

## **The Legislator's Role in Criminal Deterrence Policy**

Determinate sentencing became the predominate sentencing philosophy in the mid 1970s. Since then the literature on deterrence theory and criminal justice policy in general has paid much attention to the role legislators play in deterrence theory. It often lays much of the blame for any inefficiency and inefficacy of the criminal justice system on the theory itself and especially on the politicians. Downplaying political involvement was the order of the day in the early 20<sup>th</sup> century with its emphasis on professionalism and criminological expertise (von Hirsch 1976; Tonry, 1992, 1996, 1999). As Erika Fairchild and Vincent Webb (1985, 16) put it: "The post-Progressive era is a consequence of emphasizing politics rather than progressive efforts to downgrade politics." The 1970s emphasized greater political involvement in the criminal justice system through the enactment of determinate sentencing laws and legislative authorization of new prisons.

Authors such as Wayne Welsh (1993), Joseph Davey (1998), Erika Fairchild and Vincent Webb (1985), and Alida Merlo and Peter Benekos (2000), to name but a few, have added their voices to this argument by stressing that for more than two decades now the academic community interested in criminological matters, that in the latter half of this century the legislature seemed to be the "best-equipped" to the problem of crime. Making the legislature the primary figure was intended to demonstrate a commitment on the part of the government (Windlesham 1998). Today, a generation later, the legislature is among the most relevant actors but little referred to in systematic studies on deterrence studies. Legislatures adopt laws that significantly influence the intake into prison as well as the length of stay. They also hold the power over the allocation of resources not only for the criminal justice system as a whole but for the individual organizations within the system." (Welsh 1993).

Scant systematic research has been conducted toward to further our understanding of legislative sentencing policy and of how the legislatures affect deterrence theory. There are, so far as I can determine, no empirical studies on the determinants of the criminal sentencing policies, that is, statutory maxima, and no data exists in any collected form until now (see Lynch 1988, 1993 for a qualitative approach to sentence severity and Bowers 1997, 1998; Bowers and Waltman 1993; and Marshall and Marshall 1997 for studies on judicially imposed severity studies). There is a lot of speculation and inconclusive cross-jurisdictional comparisons of sentence severity, but the severity he refers to is judicially imposed sentence severity and not sentence severity as it is adopted at the law-making stage. Statutory severity is important in and of itself. The legislative role is to provide the public with which to judge the seriousness of a given crime. The extent of their role in deterrence theory and practice is, however, much more critical. Legislatures set the rules. They first establish the threat of punishment; therefore they have the first say in what the expected cost of punishment should look like. By deciding the amount of resources to allocate to the criminal justice agencies, they ultimately influence the certainty and severity of punishment and, ultimately, the success of deterrence strategies.

### **The Role of the Legislature in Criminal Policymaking**

Why is that determinate sentencing has left criminal justice scholars unsatisfied, just as they once were with the indeterminate sentencing scheme? The “politics as symbolism” literature (Lasswell 1930; Edelman 1971, 1964; Oppenheimer 1974; Elder and Cobb 1983; Beckett 1998) provides one answer. In essence this literature, as applied to criminal policymaking, i.e. “law and order politics”, suggests that politicizing the issue of crime has made the production of rational criminal policies very difficult; some would say impossible (Elder and Cobb 1983; Tonry 1999; Merlo and Benekos 2000). Candidates avoid serious

discussion of both the complex nature of crime and the commitment of time and resources necessary to confront this social problem [crime] adequately...the momentum of get-tough, punitive politics seems resistant to rational analysis of the causes of crime and consequences of retributive punishment. ... As with the get-tough ideology and policies of the 1980s and 1990s, the post-modern penology is likely to generate its own dysfunctions.”(Merlo and Benekos 2000 12,107).

If politicians are, “single-minded seekers of reelection” as David Mayhew (1974) suggested and are only involved in “lawmaking, pork barrelling, and casework” (Fiorina 1975), they are concerned with the public interest insofar as they can attract and secure the vote. This is likely to undermine rational sentencing policymaking. Elder and Cobb (1983, 1-2) claimed that politics is neither rational nor irrational but rather *arational*, meaning that while politics may have rational and irrational elements to it, it largely comes down to politicians working in a “loosely structured process of interpreting fragmentary information and ambiguous cues in the light of prior expectations and changing, uncertain, or conflicting personal preferences.”

In the late 1970s Michael Hayes, building on theory by Robert Dahl and Charles Lindblom (1953); Theodore Lowi (1964; 1972), Morris Fiorina (1975), David Mayhew (1974), and Robert Salisbury and John Heinz (1970) developed a theory of transactional costs of lobbying. In doing so, he discusses his take on Lowi and Edelman’s typology of policies. Of interest here is his argument on regulatory policy. Salisbury and Heinz (1970, 40) posited that “there is a fundamental distinction to be made between decisions that allocate tangible benefits directly to persons or groups...and decisions which establish rules or structures of authority to guide future allocations.” They go on to argue their viewpoint on how the politics of regulations is conditional upon the decisionmaking structure and the demand pattern for a given policy. By decisionmaking structure, Salisbury and Heinz mean the degree of integration of the decisional system. By the pattern of demand, these authors refer to the degree of unity among the individuals or groups, and not merely their interests, when pressing for a given policy.

Depending on whether the degree of integration in the system and in the demand pattern are fragmented or integrated, legislators will behave one way or another; that is, they will produce one type of policy as opposed to another.

