

Franklin E. Zimring

and

Gordon Hawkins

The background of the cover features a stylized illustration of a prison cell. It consists of two rows of vertical green bars. The top row has six bars, and the bottom row has five bars. A green door is located at the bottom center, with a small blue keyhole. On the left side of the bottom row, there is a small, dark, rectangular object with a white border, resembling a lock or a piece of equipment.

THE
SCALE
OF

IMPRISONMENT

Franklin E. Zimring &
Gordon Hawkins

**THE SCALE OF
IMPRISONMENT**

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*This book is dedicated to the memory of
Molly Dilman Zimring, 1906–1990.*

An Earl Warren Legal Institute Study

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The dedication reflects a longer-term and larger debt of one of us.

Introduction

Three kinds of question arise in relating a society's use of the criminal law to its prison population. There is first the general justification of the use of imprisonment as a criminal sanction. There is second the justification of the use of imprisonment in particular cases. And finally there is the separate question of the scale of the use of prisons as a penal method.

The first question addresses whether prison should be used as a criminal sanction. The second question concerns whether particular offenders should be sent to prison. The third question, the subject of this book, concerns the size of a society's prison enterprise in relation to other criminal sanctions and to the general population. How many prisoners? How many prisons? What criteria should govern decisions about how large a prison enterprise should be constructed and maintained?

While the institution of the prison is a universal characteristic of industrialized nations, the scale of the prison enterprise varies substantially from place to place and over time. In the United States, the prison population in the state with the highest rate of imprisonment usually exceeds that of the lowest-rate state by a factor of ten. Moreover, in less than two decades, the number of persons imprisoned in the United States has tripled, a substantial change by any measure and one that is not linked to other social or demographic shifts of similar magnitude.

The question of the proper scale of a penal enterprise is distinctive and important but infrequently addressed. Although concern has been intermittently expressed about prison overcrowding throughout the century, little attention has been paid to the factors which determine the extent to which imprisonment is used. Discussions of the purposes of punishment in general, and of imprisonment in particular, have taken precedence over, and have almost entirely precluded consideration of, such questions as how far the use of imprisonment is responsive to social factors and what factors determine the amount of imprisonment im-

posed. Rarely do we find anything more than oblique reference to such questions.

It might be asked whether such an approach—what we shall call a political economy of imprisonment—is really necessary if an acceptable jurisprudence of imprisonment could be determined. If appropriate principles governing the use of imprisonment have been defined and adopted, would not the application of those principles automatically determine the size of the prison population? Moreover, would not the number of prisoners produced by this calculus axiomatically be an optimum prison population?

In fact, that is not the case. In the first place, the jurisprudence of imprisonment is rarely precise about the number of offenders who must be sent to prison or about the duration of their imprisonment. Aside from mandatory minimum schemes, the law speaks of when offenders *may* rather than *must* be incarcerated. Second, the choice between imprisonment and alternative punishment is a function not only of the application of theoretical jurisprudential notions such as “desert” but also of the nature and extent of alternative punishments available to the system. Third, while “desert theorists” are concerned with what they call “ordinal proportionality,” that is, the determination of the rank order of punishments to be used for crimes of different seriousness, the quantum of punishment suitable for a specific type of crime is left an open question.

Indeed, one distinguishing feature of many modern accounts of the jurisprudence of punishment is the leeway that the various schemata allow to prosecutors, judges, and correctional authorities in regard both to the choice between prison and alternative sanctions and to the determination of terms of imprisonment. Thus, there is no necessary concordance between a particular set of jurisprudential principles and the extent of the prison population resulting from the application of those principles.

Empirical demonstrations of the lack of concordance between penal principles and prison populations abound. States with strikingly similar criminal codes have very different levels of prison population. In the United States regional characteristics seem to be more significant determinants of levels of prison population than either substantive criminal law or aggregate crime statistics. Over time, many American states have experienced significant upward and downward variations in prison population without any significant change in either crime rates or penal code provisions which might explain them.

Rusche and Kirchheimer, in discussing “the illusion that a specific

penal practice is bound up with a specific penal theory," demonstrated that in "the development of punishment by imprisonment" there were marked differences among European countries in the years following World War I, and considerable fluctuations within those countries, in relation to prison sentencing at a time when formal principles of punishment were both uniform and unvarying. For this was "the period when the reform school was at its height" and "reform theories were officially accepted everywhere" (1939:141–142, 145–165). More recently, Bottomley and Pease have noted the "dramatic differences between countries in their use of imprisonment" evident in Council of Europe data (1986:153), but neither they nor anyone else has identified any marked differences in penal philosophy or principles that would explain the divergent rates of imprisonment.

