

The Evolution of American Sentencing Policy & What the U.S. Can Learn From Germany

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Abstract

Since the 1970s, the United States has produced the highest incarceration rates among advanced democracies. This paper examines the cultural and political forces that transformed American policy from a system of indeterminate sentencing to one defined by mandatory minimums, truth-in-sentencing laws, and punitive drug laws. These reforms grew from the War on Drugs, as well as from rising public concern about violence, and a political climate that rewarded “tough on crime” policies, which led to expanded sentence lengths and a drastic rise in incarceration. The U.S.’s reliance on retribution and the politicized nature of sentencing have produced uniquely severe results. In contrast, the German criminal justice system emphasizes rehabilitation and reconciliation, and reflects broader public attitudes that favor less punitive measures in order to facilitate reintegration. The U.S. could adopt German systems in order to return to a more equitable and proportionate sentencing system akin to its industrialized democratic counterparts. Specifically, the U.S. could incorporate the day-fine system, limits on mandatory minimums, and a greater insulation of prosecutors and judges from political pressures.

Keywords: sentencing policy, incarceration, American Criminal Justice System, German Criminal Justice system, rehabilitation, retribution

1. Introduction

The United States currently has an incarceration rate of 541 individuals per 100,000. New Zealand has the next highest rate among advanced industrialized liberal democracies, of 185, with the United Kingdom, France, and Germany producing rates of 139, 117, and 68,

respectively.¹ The U.S. rate more closely resembles that of Rwanda and Turkey than it does any other OECD

¹Statista Research Department and 19 N, ‘Most Prisoners per Capita by Country 2025’ (*Statista*, 19 November 2025) <<https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/?srsltid=AfmBOopXwS8eDyKAWNWGceSX3q5Ma4j9md-qADJIPsOui3EZOnht8FV>> accessed 30 November 2025

member country. How did the United States arrive at this point, and how did it diverge from other industrialized democracies to become so punitive?

The answers lie in changes to U.S. sentencing policy since the 1970s. A U.S.-German comparison will highlight how differing philosophies about their punitive framework produce staggeringly different outcomes for incarcerated people.

Germany is widely regarded as having an exemplary criminal justice system, known for its emphasis on rehabilitation. As the largest country in the E.U., and with a similar population composition, Germany is a good point of comparison. Furthermore, Germany has recently faced similar societal challenges, including “one of the highest levels of wealth inequality in Europe, ethnic minority groups (particularly individuals of Turkish origin) who face discrimination and persistent intergenerational disadvantage, and the highest rates of methamphetamine and amphetamine use in Europe.”² Despite these challenges, Germany maintains low levels of incarceration. The U.S. could adopt several of Germany’s policies to turn toward a more just and equitable system.

2. Philosophies of Prison and Justice

²Ram Subramanian and Alison Shames, “Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States (Vera Institute of Justice, October 2013)” (2014) 27 Federal Sentencing Reporter 33.

2.1 Differing Ideologies

Germany and the United States have fundamentally different goals for their prison systems. The German system prioritizes rehabilitation with the goal of societal reintegration. The U.S. system is based on retribution. These disparate ideologies result in drastically different sentencing laws and structures, and outcomes.

3. The Impetus for Change in the United States

3.1 Departure from the Mainstream

Despite today’s extreme incarceration rate, the United States was not always exceptionally punitive. In the 1830s, after visiting several American prisons, Alexis de Tocqueville concluded that “*In no country is criminal justice administered with more mildness than in the United States.*”³ Indeed, until the 1970s, the U.S. system was aligned with the highly indeterminate sentencing policies of mainstream Europe. Such systems “stipulated a fairly broad range of sentences to allow for discretionary parole release upon evidence of rehabilitation.”⁴ With such broad discretion, sentences did not necessarily match the length actually served before release on parole.⁵

³Marc Morjé Howard, *Unusually Cruel: Prisons, Punishment, and the Real American Exceptionalism* (Oxford University Press 2017).

⁴ *Ibid.*, 52, The author is citing Frost, 2006, 13.

