case to demonstrate that Dukakis was weak on crime and unfit to be president. Media generated images and discourse on crime typically follows the old journalism adage of “if it bleeds, it leads.” That is, sensational
crimes are picked up by media outlets and suggest to the public that criminals are violent, predatory, and random, which is not supported by official statistics of crime that demonstrate that most criminal acts occur among people knowing one another beforehand. The jury has become a contemporary corollary to the medieval executioner. As the executioner was to rid society of evilness with a single blow across the neck or a “mercy blow” to the heart, so too is the jury to protect society from criminals by ensuring that criminals do not go free.

Third, common law prosecutors are given broad discretion in the collection of evidence, interrogation of witnesses, and cross-examination during trials. Prosecutors, however, are also tied to public opinion by their need to maintain high conviction rates and a perception of ensuring that criminals are punished. The courtroom drama or game requires prosecutors to seek long punishments for offenders that catch the public’s eye through media coverage. A prime example of this is a local prosecutor for Lexington, Kentucky, Ray Larson, who is notorious for pushing for long prison sentences and promoting harsh justice for offenders. Larson maintains a webpage that includes photographs and descriptions of the offenders tried in his district as well as conducting radio and television shows in which he argues for longer sentences. Larson is not alone in his use of the media to disseminate his punitive message, and, in fact, he uses these mediums as a way to demonstrate to the public that he is doing what he believes needs to be done to protect society. He argues that his job is to battle defense attorneys that use legal technicalities to allow offenders to go free and soft judges that are unwilling to hold offenders accountable. While this may or may not be the case, the point here is that Larson and other prosecutors in the common law regime participate in an extra-legal battle that incorporates the media into framing crime as an “us vs. them” or good vs. evil situation. This broad discretion for prosecutors results in an organizational structure in which there is little internal oversight of prosecutors. Instead, prosecutors are evaluated by external forces, namely the public, which encourages them to utilize various media sources to promote their effectiveness at protecting society.

Fourth, a unique characteristic of the US criminal justice system is that many judges are not appointed or enter through special training. Rather, judges are elected by the public. During election cycles it is common to see television commercials, radio advertisements, and bumper stickers attesting to the punitiveness of a judge up for election, and the softness of other judges running. Voting for judges runs counter to reliance on legal science and abstract notions of legal principles. The US form of common law, however, blurs the judicial role by allowing them to act as both judge and politician. And, it is the judge’s political role that forces them to satisfy the public’s desire for punishment.
Chapter Five: The Romano-Germanic Incarceration Regime: Germany

This chapter presents the characteristics of a Romano-Germanic type of legal thinking. It is argued that this type of legal thinking is instrumental in shaping a Romano-Germanic criminal justice regime. This regime is one in which (1) prosecutorial discretion is minimized, (2) lay participation is limited, (3) plea bargaining is non-existent, (4) the use of fines and charitable punishments are commonplace, and (5) the legal actors operate in highly regulated bureaucratic frameworks. These legal and criminal justice institutions are rooted in reinforcing historical patterns that have long-lasting effects upon the purpose, organization, and function of the Romano-Germanic punishment regime (Arthur, 1994; David, 1985, 2007; Stone Sweet, 2002).

Romano-Germanic legal thought and practice are at the center of legal history for much of continental Europe and Latin America (David, 1972; de Cruz, 1999; Jolowicz, 2003; Merryman, 1985; Strauss, 1986; Whitman, 1990). This chapter analyzes the characteristics that shape legal thought and practice in a group of countries that have legal traditions based on Roman law. First, a brief historical account of the influence of Roman law in Europe is presented. Next, there is a discussion of the Napoleonic Code, as the legal code emerging out of the French Revolution, influencing the dissemination and development of civil legal systems. The drafters of the Germanic Code of 1900 were aware of this “enlightened” document, but were more interested in developing a formal-rational legal system (Weber, 1967). This history is used to demonstrate the plausibility of a Romano-Germanic legal and criminal justice regime that contributes to understanding the use of incarceration in similar countries.

Romano-Germanic legal thinking is used to reference that type of legal thinking that emerged in much of Europe starting sometime around the 11th and 12th centuries with the Second Renaissance or Revival of Roman Civil Law—referred to as the Bologna School—and continued to develop through the French Revolution (Napoleonic Codes of 1804) and culminating with the German Historical and Pandectist Schools (de Cruz, 1999; Merryman, 1985; Zweigert and Kotz, 1998).

In some respects, fleshing out the Romano-Germanic criminal justice regime type is the most difficult of the three offered in this dissertation. This is the case because the common law countries are easily identified through a particular legal history rooted in English case law that has resulted in rather consistent policy development throughout much of the common law world (with Canada remaining on the less punitive end, and the US on the more punitive end of this regime). Nordic legal thinking is embedded in the Nordic criminal justice regime through intense cross-country collaboration, and close geographic, linguistic, and cultural affinities among those countries. The Romano-Germanic regime type includes slightly more within group variance due to the influence of French legal thinking, the recent exception of the Netherlands’ increasing prison population, and important cultural differences among these countries.

Romano-Germanic legal thinking is not concerned with extra-legal reasoning or issues. Instead, the formal-rational law designed a “gapless” system that provides legal actors with specific rules defining the appropriate operating logic or organizational patterns for legal decision making and action. These institutions provide judges, lawyers, and citizens with foreknowledge of legal rules—predictability and calculability to use Weber’s words-- that will shape individual expectations about legal decision making (Stone Sweet, 2002).
This chapter seeks to answer two essential questions relevant for understanding the use of incarceration throughout the West. One question is what are the unique legal and criminal justice institutions of the Romano-Germanic regime? The second question is what are the causal effects between unique—and historically embedded—regime characteristics and contemporary crime control policies? Each type of legal thinking has a particular approach to define roles of central legal actors, but also lay participation, law enforcement practices, and forms of punishment. These legal actors operate in a highly interconnected network in which the flow of arrests, convictions, and sentences is determined through an asymmetrical distribution of discretionary power among individual legal actors (e.g., police, prosecutors), with the judge sitting at the top, not beholden to an electorate, but rather the most powerful of all legal bureaucrats. Particular types of legal thinking foster specific expectations for legal actors, as well as the general citizen that would have preconceived notions about what it means to file a charge, come forward as a witness, or participate with formal criminal justice actors in other ways.

The Romano-Germanic type of legal thinking differs from the common law regime’s substantively-rational type of legal thinking. The former type of legal thinking is best characterized as a highly bureaucratic form of legal decision making that Weber referred to as the ultimate form of formal-rational legal development. The common law type of legal thinking sees the law as a mechanism to promote further capitalist development and conservative politics. The Nordic type of legal thinking is also concerned with extralegal issues, but in a much different way. Nordic law is known for shaping policies that are intended to ameliorate capitalist inequalities, with one resulting policy being the creation of the most generous welfare states in the Western world (Esping-Anderson, 1990). The Romano-Germanic type of legal thinking is the least concerned with social, political, or ethical considerations when developing the law. This type of legal thinking is argued to produce a highly bureaucratized organizational structure in which legal actors are trained how to think and base their decisions upon a rigid code of legal decision making.

Roman Legal Thought

This dissertation is an exercise in comparative-historical sociology, which seeks to improve upon explanations of the variation among the incarceration rates of 17 advanced capitalist countries. While the primary focus of this research concentrates on the post-WWII era, there is a need to explore a bit deeper into the historical foundation of the Romano-Germanic type of legal thinking. This discussion is not meant to uncover all of the nuances involved in Romano-Germanic law, but instead it is to consider how the influence of previous legal decisions affects contemporary legal thinking (Stone Sweet, 2002), and how these types of legal thought effect criminal justice policy outcomes.

Roman legal history is traced to the Twelve Tables of the fifth century B.C. This document built upon Greek law, which, at that time, was essentially a collection of rules of behavior. These ancient legal foundations were influential in determining the course of Western law for many centuries to come. For the purposes here Roman legal development will be seen in two relatively distinct phases separated by nearly 600 years (de Cruz, 1999). The first phase of Roman law is credited to the Byzantine Emperor Justinian during the sixth century, and the second phase was during what is referred to as the Revival of Roman law beginning in the latter 11th century in the emerging Italian
university system (Jolowicz, 2003).

The first phase of Roman legal development produced law rooted in authority, not principle, morality, or natural rights (de Cruz, 1999, p. 50; Dubber, 2005). Early Roman law was used as a class-based demonstration of sovereignty, formal power and social ordering. Roman law began with two central legal actors, the praetor and the iudex, of which all members were lay citizens, as formal legal training had yet to emerge. The praetor acted similar to modern prosecutors, and the iudex performed roles similar to modern judges. Added to these legal actors were a group of self-appointed legal scholars, jurists, that were also laymen, but they attained intellectual mastery over legal rules and resources. The jurists were consulted by legal professionals and laymen on legal matters. Who occupied these roles? Fitting with Weber’s elite perspective of legal development, ancient Rome built a legal system dominated by the upper classes, and it would follow that these groups sought to develop legal structures and institutions that strengthened their power. The elitist roots of Roman law fostered laws that resemble Greek thought and culture because the Roman intelligentsia was rooted in Greek philosophy and logic (de Cruz, 1999).

Justinian came to power in the 6th century and planted the seeds for the rationalization of society through a complex legal system. His goal was to “enact or reenact a comprehensive compilation, systemization, and consolidation of all the existing law, from every source” (de Cruz, 1999, p. 53). What does this mean for social ordering? This suggests that the Romans were in need of more consistent, predictable, and calculable forms of legal reasoning. To achieve this, Justinian commissioned the development of the Corpus Juris Civilis or the Corpus Juris, which contained four books: (1) Digest (or Pandect), (2) Institutes, (3) Code, and (4) Novel. The Institutes were the elementary textbook for first year law students. The Digest (or Pandect, Greek for “to take in everything”) (Strauss, 1986, p. 61) were classical juristic writings arranged according to heading from the classical period (spanning from around 120 A.D. to about 235 A.D) (Glendon et al., 1982). The Code were imperial enactments “dating from Hadrian, arranged chronologically within each title, so that it is possible to trace the legal evolution of a concept, as the facts in a case were distinguished from apparently similar facts in earlier cases” (de Cruz, 1999, p. 53, emphasis added). The Novels were imperial legislation from Justinian’s time, but these were never officially released (see de Cruz, 1999; Glendon, Gordon, and Osakwe, 1982; Jolowicz, 2003; Merryman, 1985; Whitman, 1990).

The Roman laws are a complex and systematic statement of legal rights, obligations, and procedures. Prior to the emergence of the Corpus Juris, the Western Roman Empire was losing much of its hold over Europe—a slow process of defeat beginning during the third century. It is important to consider that the Western Roman Empire was stretched thin and began to crack, most obviously with the fall of Rome around the year 410. The Eastern Roman Empire was dissolved after “the Lombard, Slav and Arab invasions that followed the reign of Justinian, the Corpus Juris Civilis fell into disuse for centuries” (Glendon et al., 1982, p.17). Up to this point there was little systematization of the law and the Roman Empire was giving way to more localized rulers, raiders, settlers, and a lack of powerful centralized state administrative mechanisms (Glendon et al., 1982; Whitman, 1990; Zweigert and Kotz, 1998).

Before moving to the revival of Roman law, it is important to consider that this
break in the use of Roman law was not as absolute for the people inhabiting portions of the former Roman Empire. Much of Europe was “Romanized,” which is to say that Roman thought and culture was spread throughout this region for several centuries in such a way that the new rulers (and the ruled) were normalized to Roman law and culture. This is merely to point out that Roman legal thinking never completely disappeared from Europe as it existed in several forms throughout the 10th century (Glendon et al., 1982, p. 18). Romano-Germanic legal thinking changed incrementally through customary borrowings and infusion of local traditions until some of the original Roman texts reemerged in Italy several centuries later.

Europe slowly experienced changing political, economic and social shifts that necessitated the use of a more rationalized form of legal procedure than was emerging from the “barbarized Roman law” of the Germanic conquerors. Justinian’s legal system emerged in the 11th and 12th centuries to form the second phase of Roman law—a Revival. Some of the original classes taught at the newly built Italian universities were on Roman law. These schools quickly became the best institutions in the world to receive legal training, and students came from outside of Italy to be trained in the “learned law.” Once educated in Roman legal traditions, these students returned to their native lands to slowly institutionalize Roman legal thinking and procedures throughout much of Western Europe, no doubt, with numerous customary differences from the original *Juris Corpus*.

These ancient Roman texts referenced many issues that were unfamiliar or outdated to the emerging body of law students. There were two groups of legal scholars that provided contemporary understanding of these Roman legal texts. The first of these groups were known as Glossators because they would “gloss” a legal document and provide brief commentary or raise important questions. Later the Commentators became the leaders of the *Corpus Juris* by arranging it in a more systematic fashion and synthesizing legal doctrines (de Cruz, 1999; Glendon et al., 1982). The Revival of Roman law was, essentially, part of a revolution in legal, administrative, and educational structures that spread—although slowly—throughout much of Europe. These changes were academic, scientific, and bureaucratic.

**The Revival of Roman Law: Public Peace in Germany**

The revival of Roman law was part of broader changes taking place within Europe. Europe, during the Middle Ages, was undergoing numerous shifts in social, political, and economic institutional arrangements that required a more predictable system of conflict resolution and ordering. In Germany, for instance, the Middle Ages were a time of regular warring and marauding knightly conquests throughout the territory. This was a violent and unpredictable time. The “use of learned law was at odds with European views of the legal world” in which Europeans “generally thought of [law] as local or personal law, embodying local or personal rights” (Whitman, 1990, p. 7). What became known as the *ius commune* (European law or common law) allowed for applying a hierarchical arrangement to deciding legal matters that ranged from local customs on one end to Roman-Canon law, on the other, with the latter gaining supremacy throughout the Middle Ages and replacing customary law, for the most part, during the middle and latter 16th century (Glendon et al., 1982; Merryman, 1985; Whitman, 1990).

The German people were searching for a systematic, yet fair, way to handle legal
matters. Violence was a pressing area of concern during this time. To stem this violence, a Public Peace (Landfriede) movement emerged to support a learned law system in which government became rationalized with “new courts of justice, staffed by jurists trained in Roman law…[that] served the need for some elaborately formed legal system that could provide the basis of government” (Whitman, 1990, p. 12). In 1495, under Emperor Maximilian I, the Imperial Chamber Court (Reichskammergericht) was created to enforce the “perpetual public peace” (Landfriede). Essentially, then, Roman law was promoted by both jurists and governmental entities, and laid the foundation for a formal-rational legal system within Germany.

