

Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States

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FROM THE CENTER DIRECTOR

Four decades of ever increasing prison populations—driven, in part, by harsh sentencing practices—have left more and more formerly incarcerated people unable to support themselves or their families, disenfranchised, and often homeless. Facing this, many state officials are quite ready to at least consider the corrections practices of other countries.

In February 2013, participants in the European-American Prison Project, funded by the Prison Law Office and managed by the Vera Institute of Justice, including delegations from Colorado, Georgia, and Pennsylvania, visited Germany and the Netherlands to tour prison facilities, speak with corrections officials, and interact with inmates. The goal was to expose project participants through firsthand experience to radically different correctional systems and practices in order to advance an international dialogue around effective corrections and to stimulate reform efforts in the United States.

Given the experiential nature of the project, this report aims to capture the observed differences between the American and certain European corrections systems, as well as the conversations, personal experiences, and perceptions of project participants. It also discusses the impact that exposure to these systems has had (and continues to have) on the policy debate and practices in the participating states. In particular, as both state and the federal prison systems seek to better prepare their prisoners to rejoin society more successfully, and both state and federal governments look to reduce the number of people incarcerated, German and Dutch sentencing and correctional practices, with their emphasis on rehabilitation and “normalization,” offer many valuable lessons.



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Introduction

For the past four decades, crime control policies in the United States centered heavily on the increased use of prisons. Fueled by a belief that only incapacitation and punitive sanctions could protect public safety, these policies included the introduction of mandatory minimum sentences, habitual offender legislation, parole release restrictions, truth-in-sentencing laws, and an overall increase in the number and length of custodial sanctions. By 2012, their impact had become clear: in 40 years, the prison population grew by 705 percent, from nearly 175,000 state inmates in 1972 to just under 1.4 million as of January 1, 2012.¹ With more than one in every 104 American adults in prison or jail, the U.S. has the highest incarceration rate in the world—at 716 per 100,000 residents.² State corrections expenditures reached \$53.5 billion for fiscal year 2012.³

Unfortunately, mass incarceration and increased investment in corrections have not brought better safety returns. Research indicates that the prison build-up over the last three decades is responsible for only about 20 percent of the reduction in crime experienced since the early 1990s, and will have only marginal impact on crime going forward.⁴ In addition, prisoner recidivism rates—a key indicator of a corrections system’s performance—have remained too high, stubbornly hovering around 40 percent over the last 20 years.⁵ Despite pouring more money into prisons, more than four out of ten adult offenders still return to prison within three years of release, and in some states that number is six in ten.⁶ These poor results raise the question of whether alternative sentencing and correctional strategies can be developed and deployed that achieve better public safety outcomes.

Over the last five years, in part due to these poor outcomes and rising costs, the national debate over crime and punishment has shifted. According to a 2012 poll, a plurality of the American public believes too many people are in prison and that the nation spends too much on imprisonment. The poll also found that an overwhelming majority supports a variety of policy changes that would shift non-violent offenders from prison to more effective, less expensive alternatives to incarceration.⁷ Accordingly, policymakers no longer uniformly believe that being tough on crime is the only or even best way to achieve public safety.

With more political latitude and a fiscal need to reexamine their criminal justice systems, state policymakers are revisiting sentencing policies and instituting a number of reforms.⁸ Since 2005, 27 states have participated in the federally funded Justice Reinvestment Initiative, a data-driven approach that seeks to reduce corrections spending and reinvest the savings in practices that can improve public safety and strengthen neighborhoods.⁹ States are also benefiting from decades of research that demonstrate that carefully implemented, targeted community-based programs and practices can produce better public safety outcomes than incarceration. Although these developments have

contributed to a decline in the U.S. prison population for the third consecutive year,¹⁰ there remains significant room for improvement in terms of achieving successful outcomes for communities, reducing the prison population, and decreasing corrections costs.

SEARCHING FOR SOLUTIONS

Although states have always looked to other jurisdictions within the United States to identify best practices and find feasible solutions to common problems, little cross-national analysis has been done, despite the effective solutions that other countries may offer.¹¹ Many countries in Northern Europe—such as Germany and the Netherlands—have significantly lower incarceration rates and make much greater use of non-custodial penalties, particularly for nonviolent crimes.¹² Conditions and practices within correctional facilities in these countries also differ significantly from the U.S.¹³

Recognizing the resource that German and Dutch correctional systems might provide state-level policymakers in the United States, the California-based Prison Law Office initiated the European-American Prison Project, with assistance from the Vera Institute of Justice (Vera).¹⁴ The project aimed to introduce U.S. policymakers to the European systems and stimulate reform efforts in the U.S. One of the project's main enquiries was whether, and to what extent, the approaches used by certain European corrections systems were transferable to the United States.

After a thorough assessment process, three states—Colorado, Georgia, and Pennsylvania—were selected to participate in the project. Each state had acknowledged the need to improve its corrections systems, as evidenced by its participation in other reform efforts; and each had brought innovative solutions to the problems within its system. With help and direction from Vera, the states convened teams of six to eight people from across the criminal justice field, including the directors of correction, legislators, judges, prosecutors, public defenders, and other key stakeholders.

The project was structured in three phases:

- > **PHASE I: State conferences.** Vera convened a two-day conference in each state in December 2012 and January 2013, at which the core project team was joined by additional criminal justice stakeholders; they visited correctional facilities and met with prison administrators to discuss current areas in need of reform. This provided team members with comprehensive knowledge about their own system to serve as a baseline against which they would compare and contrast what they saw in Europe during the second phase.
- > **PHASE II: Visit to Europe.** In February 2013, the three state teams spent one week together in Germany and the Netherlands visiting corrections facilities, speaking with inmates, and meeting with European correc-

tional officials and researchers. Through presentations and discussions, the American and European policymakers exchanged ideas and shared strategies.

> **PHASE III: Debriefing sessions.** Following the visit to Europe, debriefing sessions were held in the three states to allow the state teams to strategize about the implications of the European models for their respective state policies.