⁵ *Ibid.*, 52, The author is citing Stemen, Rengifo, and Wilson 2006, 17.

3.2 *Calls for Uniformity*

These discrepancies in U.S. sentencing led to calls for reform across both sides of the legislative aisle. Liberals asserted that judicial discretion left the system vulnerable to discrimination, abuse, and disproportionately harsh sentences for minorities. Conservatives argued against overly lenient policies and favored harsher sentencing of criminals.⁶ Both sides aimed to equalize penalties and to increase consistency in sentencing.⁷ This bipartisan reform led to severe changes in sentencing policies with drastic impacts on incarceration rates.

3.3 *War on Drugs & War on Crime*

To comprehend the punitive changes of the 1970s, one needs to understand the rising public concern about recreational drug use in the 1960s, an issue that was inflamed by underlying political and racial biases. By June 1971, President Nixon officially declared a “War on Drugs,” identifying drug abuse as “public enemy number one.”⁸ Nixon drew on existing biases to link the black community to especially dangerous drugs such as heroin and crack cocaine. His advisor, John Ehrlichman,

⁶ Howard (n 3) 52. The author is citing Mauer 2001, 11.

⁷ *ibid* 52.

⁸ HISTORY.com Editors, “War on Drugs - Timeline in America, Definition & Facts” HISTORY (May 31, 2017)

<<https://www.history.com/articles/the-war-on-drugs>> accessed January 12, 2026.

confessed to this policy goal in 1994, asserting that the Nixon campaign had two enemies: “the antiwar left and black people.” He admitted, “We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities.”⁹ Policies that exaggerated the dangers of crack led to different sentencing guidelines for two different forms of cocaine, with harsher penalties falling on crack users. President Reagan pushed for even harsher legislation and policy change, part of the White House Office of National Control Policy’s goal of creating “a Drug-Free America” by 1995.¹⁰ Reagan successfully “stok[ed] the ideological fires for tougher crime policy,” which was furthered by the subsequent Bush administration.¹¹ These intentional narratives incited policy changes that today make the United States stand out as uniquely punitive.

3.4 *Tough on Crime*

The War on Drugs corresponded with growing fear regarding crime. Between 1960 and 1980, “the homicide rate doubled, and the violent crime rate, as measured by police reports, more than tripled.”¹² Heightened media

⁹ *ibid*.

¹⁰ Howard (n 3) 58.

¹¹ *ibid* 58.

¹² Alex Tabarrok, “The 1970s Crime Wave” (Mercatus Center, November 12, 2024) 51 min., 09 sec., <<https://www.mercatus.org/marginal-revolution-podcast/1970s-crime-wave>> accessed January 12, 2026.

attention on violence created the perception that crime was out of control. Politicians responded to public outcry with promises of being “law-and-order champions” who were “tough on crime.” Reagan’s “War on Crime” solidified the thread between crime, drug use, and the non-white community.

3.4.1 The Martinson Report

Punitive changes in the U.S. were further bolstered by publications like the Martinson Report, a 1974 article that concluded that “with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.”¹³ The report persuaded many to abandon rehabilitation, convincing policymakers and the public that the way to deal with dangerous criminals was to contain them through longer sentences and fewer opportunities for parole.

3.4.2 The Willie Horton Ad

A watershed moment occurred in 1988, when George H.W. Bush’s presidential campaign successfully framed Massachusetts governor Michael Dukakis as soft on crime. The “Willie Horton” advertisement described a Massachusetts prisoner who committed robbery and rape while out of prison under a common furlough program. The ad served “to transform the political climate on race and crime throughout the country.” Ever since, “most

¹³Robert Martinson, “What Works?- Questions and Answers about Prison Reform” [1974] *The Public Interest*.

politicians, prosecutors, and elected judges have become afraid of taking part in decisions that would lead to the release of prisoners, in fear that one of them might go on to commit a violent crime, thus likely costing that official his or her job.”¹⁴ To avoid this image politicians attempt to “one-up” each other by calling for tougher increases in length and severity of sentences.