The German legal system was rooted in elitist class biases from the beginning as the jurists and the bulk of legal actors were aristocrats that instituted legal actions that fit their political and economic goals. Gerald Strauss (1986), in fact, identified the dislike for much of this learned legal class emerging during the Reformation. On the opening page of his *Law, Resistance, and the State*, Strauss recites a common 16th century joke that asks if God were in litigation against Satan, who would win? The answer is: the devil would win because “he has all the lawyers on his side” (Strauss, 1986, p. 1). Although this may be only a small piece of 16th century humor, Strauss (1986) uncovers a deeper social meaning of the time regarding “alienation from the drift of political life” for a traditional society that saw the creeping Roman law with its emerging class of legal experts as challenging their “stability,” “survival,” and “familiar social patterns.” The sixteenth century is characterized by immense social change that concerned the more traditionalist classes, especially with “the transmutation of jurists into powerfully placed bureaucrats, and the evident linkage between bureaucracy and the would-be autocratic state” (Ertman, 1997; Strauss, 1986, p. 29).

The Revival of Roman law, therefore, cannot be understood only as a legal transformation. This movement is part of a broader historical process of bureaucratic development, nation-state formation, new religious beliefs, and a rationalization of social processes that took several centuries to come to fruition. These legal changes unraveled centuries of patterns of social life at all levels of society. The acceptance of Roman law in Germany during the sixteenth century was, for the most part, solidified with the Peasant War of 1524-25. This conflict pitted the peasantry against a growing elitist class promoting Romanized legal institutions.

The sixteenth century was a critical time for the initial development of the bureaucratic German state as well as Lutheranism (see Ertman, 1997), in which Luther “fearful of a civil war that would require more strength than [the Lutherans] had, turned back to the old idea of the ius commune that had been linked with the Public Peace [Landfriede] for two-and-a-half centuries” (Whitman, 1990, p. 23). Luther, indeed, changed his mind regarding the usefulness of a learned written law and the learned men of the law. With Luther’s acceptance of Roman legal procedures and rules, Germany was prepared to combine the secular and canon law. It is not clear why Luther changed his mind on the “godlessness” of Roman law, but it appears that he felt his Lutheran movement slipping away in the face of knightly conquest, violence, and a general lack of order. The German law that emerged was an amalgamation of Roman and canon law that sought to order society. Therefore, the law was used to provide predictable exchange among citizens even if this early modern legal thinking worked to institutionalize the values, beliefs, and attitudes of the elite segments of society. Legal education was
reserved for elite class of individuals. These individuals needed finances to afford the lengthy training in Roman and Germanic legal thought—a combined ten years of training before one could sit for the doctorate of law—something that prevented commoners from acquiring the legal knowledge.

The French Revolution and Romano-Germanic Law

Throughout the 18th century, enlightenment thinking fostered humanist and liberal trends in France (and other parts of Europe) that competed with notions of absolutist rule in much of the Germanic speaking territories (e.g., Austria, Germany, Prussia) (Ertman, 1997). Once the Ancient Regime was toppled, and Napoleon was firmly in place as “leader” of the Republic, he commissioned four legal scholars to construct what is commonly referred to as the Napoleonic Code, but was originally known as the Code civil des francais (the civil code of the French people).

One thing that sets the French code of 1804 apart from that of the Germanic code of 1900 is its plain language; it was designed for an intelligent (bourgeois) citizen to be familiar with the law. Natural law influences—such as Voltaire, Rousseau, and Montesquieu—shifted the framing of man into “a rational and responsible creature who acquires at birth an inalienable right to freedom of conscience, belief, and economic activity” (Zweigert and Kotz, 1998, p. 80-81). Napoleon, a soldier, not a lawyer, demanded that the Code be made available so that everyone could have some idea of their legal rights and duties. The drafters of the Code civil did not write this document for uneducated laborers, but rather it was written for the enlightened bourgeoisie as the emerging propertied class (Elliott and Vernon, 2000; Glendon, et al., 1982; Zweigert and Kotz, 1998, p. 93). The code of 1804 consisted of three books: Book One is titled of Persons, Book Two of Property and Different Kinds of Ownership, and Book Three of the Different Ways of Acquiring Property.

Cumulatively, these codes had three foci—(1) protect private property, (2) enforce contracts, and (3) support the patriarchal family. While these areas were not completely absent from Roman law, the Code was acting within a newly created institutional arena that wanted to reduce the power of the landed elite, and support democratic, constitutional, state formation, with the patriarchal family supporting this system in private, and rationalizing economic transactions. The Napoleonic Code was not the only legal code to emerge during this time in Europe (e.g., Prussia, 1794 and Austria, 1811). These codes were influenced to varying degrees by rational Enlightenment thinking, but neither went as far as the French code to shape a rationally ordered society that promoted liberal commerce. There were also central ideological differences between the Code civil of 1804 and that of the Prussian and Austrian codes, as the latter two were put in place to maintain elite class structures and support an autocratic rule. The French Revolution and the Code were movements led by an emerging bourgeois class in which property and freedom of contract were paramount.

These differences produced a specific attention to the separation of powers that fostered a desire to keep politics and law making separate. The courts of the Ancient Regime were inquisitorial as the judge not only controlled the courtroom, but was also in charge of the investigatory phase, an institutional arrangement that led to much judicial corruption. The legislature is to have exclusive rights over making law, and the judge should be restrained in his power to interpret the law. The Code civil was drafted at a
time when suspicion of the role that legal actors, namely judges, played during the *l’ancien droit* (the ancient law), and therefore created a legal document that sought to reduce monarchical domination through a humanist (or natural law) based rationalization of legal rules, procedures, and roles.

**Germanic Legal Science: From the Historical to Pandectist School**

Germany lacked the organization to establish a unified national legal code during the early 19th century. Instead, they were embroiled in intense conflicts that delayed the onset of a formal rationalization of the law in 1896. The French Revolution sparked a movement toward ordered state development through liberal, natural law based systems. Germany did not, however, completely accept the French Code, as it was rooted more in natural law than legal science.

Simultaneous to the rise of the “unscientific” natural law in France, German scholars were dedicated to a more systematic and calculated view of the law. This was led by Gustav von Hugo and Friedrich Carl von Savigny as leaders of the Historical School of jurisprudence in Germany. The Historical School diverged from Enlightenment thinking by understanding the law as a more natural, dynamic product worked out over the course of time through cultural infiltration. “All true law”, according to the German Historical School, “is customary law, developed, handed down, and captured in usage and manners; the law-bearers are the people and, as the people’s representatives, the lawyers” (Zweigert and Kotz, 1998, p. 139).

Germany lacked well-written records of customary law formation leaving the Historical School jurists to review the ancient Roman texts. This was done with a complete study of the Digest, which is why the Historical School became known as the Pandectist School. It was with Bismarck’s unification of the German Empire in 1871 that work began to construct a national legal code. Zweigert and Kotz (1998) characterize Bismarck’s Germany as a *grande bourgeoisie* that was intermingled with conceptions of authoritarianism typical of Prussian thinking at the time. These legal historians contextualize Bismarck’s time by saying that “it was the day of a marked liberalism in economics, of the belief that the general good would spontaneously ensue from the interplay of economic forces provided that the state did not interfere” (Zweigert and Kotz, 1998, p. 144). Any social movements or drives during this time in Germany were rooted in a paternalistic state and private life. The industrial revolution uprooted traditional rural lifestyles for a more urban industrial production, resulting in legal institutional gaps for which new policies, regulations, and laws were created to address.

What does this mean for the social and legal context in which German law was formed? Social changes fostered the development of a legal system that supported market relationships through, as Weber pointed out, the purposive contract and other legal rules. This brings us to why and how Weber saw the German legal system as epitomizing the formal-rational type of legal thinking because it was established--quite different from the French Code civil—for the professional lawyer, not the learned “enlightened” man. Rather, the German code is a highly dense, technical, and detailed system of legal thinking (Dubber, 2005). Interestingly, this legal thinking emphasizes minimal lay participation that characterizes the Nordic regime, and, in fact, Romano-Germanic legal thinking can be characterized as limiting all human decision making outside of the legislative branch. Legal decision making in Germany is based on a
rational (cognitive) process using a rationally designed system of legal rules that serve to both construct and circumscribe the individual legal bureaucrat, which reaffirms the institutionalized legal form. Legal scholars describe the German code typically with such phrases as a calculating machine, as a logical-mathematical application of reason, scientific, and technical.

The first German Civil Code was instituted on January 1, 1900. It was originally completed in 1896, but was not formally instituted until the first day of the 20th century. There are five primary codes in Germany, the Civil Code, the Code of Civil Procedure, the German Commercial Code, the Penal Code of the Federal Republic of Germany, and the German Code of Criminal Procedure. The German code of 1900 was, of course, altered significantly following WWII, which resulted in the German Code of 1949, the Grundgesetz or the Basic Law.

German Criminal Justice System

The Romano-Germanic criminal justice regime is characterized by high levels of bureaucratic control and formal legalism that promotes sentencing policies that limit incarceration (Frased, 2001). These characteristics foster specific legal and criminal justice institutions that maintain relatively stable incarcerated populations in post-WWII Germany (Tonry, 2004b). The German constitution of 1949 (Grundgesetz) established the code law for West Germany, and served in a modified version as the chief legal document for unified Germany beginning in 1990. It is argued that these arrangements create specific organizational structures as well as specific cognitive frameworks for legal actors. These cognitive structures are formed through extensive legal education, and later on-the-job socialization that cumulatively serve to shape how legal actors think and act. Prosecutors and judges are not elected positions in Germany, as in the US. These legal actors are appointed (by other bureaucrats) to implement and manage criminal justice policies and practices that reflect the legal rationality contained in the Grundgesetz. This rational, cool, and calculated legal actor is able—theoretically, at least—to move past any personal, social, and political biases to objectively—according to formal legal criteria—determine the guilt or innocence of individuals.

This rational bureaucratic approach to legal decision making is structured by the German Constitution of 1949. The Basic Law centralized human rights and dignity by placing several individual protections in the first 19 articles, with the first titled human dignity. That such an emphasis was placed on human dignity and the protection of the individual from the state moved beyond previous constitutions (e.g., North German League of 1867 and German imperial constitution of 1871) and incorporated influences from the US Bill of Rights, the French Declaration of the Rights of Man, as well as a need to construct a pragmatic legal order (Spevack, 1997).

The Basic Law, as with many governmental documents, is the product of political maneuvering, acquiescence, and intense debate. A Parliamentary Council met several times to negotiate the terms of the Basic Law with external forces following WWII. It was obvious that the German empire, as it once existed, was ending, and the unconditional surrender rendered many German political thinkers without “the authority to reform the Reich” (Spevack, 1997, p. 416).

Savelsberg and King (2007, 2005) demonstrated that collective memory is important when considering how and why laws are constructed. They define collective
memory as “knowledge about the past that is shared, mutually acknowledged, and reinforced by collectivities such as small informal groups, formal organizations, or nation states and global communities” (Savelsberg and King, 2007, p. 190). These authors point out that collective memories are expressed through legislation and “legal decision making.” Giesen (2004) wrote about the ‘trauma’ felt by the German population during the immediate post-war period. In order to cope with this trauma, the public needed to “decouple” themselves (as a collective) from the “perpetrators” of the Nazi atrocities, and the “law court was the institutional arena in which the demarcation of individual guilt was staged, ritually reconstructed, and reaffirmed” (Giesen, 2004, p. 121; as quoted by Savelsberg and King, 2007, p. 194). Assigning guilt to certain individuals served several purposes that include allowing individuals to feel “cleansed of the collaboration of many” and paved the way for focusing on the reconstruction effort. Some legal scholars were incorporating past knowledge of the social world to solve the problem of developing a modern legal code.

Indigenous German legal principles were not the only perspectives involved in the construction of the Basic Law. Western influences are seen throughout the Code of 1949. The development of the Basic Law was the outcome of intense political wrangling and debate. The German framers had to work within the confines of post-war defeat, as well as accept Anglo-American conceptions of liberalism expressed in individual rights (over social rights). This created a situation in which leaders from the Christian Democratic Party (CDU), the Social Democratic Party (SPD), and the Communist Party (KPD) all battled over inserting their ideological beliefs into the code. The KPD was ruled out early on in the constitutional debates because their ideas “were incompatible with western democracy and free market capitalism” and the fear of Russian-backed communism (Spevack, 1997, p. 423). The CDU “supported American ideas about how to formulate the catalogue of basic rights…[and] would facilitate the growth of a capitalist economy and avoid socialization of industry” (Spevack, 1997, p. 427). This resulted in an initial imbalance in political party power that proved to have long-term policy effects, with the CDU maintaining dominance for most of the post-war era, placing the social democrats in a secondary role.

Long-term patterns of the partisan composition of government influence policy over the long-run (Huber and Stephens, 2001). Path dependent processes are often instigated by small early gains that strengthen individuals, groups, or positions, relative to competitors, over time (Pierson, 2004). This sort of structural inertia is well known in political phenomena, and supports the notion of structural limitation. In post-WWII Germany, the partisan composition has been a unique blend of the rather conservative and somewhat elitist Christian democratic parties with the more universalist working class social democratic parties (van Kersbergen, 1995) to produce a welfare state fitting somewhere between the more restrictive Anglo-American and the more open Scandinavian welfare regimes (Esping-Anderson, 1990; Huber and Stephens, 2001).

The Basic Law was instituted on a temporary basis as the framers thought that unification would bring about a new constitution. Unification has taken place without a completely new constitution, but rather several adjustments have been made to the Code of 1949. Central to the study at hand is that several countries in Western Europe were in need of a legal framework, and the 1949 law served as a model. During the 1960s, social democratic parties became powerful and were able to form a Grand Coalition with the
CDU that made possible several institutional changes. This coalition only lasted from 1966 to 1969, which was enough time for several changes to the criminal law and criminal justice procedures. The next section discusses some of the major criminal law reforms of the 1960s.

German Radicalism: 1960s

WWII fostered a specific German collective memory of a distrustful central state that blended with previous notions—even if mostly vicariously experienced—of the patriarchal, bureaucratic state characteristic of the Weimar Republic. These cultural and other social forces brought about a desire for a reformed legal system from the highly western influenced Basic Law of 1949. A critical piece of legislation emerged out the 1969 criminal law reforms with the goal of developing a penal system concerned with retribution and deterrence, what became a sentencing policy known as general positive prevention. This sort of rational administration of justice would reduce the use of incarceration as a criminal punishment; instead the German’s started to rely upon day fines and community service as the primary punitive mechanism.