This relationship among the decisional structure, demand pattern, and the cost of the policy to the legislators is what inspired Hayes to take Salisbury and Heinz's theory a step further and postulate that legislators will likely pass on making decisions when the electoral costs to them of deciding one way or another are excessively high *and* when demand is sufficiently fragmented to allow them the needed room to maneuver. When it comes to criminal justice policy, the criminal justice system is permeated with institutional fragmentation as I discussed in the Chapter One. "Constituency problems are the second peculiarity of the criminal justice agencies [the first one is institutional fragmentation] that distinguish them from conventional policy-making agencies in American government." (Nagel et al. 1983, 8). As for costs, crime is undoubtedly a controversial issue, one that can make or break an election campaign—that means it is costly. Finally in regard to the demand pattern, it may be arguably consensual, but it is quite diffuse (Niskanen 1971; Benson et al. 1995; Nagel et al 1983; Elling 1996; Lynch 2000). "There is virtually no organized and effective political opposition to spending more money on police and prisons...There are no interest groups which can effectively support lower levels of spending on law enforcement and prisons." (Lynch 2000, 5-6). Salisbury and Heinz are careful to point out that consensual demand does not only refer to unity of interests among interested parties; the unity of the actors themselves is essential to their theory. "Criminals don't have unions and political action committees to lobby against higher spending." (Lynch 2000, 6). "Criminal justice shares with poverty policy the fact that organized constituencies that attempt to influence policymaking are not the clients of the system..., but rather the professionals who deal with them...Thus, it is the self-interest of professionals that become the focus of bargaining and compromise in policymaking."(Nagel et al. 1983, 11).

What happens is what Hayes calls “issue movement.” That is, legislators will produce regulatory policy and defer the real decisionmaking process elsewhere. Since “A theory of policy formulation must, if it is to be comprehensive, account for policies made by all kinds of governmental agencies...” (Salisbury and Heinz 1970, 49), the other actors in the system would have to deal with the legislative regulatory policy. In the criminal justice system, where would legislators delegate or in lay terms, where would they “pass the buck”? To the administrative (law enforcement and prosecution and corrections) and the judiciary. The end result is what Lowi (1969) calls “policies-without-law”. From an applied criminal justice policy viewpoint, these would be criminal policies where policymakers will decide on statutory severity, for instance, in a way that will satisfy the public’s and the various interest groups’ demand for harsher punishment in a sufficiently abstract or vague manner. They will do this just enough to look as if they are acting on the issues (Lasswell 1930; Tullock 1967; von Hirsch 1976; Hayes 1978,1981), but in reality all they are doing are granting those who will have to execute the policy or make the real decisions with a broad discretionary powers.

“The number of statutes which pass the legislature, or the number of decrees which are handed down by the executive, but which change nothing in the permanent practices of society, is rough index of the role of magic in politics... .” (Lasswell 1930, 195).

This is the core of the “political symbolism” criticism of the legislative role in the making sentencing policy.

### ***Hypotheses***

The question of interest here is why some states or nations have more severe sentences than others. Why do jurisdictions differ in the level of severity? What are the key determinants of statutory severity in a given state or nation? To address these questions, I test four key

hypotheses. As with any other policy, sentencing policy should constitute a reflection of: 1) the need for it; in this case that need originates from the crime rate; 2) the will or desire for it; here, that desire comes from the public and the policymakers themselves; and 3) the availability of resources.

Establishing the deterrent threat of punishment is influenced by a state's need to reduce the crime rate. Policymakers in states with higher crime rates need to impose more severe deterrent penalties (the deterrent or need hypothesis). Elected public policymakers are also expected to be responsive to the public's preferences in regard to policy choices or run the risk of being rejected in the next election period. One can thus expect public opinion to influence policymakers' decision in establishing a credible sentencing policy. This is the "democracy-at-work" thesis (Beckett 1998). Public opinion can be more or less conservative or more or less liberal. We know from electoral theory that voters choose representatives that share their values and/or views on political issues. And we know that it is the role of the parties, among others, to aggregate public interests and translate public preference into policy. Those jurisdictions with a more conservative electorate would be inclined to adopt more severe deterrent threats and those with a more liberal electorate would adopt more lenient or less severe sentences.

The potential that a jurisdiction will have to raise the public funds necessary to build more prisons should affect policymakers' decision as to whether they should establish a greater or lesser severity of the deterrent threat. Some authors have argued that this may not be the case. The fact that other actors in the criminal justice system such as the courts and correctional agencies are more dependent on their environment than the legislature leaves the legislators with a greater margin to maneuver. Jurisdictions with more prison availability and great tax or revenue raising capacity are more likely to establish greater statutory penalties (the resource constraint or overcrowding effect hypothesis).

In addition to a direct effect, prison capacity could also mediate the political will to establish a specific penalty. This means that the relationship between sentence severity and public opinion would be conditional upon the availability of prison space and the capacity of a state to provide more space so that sentences in a very conservative but less affluent state may be more lenient than in an equally conservative but more affluent state. Also, jurisdictions with a higher crime rate but overcrowded prisons may be more lenient than otherwise expected. Prison space availability and/or greater tax or revenue raising capacity conditions the political will and need for establishing more severe statutory penalties.

### **Research Design and Data**

Tables 1 and 2 list the statutory maxima allowable in years for six different crimes in 48 U.S. States (Alaska and Hawaii are excluded due to missing data on some key explanatory variables) and in 16 Western European nations. These maxima represent the set of dependent variables under analysis. The crimes covered are: robbery, burglary, and larceny in the U.S. and rape, robbery, and theft in Europe.<sup>1</sup>

[Tables 1 and 2 about here]

Tables 3 and 4 present the descriptive statistics of the variables employed for the U.S. and Western Europe, respectively. These numbers tell that the deterrent threat as measured by the harshest allowable penalty for committing a particular crime is on average substantially higher for violent crimes than for property crimes, in both the U.S. and Europe.

[Tables 3 and 4 about here]

When comparing Tables 3 and 4, I can see that the U.S. is potentially harsher than the Western European nations under analysis. The U.S. also provides more prison space as there are comparably more crimes per 100,000 persons. In the U.S., robbery is punishable by death,

whereas in Western Europe, life is the maximum penalty for this crime. Life is also the maximum penalty for any kind of theft, burglary or larceny in both the U.S. and Western Europe. In general, though, the typical statutory penalties are a bit higher for the same crimes in the U.S. than in Europe. In the U.S., a criminal committing a first-time aggravated robbery could typically, on average, face up to about 260 months in prison; as many as 190 months on average for aggravated burglary and about a third of this, 64 months, for aggravated larceny. There were on average in 1995 about 153 robberies per 100,000 persons, 925 burglaries for every 100,000 persons, and more than three times as many larcenies, 2,932 larcenies per 100,000 individuals. In Europe, a convicted criminal could get up to 242 months for a first-time, aggravated rape, just about what criminal could face in the U.S. for robbery; about 213 months for robbery; and about 123 months for theft. During the same year, 1995, there were on average eight rapes for every 100,000 persons, nine times as many robberies or 76 for every 100,000 persons, and over 400 times as many theft; that is almost 3,800 thefts per 100,000 persons.

