Impending Challenges to Penal Moderation in France and Germany

This book investigates the penal culture in France and Germany – how it is shaped in politics, media, and public opinion. Although compared with the US or the UK, France and Germany seem to place a strong emphasis on the ideal of rehabilitation that would block excessive punishment and other outcomes of punitive developments in society, there is a steady increase in punitiveness over time for which the term “strained restraint” is proposed. The book shows that the idea of penal moderation is deeply rooted in public opinion, politics, and the media and that it is renegotiated every day in a dynamic interplay between these spheres.

Punishment and society research has traditionally focused on the US and the UK. In comparative research, both are considered extreme in punitive developments with high rates of imprisonment and large groups of the population under penal control. The other extreme in comparative research would be Scandinavia with the famous Nordic Exceptionalism marked by low prison population rates. Germany and France are often considered to be “the same” when compared with each other, and “the other” with reference to both of these extremes. However, this book shows that France and Germany are far from being the same when it comes to state organization (centralistic vs. federal), criminal justice and the criminal law, political traditions, and the media. Also, research from both countries has looked at whether developments such as the “punitive turn” have occurred in Germany and France. Research focused on the domestic situation concludes that punitiveness is on the rise, and that both countries are indeed experiencing their own punitive turn.

How do we reconcile these contradictory findings? Why do these two seem to follow the path of penal moderation in the overall outcome of punishment in society when we look at comparative research? And how is it that from a domestic perspective, punitive attitudes and desires are leading to more punitiveness? By focusing on the meso level, with a comparative perspective on the two countries and a dynamic analytical approach, this book reconciles the fluidity of individual attitudes and opinions with the relative stability of societal discourse. The authors posit that penal moderation comes at a price: overall and in an internationally comparative perspective,
there is penal moderation, but a closer look at the domestic situation and development reveals that it is nonetheless challenged by a slowly rising tide of punitiveness.

Going beyond the main tenets of punishment and society research with a dynamic analysis of two large societies in Europe, this book is ideal reading for scholars and students of penology, criminal justice, and European studies.

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Impending Challenges to Penal Moderation in France and Germany
A Strained Restraint

Edited by
Kirstin Drenkhahn, Fabien Jobard and Tobias Singelnstein
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Preface and Acknowledgements

This book is the outcome of a French-German project that we have been working on since the summer of 2015. We started with developing an online population survey among the French and German public entitled “Punitivités comparées”, whose main results and methodology were published in Jobard et al. (Punitivités comparées. Les représentations pénales en France et en Allemagne, Paris, 2019). This project would become part of the larger project “Cultures pénales continentales – Comparaisons franco-allemandes” or “Strafkulturen auf dem Kontinent – Deutschland und Frankreich im Vergleich” (“Penal Cultures on the Continent – France and Germany in Comparison”). At the outset, the idea was to look into the role that punishment plays in the French and German society and test if the grand narratives of international Punishment and Society research still hold if we compare two large societies in the middle of Europe with each other rather than comparing one of them to the development in the US as the one extreme on a dimension of societal punitiveness or to Scandinavia as the other extreme.

Both Germany and France are in the somewhat unremarkable group of Continental Europe when it comes to one of the key factors for comparison in this field of research, the rate of imprisonment as in the number of prisoners per 100,000 of the population. At least that seems to be the perspective of international or rather English-language research. From the point of view of domestic research, our countries are far from being unremarkable and developments in criminal justice politics and practice as well as attitudes of the population and the role of the media are much debated. This divergence of the outside and inside view is another aspect that motivated us for the research presented in this book.

The grand narratives of Punishment and Society research are also macro-level explanations, but there is a lack of in-depth comparative research that involves the actors who contribute to the penal culture. In addition, a lot of studies look at the contributions of one societal sphere. So, we wanted to remedy some of these shortcomings by investigating the commonalities of and differences between two countries in the middle of Europe by looking at different spheres of society – the population, politics, and the media –
with a mixed-methods approach that includes the perspective of actors in these fields.