On July 4, 1969, the 

Zweites Gesetz zur Reform des Strafrechts

(The Second Criminal Law Reform Act) was passed in order to make changes to the General Part of the German Criminal Code, but it was not fully implemented until 1975 (Weigend, 2001). Reduced use of incarceration was the motive for the 1969 legislation and penal code changes, which fit the 1960s rehabilitation ideology in the US. Although German correctional philosophy is not traditionally rehabilitative or therapeutic, 19th century German scholars such as Franz von Liszt recognized that “Short term imprisonment is not only useless. It does more harm to the legal system than the offender’s total impunity would” (Dubber, 2005, 2006; Weigend, 2001, p. 193). This move away from incarceration should be seen as a rational policy movement to reduce incarceration and allow more community sanctions.

Michael Tonry (2004b) pointed out that German incarceration has remained relatively stable during the post-war era due to specific political features shaping German crime policy. Most notably, the Christian Democrats have tended to maintain dominance in the German parliament or they formed a coalition government, usually with the Social Democratic Party during the latter part of the 20th century. Thomas Weigend (2001, p.192) provided a thorough description of the reform act of 1969:

“First, prison sentences of less than one month were abolished altogether—fines were regarded as sufficient reaction to offenses of such low seriousness. Second, many petty offenses were decriminalized and turned into mere administrative infractions (Ordnungswidrigkeiten)...decriminalization of many traffic offenses...[and] a host of public order offenses. Third, the new version of the Penal Code strongly discouraged the imposition of sentences of less than six months: paragraph 47, section. 1 PC requires courts to give specific reasons in writing for imposing short prison sentences, and courts must provide additional justification if they refrain from suspending a sentence of less than one year.”

The coalitional government made possible several needed compromises in criminal law (Eser, 1995). Gustav Heinemann, a Social Democrat, became the Minister of Justice, and later the Federal President. In the post-war period, Germany was working
to reshape German criminal law in the aftermath of the Nazi party. The Grand Criminal Law Commission, worked through the mid and late 1950s, to develop numerous drafts of criminal law reforms. The Commission managed to produce a Draft Penal Code in 1962 that was not accepted by parliament. An Alternative Draft Penal Code was established by 14 German and Swiss law professors in 1966 with “its primary concern…to adjust the sanction system to reflect the notion of rehabilitation and to restrict the criminal law to socially harmful conduct” (Eser, 1995, p. 32). These criminal law reforms were part of the general trend toward a more liberal penal model in Germany, and they were attached to the Criminal Reform Acts instituted in 1969 (The First Criminal Reform Act) and The Second Criminal Reform Act implemented in 1975.

The Reform of 1969 instituted several criminal justice practices that contributed to the declining incarcerated population despite rising crime throughout the 1960s and 1990s. Germany has exhibited relatively stable penal trends, if not slightly smaller during the latter part of the 20th century. German penal policies have not fit Garland’s notion of “elsewhere”, but rather the criminal law reforms reduced the prison population by curtailing judges’ ability to impose sentences of less than six months (Tonry, 2004b). These reforms also brought a move away from the legality principle requiring German prosecutors to take any case in which there is enough evidence to warrant a conviction. This reform brought about shifts in the composition of power among criminal justice actors.

Garland’s notion of elsewhere neglects the importance of country-specific institutional and structural differences that shape policy outcomes (Savelsberg, 1994, 2008; Sutton, 2004, 2004; Tonry, 2004b). The notion of Germany fitting with Anglo-American type countries in criminal justice policy outcomes neglects to consider the reality for many European countries, and Germany has maintained a relatively stable level of incarceration for the past thirty years (Albrecht, 2001). Savelsberg (1994, p. 936) suggested that comparative research needs to consider the “factors that caused the country-specific construction of political knowledge” that shape different criminal justice systems in Germany and the US.

Crime and Punishment Theories: General Positive Prevention

A criminal justice system characterized by highly rational and bureaucratic processes operates under specific theories about crime and punishment. What is punishment? How should people be punished? Why should they be punished? There are numerous theoretical stances one can take regarding the (non-sociological) purpose of punishment. Most introductory criminology textbooks inform students that the goals of formal punishment are: (1) incapacitation through incarceration, (2) rehabilitation through specific behavior changing interventions, (3) deterrence by encouraging the apprehended to become law abiding (specific) or encouraging others witnessing the punishment (general) to avoid criminality, and (4) retribution through harsh policies. Dubber (2006, p.2) referred to the first of these goals as consequentialist because related policies “advocate punishment for the sake of some beneficial consequence, such as crime reduction.” He suggested that retribution is punishment for its own sake, no doubt proportional to the offense committed, but nonetheless related policies satisfy a Kantian (i.e., retributive) notion of punishment for German legal science.

German legal science found deterrence models to use offenders unjustly as “examples” or as Hegel argued to treat people as “animals…to be scared, and beaten, into
submission” (Dubber, 2006, p. 18), something standing at odds with classical criminal thinking that supported overtly deterrent models for legal reform (e.g., Bentham).

In Germany, policies aimed at strengthening existing law abiding social norms at the community and social levels, not the individual offender. Dubber (2006, p.15) described the debate in German legal circles between the consequentialists and the retributivists, what is referred to as the *Schulenstreit* (clash of the schools), in which Franz von Liszt, the founder of German criminology, is pitted against Karl Binding, the founder of German criminal law norm theory, representing the classical school. This was really a battle between modernist notions of policy utility. Liszt asserted punishment should serve some social good, whereas Binding adhered to a more Roman view of the “right to punishment” as “nothing but the right to obedience of the law which has been transformed by the offender’s disobedience.” What is needed is “the inmate’s subjugation under the power of law for the sake of maintaining the authority of the laws violated” (Binding, 1915, p. 84; found in Dubber, 2006, p. 16-17). Liszt and his colleagues pushed for legislation to encourage a more individualistic, treatment focused criminal law. This perspective should not be seen as purely benevolent, but rather as serving a means to an end. The end is that of norm reinforcement through “public reprobation and imposition of punishment” as the criminal law is “the public reaffirmation of the validity of basic social norms that have been called into question” by the law violation (Weigend, 2001, p. 209). This fits with Durkheimian notions of the ritualistic nature of punishment to convey the specific message of rule compliance. Norm reinforcement did not require purely incapacitative methods or purely deterrent methods, but rather individual approaches to determine what combination of practices were needed. Liszt and the progressives were sidelined by WWII when the Nazis took over in 1933, but their thoughts influenced the 1960s criminal reforms (Dubber, 2006).

German punishment theory took an alternative path from that of the US by responding to the failure of specific prevention models by shifting the “objects of prevention” and arguing that “perhaps [punishment] could stiffen the resolve of non-offenders not to become (unrehabilitatable) offenders…[essentially] reinforce the general legal consciousness” (Dubber, 2006, p.18). Huber and Stephens (2001) demonstrated that German social policies were shaped by a unique blend of social and Christian democratic parties and coalitions that were consequential for welfare policy outcomes. These coalitions emerged out of political power shifts among political associations in which early advantages of the Christian democratic parties placed Germany on a more restrictive policy path than that found in the heavily social democratic Nordic countries’ universalistic approach. The essential principle here is that of “subsidiarity…the principle that the smallest social unit capable of taking care of its members should do so (family, congregation, local community, and the state only as a last resort for social programs)” (Huber and Stephens, 2001, p. 19). Positive general prevention fits with the principle of using incarceration as the last option for serious offenses. Huber and Stephens (2001) showed that post-war Germany lacked an organized and centralized left movement focused on wage restraint and universalistic policies found in Sweden with the *Landsorganisationen i Sverige* (LO). This placed the Christian democratic parties on an advantageous initial path that developed into long-run political party effects on social policy outcomes in Germany. The principle of subsidiarity lends itself to penal policies that seek to limit incarceration, and prefer for more community oriented punishments, whereas the more universalist approach found in Sweden may be attached with the strong
working class base of the labor movement compared to the influence of middle- and upper-class German unions.

Conclusion: Mechanisms of Bureaucratic Punishment

The Romano-Germanic regime differs from the common law regime in several ways. Interestingly, Roman law was originally created by and for lawyers in order to determine the guilt or innocence of the accused. In this legal system, however, lawyers have always held something of a secondary role to judges. Judges are highly trained legal professionals at the top of the civil service hierarchy, and they work with prosecutors, defense attorneys, and lay judges in much different ways than common law judges. The absence of judicial elections frees judges from the condemnation of an irrational public demanding harsh punishment. German, French, or Italian judges are concerned with how the public perceives their decisions or courtroom behavior. Instead, these judges are more concerned with ensuring that they meet the organizational requirements of following rather rigid legal rules and internal evaluations by other judges. In many continental systems, trials are not considered complete until after appellate review of the trial of first instance. That is, there is an automatic review of judicial and prosecutorial decisions to ensure that legal rules were followed, which is to say that subjective or emotional decision making is eliminated from the trial. One could argue that this highly bureaucratic legal system shields courtroom actors from public scrutiny with a blanket of rationality.

First, the Romano-Germanic regime has little need for defense attorneys. This regime does not rely on an adversarial process in which the state and the defendant compete to convince juries of one’s innocence or acquit individuals based upon legal technicalities. There are few technicalities that defense attorneys use to free accused individuals as these systems do not have exclusionary rules regarding physical evidence or testimony. Instead, defense attorneys are used to instruct defendants on legal procedures and expectations as they work with prosecutors to discover the truth of the alleged event. Why are defense attorney so weak in this regime? Part of the reason for this weakness has to do with the lack of a jury. Recall that defense attorneys in the common law regime argued that juries are untrained and prone to subjective decision making, which requires complex evidentiary rules. The Romano-Germanic regime, on the other hand, suggests that judges are such highly trained legal professionals that they can put aside their emotions to make legal decisions in a context of complete objectivity. Therefore, it is not inappropriate for evidence that is gathered with questionable police tactics or hearsay testimony that lends plausibility to one’s guilt or innocence to be included in trials because the professional judge is a legal scientist able to separate his or her subjectivity when making legal rulings.

Second, prosecutorial discretion is nearly eliminated in the Romano-Germanic regime. Similar to judges, prosecutors must meet strict bureaucratic rules when making decisions to charge or dismiss individuals as well as their investigatory and courtroom practices. This lack of discretion contributes to the power of the judiciary and the weakness of defense attorneys relative to the common law regime. That is, with judges appointed through a tight bureaucratic process, and overseeing the investigatory phase and leading the courtroom trial, prosecutors are placed in a secondary role to judges. Prosecutors are not independent legal actors striving to inflict punishment upon
wrongdoers as much as they are bureaucrats trained to follow legal procedures to
discover the guilt or innocence of an accused person.

Third, some may argue that the Romano-Germanic regime may become tainted
with emotional rulings through the use of lay judges. Upon first glance this may appear
to be the case, but it is important to understand the lay judges are not held in high regard,
they possess little power, and often their decisions are shaped by professional judges.
Lay judges sit with and are to debate points of fact and law with professional judges,
which is akin to placing a professional boxer in the ring with a professor. The result is an
unfair fight. Research was presented in this chapter to demonstrate that rarely do lay
judges disagree with professional judges and more often than not lay judges simply
follow the lead of their trained counterpart.

Fourth, one of the fundamental differentiating principles between this regime and
the common law regime revolves around the application of scientific principles to legal
decision making. That is, the Romano-Germanic regime is founded on and continues to
move from a perspective of hyper-rationality in bureaucratic form and courtroom
decisions. This system is academic, bureaucratic, and hierarchical, which has the effect
of diminishing public opinion to an afterthought. Judges and prosecutors are not
concerned with elections. Lay judges are not perceived as an extension of the public’s
desire for pain. Rather, the opposite exists in which judges and prosecutors are there to
restrain such desire for punishment, and replace this emotionalism with rationality.
Reason rules the Romano-Germanic regime and offers the accused protection from a
potentially hyper-punitive public. In this case, prosecutors do not need web pages,
commercials, or radio spots to demonstrate their effectiveness. Judges do not appear on
television arguing that they are more punitive than their counterparts. Instead,
prosecutors and judges are reined in with reliance upon objective decision making that is
supported by legal rules, not how such incidents will play out in the public arena.

The four courtroom actors identified are defense attorneys, prosecutors, judges,
and lay representation that exist in all three regimes. These courtroom actors compete for
discretionary power in the investigatory and trial phases. The common law regime is one
that relies upon the adversarial battle between defense attorneys and prosecutors in which
the judge acts as the referee, whereas the Romano-Germanic regime places defense
attorneys and lay participation at the bottom of the discretionary power grid. There is
little need for defense attorneys in this regime because legal wrangling and technicalities
do not exist to the extent they are present in the common law. Public opinion is muted
through bureaucratic organizational structures that ensure that prosecutors and judges
follow legal rules over the public’s desire for punishment.
Chapter Six: Nordic Incarceration Regime: The Case of Sweden

The Nordic type of legal thinking is predicated on ameliorating social inequalities with minimal criminal justice intervention. Just as Soskice and Hall (2001) and others identified “varieties of capitalism” this dissertation borrows from Weber’s types of legal thinking and argues that these types of legal thinking foster different types of criminal justice institutions. These institutions, in turn, shape criminal justice actors’ thoughts and behaviors regarding the appropriate actions—punishments, interventions—necessary in response to law violation. The central question guiding this research is: Why do relatively similar modern nation-states have such disparities in penal populations? This chapter demonstrates that a Nordic type of legal thinking exists to foster a Nordic criminal justice regime characterized by (1) strong lay participation, (2) strong penal abolitionist grassroots movement, (3) lack of faith in harsh punishment, and (4) inclusive criminal justice system.

Comparative legal scholars routinely discuss common and civil law families, with little attention to the unique legal thinking in the Nordic countries (e.g., Zweigert and Kotz, 1998). It is commonly accepted that continental Europe received its legal foundation from Roman legal traditions (Merryman, 1985). The Roman legal system provided the basis for ‘formal-rational legal thinking’ that promoted highly rationalized institutional arrangements throughout society (Weber, 1967). Roman legal thinking established rational legal and administrative structures for economic, social, and political life in much of continental Europe.

Pierson’s (2004) research on path dependency allows for combining important cultural elements with the historical path or trajectory by which these elements were developed to demonstrate (1) policy ratchet effects, (2) structural limitations, and (3) regime legacies (Huber and Stephens, 2001). This institutionalist view emphasizes the importance of legal and criminal justice institutions that are rooted in historical processes, and recognizes the importance of how individual social actors engage in and with the criminal justice policy field (which is further embedded in larger fields) to develop unique policies (Brubaker, 1985; Bourdieu, 1977; DiMaggio, 1979).

First, a brief discussion is provided to explain what is meant by Nordic legal thinking. Second, incarceration rates are reviewed to demonstrate trends in penal policies in Sweden. Any explanation of penal trends would be remiss without consideration of criminal behaviors, as some may suggest a democracy-at-work thesis in which the public reacts against rising crime thereby encouraging legislators to increase penalties (Beckett and Sasson, 2002). Next, political variables are presented to highlight important legislation on crime and justice issues and other political interventions potentially effecting incarceration trends. Moving away from such a structural discussion, the Swedish social landscape is sketched to contextualize Swedish punishment.

