

Chapter 2

Some Reflections on the History and Development of Alternatives to Prison

2.1 Introduction

The interest vested in the examination of the historical development of non-custodial penalties is fairly limited in contradistinction to that of custodial penalties. Indeed, far less attention has been given to the gradual transformation that has been occurring in the modalities of punishment since the mid-nineteenth century. This is not to underestimate the existence of a body of literature on the history of individual punishments, most notably on the history of the probation order.¹ It seems fair, however, to suggest that a comprehensive historical analysis from a comparative perspective on the theme largely remains an unfulfilled task.

For two reasons such an historical analysis appears to be both feasible and essential. Firstly, as will be demonstrated below, on the whole the conceptualisation of alternatives to prison has to a great extent remained akin to its foundational forms. By virtue of this, a historical examination of the quest for alternatives and their legislative adoptions would potentially facilitate a greater understanding of the contemporary location of these sanctions. Secondly and equally importantly, the transformations which these penalties have undergone, both at philosophical and practical levels, may well likely indicate possible future directions of non-custodial sanctions.

This chapter therefore aims to take one modest step towards understanding the foundations of non-custodial modes of punishment, an arguably unduly neglected area of comparative penology. Two periods in this context will be under examination. Of these periods, the first is concerned with the early emergence of the concept of prison alternatives. Here, particular attention will be paid to the adoption of conditional suspension of the execution of imprisonment and probation as the most

¹Timasheff, N., S. (1941) *One Hundred Years of Probation, 1841–1941*, Part I: Probation in the United States, England and the British Commonwealth Countries, and (1943) Part II: Probation in Continental Europe, Latin America, Asia, and Africa, Fordham University Press, New York; United Nations/Department of Economic and Social Affairs (1951) *Probation and Related Measures*, United Nations Publications, New York; Harris, R. (1995) Probation round the World: Origins and Development in Hamai, K., Ville, R., Harris, R., pp. 25–67; Hough, M. and Zvekic, U. (eds.) *Probation Round the World: A Comparative Study*, Routledge, London.

innovative and practically sustainable forms of early prison alternatives. The second period focuses on the rapid proliferation of non-custodial penalties since the 1970s.

2.2 ‘Reforming’ Prisons and Prisoners: Setting the Scene for the Concept of Alternatives to Imprisonment

The terms ‘prison alternatives’ and ‘non-custodial penalties’ have long been used interchangeably to reflect the common characteristic of an array of sanctions that are executed outside the prison realm. Historically, however, a further qualification ought to be made, since any insight into the historical development of such sanctions as public work, the fine reveals that sanctions of this kind in various forms existed in earlier periods of the history,² during which prisons were used to confine debtors and persons awaiting their trial and punishment.³ In view of this fact, here no attempt is being made to cover the distinct origins of sanctions not containing custody. The chief concern of this section is, rather, to analyse the emergence of alternatives to imprisonment against the background of the birth of prison as a penal institution. As detailed below, for the concept of prison alternatives to evolve, first of all imprisonment needed to be inaugurated as a major form of punishment.

It was not until the early seventeenth century that confinement began to function more than a mere form of detention.⁴ Gradually, by the early nineteenth century in virtually every European country, imprisonment became the dominant mode of punishment and in many cases replaced capital and corporal punishments. Several studies have attempted to explain the nature of this change occurring in the form of punishment within a broader context, according to which this transformation has been attributed to the social, economic and political needs of the period.⁵ It is

²von Hentig, H. (1955) *Die Strafe*, vol. 2, Die modernen Erscheinungsformen, Berlin, Springer; Grebing, G. (1978) Die Geldstrafe in rechtsvergleichender Darstellung, in Jescheck, H.-H. and Grebing, G. (eds.) *Die Geldstrafe im deutschen und ausländischen Recht*, Nomos, Baden Baden, pp. 1185–1357; Albrecht, H.-J. and Schädler, W. (1986) (eds.) *Community Service: a New Option in Punishing Offenders in Europe*, Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg.

³Peters, E., M. (1995) Prison before the Prison: The Ancient and Medieval Worlds in Morris, N. and Rothman, D. J. (eds.) *The Oxford History of Prison*, Oxford University Press, Oxford, pp. 3–47.

⁴Spierenburg, P. (1996) Four Centuries of Prison History: Punishment, Suffering, the Body, and Power in Fintzsch, N. and Jütte, R. (eds.) *Institutions of Confinement: Hospitals, Asylums, and Prisons in Western Europe and North America, 1500–1950*, Cambridge University Press, Washington, D. C., pp. 17–38, pp. 23–24.

⁵Rusche, G. and Kirchheimer, O. (1939) *Punishment and Social Structure*, Columbia University Press, New York; Rothman, D. (1971) *The Discovery of the Asylum: Social Order and Disorder in the New Republic*, Little Brown, Boston; and (1980) *Conscience and Convenience: the Asylum and*

beyond the scope of this chapter, however, to carry out such a macro analysis. This study is concerned with the consequences of the 'Great Confinement' into prisons in terms of a very narrowly defined area, its impulse in stimulating almost concurrently its alternatives.

In order to do so, first of all it must be noted that the need for incarceration of greater number of offenders led to a rapid proliferation of prisons across the Continent. In studying the newly emergent prisons in Europe, O'Brien highlights that these prisons displayed a remarkable similarity in relation to their prison regimes, construction, internal regimes, architecture, work systems and inmate cultures.⁶ It may be by virtue of these similarities that reform initiatives came into existence simultaneously in various countries. However, reforming prisons was not as straightforward a task as it might once have been considered. As soon as the reform ideas entered into the field of application, they found themselves in conflict with the reality of the prisons of the period.

The reformers of this period envisaged a prison system that would be capable of regenerating the morality of prisoners and reintegrating the convict into the community as a useful, productive and law-abiding citizen.⁷ Since the causes of crime were seen as 'oblivion of religious and moral principles, ignorance of duty, idleness and habits of drinking',⁸ it was believed that through discipline, education and classification according to a 'moral diagnosis',⁹ prison would enable inmates to resist criminal inclinations within and outside of prison. Such a system, in their view, was to enable the convict to acquire industrial, scholastic, moral and religious education, whereby particular importance was attached to moral instruction.¹⁰ In accordance with this view, many of the reformers were in principle against the idea of a harsh, cruel and vindictive prison regime and of the opinion that corporal punishment-based prison discipline did not, in the long term, contribute to

its Alternatives in Progressive America, Little, Brown, Boston; Foucault, M. (1975) *Discipline and Punish: the Birth of the Prison*, Penguin, London; Ignatieff, M. (1978) *A Just Measure of Pain: the Penitentiary in the Industrial Revolution, 1750–1850*, Pantheon Books, New York; and (1981) *State, Civil Society and Total Institutions: A Critique of Recent Social Histories of Punishment, Crime and Justice*, vol. 3, pp. 153–192 and; Melossi, D. and Pavarini, M. (1981) *The Prison and the Factory: Origins of the Penitentiary System*, Macmillan, London.

⁶O'Brien, P. (1995) *The Prison on the Continent: Europe, 1865–1965* in Morris and Rothman, *op. cit.*, pp. 199–226, pp. 199–200.

⁷Ruggles-Brise (1925), *op. cit.*, p. 20, Grünhut, M. (1948) *Penal Reform: A Comparative Study*, Clarendon Press, Oxford, pp. 96–98, at p. 68, Nutz, T. (2001) *Strafanstalt als Besserungsmaschine: Reformdiskurs und Gefängniswissenschaft*, Oldenbourg, München, pp. 69–97.

⁸Wines, E. C. (1873) *Report on the International Penitentiary Congress of London* (held July 3–13, 1872), Government Printing, Washington, pp. 98–100.

⁹*Ibid.*, p. 133, Carpenter, M. (1967) *Reformatory Prison Discipline*, reprinted from the 1872 edition, Patterson Smith, Montclair, p. ix.

¹⁰Tallack, W. (1889) *Penological and Preventive Principles*, reprinted in 1984, Garland Publishing, New York, pp. 62–65, Wines, *op. cit.*, p. 138.

the ‘moral amendment’ of the convicts.¹¹ Intriguingly, however, the translation of the idealised form of prison into practice, even in its very inception, appeared to be hard to achieve. In this sense, the very drive for the ‘moral correction’ of prisoners through a prison stay and through discipline soon led to a certain disillusionment as to the ability of the prison to fulfil such expectations. It began to be acknowledged that prison created the danger of further moral contamination and deviant careers.¹² Hence, the reformers of this period, while thinking about the ways in which prisons could become well-regulated, disciplined, humane and adequately sanitary, meanwhile questioned at the very outset their presumed reformatory function. One of the greatest hindrances in realising the latter function of prisons was, for many, the growing presence of habitual offenders in the establishments.

Indeed, at this period recidivism aroused great concern. Scholars and criminal justice practitioners demanded draconian penalties, a more rigorous imprisonment and the imposition of greater deprivations upon recidivists.¹³ It was recorded that at this time recidivists or habitual criminals made up more than 50% of the prison population in Europe.¹⁴ Offenders of this kind were seen as being “in a state of absolute antagonism to society”,¹⁵ affording no hopes of the improvement of their morals. In accordance with this point of view, it was thought that confining first offenders together with habitual and repeated offenders would constitute a serious obstacle to the rehabilitation of the former. One way of preventing this contagious effect of the prison might be the separation of the former from the latter kind of offenders. However, the classification on this basis was deemed insufficient for the purpose of the avoidance of contamination among prisoners. Neither was it seen in practice as fully achievable, since in many prisons the crowded state of the prison,

¹¹Pears, E. (1872) *Prison and Reformatories At Home and Abroad: The Transactions of the International Penitentiary Congress*, Longmans, London, in fact, in the London Congress questions like ‘ought corporal punishment to be admitted in the disciplinary code of a penitentiary system?’ and ‘should whipping be employed as a disciplinary punishment?’ were also discussed. In response to these questions, some prison governors contended that ‘there was a class of men who thought nothing of disgrace, but cared only for the stripes that they received.’ See also p. 137, Wines, *op. cit.* p. 137, Ruggles-Brise (1925) *op. cit.*, p. 9, Grünhut (1948) *op. cit.*, pp. 65–72.

¹²Saleilles, for example, argued that “It is the promiscuous association within the prison, the contamination of its communal life, and the exposure to the vices of humanity, that make the habitual criminal”. p. 105, Saleilles, R. (1911) *The Individualisation of Punishment*, reprinted in 1968, Patterson Smith, Montclair.

¹³Carpenter, *op. cit.*, pp. 9, Wines, *op. cit.*, pp. 141–142, von Liszt (1882/3) *Der Zweckgedanke im Strafrecht*, reprinted in 2002, Nomos Verlagsgesellschaft, Baden, pp. 42–47, Ruggles-Brise (1925) *op. cit.*, pp. 13–14 and 57–58, *Mitteilungen der Internationalen Kriminalistischen Vereinigung* (1891), vol. 2, Guttentag, Berlin, pp. 96–103, see also the report of von Lilienthal, Wie ist der Begriff der unverbesserlichen Gewohnheitsverbrecher im Gesetze zu bestimmen und welche Maßregeln sind gegen diese Verbrecher zu empfehlen?’ in *Mitteilungen der Internationalen Kriminalistischen Vereinigung* (1891), vol. 2, pp. 64–75.

¹⁴Ruggles-Brise (1925), *op. cit.*, p. 15.