When we developed this project, we expected that in the end, we would be able to synthesize a Continental European penal culture. As it turns out, we were able to find the dynamics behind what Sonja Snacken and Els Dumortier (Resisting Punitiveness in Europe? London, 2012) have described as “resisting punitiveness” and what Sonja Snacken (“Punishment, legitimate policies and values”, Punishment & Society, 17 (2015), 397 ff.) finally termed as “penal moderation”. We will show in this book that penal moderation is still real – so the outside perspective on Continental Europe and its penal culture holds true. But there is also truth in the inside perspective because this penal moderation is continuously contested and renegotiated. It is a strained restraint.

We were only able to see these patterns because we collected and analysed a lot of data. This would not have been possible without the generous financial support of the French Ministry of Justice, Mission de recherche Droit & Justice (grant no. 2/6.02.02.27) which supported the project “Punitivités comparées” and the Agence Nationale de la recherche (grant no. ANR-16-FRAL-0009-01) and the Deutsche Forschungsgemeinschaft (grant no. 322994647), our national research funding organizations, who supported the project “Penal Cultures on the Continent – France and Germany in Comparison”. The French organization CIERA (Centre interdisciplinaire d’études et de recherches sur l’Allemagne) also contributed to the project, in financing our meetings in Berlin, Bochum, and Paris, through the “programme formation recherche, ‘Méthodologies d’analyse comparée des représentations pénales’”.

An important part of our work were these meetings in Berlin, Bochum, and Paris where we discussed our ideas, methods, and findings with the project group and other researchers who were kind enough to dedicate their time and creativity to our project. In addition to the contributors to this book Martin Baloge, Barbara Bauduin, Mathilde Darley, Malin Ebersbach, Lukas Huthmann, André Kuhn, Joachim Obergfell-Fuchs, Lars Ostermeier, Océane Pérona, Xavier Pin, Alexis Provost, Camille Roth, Fritz Sack, and Renée Zauberman enriched this discussion with their contributions. A lot of further work during the realization of the project has been done by Nicky Aryanfar, Benjamin Derin, and Julia Habermann. In the final phase of preparing the manuscript, Carla Geib and Peet Burmeister supported us with great commitment.

Berlin, Guyancourt, Frankfurt, October 2022
Kirstin Drenkhahn, Fabien Jobard and Tobias Singelnstein
Part I

Points of Departure
1 Testing the Continental Restraint Hypothesis in France and Germany

Kirstin Drenkhahn, Fabien Jobard, Johanna Nickels and Tobias Singelnstein

Punitiveness as the Standard Lens of Punishment and Society Research

“Punitiveness” – this term has dominated international research on punishment and society for the last three decades. Accepted by many and discussed by even more, the concept of a “punitive turn” that has taken hold of Western democracies is omnipresent in the literature. In this context, most observers refer inter alia to an expansion of the realm of criminalized behaviour, new legal provisions on harsher penalties, an increasing acceptance of high prison population rates and a decline of rehabilitative ideals. Many authors situate these observations in a context of a growing desire to punish in the general public as well as heightened electoral competition.

However, most of these observations have been voiced for the US and the UK. Already anticipated in the 1980s (Garland and Young 1983), these trends have been masterfully synthesized by David Garland for the US and UK national cultures and the “penal state”, as well as by Jonathan Simon who observed an increasing use of the crime topos in various fields of US society, especially in the political field. For Garland, a “culture of control (...) has increasingly taken hold in public discourse about social and criminal issues” (Garland 2001, 185), a culture that is both marked by heightened attention to crime and criminality in public life and by strong punitive views on crime policies. For Simon, echoing a fundamental societal transformation, “the American elite are ‘governing through crime’”, since

crime has become a significant strategic issue across all kinds of institutional settings (...), people deploy the category of crime to legitimate interventions that have other motivations (...), technologies, discourses, and metaphors of crime and criminal justice have become more visible features of all kinds of institutions, where they can easily gravitate into new opportunities for governance.

(Simon 2007, 4 f.)

