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Chapter 5.1: What Would You Do? Decisions By French and German Judges and Laypeople on Sanctions for Everyday Delinquency

Fabien Jobard

Abstract

In early 2018 we organized a double survey, presented in small case scenarios, in order to understand the kinds of sentences that regular French and German people, as well as French and German magistrates, assign to perpetrators of various offenses. The major results of these surveys are twofold. First, despite strong demographic and ideological differences between Germany and France, the distribution of sentences is highly consistent between the two populations: in each case, whenever the majority of French respondents decide on a given sentence, the majority of German respondents do the same. Second, the sentences given out by laypeople are by and large no more severe than those given out by judges, though here it is necessary to distinguish between the countries. Like their citizens, French judges make use of a broad array of sentences and measures. Their choices range widely and are for the most part neither more nor less punitive than French citizens'. However, German magistrates tend to deploy only two punishments: fines and probation. A certain proportion of German citizens are in favour of imprisonment, with a smaller percentage favouring highly lenient sentences or measures. Alongside these general provisions, there are very clear punitive inclinations towards certain categories (those who had already served a jail sentence; repeat offenders), or certain crimes (domestic violence; tax fraud). Three conclusions emerge: a certain moderation on the part of both citizens and judges; common ground between Germans and the French; and a quite clear divergence regarding certain kinds of social behaviours.

Introduction

In the abundant scholarly literature on Anglo-American countries, it is often argued that the 'punitive turn' at the end of the twentieth century was accompanied by a spectacular increase in detention rates, as well as by growing public support for punitive views. People increasingly expressed hostility to supposedly lax justice and rehabilitative solutions in favour of harsher sentences, expressing support for the restoration of the infamous penalty or even the death penalty (the work of Roberts et al. 2003, 21-34 on public opinion in USA, Canada, UK, Australia, New Zealand is illuminating in this regard). This multi-faceted movement, dubbed by Anthony Bottoms (1995) as 'populist punitiveness', is often caught up in a circular dynamic. As John van Kesteren (2009, 26) argues, "It is often assumed by politicians and judges that public opinion in their country will not accept less severe sentencing." Judges and politicians thus nurture 'populist punitiveness' in order not to be accused of leniency. Scholars, however, have been quick to warn against the assumption of public opinion's 'punitive preference', even in the United States, where it still seems difficult for politicians not to appear 'tough on crime':

"Evidence is accumulating from a variety of sources that suggests that the public (in the US and elsewhere) is less punitive than the polls would suggest" (Roberts 1992, 101, also Cullen et al. 2000).

In Europe, there is no consensus on the general orientation of public opinion on crime and punishment. Cross-sectional longitudinal data are simply non-existent (Reuband 2011, 140, Robert 2008); the only exception is on the legitimacy of the death penalty. Despite the 'at best hypothetical' nature of the question (Kury and Obergfell-Fuchs 2011, 280), it has been asked in surveys for decades—including, for around the last forty years, in cross-national initiative surveys such as the International Crime and Victims Survey (ICVS) and the European Survey of Crime and Safety (Van Dijk 2008, Van Kesteren 2009). In these surveys, respondents are asked

to choose the sentence they would impose on a repeat burglar who had taken a television from a private home, from among a limited set of options (fine, prison, community service, suspended sentence, prison, another sentence). In Northern Ireland, England and Wales, Scotland, the USA, Canada, New Zealand and possibly Ireland (depending on the confidence interval), prison is the preferred sentence, while in Europe only Bulgarians (and possibly Greeks) declare such a choice. All other countries prefer community service to imprisonment, with France and Germany being among the most unfavourable to prison (only one-fifth of respondents in these two countries) and, in the event of a prison sentence, the most favourable to a short sentence (van Kesteren 2009, 28 and 30).

Apart from this suggestion of greater moderation in continental Europe than in Anglo-American countries, research in France and Germany has not produced a great volume of scholarship. The 1970s and early 1980s saw a notable investment of in-depth studies into social representations of criminal justice, which revealed the importance of social class on opinions about justice and crime (Robert and Faugeron 1978, Robert 1979, Ocqueteau and Perez-Diaz 1990). Subsequently, however, French researchers began to explore feelings of insecurity and fears of crime supplemented by more general examinations of social tolerance. On the one hand, these two bodies of knowledge have illuminated a general growth in tolerance and relatively low concern for crime (compared to worries about unemployment, poverty or illness); though sometimes affected by exceptional events such as attacks, urban riots or electoral campaigns, these trends have remained otherwise stable over the long term (Robert and Pottier 2006). In Germany, tolerance has obviously increased insofar as support for the death penalty has collapsed; there has also been growing tolerance towards cannabis use (now decriminalised in many Länder) and homosexuality. But despite stable sentencing preferences in, for example, the ICVS, there are also indications of increasing punitiveness: take, for example, the decline in the rehabilitative

ideal that had prevailed in sentencing since 1970 (Reuband 2011, 145), or the clear majority, beginning in the early 2000s, that came to favour harsher sentences in Germany (Baier et al. 2011, 145-146).

Our research proposes a contextualised comparison of German and French public opinion on punishment and crime. As we have already indicated (see chapter 1), we are less interested in comparing two Western European countries in their own right than in investigating the penal culture at work in two countries on the European continent. As such, we are less concerned with the position of France in relation to Germany than with the factors associated with punitiveness or moderation. Secondly, given that our survey is not intended to be a long-term one, we sought a benchmark specific to each of these two societies: their judges. Thirty years ago, Julian Roberts considered regular people's penal judgments as one of the few achievements of his research:

“The question has never failed to generate the result that the majority of the public ... expressed their desire for harsher penalties. In fact, this question concerning sentencing severity generates a higher consensus than any other issue in criminal justice” (Roberts 1992). As a matter of fact, research has consistently showed that people systematically express the opinion that judges' sentences are too lenient (Mayhew and Van Kesterem 2002, Roberts 2002, Roberts et al. 2007).

