1 INTRODUCTION

The goal of this book is to provide a general and practical overview of how American criminal justice works for readers who have not studied the subject, and who may not have a background in the American legal system generally. It explores, and tries to explain, some inherently distinctive features of American criminal procedures.

The idea for the book sprang from the May 14, 2011, arrest of Dominique Strauss-Kahn, then the Managing Director of the International Monetary Fund and a likely candidate for the President of France, on charges that he had sexually attacked a chambermaid in the New York hotel where he had been staying. A bit over three months later, the District Attorney of New York submitted a memorandum in court asking that all the charges against him be dismissed. The sequence of procedures between these two events transfixed French readers and television viewers. As a former US federal prosecutor then living in Paris and a member of the Paris Bar, I appeared frequently on French radio and TV to explain the American criminal procedures that were suddenly becoming daily news in France. It was often a challenge, because the first reaction of many was to conclude that procedures that were so difficult to understand must somehow be less fair, that principles of justice so different from their own must somehow be less "just." This experience and others like it led to the development of an academic course on comparative criminal procedures, which I have now taught at the University of Amsterdam and Columbia Law School, and to lectures that I have presented in France at the Ecole Nationale de la Magistrature and Paris 2.

This book focuses on criminal procedures, as distinct from criminal laws; the latter attempt to define what conduct is illegal and worthy of punishment, the former inform us *how* a person suspected or accused of a crime should be treated. These procedures are the core of criminal justice, since they reflect each country's attempt to find the appropriate balance between the interest of the state in punishing (and thus deterring) misconduct, and the right of individuals to maintain their liberty, dignity, and privacy, and to elemental fairness in adjudication. This book will also not discuss **administrative proceedings**, even though they are often linked to criminal ones. In the United States, several agencies in both the federal and in state governments have powers to investigate violations of regulatory laws and to impose financial and other noncustodial sanctions. At the federal level, for example, the **Securities and Exchange Commission** may often investigate violations of federal securities laws and laws related to overseas bribery in parallel with a federal prosecutor. While often appearing similar to criminal proceedings in net result because they cause the imposition of huge fines, administrative proceedings follow their own separate procedures.

Criminal procedures are inevitably linked to national culture and result from each country's distinctive history. Substantive criminal law—the definition of what is illegal—may be converging at least among economically advanced countries; while disagreements about what conduct should be punished sometimes arise, by and large most countries agree on the basic definition of criminal conduct. But the same is much less true with respect to criminal procedures, and observers generally tend to view procedures in countries other than their own as inherently less just than the procedures in which they were trained and that they understand. My belief is that US criminal procedures are no more and no less "fair" and "just" than procedures in other countries; they simply respond to quite different traditions, cultural needs, and expectations.

Differences among national criminal procedures are of growing importance, largely for two reasons: First, crime increasingly takes place across borders; investigators and prosecutors from different countries now work together far more than had been the case previously, and lawyers representing clients—particularly multinational corporations—often face investigations under procedures that are

different from those with which they are familiar. In my experience in this area, advising both prosecutors and international corporations on cross-border criminal issues, such efforts are often misguided and ineffective because the participants simply do not understand each other—not just because of language differences, which is itself a big problem, but because the frames of reference, the essential context, of their respective procedures are so different. And second, beginning with the creation of the International Criminal Tribunal for ex-Yugoslavia in 1993, and later the establishment of the International Criminal Court in 2000, there now exist one permanent and occasionally several ad hoc international criminal tribunals that conduct investigations, and have trials, based on **international criminal law** rather than the criminal laws of any one country. But the development of relatively coherent, substantive international criminal law has not been accompanied by the growth of anything that one could call international criminal procedures. As a result, and again based on my experience working with several of those tribunals, I am convinced that most of them work rather inefficiently because their participants are inevitably trained in—and feel comfortable with—the norms and procedures in their home countries, and struggle to understand the mind-set of their colleagues schooled in other traditions.