4. Changes in Policy

4.1 Sentencing Guidelines

This understanding of U.S. history illustrates how social fears, doubts about rehabilitation, and political postures led to concrete sentencing policies with more punitive effects.

4.1.1 Determinate Sentencing through Mandatory Minimums and Truth in Sentencing Laws

Indeterminate sentences faced backlash for presumably giving judges too much discretion. The 1984 Sentencing Reform Act aimed to establish federal sentencing guidelines to “limit judicial discretion and make sentences consistent,” but “carried a heavy presumption of imprisonment for most offenders and [gave] little regard for any mitigating circumstances involved in an offence.” Judges lost discretion to impose lower sentence terms because criminal statutes set sentence minimums. While this seems more just and uniform, the fixed length of terms

¹⁴ Howard (n 3) 119.

for crimes is extraordinarily severe. Judges have no choice but to impose these sentences, even if they are disproportionate to the crime.¹⁵ “Truth-in-Sentencing Laws” were intended to reduce the discretion afforded to parole boards by requiring individuals to serve around 85% of their sentence before being considered for parole. Starting in 1984, these laws extended the proportion of the sentence that incarcerated people must serve before being eligible for parole.¹⁶ Following this period, fourteen states eliminated parole entirely.¹⁷

4.1.2 Constitutionality of Sentencing Reform

Although the Supreme Court declared the 1984 mandatory guidelines unconstitutional in 2005, they remain advisory and are still employed by judges today. As of 1995, “all 50 states and the federal government constrained judges’ discretion in sentencing by mandating minimum imprisonment terms for a wide variety of offenses.”¹⁸

¹⁵Howard (n 3) 58.

¹⁶Ibid., 56, citing Stemen, Rengifo, and Wilson 2006, 1.

¹⁷Ashley Nellis, “Mass Incarceration Trends – The Sentencing Project” (The Sentencing Project, May 21, 2024) <<https://www.sentencingproject.org/reports/mass-incarceration-trends/>> accessed January 12, 2026.

¹⁸“How Mandatory Minimums Perpetuate Mass Incarceration and What to Do About It – The Sentencing Project” (The Sentencing Project, February 14, 2024) <<https://www.sentencingproject.org/fact-sheet/how-mandatory-minimums-perpetuate-mass-incarceration-and-what-to-do-about-t-it/>> accessed January 20, 2026.

4.1.3 Three-Strike Laws

U.S. sentencing laws became even stricter with the adoption of “three-strike” or “habitual offender” laws. In 1994, the Supreme Court upheld California’s law that an “offender with a history of at least two criminal convictions could receive a sentence of 25 years to life upon the commission of any felony—even shoplifting.”¹⁹ The 1994 Crime Bill included three-strike provisions mandating life sentences after a third, even if minor, offense, for those with prior drug or violent felonies.

4.1.5 Drug Laws

The most powerful changes to U.S. sentencing policy came from revisions to federal drug policy that were supported by the political War on Drugs. The Anti-Drug Abuse Act of 1986 demonstrated the racial bias of the time period when it imposed equivalent five-year mandatory minimum sentences for possession of disproportionate amounts of similar drugs: 500g of powder cocaine and 5 grams of crack cocaine, primarily used by black people. Continuing fears led Congress and President Reagan to pass the Anti-Drug Abuse Act of 1988, implementing further mandatory minimums.

5. The Impact

The changes to sentencing guidelines and structures for drug-related crimes have had an enormous effect on overall

¹⁹Howard (n 3) 43.

U.S. incarceration rates. Marc Mauer reports that “from 1985 to 2000 the percentages of inmates sentenced for drug crimes increased by 402% in state prisons and 546% in federal prisons, which represented 52% and 28% of the total increase in prisoners.” Within federal prisons, often thought of as reserved for the most violent crimes, roughly half (46%) of those sentenced have been convicted of drug offenses.²⁰ Overall, there are today over 2 million people in the nation’s prisons and jails. This is a 500% increase over the last four decades (See Figure 1). Adjusting for “the higher rate of violent crimes and drug crimes in the U.S., “overall sentencing severity per crime was about three times more severe in the United States than in Germany.”²¹ These figures place the United States as an outlier, exceptional for the wrong reasons. To investigate solutions, this paper will consider how the German system has avoided this path and what the U.S. can do to emulate its more moderate approach.