¹⁵Carpenter, *op. cit.*, p. ix.

and the regular changes of its inmates, made it difficult to introduce classification.¹⁶ In this respect, the English historian Wiener's observation in the context of Britain that in this period "recidivism came increasingly to be interpreted as an evidence for the prison's ability either to deter or moralise criminals" may be generalised as being applicable across Europe.¹⁷ This view was most evident within international discussion platforms such as International Penitentiary Congresses.¹⁸

Consequently, the debates on prison discipline, classification of offenders and creating a humane atmosphere in prisons turned out to provide the arguments for the necessity of keeping particular categories of offenders, first and petty offenders, out of prison. For the latter group of offenders, it came to be recognised that institutional confinement, due to its counter-productive effects, ought not to be a sanction of first resort. In a wider context, the state of prisons, particularly in terms of the inflated prison populations, posed a serious challenge to the operation and maintenance of prisons. Conditional release was one of the ways for diminishing such perceived effects of prisons while reducing the prison population. Nevertheless, by definition it only had a limited impact. Going one step further, the reformers of this age began to seek for alternative sentences which could replace custodial sentences in certain cases. However, without an accompanying shift in the perceptions of crime and punishment, such a change would certainly have been unthinkable.

2.3 The Intellectual Background of Alternatives to Imprisonment

The classical school regarded imprisonment as the most adequate method of punishment. Imprisonment was not merely a humane alternative to various forms of capital and corporal punishments, but also and more importantly a method of incapacitating offenders, while exerting more powerful and lasting deterrent effect on them.¹⁹ This view is clearly reflected by Beccaria when he, having compared the death penalty with imprisonment, concluded that "it is not the terrible but fleeting sight of a felon's death which is the most powerful brake on crime, but the long-drawn-out example of a man deprived of his freedom".²⁰ In this sense, it may be

¹⁶Society for the Improvement of Prison Discipline and for the Reformation of Juvenile Offenders (1832) *The Eighth Report of the Committee of the Society for the Improvement of Prison Discipline and for the Reformation of Juvenile Offenders*, J. and A. Arch, London, pp. 132–156.

¹⁷Wiener, M. J. (1994) *Reconstructing the Criminal: Culture, Law and Policy in England, 1830–1914*, Cambridge University Press, Cambridge, p. 343, see also Ancel (1971), *op. cit.*, p. 6.

¹⁸For example, the Congress of Paris (1895), see Ruggles-Brise (1925), *op. cit.*, pp. 56–88.

¹⁹Beccaria, C. (1764) *On Crimes and Punishments* reprinted in 1995 in Bellamy, R. (ed.) *Beccaria On Crimes and Punishments and Other Writings*, Cambridge University Press, Cambridge, see the Purpose of Punishment, p. 31.

²⁰Beccaria, *op. cit.*, the Death Penalty, p. 67.

plausibly argued that the institution of prison found its theoretical base and justifications in the writings of this school. It is therefore no coincidence that the alternatives to prison emanated from a lively scholarly debate severely questioning the assumptions of the classical school.

In this context, the notion of free will constituted a major point of conflict in newly emerging ideas about criminality. As opposed to what classical jurisprudence postulated; that criminal behaviour was a product of exercising free will and based on a pleasure-pain calculation, it was increasingly appreciated that there may be factors beyond the control of individual actors which may, to a lesser or greater degree, determine his/her choices and behaviours.²¹ Once the idea of crime as rational choice began to be questioned, attention was paid to understanding the causes of criminal behaviour. The shift from studying crime to studying the causes of crime was then manifested by the statement that crime was conceived not merely as a judicial concept – as an abstract entity – but at the same time as a social and anthropological phenomenon.²² It goes without saying that the advances made in the natural and social sciences functioned as an important catalyst for such a shift. And furthermore, the progress in the disciplines of medicine, psychiatry, psychology and sociology did not merely lend their concepts and methodologies to the efforts of understanding the deviant behaviour, but they also evoked a hope for the treatment and cures of deviance and criminality. It was thought that only after the causes of criminal behaviour were diagnosed, could efficient remedies be employed against them.²³ Different theories were put forward to explain the causes of crime.

Among these, the most provoking was perhaps the contribution of the Italian positivist school, established by Cesare Lombroso. Inspired by the evolutionary studies, Lombroso argued that the criminal is a distinct type from birth, a biological ‘throwback’, a result of *atavism* (explained as the reappearance of characteristics that were seen only in the distant ascendants).²⁴ The criminal, he argued, “must be a survivor of the primitive man and the carnivorous animal”.²⁵ Certain physical features such as asymmetries in the face, deviation in head size were seen by the scholar as an atavistic ‘stigmata’. In his subsequent studies Lombroso modified his argument by paying increasingly more attention to environmental factors such as

²¹ von Liszt, F. (1905) *Strafrechtliche Aufsätze und Vorträge*, vol. 1 and 2, de Gruyter, Berlin, vol. 1, Die deterministischen Gegner der Zweckstrafe, p. 65.

²² E.g., *Mitteilungen der Internationalen Kriminalistischen Vereinigung* (1899), *op. cit.*, vol. 7.

²³ von Liszt, *op. cit.*, vol. 2, Die gesellschaftlichen Faktoren der Kriminalität, p. 444, Ferri, E. (1901) *The Positive School of Criminology* reprinted in Grupp, S., E. (ed.) (1971) *Theories of Punishment*, Indiana University Press, Bloomington, pp. 229–242, p. 233.

²⁴ Lombroso, C. (1895) *Atavism and Evolution*, *Contemporary Review*, vol. 68, p. 42–49 reprinted in Horton, D., M. and Rich, E., K. (2004) *The Criminal Anthropological Writings of Cesare Lombroso Published in the English Language (Periodical Literature During the Late 19th and Early 20th Centuries)*, Mellen, Lewiston.

²⁵ Lombroso, C. (1895) *Criminal Anthropology: Its Origins and Application*, *Forum*, vol. 20, pp. 33–49, in *ibid* p. 66.

climate, poverty, immigration and urbanisation.²⁶ With this alteration he distinguished three other criminal types alongside that of inborn or atavistic criminals: insane criminals, occasional criminals and criminals of passion. Lombroso's theory was further advanced through greater recognition of sociological factors in the causation of the crime by his disciples Ferri and Garofalo. Since the positivist school regarded criminality as a naturally occurring phenomenon and accordingly criminals as a special class of human, according to them, the concept of free will was nothing more than a "subjective illusion".²⁷ By focussing on criminals rather than crime as an abstract concept, the school declared one of its primary aims as preventing criminality, which meant that a scientific examination of criminality was deemed essential.

The groundbreaking ideas and influence of the Italian positivist school were met with a vigorous response across the Continent. Intriguingly, the response to the positivist school reflected a substantial agreement on their standpoints²⁸ and subsequently institutionalised under the roof of 'Internationale Kriminalistische Vereinigung' in 1888. The leading figures of *Internationale Kriminalistische Vereinigung* were von Liszt, Prins and van Hamel. Here a brief reference should particularly be made to the thoughts of von Liszt, who was one of the most prominent legal theoreticians of the Foundation, and who was therefore described as the soul of this influential organisation.²⁹

Von Liszt, while acknowledging the significance of the positivist school in terms of widening the horizon of criminal law and introducing scientific methods to this discipline, firmly rejected the Lombrosian concept of inborn criminality or atavistic criminality. Instead, he considered criminal behaviour as a product of both individual dispositions of the offender (e.g. mental and physical deficiencies), which might be inherited or subsequently developed, and the social milieu and upbringing of the individual.³⁰ For him, social and biological factors ought not to be seen as contradictory in terms of determining criminality, since these factors in fact mutually complement one another.³¹ In his view, however, social factors have a more decisive

²⁶Lombroso, C. (1902) *Die Ursachen und Bekämpfung des Verbrechens*, Hugo Bermühler Verlag, Berlin.

²⁷Ferri, E. (1896) *Das Verbrechen als soziale Erscheinung: Grundzüge der Kriminal-Soziologie*, Wigand, Leipzig, p. 21.

²⁸von Liszt, *op. cit.*, vol. 2, Über den Einfluss der soziologischen und anthropologischen Forschungen auf die Grundbegriffe des Strafrechts, p. 77.

²⁹Kitzinger, F. (1905) *Die Internationale Kriminalistische Vereinigung: Betrachtungen über Ihr Wesen und Ihre Bisherige Wirksamkeit*, Beck, München, p. 4, see also Bellmann, E. (1994) *Die Internationale Kriminalistische Vereinigung (1889–1933)*, Lang, Frankfurt am Main, Kesper-Biermann, S. (2007) *Die Internationale Kriminalistische Vereinigung. Zum Verhältnis von Wissenschaftsbeziehungen und Politik im Strafrecht 1889–1932*, Kesper-Biermann and Overath (eds.), pp. 85–107.

³⁰von Liszt, *op. cit.*, vol. 1, Kriminalpolitische Aufgaben p. 309, Das Verbrechen als sozialpathologische Erscheinung, *op. cit.*, vol. 2, p. 232 and Die gesellschaftlichen Faktoren der Kriminalität, pp. 438–441.

³¹von Liszt, *op. cit.*, Das Verbrechen als sozialpathologische Erscheinung, p. 234.

role in determining the criminal career.³² Critically, von Liszt distinguished three types of criminals: occasional criminals, persistent but corrigible criminals and incorrigible habitual criminals.

As this brief outline suggests, the ways in which criminals were classified presupposed the distinction between habitual and occasional offenders.³³ Such a differentiation of criminals constituted the foundation for the recognition that the punishment should fit the criminal and not the crime. In this regard the Italian positivist school rejected the use of the concept of punishment. On their account, since the offences of criminals are determined by factors external to their will, they cannot be held responsible for their criminal behaviour and thus they must be treated rather than punished. In this sense, it was contended that punishments “have the same relation to crime that medicine has to disease”.³⁴ In a related but a distinct and legalistic vein, von Liszt developed the conception of purpose-oriented punishment, *Zweckstrafe*. Punishment, he argued, should no longer satisfy the collective vengeance of the public; it should not in this sense be conceived as an end itself. Rather, punishment should be adapted to bring about a certain result in a given case. This, according to him, could only be done by taking the nature and individual circumstances of the offender into account.³⁵ For the occasional offender, von Liszt argued that punishment ought to have a deterrent impact and in this sense it should function as a warning.³⁶ With regard to persistent but corrigible criminals, punishment should serve the re-socialisation of the offender. In this case, von Liszt proposed the use of indeterminate sentences indicating the minimum and maximum limit of the imprisonment term (which according to him should range from 1 to 5 years) without pronouncing the duration of imprisonment definitely. The duration of the sentence would then be meted out separately by the sentencing court according to the offender’s rehabilitation. Finally, when it is ascertained that the criminal is incorrigible, the punishment (a life sentence) should be a measure taken for the sake of incapacitation, or in other words, a measure for the protection of society from the criminal, while preventing him/her from committing future crimes.

Overall, it seems plausible to suggest that despite the theoretical diversity among the positivist and modern schools, the agreement on differentiation of criminals and

³²*Ibid.*, Kriminalpolitische Aufgaben, p. 312.

³³See e.g., *Mitteilungen der Internationalen Kriminologistischen Vereinigung* (1897), *op. cit.*, vol. 5, p. 1, Satzungen der Internationalen Kriminologistischen Vereinigung.

³⁴Ferri, E. (1901), p. 231, see also Lombroso, *op. cit.* p. 345–347.

³⁵von Liszt, *op. cit.*, vol. 2, Die deterministischen Gegner der Zweckstrafe, p. 57, Der Zweckgedanke im Strafrecht pp. 39–49; von Liszt’s argument created a lively academic debate, e.g. see, von Birkmeyer, K. (1909) *Studien zu dem Hauptgrundsatz der Modernen Richtung im Strafrecht*, Leipzig, Engelmann, p. 17.

³⁶von Liszt, Der Zweckgedanke im Strafrecht, pp. 42–49.

their punishment at a practical level by implication induced a firm fight against recidivism.³⁷ In the face of the reality of prisons, as argued above, this consensus also implied the need for cutting down the ‘clientele’ of prison whose offending behaviour is rather occasional. Those offenders who were deemed to be amenable to correction were to be ‘saved’.³⁸ The ‘salvation’ of these criminals, it was believed, required the establishment of alternative measures in order to remove them from prison. Such views furthermore gained a major boost through the meetings of the International Penitentiary Congresses and the *Internationale Kriminologische Vereinigung*. This climate of opinion was categorically in favour of the legislative introduction of non-custodial alternatives, as will be discussed below.