We therefore opted for a survey of four distinct populations (see details of the operations in chapter 4): a representative sample of the 2018 German population, a representative sample of the 2018 French population, an unstructured sample of 2017 German magistrates and an unstructured sample of 2017 French magistrates. We submitted the same survey to all four populations, consisting of a series of general questions on crime and justice and a series of 13 vignettes presenting an offence committed by a certain perpetrator, named and succinctly introduced. The offences included shoplifting, reselling a small quantity of cannabis, severe domestic violence,

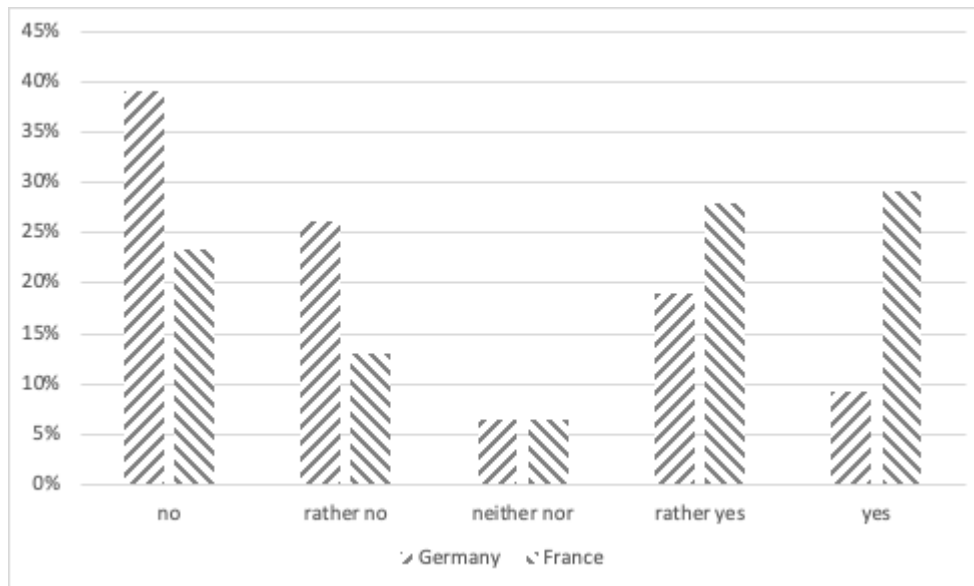
etc. Thus, levels of punitiveness among laypeople in these two countries could be measured against that of professionals.

German and French opinions on criminal justice

Two of the questions most frequently posed in comparative criminology—support for the death penalty and the aims of criminal sentences—result in a strong (to say the least) divergence between the French and German cases.

“Should particularly serious crimes be punished by the death penalty?” This question is met with very different answers in the two populations (Fig. 5.1.1). Two-thirds of the German population oppose the restoration of the death penalty, even for “particularly serious crimes.” Conversely, nearly 60% of French respondents are favourable (or in any case not hostile) to the restoration of the death penalty for the same kinds of crimes. Unsurprisingly, the dispersion values are particularly high concerning this particular question ($\chi^2 = 584,84$, $df = 4$, $p\text{-value} < 2,2e-16$).

Fig. 5.1.1: Support to restoration of death sentence in case of particularly serious crime



X-squared = 584,84, df = 4, p-value < 2,2e-16

The second issue on which French and Germans are clearly divided concerns the purpose of punishment. To the question “In your opinion, what is the main purpose of a sentence?”, the two populations display quite different attitudes (X-squared = 999,03, df = 6, p-value < 2,2e-16). In fact, retribution is strongly supported in France (25% of respondents), suggesting a punitive impulse behind criminal convictions, while Germans tend to privilege protecting society (33.5%), thus assigning a preventive motivation to criminal sentences. (Deterrence accounts for Germans’ second most frequently cited purpose, at 26.4%.) If one preference unites the two public opinions, it is the rejection of restorative justice and of the rehabilitative ideal (to put it in scholarly terms): these are shared by only 21.8% of Germans and 13.5% of French respondents. From these two questions, we can conclude that there is a substantial punitive inclination in both populations, even stronger in France than in Germany, where the death penalty remains highly unpopular and where the desire to punish does not take precedence over either protecting society or over deterrence. But in both countries, neither the rehabilitative ideal nor the perspective of

restorative justice (again, to reformulate the answers to the questionnaire in terms of criminological research) takes the first place. Nevertheless, it should be noted that in both countries, crime is not a primary concern (19.2% of respondents in Germany, 15.8% in France), and neither is terrorism (9.7% and 16.5% respectively), despite the fact that the polls were conducted a few years after major attacks in Germany (Berlin, December 2016), and after similar attacks in France (Charlie Hebdo, Bataclan and Parisian restaurant massacres in 2015; Nice in 2016), not to mention only a few days after a terrorist took hostages in Trèbes in southern France and a member of the armed forces was shot dead. Instead, social concerns remain paramount in both countries: 34% of Germans (and 20% of French) believe that poverty is the major problem that the government should address; 25.2% of French (and 5% of Germans) consider unemployment as the major national issue.