A different approach to sentencing and corrections: the German and Dutch models

Jurisdictions across the U.S. and around the world grapple with the same basic questions regarding the role of punishment in their criminal justice systems: Who should be punished? How should offenders be punished? Under what conditions? For how long? By no means are these questions answered uniformly. Within the U.S., the rate of incarceration and the proportion of offenders sentenced to prison and community supervision differ from state to state. Indeed, the rate of imprisonment in state prison in the U.S. ranges from 147 per 100,000 residents in Maine to 865 per 100,000 residents in Louisiana.¹⁵ The overall imprisonment rate in the United States, including the jail and federal population, is 716 per 100,000 residents.¹⁶ The comparison to European rates is startling: 79 per 100,000 residents in Germany and 82 per 100,000 residents in the Netherlands are in prison [see Figure 1].¹⁷

While the prevalence of criminal behavior and the rate of arrest may be quite different from country to country, what these numbers demonstrate is that Germany and the Netherlands incarcerate proportionately far fewer people than the United States. Though this was an unsettling fact for many project participants, it fueled their desire to learn how the German and Dutch systems could contribute to such low incarceration rates. In explaining her rationale for participating in the project, a judge from Georgia explained, “I am always interested in learning ways to decrease the number of defendants sentenced to prison [and] I wanted to learn the reasons why Europe has a low prison population compared to the U.S.” The director of the Pennsylvania Commission on Sentencing agreed, viewing the project as an important “opportunity to learn innovative approaches to managing prison populations based on successful practices in other jurisdictions.” The director of research at the Colorado Department of Corrections added, “I was excited by the prospect of seeing how prisons were operated in other countries. It’s one thing to read about differences in correctional systems, but another to experience them.”

MAKING CROSS-NATIONAL COMPARISONS

The first question from project participants was how Germany and the Netherlands compared to the U.S. in terms of recidivism, crime, and incarceration rates. Although definitions of crimes, specific punishments, and recidivism vary across jurisdictions—thus limiting the availability of comparable justice statistics—looking across jurisdictions remains a worthwhile effort because such differences in measurement practices need not prevent replication or adaptation of certain sentencing policies or correctional strategies observed in Europe.

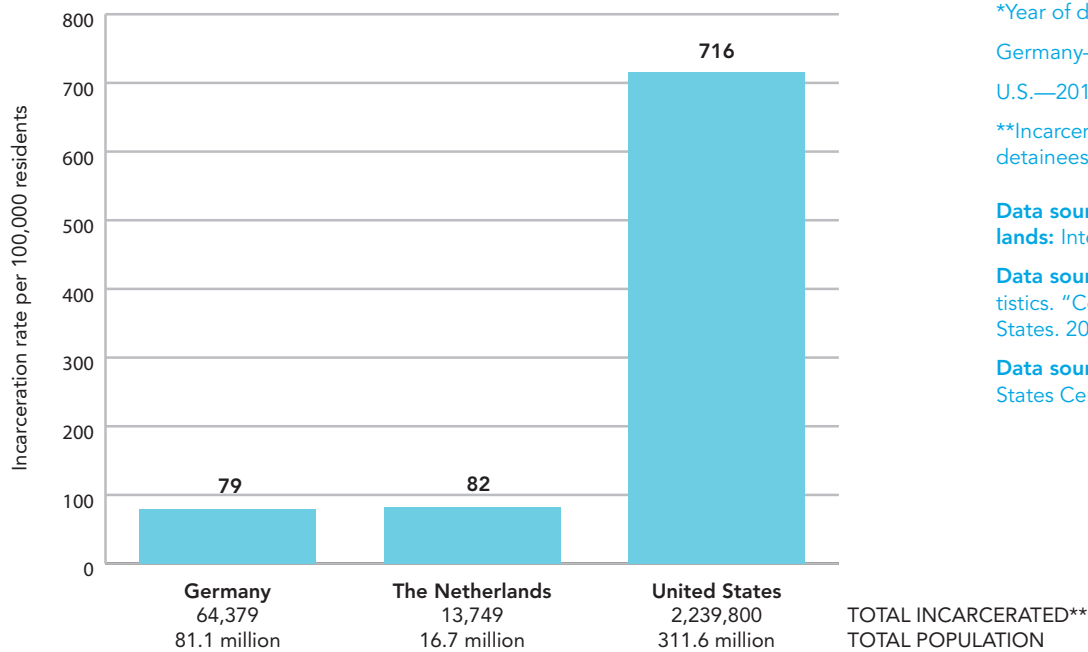
Crime and incarceration: Although a higher crime rate would be the simple explanation of why the United States has a higher incarceration rate compared to Germany and the Netherlands, efforts to establish a consistent causal relationship between crime and incarceration are confounded by differences in cross-national measurement practices. Research has noted variations across nations in definitions of offenses and crime categories, frequencies at which crime is reported, methodologies used to produce official crime rates, discretion in enforcement and prosecution, and sentencing practices.¹⁸ Such variations make it difficult to use crime incidence to fully explain differences in incarceration rates across jurisdictions.¹⁹ Detailed empirical research into crime statistics—beyond the scope of this report—needs to be undertaken in order to make more meaningful comparisons; without this, surface cross-national comparisons of available crime statistics can be misleading. For example, if “dangerous and serious bodily injury” in Germany is compared to the analogous crime category of aggravated assault in the U.S., Germany’s rate is lower. However, the definition of aggravated assault in the U.S. is much wider and includes any assault that is accompanied by the use of a weapon, and any offense that involves the display of—or threat to use—a weapon.²⁰

Incarceration rate: Countries include or exclude certain subpopulations in their incarceration rates, such as remand detainees, juveniles, mentally ill offenders held in special facilities, or immigrants held in detention, making comparisons difficult. In Germany and the Netherlands, prisons include individuals charged, but not yet convicted, of a crime—a population held in local jails in the U.S. The U.S. incarceration rate used in this report accounts for offenders in local jails, state or federal prisons, and privately operated facilities.²¹ However, it excludes prisoners in military, immigration, and juvenile facilities.²²

Recidivism rate: The recidivism rate is often used as a key indicator of the performance of a justice system. However, comparing recidivism rates between jurisdictions is a complicated if not impossible task because each locale uses a different set of definitions and different time periods for measurement.²³ The U.S. generally looks at all people released from state prison and counts all re-incarceration in state prison within three years as recidivism.²⁴ This method differs from Germany and the Netherlands in three significant ways: (1) Germany and the Netherlands use different base populations: both countries usually look at all people sanctioned by a court, not just those released from prison; (2) Germany and the Netherlands generally measure re-conviction, not just re-incarceration (which might not be for a new crime); and (3) the follow-up time in Europe is variable, ranging from one to eight years.