If the formal structure of the criminal law does not explain the different levels of imprisonment at different times and in different political units, what does? Part I of this book identifies and analyzes four separate traditions for addressing this question. Chapter 1 examines two efforts to think about levels of imprisonment as the outcome of economic and social trends in society. Chapter 2 discusses the work of three social historians whose work on the origins of imprisonment relates to questions about the proper scope of imprisonment. Chapter 3 examines efforts to predict the demand for future prison resources by projecting from past levels of imprisonment, a process called correctional forecasting. These forecasting methods are usually constructed without the benefit of any theory regarding the social forces that influence the decision to imprison. Correctional forecasts were born more from a need to plan than from any belief that variations in prison population can be explained. Correctional forecasters see themselves more as reporting likely future conditions than as finding explanations for them—more like television weatherpersons than meteorologists.

If the correctional forecaster regards levels of imprisonment as similar to natural phenomena, the advocate of the instrumental theories discussed in chapter 4 sees levels of prison population as the outcome of deliberate policy choices related to the manipulations of sentencing policy to influence crime rates. This instrumentalist view was always implicit in the jurisprudence of sentencing but has recently also been formalized in analyses that address the effect of different levels of imprisonment on crime rates. This latter group of studies, while depending on criminological data, most resembles self-conscious political economy in its style and frequently prescriptive approach.

Part II investigates postwar trends in imprisonment in the United

States in some detail. Chapter 5 presents data on trends in U.S. prison population as an aggregate and compares fluctuations in imprisonment with national trends in crime, in unemployment, in demography, and in drug arrests. None of the social factors analyzed vary in a pattern that would explain the prison trends.

Chapter 6 examines regional and state-by-state patterns of imprisonment, showing the wide variation in rates of imprisonment and the significant convergence in trends in recent decades that has occurred despite the decentralized nature of political authority over the scale of imprisonment.

Chapter 7 analyzes the impact of specific criminal justice policies on prison populations, including new penal priorities, mandatory minimum prison sentence legislation, new systems of allocating the authority to set criminal sentences and prison releases, and prison construction policies.

Chapter 8 discusses the potential impact of policy devices that are designed to reduce prison populations, both alternative penal sanction programs and nontreatment devices to reduce population.

Chapter 9 concludes our study with a discussion of the relationship between issues of scale and the usual discussion of prison crowding as well as two elements of what we call the political economy of prison scale.

This project was undertaken not to settle a field of inquiry but to help establish one. It is in that spirit that we offer the book that follows. The end-product is far from a general theory of prison scale. The causes of variation in prison population are not easily specified and not obviously the same in different times and locations. The prescription of appropriate policy responses is not an automatic inference from current data on prison population. But we are confident both of the significance of the topic of scale to criminal justice policy and of the value of further research to scholars and practitioners.

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PART I

The Issue of Scale

The occasions for research on the scale of the imprisonment enterprise have been few in number and dispersed throughout the social sciences. This part reviews the principal published work on the subject to provide a background for the analysis in part II. Chapter 1 examines the two attempts to construct criminological theories of prison scale. Chapter 2 discusses the work of the social historians of prison creation who should have, but by and large have not, dealt with questions about what determines the size of a prison system. The two scholarly traditions have different perspectives. The criminologists who are the subject of chapter 1 speak of fixed laws that are expressed in prison population while the historians in chapter 2 address the more particular and contingent circumstances that are the probable causes of the events they describe.

The correctional forecasters profiled in chapter 3 are, at their best, applied social scientists trying to provide practically useful estimates of the need for prison space in a jurisdiction one year and five years forward. To date, they have found little of use from either the historian or the social theorist. The academic social scientists have, in turn, all but ignored the efforts and methods of correctional forecasters. Finally, and unconnected to many of the previously discussed efforts, economists and policy analysts have begun to formulate recommendations of what constitutes a desirable or even optimum prison population from calculations of the cost and functional value of imprisonment, either in dollar savings or in crime avoided. This work is examined in chapter 4.

The primary fact about the literature on what determines the size of a prison system is that there is not much. What is encouraging, however, is that our current lack of knowledge is the product of oversight rather than frustrated scholarly effort. Inattention to this topic has, as we shall see in part II, a sure cure in the policy climate of the United States in the 1990s.

I Imprisonment as a Social Process: Rusche, Kirchheimer, and Blumstein

This chapter discusses two episodes of scholarly interest in the forces that determine prison population and the lesson these prior efforts hold for contemporary students of the social factors that shape the scale of a prison enterprise. Our researches have identified only these two accounts in all of modern criminology of the forces that influence levels of imprisonment.

In these pages, we develop each theory of the determinants of prison population and describe the reaction of the scholarly community to each of them. A concluding section compares the two explanations as theories of imprisonment and episodes in modern criminological theory.