The question that arises, therefore, is the classic problem of the “artefact” formulated by Pierre Bourdieu, on polls with questions that no one would ever pose to him- or herself (Bourdieu 1990, s. see also Kury and Obergfell-Fuchs 2011, 280). What can be gained from asking about the purpose of punishment to people who will never pronounce sentences, or about the restoration of the death penalty in countries under the European Convention, where this sentenced was abolished in 1949 (Germany) and 1981 (France), and where no party represented in parliament supports such a claim—all within a context where crime itself is a secondary concern?

In fact, as soon as more theoretical questions about justice rub up against more narrow concerns about the criminal justice system as it actually functions, Germans and French also reveal divided views, which take much the same shape in both countries. Thus, a majority of French and Germans consider their justice system to be lenient or somewhat lenient (52.3% of the French and 61.3% of the Germans); for a quarter it is neither lenient nor harsh; and a fifth consider it to be harsh. A relative majority of Germans and French believe that the justice system does not do a

good job (42.3%), yet over a third (37%) are of the opposite opinion, whereas a fifth of these two populations have not made up their minds on the question. In the end, Germans and French remain just as divided on the merits of their respective criminal justice systems as they are on the question of the death penalty or the objectives of sentencing. Nevertheless, these more concrete questions are posed about their own criminal justice system and not on abstract sentences or motivations: public opinion in both cases is divided along the same lines. The same is true, if not more so, for the question of whether the severity of sentencing has any effect on crime. On this question, a large majority of French and Germans (61.6%) believe that tough sentences do have an effect on crime; 14.7% of them are absolutely convinced of this. Fewer than 15% do not have a clear opinion on the question and a quarter think that the severity of justice has little or no effect on delinquency.

Several conclusions can be drawn from this information: in continental Western Europe, the majority of respondents believe that the severity of the justice system is likely to have an impact on crime, so most people (almost two-thirds) believe in the justice system. But public opinion is divided on the effectiveness of their criminal justice system: two-fifths believe that it does not do a good job, two-fifths believe that it does, and one-fifth does not know. The diagnosis that can be made is that public opinion is divided in comparable proportions, but that the majority of Europeans, simply put, do believe in criminal justice.

These questions are not very useful in determining whether or not Continentals are punitive, or whether or not public opinion is moderate on the Continent. Although they are divided, they are not clearly in favour of greater severity, and they believe in the justice system. Yet when it comes to concrete cases of sentencing, as we shall see, German and French opinions are remarkably close.

Converging sentences

Thirteen cases were submitted to respondents and to magistrates: 4 cases of shoplifting, 1 case of tax fraud, 3 cases of traffic offence, 1 case of cannabis dealing, 2 cases of insulting police officers, 1 case of severe violence in a public place, 1 case of severe domestic violence. The sentences given were: case dismissed, order for treatment (no entry into the criminal record), dismissal with the obligation to pay a small fine, community work, fine (not more than one month's net salary), fine (at least one month's net salary), prison with probation, prison sentence (up to one year), prison sentence without probation (more than one year). How do Germans and French judge these criminal acts? Can we evaluate the overall degree of severity for the sentences handed down?

Before endeavouring to answer this question, we first attempted to understand the overall environment that affects people's criminal judgments. That is, we sought to determine whether the sentences chosen by all respondents (German and French together) can be grouped into clusters according to their penal preferences; for example, whether one particular cluster can be distinguished by a clear preference for punishment, another by a clear preference for therapeutic solutions, another by a clear preference for dropping the case, etc. To this end, we produced a geometric analysis of the data (multiple correspondence analysis, MCA). This kind of descriptive analysis of correspondences between individual choices or preferences and independent variables has been popularized in social sciences through Pierre Bourdieu in his book *Distinction* (1979/1987), which describes the “social spaces” of people’s “social judgements”. With this technique, it is possible to provide a synthetic vision of the social space (here of “French and Germans”) as a global structure and to study different sub-sectors of this social space more in-depth (Lebaron 2009: 14). In descriptive research on individual choices, “concentration ellipses” are used which show geometric summaries of subclouds of individuals, in which these ellipses

gather up to 90 percent of the individuals of a given subcloud (Le Roux and Rouanet 2010: 69-80).

In our work, each respondent, defined by his or her answers to the various questions asked (gender, age, nationality, education, preferences relating to justice, feeling of insecurity, etc. – these are the "illustrative" variables), is situated within a grid of $7 \times 13 = 91$ dimensions (the 7 sentences that can be pronounced, after merging both fine penalties and both prison penalties) \times the number of fictitious cases (these are the "active" variables). We can thus represent a multidimensional space in which the individuals are situated in relation to each other according to what defines them (illustrative variables) as well as the sentences they have handed down (active variables). This space illuminates the logic behind grouping individuals together and the distance of the groups formed from each other, which we will call "respondent clusters".

Fig. 5.1.2: Geometric Modelling (MCA) of Sentences with Ellipses on French and Germans Respondents

The representation of all the respondents on the first two axes of the multidimensional grid clearly shows a so-called "Guttman" distribution, which indicates a very low general variance of the individuals in relation to each other. Thus, the sentences handed down are closely gathered around the point of origin where an axis 1, representing sentences that are opposed to each other (prison sentences vs. dropped charges), intersect an axis 2, representing sentences according to whether they are frequent or rare. Within this agglomerate, classes can be distinguished, but they are not very far from each other.