Sentencing practices: Sentencing practices vary across countries. Certain conduct may be criminal in one country, but it may be partially or totally decriminalized in another; jurisdictions classify similar crimes in different ways, exposing offenders to different sanctions. In Germany, crimes are divided into two categories, *Vergehen*, which are minor crimes, and *Verbrechen*, which are more serious crimes punishable by a minimum term of one year. While the former is sometimes translated in the U.S. to mean a “misdemeanor,” this is not accurate because it includes many crimes of moderate-to-high severity that would be considered felonies in the U.S. (such as burglary, forgery, extortion, aggravated assault, and many drug crimes).²⁵

Figure 1. Comparison of German, Dutch, and American incarceration rates*



*Year of data varies by country:

Germany—2013, The Netherlands—2012, and U.S.—2011

**Incarcerated population includes pre-trial detainees.

Data sources for Germany and the Netherlands: International Centre for Prison Studies

Data source for U.S.: Bureau of Justice Statistics. "Correctional Populations in the United States. 2011."

Data source for total populations: United States Census Bureau.

BASIC PRINCIPLES

The German and Dutch systems are both organized around the central tenets of resocialization and rehabilitation. This is in contrast to the corrections system in the U.S., where incapacitation and retribution are central and where rehabilitative aims remain secondary (at least often in practice if not in policy). Notably, the focus on rehabilitation is clearly stated in law. According to Germany's Prison Act, the sole aim of incarceration is "to enable prisoners to lead a life of social responsibility free of crime upon release, requiring that prison life be as similar as possible to life in the community (sometimes referred to as "the principle of normalization") and organized in such a way as to facilitate reintegration into society.²⁶ The German Federal Constitutional Court stated that the protection of the public is not an "aim" of confinement in and of itself, but a "self evident" task of any system of confinement—a task that is resolved best by an offender's successful re-integration into society.²⁷ Similarly, the core aim of the Netherlands 1998 Penitentiary Principles Act is the re-socialization of prisoners in which incarceration is carried out with as few restrictions as possible through the principle of association (both within prison and between prisoners and the community), and not separation.²⁸ Thus, prisoners are encouraged to maintain and cultivate relationships with others both within and outside the prison walls.

These principles of rehabilitation and normalization inform the sentencing practices as well as the conditions of confinement of the Dutch and German

SENTENCING OPTIONS IN GERMANY AND THE NETHERLANDS

Diversion: Prosecutors in Germany and the Netherlands have broad power to divert offenders away from prosecution. In the Netherlands, a *transaction* is a widely used form of diversion in which an offender voluntarily pays a sum of money to the treasury, or fulfills one or more financial conditions laid down by the prosecution, in order to avoid criminal prosecution. A transaction, for example, may require the transfer of goods or assets acquired through commission of the offense, or its monetary value; or participation in a training course or performance of unremunerated work.²⁹ Transactions are available for offenses for which the maximum penalty is less than six years, which covers the overwhelming majority of crimes, and must be equivalent to a minimum of €2 up to a maximum of €450, or the statutory fine prescribed for the alleged offense.³⁰ In 2004, 33 percent of cases were disposed of through a transaction.³¹ Prosecutors in the Netherlands and Germany can also impose a *penal order*, which can comprise a fine, community service, compensation, driving restrictions, mediation, forfeiture, or confiscation of assets obtained by or used in the conduct in question.³² In Germany, while diversion through a penal order is limited to minor offences (*Vergehen*), these include many crimes that are considered felonies in the U.S.³³

Fines: In the U.S., fines are generally used as an accessory penalty in combination with other sanctions. In Europe, fines serve as a stand-alone—and often preferred—sanction. In the Netherlands, the Financial Penalties Act (1983) expresses the principle that a fine should be preferred over a custodial sentence and that all offenses, including those subject to life imprisonment, may be sentenced with a fine. Indeed, courts are required to give special reasons whenever a custodial sentence is ordered instead of a fine.³⁴

Germany uses the *day fine approach*, in which fines are imposed in daily units (representing one day incarcerated) and are based on an offender's personal income. This is to ensure that the fine has the same impact on offenders who have committed equally serious crimes but live under different economic circumstances. The total fine derives from the number of daily units imposed reflecting degree of guilt (i.e., the number of days), and the level of units reflecting the offender's ability to pay (i.e., a monetary amount, for example, €10).³⁵

Suspended sentences and other community sentences: Even when a custodial sentence is given, a relatively large percentage of these in both the Netherlands and Germany are suspended. *Suspended sentences* are roughly analogous to probation in the United States, although a suspended sentence may not necessarily attach conditions or require active supervision in the community. Since 2006, in the Netherlands, custodial or financial sentences of up to two years may be suspended in whole or in part. In Germany, if an offender is sentenced to a prison sentence of up to two years, the court will typically suspend the execution of that sentence and place the offender on probation.³⁶ Courts are directed to suspend sentences of one year or less.³⁷

Another community-based sanction in the Netherlands (used in about seven percent of cases in 2004) is a *task penalty*—a distinct option considered to be less severe than the custodial sentence and more severe than a fine.³⁸ A task penalty may not exceed a total of 480 hours; can consist of a work order, a training order, or a combination of both; and typically must be completed within twelve months. A work order must benefit the community and can be with public bodies, such as a municipality, or with private organizations, such as those involved in health care, the environment, and social or cultural work. A training order requires an offender to learn specific behavioral skills and are often imposed on offenders who need to improve their communication skills or social abilities.³⁹

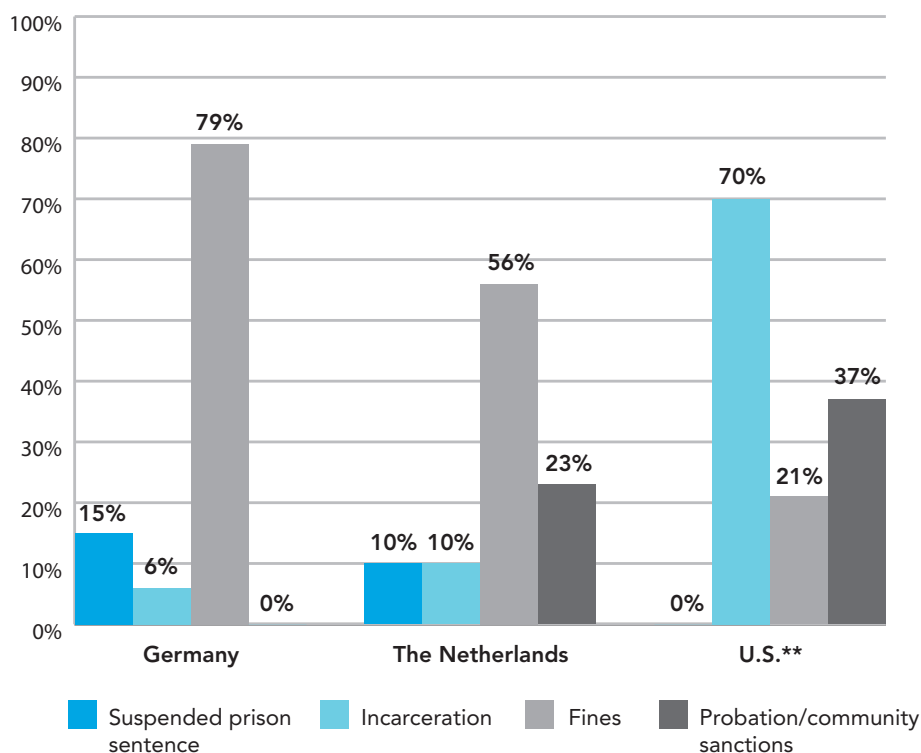
criminal justice systems. Because the rehabilitation principle favors intermediate, non-custodial sanctions, prison is used sparingly. With offender rehabilitation and resocialization the primary goals of corrections, conditions of confinement—in particular, treatment and disciplinary approaches—are less punitive and more goal-oriented.