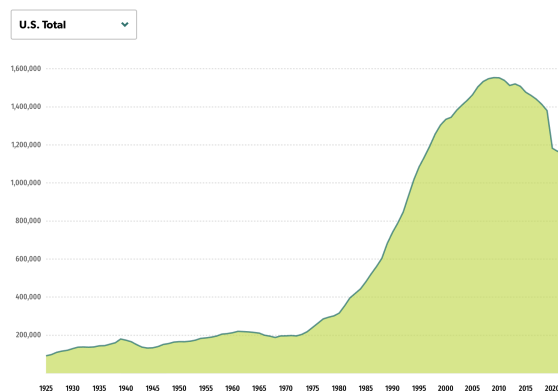


Figure 1, U.S. State and Federal Prison Population 1925-2022, The Sentencing Project Research (2024).

6. What Can the United States Learn from Germany?

6.1 The German Way

While legal statutes and policies are a direct outgrowth of public attitudes toward the criminal justice system, studies have shown that the German public and lawmakers are comparatively less punitive. A study asked Germany and U.S. citizens “whether they demanded a prison sentence for the identical case of burglary.” On a “scale from zero to sixty, Germany is at around fifteen and the U.S. higher than fifty.”²² Policies have reflected these sentiments. As Germany has “engaged in intentional efforts to reduce its reliance on incarceration, crime rates in

²⁰ *ibid* 43. The author is citing Frase and Weigend 1995, 348.

²¹ *ibid* 43.

²² Cornelius Nestler, “Sentencing in Germany” (2003) 7 Buffalo Criminal Law Review 109.

the country have been dropping for decades and are at their lowest level in 30 years” (as of 2020).²³

6.2 German Sentencing Structures

Compared to the U.S., German judges have greater discretion in sentencing. With sentencing ranges for most crimes, judges may consider other factors, such as the defendant’s history and income level, and the gravity of the offense. They do not employ three-strike laws, and for “most criminal offense statutes, do not prescribe a minimum sentence but define the maximum penalty only.”²⁴ Most crimes have fixed terms with maximum sentences of 15 years. For more serious offenses, there are statutorily defined minimum penalties typically of one year imprisonment, and the system allows for indeterminate application of preventive detention as a response to dangerous offenders.²⁵

In addition to lighter sentences, Germany simply sends fewer people to prison. By relying on non-custodial sanctions and diversion strategies, only six percent of convicted offenders are sentenced to prison, compared to 70% in the U.S. Even when prison time is sanctioned in

the sentence, 75% of German prisoners are sentenced to 12 months or less. In contrast, the average sentence length in the U.S. is 3 years. Germany suspends the vast majority of sentences under two years; thus, a small percentage of those sentenced to prison time actually go to prison.²⁶ Compared to Germany, the “United States has reached a level of punitiveness in criminal law that is so much higher than the German level that many German criminal law scholars consider the strongly punitive nature of the American system to be out of proportion and unacceptable.”²⁷

Although there are significant differences between Germany’s inquisitorial system compared to the American adversarial system that are beyond the scope of this paper, the U.S. can still learn from Germany when it comes to punishment. There are philosophical approaches and policies that might work in the United States. For instance, the U.S. could implement a wider use of mandatory maximums and rethink its mandatory minimums.

Additionally, the United States should consider emulating Germany’s day fines as an alternative to prison sentences. In response to calls for alternatives to prison time, a 1969 German reform gave priority to fines, which now account for “more than 80% of criminal penalties.”²⁸ Day fines are calculated based on the seriousness of the

²³“Lessons Learned from Germany: Avoiding Unnecessary Incarceration and Limiting Collateral Consequences.” [2020] Fair and Just Prosecution.