We will not go into the details of these classes here. However, it is important to represent the possible differences in distribution between Germans and French in this multidimensional space: this is represented by the two ellipses (called "concentration ellipses") which are intended to bring together the four-fifths of the German and French respondents who are closest to each other, respectively. As can be seen in the diagram below, the two concentration ellipses are quite close together. This means that, on the whole, considering all fictitious cases proposed, Germans and French differ very little in terms of the sentences they wish to impose. The vertical axis of the French ellipse is slightly longer, its centre slightly further south than that of the Germans (i.e. on the vertical axis), which means that Germans pronounce the most frequent sentences in the set of offenses by all respondents (in this case, fines) slightly more often than the French. But the French and Germans respondents are indistinguishable on the horizontal axis: there is no notable difference between both public opinions as far as prison sentences and drops of prosecution are concerned. These two populations, in this respect, are highly homogeneous.

Without going into detail on the organization of penal preferences in France and Germany, we can note that certain variables are much more divisive than nationality when it comes to sentencing. For example, educational level: respondents (German or French) who refrained from mentioning their highest diploma received are grouped together in the only ellipse oriented from north-east to south-west. Another ellipse stands out because it is wider than the others, namely the ellipse of individuals without a degree. These individuals have a significantly higher frequency than other respondents for rarely pronounced sentences (unsuspended prison and dismissal of charges; mainly dismissal of charges in the case of non-respondents). The impact of educational attainment thus appears to be much more significant than the fact of being German or French.

Fig. 5.1.3: Geometric Modelling (MCA) of Sentences with Ellipses on French and Germans Respondents (Highest Professional Qualification)

The same is true for respondents' self-reported financial situation. Here again, respondents who did not answer the question about whether they are in a good or bad financial situation at the end of the month and the 350 who considered themselves to be in a "very bad" situation at the end of the month (these are the two ellipses that are much more spread out than the others) favoured the sentences least frequently chosen by all respondents: in this case, dismissal of charges and being sent to prison.

Fig. 5.1.4: Geometric Modelling (MCA) of Sentences with Ellipses on French and Germans Respondents (Perception of Own Financial Situation)

Thus, the geometric analysis of the data allows us to conclude that, in general, the Germans and the French assign concrete sentences comparably, despite their noteworthy differences on certain more general questions relating to the main principles of criminal justice: the death penalty and the ultimate aims of criminal sentencing. It remains to be determined to what extent the sentences pronounced by these Continental citizens are moderate, and to what extent they are punitive.

Severe or lenient? Europeans' sentencing choices

In the following section, in order to simplify the presentation, we have merged the two sentences relating to fines, the two that pertain to imprisonment, and the two forms of dismissal of prosecution (accompanied or not by payment following dealings with the prosecutor).

Punishment, but also healing: confronting violence and repeat offenses

The first conclusion that can be drawn on the subject of restraint vs. severity of public opinion is how rarely these cases give rise to a very clear preference for a given sentence. The majority of the 13 cases submitted to German and French laypeople prompted a great diversity of responses. The sentences chosen were mainly community work, fines, probation and prison – heterogeneous, to be sure, but which together attracted 85 to 90% of the respondents in 5 of the 13 cases presented. All but two are cases where the offence was committed by a repeat offender. Both exceptions are cases of violence committed on a public space or, more precisely, out of the domestic sphere: that of a severe beating inflicted by an individual in a nightclub's parking lot; that of a robbery.

Fig. 5.1.5: Repeat Offences and Street Violence: Diversity in Punitiveness

In these cases (assault leading to a broken jaw and repeat offences), discharge (even in exchange for a monetary payment) and required therapeutic treatment are options that were rarely chosen (each less than 10% of votes). For repeat (or violent) offenders, respondents seldom chose either no punishment, on the one hand, or medical treatment, on the other. In contrast, the relative

severity of the sentences handed down in these cases is notable: Europeans judge recidivism and repeat criminality severely.

However, such severity does not tell the whole story about European attitudes towards recidivism or violence. Indeed, as can be seen in the graph, community work is not dismissed to the same extent as prosecution or therapy: 22.4% and 21.4% of the Germans and French surveyed consider community service to be the appropriate punishment for a repeat cannabis street dealer or for a repeat theft of a jumper from a store; 17.2% and 16.5%, respectively, consider that this is the appropriate punishment for repeat insulting of a police officer and for recidivist violence. Only repeated driving under the influence of alcohol seems to be met with a reluctance to impose community work (6% of the sentences chosen, whereas mandatory treatment is chosen by almost 10% of the respondents). On the other hand, probationary sentences are also highly common: one third of Europeans questioned on the (recidivism) case of an unemployed father raising his two children alone who stole a jumper from a store consider probation to be a fair sentence. Almost one third of those judging the perpetrator of the jaw fracture and between a fifth and a quarter of those judging the other offences (repeat sale of cannabis, repeat drunk driving, repeat insult to police officers) also consider probation to be the most appropriate sentence.

What kind of probation do Europeans expect when they decide on this sentence? We do not know. But it is noteworthy that Europeans recommend probation for offenders, even repeat offenders, as a possibility of avoiding prison (probably seen as the sentence to be evaded) and demonstrating acceptable behaviour (without knowing, once again, the nature of this behaviour: compensation? personal amendment? job search? redress?). Thus, many offences, and in particular those characterized by recidivism or repetition, call for laypeople's judgments to be marked by the desire to punish (probation sentence or fine), but also, and sometimes equally, by

the desire to put the guilty party to the test, whether through a probation requirement or community work.

Punishment without healing, while still avoiding prison: sentencing fines

For a certain number of offences, also rather numerous, Europeans opt for punishment, with a prevailing tendency towards monetary penalties. For 4 offences, almost half of the respondents landed on a fine as the chosen penalty: for a first-time conviction of a driver under the influence of alcohol, for a single working-class man who shoplifted a jumper, for an unemployed man raising his two children alone who shoplifted an expensive watch, and finally for tax evasion committed by an individual who had already been convicted twice.