There is another reason why it is useful to study other countries' criminal procedures, and to take a fresh look at our own through the eyes of others: there is always room for improvement. When I first started studying, and then teaching, criminal procedures on an internationally comparative basis, I hesitated to urge that American criminal procedures could benefit from studying criminal justice systems so different from our own. The idea of simply "grafting" some other country's procedure into one's own seems destined to failure. Indeed, the mixed results at the international criminal tribunals are at least in part a result of such attempts: those tribunals have had neither the time nor the history to grow their own, indigenous procedures; rather, they have created a hodge-podge based as much as anything else on simple negotiation among participants in an effort to maximize the use of their own procedures. But several years of presenting US criminal procedures to non-American audiences—and answering puzzled, sometimes unbelieving, questions about how criminal justice occurs in the

United States—has led me to think that some of those questions deserve attention. Three distinctly American phenomena stand out.

The first is that US criminal justice gives far more unreviewable power to prosecutors than is the case in other countries. In continental Europe, and to some degree in the United Kingdom, as well as in countries whose legal traditions derive from them, a much wider range of decisions by prosecutors is subject to at least some review by a court than is the case in the United States. To some degree, this allows US prosecutors to act more quickly than their counterparts, and often to innovate. To take one example, Chapter 11.D of this book will discuss the rapidly emerging procedure known as the **deferred prosecution agreement**, or "DPA," whereby large corporations can negotiate with a prosecutor to pay (often huge) sums of money but avoid a criminal conviction. Because this procedure is effective (although not free of controversy), some other countries are exploring its use. More insidiously, Chapter 14.B will discuss the relatively recent phenomenon of **mandatory minimum sentences**. While designed to diminish the discretion exercisable by both judges and prosecutors, in fact mandatory minimum provisions provide an unreviewable—and, some believe, pernicious—power to prosecutors that gives them remarkable advantages in negotiating **guilty pleas**, as discussed in Chapter 11.C.

A second distinctly American phenomenon is **discovery**, or more precisely the right and ability of an accused to obtain access to the evidence against him, which is discussed in Chapter 10.B. A US defendant in fact has important rights to such discovery, although those rights are not rigorously codified but rather are spread among a number of laws and rules, as well as interpretations of decades-old **precedent** from the Supreme Court. But what is striking to non-Americans, and worrisome to some in the United States, is that those provisions are largely under the control of *adversaries*—the prosecutor and the defense—who may have a tendency to share no more than the minimum the law clearly requires. Several European and other countries take a different approach: the trial **record** is in essence assembled in advance, and a trial is basically an inquiry whether that record—equally available to both sides—suffices to justify conviction. As a result, "surprises"—and the risk of "trial by ambush"—are greatly diminished.

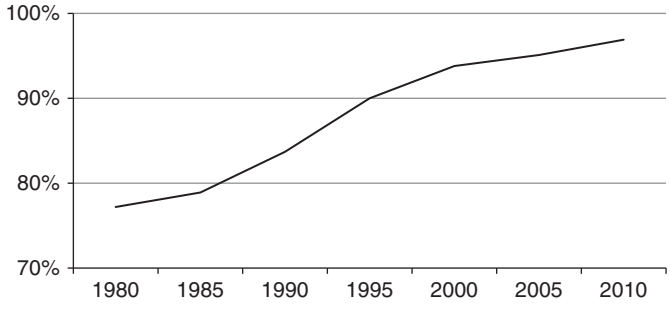

Figure 1: Percentage of Guilty Plea Dispositions in Federal Courts, 1980 to 2010

A further phenomenon may well follow from the first two, at least in part: almost 95 percent of all criminal cases nationwide in the United States—and more than 97 percent of the cases in the federal system—result in a **guilty plea**, where the defendant elects to negotiate with a prosecutor rather than exercise a constitutional right to have the case against him tested by a judge and jury. As recently as 1973, roughly 63 percent of federal criminal cases ended in a guilty plea, with the rest going to trial—a rate roughly comparable to the plea rate in the United Kingdom today. Since then, trials have become less and less frequent. As noted in Figure 1, the rate of guilty pleas has increased relentlessly, and for fiscal year 2017 an official report for the federal courts noted that 97.2 percent of federal defendants pleaded guilty.

More than anything else, this statistic raises eyebrows when I share it with foreign audiences. To many—including this author—the statistic suggests a system that is not working. An analysis of its causes is extremely complex and nuanced, but could appropriately include an appreciation of the many ways in which US criminal justice depends on procedures unique to this country, which seem to make the exercise of the constitutional right to go to trial prohibitively difficult and risky.