2.4 The Legislative Developments: The Birth of Alternative Punishments

The end of the nineteenth century marks a milestone in the codified and non-codified penal laws of western countries, as alternatives to imprisonment were enacted for the first time in this period. Prior to a closer investigation into this development, it must be remembered that the adoption of these alternatives did not occur without disapproval,³⁹ since the new forms of punishment such as conditional suspension of punishment *per se* constituted a marked departure from the established principles of penal law. At this point, however, a distinction must be made, since the experiences of countries with civil and those with common law systems displayed significant differences.

Central to discussions in the civil law systems was the changing role of the judge, or in other words the extension of his discretionary power.⁴⁰ In the civil law

³⁷E.g. the title of Berenger’s Bill was “Bill on the progressive augmentation of sentences in cases of recidivism and on their mitigation for first offences”, Ancel, M. (1971) *Suspended Sentence*, Heinemann, London (1971) p. 11.

³⁸Lombroso (1895), *op. cit.*, pp. 33–49, reprinted in Horton and Rich, *op. cit.* p. 79 Lombroso argued that “all efforts should be concentrated upon occasional criminals. They are the only ones for whom much can be done”.

³⁹Kirchenheim (1890) *Bedingte Bestrafung, Gerichtssaal*, vol. 43, pp. 51–70, Appellius, H. (1891) *Die Bedingte Verurteilung und die anderen Ersatzmittel für Kurzzeitige Freiheitsstrafen: eine Kritik der neusten Reformbestrebungen auf dem Gebiet des Strafrechts*, 4th edition, Keßler, Cassel, Wach, A. (1899) *Die bedingte Verurteilung, Deutsche Juristen-Zeitung*, vol. 4, no 6, pp. 117–120. See also, Grünhut (1948) *op. cit.*, pp. 104, Ancel (1971), *op. cit.*, p. 12, Ruggles-Brise, E. (1911) An English View of the American Penal System, *Journal of Criminal Law and Criminology*, vol. 2, no. 3, pp. 356–369. He noted that “at the present time complaints (in France, Belgium and Italy) are loud that ‘sursis de l’exécution de la peine’ means only immunity for the malefactor, and that the arm of law is being weakened by its operation”. p. 364

⁴⁰For example, the Paris Congress 1895, Ruggles-Brise, E. (1925) *Prison Reform at Home and Abroad: A Short History of the International Movement since the London Congress 1872*, Macmillan, London, pp. 59–64.

tradition, influenced by the classical school, which viewed an unguided discretion of the judge as ‘always contrary to public safety’,⁴¹ the latter concept was then in general interpreted as causing inevitable arbitrariness, favouritism, and accordingly breach of equality before the law.⁴² In accordance with this philosophy, the function of the judge was that of an “automatic dispenser”,⁴³ limited to pronouncing the sentence laid down objectively by the law. As such the judge had no right to decide whether or not the sentence which s/he pronounced should be executed.⁴⁴ This was seen as an essential prerequisite of justice. Hence, extending the discretion of the judge at the sentencing stage would, according to some accounts, cause unwarranted privilege of grace and mercy, while lessening the deterrent effect of punishment.⁴⁵

Of equal significance was another controversy related to the notion of proportionality. The classical theory of penal justice comprised of a strict equivalence between crime and punishment, and demanded for what Beccaria called a ‘mathematical exactness’⁴⁶ in fixing corresponding scale of punishment. Thus, if two individuals incur different punishments for the same offence “it would seem as though equity had been disregarded, and that caprice had replaced justice”.⁴⁷ However a growing body of opinion increasingly questioned the idea of ‘equal punishments for equal crimes’. Many believed that not only the gravity of the offence, but also the personality and the unique circumstances of the offender must also be taken into account in determining the punishment.⁴⁸

Clearly, such tensions between the established principles and the proposed methods determined the way in which early prison alternatives were introduced into legislation. Thus, on the Continent the reform initiatives, as Ancel observed, gained recognition only insofar as they were presented as “a limited exception to the traditional rules of penal law”.⁴⁹ That limited exception was deemed to be justifiable by many continental scholars only in respect of those petty and first offenders who incurred a sentence of short-term imprisonment.⁵⁰ The underlying belief of the legislative enactments was that short-term imprisonment was ineffective and had a detrimental impact upon the individual. Most vocal in ‘the crusade

⁴¹Beccaria, *Of Detention Awaiting Trial*, p. 73.

⁴²Kirchenheim (1890), *op. cit.*, p. 53.

⁴³Ancel (1971), *op. cit.*, p. 5.

⁴⁴Kirchenheim (1890), *op. cit.*, for a discussion, see Saleilles *op. cit.*, pp. 57–61.

⁴⁵Groß, A. (1907) *Für den Bedingten Straferlass: Rechtsvergleichend-Kritische Untersuchung*, A. Hödler, Wien, *op. cit.*, p. 56, Kirchenheim, *op. cit.*, p. 60.

⁴⁶Beccaria, *the Proportion between Crimes and Punishments*, *op. cit.*, p. 19.

⁴⁷Saleilles, *op. cit.*, p. 13.

⁴⁸*Ibid.*, pp. 57–61 and 187–188, Garland, D. (1985) *Punishment and Welfare: A History of Penal Strategies*, Aldershot, Gower, pp. 86–87.

⁴⁹Ancel (1971), *op. cit.*, p. 22.

⁵⁰For example, see *Mitteilungen der Internationalen Kriminalistischen Vereinigung* (1889) vol.1, p. 2, von Liszt, *op. cit.*, *Die Reform der Freiheitsstrafe*, p. 513.

against short-term imprisonment'⁵¹ is von Liszt with the statement that a short prison sentence is "worthless, indeed harmful. It does not deter, it does not improve, it contaminates".⁵²

On the other hand, the existing non-custodial sanctions appear to have failed to achieve the desired impact in law in action.⁵³ The fine, as the major non-custodial sentence, was often, in the face of the inability of the offenders to pay, far from being an alternative to short-term imprisonment. Although there were enthusiastic arguments for imposing a fine after a thorough assessment of the defendant's income and resources,⁵⁴ in the absence of such measures in sentencing, default detention was often unavoidable, as will be touched upon later in Chaps. 3 and 4. In this respect, it may be argued that the attempts to reduce the use of default detention also gave the stimulus to alternative modes of punishment.

Other existing non-custodial penalties such as forced work, judicial reprimand and home detention were rarely applied in practice.⁵⁵ A special mention here ought to be made to work as a sanction. The origin of using work as a sanction, as academic studies suggest, goes back far beyond this period, in particular with regard to Germany. However, as an alternative to prison, it was not until this period that the question was raised as to the feasibility and desirability of forced labour or labour sentences as a replacement for short-term imprisonment.⁵⁶ In many respects, forced labour was deemed unsuitable to substitute short-term imprisonment, and was even found 'chimerical'⁵⁷ in its application. First of all, it was theoretically dismissed by the suggestion that this sanction relates essentially to the assets of an individual, which does not contain any limitation of personal freedom. Secondly, the applicability of this sanction in practice was deemed to be limited to only a small number of offender categories. Thirdly, it was believed that the enforcement of it in terms of inspection, control and so on would entail drastic costs. Fourthly, the stigmatising effect of work as a penal sanction was seen potentially as an undesirable consequence of the execution of this type of punishment. Lastly, the danger that the 'moral infection' that the gathering of convicts would cause was regarded as a possible counter-productive effect of forced labour, which was deemed practically no less harmful than in the case of short-term imprisonment.

⁵¹von Liszt, *op. cit.*, vol. 1, Kriminalpolitische Aufgaben, p. 347.

⁵²*Ibid.*, p. 382.

⁵³*Ibid.*

⁵⁴von Liszt 'Welche Maßregeln können dem Gesetzgeber zur Einschränkung der kurzzeitigen Freiheitsstrafe empfohlen werden?', in *Mitteilungen der Internationalen Kriminalistischen Vereinigung* (1889), p. 45, *Mitteilungen der Internationalen Kriminalistischen Vereinigung* (1892), vol. 3, pp. 143–157.

⁵⁵See, e.g., von Liszt, *op. cit.*, vol. 1, Kriminalpolitische Aufgaben, pp. 347–382.

⁵⁶von Liszt in *Mitteilungen der Internationalen Kriminalistischen Vereinigung*, vol. 1, p. 46, Kitzinger, *op. cit.*, p. 144, Zürcher, Ist Zwangsarbeit ohne Einsperrung geeignet, für gewisse Fälle an die Stelle der kurzzeitigen Freiheitsstrafe zu treten?' in *Mitteilungen der Internationalen Kriminalistischen Vereinigung*, (1891), vol. 2, pp. 76–82, pp. 76–77.

⁵⁷Baron Mackay (Holland) in the London Congress in Ruggles-Brise, E. (1925), *op. cit.*, p. 28.

Turning back to the above-mentioned legislative development, the overwhelming use of short-term imprisonment proved beyond any doubt that forced labour, reprimand and other alternative sentences were of little significance in practice.⁵⁸ It was not until the introduction of the conditional sentence (*condamnation conditionnelle*) or the conditional suspension of the execution of the sentence that a practically sustainable alternative was created to substitute for short-term imprisonment.⁵⁹ In effect this made the establishment of this institution one of the most significant developments in the realm of penology.

France was the first country where the suspended sentence was brought before parliament by an official draft in 1884.⁶⁰ The draft emphasised the importance of avoiding the effects of short-term imprisonment on an offender “who has not been previously prosecuted and whose moral character, despite his offence, has remained sufficiently intact for society to have nothing to fear from his liberty”.⁶¹ However, it was not until 1891 that the draft was enacted. According to this law, the conditional suspension of the execution of both fines and imprisonment was possible and could be granted to those offenders who were not previously sentenced to imprisonment or a more severe penalty. The duration of the period of suspension was 5 years. The suspension was to be revoked, if the offender, during the term of suspension, was to be sentenced to imprisonment, otherwise no conviction was deemed to have taken place.

In the meantime, as early as 1888, Belgium had adopted a law,⁶² the origin of which could be traced back to the French draft.⁶³ The Belgian law determined the ambit of application of the conditional sentence more restrictively than the French law of 1891. As opposed to the French draft in its original form, the suspension could be made only with regard to prison sentences not exceeding 6 months and only granted to offenders who had not incurred a sentence for felonies (*crimes*) or misdemeanours (*delits*). Further, the Belgian law empowered the judge to determine the duration of the period of suspension within a maximum limit of 5 years.

As this brief description of the French and Belgian laws shows, the Belgian law did not differ from the French law much. Due to the similarities between the law of the aforementioned countries in terms of purpose and principles, the respective legislation of these countries was later seen as constituting a pattern in the creation

⁵⁸See e.g., Zürcher, *op. cit.*, pp. 76–82.

⁵⁹Conditional sentence is defined as “a penalty which consists of the threat of execution. Conditional sentence is a true sentence comprising a penalty whose execution is suspended and an admonition which is a moral punishment”. Ancel (1971), *op. cit.*, p. 16.

⁶⁰Gruber, L. (1903) Die bedingte Verurteilung in Frankreich, *Gerichtssaal*, vol. 62, pp. 292–306.

⁶¹Cited in Ancel (1971), *op. cit.* p. 18.

⁶²See Belgisches Gesetz vom 31 Mai 1888 über bedingte Entlassung und bedingte Strafurteile, *Gerichtssaal*, vol. 41, pp. 246–250.