1.1 PUNISHMENT AND SOCIAL STRUCTURE

The first attempt to study the determinants of prison population was Georg Rusche and Otto Kirchheimer's *Punishment and Social Structure*, published in 1939. In that book the authors note the neglect of such questions as "Why are certain methods of punishment adopted or rejected in a given social situation?" and "To what extent is the development of penal methods determined by the basic social relations?" Moreover, they offer an explanation of that neglect. It can "probably be attributed," they say, "primarily to the fact that the problem is generally approached from the standpoint of penal theory." And they argue that "not only have penal theories made little direct contribution, but they have had a negative influence on the historical-sociological analysis of penal methods" (1939: 3-4).

Earlier writers, said Rusche and Kirchheimer, had restricted themselves to such things as "[defending] the ideological integrity of the institution of punishment" or "writing a history of the idea of punishment." "It was also common practice to limit oneself to a mere schema of the succession of historical manifestations, a mass of data supposedly

bound together by the notion that they reveal progress." By contrast, they argued that "a more fruitful approach" would consider punishment "in its real relationships . . . in its specific manifestations [and investigate] the causes of its changes and developments, the grounds for the choice or rejection of specific penal methods in specific historical periods . . . the use or avoidance of specific punishments, and the intensity of penal practices as they are determined by social forces, above all by economic and then fiscal forces" (1939:4-5).

The essence of Rusche and Kirchheimer's theory of punishment was that "[e]very system of production tends to discover punishments which correspond to its productive relationships" (1939:5). Their principal thesis was summed up in one sentence by Thorsten Sellin: "In short the demands of the labor market shaped the penal system and determined its transformation over the years, more or less unaffected by theories of punishment in vogue" (1976:vii).

Such broad formulations are, of course, susceptible to a wide range of interpretation and exegesis. But both the virtues and defects of Rusche and Kirchheimer's work and the importance of their contribution to penological theory are largely independent of the minutiae of textual analysis. They are also independent of the various ways in which their work has been construed by interpreters and whether or not it can be properly described as "the landmark Marxist account" (Braithwaite, 1980:192) of the connection between punishment and the economy.

The principal feature of their work which justifies the "landmark" appellation is exemplified in their definition of their approach to the sociology of penal systems. "It is necessary to strip from the social institution of punishment its ideological veils and juristic appearance and to describe it in its real relationships . . . Punishment as such does not exist; only concrete systems of punishment exist. The object of our investigation therefore is punishment in its specific manifestations" (Rusche and Kirchheimer, 1939:5). But insofar as a "landmark" in this context means an idea or insight which may be considered a high point or turning point in the history or development of penological theory, the title is inappropriate. Indeed, their emphasis on the necessity for an empirical approach to the theory of punishment, far from being a turning point, was at that time almost entirely ignored. As Greenberg has noted, "the work of Rusche and Kirchheimer . . . made little impact at the time of publication" (1981:27).

Moreover, it continues to be ignored. One of the most recent discussions of the theory of punishment, in Robert Nozick's *Philosophical Ex-*

planations (1981), provides an apt example. Nozick there discusses the rationale for retributive punishment in precisely the way which Rusche and Kirchheimer condemned in their critique of earlier penal theorists (Nozick, 1981: 363–397; Rusche and Kirchheimer, 1939: 3–4). As Bernard Williams has observed, Nozick's discussion of punishment "is vastly removed from any actual social institution. There are one or two desultory references to the law, but virtually nothing that focuses on the fact that punishment is inflicted by some actual authority in some actual social circumstances. This characteristic . . . issues in a level of abstraction that is often bewildering" (1982: 34).

By contrast, Rusche and Kirchheimer not only focused attention on what occurred in some actual social circumstances but also supported their analysis of the social forces they saw as shaping penal systems with relevant statistical data. In their view, "penal methods [were] determined by basic social relations" (1939: 3) and penal theories like those of Beccaria and Bentham merely reflected "the bourgeois desire for security" and the requirements of "the prevailing social order based on private property" (1939: 74, 76). Their own view that "specific forms of punishment correspond to a given stage of economic development" was advanced not as another theory of punishment but as the result of "critical historical analysis," the product of which was, they maintained, self-evidently true.

Thus:

It is self-evident that enslavement as a form of punishment is impossible without a slave economy, that prison labor is impossible without manufacture or industry, that monetary fines for all classes of society are impossible without a money economy. On the other hand, the disappearance of a given system of production makes its corresponding punishments inapplicable. Only a specific development of the productive forces permits the introduction or rejection of corresponding penalties. But before these potential methods can be introduced, society must be in a position to incorporate them as integrated parts of the whole social and economic system. Thus, if a slave economy finds the supply of slaves meager and the demand pressing, it cannot neglect penal slavery. In feudalism, on the other hand, not only could this form of punishment no longer be used but no other method was discovered for the proper use of the labor power of the convict. A return to the old methods, capital and corporal