

Day Two
Comparative Law

*Moderator: **Honorable Ricardo H. Hinojosa**, Chair, United States Sentencing Commission*

***Alvin J. Bronstein**, Director Emeritus, ACLU National Prison Project*

***Abbe Smith**, Co-Director, Criminal Justice Clinic and E. Barrett Prettyman Fellowship Program; Professor of Law, Georgetown University Law Center*

***Richard S. Frase**, Professor of Criminal Law, University of Minnesota Law School*

SUMMARY

This panel expanded the conversation by addressing what the United States federal court system might learn from other countries about how and when to implement alternatives to incarceration. The three panelists discussed their own research on this issue, as well as studies conducted by other academic and governmental entities. They focused their comparisons on the use of alternatives to imprisonment in Australia, Canada, Scandinavia, and Germany.

Among the specific examples provided by the panelists were Australia's use of restorative justice techniques (originally modeled after the criminal justice norms of New Zealand's indigenous population) in juvenile and some adult cases, practiced with significant variation by states throughout the country; Canada's enactment of legislation implementing several sentencing options, including diversion, restorative justice, drug courts, conditional discharge, and fines in lieu of incarceration; and the use of sliding-scale day fines in Germany. In some countries, such as Canada, alternatives to incarceration are available to noncitizens as well as to citizens.

In several countries, implementation of these alternatives sprang from intentional policy changes, the goal of which was to reduce incarceration rates. In addition to implementing alternative sentencing options, certain Scandinavian countries also limited construction of prison bed space and designed prisons with a focus on reentry into the community rather than on retribution. Several prisons in Scandinavia seek to emulate real life as a way of preparing inmates for return to the community and seek to reduce recidivism by establishing programs (such as conjugal visits and overnight furloughs) to maintain ties between inmates and their families. In Norway, if there are no beds available when a person is sentenced, he or she will receive a number and be instructed to wait—sometimes for several months—until bed space becomes available. In order to staff the implementation of alternatives to incarceration, and to better facilitate reentry into the community after imprisonment, several countries have also worked to decrease the number of individuals supervised by each probation officer. In Canada, most officers now have caseloads of 20–25 persons, and Swedish probation officers have average caseloads of approximately ten people.

COMPARATIVE LAW

[Introductions given and presentations begun. Transcriber's equipment failed.]

PROFESSOR SMITH: We know some things about school factors, poor performance, attitude, academic failure. We know something about peer group factors, weak social ties, anti-social delinquent peers, gang membership. We know something about the communities which kids may come from, the high-based crime and drugs in those neighborhoods, the level of neighborhood disorganization.

Instead of grappling in this country with those causal factors, starting in the 1980s, around the time I began my career as a criminal defense lawyer, the public immediately began to clamor for harsher and harsher punishment of juveniles. Many states have [inaudible] punitive laws, including mandatory sentences and automatic waivers to adult court for certain crimes. In the 1990s, this tough-on-crime trend accelerated, and in many states made it easier to transfer juvenile offenders to the criminal justice system and the court process, and in detention there is much more emphasis on punishment and less emphasis on rehabilitation. So the restorative justice alternative, which is what I want to talk about and which very much is that down-under phenomenon, having originated in New Zealand and now developed in Australia.

The [basis] of restorative justice is that it is a problem-solving approach to crime which involves the parties themselves, the community generally, and an active relationship with statutory agencies. The principles include personal involvement, making room for the personal involvement of those who are centrally concerned, particularly the offender and the victim, but also family members of the offender, family members of the victim, community members. Social context is an important part of restorative justice, seeing crime problems within their social context, including the factors I just rattled off that we all know correlate to juvenile [inaudible] and these crimes.

Prevention, a forward-looking model or preventative problem-solving orientation to stop crime from happening in the future and stop reoffending from happening, and flexibility, the flexibility of focusing on direct [inaudible] contrast to things like mandatory minimum sentencing and guideline sentencing.

The practice of restorative justice and the schemes that exist in Australia can include any of the following: diversion from court prosecution (*i.e.*, a separate process for determining justice which is generally police controlled), actions taken in parallel with court decisions. (for example, the [inaudible] to health, education and [inaudible] assessments and so on), and meetings between the victims and offenders at any stage in the criminal process, that is, shortly after the arrest, in the court process, presentence or post-release from some detention facility.

As I said, the origins of restorative justice come from New Zealand. In 1989, New Zealand passed the Children, Young Persons, and Their Families Act with a goal of creating a culturally sensitive criminal process incorporating Maori traditions—those are the people who are native to New Zealand—of involving family and the community and addressing wrongdoing. The scheme relies heavily on informal sanctions and one of the main goals is to divert juveniles from the courts to avoid criminal records and labeling. Stigmatizing, and perhaps the shame that follows young people can sometimes be related to future criminality.

Then John Braithwaite, who is kind of internationally known as the scholar of restorative justice, began writing in the area and conducting research starting in the early 1990s. He published his book *Crime, Shame and Reintegration* in 1988 in which he described an alternative to traditional methods of dealing with criminal offenders. In particular, his approach is called “reintegrative shaming,” which involves friends and family of the offender, the consequences [inaudible], and allowing for the expression of remorse on the part of the offender so that the offender can reintegrate into society.

Braithwaite distinguished stigmatizing from the kind of reintegrative shaming that he had in mind and he defines the latter as disapproval focused on wrongdoing as opposed to on wrongdoers. [inaudible] model that mimics that, and the kind of shaming that’s finite and [inaudible] at a certain point, and it’s followed by gestures of forgiveness and acceptance; we accept it as a society, and throughout which the offender is treated with respect and love.

Conferencing, as it’s sometimes called in Australia, as a typical alternative to the term restorative justice, first came into being in New South Wales, which is a state in Australia. I’ll show you where Sydney is located, and the first model in Australia was called the Wagga-Wagga Model. In 1991, a couple of Australian police officers were kind of pioneers in that they wanted to use family members in particular to do some conferencing in order to avoid placing juveniles into the juvenile delinquency or criminal justice system.