⁶³Ancel (1971), *op. cit.*, p. 15.

of the suspended sentence.⁶⁴ In the years immediately following the introduction of the French and Belgian laws, as an alternative to imprisonment the suspended sentence began to be presented in international meetings, most notably at the third International Penitentiary Congress in 1885 in Rome and the fourth Congress in St. Petersburg in 1890.⁶⁵ The dissemination and exchange of the ideas soon inspired the adoption of the suspended sentence or the conditional execution of punishment with local modifications in Europe with the following chronology: Luxemburg (1892), Portugal (1893), Norway (1894), Italy (1904), Bulgaria (1904), Denmark (1905), Sweden (1906), Spain (1908), Hungary (1908), Greece (1911), the Netherlands (1915) and Finland (1918).⁶⁶

Germany, despite its influential proposition of the conditional suspension of imprisonment was initially an exception to this tendency.⁶⁷ In German states, by this time a distinctive method, the so-called conditional pardon, as will be further elucidated in Chap. 4, functioned as a prison surrogate. Saxony was the first German state where a law concerning conditional pardon ‘bedingte Begnadigung’ was enacted. Subsequently, this law constituted an example for the other states. The principle purpose of this measure was based on the need of diverting juvenile and petty offenders from the prison. Hence in the final analysis it theoretically differed little from related measures in other countries, considering the fact that it also envisaged a suspension of a prison sentence or under certain circumstances also the suspension of the prosecution. Practically, however, the German conditional pardon was an administrative measure. Its application was at the discretion of the public prosecutor and only after (her)/his inquiry into the circumstances of the offender as to the suitability of an application of the conditional pardon could s/he refer the case to the Ministry of Justice. The ultimate decision was entrusted to the Minister of Justice. In practice, the new measure was mainly applicable to young offenders whose prison sentences were not longer than 6 months.⁶⁸

Concomitant with the legislative developments occurring on the Continent, in the common law countries too, statutory enactments were made to provide a legislative basis for the previous ad hoc practice of releasing of offenders on the condition of good behaviour. In fact, as distinct from civil law countries, with regard to a small number of offenders prison had long not been the sole device,

⁶⁴United Nations (1951) *op. cit.*, p. 66.

⁶⁵Frede, L. (1932) *Die Beschlüsse der Internationalen Gefängnis-Kongresse 1872–1930*, Frommann, Jena, Teeters, N., K. (1949) *Deliberations of the International Penal and Penitentiary Congresses: Questions and Answers, 1872–1935*, Temple University Book Store, Philadelphia, Schmidt, E. (1935) ‘Zum internationalen Kongreß für Strafrecht und Gefängniswesen: Die internationalen Gefängnis-kongresse: Ein Rückblick auf ihre Arbeit, *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 55, pp. 177–200, Henze, M. (2007) *Die internationalen Gefängnis-kongresse 1872–1935* in Keser-Biermann and Overath, *op. cit.*

⁶⁶Trought, T. W. (1927) *Probation in Europe*, Basil Blackwell, Oxford.

⁶⁷von Liszt, *op. cit.*, vol. 1, Kriminalpolitische Aufgaben, p. 412 and *Die Reform der Freiheitsstrafe*, p. 524.

⁶⁸Groß, *op. cit.*, p. 57.

since over time common law accommodated a number of measures enabling the courts to suspend sentences conditionally. There is no space here for a detailed analysis of these institutions, but very briefly the primary institutions that are frequently cited as the forerunners of probation are the ‘judicial reprieve’, ‘the recognizance or binding over on good behaviour’ and ‘the benefit of clergy’. Of these measures, the benefit of clergy enabled clergy to claim exemption from or mitigation of punishment in the secular (as opposed to ecclesiastical) courts, while the judicial reprieve suspended the imposition of the sentence in order to allow the defendant to apply to the Crown for a pardon. Finally and perhaps more importantly, recognizance for keeping the peace and good behaviour at the very outset functioned as a release from custody without bail while awaiting the trial. Here the offender promised to pay a bond or bail, with or without guarantee, and was returned to the court if s/he violated any of the specified conditions. At the beginning of the nineteenth century, the measure of recognizance on the subject of good behaviour was applied increasingly. In some localities of the common law jurisdictions, such as Birmingham and Boston, in addition to suspension of sentence, some form of supervision and guidance was also provided for. Such a practice of a combination of the conditional suspension of sentence and the supervision certainly pointed to the birth of a distinct method of dealing with offenders, which was subsequently referred to as ‘probation’, the “more adventurous and adaptable sister”⁶⁹ of the continental suspended sentence.

As a “simultaneous social invention occurring in England and the United States”,⁷⁰ the institution of probation revealed a number of commonalities. In both countries, a selection of appropriate cases was initially made, whereby particular categories of offenders were deemed more suitable for such supervision and/or treatment e.g. juveniles, inebriated offenders. The intellectual background of the probation order and its distinct origin in comparison to the continental ‘conditional sentence’ will be analysed in Chap. 3 in detail, a brief overview on the emergence of probation at this point is still however deemed necessary. Certain courts in these two common law jurisdictions assumed the power of suspending sentences in combination with the placement of the defendant under the supervision of a guardian. In the course of the supervision, conducted on an informal basis, periodical inquiries were to be made into the conduct of the offenders, and if the offender failed to comply with the obligations prescribed, the decision suspending the sentence might be revoked. Alongside these legal similarities, it can be maintained that a clear religious zeal, what has been metaphorically expressed as ‘saving the souls’,⁷¹ was an underlying motivation in both countries.

⁶⁹Radzinowicz in Ancel (1971), *op. cit.*, p. vii.

⁷⁰Timasheff, *op. cit.*, p. 1.

⁷¹Whitehead, P. (1990) *Community Supervision for Offenders*, Gower Publishing, Aldershot, see Chapter 1: From Saving Souls to the Decline of Rehabilitation, pp. 1–18.

In the United States⁷² the probation practice of the courts gained a legal basis as early as in 1878, when the state of Massachusetts passed a law empowering the mayor of Boston to appoint a paid probation officer with jurisdiction in Boston's criminal courts. Despite the fact that this law regulated only the selection of probation officers, it had marked policy implications, leading to a widespread adoption of probation laws in the United States. In England, the legislative development took place relatively slower. The first step was taken with the passing of the Summary Jurisdiction Act. The Act stipulated that the court could conditionally discharge an offender as long as the offender was of good behaviour and 'agreed' to appear for sentencing if required. The 1887 Probation of First Offenders Act later gave a greater statutory recognition of the institution of probation by extending the application of the measure to a certain number of offences other than summary offences. Accordingly, this Act, after considering the special circumstances of the offender and offence, allowed the court to release the offender on probation of good conduct, provided that s/he was previously not convicted of an offence punishable with 2 years imprisonment. However, it was not until the enactment of the 1907 Probation of Offenders Act that probation became an established practice of the English courts. With this Act the previously informal practice of the guardianship of a member of community was refined and defined as personal supervision and individual guidance, whereby the role of the probation officer was delineated as 'advising, assisting and befriending the offender while monitoring, instructing and reporting'. Thus, as opposed to civil law countries, the probation order was not formed solely as a device of the suspension of the execution of sentence, but more importantly as a special method of punishment offering a rehabilitative treatment to the offenders.

With its very innovative nature, the probation order in due course gave rise to similar institutions of mixed nature on the Continent such as the French institution of *liberté surveillée* in the continental European countries.⁷³ In this respect Max Grünhut may be agreed with in retrospect, when he regarded the rise of probation as "the most remarkable feature of the recent history of criminal law".⁷⁴ However, it would be misleading to see the subsequent developments tracing the Anglo-American institution of probation in the continental European countries as a 'smooth' process of 'reception'.

Many continental legal scholars from the inception of the probation order were of the opinion that the latter conflicts with the ideas on which the continental law

⁷²On the early legislative developments in the United States, see Parsons, H., C. (1918) Probation and Suspended Sentence, *Journal of American Institute of Criminal Law and Criminology*, vol. 8, no. 5, pp. 694–708.

⁷³United Nations (1951), *op. cit.*, pp. 66–67; Dünkel, F. (1983) Strafaussetzung zur Bewährung und Bewährungshilfe in Internationalen Vergleich: Ein Überblick in Dünkel, F. and Spiess, G., *Alternativen zur Freiheitsstrafe*, Max-Planck-Institut für internationales und ausländisches Strafrecht, Freiburg, p. 400, Harris, *op. cit.*, pp. 63–66.

⁷⁴Grünhut (1948) *op. cit.*, p. 297.

systems are based, as will be further elaborated in the discussion in the chapter concerned with Germany.⁷⁵ As touched upon above, with the introduction of the suspension of sentences the judge was empowered to grant a suspension, when particular criteria specified by law were met. For many, this constituted the maximum limit of the discretionary power that a judge might have. It would then therefore be inconceivable to enable the judge or any other person to give instructions or orders to the defendant whose sentence was suspended as in common law jurisdictions. Nor would it be acceptable for any kind of non-compliance to such instructions or obligations to automatically lead to a revocation of the suspended sentence.⁷⁶ On the Continent, suspended sentences or conditional sentences formed, in their inception, a particular form of ‘leniency’, as the related document of the United Nations indicated.⁷⁷ At the heart of the recognition of this method of dealing with certain offenders was the view that these offenders are capable of rehabilitating themselves.⁷⁸ In this sense, a conditional sentence was to function as a warning against future offending behaviour rather than a measure of rehabilitation on its own.

This perception, however, underwent a dramatic change in course of the spreading of juvenile courts and welfare laws, for at that time it came to be recognised that the offending behaviour of juveniles indicated a need for educational measures.⁷⁹ In accordance with this view, with regard to juvenile justice, the individualised dispositions comprising a supervision element began to find a place in the legislation of numerous European countries.⁸⁰ The field of juvenile justice in this sense functioned as an experiment for adult supervision.

⁷⁵For a summary of the discussions and the proposals at the time, see, Ancel, M. (1954) Probation in Relation to European Penal Systems and Modes of Criminal Procedure, pp. 33–48 and Nuvolone, P. (1954) Probation and Related Measures in European Legal Systems: A Comparative Survey, pp. 15–32, in United Nations, *European Seminar on Probation, 20–30 October 1952*, United Nations Publications, London.

⁷⁶Ancel (1954), *op. cit.*, p. 36.

⁷⁷United Nations/Department of Social Affairs, (1954) *Practical Results and Financial Aspects of Adult Probation in Selected Countries*, United Nations Publications, New York, p. 79.

⁷⁸The Belgian Minister Le Jeune in the course of the discussions taking place during the adoption of the conditional suspension of the execution of a sentence indicated that “those for the benefit of whom the conditional sentence has been created, have *no need of the assistance of protective supervision*. They will reform by themselves”. (Emphasis added.) Cited in United Nations (1951), *op. cit.*, p. 64.

⁷⁹Grünhut (1948) *op. cit.*, p. 301, United Nations (1951), *op. cit.*, p. 70, Harris, *op. cit.*, p. 55.

⁸⁰Trought, *op. cit.*, pp. 185–186. See on the changing perceptions in this context in France, e.g. Germain, C. (1954) Post-war Prison Reform in France, *Annals of the American Academy of Political and Social Science*, vol. 293, pp. 139–151, pp. 150–151. Germanin noted that “during very recent years it has become clear that it would be useful to have a special type of suspension, to which there would be attached both a control over conduct and aid by guidance for certain individuals who, not being subject to a mandatory punishment, need both control and help during a probationary period if they are to be saved from recidivism”.

In a further step, a number of European countries recognised probationary supervision in relation to adult justice. It was increasingly acknowledged that this measure would be instrumental to the rehabilitation of offenders.⁸¹ On the other hand, in the hope of reducing the reliance on custodial sentences in England, the suspended sentence was statutorily introduced as an independent measure. Faced with similar problems in dealing with offenders, the convergence between common and civil law jurisdictions (and the Nordic jurisdictions), in terms of creating alternative modes of punishment to imprisonment, was further intensified, as will be discussed below.