European prison capacity was in 1995 considerably smaller than in the U.S.—78 cells per 100,000 persons, on average, in Europe and in the U.S. almost four times that, 300 beds for every 100,000 persons, assuming one bed for every cell.<sup>ii</sup> We know that at least in the U.S. this is a big assumption as double-bunking is widespread.

On a scale from 1-5, government opinion in the U.S. is typically Center-Right around 3.5, where a higher score indicates a more liberal attitude. Electoral opinion is conservative and ranges from .2 to 28 with a mean of 14.3. It is measured as the conservative balance, calculated by subtracting the percentage of those individuals identifying themselves as liberals from the percentage of those identifying themselves with the conservatives. Differently, European government opinion is Center-Left, -6, and the median voter's left-right position, ranging from -11 to about 21, is typically Center-Right around 6.



## The Model and Findings

If one were to model the determinants of statutory severity for a given crime, such a model could look like the following:

$$\begin{aligned} \text{SentenceSeverity} = & \beta_0 + \beta_1 \text{CrimeRate} + \beta_2 \text{GovtOpin} + \beta_3 \text{ElectOpin} + \beta_4 \text{PrisonCap} + \beta_5 \\ & \text{TaxCap} / \text{CorrectionsRev} / \text{StateGDP} + \beta_6 (\text{TaxCap} / \text{CorrectionsRev} / \text{StateGDP} \\ & * \text{GovtOpin}) + \beta_7 (\text{CrimeRate} * \text{PrisonCap}) + \beta_7 \text{OpportunityCosts}, \end{aligned}$$

*SentenceSeverity* measures the maximal threat of punishment in months of imprisonment that rational potential criminal may expect to face when breaking the law. *CrimeRate* is the number of offenses per 100,000 persons. *GovtOpin* is the government's opinion measured as the level of conservatism/liberalism of the government; *ElectOpin* is the electorate's opinion measured as the level of conservatism/liberalism or Right/Left; *PrisonCap* refers to the number of available beds or cells for every 100,000 persons; *TaxCap* represents another source of resource constraint on policymakers. It is measured as either the per capita tax revenue or tax revenue as a percentage of GDP. *CorrectionsRev* and *StateGDP*, measured in per capita millions and billions of dollars, respectively, are alternative resource constraints in the case of the U.S.; *Opportunity Costs* refer to major social expenditures other than criminal justice expenditures that policymakers must also make. Specifically, they refer to public welfare and education expenditures in the U.S. case and health and education expenditures in Europe.

There are several concerns with a model such as this one. For one, there is the potential reciprocal relationship between statutory maxima and the crime rate. Second, one could also make the case of a simultaneous relationship between statutory severity and the opinion variables. Of course 2SLS and 3SLS would be a solution to these concerns, however, as I will show, this would needlessly occupy time and space. The OLS results, reported below, are

sufficient to suggest what the data already suggest—that there is little to lead one to expect that legislatures to arrive at a rationally-derived deterrent penalty. States like Alabama, Maryland, Rhode Island, and Virginia have the same maximal penalty for burglary and larceny. One would hardly believe that with three times as many larcenies as there are burglaries, the legislatures of these States consciously meant to have burglars and thieves potentially receive the same penalty.

For the sake of a preliminary exploration of what the results of an OLS 1995 cross section-regression analysis of the above model can reveal, I present Appendix Tables 1 through 6; Tables Appendix 1-3 for the U.S. and Appendix Tables 4-6 for Western Europe.

The results show that not much is going on here to explain criminal sentencing in the legislatures. To begin with, not one of our models, for any of the crimes, in the U.S. and in Europe alike, show significant effects. Policymakers are simply not concerned with the need for the levels of severity. This means that we find no evidence that would imply that the crime rate is a driving force behind policymakers' decisionmaking. In general, the results are also indicative of null effects of resource constraints. In regard to opportunity cost effects on setting the statutory penalty, in all but one model and only in the European case. The more resources spent on health services, the less severe the statutory penalty for robbery and theft but not so for the more serious crime, rape.

Prison capacity is never statistically significant matter in arriving at statutory severity in either the U.S. and Europe, whether we are talking about direct or mediating effects. Political will is not mediated by the state's prison capacity. There is no evidence that the availability of prison space or beds makes a bit of difference to policymakers. The same is true of the state's capacity to back up the threat of punishment, at least in the U.S.. The state's tax capacity to sustain the threat through the resources that policymakers allocate to the organizations in the criminal justice system that put that threat into effect does not condition governmental opinion

in the U.S., but does so in the European case. Here, the tax capacity restricts or limits the positive effect of governmental opinion on statutory severity.

The results suggest that policymakers pay attention to what they think the level of severity should be limited only by the restriction of other social spending. Across the models presented, the more conservative the governments the greater the sentence policymakers are likely to adopt.<sup>iii</sup> Only in the case of larceny does electorate opinion reach statistical significance and in the expected direction, that is, a more conservative electorate has a positive influence on severity.

### **Implications for Rationality Expectations Theory in Criminal Policymaking**

While the evidence reported above is weak to nonexistent and potentially biased due to potentially reciprocal relationships between some the variables, it does suggest something important about the rationality or lack of it behind the sentences legislators adopt. We can say with some confidence that, aside from capital punishment, legislators are not too terribly concerned with variable punitive content for the sentencing policies they produce. Were they concerned, the level of severity they adopt, and tacitly approve by non-decisions thereafter, would be a reflection of the need for that level and the availability of resources. The notion of need here in this context is captured in the crime rates. As the results indicate, legislators do not appear to pay much attention to the crime rates nor to the level of prison capacity, which is that resource commonly agreed upon to be the most crucial resource limited in the criminal justice system. They are concerned with the desire for a given level of severity, as the “law and order” politics would lead us to expect. This means that they are simply concerned with conveying a tough approach, even if only symbolic, to the public. According to this body of literature, we should expect legislators to heed public opinion as much as possible. Political will has the primary role in criminal sentencing policy, at least where legislatures are concerned.