Marked by positioning effects in the transnational field of idea production (Bourdieu and Wacquant 1991), international criminology, essentially an
Anglophone endeavour with a strong research focus on Western Anglophone countries, has adopted the punitive turn as a standard diagnosis for the evolution of Western societies (Body-Gendrot et al. 2014, 1; see also Nelken 2009, 294). Regarding the (epistemological) relevance of the notion of the punitive turn beyond the US and the UK, two positions have emerged in the international literature.

One of them, rather a minority in the international academic field, but very popular in the critical social circles of the countries concerned (we will come back to this perception gap), consisted in making the punitive turn not only the standard for research, the reference point, but moreover the political horizon of all Western countries. In this vein, Loïc Wacquant soon considered Great Britain as “the acclimation chamber of neoliberal penal policy with a view toward its dissemination on the continent” (Wacquant 2008, 11) and America as the “living laboratory of the neoliberal future”, bringing “carceral aberration in France” (Wacquant 2009, xi, 270). But warnings against US ethnocentrism were soon to be heard, provoking a second perspective to emerge. David Downes asked already at the beginning of the 2000s: “A great deal rides on whether or not, and the extent to which, the USA is an exceptionalist outlier in the penal sphere or both a prefiguration and a driver of things to come” (Downes 2001, 63). Speaking to the European Society of Criminology in 2007, John Muncie said:

> There is something of an unfortunate tendency for many Anglophone academics and policy makers to assume that general trends in the USA are not only crossing all American states, but are also capable of being transferred internationally. They are not.

(Muncie 2008, 118)

David Nelken also emphasized the need for comparative criminology, since it “has the potential to make criminologists become more reflexive, for example learning to avoid the common error of treating the modern Anglo-American type of ‘pragmatic instrumental’ approach to law as if it were universal” (Nelken 2012, 139; see also Pakes 2015, 4).

And indeed, an opposite position rejecting the idea of the diffusions of trends in the US and the UK to other Western democracies has surfaced in international research. This second position has seen particularly the UK and the US as exceptions and Continental Europe as a space of “resistance” to punitiveness (Snacken 2010; see also Jobard 2017). Yet, it is noteworthy that even in this perspective, US and UK punitiveness tends to remain the standard lens, through which Continental Europe acquires the status of an area of penal restraint. Hence, the picture of penal restraint only becomes visible in relation to a punitiveness standard shaped by the development in the US and the UK.

It is exactly this body of international literature, the literature on the diffusion of US and UK punitiveness to other Western democracies as well
as the literature which distances Continental Europe from these trends that sparked our idea of a closer look on two Western Continental European countries: France and Germany. As will be shown, literature focusing on one or the other country either traces elements of US-like punitiveness in each society or classifies them as archetypical strongholds of penal moderation. This book sets out to zoom in on three spheres of society, the general public, politics and the media, to empirically and systematically explore the social production and meanings of punishment in both countries, as well as the notions of punitiveness and penal restraint.

Being sparked and referring to the standard narrative of punitiveness or a punitive turn in Western democracies, this book thus contributes to the debate by nuancing and above all contextualizing diagnoses for France and Germany. However, this book also aims to move beyond other accounts on punitiveness in one important way. As the focus is on France and Germany and each country’s specific configurations of the social production of punishment, punitiveness and penal moderation are primarily understood and analysed in the context of these two countries. Only to a lesser degree are the findings linked back to research accounts of the US and the UK. This book therefore undertakes a two-fold endeavour: providing innovative empirical analyses of both countries as well as a more epistemological challenge to the standard lens of punitiveness.

As a point of departure and to situate this book in the existing literature, international accounts on driving factors for punitiveness are briefly revisited that have been identified for the US and the UK or by comparative macro-level studies. This is contrasted with earlier diagnoses specifically expressed for France and Germany. In this context, puzzling contradictions between the national and international literature become apparent. The second part of this chapter introduces the interdisciplinary research project that forms the foundation for this book.