Finally, observers of US criminal justice are often struck by some prominent statistical anomalies. Figure 2 shows the number of individuals in prison in the United States, and how that number has mushroomed in the last forty years—that is, during the same period when jury trials in federal cases shrank to less than 3 percent of all criminal cases.

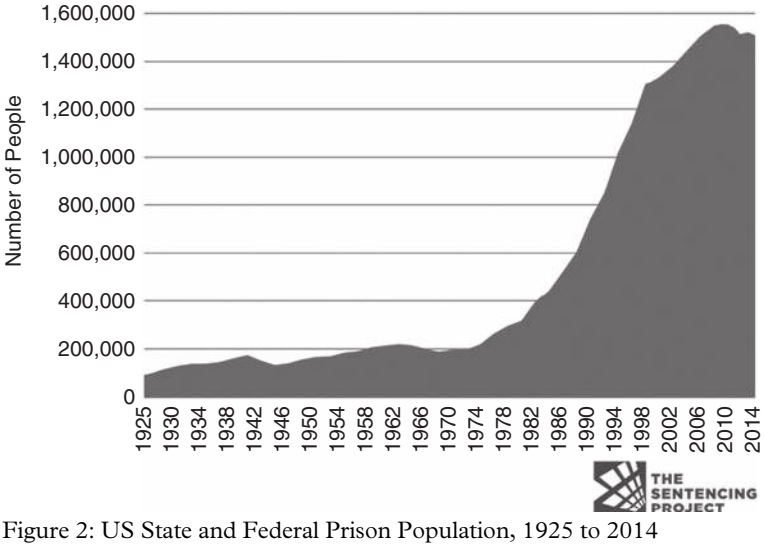

Figure 2: US State and Federal Prison Population, 1925 to 2014

As a result, the prison population as a percentage of overall population, and thus the rate of incarceration, is far higher in the United States than in any other economically advanced nation:

Further, the racial composition of those caught in the web of criminal prosecutions differs greatly from the population as a whole, since in most places racial and cultural minorities are disproportionately represented; and of course almost alone among economically advanced nations, some of the states in the United States (albeit a dwindling number) exercise the **death penalty**. These very important issues are beyond the scope of this book, although readers will find in the Bibliography some of the many excellent books and articles that address them. But the Conclusion (Chapter 19) argues that these and other pressing problems with American criminal justice cannot be understood, or addressed, without first understanding the procedures in which they have evolved.

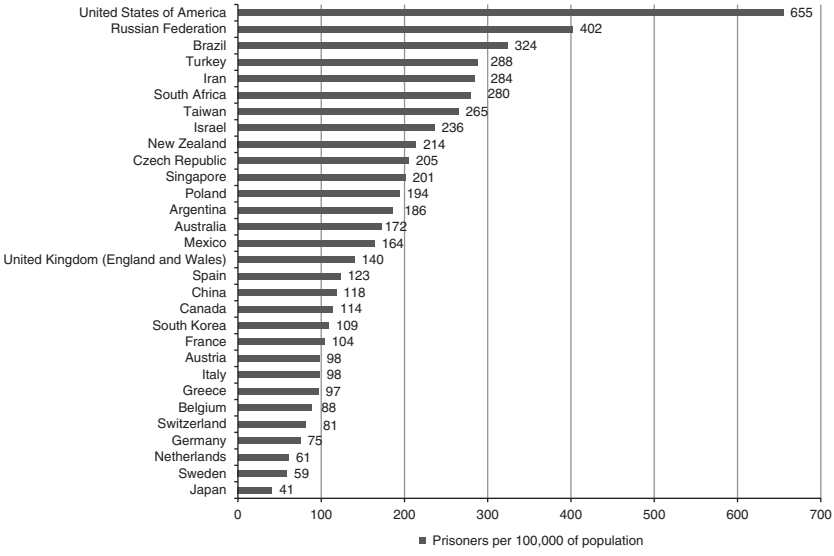

Figure 3: Prison Incarceration Rates in Selected Countries