So if crime rates and resource capacity are not relevant factors in legislative sentence decisionmaking, the question becomes: How do legislators arrive at the level of severity for a given crime? And how does the level of severity for one crime differ from the level of severity of another, if they differ at all? Factor analysis, as I will show, allows one to decisively arrive at an answer to this question.

SS Stevens (1975, 259) asked “How well does society’s accumulated wisdom or lack thereof in legislating punishment accord with the judged gravity of offenses?” The just deserts rationale would suggest that severity should vary proportionately to the seriousness or harshness of a particular crime. “Fear of harm ought to be proportional not merely to the gravity of the harm but also to the probability of the event.” (Arnauld in *Logic*, 1662, cited in Bernstein 1999).

This would suggest that there should be something common at work—the association between the seriousness of the offence and the severity of the punishment—in all sentencing statutes. Therefore, the states or nations that have especially harsh or especially lenient penalties for one crime type would be expected to also have similarly harsh or lenient maxima for others. And states or nations would not adopt a greater severity of punishment threat for less serious crimes than for more serious crimes. This would make less serious crimes as punishable as more serious crimes and thus diminish the tradeoff effect between the deterrent cost of crimes (Becker 1968; Sollars et al 1994; Mendes 2000).

Looking to the data in Tables 1 and 2, the statutory maxima do not seem to have been adopted with the relationship between offense gravity and punishment severity. Too often the levels of severity among crimes do not differ much.

In many U.S. States, the maximal threat for rape is greater than that of voluntary manslaughter or on a par. In some states, for instance Pennsylvania and Montana, maximal threat of punishment is the same across the crimes of manslaughter, rape, robbery, and burglary. In other states, the lack of a relationship between the seriousness of the offense and the severity of

punishment is more glaring. In Oregon criminals can expect to get up to 20 years for robbery or burglary but only five for forcible rape. In New Hampshire the threat for rape is about half that of robbery or burglary. And in South Carolina, a convicted felon could get up to a life sentence for burglary but only 30 for robbery or rape. In Europe, Table 2 suggests that criminal severity threats are not as invariant as in the U.S.; however, in almost two thirds of the nations covered, the statutory severity of manslaughter is the same or about the same as that for theft. In England and Wales, a convicted person could get a greater punishment for theft—life—than for robbery—12 years. If criminals are rational beings as deterrence theory assumes, how do severity ceilings such as these factor into the calculation of the expected cost of punishment?

For more than 30 years, at least since the seminal work of Johan Thorsten Sellin and Marvin Wolfgang (1964), scholars have attempted to associate the judicial or imposed severity of punishment to the seriousness of the offense. Psychophysicists argued that “human observers can judge the ratio of two sensations, and they can do so with fair consistency” (Stevens 1975, 21). The Weber-Fechner Law of “just noticeable differences” states that various responses are proportionate to the intensity of stimulus. In a punishment setting, this psychophysical law tells us that there should be a relationship between culpability and penal punishment, whereby more serious crimes should correspond to stiffer penalties (von Hirsch 1976; Green and Allen 1981/82). This psychometric scaling or the measurement of sensation based on the estimation of the experimental perceived intensity of penal stimuli is referred to in the criminal literature as quantitatively-determined methods or consensual scaling. Other methods used to construct severity scales include subjective assignment and *ex-poste* judicially-derived scales (von Hirsch 1976; Sebba and Nathan 1984; Ostrom and Ostrom 1999). Sentencing scholars such as Maynard Erickson and Jack Gibbs (1979), Catherine Fitzmaurice and Kenneth Pease (1986), Pierre Tremblay (1988), and Leslie Sebba and Gad Nathan (1984) have argued that crime seriousness scales/severity of punishment scales have been successfully constructed when based on

stimulus-response relationships. The evidence of this literature largely suggests curvilinearity (Erickson and Gibbs 1979; McDavid and Stipak 1981/82; Sebba and Nathan 1984); that is, there is a declining marginal disutility of the severity of punishment. Linearity would imply that equal increases in the gravity of an offense would on average correspond to an equal increase in the severity of the punishment. As the severity of punishment increases, the perceived utility of increased punishment does not increase indefinitely, but rather its rate of increase decreases once the level of severity reaches a specific level.

These perceptual studies on the gradation or ordering of the severity of sentencing are based on information acquired from judges, inmates, and students (Buchner 1979; McDavid and Stipak 1981/82; Sebba and Nathan 1984; Tremblay 1986) but not from legislators. The results shown in this chapter suggest that perhaps there is a reason for this. A simple factor analysis of the statutory maxima, shown in Table 5, helps in arriving at a more confident conclusion regarding the rationality of legislative sentencing. According to the evidence thus far presented, I would expect to find that there is no guiding force common to all sentence maximum lengths. What these analyses tell us is that there is essentially no commonality among the severity in the legislative arena. There does not appear to be a functional relationship between the severity of punishment of a given offense and the seriousness of that offense. These sentences appear to be as if essentially arbitrary. The scores in Table 5 represent the eigenvalues of the factor analysis of the sentence maxima logged and unlogged for the U.S. and European.<sup>iv</sup> In the U.S., the sum of the initial eigenvalues—1.432 in the case of the logged sentences and 1.225 when the sentence maxima are not logged—does not reach half of the number of source variables, that is, the number of crimes for which we have statutory sentence data. There are six such variables in the case of the U.S. analysis and five in the case of the Europe. The one exception is the logged version of the European maximum sentences. An eigenvalue of 1.0 means that the factor analysis accounts for as much variance as one source variable; an eigenvalue of six in the U.S.

for instance would indicate that there is one common factor among all six variables so that it would be possible to reduce all six variables to a common factor. An eigenvalue of 1.2 or 1.4 indicates hardly any reduction toward a single factor (Uslaner 1976). These scores in other words reveal no commonality among the statutory maxima. Pure and simple.