And so they began adapting to the New Zealand models, working with kids in order to kind of stop the process post-arrest. The Wagga-Wagga model differed from New Zealand in that the New Zealand family conferences are managed and run by the Department of Welfare, by social workers. And the ones that first began in Australia in New South Wales were police administered, and, thus, the good news is that they were diversionary. They stopped a kid from entering the system, and the new bad news is that, you know, are the police the proper folks to run an alternative to incarceration model?

The conference protocols were basic, and they remain in most states and territories in Australia; they tend to talk about what happened. They talk about what they were thinking. They acknowledge who was affected by what they did, followed by the victims and the victims’ supporters, followed by the defendant’s family and supporters, and community members.

Their discussions focus on what needs to happen to make things right, and all the participants are given an informal opportunity to talk while a facilitator helps conduct the discussion and prepares a written document.

An evaluation of the first two years of the Wagga-Wagga model undertaken by a couple of researchers in 1994 revealed some very encouraging findings. There was a 50-percent reduction in young offenders before the court, 93 percent offender compliance with conference agreements, very high levels of victim participation and reported victim satisfaction, an apparent reduction in recidivism of approximately 30 percent, and also some high levels of police satisfaction who felt they were doing something more than simply arresting young people. How much time do I have left?

CHAIR HINOJOSA: As long as you want.

PROFESSOR SMITH: Okay. I’m not going to take that long.

CHAIR HINOJOSA: No. I said that because you told me you had to be done in 15 minutes.

PROFESSOR SMITH: Yes, okay, I know. I have a judge breathing down my back. Okay. Legislative schemes. The debate arose in the early 1990s in Australia about the merits of police-run versus non-police run models of restorative justice, meaning police-run versus any court, and the juvenile court in particular, but also there are some states and territories in Australia that use these methods for cases other than juvenile cases, young adults. They're not always different property crimes. Sometimes they're crimes of violence, crimes against persons.

Although some states—originally in some territories, Tasmania, the northern territory, and Queensland—first began restorative justice projects in a police-run model, though more and more there are legislative teams. In the middle 1990s, there were parliamentary inquiries in New South Wales, Sidney, and South Australia to address the perceived problem of increasing juvenile offending and to consider more effective approaches to juvenile justice, so what Australia was doing was, instead of reacting to a perceived rise in juvenile crime and serious juvenile crime, which also was maybe sort of trumpeted in the media, instead of harsher punishment, instead of transferring kids to adult court, they were instead experimenting with these alternatives to incarceration models.

For example, in South Australia, conference administration was originally, and is now, located within the Youth Court, not the police. Conferences are managed and run by civilian staff recruited and trained to convene these conferences. In Western Australia, young people charged with minor offenses can go [to] conferencing as a diversion from court processing with referrals [inaudible] and youth court. There are all kinds of variables in Australia. It's a huge country. States and territories have different ways of doing things. But let me just kind of share the following, you know, variances.

First, jurisdictions vary in the length of time to complete an outcome, and this can range from six weeks in Western Australia in practice, although not stipulated necessarily in the legislation that it's that period of time, to six months in New South Wales, which can also be extended to 12 months in South Australia.

The sanctions or reparations that are made as part of the agreements include verbal and written apologies by the young offenders, paying some sort of money compensation, working for the victim or doing some other form of community work, attending counseling sessions, and so on.

Second, while all jurisdictions prefer that the outcome of these conferencing sessions be by consensus, they differ on which people at a minimum must agree to it. For example, in South Australia, the young person and the police officer must at a minimum agree to whatever the agreement is. In New South Wales, which is also a jurisdiction where the police officer involved in the case may not be present, the young person and the victim must agree to any proposed outcome or plan. In Queensland, where Brisbane is located, the young person, victim, and police officer must all agree on the outcome. In all jurisdictions the outcome of these conferencing sessions is legally binding.

Third, jurisdictions, of course, vary in the kinds of offenses that can be conferenced or for which there is a restorative justice system, including a substantial proportion of jurisdictions that allow violent offenses, including serious assaults and some sexual assaults. In 2003, approximately 17 percent of all [inaudible] family conferences [involved], for example, crimes against persons, what we call violent crimes here.

In New South Wales, offenses that include causing the death of a person, serious sexual assault, serious drug offenses, breaches of aggravated violence, or some trafficking offenses are not covered by the Act, but in Queensland and Tasmania, there are no upper limits on the types of offenses that can be referred to a conference. There are other examples from other states and territories.

Measures of success. The problem of restorative justice—and I actually like the model. I think there's a lot to learn from the model, especially for young people. I don't just mean people under the age of 18. I mean young people during high-crime years [inaudible] there isn't enough study yet, in particular, of recidivism and of impact on communities, but that's at least being undertaken in Australia in a number of states and territories.

Likewise, with the [inaudible] participant satisfaction, which I think is, frankly, very important especially for young people. If young people feel that they've been active and legitimate participants in their own fate, I think a developmental psychologist would say that they'll invest more in it, and so I think that has yet to be studied.

There are [many] criticisms of restorative justice programs. Aside from the fact that there hasn't been the kind of thorough collection of data as there might be, it's the same sort of criticism that, had I been able to attend the rest of this symposium, I probably would have offered up. It's the same criticism that many of us, particularly perhaps in the criminal defense bar—civil libertarians, have with problem-solving courts, therapeutic justice programs and the like.

That is, instead of providing proper rehabilitative resources, treatment programs, work training opportunities, as part of a disposition or sentencing, defendants are required to give up fundamental Constitutional—or in Australia, not constitutional, just fundamental rights, and sometimes they end up incarcerated anyhow if the agreements don't turn out, if the problem-solving courts don't work to the satisfaction of those who run them, or if therapeutic justice techniques don't completely turn around the kind of life history of an individual.

On the other hand, I would say this about restorative justice. There's an amazingly wide range of political support for these programs. From the right these programs seem to attract—I don't mean for this to sound the way it sounds—religious leaders who are attracted to these kinds of programs because they include some personal responsibility and because they seem morally superior, more humane. I mean religious people from the right or from the left.

Conservative advocates like restorative justice because it emphasizes family values and victims' rights. Especially in those jurisdictions that require consensus from everybody, there's a real victim's right, a victim voice piece of that. And liberals view restorative justice as individually empowering and a less repressive, less punitive response to crime, so there actually, I think, is some potential, politically, in this country for those kinds of approaches.