SENTENCING PRACTICES

In Germany and the Netherlands, incarceration is used less frequently and for shorter periods of time. Both countries rely heavily on non-custodial sanctions and diversion, and only a small percentage of convicted offenders are sentenced to prison—approximately six percent in Germany and 10 percent in the Netherlands [see Figure 2].⁴⁰ In most cases—even for relatively serious crimes such as burglary, aggravated assault, or other crimes considered felonies in the United States—prosecutors divert offenders away from prosecution or judges sanction offenders with fines, suspended sentences, or community service.⁴¹ In both the Netherlands and Germany, fines are used extensively as a primary sanction.⁴² For example, in 2010, day fines were used in approximately 79 percent of cases in Germany.⁴³ (See “Sentencing options in Germany and the Netherlands” on page eight.)

Figure 2. Comparison of German, Dutch, and American sanctioning practices*

In contrast, because incapacitation and retribution are primary goals of sen-



*Year of data varies by country: Germany—2010, The Netherlands—2004, and U.S.—2004

**U.S. data does not add up to 100 percent because combinations of sentences are possible

Data source for Germany: Dünkel, 2013 (“Not Suspended Prison Sentence” included in “Incarceration” category)

Data source for the Netherlands: van Kalmthout and Hofstee-van der Meulen, 2007 (“Non-conditional Prison Sentence” included in “Incarceration” category; “Transactions” included in “Fines” category; “Task Penalties” and “Penal Measures” included in “Probation/Community Sanctions” category)

Data source for U.S.: Petteruti and Fenster, 2011 (“Control of Freedom” included in “Probation” category; “Community Service” included in “Probation/Community Sanctions” category)

tencing in the U.S., incarceration is used frequently and for longer periods of time. In 2010, 70 percent of convicted offenders in the U.S. received a sentence that included a prison term, while only 30 percent received a probationary sentence (though some of these may have been split prison and probationary sentences.)⁴⁴

Another stark difference in sentencing practices is the length of the prison sentence imposed. In Europe, the sentences associated with a particular crime are generally much lower than in the United States, and there is less use of long mandatory prison sentences, resulting in overall shorter sentences.⁴⁵ In 2006 in Germany, 75 percent of prison sentences were for 12 months or less and 92 percent of sentences were for two years or less. In addition, Germany suspended the vast majority of prison sentences that were under two years—in about 75 percent of cases, so only a very small percentage of those sentenced ever went to prison [see Figure 3]. Similarly, in the Netherlands in 2012, the vast majority of sentences (91 percent) were for one year or less, going up to 95 percent if sentences of two years or less are included [see Figure 4]. In contrast, the average length of stay in American prisons is approximately 3 years.⁴⁶ Colorado, Georgia, and Pennsylvania hover above the national average—at 3.4 years,⁴⁷ 3.6 years,⁴⁸ and 3.5 years respectively.⁴⁹

Figure 3. German sentence lengths*

*Data covers sentences assigned in Former West Germany and Berlin
Source: Jehle, 2009

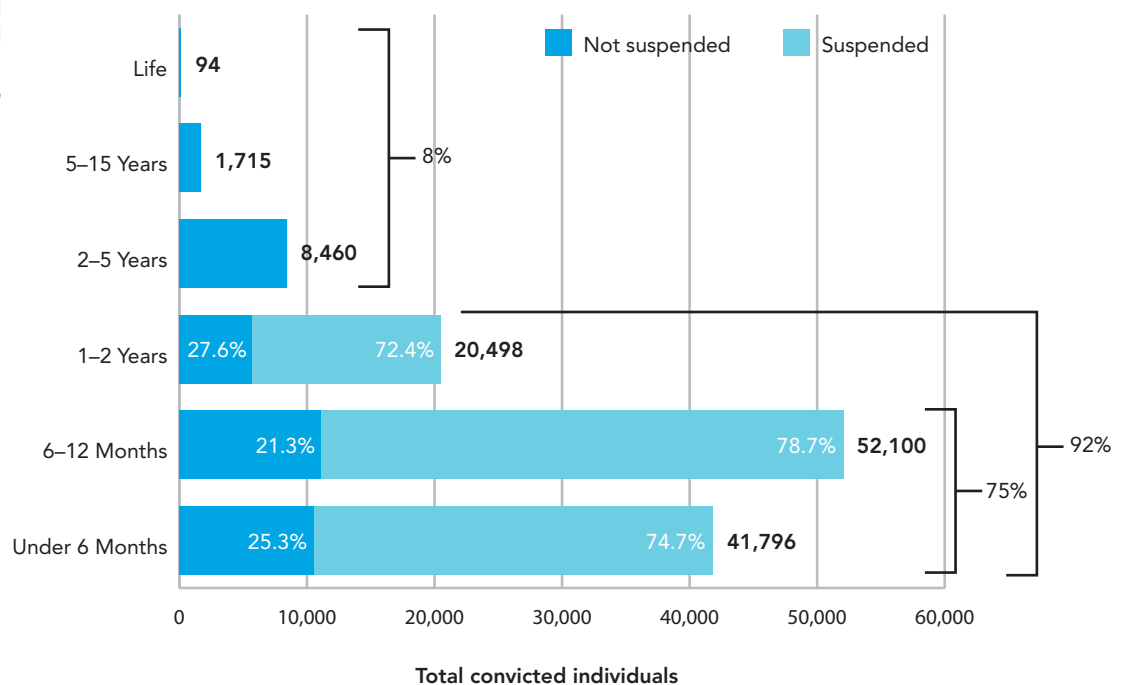
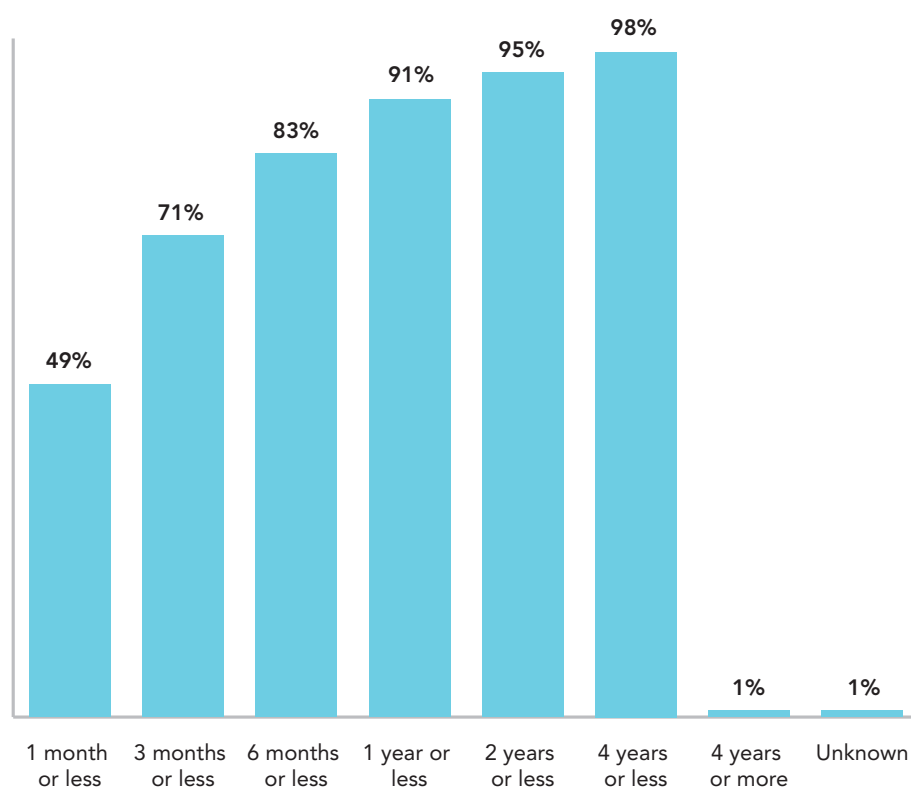