[Table 5 about here]

A comparison of these factor analysis results to the results of another set of factor analyses of variables that are surely expected to have some common ground among would help stress this point. Such variables could be the crime rates of the respective offenses. Despite the complexity of explaining crime rates, judging from the factor analyses presented in columns three and four in Table 5, these do seem to have at least one common factor explaining them. The sum of the eigenvalues is about three or greater (out of seven source variables) in both the U.S. and Europe, regardless of whether they are logged or not.

What does this mean for sentence severity as the ultimate threat of punishment and essential component in the expected cost of punishment? More importantly, what does it mean for deterrence theory as it is applied to the criminal justice system as a rational deterrence strategy? From a policy perspective, which is the perspective relevant here, it simply means that legislatures are not approaching the criminal justice system from the rational mind set that stands behind deterrence theory. They are not concerned with the other actors' (in the criminal justice system) expectations, as the theory requires. "...if punishment is to play any role in criminal justice, existing penalties must be converted into a rational system." (Erickson and Gibbs 1979, 105). Hayes's argument of legislators "passing the buck" to the executive and the bureaucracy seems all too fitting for what appears to be going on here. "When the legislature determines sentencing ranges, it is operating at a level of abstraction far removed from individual case dispositions, or even the allocation of resources to courts and correctional agencies. At that level of abstraction the symbolic quality of the criminal sanction is of great

importance.” (Zimring 1976, 13). The statutes allow law enforcement and judicial actors enough latitude to carry out their function in the criminal justice system. The establishment of the threat of punishment in the legislative arena is not driven by any justifiable, objective need. So to answer Stevens’s question, legislated punishment does not accord very well with intuitive reasoning on the gravity of the offense.

## **Conclusion**

This paper investigated the determinants of the legislative threat of punishment for noncapital crimes. The story it tells is one of legislative uncoordination when it comes to setting the deterrent threat of punishment. This part of the criminal justice system is not concerned with setting rational component of deterrence, making them irresponsible from an applied policy view. Rather, legislative policymakers in delegating discretionary powers to the remaining actors of the criminal justice system they also delegate the potential for any rationality to them. Statutory severity of punishment is irresponsive to the need for more deterrent policies and the financial capacity to secure the threat of punishment.

The extent of the legislative involvement in the establishment of the potential threat of punishment appears all but blind to the crime rates, as well as prison capacity and tax capacity. In this way, the legislatures introduce the possibility of slippage in deterrence as a rational and comprehensive applied strategy. Rationality in applied deterrence strategies is absent in the legislative arena. Legislators leave rationality to the bureaucratic apparatus of the criminal justice system and the judiciary. Political will is *the* driving force behind legislative sentencing decisions, the only determining factor. The general finding is, as expected, more conservative or Right-leaning governments tend to adopt more severe threats of punishment.

There is no evidence that existing prison capacity makes a difference in deciding when

to level off statutory severity, but it would be interesting to see if, to what extent, and under what conditions legislative policymakers account for the level of severity they stipulate when adopting or tacitly approving the statutory maxima for a given crime. At some point politicians have to be held accountable even if that accountability lie in the budgetary allocation decisions they make. If policymakers are at all serious about deterrence strategies, then they have to empower the actors to whom they delegate decisionmaking power with tangible or material assets to make real decisions.

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**Table 1: U.S. Maximum Statutory Prison Sentences**

<b>State</b>	<b>Murder</b>	<b>Culpable/Vol. Manslaughter</b>	<b>Rape</b>	<b>Robbery</b>	<b>Burglary</b>	<b>Theft</b>
Alabama	Death	20	Life	10	10	10
Arizona	Death	5	7	4	5	2
Arkansas	Death	10	Life	20	20	10
California	Death	11	8	5	6	3
Colorado	Death	8	16	8	8	8
Connecticut	Death	40	25	10	5	1
Delaware	Death	10	Life	5	8	1
Florida	Death	15	40	15	15	5
Georgia	Death	20	Death	20	20	10
Idaho	Death	15	Life	Life	10	1
Illinois	Death	14	30	30	30	10
Indiana	30	6	20	20	6	1
Iowa	Life	10	Life	25	25	1
Kansas	Death	.8	10.3	5.1	2.8	.6
Kentucky	Death	20	20	20	20	5
Louisiana	Death	40	Life	40	12	10
Maine	Life	40	10	40	5	.5
Maryland	Life	10	Life	20	15	15
Massachusetts	Life	20	Life	10	20	5
Michigan	Life	15	15	15	10	5
Minnesota	Life	15	20	20	20	5
Mississippi	Death	20	Life	15	10	5
Missouri	Death	20	Life	Life	20	10
Montana	Death	40	Life	40	40	.5
Nebraska	Death	25	25	50	25	5
Nevada	Death	10	Life	20	15	5
New Hampshire	Death*	30	7	15	15	7
New Jersey	Death	20	15	15	7	4
New Mexico	Death	4	24	12	2	2
New York	Death	25	25	15	15	1
North Carolina	Death	8.8	30.8	8.8	8.8	0
North Dakota	Life	20	20	10	10	5
Ohio	Death	25	25	15	25	5
Oklahoma	Death	Life	Death	Life	20	10
Oregon	Death	20	5	20	20	5
Pennsylvania	Death	10	10	10	10	5

Rhode Island	Life	30	Life	Life	10	10
South Carolina	Death	30	30	30	Life	3
South Dakota	Death	life	25	25	25	10
Tennessee	Death	15	60	60	15	6
Texas	Death	20	Life	Life	Life	1
Utah	Death	15	Life	Life	Life	1
Vermont	Life	15	Life	10	25	10
Virginia	Death	10	Life	Life	20	20
Washington	Life	10	20	20	20	5
West Virginia	Life	15	35	20	15	1
Wisconsin	Life	60	30	15	15	.8
Wyoming	Death	20	50	25	25	10

*Source:* U.S. State Penal or Criminal Codes (Cornell Myron Taylor Law Library).

\* New Hampshire repealed the death penalty in 2000.