2.5 The Proliferation of Prison Alternatives: 2nd Period

A comparative penological survey of the post-war western countries reveals that since the emergence of the concept of non-custodial penalties, there appears to have been a slow expansion in the number and variety of non-custodial penalties until the 1970s. During the course of the 1970s, a wide variety of alternative penalties and measures began to be introduced. These new sanctions and measures include the conditional dismissal of cases at the prosecution stage; sanctions of restricting and withdrawing rights, compensation and notably public work at the sentencing stage, and intermittent custody and house arrest at the execution stage.⁸² Thus, here too, one could talk of an emergence of new patterns, a new trend that is perceptible in the introduction of new measures among western countries. Clearly, each country reacted in this context in proportion to its needs and available resources. It would be an interesting task to highlight these differences with reference to the economic, social, cultural and legal characteristics of European countries, and perhaps this remains a challenging assignment for the researchers. The scope of this study at this point is less ambitiously defined; this section is concerned with the causes of a common pattern that occurred for a second time in western countries.

At the risk of oversimplification, the causes of this trend can be seen as the growth of prison population and related fiscal problems, the loss of the belief in the rehabilitation paradigm and the discovery or perhaps rediscovery of the victim as an actor in criminal justice. In fact, all these factors are dialectically interrelated, and as such a demarcation of these themes will, to a certain extent, be artificial. Nevertheless, for the purpose of clarity, a separate examination of these causes under these three headings seems necessary.

⁸¹United Nations (1951), *op. cit.*, p. 204.

⁸²See, Rentzmann, W. and Robert, J., P (1986) *Alternative Measures to Imprisonment*, Council of Europe, Strasbourg.

2.5.1 *Expanding and Inflating Prison*

From the 1970s onwards, the rapid growth of the size of the prison population was one of the important preoccupations of penal policy, even in those countries where the increase in the reception into custody remained relatively stable.⁸³ This trend was on the grounds of both humanitarian and economic considerations and posed a serious challenge for western penal systems.

The prison population growth was and has often been linked with the increase in crime rates.⁸⁴ Indeed, the 1970s were characterised in Western Europe by a rapid increase in the recorded level of crime. At this point, however, one has to be cautious about the extent to which those crime rates brought corresponding increases in imprisonment rates with them, since subsequent cross-national research has demonstrated that imprisonment rates do not directly flow from the volume of officially discovered crime.⁸⁵ Even studies comparing crime rates in specified categories of serious offences which are likely to incur custodial sentences have not been able to show that any consistent relationship between those rates and prison populations exists. For example, between 1950 and 1975 recorded crime in the Netherlands increased by 300%, whereas the prison population fell by 50%.

Even if the increased level of crime was only partially responsible for the increase in imprisonment rates, it clearly influenced the public attitudes towards crime and as such led to, as Junger-Tas rightly puts it, 'a public outcry for stiffer sentencing'.⁸⁶ The policy response was then in proportion to the public demand for harsher penalties for the increasing level of the threat of crime, in particular with regard to certain offence types; drug-related offences, sexual offences and

⁸³See, Changes in prisoner numbers in Council of Europe member states since 1970 excluding Austria, Iceland, the Netherlands and Turkey, Council of Europe (1987) *Prison Information Bulletin*, no 9, p. 18, Changes in prisoner numbers since 1970 in Turkey Source: Council of Europe *Prison Information Bulletin* (1987) No 9, p. 19.

⁸⁴For the results of the First and Second United Nations Crime and Operations of Criminal Justice Statistics, see HEUNI (1985) *Criminal Justice Systems in Europe and North America*, Helsinki, p. 2., van Dijk, J. (1993) More than a Matter of Security: Trends in Crime Prevention in Europe in Heidensohn, F. and Farrel, M. (eds.) *Crime in Europe*, Routledge, London, pp. 26–54.

⁸⁵Young, W. (1986) Influences upon the Use of Imprisonment: A Review of Literature, *Howard Journal*, vol. 25, issue 2, pp. 125–135, Young, W. and Brown, M. (1993) Cross National Comparisons of Imprisonment in Tonry, M. (ed.) *Crime and Justice*, vol. 17, pp. 1–49, Muncie, J. and Sparks, R. (1992) *op. cit.*, pp. 89–106, see for a slightly revised approach, Aebi, M., F. and Kuhn, A. (2000) Influences on the Prisoner Rate: Number of Entries into Prison, Length of Sentences and Crime Rate, *European Journal on Criminal Policy and Research*, vol. 8, issue 1, pp. 65–75.

⁸⁶Junger-Tas, J. (1994), *op. cit.*, p. 44, see also, van Dijk, J. (1979) The Extent of Public Information and the Nature of Public Attitudes Towards Crime in Public Opinion and Crime and Criminal Justice (Reports presented to the Thirteenth Criminological Research Conference, 1978), Council of Europe, Strasbourg, pp. 7–39, Snacken, S. and Beyens, K. (1994) Sentencing and Prison Overcrowding, *European Journal on Criminal Policy and Research*, vol. 2, no 1, pp. 84–99, p. 92.

terrorism. During the seventies many European countries increased the maximum penalties applicable to the respective crime types in their legislation. The 'law and order' legislation at the time was also backed by the judiciary, who pronounce more frequent and longer terms of imprisonment. Consequently, the increase in the length of sentences drastically enlarged the size of the prison population.⁸⁷

The almost exploding prison population led to two immediate results. One consequence was the massive increase in prison expenditure in virtually all western countries. During the 1970s the economic costs of imprisonment, as Robert and Rentzmann phrases, 'skyrocketed' at such a speed that the financial considerations became a key factor in the promotion of non-custodial alternatives in Europe.⁸⁸ Coupled with an economic climate that was generally worsening, there was broad recognition of the need to establish new alternatives to prison.

The consensus was particularly clearly expressed by Resolution 76 (10) adopted by the Committee of Ministers of the Council of Europe on 'Some Alternative Penal Measures to Imprisonment'.⁸⁹ Based on the available research at the period, it was concluded that imprisonment has a higher unit cost than almost any alternative measure of punishment. This was, it is indicated, due to the fact that the cost of prison entailed various spending on the construction, personal and security costs, physical health services, rehabilitative services, supervision of inmates and finally the increased social spending needed to support the families of the incarcerated people.⁹⁰ It was further pointed out that prisons also indirectly had an impact on the other areas of public spending due to its greater budgetary allocation. Indeed, the increased expenditure on the construction, maintenance and operation of prisons meant, in the practice, the curtailment of resources in the other areas of public expenditure. For example, Rutherford suggests that the spending on the English prison system over the 5-year period up to 1978–1979 rose by 36%, compared with 15% hospital services and 9% on education.⁹¹

Hence, non-custodial sanctions were deemed far more cost-effective than custody, even though it was appreciated that a full cost comparison between prison and its alternatives is a complex matter. At this point in time there already was the recognition that a real saving can only occur if the construction of new prisons and corresponding staff recruitment can be halted or if existing institutions can be closed and staff numbers reduced.⁹² Over time, the merits of non-custodial penalties in terms of their economical advantages proved to be difficult to substantiate, since the

⁸⁷This was also confirmed by the Fifth United Nations Survey, see Kangaspunta, K., Joutsen, M. and Ollus, N. (1998) *Crime and Criminal Justice in Europe and North America 1990–1994*, HEUNI, Helsinki, see also, Tournier, P. (1994) *The Custodial Crisis in Europe: Inflated Prison Populations and Possible Alternatives*, *European Journal on Criminal Policy and Research*, vol. 2, no 4, pp. 89–100.

⁸⁸Robert and Rentzmann, *op. cit.*, p. 2.

⁸⁹Council of Europe (1976) *op. cit.*

⁹⁰*Ibid.*, pp. 44–51.

⁹¹Rutherford, A. (1984) *Prisons and Process of Justice*, Heinemann, London, p. 90.

⁹²Council of Europe (1976), *op. cit.*, p. 45.

existing institutions were only exceptionally closed. In many countries, subsequently substantial prison buildings and capacity enlargement programmes were launched.⁹³ Nevertheless, the view that the administration of alternatives is considerably 'cheaper' than the administration of imprisonment with the reference to the long term prospects has remained a major justification for non-custodial sanctions.⁹⁴

Returning to the direct results of prison overcrowding, the second direct consequence of the dramatic increase in the size of the prison population was overly crowded prisons in a number of countries, most notably in the United States and England.⁹⁵ The detrimental effects of overcrowding have been manifested in a number of ways in the respective countries.⁹⁶ Research has shown, for example, that prison overcrowding causes a drastic deterioration in living conditions of prisons in terms of space and facilities. This has further detrimental impacts on the physical and mental well-being of the inmates and staff, while the lack of space potentially restricts the educational activities taking place in penal establishments. In addition, it has been well-established that overcrowded prisons are a potential source of inter-personal violence and the risk of disturbances, as was the case in English prison disturbances in the early 1980s.⁹⁷ Offering greater capacity in prisons, non-custodial alternatives were and have been seen as a remedy to prevent prison overcrowding.

2.5.2 The Shift from 'Doing Good' to 'Doing Less': Prison Under 'Attack'

As argued in the earlier pages of this chapter, the birth of the notion that offenders could be 'cured' of criminal tendencies, which later became known as the treatment

⁹³van Swaaningen, R. and de Jonge, G. (1995) The Dutch Prison System and Penal Business Management in Ruggiero, V., Ryan, M. and Sim, J. (eds.) *Western European Penal Systems: A Critical Anatomy*, Sage, London, pp. 26–27.

⁹⁴See e.g., Rentzmann and Robert, *op. cit.*; Schädler, W. (1988) The Interest of the State in the Effectiveness of Alternatives to Imprisonment, in HEUNI, *Alternatives to Custodial Sanctions* (Proceedings of the European Seminar held in Helsinki, Finland, 26–28 September, 1987), Helsinki; Bishop, N. (1988) *Non-Custodial Alternatives in Europe*, HEUNI, Helsinki.

⁹⁵van Zyl Smit, D. and Dünkel, F. (1991) *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions*, Kluwer, Deventer; Peters, Sesar, K. (1994) Overcrowding- Not only Crisis in the Custodial System, *European Journal on Criminal Policy and Research*, vol. 2, no 4, pp. 107–116, pp. 107–111; Kensey, A. and Tournier, P. (1999) Prison Population Inflation, Overcrowding and Recidivism: the Situation in France, *European Journal on Criminal Policy and Research*, vol. 7, issue 1, pp. 97–119.

⁹⁶Gaes, G. (1985) The Effects of Overcrowding in Prison, *Crime and Justice*, vol. 6, pp. 94–146, Kuhn, A. (1994) 'What can we do about prison overcrowding?', *European Journal on Criminal Policy and Research*, vol. 2, issue 7, pp. 107–116.

⁹⁷Cavadino, M. and Dignan, J. (1997) *The Penal System: An Introduction*, 2nd edition, Sage, London, p. 120.

model, dates back to the early attempts to uncover the aetiology of crime. From this point onwards, in Anglo-American countries the rehabilitation paradigm, as a philosophical source of treatment model, exerted a considerable influence on penal policy-making, in terms of the execution of both custodial and non-custodial sentences (such as probation orders).⁹⁸ Conversely, with the notable exceptions of the Nordic countries (in particular Sweden and Denmark)⁹⁹ and the Netherlands,¹⁰⁰ with indeterminate sentences not being available to the courts on a comparable scale, in many European countries the treatment model never dominated the policy-making as such.¹⁰¹ In these countries, the rehabilitation, or more accurately re-socialisation philosophy,¹⁰² was also incorporated into law, but despite its legislative pronouncement from the very outset it was subordinated to the aims of retribution and general deterrence. Paradoxically, however, the 'obsolescence' of the rehabilitative thinking produced internationally recognisable trends in varied degrees in the countries in which it had hitherto ascendancy in penal thought. Below, a very condensed summary of the grounds for the loss of confidence in rehabilitative thinking will be provided.

From the end of the 1960s towards the end of the 1970s, the treatment model began to be subjected to a burgeoning criticism.¹⁰³ One important thrust of this criticism was concerned with the rights of the offenders involved in those 'rehabilitative' processes. In this context indeterminate sentencing as the most substantiated form of rehabilitative thinking most notably in the United States came

⁹⁸Whitehead, *op. cit.*; May, T. (1991) *Probation: Politics, Policy and Practice*, Open University Press, Milton Keynes, Crow, I. (2001) *The Treatment and Rehabilitation of Offenders*, Sage, London.