Figure 4. Dutch sentence lengths

Source: Horstink, 2013.



CONDITIONS OF INCARCERATION

Despite these wide differences in incarceration rates and sentencing practices, project participants from the U.S. were open to learning about the treatment and disciplinary approaches in Dutch and German facilities. Participants spoke about how struck they were by the degree to which the conditions of confinement are informed by the emphasis on resocialization and reentry, noting in particular the personal agency with which prisoners were invested in their daily life, the positive interactions between staff and offenders, and the focus on vocational training and education.

Treatment of offenders. As noted, German and Dutch corrections systems set rehabilitation and resocialization as their primary goals. This approach is carried out on an individual, institutional, and physical basis. On an individual level, the conditions of confinement are not meant to be punitive: the punishment is separation from society represented by the custodial sentence itself. The principal goal of incarceration is to help inmates lead more independent, productive lives in society once released. As a result, life in prison aims to inculcate fundamental skills that offenders will need in the community. For example, prisoners are allowed individual expression and a fair amount of

FACILITIES VISITED IN EUROPE

MECKLENBURG-WESTERN POMERANIA, GERMANY

Waldeck Prison (Pop: 354): Male prison for offenders with longer sentences (above two years); includes closed and open departments, a diagnostic center, social therapy, and workshops.*

Neustrelitz Prison (Pop: 190): Co-educational prison for young adults (ages 18–25); includes closed and opened departments, social therapy, workshops, vocational training, treatment programs, unit for female inmates and their children.

THE NETHERLANDS

Penitentiary Institution Haaglanden (Pop: 240): Male institution; includes a closed department, workshops, and an isolation unit.

De Kijvelanden Forensic Care Institution (Pop: 185): Institution for mentally ill offenders and offenders with addiction problems; treatment aims to reduce the causes of criminal behavior and to reduce the risk of recidivism once offenders return to the community.

* A closed department resembles a secure prison in the U.S., while an open department is akin to a work release center, or other similar community corrections residential center, but is housed on the same grounds as a prison.

control over their daily lives, including the opportunity to wear their own clothes and prepare their own meals; and, in order to instill self-worth, both work and education are required and remunerated.⁵⁰ In addition, respect for prisoners' privacy is practiced as a matter of human dignity.⁵¹ One American participant viewed this practice as matter of common sense, commenting while visiting a German prison, "If you treat inmates like humans, they will act like humans." Another treatment approach that captured the interest of the three delegations (which also happens to be practiced in a number of U. S. jurisdictions) was a mother-baby unit at a German facility. The unit allows mothers to parent their children up to the age of three within a special housing unit that includes access to mother and child health care, parenting classes, and babysitting services. The aim of the program is to allow for the formation of maternal and child bonds during a critical period of infant development.

On an institutional level, corrections staff are professionals who undergo extensive training that is more akin to that of social workers and behavior specialists in the U.S.⁵² In Germany, training spans two years with 12 months of theoretical education followed by 12 months of practical training. Courses include criminal law and self-defense as well as constitutional law, educational theory, psychology, social education, stress and conflict management, and communicating with prisoners.⁵³

In their relationships with prisoners, German corrections staff are trained to rely on the use of incentives and rewards, with an emphasis on positive reinforcement; disciplinary measures—such as solitary confinement—are used sparingly.⁵⁴ Offenders in Germany and the Netherlands are also given the right to appeal negative administrative decisions to independent review boards or courts and may receive damages if decisions are reversed.⁵⁵

Finally, on the physical level, German and Dutch prison facilities are designed with features that are conducive to rehabilitation, such as moderate temperatures, lots of windows and light, and wide hallways. The physical

plant of one of the Dutch facilities stunned one U.S. participant who remarked: “the facility screamed ‘therapeutic milieu.’”