Laying the Foundation for a Nordic Type of Legal Thinking

In Weber’s (1967) Sociology of Law there is little mention of the legal systems of the Nordic countries. Why did Weber glance over Nordic law? It is difficult to say for sure, but it is worth mentioning that during Weber’s research, the Nordic region looked much different than it does today, and these countries lacked an emphasis on the rational legal form that Weber concentrated on. The Nordic countries were powerful seafaring colonizers, throughout the 17th and 18th centuries, in which Denmark and Sweden were
the more powerful empire builders, with Norway gaining its independence much later. Finland, although geographically connected, lacks some of the cultural similarities with the rest of the Nordic (e.g., language), and has strong cultural leanings with Eastern Europe. These countries, nonetheless, lacked the early emergence of industrial capitalism that Weber witnessed in England and Germany. It is commonly known that the Nordic countries lacked the class structures found elsewhere to support early modern capitalist enterprises—namely, a class of powerful landed elite (Rothstein, 2001).

The Nordic region is known for its attention to social cohesion, universalism and solidarity that is reflected in social policies (Esping-Anderson, 1990, p. 67-69). The German code law is characterized as rigid, abstract, and gapless, and, the other type is flexible, empirical, and concrete. These perspectives brought about different court rules, legal training, and emphases in the law, but Weber did not include Nordic countries in his Sociology of Law. The essence of the Germanic civil law approach was to base legal decisions upon science through the systematic revision of Roman legal documents to produce the German Civil Code of 1896 (Merryman, 1985, p. 62). The law is not to be harsh, but rather the German legal scientists, referred to as the Pandectists, were interested in the scientific construction of a formal, pure, concept driven code law (Merryman, 1985). As was detailed earlier, the common law was developed later through a very unscientific process predicated on trial by jury and judicial precedents (Hogue, 1966).

The Nordic legal regime, unlike that which exists in the common law world, is characterized by a mixture of substantive and formal legal thinking. Recall that substantive legal types are concerned with non-legal issues such as social engineering, achieving political desires, and ethical norms, whereas formal-rational legal thinking is rule bound and provides clear directives on how judicial decision makers are to proceed—as ‘bureaucratic automatons’ they are merely to apply a code to an act. This, however, is not to say that these types exist in their pure form in reality, but rather they offer a heuristic tool to understand western law (Rheinstein, 1967). These types do not go far enough to explain Nordic legal thinking, which is composed of unique cognitive, cultural, and organizational perspectives (Pihlajamaki, 2004). Weber recognized that the common law is substantive-rational law, but he said little about the Nordic law type. The typological model developed by Weber operates upon two axes in which pure types are claimed to exhibit either substantive or formal characteristics and either rational or irrational law making and law finding processes. While these pure types may exist in the abstract, they do not necessarily correspond to empirical reality perfectly. The entire sample possesses variable ranges of each of these qualities, with some showing a clear preference for specific characteristics, such as the German law imbued with scientific legal thinking, the Nordic law emphasizes working-class concerns, and common law thinking promotes and supports elitist market conditions.

An underlying assumption of Weber’s analysis is that western legal systems created rules that worked to benefit certain groups—capitalists—through the calculability brought about with the purposive contract and other economic-legal institutions (Kronman, 1983; Trubek, 1985). This asymmetry fosters class inequalities between the bourgeoisie and the proletariat to which additional laws and procedures are created to continually block the working classes from gaining complete access to the political, economic, and legal spheres in any civilization. This inequality motivates several
substantivizing reforms: (1) strengthening of bureaucratic welfare states, (2) growing social democratic political power, and (3) changing legal perspectives among legal professionals (Ewing, 1987, p. 507; Savelsberg, 1992).

The law performs several non-legal social functions one of which revolves around the distribution of power, and Weber recognized the inequality brought about by modern legal systems. This inequality potentially fosters a backlash to provide safety mechanisms to prop up the individuals not fitting into modern capitalism. Formal rational legal thinking is weakened by movements directed at bringing about legal changes to balance the scales of inequality. The “substantive rationalization of law results on the one hand in an intrusion of the state into society and, on the other hand, in an opening of state decision making to social (‘extralegal’) criteria” (Savelsberg, 1992, p. 1348).

There is no doubt that both English common law and German legal science have contributed to shaping Nordic law (Pihlajamaki, 2004). There are, however, specific elements that characterize this legal regime as a specific type of legal thinking predicated on minimal criminal justice intervention. These differences are measured and tested against competing perspectives to offer an explanation of contemporary punishment outcomes. Why do relatively similar modern nation-states have such disparities in penal populations?

A Nordic legal type underpins decisions by criminal justice policymakers to implement various practices and policies that exhibit a Nordic type of legal thinking that is embedded in a Nordic type of criminal justice system. This type of criminal justice system is predicated on a relationship between individuals and the state in which formal interventions are intended to improve (or at least maintain) the material and social wellbeing of citizens. The criminal justice system is one organizational form used by democratic states to legitimately coerce citizens to accept social roles aligned with dominant material and cultural norms. Individual failure to successfully perform one’s role-bound expectations could result in formal governments using mechanisms from other governance spheres—the mental health, welfare, and labor market institutions to enforce social order (Beckett and Western, 2001; Liska, 1997; Western and Beckett, 1999). A Nordic criminal justice regime type is characterized by perceiving individual criminality as a problem beyond the individual. Individuals are seen as rational human beings (von Hofer and Tham, 1980), and criminality is the result of weak social bonds (Gotfredson and Hirschi, 1990) and failed social learning (Akers, 1998), not, as in the common law regime type, the result of weak genetic structure, single parenthood, low ambition and moral depravity (Wilson, 1985; Wilson and Herrnstein, 1985). Ironically enough, it is this more treatment minded focus that eventually led to major crime policy reforms in several of the Nordic criminal justice systems, and, in 1977, The National Swedish Council for Crime Prevention published the report A New Penal System: Ideas and Proposals that had dramatic effects on crime policy.

Nordic law is recognized for its attention toward social justice and using the law as a tool to ameliorate class inequalities (Tham, 1995). The Nordic legal system relies on written law, but in a much less formalistic fashion than the Germans or French. What sets Nordic legal thinking apart is its reliance upon seeing the law’s purpose as a mechanism to fix social problems (Husa, et al., 2007; Pihlajamäki, 2004). Christie (2000) mentioned that the US criminal justice system is an out of control machine-like
force that has no checks in place to slow its growth—"to put the brakes on." The Nordic legal regime supports criminal justice practices that help to keep prison populations low: e.g., lay courts, open prisons, prison waiting lists, and no death penalty.

It is important to remember the closeness among the Nordic countries, not only geographically but also in their social, economic, and political structures. These connections are not accidental, but rather created through intentional design. Some of this closeness is the byproduct of war and conquest, such as Finland’s place within the Swedish Empire for nearly five centuries (ending in 1809). Moving toward the west, Norway was part of the Danish empire for hundreds of years as well as being incorporated as a Swedish territory, not gaining independence until 1905. These more coercive relationships were replaced by more cooperative interactions taking off during the 19th century and continuing today. One such example is the 1872 congress of Scandinavian jurists “convened in Copenhagen with the express purpose of advancing legal unification in Scandinavia” (Zweigert and Kotz, 1998, p. 280).

Tapio Lappi-Seppala (2007) provides a thorough review of how, beginning shortly after WWII, the Scandinavian countries turned to one another to modernize their criminal justice systems. In 1952, for instance, the Nordic Council was created to increase similarities in legislative issues and from 1960 to the mid-1980s the Nordic Criminal Law Committee sought to “harmonize” criminal justice practices (von Hofer, 2004; Takala, 2004). Beyond these connections, the Nordic countries are said to form a distinct legal family (see Zweigert and Kotz, 1998).

**Swedish Prison: Brief History**

The Swedish penal system emerged, for the most part, out of latter-19th century industrialization (Nilsson, 2003; von Hofer, 2003b). Sweden changed from a predominantly agricultural based economy to one that was, although much slower than other parts of the West, developing an industrialized production force. Modern capitalist structures necessitate that material resources are distributed unevenly, along a continuum, but with differences between the lower and upper ends. The Swedish view of this situation was one concerned with utilizing legal interventions to provide mechanisms to reduce the impact of class conflict with policies characterized as solidaristic, universalist, and de-commodifying (Esping-Anderson, 1990; Tham, 1995, p. 113). Consider how different of a perspective this is from the path taken by the ideal-typical case of the common law regime with American socio-legal perspectives rooted in protection of economic structures and neo-liberal responsibilization (Garland, 1997).

The substantivizing orientation toward legal development sought to produce inclusive criminal justice practices (Pihlajamäki, 2004). Despite contemporary views of prisons as filthy, horrible places, during their initial development, the prison was seen as an enlightened way to go about social ordering (Nilsson, 2003). It is important to consider what a relief it was for individuals living during the 19th century (especially criminals) as the use of corporeal and capital punishment was exchanged for punitive techniques rooted in isolation. One Swedish criminologist, Roddy Nilsson (2003), provides a thorough review of the historical establishment of the Swedish penal system emerging out of the 19th century, and points to how it was modeled after the Anglo-American Philadelphia prison system. As was discussed the US developed two general prison models: Philadelphia and Auburn. The first was rooted in solitary confinement,
whereas the second was a silent system in which inmates worked together but were not able to speak to one another. Each of these systems focused on work, religion, and introspection.

Before describing more recent 20\textsuperscript{th} century penal trends, it is important to mention that prior to the 19\textsuperscript{th} century in Sweden, Holland, Germany, and other parts of Europe bridewells and workhouses existed in the latter 16\textsuperscript{th} and 17\textsuperscript{th} centuries (Ignatieff, 1978; Rothman, 1971; Spierenburg, 1984). In 1840, the Swedish Parliament directed money to build “45 nearly identical regional institutions of the Philadelphia model. To this should be added five central prisons in which a large number of the cells were intended for prisoners in solitary confinement” (Nilsson, 2003: 6). These prisons were to replace the inefficient and archaic punishment systems that were characterized as abusive workhouses. The workhouses were common places for violence, riots, and overcrowding (Nilsson, 2003: 5).

Sweden is typically thought of as an idyllic welfare state with relatively lenient, humanistic, treatment oriented practices. Tham (1995, 2001, p. 410) points out past experimentation with forced sterilization and forced treatment of alcohol abusers. With a tradition of Social Democratic power, during the latter 1960s and through the mid-1970s, there was a general radical political mood infusing much of the Nordic. This was attached with a strong tradition of anti-authoritarianism that ran so deep that many began calling for the forced treatment to stop. The notion of mandating treatment stimulated a great deal of frustration across political cleavages, with the most vocal of these groups coming from the far-left. The National Organization for Penal Reform (KRUM), a Swedish prisoner based reformist group that “demanded equality under the law, humanization of the correctional system, and more effective aftercare for released prisoners” (Tham, 1995, p. 92). These movements fostered the decriminalization of certain laws and depenalizations for certain offences, which resulted in significant reductions in the prison populations. The 1970s were a period in Swedish crime policy in which the leading commentary was focused on less state intervention, fewer inmates, and rational policies that meet Swedish cultural norms. Swedish crime policy, more recently, has shifted direction from these abolitionist undertones.

**Swedish Incarceration in the Post-WWII Era**

The Swedish prison population, between 1950 and 2000, has remained within the range of around 2,500 to 5,400 prisoners. This results in a prison population rate of between 36 and 70 per 100,000 of the population. These figures reflect a typical position for the Nordic regime. Looking at the Swedish prison figures more closely, one can see that in the years shortly after WWII there was a steady and steep increase in prison populations that continued until the latter 1960s. This growth resulted in prison populations slightly above 5,000 total inmates, and began to recede during the 1970s—the era of radical reforms--and remained relatively stable until the early 1990s—when more conservative forces entered the policy arena. During the 1990s, incarceration populations increased until peaking around 1998.

These prison population figures in Sweden contrast slightly with two Nordic countries, Denmark and Finland. Finland’s incarceration trend is rather unique. Finland was known for having a large prison population following WWII with around 7,500 inmates producing a rate of nearly 190 per 100,000 of the population. This rate is more
on par with current common law countries than Nordic countries, and Finland engaged in a strong effort to reduce their prison population. In fact, mass amnesties were used to free many political prisoners, and by 1975, their prison population was much closer to 5,000 prisoners, and with their incarceration rate now close to 55 inmates per 100,000 (Lappi-Seppala, 2001).

What caused these prison population shifts? Do crime indicators present an explanation for these fluctuations? There is no doubt that reported crime has increased significantly throughout all countries that do a better job of recording crimes. Criminologists routinely find that crime rate variation does a poor job of explaining incarceration rate shifts (Blumstein and Beck, 1995). There are, of course, broad structural factors bringing about the incarceration rate in Sweden. Before discussing potential policy and political explanations of the Nordic criminal justice regime, specific criminal justice institutions characteristic of a Nordic criminal justice system are discussed below.

Courts and Legal System

A central aspect of any criminal justice system is the “courts.” Swedish courts are arranged along two separate tracks, one of which handles all criminal and civil cases and another that handles all administrative issues (Swedish Ministry of Justice, 2007, p. 10). Within the general courts three levels or tiers exist: district courts, courts of appeal, and the Supreme Court. The administrative courts are similarly arranged into three tiers: county administrative courts, administrative courts of appeal and the Supreme Administrative Court. There is also the possibility of establishing special courts or tribunals to hear exceptional cases.

The court of first instance is the district court, with 53 such courts in Sweden. If unsatisfied, a litigant can request that his or her case goes to the second level in one of the six courts of appeal. The court of last resort is the Supreme Court that “consists of a minimum of 14 judges, entitled Justice of the Supreme Court” (Swedish Ministry of Justice, 2007, p. 11). The Supreme Court is charged with hearing cases of significance to establishing precedent—developing law—with accepted cases usually heard by five justices. The general courts handle both criminal and civil cases, in the former a prosecutor initiates the proceeding and the latter two civil parties bring forth a disagreement in need of legal remedy.

Lay Judge: More and Individual vote?

Lay participation is an essential feature of Swedish law. Christian Diesen (2001, p. 313) identified the durability of this legal institution by stating that “for more than a thousand years, lay judges, elected by the people, have been members of the local courts.” He goes on to recognize that this has changed over the centuries, but nevertheless the Swedish legal system has maintained lay judge participation. This system, Diesen (2001) argued, grew out of the Viking ting in which local courts were structured such that the king appointed a judge, and 12 community members were elected as a system of lay judges, later referred to as the namnd (Ginsburg, 1963, 1965). The “Swedish namnd does not operate as a common law jury, nor as a board of experts” (Ginsburg, 1965, p. 340).