**Continental Western Europe: A Subcontinent of Penal Restraint**

As has been pointed out, Europe is – in contrast to the US and the UK – seen as the continent of penal moderation by most comparative criminologists and there is even the question if this moderation could define a specific “European criminology” (Body-Gendrot et al. 2014) or “European penology” (Daems et al. 2013). However, even at a first glance, this does not appear to be totally obvious because, as the promoters of this European criminology of penal restraint state themselves, one of the characteristics of continental countries is that “there has been an upward trend in incarceration rates since the 1990s, and for many Western European countries since the 1960s” (Body-Gendrot et al. 2014, 9). European penal restraint is therefore a relative notion both in space and in time. In space, it is established in relation to the US and the UK. In time, or diachronically, it is
established in relation to the abruptness of the changes in Anglo-American countries.

With these first hints at the need for a more complex understanding of penal restraint in mind, it is important to briefly consider the elements on which the hypothesis of moderation is based. We will revisit the three most pertinent arguments, which shape today’s comparative research on punishment and society and serve as important points of departure for this book. Moreover, we will also introduce a fourth comparative argument, which has usually been neglected in international punishment and society research.

**The Political Culture Explanation**

The cultural or historical dimension of European restraint has been eloquently traced by James Q. Whitman. According to him, the reason why “American punitiveness is comparatively harsh, comparatively degrading, comparatively slow to show mercy” (Whitman 2003, 19), is mainly because the political culture of the US was not built on opposition to a former regime of iniquitous, degrading and inhumane treatment. By contrast, the Enlightenment in Europe was primarily a rupture with previous regimes and thus tamed state coercion with the devices of *Rechtsstaat* and due process, tending towards the measure and proportionality of sentences and respect for the human dignity of arrested or convicted persons. This line of interpretation of European restraint draws on an intellectual tradition already at work in Alexis de Tocqueville’s questioning of the historical foundations of US institutions, especially prisons (de Tocqueville 1840), but also on a Weberian tradition of reflecting on the role of culture in shaping societies (Melossi 2001, 2008, 88 ff.).

**The Autonomy Explanation**

The second explanation focuses on the sharp contrast between US political decision-making and European policy paths, a contrast that can be summarised by the notion of “autonomy” (Garland 2013, 495 ff.; Snacken 2015, 404 ff.). It draws most often on the pioneering work of David Downes (1988) on the difference between high prison population rates in England and Wales and low detention rates in the Netherlands in the 1970s and 1980s. According to his analysis, the Dutch criminal justice system was then characterized by academic expertise and bureaucratized forms of decision-making, and hence rather sealed off from external influences. By contrast, in England and Wales judges were granted more freedom in the sense of being more independent from occupational guidelines and doctrinal limitations. Autonomy and bureaucracy are hence thought of as key analytical concepts. This is supported by Whitman who also points out that
“bureaucracies are relatively immune to the vagaries of public opinion” (Whitman 2003, 13 f.).

Three main aspects characterize this notion of autonomy of state punishment. The first points to rather centralized and bureaucratized political institutions, which, in contrast to the US, insulates political and judicial decision-makers from the interests and emotions of local electorates. Following the example of the so-called Utrecht school in the Netherlands, the second one describes a rather sealed-off circulation of penal ideas between policymakers and academics. As Joachim Savelsberg (1994) pointed out, it is this specific institutionalized form of knowledge production on punishment that is crucial and separates Germany from the US. The third aspect refers to the European integration of courts and judicial systems creating with, e.g., the European Court of Human Rights (ECtHR) of the Council of Europe, a transnational judicial umbrella that is detached from national politics and backs a progressive alignment of jurisprudence and judicial practices in Europe (Snacken 2010; Cliquennois 2021).