²⁴Hans-Jörg Albrecht, “Sentencing in Germany: Explaining Long-Term Stability in the Structure of Criminal Sanctions and Sentencing” (2013) 76 *Law and Contemporary Problems* 211.

²⁵ Hans Julius Wolff, “Criminal Justice in Germany” (1944) 42 *Michigan Law Review* 1067.

²⁶ Subramanian, Shames (n 2)

²⁷ Nestler (n 19) 109.

²⁸ Albrecht (n 21) 211–36.

crime and the individual's ability to pay," and are calibrated to equalize the fine across different economic strata.²⁹

The result is that incarceration is used much less frequently and for shorter amounts of time. Prison time is not seen as the norm, but the last resort. Only "once imprisonment has been deemed to be necessary are the concepts of retribution, deterrence, and incapacitation used to support relatively harsh sentences."³⁰ Germany's system is reform-minded and effective, showing that "high incarceration rates, lengthy sentences, harsh prison conditions, and emphasis on punishment rather than rehabilitation are not necessary for preventing recidivism or protecting public safety."³¹ If the U.S. could move away from using prison time as the default punishment and towards the use of alternative sanctions, U.S. prisons would not be so overcrowded, and the staggering rates of incarceration would drop. The "concept that offenders deserve punishment but nevertheless should not go to prison appears to be of high importance in German sentencing," and the U.S. should follow Germany's expansion of alternative sanctions that have proven to work, namely the "day-fine" approach.

6.4 A Change in the Narrative

²⁹Ibid., 223.

³⁰ Nestler (n 19) 127-28.

³¹ Fair and Just Prosecution, "Lessons Learned from Germany: Avoiding Unnecessary Incarceration and Limiting Collateral Consequences," April 2020, https://www.fairandjustprosecution.org/staging/wp-content/uploads/2020/04/FJP_Brief_GermanIncarceration.pdf.

Despite the issues outlined here concerning the American criminal justice system, this paper also demonstrates that, as the current system stands, it responds to policy and is inherently intertwined with politics. These features have enabled the U.S. criminal justice system to undergo a rapid and drastic transformation since the 1970s. The "driving force behind the punitiveness in American criminal law is a cultural and political development in American society."³² The U.S. criminal justice system could be transformed if policies supporting rehabilitative reforms can emerge as "a narrative that is politically acceptable," one "that endorses decarceration policies or alternatives to imprisonment, and that is embraced by the legal professions to whom the implementation of crime policies is entrusted."³³

6.5 The Need for Isolation & Depoliticization of Judges

The U.S. should take steps to protect law enforcement officials from political pressures and to diminish the presence of criminal justice issues in political rhetoric. Because judges and prosecutors rely on elections to maintain their positions, they remain beholden to donors and public opinion. The need to appear tough on crime has led prosecutors to push for more punitive sentences and judges to impose harsher sentences. Tatjana Hörnle cites the apolitical nature of the judiciary as a primary

³² Nestler (n 19) 111.

³³ Albrecht (n 21) 211-36.

reason for Germany's consistent sentencing policies.³⁴ Until then, the U.S. system remains vulnerable to fleeting public emotions or fears, stoked intentionally by politicians as a means of political or campaign strategy. Politicians will remain terrified of being "Willie Horton'ed," and harsh sentencing practices will persist.

7. Conclusion

This paper highlights why the U.S. took a punitive turn around the 1970s, despite exhibiting similar trends and statistics to its industrialized, democratic counterparts until then. The paper then examines the German criminal justice system, offering a comparison with the U.S. system, highlighting that the philosophy and attitudes toward punishment directly shape sentencing laws and policies. These impacts are prevalent in systems that are open to politics and vulnerable to public and political rhetoric, which can encourage harsher laws in response to public fear of crime. The final portion of this paper examines what the U.S. will need to do to shift its focus back to a rehabilitation-centered system with less punitive sentencing. Although this will require larger societal change, the U.S. can adopt several of Germany's policies and begin reforming its system to once again align with Germany and other advanced democracies in the European Union.

³⁴Howard (n 3) 51.

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