⁹⁹Finland may partly be seen as an exception in this context, see *e.g.*, Lappi-Seppälä, T. (2001) Sentencing and Punishment in Finland: The Decline of the Repressive Ideal, in Tonry, M. and Frase, R., S. (eds.) *Sentencing and Sanctions in Western Countries*, Oxford University Press, Oxford, pp. 92–150, pp. 92–93.

¹⁰⁰van Swaaningen, R. and Beijerse, J. (1983) From Punishment to Diversion and Back again: the Debate on Non-Custodial Sanctions and Penal Reform in the Netherlands, *Howard Journal*, vol. 32, issue 2, pp. 136–156; Downes, D. (1998) The Buckling of the Shields: Dutch Penal Policy 1985–1995, in Weiss, R., P. and South, N. (eds.) *Comparing Prison Systems: Toward a Comparative and International Penology*, Gordon & Breach, Amsterdam, pp. 143–174, pp. 144–149.

¹⁰¹Kaiser, G. (1977) Resozialisierung und Zeitgeist in Rüdiger, H. and "Kienapfel, D. (eds.) *Kultur, Kriminalität, Strafrecht, Festschrift für Thomas Württemberg zum 70. Geburtstag am 7.10.1977*, Duncker & Humblot, Berlin, pp. 359–372, at p. 366; Weigend, T. (1982) "Neoklassizismus" – ein transatlantisches Missverständnis, *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 94, pp. 801–814, p. 812.

¹⁰²For a comparative examination of the difference between the notion of rehabilitation in Anglo-Saxon countries and 're-socialisation' in the academic writing in Germany see Lazarus, L. (2004) *Contrasting Prisoner's Rights: A Comparative Examination of England and Germany*, Oxford University Press, Oxford.

¹⁰³Bishop, N. (1974) Aspects of European Penal Systems in Blom-Cooper, L. (ed.) *Progress in Penal Reform*, Clarendon Press, Oxford, pp. 83–100, pp. 97–98, Ryan, M. and Sim, J. (1998) Power, Punishment and Prisons in England and Wales 1975–1996 in Weiss and South, *op. cit.*, pp. 175–206, Mathiesen, T. (2000) *Prison on Trial*, 2nd edition, Waterside Press, Winchester.

increasingly under attack. It was believed that indeterminate sentencing leaves an unwarranted discretion on the hands of executive bodies, and this often led to a lengthy custody in the name of treatment, since it was the psychological assessment of the offender as to the amenability to treatment that determined the duration of custody in prison. Instead, it was maintained that it should no longer be the rehabilitative needs of the offender that determine the severity of punishment, but the gravity of the offence. On the other hand, the allegedly unjustified interventions of social work professionals for the rehabilitation of juvenile offenders constituted another important strand of the criticism. It was posited that the interventions of social work professionals often take a form in which the rights of juveniles are infringed, while the 'net' is widened and the use of institutional responses to juvenile crime is promoted. It must also be mentioned that on the other side of the political spectrum, the treatment approach was also seen as too soft in dealing with offenders.

However, it was not until the publication of Martinson's classic essay of the empirical analysis of the effectiveness of various forms of treatment programmes in terms of recidivism¹⁰⁴ that the rehabilitative approach was questioned widely by the academic community as well as criminal justice practitioners. In this study, by reviewing 231 studies between 1945 and 1967 Martinson concluded that none of these treatment methods in fact made any 'appreciable effect' on recidivism'.¹⁰⁵ He furthermore suggested that not only treatment programs that were taking place in custodial establishments, but also those of non-institutional programs such as probation, parole and intensive supervision gave no indication as to their effectiveness in preventing recidivism. However, Martinson acknowledged that treatment programmes in non-custodial settings had the advantage of being cost effective and thus he concluded that "the implication is clear: *if we can't do more for (and to) offenders, at least we can safely do less*" (emphasis in original).¹⁰⁶

The main argument of Martinson's study, 'nothing works', despite critical evaluations¹⁰⁷ was taken as a widely accepted indictment of the failure of the prison system to rehabilitate its subjects in those countries where the sentencing system was characterised by the ideal of rehabilitation. Interestingly, to a significant extent, this period marks in many European countries the legislative entrenchment of the principle of re-socialisation in major western European countries such as

¹⁰⁴Martinson, R. (1974) What works? - Questions and Answers about Prison Reform, *Public Interest*, vol. 35, pp. 22-54.

¹⁰⁵*Ibid.* p. 25.

¹⁰⁶*Ibid.*, p. 48.

¹⁰⁷Some argued that rehabilitative measures in fact have never been given a chance to prove their effectiveness. For example, Cullen and Gilbert argued "the pre-eminence of rehabilitation was more myth than reality". Cullen, F., T. and Gilbert, K. E., (1982) *Reaffirming Rehabilitation*, Anderson, Cincinnati, p. 7.

France (1972, 1975), Germany (1976), and Italy (1975).¹⁰⁸ In two respects, however, these developments were not able in practice to facilitate rehabilitative optimism in the countries in question. Firstly, in these countries the notion of rehabilitation, despite its official encouragement, was not wholly affirmed by practice and as such remained an official discourse¹⁰⁹ or even a myth¹¹⁰ rather than an operational principle of the penal justice system. Secondly, and equally importantly, the academic writing in these countries was and has been heavily influenced by the negative findings of the effectiveness literature elsewhere. This state of affairs, as it was in other countries, however, did not bring about a dramatic renunciation of the offender rehabilitation. The belief that offenders can be ‘re-socialised’ still retained its power,¹¹¹ but it was/has been increasingly appreciated that prison in its present form is not able to facilitate a suitable atmosphere for achieving this.

Thus, losing one of its primary justifications, as Pavarani suggests, prison was bound to be “an instrument of incapacitation for those who cannot be otherwise controlled”.¹¹² This approach meant in practice what is often termed in the literature a strategy of bifurcation or ‘la politique de dualisation’,¹¹³ the central aspect of which is to incarcerate serious offenders, while dealing with less serious offenders through non-custodial penalties. Rooted in a critique of rehabilitative measures and the rise of labelling theories,¹¹⁴ as will be dealt with in the following section,

¹⁰⁸Faugeron, C. (1991) Prisons in France: Stalemate or Evolution? in van Zyl Smit and Dünkel, *op. cit.*, pp. 249–273, p. 250, Dünkel, F. and Rössner, D. (1991) Federal Republic of Germany in *ibid.*, pp. 203–248, p. 215, Fachiotti, V. (2002) Alternatives to Imprisonment in the Italian Criminal Justice System, p. 331 and Kensey, A. (2002) Community Sanctions and Measures in France in Albrecht and Kalmthout *op. cit.*, pp. 209–242, p. 210.

¹⁰⁹Gallo, E. (1995) The Penal System in France. from Correctionalism to Managerialism in Ruggiero, Ryan and Sim, *op. cit.*, pp. 71–92, pp. 74–78; Feest, J. and Weber, H.-W. (1998) Germany: Ups and Downs in Resort to Imprisonment- Strategic or Unplanned Outcomes in Weiss and South, *op. cit.*, pp. 233–261, pp. 234–239, Pin, X. and Lombard, F. (2001) Frankreich in Eser, A., and Walther, S. (eds.) *Wiedergutmachung in Kriminalrecht: Internationale Perspektiven*, Max-Planck-Institut für internationales und ausländisches Strafrecht, Freiburg, pp. 1–127, pp. 9–10.

¹¹⁰Ruggiero, V. (1998) The Country of Cesare Beccaria: the Myth of Rehabilitation in Italy, in Weiss and South, *op. cit.*, pp. 207–232, p. 208.

¹¹¹See e.g., Redondo, S., Sanchez-Meca, J. and Garrido, V. (2002) Crime Treatment in Europe: A Review of Outcome Studies in McGuire, J. (ed.) *Offender Rehabilitation and Treatment: Effective Programmes and Policies to Reduce Re-offending Crime*, John Wiley, Chichester.

¹¹²Pavarani, M. (1994) The New Penology and Politics in Crisis, the Italian Case in Ruggiero, *British Journal of Criminology* vol. 34, special issue, pp. 49–61, pp. 55.

¹¹³Sim, J., Ruggiero, V. and Ryan, M. (1995) Punishment in Europe: Perceptions and Commonalties in Ruggiero, Ryan and Sim, *op. cit.*, pp. 1–23, p. 3–8; Cavadino and Dignan, *op. cit.*, p. 187, Ashworth, A. (2002) European Sentencing Tradition: Accepting Divergence or Aiming for Convergence? in Tata, C. and Hutton, N. (eds.) *Sentencing and Society: International Perspectives*, Ashgate, Aldershot, pp. 225–226, p. 231.

¹¹⁴Dean-Myrda, M., C. and Cullen, F., T. (1985) Panacea Pendulum: An Account of Community as a Response to Crime in Travis, L., F. (ed.) *Probation, Parole and Community Corrections*, Waveland Press, Prospect Heights, pp. 9–29, pp. 19–20.

a second implication of the loss of confidence in rehabilitation at the policy level was the increasing importance attached to the diversion of juveniles from custody and residential institutions.¹¹⁵ If, it was maintained, everything was equally ineffective, non-custodial sanctions at the very least are generally less expensive and socially less damaging.¹¹⁶ Since the existing forms of non-custodial sanctions, in particular probation and suspended sentences, were also discredited on the ground that they had also no significant effect in reducing recidivism, there was a growing interest in introducing new forms of non-custodial sanctions. This tendency was furthermore underpinned by the increasing attention paid to crime victims, which will be discussed later in this chapter.

2.5.3 *The Emergence of Diversion: Right Time and Right Place?*

The notion of diversion in its ‘contemporary’ sense entered into the discourse of criminal justice in the 1960s in the United States. This decade in the United States was characterised by a widespread social unrest, periodical economic recessions, and a sharp rise in violent and juvenile offences.¹¹⁷ The growth in juvenile crime was then in part attributed to the perceived ineffectiveness of traditional practises of both juvenile welfare and justice.¹¹⁸ The existing practices were not merely found to be ineffective in controlling delinquency, but more significantly, they were also

¹¹⁵Kerner, H.-J. (1983) *Statt Strafe: Diversion, Zur Einführung in die Thematik* in Kerner (ed.) *Diversion statt Strafe?: Probleme und Gefahren einer neuen strafrechtlicher Sozialkontrolle*, Kriminalistik Verlag, Heidelberg, pp. 1–13, pp. 1–5, van Swaaningen, and Beijerse, *op. cit.*, pp. 136–139, Muncie, J. (1999) *Youth and Crime: A Critical Introduction*, Sage, London.

¹¹⁶Crow, *op. cit.*, p. 31, Vass (1990), *op. cit.*, p. 9.

¹¹⁷The President’s Commission on Law Enforcement and Administration of Justice (1967) *The Challenge of Crime in a Free Society*, U.S. Government Printing Office, Washington, pp. 18–31, Austin, J. and Krisberg, B. (1981) Wider, Stronger and Different Nets: The Dialectics of Criminal Justice Reform, *Journal of Research in Crime and Delinquency*, vol. 18, no. 1, pp. 165–196, p. 166, 167, Sarri, R. (1983) Paradigms and Pitfalls in Juvenile Justice Diversion, in Morris, A. and Giller, H. (eds.) *Providing Criminal Justice for Children*, Edward Arnold, London, pp. 52–73, pp. 52–53, Davidson, W., S., Redner, R., Amdur, R., L. and Mitchell, C., M. (1990) *Alternative Treatments for Troubled Youth The Case of Diversion from the Justice System*, Plenum Press, New York, at pp. 6–7, Feld, B. (1993) Criminalising the American Juvenile Court, *Crime and Justice*, pp. 197–280, pp. 204–206, Krisberg, B. (2004) *Juvenile Justice: Redeeming Our Children*, Thousand Oaks, California, pp. 50–51.