The Political Economy Explanation

The third argument put forward by comparative criminology has been subject to numerous developments in recent years and is commonly referred to as “political economy and punishment” (Cavadino and Dignan 2006, 14). Even if this tradition stems from Rusche and Kirchheimer’s (1939) analysis of the economic foundations of punitive institutions, it has been strongly renewed. Especially, Michael Cavadino and James Dignan’s (2009) recourse to Gøsta Esping-Andersen’s (1990) typology of welfare states has been highly influential. In a study of 11 countries, Cavadino and Dignan observe that more punitive criminal policies go hand in hand with “liberal” welfare regimes that characterize the US and the UK. “Conservative-corporatist welfare states” such as France and Germany are characteristic of Western Continental Europe and have more moderated approaches to criminal policies (Cavadino and Dignan 2009, 17). These findings are supported by David Greenberg (1999), Katherine Becket and Bruce Western (2001) or David Downes and Kirstine Hansen (2006) who all established that one of the best-known correlations with indicators of punitiveness of Western penal systems, e.g., prison population rates, is welfare spending. Corporatist and social-democrat countries are considered to be comparatively lenient in their penalty, but relatively generous and supportive in other aspects of their social policies and display a “high degree of empathic ideology and concern for the well-being of others” (Greenberg 1999, 297).

In the same vein of neo-institutionalism, Nicola Lacey uses Peter Hall and David Soskice’s varieties of capitalism (2001) to oppose “co-ordinated market economies” and “liberal market economies”. This differentiation is coupled with different markers of democratic systems. Drawing on Arend
Lijphart’s typology of democracies (1984 and 1999/2012), special attention is given to different voting systems. According to Lacey, countries with co-ordinated market economies and a proportional voting system like Germany tend to have a more consensual political culture that is shaped by long-term coalition governments and more stable and lenient approaches to criminal policies. Liberal market economies with majority electoral systems like the UK or the US, by contrast, show a more competitive political culture that incentivizes political actors to politicize criminal justice topics and to promote harsh criminal policies. Here again, Germany is held up as a textbook example of a consensualist political system, as opposed to the US and the UK (see, e.g., Lacey 2008, 62 ff.). Taking France into consideration shakes up this clear-cut typology: despite strong welfare elements, France is neither a co-ordinated nor a liberal market economy and relies on a two-stage majoritarian voting system, but also shows aspects of a more consensualist democracy.

**Types of Media Systems**

These hypotheses and explanations on the causes of punitiveness or penal moderation are often bolstered up by a “media-driven hypothesis” (Cavadino and Dignan 2009; see also Beckett and Sasson 2004, 73 ff.). This hypothesis generally focuses on the relationship between patterns in crime news and in crime statistics or the lack thereof, and the strong affinity between media coverage of crime and policies of law and order (Reiner 2012). However, comparative research has not yet developed the same degree of sophistication in distinguishing observable patterns as in the cultural, political, or economic fields that were just mentioned. Most often, the influence of quality press and popular press is considered, or the mere presence of the tabloid press is identified as a driving factor for punitiveness (e.g., Lappi-Seppälä 2014). The Anglo-American countries with the Rupert Murdoch consortium as a paradigmatic case offer a clear example of tabloid-driven media on law-and-order issues. Germany, in contrast, disturbs these approaches with its very powerful tabloid press and the influential Bild Zeitung in particular.

Current media studies use a more nuanced approach and distinguish between three media systems sorting France and Germany in two different boxes: a polarized pluralist model in the case of France and a democratic corporatist model in the case of Germany. These are both opposed to the liberal model, e.g., in the US and the UK (Hallin and Mancini 2004; Benson et al. 2012). The liberal model is characterized by a “neutralized” journalism, which favours a strong separation of facts and comments in media coverage. Conversely, the polarized pluralist model displays a stronger preference for “committed journalism”: articles do not always separate facts and comments and put a greater emphasis on the debate of ideas. In this model,
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media groups are often linked to and subsidized by public stakeholders. This helps to maintain a larger diversity of news outlets with varying orientations than in the liberal model. Intersecting these two models, the democratic corporatist system is defined not only by the significant weight of public media in the audio-visual sector but also by large private press groups (Springer, Bertelsmann, Burda, DuMont, etc.). The journalistic tone adheres to the liberal model’s neutralized style with a strict separation of facts and commentary, and journalistic writing is rather consensual. Private groups, however, often politicize their publications with controversial comments, as in the polarized-pluralistic model. This specific complexity of media systems is generally overlooked in punishment and society literature but offers great potential for a more subtle comparative understanding of the role of the media.