Maintaining a connection with society. Consistent with the principle of normalization, offenders in Germany and the Netherlands who serve time in prison are not stripped of their rights as members of society. For example, prisoners retain their right to vote and often receive certain social welfare benefits.⁵⁶ They do not suffer the collateral consequences of conviction that befall so many offenders in the United States after release, such as restrictions on housing and professional licensing, limited access to social benefits, and suspended driver licenses. They are also given opportunities to spend time outside of prison. In the Netherlands, many offenders are allowed to “report” to their prison sentences during the week so that they can return home on the weekends to work on their relationships and practice the various skills learned through reentry programming in prison.⁵⁷ In Germany, recognizing that strong family and community connections are associated with successful reentry outcomes, corrections officials routinely award prisoners short term or extended home leave to visit with family or search for work or accommodation.⁵⁸ Germany’s Federal Constitutional Court has affirmed the importance of prison leave to the principles of resocialization and reintegration.⁵⁹ Strikingly, the failure rate from home leave (i.e., the failure to return to prison from home leave) amounts to a mere one percent and many prisoners consider denial of leave as a more severe sanction than detention in solitary confinement.⁶⁰

Disciplinary approaches. The disciplinary measures used most often in Dutch and German prisons include reprimands, restrictions on money and property, and restrictions on movement or leisure activities. A disciplinary measure is imposed very quickly in response to a violation and care is taken to relate the measure to the alleged infraction. For example, if the offender has problems interacting with other inmates, then the measure will address interaction with others within the institution; if the violation relates to money, prison authorities will restrict an inmate’s access to funds.⁶¹

Solitary confinement—the most severe disciplinary action—is used rarely and only for brief periods of time. At Waldeck Prison, solitary confinement reportedly was used two-to-three times in the past year, while Neustrelitz Prison had utilized its segregation cell twice in five years, and only for a few hours each time. By statute, this kind of disciplinary detention cannot exceed in any given year four weeks in Germany and two weeks in the Netherlands per individual offender.⁶² The Dutch Custodial Institutions Agency trains its staff to understand the collateral consequences of solitary confinement on offenders; this ensures that staff will treat segregated offenders humanely and minimize the impact of isolation. Officers are trained to treat inmates with respect, provide segregated offenders regular human contact, provide offenders a measure of personal autonomy, and give them access to programs that will provide opportunities to earn their way out of isolation.⁶³

CORRECTIONAL PRACTICES IN GERMANY AND THE NETHERLANDS

Individual expression: Prisoners wear their own clothes, decorate their own cells, and keep their personal belongings.

Self-regulation of daily lives: Prisoners have freedom of movement within the unit or facility, access to self-catering facilities, and assist in organizing daily life in prison. Cell houses are often subdivided into small living groups with communal features such as a kitchen, a common area, and other shared leisure features.

Privacy: Guards knock before entering cells, and prisoners have keys to their own cells and separate, walled toilets.

TREATMENT OF SPECIAL POPULATIONS

Young adults as juveniles: The organizing ethos of juvenile justice in Germany is that of minimum intervention, in which priority is given to diversion.⁶⁴ When sanctions are imposed, measures such as fines, warnings, community service orders, mediation, restitution, reparation, and social or vocational training courses are preferred.⁶⁵ Youth imprisonment is a sanction of last resort, the maximum sentence of which is typically five years, or ten years for certain serious offences.⁶⁶ Notably, education and vocational training remain central even for juveniles in custody—as was observed at a juvenile prison in Neustrelitz in February 2013. Since 1953, young adult offenders (ages 18–21) have been treated as a special sub-population under the jurisdiction of the juvenile courts who are authorized to apply juvenile law if they determine that the moral and psychological development of the offender is still ongoing, or when it appears that the motives and circumstances of an offense are those of a “typically juvenile” crime.⁶⁷ In effect, this extends the scope of juvenile justice to young adults as old as 27, since an 18 year-old sentenced to a ten-year sentence will remain under the purview of Germany’s Juvenile Justice Act (JJA) while in custody (although such a long sentence is extremely rare). Significantly, a large proportion of young adult offenders benefit from this approach; in 2008, approximately 66 percent of young adult offenders were sentenced under the JJA.⁶⁸

Drug offenders: Although drug offenses and drug addiction play an outsized role in the American criminal justice system, this is not the case in Germany and the Netherlands. Both countries rely on the harm reduction approach as their primary response to drug use.⁶⁹ This approach focuses on minimizing the risks and hazards of drug use and emphasizes health care, prevention, and regulation of individual use. Rather than target minor possession or sales, law enforcement focuses on more significant crimes, such as drug trafficking.⁷⁰ As a result, the number of offenders in prison for relatively minor drug offenses is small. In addition, inmates who are addicted to drugs can access detoxification or substitution therapy or needle exchange programs.

Mentally ill offenders: Because of the high proportion of mentally ill offenders in the U.S. prison population,⁷¹ there was deep interest among project participants to learn how European systems deal with this population. In Germany, this topic was not discussed because convicted mentally ill offenders are sent to psychiatric hospitals—not prison—and therefore fall outside the jurisdiction of the Ministry of Justice.⁷² The Netherlands has a well-developed system for dealing with mentally ill offenders in clinical facilities run by the Ministry of Justice—known as Forensic Psychiatric Care Institutions. Dutch law determines criminal responsibility on a multiple-point scale, rather than the all-or-nothing approach employed in the U.S; defendants can be declared entirely or partially unaccountable for an offense and sent to one of these special clinics for treatment, so long as there is a connection between the alleged conduct and an offender’s mental disorder. This determination is done through an extensive assessment that is conducted by a multi-disciplinary team that includes a psychiatrist, psychologist, social worker, behavioral therapist, and a lawyer or judge.⁷³

Changing direction

All three participating states held conferences in Spring 2013 to discuss lessons learned from the European trip. The teams discussed whether and which policies or practices observed on their trip could be adapted, including how to engage other stakeholders in accomplishing this goal. Influenced by their experience in Germany and the Netherlands, all three states identified four key areas in which to engage: (1) expanding disposition and sentencing options, (2) focusing on normalization, (3) developing a mother-baby unit, and (4) improving the management of special populations.

EXPANDING DISPOSITION AND SENTENCING OPTIONS

All three state teams were struck by the sparing use of incarceration in Europe. Although policymakers in each state had already begun working on expanding alternatives to incarceration and sentencing options more generally,⁷⁴ the experience and discussions in Europe served to inform these efforts even further. For instance, there is now an organized effort in Pennsylvania to expand the use of diversion by prosecutors and deliver relevant services to defendants in the pre-trial stage of proceedings.

In addition, members from all three state delegations—particularly the judges—returned home from Europe convinced of a need to expand the availability of problem-solving courts (such as drug, mental health, and veterans courts). Although Georgia has already invested heavily in these types of courts, the visit to a young adult facility in Germany prompted the Georgia delegation to consider whether there should be an accountability court that focuses on young adults, aged 18 to 25, with the goal of providing them vocational or post-secondary education opportunities. The Colorado team is also interested in exploring how mental health courts can help shift mentally ill offenders away from prison and improve their access to services in the community.

