

## How and Why is the American Punishment System “Exceptional”?

**Author :** Christopher Slobogin

**Date :** April 24, 2018

Kevin Reitz, [American Exceptionalism in Crime and Punishment](#) (2018).

Anyone interested in American criminal justice has to wonder why we have so many more people in prison—in absolute as well as relative terms—than the western half of the European continent, the part of the world most readily comparable to us. This book, consisting of eleven chapters by eminent criminal law scholars, criminologists and political scientists, provides both a detailed look at how U.S. punishment is different and an insightful analysis of why that might be so. While many chapters in the book describe previously declared positions of the authors, there is also much that is new in the book, particularly with respect to non-prison sanctions; whether veterans of the field or newcomers to it, readers should find this collection of the area’s leading scholars extremely useful. As the primary Reporter for the recently complete revisions to the Model Penal Code’s sentencing provisions and director of the Robina Institute of Criminal Law and Criminal Justice at Minnesota Law School, editor Kevin Reitz is ideally situated to bring this impressive compendium of material together.

In the opening chapter, Reitz lays out the reason for the book, describing the well-known American mass punishment phenomenon in ways that present the problem in a new light. For instance, he notes that the U.S. would have to release 1.8 million inmates simply to achieve the same imprisonment rate as England and Wales, western Europe’s leader in per capita imprisonment. Whether the focus is long-term confinement, the use of probation and parole, or the imposition of collateral consequences, Reitz notes, we “beat” all western European countries hands-down.

Perhaps the most eye-opening part of the book are the three chapters discussing the latter aspects of the American-European comparison. Edward Rhine and Faye Taxman document that the U.S. probation population is seven times that of Europe, making clear that Europe does not substitute probation for prison but is much more parsimonious than the U.S. with respect to both types of intervention. The authors also point out that, compared to Europe, the U.S. approach to probation tends to be more surveillance- and risk management-oriented, as well as longer, more restrictive, and more prolix in its conditions. Dirk van Zyl Smit and Alexandro Corda find the same to be true of parole, and further note that while in Europe parole is used as a mechanism for early release, in many American states it is now simply a means of supervising offenders after they have served their judicially-mandated prison time. Finally, Nora Demleitner describes the significant contrast between our willingness to recognize literally hundreds of collateral consequences to a conviction (ranging from loss of the right to vote to disqualification for welfare), and the many European regimes that view such consequences as unjustified punishment and degrading to the dignity of the offender.

Two other chapters in the book also focus primarily on the question of how, rather than why, the U.S. is different. David Garland examines the most glaring difference: the U.S. has the death penalty, while Europe and most of the rest of the West does not. But he also reminds us that an increasing number of American states do not permit death sentences, and that Europe itself countenanced capital punishment in the not too-distant past. He concludes that the U.S. is an “anomaly” but not an “exception” to the general western trend toward abolition of the ultimate sanction. Similarly, Frank Zimring’s chapter notes that, even with respect to punishment more generally, some states’ incarceration practices are closer to those in Europe than to the average American state. But neither author denies the relative punitiveness of U.S. criminal justice overall.

The other chapters in the book focus on why that is the case. Some identify aspects of the criminal justice system itself as the cause of America’s high imprisonment rates. A primary culprit in Reitz’ eyes, for instance, is the risk averse attitudes of U.S. parole boards, institutions that still reign in a number of states. Cheryl Webster and Anthony Doob

suggest that another culprit is American “optimism” about penal policies; comparing the U.S. to Canada rather than Europe, they argue that one reason imprisonment rates have stayed relatively stable in Canada is that the polity in that country is much less likely to attribute efficacy to either prison or rehabilitation as a crime prevention strategy.

Other authors look beyond the criminal justice system for causes. In their chapter, Nicola Lacey and David Soskice elaborate on a diagnosis that Lacey has advanced in other work: they argue that America’s massive and racially-disproportionate punishment system is largely the result of the U.S.’s unique aggressively decentralized decision-making infrastructure, which is more likely to create polarizing dynamics than Europe’s nationally-oriented politics. Tapio Lappi-Seppala takes a broad scope as well, attempting to test multiple hypotheses about the American punishment rate through statistical comparisons between a number of countries as well as the separate American states. He examines the effects of crime (homicide rates and general crime rates), demographics (racial makeup, geography, and population homogeneity), politics (social welfare policies, trust in government, and election of judges), and a number of other variables, and finds that while some combinations of these factors explain upwards of 60% of the variance between countries or states, identifying any particular complex of causes for our punitive practices is extremely difficult.

Many of the authors zero in on whether there is something about the nature of crime in the United States that provides insight into its punitiveness. Reitz asserts that while the U.S. does not have more “general crime” than other Western societies, it has more serious crime—which Reitz defines as homicides, near-homicides, and serious woundings—than any of them, and suggests that this difference is one reason for our heightened imprisonment rate. That view is echoed by Zelia Gallo, Lacey and Soskice, who provide solid data indicating that, while homicide rates in the U.S. may not differ that much from homicide rates in some countries, the risk of victimization by *some* sort of violent crime is much higher in the U.S., so much so that “one might reasonably suggest that violence represents a qualitatively as well as a quantitatively different social phenomenon.” (P. 354.) Lisa Miller also insists that violent crime and its politicization often occur in tandem, and argues—echoing the claim made by Lacey and Soskice—that when such politicization occurs, the localized nature of American democracy creates many “veto points” that block social welfare solutions to crime.

In contrast, Lappi-Seppala’s analysis of the data leads him to conclude that, “in global comparison, the extraordinarily high U.S. incarceration rate cannot be explained by a higher victimization rate or by a higher homicide rate.” (P. 256.) Randolph Roth reaches a similar conclusion after canvassing longer-term American historical trends, among them that neither homicide rates nor imprisonment rates were very high during much of the early history of the republic, and that American authorities were relatively lenient, at least toward white offenders, until as late as the 1970s even after homicide rates rose. Neither of these authors directly contest the notion that the U.S. is saddled with more violent crime overall, however.

Although all of the authors appear to believe the United States is too punitive, none of the chapters offers in-depth prescriptions for change. But the book significantly furthers our understanding of American criminal justice exceptionalism and thus inevitably gestures toward the manifold ways something might be done about it.

Cite as: Christopher Slobogin, *How and Why is the American Punishment System “Exceptional”?*, JOTWELL (April 24, 2018) (reviewing Kevin Reitz, **American Exceptionalism in Crime and Punishment** (2018)), <https://crim.jotwell.com/how-and-why-is-the-american-punishment-system-exceptional/>.