Fig. 5.1.6: Avoiding Prison, Refusing Healing: Sentencing Fines

When the perpetrators are assumed to be financially solvent, fines tend to be considered the most appropriate penalty: the perpetrator of the traffic offence is a civil servant earning €1800 net per month; the perpetrator of the jumper theft is an employee without children; the perpetrator of the tax offence is a senior executive earning €5500 per month. In addition to the relative appropriateness of the prison sentence and monetary penalty, one particular offence stands out from the others: the theft of a valuable watch by an unemployed single father. In this case, Europeans seem to punish greed with money, in a (Christian?) logic of retributive punishment for one's sins. In any case, the preference for a monetary penalty for a certain number of offences and, above all, for certain perpetrators, is the sign of a heightened concern for individualized

penalties, combined with a penchant for avoiding imprisonment for those who can afford to pay financially for their crime.

Nonetheless, the clear predominance of financial penalty should not efface other possible decisions, in particular prison sentences, as well as dismissal of the proceedings. For driving under the influence of alcohol, theft of a jumper by an employee without children, theft of a valuable watch, and tax evasion, prison sentences account for 7.1%, 7%, 12.9% and 23.3% of the decisions, respectively. (The tax evasion is a borderline case, given that it has almost twice the highest score of the three other offences; yet it is still only half of the sentence chosen by the majority of all respondents). But we should also note that a significant proportion of the population recommends that the prosecution should be dropped: 16.3%, 17.4%, 9.6% and 8% respectively. This reflects, once again, the relative heterogeneity of criminal judgments pronounced by Europeans faced with fictional cases. In contrast to a system in which the sentence would be mechanically determined by the definition of the offence (mandatory sentencing), Europeans make wide use of all available sentences. Here we leave aside the question of whether Europeans are generally more punitive or more lenient.

Refusing to punish: European attitudes in unjust situations

Two offences, quite distinct from each other, were disproportionately significant in the choice to drop charges (with or without the payment of a small sum of money): the shoplifting committed by the unemployed man raising his two children alone (36% of respondents chose to drop charges) and the insult against a police officer (47.9%).

The fact that almost half of those questioned wished to drop charges for the latter offence, i.e. more than for the theft of a jumper by a needy head of household, calls for comment. It was in response to being subjected to an identity check, for no apparent reason, that the individual had

said to the police, “Anyway, that's all you can do: stop people just to piss them off. You're nothing but assholes.” When he had initially asked the police why he was being checked, they replied: “Because we enforce the law.” Although France’s Code of Criminal Procedure does by and large allow the police to carry out identity checks on individuals on public spaces, the laws within the different German states are more restrictive; police intervention may thus give rise to refusal on the part of Germans in particular.

It should be noted, however, that in these two cases, prison sentences (probationary or not) are rare: around 5% of those questioned. Adding fines and prison sentences together, these options are drawn on by only 12.6% of Europeans surveyed, in the case of shoplifting, and by 19.6%, in the case of insulting police officers. Once again, community work wins out: this is the sentence most frequently chosen in the case of the jumper thief (47.5% of votes) and the second option (after drop of charges), at 30.6% of votes, in the case of insults to police officers.

Thus, for offences arising from problematic or even unjust situations (crime of necessity, abuse of authority), Europeans tend to be more lenient, whether in the form of community work or dropping charges entirely.

Sent to jail: retribution and removal

Two fictional cases (out of 13) call for an unusually high frequency of unsuspended prison sentences.

The first is the domestic violence case. On his way home from work, a man (Mr. Boulanger in France, Herr Becker in Germany) grew angry with his wife and hit her several times, so severely that she suffered a fractured jaw and bruises around her eyes, such that (according to a legal doctor) she was unable to work for two weeks. Even with Mr. Boulanger and Herr Becker denying these facts, 39% of Germans and French people chose to imprison him. Here, even

though the perpetrator earned a living (he earns €1,500 net per month and is a car dealer; his wife, who separated from him after the beating, was also employed), few opted for a fine (12.7%). This time, dropping the charges was rare (2.7%), as was community work. Thus, prison, whether actual or probationary, was favoured by 69.6% of Germans and French people. Prison has thus become a fully legitimate solution for the perpetrators of severe domestic violence (even though, it should be noted, the alleged perpetrator Mr Becker denied any wrongdoing). In this case, if we wished to ventriloquize the respondents with a single voice, we could say that prison is a measure of punishment, immediate or probationary, which punishes clearly outrageous behaviour.

The other case in which imprisonment predominates is much more unexpected, since it concerns a case of a routine roadside check on the person caught drunk driving, a person whose distinctive feature, apart from being a civil servant earning €1,800 per month, is that he was sentenced to three years' imprisonment for acts of violence that occurred five and a half years ago. Of these three years of imprisonment, he has only served a portion of them, since he has served the last 14 months of his sentence under legal supervision. The police did find that he had an alcohol level of 1.2g per thousand in his blood, one hour after pulling him over, yet Mr Loiseau (or Herr Vogel) did not commit any damage at the wheel (it was a routine police check), and at the time of the trial he had already served the whole of his earlier sentence for violence.

In this case, fully three quarters of respondents opted for imprisonment (74.7%), and among them more than three quarters expressed a wish for a custodial sentence (58.5%), i.e. twice as many as for the tax evader or the cannabis dealer, both of whom familiar with committing these acts.