Because of serious problems with juvenile crime and the way we're now approaching juveniles, there's particularly that concern, and I think it bears repeating. More than 2,000 people are incarcerated in this country for crimes they committed while they were juveniles, and they have no prospect of release. That's the way we're dealing with young people committing crimes in this country. I think that suggests that prevailing approaches or policies that recognize the underlying causes of juvenile crime and youth

crime are needed. I think Australia's experience with restorative justice may at least give us some guidance and new ideas for approaching our own problems. Thank you.

CHAIR HINOJOSA: Professor Smith, I know you have to leave, but if you don't mind, just a couple of quick questions. In the Australian model involving juveniles, if the victims do not agree to show up or don't agree with the conference, what is the outcome there?

PROFESSOR SMITH: Likely that it wouldn't happen. There needs to be—

CHAIR HINOJOSA: So then they go to the regular court system?

PROFESSOR SMITH: Correct.

CHAIR HINOJOSA: So if a victim decides, "I don't want to participate," then it will go to the regular court system?

PROFESSOR SMITH: That's right, but part of the program, as I understand it, although there are variations between states and territories, there's a lot of encouragement for it, and it's becoming more and more a part of the practice of law there, especially with regard to juveniles. And so, victims are being urged.

PROFESSOR BRONSTEIN: In Canada—if I may, in Canada, where the government makes a great effort to involve the victims, what [inaudible] benefits that they can derive from being part of this conference [inaudible] sort of provide a solution other than just having that person locked up in prison for 30 years.

CHAIR HINOJOSA: And I know that the term "victimless crime" is often used in the United States, and I guess there are those who argue that there is no [victimless crime] because society is ultimately a victim, but what some might call a "victimless crime," how does the—

PROFESSOR SMITH: The police officer becomes the—

CHAIR HINOJOSA: The representative of —

PROFESSOR SMITH: Exactly. And a lot of times—you know, a lot of juvenile crime, frankly, isn't the kind of crime where there would only be a police officer's testimony for minor [audible] or public disturbances or drinking in public or that sort of thing, so it's the police officer who has the conversation.

CHAIR HINOJOSA: Does anybody else have any other questions before Professor Smith leaves? Yes?

QUESTIONER: Yes. You said that possibly some political [audible] was the problem, which I guess I'm skeptical about. But I mean, my only time concern is I think we're at a time right now when you're looking at other issues, whether it's health care or stuff like that, you have [inaudible] you're especially referring to possible help from the conservative leaders, but there's a lot of talk of, "Well, you guys are trying to make the country seem like the rest of Europe, and we've got to make sure America

stays America,” so how do you present the plan that would get some political support, political movement, without the kinds of backlash like, “You’re trying to change us like the rest of the world?”

PROFESSOR SMITH: Probably this is way beyond my area of expertise, but I think that it can’t come from above. I think the courthouses have the resources already to try these alternative programs. And I think there’s some success. Any number of states already have conferences, especially for juveniles, and I think if we began with a little more serious collection of the data of those programs that would be helpful. But I think courts can do it with the money that they already have unless [inaudible] sell it as a uniquely American project. Why not? If it reduces recidivism, that’s the selling point, and then there are teachers who just kind of enhance that approach, so—especially the kind of juveniles and young people in general buying in as a way that they stop recidivism, and the more meaningful avenue for victims and family members of victims—

CHAIR HINOJOSA: Professor Smith, you’ve quoted that a number of juveniles in the United States get heavy sentences and I think—

PROFESSOR SMITH: Yes. I think 2,228.

CHAIR HINOJOSA: And then you quoted the other figure of 12. Where does one go to find the other figure? I can understand where you might compile the one in the United States, but where—

PROFESSOR SMITH: How did I find that 12? Several different resources—research, Tanzania, Israel, South Africa. One of the countries [inaudible] life without the possibility of parole for juveniles. You’re right, because there are other countries that do it as a result of practice.

PROFESSOR BRONSTEIN: Well, you can get all that data from the International Center for Prison Studies. The web site is www.prisonstudies.org. This is the International Center for Prison Studies at Kings College in London, a very large research organization created by the Prison Service (Her Majesty’s Prison Service, originally). [Inaudible.] There are two sides of this—you can get all that information there.

PROFESSOR SMITH: I mean this is hard to know, because not every country collects that kind of data, and even—for whatever reason, that’s the prevailing figure.

CHAIR HINOJOSA: Okay. Professor Bronstein?

PROFESSOR BRONSTEIN: I’m going to stand because there are some very weird noises behind this door and my fantasy is that it’s the former prison director of the Moscow Central Jail who, when I toured the facility in early 1991—I criticized him publicly about the fact that they served three meals a day to the prisoners and always the same meal, potato soup, and my fantasy is he’s following me around the world with a gigantic can of potato soup. He’s out there about to dump it on me, and I don’t want to be sitting when he comes through, so if you don’t mind, I’m going to stand up here.

CHAIR HINOJOSA: Actually I think he has tortillas. That’s what he had for lunch.

PROFESSOR BRONSTEIN: Well, Professor Smith covered restorative justice, so I don’t have to do that. I’m going to focus primarily on one of the Canadian systems. I do want to mention a few things

first. You all know about our outrageous incarceration figures in this country. We have about 750 per 100,000 population. The ICPS figures I mentioned before will give you the per capita for every country in the world, and, with the exception of Russia which is now at about 650, nobody else is close. So, you know, the countries that are most similar to us in Western Europe are all between 60 and 128 per 100,000. Canada—which I'm going to talk about some—is now 113 per 100,000, and we're at 750 per 100,000.

And I just want to mention why I think that's happening in this country. I think our policy of incarceration is driven not by crime rates. For example, today you are safer from the street crimes that you worry about, say car theft and mugging, pick-pocketing, assault on the street. You're safer [here than] in Madrid, London, Rome or Paris. You're safer in Washington, New York, San Francisco, and Chicago than you are in those four major European capitals. They have more street crime there than we have here.