FOCUSING ON NORMALIZATION

The freedom given to inmates in prisons in Germany and the Netherlands is a world away from the conditions in which most states hold offenders in the United States. Many participants described their experience visiting European facilities as “eye opening” and “thought provoking” as it presented entirely different ways of doing business. At first, many team members dismissed the idea that such practices could be replicated in their states; they reasoned that because offenders in U.S. prisons are more violent and anti-social, such practices would place both inmates and corrections officers at risk.

Upon further reflection, however, participants began to entertain the possibility of expanding the rights and privileges of certain inmates, such as

those in the lowest security units, special units (such as faith-based units in Georgia), or transitional units for offenders nearing their release date. For its lowest-security inmates, the Colorado team considered allowing additional personal property, imposing mandatory inmate savings accounts, and increasing inmate pay—efforts aimed at strengthening reentry outcomes. The Georgia team considered giving their lowest-risk inmates in certain units keys to their cells and offering them more clothing choices. Georgia is also developing a step-down security classification system, which will see inmates earning additional privileges as they move to lower security levels.

In Pennsylvania, the Department of Corrections is using its new transitional housing units as an experiment in normalization and reintegration. Some of the measures being implemented include: bringing parole officers into facilities to meet with offenders prior to their release; providing inmates with access to reentry services earlier; assisting inmates with obtaining much-needed identification (driver license, social security, etc.) prior to release; and offering vocational programming in fields deemed in high demand in targeted reentry communities.

Both Georgia and Colorado are also working on improving reentry planning and services and connecting inmates with parole officers prior to release.

DEVELOPING MOTHER-CHILD UNITS

After visiting a mother-child unit in Germany, all three teams unanimously expressed a strong interest in providing a similar option for pregnant women in their facilities. In the United States, the overwhelming majority of children born to incarcerated women are separated from their mothers immediately after birth and placed with relatives or into foster care. A mother-child unit—otherwise known as a prison nursery program—allows a mother to parent her infant for a finite period of time within a special housing unit at a prison or jail. Research conducted on U.S. programs has found that these programs have a positive impact for both mothers and children. Evaluations of prison nursery programs have shown lower rates of recidivism, an increased likelihood of obtaining child custody post-release, higher rates of mother and child bonding, and self-reported increases in self-esteem and self-confidence.⁷⁵ Each state is now exploring how to develop and implement this innovative model.

WORKING WITH SPECIAL POPULATIONS

The Pennsylvania team identified the need to revamp the state's Mental Health Procedures Act (MHPA). Because the MHPA has not been reviewed since its passage in 1979, many provisions are outdated and do not reflect modern medical practices. By updating and improving the MHPA, policymakers aim to deliver mental health services in a more effective and timely fashion to the people in greatest need. A committee within the Pennsylvania Commission on

Crime and Delinquency will lead the effort to review and recommend changes to the MHPA.⁷⁶

Pennsylvania has also initiated a project to review its use of solitary confinement. Prompted by a U.S. Department of Justice investigation, but informed by the limited use of segregation in European prisons, the Pennsylvania Department of Corrections will review and analyze its current use of solitary confinement and develop policies that safely and effectively decrease its use.

Implications for the United States

The evidence is overwhelming that incarceration has a negative impact on long-term individual risk and community health. U.S. policymakers seeking less crime, fewer victims, and greater safety in their states and counties cannot ignore the growing body of proof that many of the European practices—socialization, cognitive-behavioral interventions, education, life skills, and treatment of mental illness—are far more successful. It is time to put that evidence into practice. The German and Dutch systems have much to impart in these regards, and, as officials in Colorado, Georgia, and Pennsylvania begin to apply some of the lessons they learned, other states can take a cue from their efforts and undertake concrete, feasible strategies to both reduce their reliance on incarceration and improve conditions of confinement.

- > **Expand prosecutorial discretion to divert offenders.** German and Dutch prosecutors divert a large number of criminal cases, in part because many serious offenses are not typically disqualified from diversion. Although prosecutorial diversion is also a common practice in the United States, it is usually limited to first-time offenders or to special populations such as those who are drug-addicted or mentally ill. Policymakers in the United States wishing to safely lower incarceration rates and the number of people exposed to the negative consequences of criminal justice contact should consider extending diversion options to higher-risk individuals and those with more serious offenses. The availability of high-quality, community interventions, together with validated risk and needs assessment tools, is key to safely diverting these individuals to prevent them from being incarcerated solely for the purpose of care and treatment.
- > **Reduce reliance on incarceration as a first response and expand the use of community-based sanctions.** In Germany and the Netherlands, there is a much greater use of community-based sanctions for a wider array of offenses, and the menu of non-custodial sanctions available is extensive—from day fines in Germany to transactions in the Netherlands. These

choices and options are due to deliberate policy choices aimed at keeping most offenders out of prison. Community-based sanctions are not unusual in the American context: community sanctions of many kinds are used in the United States—from probation and parole supervision to fines, community service, and specialty courts. However, U.S. jurisdictions often apply them inappropriately and to too narrow a group of offenders (e.g., ordering intensive probation supervision or other programming to low-risk offenders or fines and fees to indigent offenders). Policymakers interested in effective corrections should ask whether they are making the best use of the options available to them and explore whether these options—as well as the pool of eligible offenders—can be safely expanded to support a shift in emphasis away from institutional to community corrections.⁷⁷

> **Adapt the disciplinary structure and expand the menu of sanctions.**

German and Dutch prisons use a wide array of disciplinary measures to sanction offenders. However, both systems rarely use solitary confinement when responding to offender behavior, and only use it for very short periods—a few hours or days. This policy implicitly recognizes the deleterious impact lengthy segregation can have on an individual and acknowledges that there are better, more humane ways to respond to rule-breaking within prison. There are other tools that can be used to manage behavior in prison and alternative sanctions for disciplinary violations (such as restricted movement in their current housing unit and reduction in other privileges) may be more effective. Several jurisdictions in the U.S. have demonstrated that it is possible to safely remove some prisoners from solitary and shorten the time that others spend there. Many more are in urgent need of introducing “mission-based” housing units, developing more careful classification schemes, creating alternatives to the almost automatic use of solitary confinement, expanding the menu of disciplinary (or protective) measures that better respond to offender behavior and need. While many states provide incentives for program completion and good behavior, these are usually in the future (i.e., reduced incarceration time); corrections systems need more short-term positive reinforcement or incentives to encourage more constructive interactions between the institution, staff and offenders. This must include more training for staff on positive communication techniques and conflict avoidance.