¹¹⁸Brantingham, P., L. and Blomberg, T., G. (1979) Introduction in Brantingham, P. L., and Blomberg, T., G. (eds.) *Courts and Diversion*, Beverly Hills, pp. 7–14, p. 7, Lemert, E. (1981) Diversion in Juvenile Justice: What hath been wrought? *Journal of Research on Crime and Delinquency*, vol. 18, no.1, pp. 34–46, p. 37, Sarri, *op. cit.*, pp. 52–53, Janssen, H. (1983) Diversion: Entstehungsbedingungen, Hintergründe und Konsequenzen einer veränderten Strategie sozialer Kontrolle, Oder: Es gibt viele zu Packen, tun wir es ihnen an, in Kerner, H.-J. (ed.) *Diversion statt Strafe? Probleme und Gefahren einer neuen Strategie sozialer Kontrolle*, Kriminalistik Verlag, Heidelberg, pp. 15–54, p. 22–32.

regarded as failing to give a proportionate and fair response to offenders of minor offences.¹¹⁹ The juvenile court, in this context, was seen as bearing primary responsibility in creating a setting in which juveniles were declined their rights and ended up in custody for indefinite periods of time largely for the so-called status offences such as truancy, running away from home (which would not constitute a crime if committed by an adult). In effect, this criticism constituted a fundamental attack on the philosophical premises of the juvenile court, which was originally conceived as focussing on the 'needs' and 'best interests' of the juvenile through informal, flexible and discretionary procedures.¹²⁰

Such sustained critical scrutiny of the conventional conception and practices of the juvenile court gained substantial momentum with two landmark decisions of the Supreme Court: *Kent* and *Gault*.¹²¹ In both decisions, the Supreme Court of the United States took a critical position of the hitherto procedures and recognised certain elementary procedures in juvenile court proceedings.¹²² Having also been questioned judicially, the redefinition of the mission of the court was inevitable.¹²³ Paradoxically, the scepticism towards the informal procedures of juvenile courts gave rise to 'informal' methods of dealing with juvenile offenders at the pre-court stage. In 1967, the President's Commission on Law Enforcement and the Administration of Justice gave signals of this change in the policy towards juvenile offenders. In a well-known passage of the report, the Commission indicated that:

The formal sanctioning system and pronouncement of delinquency should be used only as a last resort. In place of the formal system, dispositional alternatives to adjudication must be developed for dealing with juveniles, including agencies to provide and coordinate services and procedures to achieve necessary control without unnecessary stigma. . . . The range of conduct for which court intervention is authorised should be narrowed, with greater emphasis upon *consensual and informal means* of meeting the problems of difficult children".¹²⁴ (Emphasis added.)

¹¹⁹Singer, S., I. (1996) *Recriminalising Delinquency*, Cambridge University Press, Cambridge, p. 39–44, Feld, B. (1998) *The Juvenile Court in Tonry, M. (ed.) The Handbook of Crime and Punishment*, Oxford University Press, New York, pp. 509–540, pp. 512–513.

¹²⁰Mack, J. (1909) *The Juvenile Court*, *Harvard Law Review*, vol. 23, no 2, pp. 104–122, Mennel, R. (1972) *Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, *Crime and Delinquency*, vol. 18, no. 1, pp. 68–78, Feld, 1993, *op. cit.*, pp. 200–204, Vito, G., F. and Wilson, D., G. (1985) *The American Juvenile Justice System*, Sage, London, pp. 47–49.

¹²¹Feld, B. (1987) *The Juvenile Court Meets the Principle of the Offence: Legislative Changes in Juvenile Waiver Status*, *Journal of Criminology and Criminal Law*, vol. 78, no. 3, pp. 471–533, pp. 478–480.

¹²²*Kent v. United States*, 383 U.S., 541, 556, (1966), *In re Gault*, U.S. 1 (1967).

¹²³Krisberg, B. (2006) *Rediscovering the Juvenile Justice Ideal in the United States in Muncie, J. and Goldson, B. (eds.) Comparative Youth Justice*, Sage, London, pp. 6–18, p. 7.

¹²⁴The President's Commission on Law Enforcement and Administration of Justice (1967) *Task Force Report: Juvenile Delinquency and Youth Crime*, US Government Printing Office, Washington, p. 21.

This report had a profound impact upon policy-making,¹²⁵ but certainly, its impact upon policy ought to be understood as a result of the complex interplay between various factors. The unique structural and political situation of the United States has been mentioned above. Beside and as a result of this favourable conjuncture, in a broader perspective, what Stanley Cohen famously described the ‘de-structuring’ ideas¹²⁶ (‘away from the state’, ‘away from the expert’, ‘away from the institution’ and ‘away from the mind’) of the 1960s gave further justification to diversion programmes.¹²⁷

Here particularly relevant is the widespread reception of labelling theory as a sociological analysis and perhaps critique of crime and deviance.¹²⁸ It is indeed in this period that ‘labelling approaches’ began to attract a great deal of attention from different quarters. Clearly, there is no one single theory of labelling, rather there were (and have been) divergent constructions of the ‘labelling process’. Hence, an overview of the theory runs a high risk of oversimplifying the significant differences between various sources of the labelling approach.¹²⁹ What appear to be highly pertinent for the purpose of this study are those theories that give particular attention to the effects of the so-called ‘labelling process’ on the subsequent deviant behaviour. Of these, the approach of Edwin Lemert is particularly noteworthy.¹³⁰ This is not solely because Lemert introduced such crucial concepts as primary and secondary deviance in criminal sociology, but also because his ideas appear to have exerted great influence on policy-making at the time in

¹²⁵Kury, H. (1981) Diversion – Möglichkeiten und Grenzen am Beispiel Amerikanischer Programme in Kury, H. and Lerchenmüller, H. (eds.) *Alternativen zu klassischen Sanktionsformen*, Studienverlag, Bochum, pp. 165–245, pp. 170–171, Sarri, *op. cit.*, p. 53.

¹²⁶Cohen (1985), *op. cit.*, pp. 30–39.

¹²⁷Jannsen, *op. cit.*, p. 208.

¹²⁸Klein, M. (1979) Deinstitutionalisation and Diversion of Juvenile Offenders: A Litany of Impediments, in Morris, N. and Tonry, M. (eds.) *Crime and Justice*, vol. 1, University of Chicago Press, pp. 145–201, p. 146, Kirchhoff, G., F. (1981) Diversionprogramme in den USA – Diversion zwischen Entdeckung und Verurteilung im Juvenile Justice System in Kury, and Lerchenmüller, *op. cit.*, pp. 253–255, Farrington, D., Ohlin, L., E. and Wilson, J. (1986) *Understanding and Controlling Crime – Toward a New Strategy*, Springer, New York, pp. 111–119, Krisberg, B. (2006) Rediscovering the Juvenile Justice Ideal in the United States, in Muncie. and Goldson, *op. cit.*, pp. 6–18, p. 7.

¹²⁹There are, however, a number of valuable attempts to provide an overview on the theme; see for example Hawkins, R. and Tiedeman, G. (1975) *The Creation of Deviance*, Charles E. Merrill Publishing, Columbus, pp. 43–67, Gove, W: (1980) *The Labelling of Deviance: Evaluating a Perspective*, 2nd Edition, Sage Publications, Beverly Hills, pp. 9–33, Lilly, R., Cullen, F. and Ball, R., A. (2002) *Criminological Theory: Context and Consequences*, 3rd edition, Sage Publications, The Irony of State Intervention, at pp. 105–125, Anderson, J., F. and Dyson, L. (2002) *Criminological Theories: Understanding Crime in America*, University Press of America, Lanham, see Chapter 11, Labelling Theories, pp. 201–213, Burke, R., H. (2002) *An Introduction to Criminological Theory*, Willan, Cullompton, pp. 136–146.

¹³⁰Gove, *op. cit.*, p. 10, Krisberg, B. (2006), *op. cit.*, p. 7.

question. Very generally, primary deviance, Lemert suggested, emerges as a result of a variety of socio-cultural and psychological sources.¹³¹ It is occasional in nature and does not affect the self-concept of the individual.¹³² By contrast secondary deviance, which in his view occurs when these initial deviant activities are noticed by the society and thus subjected to 'societal reaction', has far-reaching consequences for the individual's self-concept. This is because, Lemert argued, with each act of 'primary deviance' the deviant becomes "more stigmatised through name calling, labelling, or stereotyping".¹³³ The result of this process, according to Lemert, is stage by stage the acceptance of the deviant identity; reorganising her/his life according to the status of deviance.¹³⁴ This very assumption that the labelling process generates further delinquent activity appears to be the conclusion of other labelling theorists who followed distinct lines in explaining the impact of the labelling process upon the individual. Consequently, theorising the potentially damaging effects of 'official labelling', the labelling approach favoured *per se* the avoidance or minimisation of the interventions of criminal justice agencies at the level of policy formulation.¹³⁵

Underpinned powerfully by the labelling approach as such, diversion in the United States consequently became a national strategy, in particular with the enactment of the federal Juvenile Justice and Delinquency Prevention Act of 1974, a strategy which was quick to bring about certain disenchantment.¹³⁶ At the end of 1970s, it became clear in many respects that the goals of diversion programmes were largely unrealised. Research studies demonstrated that these programmes did not limit themselves to juveniles who would otherwise have proceeded to a juvenile court, but also targeted those offenders who "are normally counselled and released by the police, if indeed they have any dealings with the police".¹³⁷ For many, the conclusion was that rather than reducing or minimising social control, diversion measures widened the net of social control.¹³⁸

¹³¹Lemert, E. (1967) *Human Deviance, Social Problems and Social Control*, Prentice Hall, New Jersey, p. 17.

¹³²Lemert, E. (1951) *Social Pathology – A Systematic Approach to the Theory of Sociopathic Behaviour*, McGraw-Hill, New York, p. 75.

¹³³Lemert 1967, *op. cit.*, pp. 76–77.

¹³⁴*Ibid.*

¹³⁵Some proponents of labelling approach went even further to demand 'non-intervention' in all but serious cases, see for example, Schur, M., E. (1973) *Radical Non-Intervention* (Rethinking the Delinquency Problem), Prentice Hall, London.

¹³⁶Zimring, H. (2005) *American Juvenile Justice*, Oxford University Press, New York, pp. 43–44.

¹³⁷Klein, *op. cit.*, p. 165.

¹³⁸Austin and Krisberg, *op. cit.*, p. 40, Curran; D., J. (1988) Deconstructing, Privatisation and Juvenile Diversion: Compromising Community-Based Corrections, *Crime and Delinquency*, vol. 34, no 4, pp. 363–378, Polk. K. (1987) When Less Means More: An Analysis of Deconstructing in Criminal Justice, *Crime and Delinquency*, vol. 33, no. 2, pp. 358–378.

Interestingly, though, diversion as an idea and set of programmes began to be imported at this time, when the idea was already discredited on the ground of its ‘unintended’ consequences in its ‘native’ soul.¹³⁹ Nevertheless, the American experience in this context was an important foundation for many European countries, as will be exemplified in part below in discussing diversion measures in the countries featured in this study.

2.5.4 *The Appearance of the Victim in the Punishment Discourse*

The disillusionment with the rehabilitative approach did not solely give rise to the renaissance of retributive ideas, but it also created a fertile ground for victim-oriented developments to flourish. It is in this period that the victim began to be recognised as a most neglected actor in the criminal justice system in western countries.¹⁴⁰ The shift in the perceptions understandably had far more consequences in the common law jurisdictions than in those of civil law. Until then, as opposed to the civil law countries where the victim has generally enjoyed the right to participate in proceedings, to present civil claims therein and under certain circumstances to initiate prosecution, in the common law countries the role of the victim in criminal proceedings was traditionally limited to that of witness.¹⁴¹

In changing the victim policy, the United States served as a beacon for other common law jurisdictions. Underpinned by an influential victim ‘lobby’ or ‘movement’,¹⁴² a significant step in improving the rather passive role of victims in the criminal justice system was taken by enactment of certain procedural measures. A second and more directly relevant development to non-custodial measures and sanctions was the initiation of experimental victim-offender reconciliation

¹³⁹Blau, G. (1985) Diversion unter nationalem und internationalem Aspekt in Kury, H. (ed.) *Kriminologische Forschung in der Diskussion: Berichte, Standpunkte und Analysen*, Carl Heymanns, Köln, pp. 311–339, p. 322 and (1987) Diversion und Strafrecht, *Jura*, vol. 9, no. 1, pp. 25–34, p. 28 Heinz, W. (1992) Diversion im Jugendstrafverfahren der Bundesrepublik Deutschland in Heinz, W. and Storz, R., Bundesministerium der Justiz, Forum Verlag, Bonn, p. 8.