The lay judges add some level of democratic assurance and legitimacy to the
court process (Diesen, 2001). The structure of the namnd, obviously, changed much since its early 13th century beginnings, and in the National Law Code of 1734 legal changes were made to stipulate that lay judges had to vote together in order to overrule the professional judge’s decision. At various points in the 19th century there were discussions of adopting a jury system more akin to that found in common law countries. The results of such efforts was a jury that could sit only in cases related to the freedom of the press (as still exists today; Norwegian defendants may sit before a jury in certain cases carrying at least a six year prison term). The original number of 12 lay judges was reduced incrementally over time—institutional change often happens slowly—such that lay judge participation was reduced from 12 to 9, in 1948, from 9 to 7, in 1971, from 7 to 5, in 1983, and from 5 to 3, in 1997 (Diesen, 2001). One of the more significant institutional changes, and something differentiating the Swedish model from other forms of lay judges, is that in 1983 lay judges were granted the ability to vote independently, meaning they no longer had to vote together to overrule a professional judge. This raised the status and power of lay judges (Diesen, 2001); especially relative to their Germanic counterparts that are often forgotten about during court cases (see Dubber, 1997).

Certain scholars argue that Nordic forms of lay participation are actually the origins of the jury system, not the English jury or the Romano-Germanic scabini system, which Diesen (2001, p. 355) refers to as merely “the emperor’s local investigators of crime.” Lay judges exist in “every district court, court of appeal, county administrative court and administrative court of appeal” (Swedish Ministry of Justice, 2007, p. 11). Lay judges are appointed in each of their local areas in which they serve four years, and they each have a vote in matters of adjudication and legal issues, and are often elected for more than one term. The appointment of a lay judge is handled through the “political parties in proportion to the votes for the county council.

Most criminal cases are tried by one professional and three lay judges at the district court level. When moving to the court of appeals, cases are usually tried by three professional judges and two lay judges. Immediacy is important to the Swedish criminal trial as cases are to be resolved “immediately”, and if a defendant is in custody “the court is to pronounce its judgment no later than one week after completion of the hearing” (Swedish Ministry of Justice, 2007, p. 12).

The intention here is not to become involved in the long debate between proponents and opponents of either a jury or lay judge system (Dubber, 1997; Langbein, 1979, 1981, 2005). It is not that one is more or less able to deliver “justice”, but rather to point out potentially seemingly small institutional differences. Why is it that Sweden operates with this type of lay judge system? The Germans can use a lay judge for crimes that carry a prison sentence of two years or more (vergehen) (Dubber, 1997, p. 557). This is slightly different from the Swedish case in which criminal cases involving the possibility of a fine or six months imprisonment will include one professional judge and three lay judges (Swedish Ministry of Justice, 1998, p. 11). The German mixed court system is more reluctant to support a lay majority. Although the second level of trial court, the Amtsgericht, can hear cases that carry up to four years imprisonment with a professional to lay judge ratio of 1 to 2. It is the third trial court level that is most different from the Swedish case, these courts are known as Landgericht and they involve the more serious criminal cases. The Landgericht maintain a professional judge majority with either a court structure of either two professional and two lay judges, or three
professional and three lay judges. The German courts of appeals, *Oberlandesgericht*, do not have any lay participation (Dubber, 1997).

The Swedish lay judge system is one that seriously incorporates intelligent lay perspective into the court process. There is no doubt that lay judges are often seen, especially by their professional judge counterparts, as lacking true legal training and therefore occupying a lower status. This is especially clear in the more typical Romano-Germanic mixed court system, but the Swedish system provides a couple of unique features—especially individual vote to overrule the professional judge, greater professional acceptance, potential to serve long terms—that demonstrate underlying legal attention to lay perspectives that should have an ameliorating effect on prison populations.

**Closed and Open Prisons**

Sweden is known for its rather lenient and rehabilitative orientation toward the treatment of offenders. US prisons, in contrast to Swedish institutions, are known for their stench, loud music, overcrowded conditions, and in general, discomfort, distrust, and violence. Prisons in the US do more than merely incapacitate individuals; they are, to borrow the words of Nils Christie (2000), to deliver “pain.” Sweden, on the other hand, perceives prisons in a different way, and they have created both closed and open prisons.

Most visitors familiar with an American prison would recognize Swedish closed prisons upon first sight, with their tall fences, barbed-wire, electronic surveillance systems, and other typical fortress-like features. But upon entering even a closed prison, it might surprise Anglo-American visitors to see the respect for “personal space and relative comfort of most prisoners” (Pratt, 2008a, p. 121). Even in Sweden there are maximum security prisons that are reserved for recidivists and violent criminals, with the other closed prisons lacking many of the additional discomforts typical of Anglo-American prisons. John Pratt, a New Zealand criminologist, recently completed ethnographic research into Scandinavian penal systems, which he detailed his experiences in a two-part series in the *British Journal of Criminology*. He juxtaposes Anglo-American prisons with closed prisons in Scandinavia in the following excerpt:

“There is no prison smell in Scandinavia—the combined aroma of poor personal hygiene, slopping out practices, food preparation and cigarette fumes. Double-bunking is quite uncommon. Prisoners have televisions in their cells, usually state-provided. Most cells have internal sanitation…Most prisoners work or receive full-time education well beyond remedial level…select inmates are entirely self-catering…Most prisons (high-security especially) provide accommodation where partners and children can stay free of charge for weekends—usually at monthly intervals—with the prisoners on an unsupervised basis” (Pratt, 2008a, p. 122).

The gist of Pratt’s findings is that punishment is different in Scandinavia, not just in numbers but also in how inmates are treated. In the prisons he toured, family visits were encouraged and included some opportunities for small children to stay over for a weekend.

The truly unique aspect of Swedish punishment is the open prison. These two
words are nearly inverses of one another—“open” and “prison.” What could be less open than a prison? No fences, no uniforms, no tall walls with armed guards, but instead a prison system that recognizes that incarceration can reproduce the criminogenic behaviors it seeks to deter. This allows inmates to own a car, leave on their own to go to work, and provide their own food, while following strict rules regarding their daily travel plans. Just as Foucault (1977) drew upon the symbolic power of the execution of Robert Francois Damiens for the crowd that gathered to watch the “drawing and quartering,” so too do open prisons send a symbolic message (on symbolic power, see Loveman, 2005). Instead of a strong state that rules with an iron fist, or Bourdieu’s “right hand”, it recognizes the need for graduated or intermediary sanctions (Morris and Tonry, 1991), which means that formal sanctions range across a continuum from more vs. less punishment measured in the level of incapacitation over community involvement, similar to what Pratt (2008a, 2008b) refers to as a penal value.

The willingness to incarcerate individuals in open prisons suggests a more lenient and trusting perspective between the state and citizen, and a prison without all the architectural security built in is closer to the community than closed prisons. Given Sweden’s expansive welfare state, and reliance upon full employment, it is possible inmates are seen as fewer individuals not working, and yet still dependent upon formal supports—incarcerated free riders, so to speak. State power, obviously, comes in many specific forms and activates a variety of mechanisms to maintain sovereignty. Garland (1996) argues that the US and the UK are challenged as the public comes to recognize the “limits of state sovereignty” with governments unable to stop crime. He suggests this fosters two types of reactions; one reinserting the state’s power through pseudo-militaristic responses and the other incorporating the community and non-justice agencies into the fight against crime. This perspective falls short of an explanation of how open prisons should be understood in Sweden.

Sweden, and much of the Nordic, does not fit the typical political models describing state power as predicated on “extraction and coercion cycles” (Tilly, 1992, p. 75) or what Gorski (1999) referred to as the bellicist perspective. In these models the purpose of the state is to extract taxes efficiently to finance wars and order the population through overtly coercive mechanisms (see Ertman, 1996). Bourdieu (1999) deviates from the Weberian notion of the state as the holder of a monopoly over the legitimate use of physical violence, and instead suggests that states operate through a monopoly of symbolic violence. Open prisons, however, suggest that the state does not rely upon violence to order the population. This fits Durkheimian notions of political power in which governments reliant on overly punitive mechanisms do not demonstrate strength, but rather weakness. A penal system that maintains open prisons allows inmates to remain a part of the community—although separated in some ways—conveys a message of confidence in the peoples’ willingness to order themselves, something Foucault refers to as technologies of the self (see Burchell, Gordon, and Miller, 1991).

For some US readers, there may be a tendency to believe that open prisons sound similar to a work release program. This is not the case, though, because work release typically has groups of workers going to particular jobs usually low level tasks in public view. These tasks commonly involve ditch digging, picking up trash along the road, and other assignments used to shame inmates, not keep them attached to the community. Rather, work release programs typically force inmates to wear striped or bright colored
uniforms to, as Goffman (1963) recognized, “stigmatize” these law violators to ensure the public understands that inmates are different and to remind the inmates that they are “outsiders” (Becker, 1963). Open prisons, therefore, serve several purposes: (1) allow inmates to return to society by limiting the stigmatizing effects of formal punishment, (2) minimize the criminogenic influences found in closed prisons, (3) send a clear message of a confident criminal justice system, and (4) suggest that the state is hesitant to strip citizens of their freedom.

Penal Waiting Lists

An important characteristic of a Nordic criminal justice regime is the social inclusion of convicted offenders. Whereas an Anglo-American criminal justice regime views offenders with individual disdain, a Nordic criminal justice regime is characterized by a criminological view of offenders as those needing additional social supports. If all offenders are not relegated to the role of the displaced “other”, then, there is no need to rush to incarcerate these people. A Nordic regime recognizes the potential problems related to overcrowding—spread of diseases, institutional predation, and criminogenic behaviors—and realizes the bulk of offenders do not necessarily present serious physical danger to the public at large. Such a criminal justice regime would empower criminal justice actors to make determinations of the risks an offender presents to society. A Nordic criminal justice regime is cognizant of its level of incarceration, will stem building more prisons or enlisting private corporations to do so, but instead will use prison waiting lists as a policy mechanism to prevent overcrowding.

Prisons are believed to be the last resort to order a population. With the abolition in nearly all advanced industrial societies of the death penalty—the US and Japan are the only exceptions—incarceration is the highest form of pain delivery by a democratic state. A Nordic criminal justice regime is characterized by having a penal policy more concerned with reintegration of the offender with family, community, and society, than punishment or retribution. The Nordic penal model, similar to the welfare state in this region, is predicated on instituting the least stigmatizing forms of punishment (Swedish Ministry of Justice, 1997). James Whitman (2003) provides an excellent account of how formal punishment is used as a form of stigmatization that is differentiated according to class, with the more humiliating punishments reserved for the lower classes, whereas other punishments are used only with elite classes. Allowing convicted offenders to remain in the community, with minimal supervision, demonstrates a unique institutional practice that has existed in Norway, Denmark, Sweden, and Finland.

That the law and its enforcement mechanisms carry with them additional social meanings is an obvious matter. Many social scientists have discussed the deeper sociological meaning of the prison as an emblematic power of the formal modern state. Prisons were once placed in the open, for all to see, this served as a reminder of what could happen to those not behaving. And, actually, during the initial days of the prison system, say in the 19th century, there were few formal, efficient criminal justice organizations to support the prison. That is to say that the police, courts, and judges were, at best, inefficient, and, at worst, corrupt, and overcrowded.

A point of clarification is needed here to ensure that penal waiting lists are not confused with pretrial or presentence release options in the US. These options do allow some defendants that have yet to be convicted in the former instance, and in the latter
have not received a sentence if they were found guilty. Penal waiting lists include individuals that have been tried, convicted, and sentenced, but there is not enough room in an institution, so they can wait in the community. No doubt, these individuals have various sorts of conditions they must follow, such as meeting with a probation officer. What is important for this analysis is not so much the specifics of how penal waiting lists operate, but rather that they exist in the Nordic regime because there are structural limitations that make such a practice in the US impossible. The US criminal justice system is locked-in a path in which less punitive policy statements and proposals are seen as failures, not innovation or mechanisms for reintegration. Instead, US political structures have established a push towards more punishment, especially non-utilitarian punishment that seeks mostly to inflict discomfort and pain, not a social goal.

Penal waiting lists and open prisons suggest that the Nordic criminal justice system is defined, not by punishment, but rather by innovation in the form of fewer exclusionary institutions. The Nordic criminal justice regime is the least exclusionary regime, with the Romano-Germanic regime second, and the Common law regime noticeable focused on exclusionary tactics. Consider how open prisons fly in the face of a more recent trend in the US of what are known as super-max prisons. These are prisons reserved for the worst of the worst inmates; those posing the greatest threat not only to society, but to the correctional guards as well. Inmates in super-max prisons are usually locked in their cells for between 21 and 23 and a half hours each day, only allowed out on certain days for isolated exercise in a fenced in area or a shower, and they are served their meals through small cell door tray slots. US prisons have moved away from their original position of “correcting” individuals—thus the names, Departments of Corrections and House of Correction—and in a post-corrections era prisons “are first and foremost about separation, amputation, excision, expurgation, and exclusion...[of those] unfit to be free agents” (Bauman, 2000, p. 206). Zygmunt Bauman (2000, p. 209) summarizes an interesting portrayal of one such super-max prison opened in the early 1990s in California, Pelican Bay:

“entirely automated and designed so that inmates have virtually no face-to-face contact with guards or other inmates. Most of the time the inmates spend in windowless cells, built of solid blocks of concrete and stainless steel...They don’t work in prison industries; they don’t have access to recreation; they don’t mingle with other inmates. Even the guards are locked away in glass-enclosed control booths and communicate with prisoners through a speaker system, are seldom, if ever, seen by the prisoners. The sole task left to the guards is to make sure that prisoners stay locked in their cells—that is, non-seeing and non-seen, incommunicado. Apart from the fact that the prisoners are still eating and defecating, their cells could be mistaken for coffins.”

The super-max prison movement sends the opposite cultural messages compared to the Nordic open prisons and penal waiting lists. US incarceration is moving increasingly toward “factories of exclusion” and the people inside these prisons are being defined by a “status of the excluded” (Bauman, 2000, p. 212). Swedish penal institutions are predicated on the notion that inmates are not such a distant status from the law abiding, and when possible institutions should work toward inclusion over exclusion.
Arming the Police

The ability for the state to use lethal force upon its citizens is a central issue. Egon Bittner (1999), in “The capacity to use force as the core of the police role,” argued cogently for such a coercive relationship between the citizen and police agents. For Bittner, the ability to dispense state force, especially lethal force, is a defining feature of police in modern societies because these are the ‘specifically trained staff prepared to respond to norm violation.’ Police agents are given the discretion to make street level decisions of whether to apply lethal force or not. While the ability to use lethal force is not ruled out in a Nordic criminal justice regime, there are institutional mechanisms in place that serve to curtail the ability for Nordic police agents to kill citizens.