But—incarceration policy, I think is money, the profitability. It's a huge business. It's not just the prisons and the private prison industry, but the medical providers who—for profit, medical providers, two big ones that are making hundreds of millions of dollars a year, the food services, everything else—the advantages they hold out to these rural towns, "Get a private prison here and you'll solve your unemployment problem." That's what driving our policy here.

The press is part of it, too. The ACLU folks in New York don't like me to say this, but I'd like to put a muzzle on some of the press. When I travel around the country, the lead story on every local news broadcast, the opening story, is always a crime. If you look at the local section of the newspapers, it is always on crime. And you talk to people in the press. You say, "Why do you do that?" They say, "Crime sells." The public loves to find out and hear about it, and if they see it on the newsstand they buy the thing. So that's what's driving our incarceration rates.

Our incarceration rates increased most dramatically during the period when our crime rates were going down. You know, between 1985 and 1995, crime rates were going down because of demographics. We have the smallest at risk population, males between 15 and 25, than we've ever had in this country, and crime is going down, and yet incarceration is going up because there's a lot of money in it.

Having said that, let me talk about some other things. Briefly, let me talk about the ten countries, not in any detail, but they assume that prisons damage people. Therefore, they want to make them as much like the real world as possible and use them as little as possible. If you get convicted of a crime today in Norway, you will get a number and that will tell you that you have to wait about six months, and we'll call you when we have a bed. They will not build any more prisons in Norway because they think it's a bad investment of their resources.

In all the Scandinavian countries, they have two kinds of prisons, the closed prisons which look like our prisons except they're much smaller. The large maximum security prison in Denmark has 96 beds and Sweden has 250 beds. They don't build prisons there with 3,000 to 4,000 beds the way we do.

But most of their prisons are what we call open prisons. They're in the local cities and towns, and the people who are committed to those are people from those cities and towns so they can have visiting, including conjugal visits. They can have overnight furloughs. They recognize that one of the things that most [impacts] recidivism, and we recognize that here, too, is the ability to maintain close family ties. We're doing everything to destroy family ties.

Our prisons are located—if you’re not shipped out of state to a private prison—I have 65 women from Hawaii who are serving their time in Corrections Cooperation of America, a prison in Frankfurt, Kentucky. Think family will be visiting? No, none of them have any visitors. The people can’t afford to come from Honolulu or any of the other islands to Kentucky. They visit for 30 minutes every two weeks on a three-inch square camera video thing. The kids are in a church back in Hawaii, and the women are imprisoned in Kentucky. Everything is counterproductive. If we don’t ship them out of state, we have our prisons in the most remote areas. All the New York prisons, most of the people in prison in New York, are from New York City. The prisons are up near the Canadian border, up around Plattsburgh and the lake district. We just do everything backwards here.

Let me talk about Canada now before I run out of time. Canada is the one country, and I’ve prepared something [similar to what] Dr. Smith said. I usually get confronted when I talk about other countries. They say, “Well, Sweden is a small country. All the people are the same. They have no immigrants,” which is not true. They have a significant African population, African-Swedish. They have a significant group of refugees from Yugoslavia, but they haven’t changed their policies.

And, you know, Canada is a country that is very much like us. It’s a young country. They have a significant immigrant population. They have a significant black population, a very significant Aboriginal population, as we have. Almost everything’s the same. They have a provincial federal system. They have provincial jails and federal jails. But about 15 years ago, they realized that their incarceration rate was approaching 130 per 100,000, which is at the high end of Western Europe. They don’t compare themselves to us because they think we’re hopeless. They compare themselves to the progressive countries in Western Europe.

And they didn’t want to be that high. The people would think, “We’re like the Americans, like the United States.” So they enacted a whole series of legislation in 1996, which I will cover in a moment, and they’ve gotten their incarceration down to 113 per 100,000, and that is 1/6 of ours. Their crime rates are very similar with the exception of homicides with handguns. They have very strict handgun control. Mr. Scalia, I want you to hear that. They have very strict handgun control there. Their homicide rate has gone down every year since they abolished the death penalty, according to [an official in the Department of Justice in] Canada. But the crimes otherwise are very similar. Everything else is very similar to ours. But they just on principle decided they did not want to lock up that many people. It just is counterproductive. It costs a lot of money and injures people.

So they have developed a whole system of what they call sentencing options. Very briefly, one is diversion. They divert youth or adult offenders away from the formal criminal justice system, the kinds of things that Abbe was talking about a little while ago. It’s often initiated by the police or the crime attorney, the prosecutor, and can occur at the pre- or post-charge state, but usually prior to a court appearance.

Then they have an alternative, the Youth, Criminal Justice Act which says there are all kinds of alternatives to incarceration for all the youths. They have a restorative justice initiative which we’re elaborating on—they do that intensively, particularly with the aboriginal population in the western half of the country.

They have drug court projects just as we do. They have conditional and absolute discharge. If a person pleads guilty and is convicted of an offense for which there’s no minimum punishment, a

maximum punishment of under 14 years, the code lets the court direct that the offender be discharged absolutely or conditionally subject to completing probation with conditions, sort of the kinds of things that we're beginning to look at in this country now with our restoration of rights, the Second Chance Act, and so on, but there it happens automatically.

They have a system of fines where they avoid incarceration by the use of fines. They can sometimes stipulate a period of imprisonment to be served in default of payment of a fine, but they [inaudible] when they do not. Restitution is another major thing. Probation. We have all of these, but our probation program in this country, it's really a joke. In Sweden, for example, or in most Canadian cities, probation officers have a caseload of 20 to 25. In Sweden, it's ten, and every probation officer has ten graduate students in social work who are assigned as interns, and every probationer has a one-to-one relationship with someone. In this country, in most major cities, including the District of Columbia, the caseload is a load of 100, 150 probationers. All they can do is play cop and report their failure to notify them of a change of address. Bingo, they're back in prison—people going back to prison in California. They're on probation violations, and they're hugely overcrowded, as you may have been reading about in the paper, the controversy about whether they should have private prisons or not, but in the meantime they're shipping them out of state.