Beside these sentences, the other options recede into the distance: only one seventh of respondents were in favour of a fine (13.9%), even though the offender earns €1,800 net per month. Other options offered barely register. For the overwhelming majority of our Europeans,

Mr Loiseau and Herr Vogel deserve prison; as if, in fact, a person who has been released from prison or convicted of 'aggravated assault' should be permanently removed from society, regardless of the second-time offence or behaviour. If the prison sentence imposed on the perpetrator of domestic violence seemed to reflect a retributive purpose, the sentence imposed on the perpetrator of drunk driving seems to be the result of a genuine desire for banishment. We are faced here with the 'dangerous other' or, more precisely (because this civil servant earning 1800€ per month does not exactly bear traits of 'otherness'), a 'born criminal' or an 'outcast': clearly, prison calls for prison, like a destiny marked with a red X.

What can we conclude regarding the penal logic of Europeans questioned about such a diverse set of fictional cases? Firstly, when it comes to punishment, a custodial sentence is rarely their main choice. When this is the case, it is aimed at a crime that contemporary morality firmly repudiates (domestic violence, even despite the perpetrator's denial) and at a defendant who, because he has already been in prison, seems worthy of imprisonment whatever his wrongdoing might be. Prison punishes scandalous offences, but also (and even more so) tags and punishes reprobate people. It should be noted that the latter are not censured because of personal characteristics, such as origin or appearance, but because of their criminal past. The 'dangerous offender' is subject to an autopoietic definition.

Secondly, Europeans quite often vary widely among the options presented. There is thus no 'penal preference' in Europe, but rather a fairly broad distribution of sentences. Linking this to what we saw at the beginning of this article, we could say that Europeans are probably less punitive or less moderate than they are divided on issues of justice and punishment. Unanimity is rare.

Nonetheless, the erosion of the rehabilitative ideal is questionable. Although therapy is rarely considered, community work is relatively popular, particularly in Germany where it is not a sentence in itself but exclusively a probationary measure.

Laypeople harsher than their judges?

We should remember that the Germans and the French, along fairly similar lines, are divided on the question of the criminal justice system (is it doing its job properly? is it tough or lenient?), even as a relative majority acknowledges the ability of sentences to influence crime rates.

However, according to a commonly held view, their level of punitiveness stems from their view of court decisions as overly lenient. Here we turn to whether laypeople in Germany and France are just as harsher or harsher than professional judges.

The French: just as divided as the professionals

In France, judgements are only loosely regulated by the Penal Code, so judges have a great deal of leeway; in addition, variations in criminal law or offenses from one jurisdiction to another can give rise to serious consequences on a local scale. Article 132-1 of the Penal Code decrees that any given sentence must be individualised. Within the limits set by the law, the court determines the nature, extent and plan of the sentences, according to the circumstances of the offence and the character of the perpetrator as well as his or her financial, family and social situation. This individualisation is carried out in accordance with the purposes and functions of the sentence: to punish the offender and to promote his or her reformation, integration or reintegration. These individualisation criteria provided for in the Code leave judges considerable discretion.

Given such discretion and range in the available sentences, as well as the licence to adapt them to individual situations and circumstances, judges can draw on a very broad range of possible

measures. It should be remembered that lay sentencing was characterized precisely by a relative heterogeneity, with a good number of offences leading to no fewer than 3 or 4 choices, each of which highly distinct from the other—not to mention the small, though not entirely negligible minority opting for dismissal or therapy. It will therefore come as no surprise, given France's Penal Code, to learn that judges and laypeople share this significant dispersion among individual judgements. One of the most striking examples is the following road traffic offence, which in many other penal systems would call for a mandatory penalty. A civil servant earning €1800 per month underwent a routine traffic stop while driving and was found to have 1.2g of alcohol in his blood. Ordinary French people's responses ranged widely. The professionals' sentences were also relatively scattered, although to a lesser extent.

Fig. 5.1.7: Diversity in Sentencing through French Laypersons and Judges (Driving While Intoxicated)

The range of sentences chosen by French professionals is notable, although less broad than that of laypeople. Both magistrates and laypeople preferred a fine to mere dismissal (half as much for professionals, a third for laypersons). In addition to a fine, both populations chose the following sanctions: a treatment order, a financial plea bargain in exchange for dismissal or a suspended prison sentence. Finally, when a fine was imposed, it was only set at less than one month's net income in both populations, although this was much more pronounced among the professionals (ten times as many were in favour of a fine of less than one month's net salary) than among laypeople (half as much). Despite this convergence, however, we should note that two sentences were rejected by judges and attorneys, which were included among the decisions of a small part

of the population: mandatory community work, which was approved by one tenth of citizens, was adopted by three times fewer judges; prison, which was adopted by 8.3% of the population, was not chosen by any professional.

In comparative terms, the punitiveness of the general population is slightly more marked here than that of the professionals, since a minority (<10%) of citizens prefer imprisonment to a fine or probation, whereas professionals rejected imprisonment. On the other hand, the proportion of lay people in favour of the long-term sentence (over one year's imprisonment) is considerable (nearly half of those who chose prison). But this greater severity in the general population should not mask the crucial point: judges and the general population share relatively similar views on the appropriate sentence for the driver.