Western Continental Europe in Punishment and Society Research

The combination of these factors produces the seemingly general consensus around a typology of Western states, which classifies Western Continental European states as “conservative corporatist democracies” (Cavadino and Dignan 2006, 15) and places them in the area of penal moderation. This typology has been nuanced and complemented by more recent contributions. Particularly relevant for Western European countries is the recent work of Georg Wenzelburger (2020), who analysed the partisan politics of law-and-order legislation in 20 Western countries. Zooming in on four European countries with in-depth case studies on law-and-order policies between the 1990s and 2014, Wenzelburger points out important differences between France and Germany. While he observes a rather substantial shift towards more repression in France, Germany’s law-and-order policies seem to remain more tempered. Despite these new developments in the international literature, it still holds true that the strong focus on the US and the UK left many countries including Continental European countries under-researched. This is even more striking, as research produced within these allegedly moderate countries is often at odds with this very hypothesis. We need to address these contradictions between international research and domestic French and German research in order to bring it closer to our project.

International Perspectives on Continental Europe: An Obscure Continent

The case seems clear: Europe is a continent of restraint. Surprisingly though, a closer look at the international literature reveals little empirical work to support this assessment. In fact, the comparative literature is
overwhelmingly devoted to describing the punitive turn or the tradition of harshness in the US, and to describing the policy path followed in England and Wales and then in Scotland. Meanwhile, little is said about the countries of Continental Europe. Two noteworthy exceptions to this are David Nelken's work on juvenile justice in Italy (2006, 2012), extended today by Zelia Gallo (2015, 2019) on the Italian penal system, and John Pratt's work on what he called (and what has since prevailed) “the Nordic exceptionalism”, testifying to particularly low prison population rates in Scandinavian countries and, in particular, to the dynamics of reducing the prison population in Finland (see also Lappi-Seppälä 2007).

Apart from the focus on specific geographical areas, comparative research has been mainly concerned with classifying countries into categories derived from the neo-institutionalist work already mentioned and later on with identifying various country-specific characteristics within the different groups of each typology. These efforts, however, do not allow us to understand the patterns of the presumed penal moderation and their endurance or endangerment in the face of various economic, social and political upheavals and crises. The Dutch example which in Downes' work provided a model for comparative analysis between a moderate system (the Netherlands) and an excessive system (England), was overturned a few years after its publication, though, by the transformation of Dutch society in the face of drug-related problems: the Netherlands became in a few years a model country of the punitive turn, “on the road to dystopia” (Downes and van Swaaningen 2007).

Comparative research seems to have little concern for empirically testing and exploring the patterns of penal moderation. Germany, France, the Netherlands or Italy seem to be firmly and soundly classified as moderate democracies, but not “exceptional”, offering the reassuring face of a kind of stable restraint. Yet, an increasing number of contributions acknowledge that things are probably not that simple. Many authors also voice their dissatisfaction with the heuristic scope of the very macro-sociological scales of analysis and call for the testing of the soundness of classification conventions and for exploring the mechanisms by which restraint (or harshness) is perpetuated or, on the contrary, retreats or collapses. In his presidential address to the American Society of Criminology, David Garland (2013, 489) alleged that “most of (the) questions can only be answered by means of careful, qualitative and quantitative comparisons, most likely using in-depth analyses of a few comparable jurisdictions or perhaps of the same jurisdiction at different points in time”. A decade earlier, Michael Tonry (2001a, 531) called for “more, fuller and nuanced policy histories for individual countries and their subjurisdictions”. This need to change scales and methods is, in our view, all the more urgent since, by a strange reversal effect, the specialized literature in the Continental European countries is far from agreeing on the supposed moderation in criminal policies.