But the other interesting thing that they started in 1998 was something called a conditional sentence. I have a whole other paper on that. Let me get to it. Everyone who has been convicted of an offense, except an offense punishable by a minimum term of imprisonment, where the court imposes a sentence of less than two years, can serve the sentence in the community instead of in jail, and that's called a conditional sentence. You serve your sentence in the community if the court is satisfied that such a sentence would not endanger the safety of the community and would be consistent with the fundamental purposes and principles set out in the criminal code. They can supervise the offender in the community, subject to the offender's complying with conditions, and so on. In the first two years of this sentencing option being available, they had 28,000 conditional sentences with a default rate of less than one percent.

Mandatory minimums. They find that that's a costly, ineffective way [inaudible]. The government frequently receives pressure from the media and opposition from [inaudible] AGs to introduce new mandatory minimum penalty penalties, and they refuse to do that consistently. Mandatory penalties, they find, have well-documented, negative impacts on the criminal justice system. Apart from increasing rates of incarceration, mentioned above, increasing rates of incarceration are perceived by the government as being a negative, you know, something that is wrong or something that's bad. Here we almost relish—I think some of our politicians are proud of the fact that we're the—we have the highest rate of incarceration, but being incarcerated in this country, 25 percent of the world's jail and prison population with less than five percent of the overall population, we have one fourth of the jail and prison population. That's shameful to me, an embarrassment, but to many people down the street on Capitol Hill, they're proud of it. They think it's great, we're doing the right thing.

[Inaudible.] I'm sure that, in fact, it increases the number of charges going to trial and causes significant dissatisfaction among defense counsel and prosecutors.

I know the complete history of what's going on in Canada is available. I'll be glad to give you a place where you can get all of this Canadian information from me. A colleague of mine is in the Attorney General's Office there. He's in charge of sentencing changes and sentencing history in the Canadian system. He provided me with these various papers which I think are very useful. I think I will stop there

and see if there are any questions.

CHAIR HINOJOSA: We'll go ahead and go with Professor Frase, and then we'll open it up for questions.

PROFESSOR BRONSTEIN: Okay.

CHAIR HINOJOSA: Thank you, Professor Bronstein.

PROFESSOR FRASE: Well, first of all, I want to thank the Commission for inviting me to participate and to be here. It's an important and timely conference.

I just want to add as a preliminary to who I am and where I come from to the introduction, which you might have noticed mentioned that one of the courses I teach is the defense clinic. That's been for four years, but for over 25 years, I've done prosecution clinics and I think of myself—I try to think of myself as somebody who looks at all sides of the question and I think, as you'll see in my remarks here, that's important in using data and especially in international comparisons because there's a healthy degree of skepticism about people who throw around numbers and you think, "Oh, yeah, you're just, you know [providing] numbers, and you're not asking the hard questions." I do try to ask the hard questions. I think we have to. And I think we have to recognize the limits of the data.

I will page through these Powerpoints. They are on your CDs. My apologies if they're a little bit rough in places. I'm a hard copy kind of guy, and I had to rush this into production for getting it on your CD. So first I'm going to start with a quick overview of the international situation. I got this data on June 12th.

So basically there are three charts here. It says the United States versus higher rates in Europe and then lower rates in Europe, and then a few selected other countries. I hope you can see this here and there. I guess one of the first things to notice is that England and Wales has one of the higher rates in Europe, and there's a theory that common law countries tend to have higher custody rates, which is an interesting theory. I'm not quite sure why that is.

We get into the lower rates in Europe. I'm going to be talking primarily about Germany. I've done some work on France, but, as you'll see, they're both relatively low-incarceration-rate jurisdictions in the European context, very low compared to the United States. France doesn't have as good data as Germany does, so it's a little harder to know what's going on there except the bottom line. They have relatively few people locked up.

And these are, as I understand it, all people locked up, people in what we would call jails as well as prisons. Foreign countries don't make that distinction, including pretrial as well as sentenced offenders, and you have to include everybody even if your interest is in sentencing because people may spend most of their sentence as a pretrial prisoner and never get counted as sentenced to prison.

Notice the Scandinavian countries. They are way at the end of this list. As was mentioned, they have a very different attitude towards incarceration than we do. One thing to notice, Finland, near the bottom of this list—it used to have much higher incarceration rates. They decided at some point, "We're out of line, not just with Europe, we're out of line with the other Scandinavian countries. We don't want

to be the punitive one,” so they took deliberate measures to bring their incarceration rates down. So things can change if there’s a will to do it and sometimes from international comparisons. Maybe we should look at Canada and be embarrassed.

So, anyway, the summary here is that these systems are much lower than the U.S. in their incarceration rates and [there has been] relatively little change in recent years. I mentioned Finland came down. The Netherlands went up, although it’s still way, way low compared to the U.S. and sort of midway in Europe.

The selected other countries, it’s just to point out that this is in four different continents. We’ve got four African countries spread from the top to the bottom there, so there’s no real pattern there. Notice that in the Western Hemisphere we’ve got a couple of South American countries, fairly high, Canada fairly low, and from the middle to the bottom of the list, we’ve got three Asian countries. Some people—you’ve heard about Japan having low incarceration rates, but it’s also in China and India.

So, anyway, the bottom line of all of this, as Bronstein said and many people have said, we have dramatically higher incarceration rates in the United States than in the rest of the world, including countries that we really compare ourselves to.

But the question is, “What does that actually reflect, and is it comparative?” A skeptic would say, “Well, you know, Americans have higher crime rates and especially higher violent crime rates so, of course, we lock up more people.” So one has to sort of look at the volume and the nature of crime in different countries and, more particularly, you’d want to look at the caseloads in those systems because even if two countries have the same crime rate, they may not have the same criminal court caseload. More cases may find their way to the conviction or sentencing stage and become eligible for incarceration. So we have to unpack some of these numbers.

So, as I said, I’m going to focus on Germany. I’m going to basically be working off of a paper I did while working one summer at the Max Planck Institute in Freiburg, Germany, and that paper is on your CDs. I focused on Germany because it’s got very good data. I focused in particular on Germany on non-violent offenses because, first of all, as you’ll see in a minute, the greatest differences in sentencing policies between the U.S. and Germany are for non-violent offenses. Moreover, these are high volume in the United States, both in terms of who’s going into custody and who’s in custody on a given day, and non-violent offenses usually have much lower custody sentences, must more easily converted into non-custodial offenses, alternative sentencing, and it’s also more politically acceptable to use non-custodial sentences.