It should be remembered that in other cases, the public had generally been lenient: the shoplifting of a pullover by a single father raising his two children, with no criminal record, and an insult to the police. In the case of offending the police, the judgements of magistrates and laymen are quite similar ($X^2 = 84,993$, $df = 7$, $p\text{-value} = 1,315\text{-}15$): 18.5% of the French were in favour of dropping the charges, as were 18.4% of the professionals. Here again, a portion of the French were in favour of prison sentences, mostly suspended. But is this enough to qualify laypeople as more punitive than judges, since judges and attorneys are much more likely than lay people to impose fines (24.5% vs. 10.4%), and more laypeople prefer to dismiss the case in exchange for payment of a sum of money and community job? In the case of the jumper theft, 40.5% of French people chose to dismiss the case, compared to almost two thirds of professionals (63.9%).

Additionally, on the other offence with a high classification rate, judges are undoubtedly more lenient than citizens ($X^2 = 219.84$, $df = 7$, $p\text{-value} < 2.2e\text{-}16$).

Fig. 5.1.8: Harmony in Sentencing (France, Contempt of Police Officers)

For most offences, the distribution of sentences among professionals and laypeople in France presents a profile that is fairly similar to the initial cases we saw: a wide dispersion of the handed sentences with a small proportion of laypeople preferring prison. Because of this, we made a distinction between sentences of less than one year and those of more than one year. In the vast majority of cases studied, when judges and attorneys opt for incarceration, their choice is for terms of imprisonment of less than one year, whereas a minority (but not negligible) proportion of citizens adopt terms of imprisonment of more than one year.

Two cases show a substantial gap between the judiciary and the layperson in France: the case of drunken driving by a former inmate ($X^2 = 367,5$, $df = 7$, $p\text{-value} < 2,2e-16$) and the spousal abuse case ($X^2 = 290,95$, $df = 7$, $p\text{-value} < 2,2e-16$). Most of the differences have to do with prison. In the first, as we know, four-fifths of French people choose prison, three-quarters of them specifying unsuspended prison (and mostly a sentence of more than one year). It may come as a surprise that 76.7% of professionals chose imprisonment, but in two-thirds of cases a suspended sentence. Here, the severity (even if incomprehensible in terms of strict criminal law) is shared by professionals and laypersons; yet if this takes the form of a probationary sentence for professionals, it takes the form of actual prison time for regular people.

Fig. 5.1.9: Professional and Lay Punitiveness: Sanctioning the Ex-Inmate (France, An Ex-Inmate Driving While Intoxicated)

A similar (albeit smaller) disparity can be seen with regard to the types of prison sentence when it comes to domestic violence: here too, professionals and laypeople agree on imprisonment, but the proportion of laypersons choosing incarceration (and above all long-term imprisonment) is much greater than that of judges and attorneys, as the following graph shows.

Fig. 5.1.10: (Relative) Harmony in Punitiveness (France, Domestic Violence)

In France, laypeople are more severe than professionals, insofar as, for most of the crimes, the proportion of laypeople who opt for incarceration, particularly for a long period, is in all cases higher than that of professionals. Moreover, for minor offences (shoplifting), magistrates more often prefer dismissal. But this greater punitiveness of the public as compared to the judges (which is not always the case—such as for insults to the police committed by a repeat offender) is not the most striking feature of our survey. Instead, the wide dispersal of judgements among both laypeople and professionals testifies to the unsettled or at least non-consensual nature of sentencing, among both citizens and judges. Such variability, more than the marginal excess of punitiveness of the laypeople, is particularly striking when comparing the sentences pronounced by the citizens and by the professionals.

German citizens: harsher than their judges... but also more moderate

The highly scattered nature of French professionals' sentences makes it difficult to measure the severity of the French by their yardstick. On the contrary, the punitiveness of German citizens is much easier to assess in relation to their judges and attorneys. Indeed, unlike laypeople (German and also French), and unlike their French colleagues, German professionals settle on far less

wide-ranging sentences. For most of the offences presented, they focus their decisions on two or even just one sentence or measure. In most cases, professionals split their decisions, often very unevenly, between fines and probation. The other sentences are, with some exceptions, of little relevance to them. Some examples:

- For the drunk driver who earns a very good living and has no prior conviction, 91.5% of German professionals opt for a fine,
- If the same driver was convicted in the past for the same offence, 68.8% of them give a fine and 29.5% choose probation: in total, 98.3% opt for two sentences,
- If the same individual has no conviction for the same offence but was sentenced to three years' imprisonment for violence five years ago, 79.8% opt for a fine and 16.2% for probation, with 96% total choosing these two sentences,
- In the case of acts of violence committed on the street, 61.7% opt for a fine and 34.3% for probation, with, again, 96% choosing these two sentences,
- In the case of domestic violence, 50.1% opt for fines and 45% for probation, with 95.1% choosing one of these two sentences,
- In the case of recidivist shoplifting, 72.3% choose probation and 22.7% choose a fine, with 95% choosing one of these two sentences,
- In the case of the repeat tax evader, 68.4% opt for probation and 25.4% for a fine, with 93.8% total choosing one of these two sentences,
- In the case of insults against the police by an individual already convicted of similar offences, 67.4% of German professionals opt for a fine and 25.3% for probation, so that 92.7% choosing one of these two penalties,

- If the insult was committed by a person who has never been convicted, 48% of them opt for a fine and 37.4% for dropping the case on payment of a small sum of money, with 85.4% choosing one of these two penalties,
- In the case of shoplifting a valuable watch, 76.9% opt for a fine and 15.3% for probation, with 92.2% total choosing one of these two sentences.

