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GUEST EDITOR'S PREFACE

While there is a large body of comparative research in substantive criminal law, sentencing scholarship is still a far less internationalised field. This is particularly true in respect of legal-doctrinal work as compared to sociological-empirical studies of sentencing practice (where research questions and methodologies travel quite happily). It also contrasts sharply with the cross-jurisdictional reach of philosophical writings on punishment. Exchanges between practitioners from different non-proximate jurisdictions about sentencing law and practice are comparatively rare events. Some penal innovations – such as Scandinavian day fines, or Australian restorative justice conferencing – inspire reform elsewhere. But for the most part, efforts to improve sentencing law and practice often remain domestically focused or look only to jurisdictions considered close in legal tradition and approach.¹ This is unfortunate because modern sentencing systems all face similar issues. They need continuously to resolve questions concerning the appropriate distribution of tasks between legislatures, judiciaries and administrative bodies, find ways of managing the tension between judicial authority and legislative-administrative guidance of sentencing decisions, and set limits to their use of imprisonment as a sanction. We can learn a lot from each other, not least from each other's mistakes.

In the spring of 2016 the Centre for Penal Theory and Penal Ethics at the Institute of Criminology, University of Cambridge organised a

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¹ To some extent this may simply be a consequence of the fact that very little legal-doctrinal literature on sentencing from non-English-speaking countries is available in English. Legal-doctrinal scholarship on sentencing usually speaks to domestic legal audiences; consequently little efforts are made to publish in a language that some of the domestic legal actors are less comfortable with or unlikely to read.

small judicial-academic roundtable which brought together members of the judiciary in England and Wales, Australia, Canada and Scotland, as well as academics from seven different jurisdictions (some of whom also had some judicial experience). The Cambridge roundtable provided an opportunity to explore the constitutional structures behind sentencing regimes, as well as the possibilities for guiding the exercise of sentencing discretion without constraining it inappropriately. On the one hand, sentencing judges may find their discretion curtailed by various legislative mechanisms that mandate particular sentencing outcomes or sentence enhancements. On the other hand, sentencing judges may find their sentencing options expanded through the introduction of new modes of punishment, including in cases where offenders are at risk of being sentenced to imprisonment (as occurred in the State of Victoria in Australia when, in 2012, the legislature restructured the disposal options open to courts under the banner of a new order, the “Community Correction Order”).

The aim of the roundtable was not to focus on the detail of sentencing but on the context and the general principles that should inform it. Different sessions explored the relationship between courts and legislatures, addressing the extent to which judicial discretion is necessary at sentencing and how binding any set of statutorily-based guidelines ought to be. As regards the use of imprisonment, two themes were given specific attention: the legislative design and practical operation of custody thresholds, and the feasibility of replacing significant terms of imprisonment with non-custodial sanction packages.

The articles collected in this Special Issue, which build on the work begun in the roundtable, are intended to facilitate cross-jurisdictional discussion of sentencing issues.

The first three articles address relationships between courts and legislatures and the role of the sentencing judge. Courts in almost all common law jurisdictions have in recent decades seen their discretion restricted by legislative intervention - sometimes through mandatory sentencing laws and sometimes through binding statutory guidelines. Tom O'Malley's article on “Judgment and Calculation in the Selection of Sentence” explores how different institutional designs can improve sentencing practice. Antje du Bois-Pedain's article, “In Defense of Substantial Sentencing Discretion”, draws on a range of empirical literature to argue for a sentencing framework that expects judges to make directly value-oriented sentencing decisions.

Wolfgang Frisch's article, "From Disparity in Sentencing towards Sentencing Equality: The German Experience" shows how developments in German sentencing law and practice, particularly through the agency of different institutional actors, have brought about greater consistency in sentencing.

The following two articles focus on sentencing thresholds, particularly with regard to custody. Do sentencers operate with such thresholds? Are these legislatively set or do they develop informally through practice? To the extent that sentencing practice develops in a different direction from legislative schemes, as is (in different ways) arguably the case in both England and Wales, and in Germany, what do these differences tell us about workable and unworkable ways of directing sentencers away from the use of imprisonment? Julian Roberts and Lyndon Harris' article, "Reconceptualising the Custody Threshold in England and Wales", reviews difficulties in the practical application of the current custody threshold provisions in this jurisdiction, and proposes legislative reform. Stefan Harrendorf's article, on "Sentencing Thresholds in German Criminal Law and Practice: Legal and Empirical Aspects", illustrates the gap between the legislative regime and the practices of the courts in that jurisdiction.

The final two articles address the potential and difficulties of custody-avoiding disposals in cases that would previously have attracted terms of imprisonment. In the first of these, on "Non-custodial Dispositions and the Politics of Sentencing", Justice Chris Maxwell reviews the experience to date in Victoria, Australia with the courts' use of Community Correction Orders. In the second of these, on "'Punishment' in Non-custodial Sentences: A Critical Analysis", Anthony Bottoms sets some of the difficulties encountered by the Victorian model in a broader context by problematising reliance on the concept of "punishment" in relation to non-custodial dispositions.

The articles by Anthony Bottoms, Antje du Bois-Pedain, Chris Maxwell, Tom O'Malley, and Julian Roberts and Lyndon Harris, have been developed out of discussion papers prepared for the Cambridge roundtable. The articles by Wolfgang Frisch and Stefan Harrendorf were commissioned especially for this Special Issue.