So, quickly, just to go through some earlier studies that James Lynch did, these two studies combined in this chart. The bottom line, there’s not that big a difference for homicide and robbery between Germany and the United States, especially when you look at the bottom line of frequency times duration. Burglary and theft, pretty substantial differences, much higher frequencies, so that’s 4.2 percent of persons charged with burglary or theft who got in-custody sentences. He expressed it as .4442, 4.2 percent, duration—average duration, 15.2 months. Multiply the two together, basically you’re treating a non-custody sentence at zero; you get an average custody sentence of .64 months for Germany and 1.36 months for the United States.

Notice again that you have to look at the bottom line. If you just look at duration, you'd say that Germany is more severe, but that's because they put so few people in custody for these offenses. So if you're only taking the most serious burglary and theft cases and putting them in custody, the average duration of those custody sentences is going to be higher, but, nevertheless, not that much higher. And when you multiply the two together in frequency and duration, the U.S. is considerably more severe.

A similar study by Floyd Feeney used two different bases because it's difficult to make comparisons given the available data and the different categories of [convictions]. One was suspects or arrests and the other was people convicted of each of these crimes. Again, bottom line, burglary, serious theft, drug offenses, much lower incarceration rates, and for robbery and aggravated assault, lower, but that—arguably, that could be, at least in part, reflecting offense details. Bronstein said we have a lot more guns floating around in this country. A lot more robberies involve guns. That's right. Those are the comparisons for 1993. Germany: 1993 data; U.S: 1992 to '93. This was based on a 1998 study [inaudible]. All right. So getting to my study, and these converted to Powerpoint are all—all these tables are simplified and formatted. In some cases, slightly corrected or made clearer. So basically this was the most recent data that were available. I looked at more recent years quickly after I put this on the CD, basically the same patterns in Germany and in the United States except that in the United States, state and federal sentences have actually become even more severe since 1996 except for state drug sentences, which I'll get to in a minute, and there seems to have been a slight turnaround on that. Everything else has either held the same or gotten even worse.

The footnotes show that—in asterisks, a number of these offense categories are probably not comparable. But burglary and serious theft are the closest comparability. I mean here we have incarceration rates higher for the U.S. than Germany. Now the fine category here, that's the [inaudible] that means that person got only a fine in Germany, and that's almost always a day fine.

A day fine, as you may know, is where we set the number of fine units proportionate to the seriousness of the crime, and the value of that fine unit is based on a person's net income. So you multiply them for fine units times the value of each unit and those values scaled to the means of the offenders, so a rich offender pays the same number of fine units but a much higher dollar amount. An indigent person with very little money pays a much lower amount, but relative to his income, that still hurts.

So the idea is it's affordable on the down end and it's punitive on the high end because everybody's paying a fine that's proportionate to his or her ability to pay as well as to the seriousness of the crime. So they are making pretty heavy use of fine only, and this is an understatement of the number of fines because many of these probation cases also involve fines. And there's not published data on that, but some in-depth studies have suggested that about half of the people on probation for many of these crimes are getting fines as a condition of probation.

So we're really seeing a heavy use of fines, particularly for property and drug offenses. Same thing here, high percentage of fines. Drunk driving, very high percentages of fines, and that would be even higher. As the footnote indicates, a lot of these Germany drunk-driving cases are charged as non-criminal and fine-only violations. We don't have good data on them, but if you threw them in, they'd inflate the denominator, the number of cases, and they'd all be fines in the numerator, so you'd have an even higher percentage of fines.

The American figure for drunk driving is based on a limited number of jurisdictions that have published data but, nevertheless, given that there's only two percent incarceration at most and actually considerably less for Germany, and stateside found at least ten percent in the U.S., I think it's safe to say that is also a much higher use of incarceration in the United States than Germany.

So, anyway, bottom line, there is much greater use of fines, much less use of incarceration, crime by crime, controlling for the crime category, but the skeptics would say, "Well, maybe you're not comparing apples and apfel." You may remember from the first slide the subtitle of my paper is *Comparing Apfel With Apples*, the German word for apples, and we want to make sure that we're really comparing the same thing.

In particular, if you know a little bit about German criminal justice, enough to be dangerous, as we say, you would know that German prosecutors don't have as much discretion to screen cases as American prosecutors do. So maybe a lot of weak cases are surviving the sentencing stage and, therefore, of course, they get relatively mild sentences or watered down sentences, bargained down sentences or something. Maybe it's a screening problem.

A second problem [involves] other case factors within these categories; for example, maybe all of their drug cases are marijuana cases and all of ours are hard drugs, and all of theirs are possession and all of ours are dealing. So maybe there are differences in the cases, or maybe there are differences in the offenders. Their offenders are mostly first offenders, and our offenders have lengthy criminal records.

Well, all of these are things that one can look at with data, and so I did try to look at that, and just quickly to look at the prosecution data. By the way, excluding the eastern states because they still don't have good data for the five states that were used in Germany.

So initial prosecution decisions, you can dismiss with conditions. That is like pretrial diversion. You can dismiss without conditions. That is just dismissed because it's not worth prosecuting. Both of these are assuming that there's adequate evidence. There's a category dismissed for lack of evidence and when the defendant died. So we're talking about pure discretion here in the first few, not just for evidence. And notice that those two figures together, about 677,000, are not that much less than the number of people who were chosen for prosecution. So here we have prosecutors in Germany, despite legal restrictions on their ability to decline prosecution, declining a lot of cases.

Next is [inaudible] and when he gets to court, some additional cases are dismissed with conditions, without conditions. At this point more of them are with conditions. Remember, before more of them were without conditions and the prosecutor made the decision. But in court more with conditions, a few more lack of evidence. If you add up all the people who are dismissed for non-evidence-based dismissals so that these top two asterisks plus the previous slide—the previous asterisk cases, you get over 800,000 people dismissed for non-evidence reasons, which is considerably higher than the number of [inaudible].

So, anyway, bottom line, there's a lot of screening going on, and it's not just for evidence. An awful lot of it is for policy reasons, just like in the United States. We don't have this data for the United States so we can't make direct comparisons, but we can at least say that there's a lot of screening going on. That's not an easy explanation for why sentencing [inaudible] get to the sentencing stage.