In this landscape of near unanimity, two cases stand out. In the case of shoplifting by a man without children who earns a decent living, 48.3% of German professionals opt to drop the charges in return for a small sum of money and 33% opt for a fine, so that 'only' 71.3% of them concentrate on these two penalties. In the case of the cannabis dealer who is a habitual offender, four-fifths of professionals (this time in equal proportions) also opt for fines and probation, but a significant minority (11.4%) prefer actual imprisonment (a sentence of less than one year). Only the case of the unemployed father's theft of a jumper from a shop clearly differs from the opinions of German professionals and, moreover, reveals unusual measures. 14% were in favour of dropping the charges entirely and 25% in favour of dismissing it in exchange for a small sum of money. 22.8% opted for a fine, but 37.6% for community service, which, it should be remembered, is not a statutory punishment in Germany. It is notable that this is one of the two offences where German professionals most closely resemble lay persons (the chi-square value is relatively low - the other offence is watch theft, $X^2 = 212.95$, $df = 7$, $p\text{-value} < 2.2e-16$).

Fig. 5.1.11: A Rare Convergence between German Laypeople and Judges (Theft of a Jumper)

Indeed, in Germany, lay persons and professionals generally do not react in the same way to the offences proposed: German judges and attorneys hesitate between fines and probation (most

often), but citizens, like French citizens and also French professionals, make wide use of the proposed sentences and measures. And among the sentences and measures proposed by the citizens, low prison sentences are more often resorted to compared to measures of dismissal (whether or not in exchange for a small sum of money) or therapy - even if the latter are never entirely rejected. The comparative decisions of German professionals and German lay people regarding the habitual cannabis street dealer are fairly representative of the differences between professionals and lay people.

Fig. 5.1.12: Diverging Sentences between German Laypeople and Judges (Habitual Drug Dealer)

As mentioned, four fifths of German professionals opt for a fine or probation sentence; only a third of German lay people do. Another near-third of lay persons opt for a firm sentence of imprisonment (this option is favoured by just over one tenth of magistrates). But a fifth of German citizens consider community work as legitimate (a marginal option among judges: 2.8%), while 8% are ready to drop all charges (which is not even envisaged by 3% of judges) and 7% opt for mandatory treatment (a solution that does not even meet with the approval of five judges or attorneys).

In a whole series of cases, citizens' excessive punitiveness compared to professionals is indisputable, insofar as the fraction of the population inclined to actual imprisonment is not counterbalanced by a fraction of people in favour of dropping the charges, medical treatment or even community work. One obvious example is that of the civil servant driving under the influence of alcohol, after having been released from prison a few years ago (52.7% of Germans are in favour of actual imprisonment, only 2.6% of magistrates, and barely 10% of Germans are

in favour of dismissing charges, therapy or community work). The case of violent domestic violence is also noteworthy (30.7% of Germans are in favour of imprisonment, as opposed to 2.4% of German professionals), although in this case no fewer than 15.4% of lay persons still opt for the therapeutic solution.

Conclusion

The multivariate, geometric analysis of the data on all sentences given, incorporating all variables regarding people's preferences, reveals a strong overall homogeneity between Germans and French as to the sentences resulting from offences in small case scenarios. This is true despite sometimes opposed or highly divergent opinions on, for example, the death penalty or the ultimate aims of judicial sentences. (That said, the ICVS question on the theft committed by a recidivist burglar indicated a strong proximity between two countries' public opinions as far as they are asked on singular cases or vignettes - s. van Kesteren 2009.)

The Germans and the French are divided on the question of the severity of criminal justice as well as on the question of whether criminal justice system performs well. It would be unduly extreme to conclude from such general questions that these two European populations are punitive, or even to make claims as to what extent they are moderate. What is certain is that a relative majority of them see justice as a proper tool to fight crime.

More than their moderation or punitiveness, what characterizes these Europeans is that the wide use they make of the sentences and measures proposed to them: in each case, as a group, they call for a great diversity of sentences or measures (which, it must be emphasized, is also true for French judges). Thus, Europeans seem to judge, above all, on a case-by-case basis, taking into account the circumstances of the offense and the personality of the offender (above all: his criminal record), rather than in reference to any pre-established penal ideal. And for each case,

they propose a variety of penalties and measures. They set out the sentences or measures that seem right to them—and which, notably, are never unanimous or even converging. The dispersion of sentences is very high in both populations, even more so than among French judges, who also have highly varied opinions as to the appropriate sentence.

Are French and German laypeople tougher than their judges? The rather scarce vignette research in criminal justice research thus far is uncertain on this point. Some studies in Canada and in The Netherlands (respectively Ouimet 1990 and de Keisjer et al. 2007) do show that laypeople are more severe than court practitioners when asked to sentence fictive offenders. Meanwhile, other sources of research suggest that the public is more lenient, or at least no harsher, than judges (Hough & Roberts 1998, Kuhn & Vuille 2011, Balvig et al. 2015). Our research contributes to highlighting one aspect of this situation: laypeople's penal sentences of laypeople are certainly not excessive. Europeans do resort to imprisonment more frequently than their judges (especially German judges, for whom imprisonment is very rare). But more often (although in a smaller proportion), they also opt for alternative measures such as simply dropping the charges (with or without payment of a small sum of money), as well as therapy or community work.

This final sentence is crucial in determining just how harsh or punitive the European public is. Community work can be seen as a rehabilitative action, a crude punishment (unpaid work) or even an ignoble punishment (obligation to do degrading work in public places). But it is clear that prison is most often avoided—except for a few groups: those considered deserving of or even fated for it (the driver who had been sentenced 5 years ago for violence); perpetrators of domestic violence; and perhaps also for repeated tax offenders. We can thus hazard a line of demarcation, linked as much to the offences (tax evasion, domestic violence) as to the stigma of prison.

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