*Notes:* 1.) These are penalties for a first-time, aggravated form of each offense. 2.) The length of sentence is in years. 3.) Murder penalty is for 1<sup>st</sup> degree murder. 4.) Rape is unarmed, forcible rape of a person that is not a minor but can be aggravated if causing serious injury. 5.) Robbery is unarmed, unaided robbery of a person < 60 years of age, but can be aggravated if causing serious injury. 6.) Burglary is unarmed breaking and entering of a dwelling that may or may not be occupied. 7.) The sentences for theft refer to offenses that exceed \$500.00 in value but do not exceed \$1,000.00 in value.

**Table 2: European Maximum Statutory Prison Sentences**

<b>Nation</b>	<b>Murder</b>	<b>Manslaughter</b>	<b>Rape</b>	<b>Robbery</b>	<b>Theft</b>
Austria	Life	10	15	15	15
Belgium	Life	Life	Life	20	10
Denmark	Life	4	10	10	4
Finland	Life	4	12	12	4
France	Life	3	20	20	10
Germany	Life	5	15	20	10
Greece	Life	5	20	Life	10
Italy	Life	5	12	20	6
Luxembourg	Life	Life	Life	15	10
Netherlands	Life	Life	12	15	6
Norway	Life	6	Life	12	6
Portugal	25	5	10	18	8
Spain	20	4	12	5	3
Sweden	Life	10	10	10	6
Switzerland	Life	10	20	20	10
UK (Eng & Wales)	Life	Life	Life	12	Life

*Source:* Library of Congress, Washington D.C. and interviews with legal specialists in foreign law of the Law Library of Congress (January 2000).

*Notes:* 1.) These are penalties for a first-time, aggravated form of offense.

2.) The length of sentence is in years.

3.) Theft includes acts that can be classified as burglary and larceny.

**Table 3: Variables, Sources, & Descriptive Statistics for the U.S.**

Variable	Variable Description	Source	Mean/St. Dev.		Min./Max.	
RobbStat	Sentence severity measured as maximum number of months in prison allowable by law for aggravated robbery	State Penal Codes	259.458	151.455	48	720
BurgStat	Sentence severity measured as maximum number of months in prison allowable by law for aggravated burglary	State Penal Codes	189.313	108.085	20	480
LarcStat	Sentence severity measured as maximum number of months in prison allowable by law for aggravated larceny	State Penal Codes	64.083	51.999	0	240
CrimeRate <sub>9094</sub>	Average crime rate measured as the number of offenses committed per 100,000, 1990-94	Statistical Abstracts of the U.S.	5010.335	1246.935	2548.333	8336.5
RobbRate	Robbery rate measured as the number of robberies committed per 100,000, 1995	Statistical Abstracts of the U.S.	153.25	102.241	10	423
RobbRate <sub>9094</sub>	Robbery rate measured as the number of robberies committed per 100,000, 1990-94	Statistical Abstracts of the U.S.	162.215	119.414	8.833	547
BurgRate	Burglary rate measured as the number of burglaries committed per 100,000, 1995	Statistical Abstracts of the U.S.	924.729	273.904	351	1522
BurgRate <sub>9094</sub>	Burglary rate measured as the number of burglaries committed per 100,000, 1990-94	Statistical Abstracts of the U.S.	1020.458	299.850	449.5	1854
LarcRate	Larceny rate measured as the number of larcenies committed per 100,000, 1995	Statistical Abstracts of the U.S.	2931.500	801.472	1103	4926
LarcRate <sub>9094</sub>	Larceny rate measured as the number of larcenies committed per 100,000, 1990-94	Statistical Abstracts of the U.S.	3002.294	633.919	1565.5	4514.333
PrisCap96	Average rated prison capacity measured as the number of beds or inmates assigned by a rating official to institutions per capita, 1996*	BJS Prisoners Bulletin	.003	.001	.001	.007
PrisCap9095	Average rated prison capacity measured as the number of beds or inmates assigned by a rating official to institutions per capita, 1990-95*	BJS Prisoners Bulletin	.003	.001	.001	.005
GovtOpin	Attitude measured as a support scale scored 1-5 based on the Senate National Election Study (SNES); high means more liberal attitude.	Norrander (forthcoming)	3.554	.236	3.050	4.010
ElectOpin	Electorate conservatism or public opinion as measured by the liberal-conservative ideological identification based on the cumulative CBS/ New York Times opinion surveys (high means more conservative)	Erikson et al. (1993)	14.297	7.506	.2	28
TaxCap9095	Average per capita tax revenue measured millions of dollars, 1990-95	Statistical Abstracts of the U.S.	.001	.0003	.0007	.002
Gdp9095	Average per capita state GDP measured in billions of dollars (chained 1992 dollars), 1990-95	Statistical Abstracts of the U.S.	.00002	.000004	.00002	.00004
CorrectionSp9095	Average per capita state spending on corrections measured in millions of dollars, 1990-95	Statistical Abstracts of the U.S.	.0001	.00003	.00003	.0002