Police data on drug crimes, and this is for all of Germany, not just the eastern states, and the bottom line here is actually Germany has a higher proportion of trafficking cases at the police stage, at the point at which police investigate matters. So that's not suggesting that their cases are all [inaudible] cases. There are some differences by drug. But it does seem, as I read this data—here's a chart that's just by drug type, combining possession and trafficking. We had slightly more heroin and cocaine, slightly less marijuana, but not huge differences.

Now the volume of drug crimes differ in Germany and the United States. A higher percentage of cases coming into the police, coming into court, are drug cases in the United States. To some extent that may be drug use patterns. To some extent, it's buy and bust aggressive policing actions. But in terms of the cases that make it to [inaudible] that come in the front door and that make it to sentencing, it doesn't seem as if their cases are that milder.

By the way, the difference between Germany and the United States in the percentage of trafficking, that bears out at the conviction stages. If you go back to the chart that had drug cases, the numbers of cases that are possession, the number of cases that are dealing, there, too, at the conviction stage, Germany has a higher percentage of cases involving dealing than we have in the United States. So, again, it doesn't seem as if the kinds of drug cases are [equivalent].

Prior records. American defendants all have low prior records. Here we're going to compare again the western German states, and for the United States, unfortunately, all we have is data, for example, of the 75 largest counties, so it's not a whole, but this is the best evidence available. And the patterns of prior records are strikingly similar. When I saw this I thought one of these countries is just copying the data from the other one, you know, at the same time because how could they be so similar. So the percentage of defendants with at least one prior conviction, Germany and the U.S., is almost the same. The patterns presenting with one, two, three, four, five or more, actually more in Germany with five or more.

I'll skip over the thing at the bottom because it's not strictly comparable, but it's just two measures of the seriousness of prior convictions. There is no way with the data to make direct comparisons. The paper describes a little more of why I picked those two seriousness of prior convictions.

Theft, we're going to compare serious thefts, the U.S. felony theft. And, by the way, the all thefts category here, and I realize in updating this paper that they're mislabeled. It's the numbers that are right, but that category should be labeled non-serious theft, and it was not burglary, not serious theft, other theft, so the all-theft category doesn't include serious thefts, independent serious thefts.

But serious theft is the closest thing in Germany to American felony theft. We have no data in the United States on history and conviction, so we have to base all of our studies on the national law on felony sentences. Again, 67, 66, almost the same, very similar prior record patterns in terms of how many you've got. Again, Germany: the serious thefts [category] has got a slightly higher percent with five or more prior convictions. And, finally, drug offenses: a little bit more of a difference there, but quite similar. So the bottom line is it doesn't seem as if the difference in sentencing of American offenders [is because of] longer prior records. They're remarkably, strikingly similar.

So I guess the last chart that I will show here is the ultimate bottom line where, instead of looking at sentencing decisions coming out of courts by offense, we're going to look at the number of people in custody by offense. And then we need some sort of reasonable base for that because we don't have comparable conviction data for Germany and the United States, so we need another base. Different researchers have used different bases, but this one I use, a base similar to the one that Floyd Feeney used and, in fact, an earlier chart which was persons charged by the police. This tends to wash out differences in prosecutor charging, prosecutor plea bargaining, you know, people getting dropped out before they get the conviction and varying in different countries.

So we're going to compare the percent of people in custody, sentences for people in custody, as the percent of adults charged by police with that crime in the previous year, and for all of these crimes, much higher percentages in the U.S. than in Germany.

Another advantage of this sort of bottom line of people in custody relative to people charged is that you can get into custody not just directly out of a sentencing court. You can get there because you didn't pay your fine, and, of course, in a system like Germany with a lot of fines, what are they going to do if you don't pay your fine? Well, first they try to get you to do community service, and if that doesn't work they put you in jail. And so we want to know how many of those people are ending up in jail. The only way to measure that with the data is to look at the total number of people who end up in custody. We're also picking up parole release and parole revocation. The ultimate bottom line is how many bodies in custody by offense, measured in this case against the best available base which is adult suspects at the police stage, so much higher rates for all of these crimes, basically a ratio about four times or six times higher.

So I guess I'll just end. I mean there have been a number of speculations in the paper about what does this mean even if it's true, and I think it is quite probably true, that comparing apples to apples, comparable cases, sentencing is much more severe. Custodial abuse is much higher in the United States than again in Germany.

But, you know, the ultimate, "So what?" Somebody says, "Maybe we have crime rates, so we have to control—we have to be more punitive to control that." Well, it's been mentioned a number of times that property crime rates are really not any higher than the average European rate.

We do still, however, have higher rates of life-threatening violence. I think that's still true, partly because we have so many guns out there, partly because it's just our history. But we've got lots of non-violent offenders that we could treat differently, so we just have to be smarter about it. And if we can't learn from Europe, maybe we'll have to learn from Canada because there is this bias against taking things from foreign countries.

By the way, if you go back to these charts here, the United States versus other countries, I would encourage people to do this within the United States. Comparative criminal justice has a domestic component because the variations in per capita incarceration rates and punitiveness within the United States are dramatic, so you have states that are less than 300 inmates per 100,000 residents including jail prisoners. You have other states that are, you know, a thousand, 1,100, 1,200, huge variations across the states and even within states, and the county data shows considerable variations from county to county.

Different places in the United States are using alternative sanctions more than other places. That is what I think you can draw from that data. So if you don't like the international comparisons, do domestic comparisons because there's a lot of variation.

CHAIR HINOJOSA: Thank you, sir.

PROF. BRONSTEIN: Two quick footnotes, Professor Frase, actually three. We just added the comparative states. So the states compare high incarceration states, smaller states and their history—that's the first thing—the second thing is we saw that Brazil as the highest incarcerator in South America. It's the only other large country in this part of the world that has [inaudible] United States, and the population in Brazil's prisons, and I've been to many of them, almost all black people, all African immigrants originally, rather than Spanish immigrants.