One such institutional practice of a Nordic criminal justice regime would be foregoing a widespread or general decree to provide police agents with firearms. To restrict the public police force’s ability to carry firearms sends a clear message to the public about the nature of the relationship between citizen and police agent (i.e., the state). There are few uniforms outside of the military that carry as much symbolic power as that of the modern police. Indeed, the earliest police reformers in the US, Germany, and France were quick to institute the use of specific types of uniforms. Uniforms provide several organizational and sociological functions including planting the seeds of professionalism within the police force, providing citizens with a clear understanding of which individuals are police agents, and also serving to create a hierarchical relationship between the citizen and the police agent as an individual capable of dispensing formal state punitive mechanisms. The police uniform, especially when there is a firearm attached, sends an extremely clear message that deadly force is a realistic option. A Nordic criminal justice regime is characterized by a police force that is not symbolically tied to the firearm, and while this may seem a small item of difference, it sends a powerful social-psychological effect upon how police and citizens interact with one another. This could have some influence on how “street level decisions” are made. The Swedish police force did not become regularly armed with firearms until the mid-1960s.

Centralization of Police Powers

The Nordic criminal justice regime is characterized by a police system that is predominantly organized through the national government. This is not to say that subgovernment, local, canon, and other smaller levels do not exist. Modern governments are arranged bureaucratically with police structures that function locally but are controlled at the national level. This is different from the common law type in that the latter is operated and controlled at many levels, with little direct federal government oversight. The Romano-Germanic legal type differs as it is national-militaristic, with a police force that does not overtly recognize a separation between domestic and national security measures. The Nordic type police organization is one that has oversight and financial support from the nation-state, but lacks much direct involvement over every day functions.

In Sweden the National Police Board oversees the entire police service in Sweden, which includes about 23,000 individuals (National Police Board, 2005). This bureaucracy is divided into several levels from the local, national, and international. Nonetheless, the “National Police Board (NPB) is the central administrative and supervisory authority for the police service…The main duties of the NPB are to supervise
the police and to ensure co-ordination and the rational use of resources in the police service” (National Police Board, 2005, p. 4). This national perspective allows for centralized training as well. The Swedish police are trained in one of three locations: the National Police Academy at the University of Solna, the University of Vaxjo, and the University of Umea. Here another important characteristic of the Nordic type of policing is directly related to higher education. The Nordic criminal justice regime differs from more federalist government structures, and most obviously from the common law regime in which local police positions are often decided through popular vote, not academic training and professional accreditation.

Nordic Exceptionalism: Welfare and Civic Inclusion

The model of a Nordic legal and criminal justice regime is related to similar arguments made in the welfare state literature (Esping-Anderson, 1990; Huber and Stephens, 2004). The welfare system is known as a comprehensive system that seeks to provide supports from “cradle to grave” through state subsidies without means-tests or other stigmatizing procedures. Pratt (2008, p. 274) suggested that broader “cultures of equality and welfare state security” foster a specific type of Scandinavian punishment. This type of punishment results in low levels of incarceration and humane prison treatment. The Nordic criminal justice regime is characterized by strong welfare states that continue to support prisoners. It is suggested here that Sweden demonstrates the notion of universalist social policies that are embedded in deeper institutions of care and solidarity (Huber and Stephens, 2001; Rothstein, 2001) that move through the legal field into criminal justice practices, and influence levels of incarceration.

Esping-Anderson (1990) argued that the power of left political parties, namely the Social Democrats, fostered a specific sort of political effect by holding power in Scandinavia for nearly six decades. By recognizing the temporal dynamics shaping Scandinavia through a long-term institutionalizing process, Esping-Anderson (1990) was able to discern important historical policy legacies and regime development. An historical legacy can be thought of similar to collective memories that Savelsberg and King (2005, 2007) used when describing the long-term impact of the Nazi movement and the Holocaust experience for the German culture as it was produced and reproduced through rituals, ceremonies, commemorations, and days of signification.

Scandinavian political beliefs fostered a welfare state that did not “tolerate a dualism between state and market, between working class and middle class, the Social Democrats pursued a welfare state that would promote an equality of the highest standards, not an equality of minimal needs as was pursued elsewhere” (Esping-Anderson, 1990: 27). This model attempted to bridge liberal and corporatist regimes by creating an approach that focused on de-commodification, universal benefits, and full employment. This relationship between state and individual is also seen with how the legal and criminal justice systems are predicated on the notion of incorporation and inclusivity.

A Nordic criminal justice regime would allow inmates to maintain high levels of civic incorporation. This is meant only to signify the amount of general civic participation inmates and released inmates are given. In the US, inmates are highly stigmatized something causing them problems finding employment, difficulty finding post-release housing and other reentry issues (Reentry Policy Council, 2005; Pager,
Inmates in a Nordic criminal justice regime would be able to maintain many of their civic benefits (e.g., welfare, voting) (on the U.S. case, see Manza and Uggen, 2006).

Nordic Regime Politics and Policy Changes

It is common to suggest that a country’s legal system is a reflection of broader social and cultural sentiments (Friedman, 1975). The Nordic region is characterized by a strong sense of community, equality, and rationality. The 1960s were a time in which much of the western world was questioning its central values and mores, with counterculture and “hippy” movements. These social change movements were powerful in the Nordic countries, with grassroots prison reform movements spread throughout the Nordic region. Von Hoffer and Tham (1980) and Tham (1995) provide an excellent account of KRUM and this group’s involvement in the prison reform movement of the early 1970s. Mathieson (2000) describes similar groups as in Denmark called KRIM (established in 1967) and Norway called KROM (established in 1968), with mention that a similar group existed in Finland but no details are provided. In fact, Mathieson remains active in KROM, the group continues to host meetings and publishes a journal. KROM continues to be active and maintains a webpage.

The Swedish legal code had stood relatively unchanged from its 1734 version, until it was revised in 1965. The 1960s brought policy changes that moved away from the treatment ideology that had taken over during the 1950s. Lappi-Seppala (2007, p. 245) writes that even “during the 1950s there were proposals to abolish the criminal code.” The mid-1960s were a time of radical movements, with some calling for prison abolition; others saw the therapeutic approach in Sweden as a form of ‘coercive care giving’ with treatment forced upon all offenders. These criticisms stemmed more from liberal interpretations of the prison as a place increasing the likelihood of further criminal behavior and inhumane treatment. The archetype of this is the grassroots prisoner’s organization, KRUM, that was part of a larger “grassroots movements [throughout the Nordic]…managing to convey this message to the political establishment and those responsible for the administration of justice” (Lappi-Seppala, 2007, p. 245).

Although KRUM is no longer in operation, a similar prisoner’s organization is active in Norway, the Norwegian Association for Penal Reform (KROM). KROM is “a non-governmental political organization and pressure group in the area of penal policy” (Mathieson, 2000). During the 1970s, KRUM and KROM were instrumental in organizing massive prisoner hunger strikes so inmates could receive additional rights. KROM orchestrates a three-day meeting in a mountain resort in January each year, known as a Synnseter Conference. What makes these meetings so special is who attends—prisoners, academics, social workers, lawyers, social scientists, members of organizations, as well as representatives from the Ministry of Justice. Norwegian officials initially “refused to participate, a point which was severely criticized in the newspapers. Today [Ministry officials] come as a matter of course…The debates are hot, and are meant to be hot. The mix of people and professions, and the meeting and clash between top and bottom in the prison system, make the conferences unique” (Mathieson, 2000, p. 7-8). KROM also arranges for public forums to give seminars or what they call “teach-ins” about alternative penal approaches, and they produce a journal.

These grassroots penal abolition organizations should not be confused with the small and ineffective organizations that may emerge in the US. That is, given the state of
mass incarceration that exists in the US, there have been various groups that seek to end the death penalty, stop the drug war, and reduce disenfranchisement of felons, but these groups lack any real political power. They do not put on meetings that are publicized broadly in the news media, much less taken seriously by the public and politicians, and Gottschalk (2006) demonstrated that conservative groups are effective in shaping criminal justice policies in the US. The Nordic incarceration regime is characterized by policy decisions that favor working-class politics over elitist politics or objective scientific legal decisions found in the other incarceration regimes. Max Weber’s sociology is known as an interpretative sociology because he moved away from purely descriptive or morality based explanations of social phenomenon. In an attempt to follow this approach, grassroots penal abolition organizations should be understood in their broader social structural position. Simply, these organizations fit nicely within the social and cultural landscape of the Nordic region as one composed of leftist politics, universalist social policies, and inclusive penal institutions. These grassroots organizations have been consequential in shaping penal outcomes, unlike their US or German counterparts.

These prison reform organizations exemplify the general mood of the Nordic criminal justice regime as one in which individual human integrity and social inclusion were paramount. There were 46 separate crime control related legislative acts passed in Sweden with 22 acts related to increased incarceration, 23 acts related to reduced incarceration, and one that was unidentified (Lappi-Seppala, 2007, p. 246-247). That Sweden penal policies, for the most part, sought to reduce punishments for the bulk of crimes, with the general exceptions being drug crime, sex offenses, and violence. These adjustments fit with the notion of a Nordic regime as modern governments are to provide security to the citizenry, and with the exception of drug crimes, sex offenses and violent predation involve acts that unfairly rob others of their freedom, and the state is to step in and balance the scales of justice in such instance. In 1977, a three-volume legislative report titled “the master plan” was released with the hopes of (1) reducing the amount of incarceration, (2) shifting short incarcerations into community supervision, and (3) emphasizing the need for a “sentencing system that appreciated the principles of justice and humanity” (Lappi-Seppala, 2007, p. 246; Tham, 2001).

Conclusion: Mechanisms of a Collectivist form of Punishment

Comparative legal scholars routinely discuss common and civil law families, with little attention to the unique legal thinking in the Nordic countries (for exception, see Zweigert and Kotz, 1998). It is commonly accepted that continental Europe received its legal foundation from Roman legal traditions (Merryman, 1985). The Nordic legal regime is characterized by a mixture of substantive and formal legal thinking. These types do not go far enough to explain Nordic legal thinking, which is composed of unique cognitive, cultural, and organizational perspectives (Pihlajamaki, 2004). Weber recognized that the common law is substantive-rational law, but he said little about the Nordic law type. The Nordic law emphasizes working-class concerns, and common law thinking promotes and supports elitist market conditions. The Nordic type of legal thinking is predicated on ameliorating social inequalities with minimal criminal justice intervention. Nordic type of legal thinking exists to foster a Nordic criminal justice regime characterized by (1) strong lay participation, (2) open prisons, and (3) strong anti-
prison grassroots organizations.

An underlying assumption of Weber’s analysis is that western legal systems created rules that worked to the benefit of certain groups—capitalists—through the calculability brought about with the purposive contract and other economic-legal institutions (Kronman, 1983; Trubek, 1985). It is this inequality that motivates several substantivizing reforms: (1) strengthening of bureaucratic welfare states, (2) growing social democratic political power, and (3) changing legal perspectives among legal professionals (Ewing, 1987, p. 507; Savelsberg, 1992).

There is no doubt that both English common law and German legal science have contributed to shaping Nordic law (Pihlajamaki, 2004). There are, however, specific elements that characterize this legal regime as a specific type of legal thinking predicated on minimal criminal justice intervention. This type of criminal justice system is predicated on a relationship between individuals and the state in which formal interventions are intended to improve (or at least maintain) the material and social wellbeing of citizens. Individual failure to successfully perform one’s role-bound expectations could result in formal governments using mechanisms from other governance spheres—the mental health, welfare, and labor market institutions to enforce social order (Beckett and Western, 2001; Liska, 1997; Western and Beckett, 1999). A Nordic criminal justice regime type is characterized by perceiving individual criminality as a problem beyond the individual. Individuals are seen as rational human beings (von Hofer and Tham, 1980), and criminality is the result of weak social bonds and failed socialization, not, as in the common law regime type, the result of weak genetic structure, single parenthood, low ambition and moral depravity. Ironically enough, it is this more treatment minded focus that eventually led to major crime policy reforms in several of the Nordic criminal justice systems, and, in 1977, The National Swedish Council for Crime Prevention published the report A New Penal System: Ideas and Proposals that had dramatic effects on crime policy (Husa, 2000; Pihlajamaki, 2004; Esping-Anderson, 1990, p. 67-69).

Comparative legal scholarship points the way toward several institutional differences among legal systems related to differences the nature of the relationship between the state and the individual. The criminal trial embodies the coercive power of a modern state, and the procedural, evidentiary, and organizational rules of this process have some causal implications on penal outcomes. The common law is well known for its emphasis on jury trials, and the US Sixth Amendment provides this as a central right for citizens. The typical forms of lay participation are lay judge panels and juries. These different systems of lay participation come with different perspectives, beliefs, and values. That is, lay judges are typically elected to multi-year appointments to serve alongside professional judges. Lay judges are non-legally trained adults that are either elected or appointed by their political party. This allows for socialization to legal norms for lay judges, whereas juries hear only a single case which prevents juries from gaining little legal knowledge. This is not to exaggerate the amount of legal knowledge that lay judges acquire because sociological research suggests that lay judges have little impact on trial outcomes. Common law jury trials, on the other hand, do not allow for deliberation with the judge during the trial, asking direct questions of the witnesses, but juries are able to deliberate independent of a professional judge to make decisions of fact and guilt.
Another version of jury trials involve a mixed court option, but also have a jury that works with the judge to determine guilt, but not sentence. Denmark is an interesting case because the jury was introduced in the 1848 Constitution, but was never put into practice until Article 65 added a provision for lay participation (Garde, 2001, p. 113). In 1984, a shift in political context fostered a change to the criteria for using a jury from an 8 year penalty to a four year prison sentence. This did not alter the actual use of the jury in Denmark. The point here is not to talk about the amount of the juries use but rather to demonstrate some common lay influences within the Nordic regime (Garde, 2001). The jury and judge interaction is limited throughout the trial, but the jury is able to pose direct questions to the judge or judge panel. These juries often operate with three judges, and there Romano-Germanic influences are obvious.

The power of the judge is different here from German model because the courts are not given the written record before the trial. This information could prejudice the judges’ decision, which are grounds for an appeal in Norway (Stranbakken, 2001). In the more serious cases, it is possible for the judge to request the written record from the prosecution before the trial, and in which case the defense attorney also receives a copy. Lay judges can challenge professional judge in court. They can question whether he or she followed procedural requirements. While this rarely happens, Stranbakken (2001, p.231) used this to demonstrate the power of lay participation in Norwegian trials. The lay judges can directly question witnesses and defendants. While Norway has a unified trial process, when juries are used the jury is only to make decisions regarding guilt or innocence and mixed court will decide on sentence. There are 10 members to a jury and they can pose questions to witnesses and defendants through the elected foreperson.