> **Treat young offenders as a special population.** In recognition that their developmental stage and associated needs are more similar to juveniles, young incarcerated adults in Germany are treated differently than older adults in prison. If U.S. jurisdictions want to salvage the potential of these young adults—as contributing members of communities—then attention must be paid to responding appropriately to their developmental needs, with an emphasis on treatment, education, and social or vocational training.

> **Normalize the conditions within prison.** In the United States, many jurisdictions, like Michigan, Ohio, and others, have begun the process of “reentry” at the prison gate, reordering priorities, housing assignments, and programming based on what will be needed after prison. In Germany and the Netherlands, however, the entire organizing principle of prison management and offender supervision is “normalization,” where conditions within prison, and treatment of prisoners, resemble—as much as possible—life in the community. The rationale of normalization is to mitigate the negative effects of incarceration on prisoners and increase chances for successful offender rehabilitation and reintegration. The high failure rate for those leaving U.S. prisons should push U.S. lawmakers and policymakers to take their own efforts much further. Total control, hard cells, and inadequate programming do not and cannot prepare well the more than 95 percent of prisoners who will return to our communities. A pilot with some subpopulations would be a welcome innovation for all of us to learn from.

Conclusion

The European-American Prison Project offered project participants the rare opportunity to examine firsthand different approaches to sentencing and corrections and, in the words of a team member from Pennsylvania, to “think outside of the box.” Significantly, team members have brought the principles and practices witnessed in Europe to their own practice back home. For example, two criminal court judges admitted that since the trip, they are both much more amenable to imposing non-custodial sanctions when sentencing offenders. The project has also become part of larger criminal justice conversations taking place in the states. In Pennsylvania, for example, team members viewed the project as an extension of the federal Justice Reinvestment Initiative (JRI). Inspired by how the Netherlands treats mentally ill offenders, Pennsylvania is now using the momentum gained through its own JRI initiative in 2012 to propose revamping its Mental Health Procedures Act in order to improve the treatment of mentally ill offenders in the criminal justice system. Although it’s too early to tell what individual and collective efforts such as these will ultimately augur, they indicate clearly that business-as-usual in sentencing and corrections in the United States is no longer possible.

ENDNOTES

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- 2 Pew Center on the States, *The High Cost of Corrections in America: InfoGraphic* (Washington, DC: The Pew Charitable Trusts, January 2012); International Centre for Prison Studies, "World Prison Brief," <http://www.prisonstudies.org/info/worldbrief/> (accessed May 29, 2013).
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- 11 This report is not an in-depth study of European systems and the data presented is not based on rigorous or systematic data collection. Most of the data presented in this report was provided to Vera by the host organizations and governments in Europe.
- 12 Rob Allen, *Reducing the Use of Prison: What Can We Learn From Europe?* (London: The Criminal Justice Alliance, 2012).
- 13 Frieder Dünkel, "German Prison Law and Human Rights" (presented at the European-American Prison Project conference at Waldeck Prison, Dummerstorf, Mecklenburg-Western Pomerania, Germany, February 18, 2013); Peter Tak, "Prison policy, prison regime and prisoners' rights in the Netherlands under the 1998 Penitentiary Principles Act," in *Prison Policy and Prisoner Rights: Proceedings of the Colloquium of the International Penal and Penitentiary Federation*, edited by P. Tak and M. Jendy (Nijmegen, The Netherlands: 2008), 457-92.
- 14 The Prison Law Office is a nonprofit public interest law firm that represents individual California state prisoners, engages in class action and other impact litigation, educates the public about prison conditions, and provides technical assistance to attorneys throughout the country. See <http://www.prisonlaw.com/about.html>
- 15 Bureau of Justice Statistics (BJS), *Prisoners in 2012 - Advance Counts*, 7.
- 16 International Centre for Prison Studies, "World Prison Brief," <http://www.prisonstudies.org/info/worldbrief/> (accessed October 23, 2013).
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- 18 Bureau of Justice Statistics (BJS), *Cross National Studies in Crime and Justice* (Washington, DC: BJS, 2004), vii.
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- 31 A.M. van Kalmthout, F.B.A.M. Hofstee-van der Meulen, F. Dünkkel, *Foreigners in European Prisons* (Nijmegen, The Netherlands: Wolf Legal Publishers, 2007), 625-626.
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- 34 P. J. Tak, *The Dutch Criminal Justice System* 3rd Ed., 115.
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- 37 German Criminal Code Section 56. at http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P57 (accessed August 22, 2013).
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- 39 P. J. Tak, *The Dutch Criminal Justice System* 3rd Ed., 113.
- 40 For Germany, see Frieder Dünkkel, "The Sentencing System, Probation and Re-entry of Prisoners in Germany" (presented at the European-American Prison Project conference at Waldeck Prison, Dummerstorf, Mecklenburg-Western Pomerania, Germany, February 18, 2013); for the Netherlands, see Mariette Horstink, "The Custodial Institutions Agency" (presented at the European-American Prison Project conference at the Ministry of the Interior, The Hague, The Netherlands, February 21, 2013).
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- 58 Frieder Dünkkel, "German Prison Law and Human Rights"; Frieder Dünkkel and Dieter Rossner, "Germany," in *Imprisonment Today and Tomorrow (2001)*, edited by Dirk van Zyl Smit and Frieder Dünkkel, 288-350.
- 59 Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy*, 78.
- 60 Dünkkel and Rossner, 322.
- 61 For Germany, see Frank Grotjohann, "The Role of Disciplinary Measures in the Prison Regime at JVA Waldeck"; for the Netherlands, see Mariette Horstink, "The Custodial Institutions Agency."
- 62 For Germany, see The Prison Act (*Strafvollzugsgesetz*) of 1977 § 103(1); for the Netherlands, see Penitentiary Principles Act (1998), Art. 24(1).
- 63 Mariette Horstink, "The Custodial Institutions Agency."
- 64 Frieder Dünkkel, "Germany," in *Juvenile Justice Systems in Europe—Current Situation and Reform Developments Vol. 2, 2nd revised ed.*, edited by Frieder Dünkkel, Joanna Grzywa, Philip Horsfield, and Ineke Pruin (Mönchengladbach, Germany: Forum Verlag Godesberg, 2011) 562.
- 65 Ibid, 562-3.
- 66 Ibid, 564.

- 67 Ibid, 587-589. Courts rely on aspects of a young offender's personal development in making a determination. Courts also look at the type of crime that is committed. Examples of what courts have considered "typically juvenile" crimes include crimes committed with a group or under the influence of a group, such as hooliganism which can sometimes include violent crimes and crimes committed while under the influence of alcohol.
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