PubWlfSp <sub>9095</sub>	Average per capita state spending on public welfare measured in millions of dollars, 1990-95	Statistical Abstracts of the U.S.	.001	.0002	.0003	.001
TaxCap <sub>9095</sub> *GovtOpin	Interaction term between TaxCap <sub>9095</sub> and GovtOpin	Computed	.002	.001	.001	.003
Gdp <sub>9095</sub> *GovtOpin	Interaction term between Gdp <sub>9095</sub> and GovtOpin	Computed	.00003	.00001	.00002	.0001
CorrectionSp <sub>9095</sub> * GovtOpin	Interaction term between CorrectionSp <sub>9095</sub> and GovtOpin	Computed	.0001	.0001	.00003	.0002
TaxCap <sub>9095</sub> * CrimeRate <sub>9094</sub>	Interaction term between average TaxCap <sub>9095</sub> and CrimeRate <sub>9094</sub>	Computed	6.571	2.287	3.464	16.060
TaxCap <sub>9095</sub> * RobbRate <sub>9094</sub>	Interaction term between average TaxCap <sub>9095</sub> and RobbRate <sub>9094</sub>	Computed	.220	.183	.011	.938
TaxCap <sub>9095</sub> * BurgRate <sub>9094</sub>	Interaction term between average TaxCap <sub>9095</sub> and BurgRate <sub>9094</sub>	Computed	1.337	.453	.414	2.205
TaxCap <sub>9095</sub> * LarcRate <sub>9094</sub>	Interaction term between average TaxCap <sub>9095</sub> and LarcRate <sub>9094</sub>	Computed	3.927	1.175	2.014	8.606
CorrectionSp <sub>9095</sub> * CrimeRate <sub>9094</sub>	Interaction term between average CorrectionSp <sub>9095</sub> and CrimeRate <sub>9094</sub>	Computed	.378	.189	.113	1.145
CorrectionSp <sub>9095</sub> * RobbRate <sub>9094</sub>	Interaction term between average CorrectionSp <sub>9095</sub> and RobbRate <sub>9094</sub>	Computed	.014	.014	.0002	.064
CorrectionSp <sub>9095</sub> * BurgRate <sub>9094</sub>	Interaction term between average CorrectionSp <sub>9095</sub> and BurgRate <sub>9094</sub>	Computed	.080	.042	.011	.161
CorrectionSp <sub>9095</sub> * LarcRate <sub>9094</sub>	Interaction term between average CorrectionSp <sub>9095</sub> and LarcRate <sub>9094</sub>	Computed	.227	.107	.070	.613
Gdp <sub>9095</sub> * CrimeRate <sub>9094</sub>	Interaction term between average Gdp <sub>9095</sub> and CrimeRate <sub>9094</sub>	Computed	.117	.040	.062	.297
Gdp <sub>9095</sub> * RobbRate <sub>9094</sub>	Interaction term between average Gdp <sub>9095</sub> and RobbRate <sub>9094</sub>	Computed	.004	.003	.0002	.016
Gdp <sub>9095</sub> * BurgRate <sub>9094</sub>	Interaction term between average Gdp <sub>9095</sub> and BurgRate <sub>9094</sub>	Computed	.024	.008	.009	.039
Gdp <sub>9095</sub> * LarcRate <sub>9094</sub>	Interaction term between average Gdp <sub>9095</sub> and LarcRate <sub>9094</sub>	Computed	.070	.022	.040	.159
PrisCap <sub>9095</sub> * CrimeRate <sub>9094</sub>	Interaction term between average PrisCap <sub>9095</sub> and CrimeRate <sub>9094</sub>	Computed	12.693	7.394	3.148	39.434
PrisCap <sub>9095</sub> * RobbRate <sub>9094</sub>	Interaction term between average PrisCap <sub>9095</sub> and RobbRate <sub>9094</sub>	Computed	.476	.443	.008	1.857
PrisCap <sub>9095</sub> * BurgRate <sub>9094</sub>	Interaction term between average PrisCap <sub>9095</sub> and BurgRate <sub>9094</sub>	Computed	2.798	1.890	.421	7.570
PrisCap <sub>9095</sub> *LarcRate <sub>9094</sub>	Interaction term between average PrisCap <sub>9095</sub> and LarcRate <sub>9094</sub>	Computed	7.649	4.357	1.934	21.132

\* Rated capacity is available for most cases, but when it is not, operational capacity, defined as the number of inmates that can be accommodated based on the existing programs, staff, etc. is employed; and in the few cases where operational capacity it not available, design capacity is used, whereby design capacity is defined as the number of inmates that planners or architects intended for the facility.

**Table 4: Variables, Sources, & Descriptive Statistics for Western Europe**

<b>Variable</b>	<b>Variable Description</b>	<b>Source</b>	<b>Mean/St. Dev.</b>		<b>Min./Max.</b>	
RpStSev	Sentence severity measured as number of maximum months in prison allowable by law for aggravated rape	European Penal Codes	242.118	141.684	120	480
RbstSev	Sentence severity measured as number of maximum months in prison allowable by law for aggravated robbery	European Penal Codes	213.177	113.170	60	480
ThftStSev	Sentence severity measured as number of maximum months in prison allowable by law for aggravated theft	European Penal Codes	122.824	99.547	36	480
CrimeRate <sub>9094</sub>	Average crime rate measured as the number of offenses committed per 100,000 persons	European Sourcebook on Crime and Criminal Justice Stats 1999;2000	5725.423	3272.178	886.340	10974.2
RapeRate	Rape rate measured as the number of rapes committed per 100,000 persons, 1995	European Sourcebook on Crime and Criminal Justice Stats 1999;2000	8.047	4.099	1.7	19.3
RapeRate <sub>9094</sub>	Average rape rate measured as the number of rapes committed per 100,000 persons from 1990-94	European Sourcebook on Crime and Criminal Justice Stats 1999;2000	7.333	3.965	1.380	19.660
RobbRate	Robbery rate measured as the number of robberies committed per 100,000 persons, 1995	European Sourcebook on Crime and Criminal Justice Stats 1999;2000	76.235	49.605	15	181
RobbRate <sub>9094</sub>	Average robbery rate measured as the number of robberies committed per 100,000 persons from 1990-94	European Sourcebook on Crime and Criminal Justice Stats 1999;2000	78.109	52.101	12.800	220.250
TheftRate	Theft rate measured as the number of thefts committed per 100,000 persons, 1995	European Sourcebook on Crime and Criminal Justice Stats 1999;2000	3797.882	2331.875	706	8448
TheftRate <sub>9094</sub>	Average theft rate measured as the number of thefts committed per 100,000 persons from 1990-94	European Sourcebook on Crime and Criminal Justice Stats 1999;2000	3968.234	2510.458	498	8452
PrisCap	Prison capacity measured as the number of prison cells per 100,000 persons, 1995	European Sourcebook on Crime and Criminal Justice Stats 1999;2000	83.889	28.326	41	176
GovtOpin	Average government Laver-Budge Left-Right scores based on CMP coding of party platforms at each election period; negative #s indicate Left leaning; 0= Center; positive #s indicate Right leaning	Comparative Manifesto Group	-6.143	8.433	5.396	-22.557
ElectOpin	Median voter Left-Right score based on formula by Kim and Fording (1998) and using CMP data; negative #s indicate Right leaning; 0= Center; positive #s indicate Left leaning	Comparative Manifesto Group	6.111	8.673	-11.273	20.782
TaxCap	Revenue from taxes measured as a percentage of GDP, 1995	World Economic Indicators	32.968	6.418	19.654	42.983
TaxCap <sub>9094</sub>	Average revenue from taxes measured as a percentage of GDP from 1990-94	World Economic Indicators	33.028	6.546	20.067	44.648
PopDen	Population per km <sup>2</sup> , 1995	World Economic Indicators	137.398	113.563	14.210	456
PopDen <sub>9094</sub>	Average population density from 1990-94	World Economic Indicators	131.837	109.779	13.974	447.289
HealthSp	Percentage of GDP spent on health, 1995	World Economic Indicators	6.309	1.000	4.380	8.130