The Nordic regime is composed of elements of both common and Roman legal principles. That this regime is an amalgamation of the other two legal regimes necessitates demonstrating the differences that set it apart from these other systems. It should be obvious that all three regimes include the four central courtroom actors of defense attorneys, prosecutors, judges, and lay participation, but each of these regimes distributes discretionary power differently.

First, individual privacy and a commitment to using the law as a way to balance social inequalities are essential to the Nordic regime. In Sweden, for instance, the names of accused criminals are not released to the media, only the names of convicted offenders are able to be in the media. Consider how different this is to the common law regime in which the media is a central element of the criminal trial as prosecutors and defense attorneys try to sway public opinion by demonstrating the need for certain individuals to receive harsh punishments or prosecutors maintaining web pages dedicated to their conviction ratios. How does the lack of media generated crime stories contribute to perceptions of crime, criminals, and crime control? The media is essential to creating cognitive frames of the definitions of crime and punishment in the US, but in the Nordic regime the media is restrained and crime is a non-issue. Public opinion is molded through media generated images and rhetoric about criminality that typically suggests that crime occurs among people not knowing one another in some random fashion, and that criminals are deranged, dangerous, and unpredictable. The reality, however, could not be further from the truth as crimes more often than not occur among people knowing each other, with most crimes being rather simple forms of illegality. It is plausible that the Nordic regimes emphasis on personal privacy contributes to notions of rehabilitation.
and social welfare for criminals.

Second, in the Nordic regime, prosecutorial discretion fits somewhere between the hyper-discretion afforded them in the common law regime and the limited discretion given to prosecutors in the Romano-Germanic regime. While there is attention given to legal scientific principles in this regime, it is at a lower level than found in the Romano-Germanic regime, but yet more so than in the common law regime. This modicum of prosecutorial discretion results in a system that maintains weak defense attorneys. That is, similar to the Romano-Germanic regime limiting prosecutorial discretion and lay participation, the Nordic regime places little reliance on defense attorneys to locate or even create legal technicalities to free defendants, namely because such technicalities do not exist. Third, the Nordic regime also possesses lay judges, but these lay judges have more power than those found in the Romano-Germanic system as they are able to vote independent of the other lay judges, they are instituted by their political party, and they are less influenced by professional judges.

Fourth, the Nordic regime’s punishment patterns cannot be understood without considering the well-documented effects of cumulative left party power. This political orientation results in a more collectivist orientation with a strong welfare state and reliance on active labor market policies. Recall that the quantitative findings from chapter three indicated highly significant negative coefficients for union density. That is, one of the essential features of the Nordic regime is the reliance and power of unions, especially relative to the other countries in this analysis. How is it that strong unions can stem incarceration? Incarcerated populations are typically drawn from the working classes, and countries with strong unions demonstrate reliance upon protecting workers from the inherent inequalities and precarious nature of capitalist production. High union density provides workers with protections from policies that would negatively affect laborers, as well as indicating a cultural precondition that supports alternatives to incarceration and more rehabilitative crime control practices. It should be pointed out that the legal and criminal justice systems are formal ways in which the state controls the citizenry, and punishment is a reflection of the type of relationship between the state and citizen. In fact, what defines the notion of citizenship more than the legal system? The legal system tells citizens what they can and cannot do, what is required of citizens, and numerous other necessities of being a citizen.

Fifth, the relationship between the state and citizen produce two unique criminal justice institutions in the Nordic regime. The use of open prisons and penal waiting lists are special to the Nordic regime. Upon first glance, some may suggest that open prisons exist in other places as low-level security institutions or that waiting lists are merely an extended form of presentence procedures. However, these institutions go further that. Open prisons in the Nordic regime allow the spouses and young children of inmates to stay in the prison with them if so desired. Inmates can leave the prison to go to work, to shop, and to carry out other parts of normal life. The idea with these prisons goes further than US notions of reintegration because inmates are never completely severed from the community. Instead, prisoners are seen as part of the community, and they need to work, they must remain responsible parents, and they should be able to contribute to society. Similarly, the prison waiting lists say something fundamentally different than presentence release as individuals on waiting lists have already been convicted and sentenced, which also highlights some differences between the dual trial structure in the common law
regime in which guilt and sentence are determined separately. Waiting lists suggest that criminals are perceived as citizens that need to be further incorporated into society, not some expendable or surplus population in need of separation, incapacitation, or extermination.

Sixth, the Nordic regime is, therefore, characterized as one in which crime control is perceived as an extension of the welfare state and active labor market policies. That is, the criminal justice system and the application of formal punishment cannot be separated from how societies treat the poor, underprivileged, sick, and the mentally ill. Rather, these forms of governance are intimately linked to one another as Bourdieu pointed out as the left and right hands of the state. Consider how this works in the common law regime in which these countries are known for having highly stigmatizing welfare and criminal justice practices or the Romano-Germanic regimes reliance on conservative hierarchical welfare state and crime control approaches. The point here is that it is not so unique that the Nordic regimes approach to crime control reflects some similarity with their approach to managing the disadvantaged as these systems operate according to preexisting cultural conditions that define appropriate ways for dealing with those not fitting into contemporary society.
Chapter Seven: Conclusion

Why is there so much variation among similar countries’ approach to formal punishment? Common law countries incarcerate more people than all other countries. The US is the most aggressive punisher, with between seven to ten times the proportion of incarcerated adults than other nations. This research utilized comparative-historical methods and theories to suggest that there are three ‘varieties of incarceration’ in the West. The approach here incorporated theories from several social science disciplines: political sociology, historical institutional theories, Weberian sociology of law, and comparative legal scholarship. Previous political sociological research demonstrated that “punishment is fundamentally linked to the ways in which states exercise power in order to maintain legitimacy” (see Barker, 2009, p. 6). This body of scholarship argued that long-term legal and criminal justice institutional arrangements (e.g., judicial-prosecutor relationships, lay participation, trial structures, and adversarial vs. inquisitorial models) play out differently within particular countries at particular times. Each country has specific institutional frameworks that shape how the formal law is defined and enforced, and these institutions effect legal and criminal justice decision makers and outcomes depending on the political structure, relationship between the state and citizen, and alternative conflict resolution outlets. It was argued that more empirical research is needed to understand how different socio-political structures shape and are shaped by underlying legal frameworks.

In Weber’s sociology of law he provided a typological schema to differentiate the world’s legal systems. Weber’s (1967) types of “legal thinking” argued that the English common law and the German Roman law approaches formed ideal types of substantive rational and formally rational law, respectively. The theory presented here incorporates comparative legal scholarship to compliment Weber’s typology by suggesting that a Nordic type of legal thinking also exists (Zweigert and Kotz, 1998). These underlying types of legal thinking shape criminal justice institutions in each country at different times.

Comparative legal scholarship demonstrates the differences in legal processes among countries. For instance, countries within the Romano-Germanic incarceration regime have unitary trials that are heavily influenced by written investigative reports (a dossier) by the prosecution that are given to the judge before the trial. A similar situation exists in the Nordic regime, with the exception that judges are not always allowed to see the written report before the trial, and the prosecutor’s office and the court are separate (i.e., adversarial trial). The common law trial is known for its two-part approach of separately determining guilt and sentence. Another fundamental difference among these legal systems is in the incorporation of lay participation in which some countries rely on a strong professional judge to lead several lay judges (non-legal trained) typical of the Romano-Germanic approach. This is in contrast to the Nordic incorporation of some jury trials depending on the amount of prison time possible in a case (e.g., Sweden, Norway) or when cases are brought on appeal (Denmark) (Diesen, 2001; Garde, 2001; Strandbakken, 2001).

The theoretical approach incorporates dynamic institutional variables (Janoski, et al., 1998) that are composed of several key institutions shaping punishment outcomes in each country from 1960 to 2002. Each of the hypothesized regime types has an
institutional variable that is measured for each year. These variables are measured in such a way that they are predictive of each regime type. These variables are slowly changing institutional practices used to test the plausibility of each type of incarceration regime.

Advanced capitalist societies rely upon the criminal justice and legal systems to carry out domestic control with police forces apprehending suspected offenders, courts sentencing those deemed guilty and correctional facilities and services carrying out punishments, all in the name of enforcing the rule of law. Central to the arguments here is that the differences among common law countries’, Continental countries’, and Nordic countries’ legal principles foster different investigation processes, charging practices, adjudication devices, rules of criminal evidence, judicial power, and trial structures. One socio-political axiom is that laws and the criminal justice system vacillate much over time and space as the publics’ and elites’ perceptions of allowable behaviors and legitimate enforcement mechanisms shift. Following Savelsberg (2008, p. 28), it was argued that a theory explaining cross-national differences in incarceration rates “must be conceived as a multi-factorial, historically and institutionally grounded theory” to produce nation-specific explanations over time and space.

The criminal justice and legal systems in any society are the manifestation of dominant institutional practices rooted in traditions, values, and conventions (Garland, 2001). Certain institutional arrangements bring about policy adjustments and procedural changes that have long lasting effects on the number of individuals apprehended, sentenced, and incarcerated. The arguments offered here use long-term institutionalist and political theories to trace the framing and imprinting of state based punishment processes. These institutional arrangements shape and are shaped by cognitive-cultural schemas that define the legitimate relationship between the state and citizen (e.g., neo-corporate wage bargaining vs. single issue lobbyist groups) (Field, 2002; Sewell, 1992; Swidler, 1986). The incarceration regime types used in this analysis do not imply that all countries within a regime type will be identical, rather countries tend to cluster on their legal principles that support criminal justice policies, and these practices, in turn, tend to produce similar penal outcome patterns within each regime. Regime type research uses patterns discerned from combinations of social characteristics of each country-year case to identify and group causes of major social phenomenon (Esping-Andersen 1990).

The current analysis suggests that each incarceration regime has different procedures and measures because of the different ways in which the law is perceived and enacted across regimes. Following this logic, it is suggested that an historical legacy rooted in common law nations’ lawyer-centered trials weakens judicial oversight and results in more incarceration in these countries. The Romano-Germanic incarceration regime countries are expected to produce relatively moderate levels of incarceration due to a more patriarchal relationship (i.e., written-code law, inquisitorial model, restrained criminal justice actors) between the state, as embodied by the judge, and the individual that is tempered by bureaucratic controls that do not exist in the common law world (Savelsberg, 1994). The Nordic incarceration regime has more of what Nils Christie (2000) referred to as the breaks needed to control formal punishment, and they have the least amount of incarceration.

The Romano-Germanic type of legal thinking is characterized as a bureaucratic form of legal decision making that Weber referred to as the ultimate form of formal-
rational legal development. The common law type of legal thinking sees the law as a mechanism to promote further capitalist development and elite politics. The Nordic type of legal thinking is also concerned with extralegal issues, but in a much different way. Nordic law is known for shaping policies that are intended to ameliorate capitalist inequalities, with one resulting policy being the creation of the most generous welfare states in the Western world (Esping-Anderson, 1990; Rothstein, 2001). The Romano-Germanic type of legal thinking is argued to produce a highly bureaucratized organizational structure in which legal actors—an example of micro level self-reinforcing effects—are trained how to think and base their decisions upon a rigid code of legal decision making (see de Cruz, 1999; Dubber, 1997; Glendon, Gordon, and Osakwe, 1982; Jolowicz, 2003; Merryman, 1985; Whitman, 1990, 2003).

Substantive conclusion

The historical and quantitative analyses support the plausibility of the existence of three punishment regimes. The punishment regimes are composed of long standing legal features particular to each regime. These legal features tended to involve the amount of and kind of lay participation, the balance of power among criminal justice actors, and the relationship between the state and citizen. The three punishment regimes all include law participants in the legal process, but how this lay participation takes place varies across regimes. No doubt, the starkest differences involve the common law’s use of jury trials and the lay judge panels within the Romano-Germanic and Nordic regimes. What does it say about a country that has these different types of lay participation? The Romano-Germanic punishment regime constrains lay participation more than the other regimes. This is the most bureaucratic and technical of the punishment regimes with adjudication relying heavily on written testimony and abstract application of legal principles. Jury trials suggest that lay citizens have input in legal decision making. Granting this power to citizens suggests that legal decision making requires more than technical knowledge, but rather that lay participants are needed to ensure that legal decisions reflect dominant social values and norms.

As the US case study makes evident, the common law trial evolved from an anti-lawyer system to one dominated by lawyers. The common law trial was originally to be a forum for participants of a legal complaint to articulate their cases in front of a judge with little interference from outside parties. In fact, lawyers were originally perceived with discontent in both the Romano-Germanic and common law punishment regimes. Whereas the Nordic and Romano-Germanic regimes incorporate lawyers within the trial process, the common law courtroom is controlled by lawyers. The lawyerization of the common law brought about major shifts in power balances between lawyers (defense and prosecution) and judges. As the common law trial began to incorporate lawyers there was a push for more trial rules to protect the accused from the unknown decision making abilities of lay participants, which resulted in exclusionary rules, reasonable doubt standards, and a large body of criminal evidentiary rules. These changes resulted in lawyers taking control of the courtroom trial and have fostered prosecutors with broad discretionary control. This sort of discretion is unheard of with the Nordic and Romano-Germanic regimes in which the judge holds more power. Lay participation is quieted in each of these latter regimes through the judiciary. Lawyers are controlled by strict hierarchical administration in the non-common law regimes.

There are several mechanisms needed to maintain social order. Incarceration is
only one mechanism used to order the citizenry. Societies make choices regarding how much incarceration to use based upon non-crime factors. Simply, the amount or type of crime has little to do with macro level trends in incarceration, and the non-significant and often negative regression coefficients for homicide rates support this argument. This suggests that the political structure influences governments’ crime control decisions.

**Mechanisms Embedded in the Substantive Conclusions**

Each of the four courtroom actors identified compete for different levels of discretionary power. Common law regime is the most punitive criminal justice system, the Nordic regime is the least punitive, and the Romano-Germanic regime fits in between these two. This dissertation provides a theoretical explanation for this variation in approaches to punishment. It is argued that the common law regime was originally to be a lawyer free system in which individual citizens were able to present facts before an impartial judge and self-informed jury. The Romano-Germanic regime, on the other hand, is based upon Roman and German legal principles that favor lawyers. Lawyers have always been at the center of Roman legal principles as a way to rid subjective and overly emotional legal decision making. The Nordic regime is an amalgamation of these two legal approaches. This amalgamation, however, provides blocks to the more recent lawyerization of the common law, and the overly pedantic manner of Germanic law by allowing more lay participation.