The third thing is in Germany—this is really a very interesting thing. The German public does not trust the government to do anything serious. Its experience with Hitler and with the Nazi regime makes it very suspicious of giving the government power over people. If we did a poll—and I do a lot of poll work—in Europe today, every country except Germany would vote 60, 65 percent to restore the death penalty. None of them has the death penalty. They mirror public opinion in the United States.

Germany is opposed. The German population, more than 55 percent, is opposed to the restoration of the death penalty. They do not trust the government to have that kind of ultimate power.

PROFESSOR FRASE: If I could just add a footnote to that, there have been international opinion surveys where they give members of the public the same hypothetical case. You know, the one that's been used most often is the 21-year-old burglar. He's got a prior burglary conviction. He just stole. In the most recent survey that included both the United States and Germany, 53 percent of Americans said, "Yes, he should go to prison," and I think 13 percent of the Germans said he should go to prison.

So yes, there are major public opinion differences across the board on these things, although the rest of public opinion research in the United States and other countries shows that when you give people more information about the sentencing options that are available, they become much less punitive and much [inaudible] options, and say, "Is community service a good thing; should we encourage that?" They say, "Yes." So public opinion on its surface looks very punitive. Under the surface, not so much.

CHAIR HINOJOSA: And so, of our numbers how many are pretrial detainees?

PROFESSOR FRASE: I do not have it in front of me—but I think about half or a little more than half of jail prisoners are unconvicted at this point. In jail—we've got, what, 2.3 million in the country, and I think it's something like 600,000 of them are in jail, so of 2.3 million, then I'd be estimating about—

CHAIR HINOJOSA: So the 2.3 million figure that's used for the United States, half of those are pretrial detainees?

PROFESSOR FRASE: No, half of the jail people, but jail, if I'm remembering correctly, is about 600,000, and half of them, so we're talking about 300,000 or 400,000 pretrial—so a small percentage. I don't know what that works out to.

CHAIR HINOJOSA: But the 2.3 million includes people who are on some kind of supervision?

PROFESSOR FRASE: It's just people locked up.

CHAIR HINOJOSA: But people locked up in jail or prison?

PROF. BRONSTEIN: Or detention facilities, immigration facilities now—

CHAIR HINOJOSA: Okay. Are—people on immigration—

PROF. BRONSTEIN: Yes, they do. Now they do. That's to make it uniform with the rest of the world.

CHAIR HINOJOSA: Are there any other questions?

QUESTIONER: I wanted to ask Professor Frase. Recognizing that the partition between the Russian Republic and [inaudible] recent phenomena and if you just sort of look at those [inaudible] for a moment, was there something that you found in common with the United States and Russia that accounted for their several orders of magnitude higher incarceration rate—

PROFESSOR FRASE: Well—

QUESTIONER:—that you encountered?

PROFESSOR FRASE:—the broader pattern is when you look at the first chart, all of the high rate jurisdictions above England and Wales were from either the former Soviet Union or eastern European countries, with Russian federations at the top there. I would speculate just off the top of my head that when a dictatorship opens up slightly, then you have new issues of social control that you didn't have before, but it's hard to believe that there are that many. I don't know, maybe Bronstein knows that.

PROFESSOR BRONSTEIN: Fifteen years ago the Soviet Union and then the Russian half of the [inaudible] had a higher incarceration rate than we did, and they made a political decision to reduce that, and so they reduced—for example, they gave amnesty to everyone who had been in the military who had been in prison. All of them were released. So that released, you know, about 300,000. They released everyone over 65. That brought them down to their current [inaudible] 100,000, so they were at the same [inaudible], “See, we're not as nationally punitive as the United States.”

QUESTIONER: Professor Bronstein, I'll bet you that the chairman and I together have sentenced about as many people as any two judges the last 40 years—the last 20 years, in our combined 20-something apiece. I've never violated anybody's supervised release for one or two or even three occasions of not listing a change of address, and I recognize that was probably a hyperbole on your part, but I've never incarcerated someone for one or two or fewer than three positive urinalyses, and I think you should be careful not to make public statements to people who do not know that. That suggests that people can be placed back into prison for—

PROFESSOR BRONSTEIN: Well, federal judges are not often involved in that decision.

QUESTIONER: In what decision?

PROFESSOR BRONSTEIN: Whether they go back to prison.

QUESTIONER: No, that is our decision. I think you're just absolutely wrong there.

PROFESSOR BRONSTEIN: In the state system in California, a federal judge—

QUESTIONER: Oh, no, not in the state system, of course.

QUESTIONER: In Rhode Island?

PROFESSOR BRONSTEIN: Rhode Island has a bizarre system. It's the [inaudible] prison system and they get very small sentences, but they may be convicted of a burglary of a store at night and get a five-year sentence, 36 months of probation, that's the state law. And they revoke them regularly for failing to report a change of address and soon, and the population [inaudible] is through the roof. I just testified before their legislature about this at the government's request. They've got to change their parole laws. Most of the people going back into prison are not under the jurisdiction of the federal judges, they're under state judges. The Probation Department in California arrests somebody for a particular violation. They put them in the men's central jail in Los Angeles, if it's in Los Angeles County. They have a hearing without a judge and then they go back to prison. No judge is involved.

QUESTIONER: Well, I won't argue with you about the states, but I think that does not occur in the federal system at all. I think that it might be the case that from time to time or some bargain circumstance in order to protect the housing options of the supervisee, the record may say that the only adjudicated violation was some reporting requirement, often not the case, but that is to help get a better placement with BOP and not to adversely affect the security. But the idea that non-serious violations will result in incarceration in the federal system is not—

PROFESSOR BRONSTEIN: I should have made that clear. I was talking about the state system which is, of course, 80 percent of the people.

CHAIR HINOJOSA: This will be the last question.

QUESTIONER: Since you deal with a lot of these folks, Judge Hinojosa, I'm curious in these other countries whether these non-incarceration alternatives are available for non-citizens?

PROFESSOR BRONSTEIN: They are in Canada. I asked that question specifically. Yesterday I called the Attorney General's Office because I knew that was one of the questions that was prepared by the staff and yes, immigrants who are illegal immigrants may get the same alternative sentences—I'm sure in the Scandinavian countries, too.

CHAIR HINOJOSA: On behalf of the Commission, I want to thank you all for being a part of this program. Thank you all very much.