HealthSp <sub>9094</sub>	Average percentage of GDP spent on health from 1990-94	World Economic Indicators	6.202	1.036	3.642	7.668
TaxCap <sub>9094</sub> *GovtOpin	Interaction term TaxCap <sub>9094</sub> andGovtOpin	Computed	-208.846	277.333	-717.082	111.929
TaxCap <sub>9094</sub> *CrimeRate <sub>9094</sub>	Interaction term TaxCap <sub>9094</sub> and CrimeRate <sub>9094</sub>	Computed	188699.9	121099.9	25704.5	410601.7
TaxCap <sub>9094</sub> *RapeRate <sub>9094</sub>	Interaction term TaxCap <sub>9094</sub> and RapeRate <sub>9094</sub>	Computed	246.650	148.245	46.910	666.042
TaxCap <sub>9094</sub> *RobbRate <sub>9094</sub>	Interaction term TaxCap <sub>9094</sub> and RobbRate <sub>9094</sub>	Computed	2574.265	1765.83	371.209	6391.132
TaxCap <sub>9094</sub> *TheftRate <sub>9094</sub>	Interaction term TaxCap <sub>9094</sub> and TheftRate <sub>9094</sub>	Computed	129374.1	89117.31	14442.36	277364.6
StatSev*RapeRate <sub>9094</sub>	Interaction term RpStSev and RapeRate <sub>9094</sub>	Computed	1811.76	1301.034	198.72	4392
StatSev*RobbRate <sub>9094</sub>	Interaction RbstSev and RobbRate <sub>9094</sub>	Computed	14375.74	11210.47	36009	47232
StatSev*ThftRate <sub>9094</sub>	Interaction term ThftStSev and TheftRate <sub>9094</sub>	Computed	583911.9	873095.9	59760	3655968
PrisCap*CrimeRate <sub>9094</sub>	Interaction term PrisCap and CrimeRate <sub>9094</sub>	Computed	478256.1	268264.807	36339.94	1031468
PrisCap*RapeRate <sub>9094</sub>	Interaction term PrisCap and RapeRate <sub>9094</sub>	Computed	620.018	344.824	97.80	1376.2
PrisCap*RobbRate <sub>9094</sub>	Interaction term PrisCap and RobbRate <sub>9094</sub>	Computed	6559.030	4153.177	524.890	17179.5
PrisCap*ThftRate <sub>9094</sub>	Interaction term PrisCap and ThftRate <sub>9094</sub>	Computed	331133.80	202698.434	20418.00	746426.81

**Table 5: Factor Analyses of U.S. and European Statutory Maximum Sentences and Crimes Rates**

	U.S.		European	
Variables	Initial Eigenvalues	Initial Eigenvalues of Variables Logged	Initial Eigenvalues	Initial Eigenvalues of Variables Logged
<b>Statutory Severity</b>				
Murder	.076	.104	.232	.337
Manslaughter	.168	.307	.408	.600
Rape	.273	.241	.279	.304
Robbery	.334	.406	.632	.783
Theft			.677	.825
Burglary	.222	.293		
Larceny	.152	.081		
<b>Sum of Eigenvalues</b>	<b>1.225</b>	<b>1.432</b>	<b>2.228</b>	<b>2.842</b>
<b>Crime Rates</b>				
Homicide	.570	.706	.368	.307
Rape	.251	.280	.709	.722
Assault	.700	.761	.565	.676
Robbery	.606	.751	.244	.388
Theft			.598	.469
Drug			.268	.292
Burglary	.565	.438	.527	.409
Larceny	.259	.178		
<b>Sum of Eigenvalues</b>	<b>2.951</b>	<b>3.114</b>	<b>3.279</b>	<b>3.263</b>

Extraction Method: Principal Axis; Rotation Method: Varimax

<sup>i</sup> As annotated in Tables 1 and 2, theft includes criminal acts that may be categorized as burglary and larceny according to U.S. standard definition of these crimes. For life and death sentences, we follow the Bureau of Justice Statistics National Reporting Program criteria of converting these sentences to 35, 40, or 60 years depending on whether we are talking about life with the possibility of parole, life without the possibility of parole, and death, respectively. They are the maximum allowable sentences for a first-time but aggravated form of each offense.

<sup>ii</sup> We know that at least in the U.S. this is a big assumption, given that double-bunking is widespread.

<sup>iii</sup> Since government opinion is coded so that a negative sign indicates a more conservative position, I multiplied the scale by -1 so that a unit increase in this opinion scale, leads to an increase in the number of months of the threat of punishment. Only in the case of larceny does electorate opinion reach statistical significance and in the expected direction, that is, a more conservative electorate has a positive influence on severity.

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<sup>iv</sup> There are two reasons for factor analyzing the logged values, one is statistical and the other is theoretical. The first is provided in the literature on sentence severity scaling: the declining marginal utility of the severity of punishment. Thus, logging the variables allows us model the function more adequately. Tufte (1974, 108) explains a second reason. Given the large variance among the sentences, the potential skewness in the distribution of the source variables is great. He explains that logging, for instance, these sentence maxima “spreads out the clustered values” and “pulls otherwise outlying values toward the middle of the distribution”.