Contemporary crime control policies do not occur in a vacuum. Rather, crime control is tied to other social processes and is both a cultural product and producer of cultural meanings. Essential to this is the use of the media to disseminate images and rhetoric related to crime, criminals, and crime control. It is argued that different approaches to media displays of crime and justice related information shape public perspectives about what it means to be a criminal, what a crime is, and what is appropriate punishment. For instance, Christie (2000) discussed a classroom exercise he uses with undergraduate students in which he asks them to close their eyes and imagine a criminal, imagine a typical crime, and imagine the appropriate punishment for that crime and criminal. He argued that for many students in the US this criminal is usually a minority, urban, young, male, and preying upon random unknown victims. He went further to demonstrate how these perceptions have little to do with reality, but rather are shaped by misleading, sensationalist, and hyperbolic media representations of criminality. These perceptions, as W.I. Thomas pointed out nearly 80 years, become reality for those distanced from crime issues.

These three regimes take different orientations toward media depictions of crime and justice issues. The Nordic regime is dedicated to a privacy system in which the accused are protected from arbitrary media discussion until proven guilty, the Romano-Germanic system is such a tightly bound bureaucratic approach to justice that crime stories are unable to break through hyper-rational organization control of criminal justice actors, and the common law system, however, allows for relatively open media coverage of crime and criminals that results in the public wanting harsher sentences. Take the Willie Horton incident in which an African-American criminal on furlough commits a heinous crime and the public is bombarded with images and rhetoric to suggest that there are no answers more appropriate than a long-term incarceration. This is not so much a comment on Horton’s case specifically, but rather suggests that the media creates
situation in the common law regime in which sensation crimes become superimposed onto all crimes such that when one thinks of crime they do not think of petty thefts, simple assaults, or domestic violence. Instead, images of hardened and dangerous criminals attacking strangers is what pops into to the public’s minds.

These perceptions are supported through the courtroom actors. Common law juries are to be the contemporary executioner protecting society by ridding it of heinous killers and rapists. This is interesting because originally the common law jury was seen to accomplish the opposite of harsh justice. In fact, the jury was perceived as a shield from arbitrary judicial decision making. The jury system is contrasted by two slightly different forms of lay judgeship in the Nordic and the Romano-Germanic regimes. Lay judges can be differentiated in these two regimes by the level of importance in scientific, hyper-rational legalistic approaches. That is, in the German, French, and Italian legal systems there is little that is more important to judges than ensuring that abstract legal principles are properly applied. Judges are not only the highest civil servant in these countries, but they are also legal scientists. That judges are perceived as scientists suggests that they have the ability to turn off their subjective and emotional orientations to only evaluate cases according to their legal merits. No doubt legal science is important to the Nordic regime, but in a far less rigid manner. The Nordic regime prioritizes collectivist orientations to legal decisions by searching for what is most appropriate for society at large and how to best incorporate offenders into society, not stigmatize and ban them.

Prosecutorial discretion is also shaped by these differing legal orientations. That is, the common law prosecutors have broad discretion when making decisions of who to prosecute, to take to trial, and what sentences to seek out. Common law prosecutors are also tied to the media generated system of crime control by taking their cases to the public through television, radio, and internet sources to broadcast a need for longer sentences and punitive approaches. Again, however, these forms of punishment are block by the chilling effect of hyper-rationality in the Romano-Germanic regime, and the collectivist orientation of the Nordic regime.

A third courtroom actor is the defense attorney. Defense attorneys must compete for power in these various regimes. It was demonstrated through the historical trajectory of the Romano-Germanic regime that lawyers were given a special place, but this place is much different than in the common law regime. That is, lawyers were favored in the former system because they were seen as learned individuals in legal science, and this training should allow them to make objective legal decisions devoid of emotion. The common law regime, interestingly, eschewed lawyers preferring trials to be a place for common people to argue the merits of any case and allow for the jury, as a body of untrained citizens, to decide what is most appropriate for the community. This regime lacks overarching legal principles or abstract notions of law to allow for localized definitions of legal and illegal to take hold with tremendous flexibility. There is some irony in the fact that common law originally prohibited defense attorneys in serious felony cases because they were seen as subverting facts for legal wrangling. However, lawyers successfully argued that relying on untrained juries to make such decisions necessitates a complex system of evidentiary rules and procedures.

The US system of judicial elections was identified as a unique institution offering some explanation for such high levels of incarceration in the US. That judges are part
judiciary and party politician suggests that they are at the whim of public opinion. Judges cannot make decisions without considering how certain judgments will affect their re-election bids. This does not exist in the other countries included in this analysis, and further highlights the populist nature of US punishment practices. In the other regimes judges are seen as highly trained legal professionals that decide cases legal merits, with consideration given in the Nordic regime to reducing social inequalities through the law.

The Nordic regime’s cumulative left party power shapes a political orientation that is collectivist with a strong welfare state and reliance on active labor market policies. Essential to this regime is the reliance and power of unions, especially relative to the other countries in this analysis. High union density provides workers with protections from policies that would negatively affect laborers, as well as indicating a cultural precondition that supports alternatives to incarceration and more rehabilitative crime control practices. It should be pointed out that the legal and criminal justice systems are formal ways in which the state controls the citizenry, and punishment is a reflection of the type of relationship between the state and citizen. This relationship is demonstrated by the Nordic regimes use of open prisons and prison waiting lists both of which are used to ensure that crime control does not severe an individual’s ties to family, work, and community. Crime control is perceived as an extension of the welfare state and active labor market policies as crime control cannot be separated from how societies treat the poor, underprivileged, and the mentally ill. Contemporary approaches to crime control reflect a regime’s approach to managing the disadvantaged by operating according to preexisting cultural conditions that define appropriate ways for dealing with those not fitting into contemporary society.

The four courtroom actors identified are defense attorneys, prosecutors, judges, and lay representation that exist in all three regimes. These courtroom actors compete for discretionary power. The common law regime is one that relies upon the adversarial battle between defense attorneys and prosecutors in which the judge acts as the referee, whereas the Romano-Germanic regime places defense attorneys and lay participation at the bottom of the discretionary power grid. The Nordic regime develops criminal justice institutions that support active labor market policies and collectivist social policies.

Theoretical contributions

Theoretically this dissertation seeks to contribute to comparative understandings of incarceration rate variation. It is argued that historically embedded legal differences are consequential for incarceration rates. The 17 countries included in this dissertation are similar in many ways, but there are also small differences that have large effects on crime control policies. That is, the presence of judicial elections within the US point toward a populist system that is more easily swayed toward more punitive responses. While it is difficult to determine the precise effect of this variable, given that the US is alone with its reliance on electing judges. However, this creates a situation of potential role schizophrenia in which judges are not sure if they are to be judicial or political when dealing with the public. It seems that, in the US at least, judges are rewarded for being punitive and punished for being lenient during election times. One need only recall how the Willie Horton debacle affected Michael Dukakis’ presidential bid. The point here is that when criminal justice officials are dependent on the electoral power of the public these officials are forced to consider the ramifications of appearing soft on crime. These scenarios do not exist in the other two regimes because judges are put in to place through
official appointments and training.

Politics obviously matters to explain the use of incarceration. Although the left party power variable is significant in only a few of the regression models, it is clear to that leftist sort of political institutions are consequential in long-term incarceration patterns. In fact, economic interventionism and union density are two highly significant explanatory variables. There is little doubt that left party politics provides the path by which strong unions and certain economic policies are made allowable, as it appears that union membership is a crucial variable explaining incarceration rate variation over time. It could be that countries with strong unions and more distributive economic policies simply do not depend on crime control strategies as much as other countries.

Future research

More research is needed to refine cross-nation theories of incarceration rate variation. Crime and justice related research and theory has tended to focus on micro explanation of crime causation, or more recently evaluating the recidivism reducing properties of correctional programs. However, comparative research has the potential to tell as much about the US incarceration patterns as well as other countries. Comparative projects are needed to provide infrastructure to conduct research. Currently, there is more talk about how crime and violence definitions make it difficult to compare nations than looking for strategies to conduct comparative research.

Future research will also consider immigrants and minorities in quantitative models. That is, longitudinal measures of ethnic fractionalization and minority presence within society and incarcerated has the potential to contribute to explanations of incarceration rate variation.

Policy recommendations

Criminal justice policy debates need to be reframed to consider emerging research findings. What would a reframing of the crime control debate consist of? First, there needs to be a move away from the hyper-moralistic rhetoric that tends to convey that crime and punishment are new. Instead, there should be recognition that all modern societies have crime, criminals, and formal punishment mechanisms. Many sociologists observe that crime and punishment are fundamental parts of society, and that all crime cannot be eliminated. Second, crime policy should analyze criminal acts as social processes, not merely individual incidents. This is not to say that individuals are not responsible for their actions, but effective policies cannot be developed to respond to every criminal event. Viewing crimes as a social process provides new ways of reacting to social disorganization and responding to the relationship between neighborhoods and crime and violence. There is ample criminological evidence suggesting that poorer neighborhoods tend to lack social efficacy, have limited amounts of social trust and social capital, and foster criminal attitudes and behaviors. These concerns cannot be resolved through criminal justice mechanisms alone. Crime control policies cannot emerge in isolation to other social policies--namely those related to welfare and mental health problems.
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Peer-Reviewed Articles
special edition is also being published as a book by Routledge.


Non-Peer Reviewed Publications


Max Weber routinely wrote about law—normally as lawmaking and law finding—with his most thorough account not published until after his death in 1925, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie*. This text was introduced to an English audience, in 1968, edited and translated by Guenther Roth and Claus Wittich as *Economy and Society: An Outline of Interpretive Sociology*. Within this text, it is Chapter VIII that specifically analyzes the relationships between the law and economy in modern society, and “was given the title the Sociology of Law by Weber’s widow” (Trubek, 1985, p. 919, footnote #1). The citations used in this dissertation refer to Max Rheinstein’s (1967) edition titled *Max Weber on Law in Economy and Society*, in which the bulk of Chapter VIII is translated along with Rheinstein’s thorough introduction (citations throughout refer to this latter publication).

Actually, there was a push to double-up cell occupancy, but the Norwegian prison workers union successfully protested against it on public health and safety grounds.

In order to control for population growth, Weigund also reports the offense rate per 100,000 adults in the population for these times as 3,588 and 8,125, for 1968 and 1996, respectively.

Actually, while working on this dissertation several U.S. states and the federal system are shifting to counting parolees’ time “on the street” as time served. The reasons for this shift are related to budget shortages and institutional crowding. Simply, there is less money (and willingness) to spend on incarceration and not enough beds to continue to incarcerate. Now, if an individual is released onto parole, with, say, five years left on his or her sentence and they remain trouble free in the community for three years, they would only have to serve out the remaining two years if returned to prison. Hence, even definitions of “time-served” change.

Garland (2001: 75) refers to these changes as a condition of late modernity witnessed by two sets of adaptive pressures: 1. changes occurring in social and an economic policies as free market neoliberalist policies merge with social conservatism, and 2. political realignments and policy initiatives developed in response to these socio-economic conditions, and unease with welfare state devolution.

This should not be seen as an overly functionalist position, but rather as demonstrating that in the social sciences it is often difficult (maybe impossible) to completely separate such fundamental institutions. Unlike some of the natural sciences, in which various elements can be either added or subtracted completely from an experiment, comparative sociology cannot ignore the potential effect each of these three social structures have on shaping meaning and human conduct.

Ireland has exceptionally low incarceration rates, and many Irish are incarcerated in British institutions due to separatist violence.

Japan is a difficult case to place in a regime. It is similar to the Nordic regime in many respects, but is also heavily influenced by German law.

Although not reported here, a series of lags and natural logs of the standardized homicide variables were used in many equations with little difference from the coefficients reported here.

Whitman’s (2003) analysis does not seek to explain why the amount of incarceration varies among countries. Rather, he is interested in the differences in the type of punishment between France, Germany, and the US. He reports on the distinctively harsh form of punishment dispensed in the US. This harshness does not only involve the much longer sentences imposed in the US, but also the kind of treatment that prisoners are exposed to in each system. US incarceration is characterized as highly stigmatizing and dehumanizing. French and German prisoners are treated much better than their US counterparts, and are exposed to the notion of normalization in which prisons are to create normal conditions for inmates. In Germany, for instance, correctional guards are to knock before entering a cell, and in France, inmates are to be referred to as “Mr.” or “Ms.”

Fisher (1997) argues against the prevalence of self-informing juries. He suggests that few jurors would have knowledge of the case beforehand, but chosen based on availability.

John Langbein (2005) in a series of works traces the emergence and power of lawyers in criminal trials to the Treason Trials Act of 1696. He provides a detailed history of the Popish Plot, Fitzharris and College, the Rye house Plot, the Bloody Assizes, and the Seven Bishops. His central argument is that the elite accused in these trials had the social, political, and economic capitol and networks to slowly change court procedures and eventually shape legislation. The result of the legislation was to slowly empower criminal defense lawyers, weaken judges, and shape evidentiary procedural rules.

Christopher Columbus Langdell was appointed Dean of Harvard Law School in 1870.

These prisons continue to be tourist attractions as they are open for the public to view, especially during Halloween.
This separation was taken so seriously that as new inmates entered the prison they were to wear hoods that blinded their peripheral view. Inmates did attention religious sermons together, but here too they were prevented from viewing each other by wearing hoods and placed in separated enclosures during the sermon. The separate prison model followed strict procedures to ensure that inmates could not identify one another upon release and form criminal networks, but also to maintain a highly introspective environment.

Demonstrating this bipartisan movement against discriminate sentencing, Kennedy (D-MA) and Thurmond (R-S.C.) co-sponsored the 1984 Sentencing Reform Act, which placed emphasis on imprisonment and determinate sentencing (Gottschalk, 2006).

This is not to suggest that there is no relationship between crime and incarceration. Spelman (2000), for instance, found that about 10 percent of the crime decrease between 1993 and 2001 was due to the growth in state prison populations, which leave 90 percent of the incarceration growth unexplained (see Gottschalk, 2006).

No doubt there is controversy surrounding the exact date of the fall of the Western Roman Empire. The date here refers to the defeat of Rome to the Visigoths, while others may use the year 476 to refer to the removal of Romulus Augustus.

Many comparative legal scholars point out that the German speaking peoples using Roman legal procedures and rules would typically change or “barbarize” the more eloquent Roman legal texts by muddling them with localized Germanic customs.

Huber and Stephens (2004, p. 147) suggest that the relative weakness of labor organizations (compared to the German White Collar Employee’s Union, DAG), and had the left won the 1949 elections “the German welfare state would have been reformed and given a much more universalistic and solidaristic character.”

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