¹⁴⁰Dignan, J. and Cavadino, M. (1996) Towards a Framework for Conceptualising and Evaluating Models of Criminal Justice from a Victim’s Perspective, *International Review of Victimology*, vol. 4, pp. 153–182, p. 155.

¹⁴¹However, on the Continent too, these traditional methods were in practice only of limited importance. See for example, HEUNI (1989) *Changing Victim Policy: the United Nations Victim Declaration and Recent Developments in Europe* (Report on the Meeting of an ad hoc Expert Group Meeting, Helsinki 17–20 November 1988), Helsinki.

¹⁴²At the very outset, numerous objections with regard to the appropriateness of the use of the term ‘victim movement’ have been raised. For example, Pointing and Maguire suggest that the term ‘victims movement’ gives a misleading impression of unity, p. 2 in Pointing, J. and Maguire, M. (eds.) (1988) Introduction: the Rediscovery of the Crime Victim, in *Victims of Crime: A new Deal?*, Open University Press, Milton Keynes, also see Reeves, H. and Wright, M. (1995) Victims: Towards a Reorientation of Justice in Ward, D. and Lacey, M. (eds.) *Probation Working for Justice*, Whiting and Birch, London, pp. 73–85, pp. 74–79.

programmes.¹⁴³ These programmes started as an alternative to probation for juvenile offenders, and later transformed into pre-sentence programmes which allowed the victim and offender to make a sentencing proposal.

In Europe, victim-offender mediation programmes first appeared in the beginning of 1980s.¹⁴⁴ By this time increasing awareness on the rights and needs of victims, both on national and international level, already shaped public policy markedly. This trend is clearly perceptible in the relevant recommendations of the Council of Europe, the introduction of state compensation schemes¹⁴⁵ and the promotion of victim support schemes.¹⁴⁶ Victim-offender mediation programmes on the Continent arguably emanated as a consequence of the considerations of diverting offenders, particularly young offenders, from the court procedures and the severity of sentencing measures.¹⁴⁷ The priority of diversion was not only justified by the perceived ability of these measures in preventing the stigmatising effect of formal court procedures, but also by reference to the need for reducing the case-loads of criminal justice.¹⁴⁸

¹⁴³The first victim-offender mediation programme was developed in 1974 in Kitchener/Ontario. Peachey, D., E. (1989) *The Kitchener Experiment*, Wright, M. and Galaway, B. (eds.) *Mediation and Criminal Justice: Victims, Offenders and Community*, Sage, London.

¹⁴⁴On the early experiments carried out in Europe, see Messmer, H. and Otto, H.-U. (1992) (eds.) *Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation- International Research Perspectives*, Kluwer, Dordrecht, Jung, H. (1998) *Mediation/Paradigmwechsel in der Konfliktregelung*, pp. 913–926 in Scwind, H.-D., Kube, E. and Kühne, H.-H. (eds.) *Festschrift für Hans Joachim Schneider zum 70. Geburtstag am 14 November 1998*, de Gruyter, Berlin.

¹⁴⁵Council of Europe/European Committee on Crime Problems (1978) *Compensation for Victims of Crime*, Strasbourg, Greer, D. (1996) *Compensating Crime Victims: a European Survey*, Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg.

¹⁴⁶van Dijk, J. (1988) *Ideological Trends within the Victims Movement: An International Perspective* in Maguire, M. and Pointing, J., *op. cit.*, pp. 127–137, Shapland, J. and Maguire, M. (1990) *The Victim Movement in Europe* in Lurigio, A., J., Skogan, W., G. and Davis, R., C. (eds.) *Victims of Crime: Problems, Policies and Programmes*, Sage, Newbury Park, pp. 205–225, Fattah, E. and Peters, T. (eds.) (1998) *Support for Crime Victims in a Comparative Perspective*, Leuven University Press, Leuven, Weitekamp (2001) *op. cit.*, pp. 145–160, Miers, D. and Willemsens, J. (eds.) (2004) *Mapping Restorative Justice Developments in 25 European Countries*, European Forum for Victim-Offender Mediation and Restorative Justice, Leuven, Mestitz, A. (2005) *A comparative perspective on Victim-Offender Mediation with Young Offenders throughout Europe* in Mestitz, A. and Ghetti, S. (eds.) *Victim-Offender Mediation with Youth Offenders in Europe*, Springer, Dordrecht, pp. 3–22, Pelikan, C. and Trenczek, T. (2008) *Victim offender mediation and Restorative Justice: the European Landscape* in Sullivan, D. (ed.) *Handbook of Restorative Justice*, Routledge, London, pp. 63–90.

¹⁴⁷See e.g., Hartmann, A. and Kilchling, M. (1998) *The Development of Victim/Offender Mediation in the German Juvenile Justice System from the Legal and Criminological Point of View* in Walgrave, L. (ed.) *Restorative Justice for Juveniles: Potentials, Risks and Problems*, Leuven University Press, Leuven, pp. 261–282, Trenczek, T. (2003) *Within or outside System? Restorative Justice Attempts in the Penal System* in Weitekamp, E., G. and Kerner, H.-J. (eds.) *Restorative Justice in Context: International Practice and Directions*, Willan, Devon, pp. 272–284.

¹⁴⁸See e.g., Verrest, P. (2000) *The French Public Prosecution Service*, *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 8, no 3, pp. 210–244, pp. 211, Albrecht, H.-J. (2000)

The development of victim-offender mediation programmes, and other schemes that were inspired by indigenous and informal justice practices, most notably in Canada and New Zealand, in due course stimulated a vast body of literature on what has come to be termed as ‘restorative justice’. Given the contentious nature of the philosophy behind this concept,¹⁴⁹ this study does not seek here to discuss different constructions of the notion of restorative justice. Suffice to say that the term “restorative justice” does not indicate a “unitary” concept¹⁵⁰ but rather a “shorthand convenient term”¹⁵¹ that describes a variety of divergent practices in which victim orientation is noticeable. The challenge of the basic philosophy of restorative justice is suggested to be in its conception of crime, as crime is not seen as a mere violation of law or the interests of the state, but as a violation of human relations.¹⁵² Accordingly, the innovative pledge of restorative justice is explained with the ‘restoration’ of ‘harm’ that is caused by the crime through a process whereby the offender is held accountable for her/his crime and the victim is given a voice to participate in decisions that affect them. Such a process involving both the offender and victim, it is believed, provides a more satisfactory experience to the individual victims on the one hand, and offers greater reintegration possibilities to offenders on the other hand.¹⁵³

The promises that are attributed to this new ‘paradigm’ have certainly made restorative justice an important philosophical source of creating new forms of alternative sanctions and measures. Also considering the savings on cost and administrative efficiencies that this perspective inherently brings about, restorative justice as a new panacea seems to reshape existing methods and induce new forms of non-custodial sanctions and measures.

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¹⁴⁹For critical evaluations on the theme, see Haines, K. (1998) Some Principled Objections to a Restorative Justice Approach to Working with Juvenile Offenders in Walgrave, L. (ed.) *Restorative Justice for Juveniles: Potentials, Risks and Problems for Research*, Leuven University Press, Leuven, pp. 93–113, Levrant, S., Cullen, F. T., Fulton, B. and Wozniak, J., F. (1999) Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?, *Crime and Delinquency*, vol. 45, pp. 3–27.

¹⁵⁰Shapland, J. (2003) Restorative Justice and Criminal Justice: Just Responses to Crime in von Hirsch, A., Roberts, J., V., Bottoms, A., Roach, K. and Schiff, M. (eds.) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* Hart Publishing, Oxford, pp. 195–218, p. 197.

¹⁵¹Dignan, J. with Lowey, K. (2000) *Restorative Justice Options for Northern Ireland: A Comparative Review*, Criminal Justice Review Commission/Northern Ireland Office, Belfast, p. 3.

¹⁵²Zehr, H. (1990) *Changing Lenses: A New Focus for Crime and Justice*, Herald Press, Scottdale.

¹⁵³Bazemore, G. and Colleen, M. (2002) Restorative Justice and the future of Diversion and Informal Social Control in Weitekamp and Kerner, *op. cit.*, pp. 143–176, p. 143, Pavlich, G. (2002) Deconstructing Restoration: the Promise of Restorative Justice in Weitekamp, G., M. and Kerner, H.-J. (eds.) *Restorative Justice Theoretical Foundations*, Willan, Cullompton, pp. 90–109, p. 90, Weitekamp, E., G. (2001) Mediation in Europe: Paradoxes, Problems and Promises in Morris and Maxwell, *op. cit.*, pp. 145–160.

2.6 Conclusions

The foregoing discussion of the history of prison alternatives appears to reveal that the changes in the perceptions of crime and punishment played a critical role in the making of and expanding of the scope of prison alternatives. Indeed, the philosophical justification of imprisonment, alongside ‘deterrence’ and ‘retribution’, on the grounds of ‘reform’ or ‘rehabilitation’, should be regarded as the principal source of inspiration of early prison alternatives. In conjunction with the new ideas on the very nature of criminality and the distinction of criminals, the notion of rehabilitating criminals soon gave a foundation to the differential treatment of offenders. Early prison alternatives, in this sense, ought to be seen as a direct outcome of such a change of view in dealing with offenders. Interestingly, another crucial development that has affected prison alternatives emerged as a result of increasing scepticism on the ability of prisons to rehabilitate its inmate populations. As has been argued above, the decline of the rehabilitation paradigm created a strong case for non-custodial sanctions. Finally, in this chapter it has been highlighted that the recognition of the notorious status of crime victims in criminal justice and their ‘location’ in the punishment discourse has made alternatives to prison continue to grow.

The examination of non-custodial sentences in a historical context is also indicative of the fact that the exchange and dissemination of ideas have had a profound impact upon law-making. This has been the case from the very origin of alternative sanctions to the present. Even if recently the legal influences of the United States upon European jurisdictions appears to be reversed considerably,¹⁵⁴ as has been shown, in many respects the penological developments occurring in the United States in the 1970s and 1980s were widely followed by European countries. Matti Joutsen, therefore, is right to call the United States a powerhouse of empirical (and to a lesser extent, theoretical) criminology, and victimology-related sciences.¹⁵⁵ On the other hand, this chapter has provided sufficient evidence to argue that in the realm of non-custodial sanctions, there is a certain form of convergence between European countries. By comparing three jurisdictions in terms of non-custodial measures and sanctions that are, at any rate, geographically located in Europe, the following chapters are likely to further explain and exemplify such interaction and convergence occurring within Europe.

¹⁵⁴See, for example, Tonry, M., H. (2006) *Thinking about Crime: Sense and Sensibility in American Penal Culture*, Oxford University Press, Oxford. See for an early account on the theme, Weigend, T. (1980) Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform, *Crime and Justice*, vol. 2, pp. 381–428.

¹⁵⁵Joutsen, M. (1991) Changing Victim Policy: International Dimensions in Kaiser, G., Kury, H. and Albrecht, H.-J., *Victims and Criminal Justice*, vol. 52/2, Max-Planck-Institut für internationales und ausländisches Strafrecht, Freiburg, pp. 765–797, p. 785, also Downes, D. (2001) Mass Incarceration in the United States- a European Perspective in Garland, D. (ed.) *Mass Imprisonment- Social Causes and Consequences*, Sage, London; Cavadino, M. and Dignan, J. (2006) *Penal Systems: A Comparative Approach*, Sage, London.

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