

On the Scale of Imprisonment: Downes's Contrasts in Tolerance

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DAVID DOWNES, *Contrasts in Tolerance: Post-War Penal Policy in the Netherlands and England and Wales*. Oxford: Oxford University Press, Clarendon Press, 1988. Pp. 226. \$45.00.

This essay proceeds under four headings. In the first, we distinguish between three sorts of questions about imprisonment and urge that more attention be paid to those factors that determine the scale of imprisonment in a particular jurisdiction. In the second section, we describe the analysis of such issues presented in *Contrasts in Tolerance*. The third part of this essay questions whether Professor Downes has isolated the factors responsible for reductions in prison populations in the Netherlands. A concluding section argues that study of the determinants of the scale of imprisonment in society should be a topic of concern to scholars of the criminal law.

I. THREE ASPECTS OF THE JUSTIFICATION OF IMPRISONMENT

It seems to us that there are three different kinds of questions to be considered 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 impris-

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onment in particular cases. There is third the question of the scale of the use of imprisonment as a penal method.

The general justification explains why imprisonment is available as a criminal sanction without reference to its use in particular cases or the determination of levels of imprisonment. The second question relates to decisions about the particular use rather than the general availability of imprisonment—whether or not particular individual offenders should go to prison or suffer alternative penal sanctions. The third question, the question of scale, is not about whether we should have prisons but about how many prisons we should have and for how many offenders. This is not usually thought of as a jurisprudential question. We propose to call it a question of the political economy of imprisonment. We also believe it to be an important part of the jurisprudence of the criminal law.

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

It might be asked whether analysis of the 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, “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 as an open question.

Indeed, one distinguishing feature of many modern accounts of the jurisprudence of punishment is the leeway that the various schema allow to

prosecutors, judges, and correctional authorities in regard both to the choice between prison and alternative sanctions and 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 demonstration 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 levels of crime. 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 that 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 between 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."¹ More recently, Bottomley and Pease have noted the "dramatic differences between countries in their use of imprisonment" evident in Council of Europe data,² but neither they nor anyone else has identified any marked differences in penal philosophy or principles that would explain the divergent rates of imprisonment.

This issue of the political economy of imprisonment has assumed particular significance in the light of developments in many Western nations in the late 1980s. In England in the 1980s the number of prisoners reached a historic high, and it gave rise to the sort of debate about prison population growth and prison crowding which prompted Downes's inquiry.

In the United States debate about prison population policy has been provoked by much more rapid and more dramatic fluctuations in prison population than in England or other countries in western Europe. After both rates of imprisonment and total prison population in the United States fell during the 1960s, prison population increased by 150% in the 15 years from 1972 to 1987. If the current rate of growth were to con-

1. Georg Rusche & Otto Kirchheimer, *Punishment and Social Structure* 141-42, 145-65 (New York: Columbia University Press, 1939).

2. Keith Bottomley & Ken Pease, *Crime and Punishment: Interpreting the Data* 153 (Philadelphia: Open University Press, 1986).

tinue, in less than a decade the U.S. prison population would be over one million, a scale of imprisonment unknown in any Western industrial nation. Clearly then the question of the political economy of imprisonment, although not unrelated to either the general justification of imprisonment or the jurisprudence of sentencing particular offenders, is a question distinct from either. And in the context of rapidly growing prison populations it is of more significance than has been recognized in the past.

II. CONTRASTS IN TOLERANCE

Downes's *Contrasts in Tolerance: Post-War Penal Policy in the Netherlands and England and Wales* is the first book-length treatment of imprisonment to have appeared in decades that is centrally concerned with changes in the scale of imprisonment and views these changes in a comparative perspective. Downes opens with an analysis of the problems involved in comparing sentencing and penal trends in the Netherlands and England at different stages of the sentencing process. He suggests that while such trends may often be independent of policymaking, the distinctive role of the public prosecutor in the Netherlands has made possible a degree of overall integration in sentencing policy that has no equivalent in England.

Downes's second chapter, which contrasts trends in penal populations in the years since the end of World War II, reports striking differences in the two countries. In the immediate postwar years the Netherlands exceeded England in reliance on custodial penalties. Beginning in 1947, however, the Dutch prison population began to fall and by 1957 the rates of imprisonment (daily average population per 100,000) for the two countries converged; and from then on the rate for the Netherlands became progressively lower than that for England. By 1975 the situation had been transformed in that the prison population in England had *doubled*, while that in the Netherlands had dropped by more than half. Downes concludes that a major reason for the contrast in trends was the coordination in the Dutch criminal justice system that concentrates power in the prosecutor and has led to the use of a variety of devices employed to resist recourse to prosecution and imprisonment wherever possible.

The third chapter critically considers a variety of "theories of decarceration" which might conceivably explain the Dutch pattern of relative decarceration. Downes argues that "the main burden of accounting for the trends seems to fall ultimately on variables closely connected with the actual accomplishment of sentencing by the prosecutors and judges themselves" (at 101). Chapter 4 deals with the consequences of sentencing trends in the Netherlands and the costs and benefits of Dutch sentencing policy. The author concludes that the most serious possible adverse consequence of that policy—the rise in crime—"seems more plausibly at-

tributable to more fundamental social and economic developments" (at 120–21).

The remainder of the book is less focused on issues of the scale of imprisonment. Chapter 5 deals with the problem of illicit drug consumption and the question of how far the politics of drugs changed the direction of postwar penal policy in the Netherlands. The author concludes that the rapid growth of hard-drug use and addiction since the mid-1970s and the steepening of the crime rates which was seen as predominantly a problem of drug-related crime "spelt the end of reductionism in penal policy" (at 161) in that there was no attempt to reduce the prison population yet further.

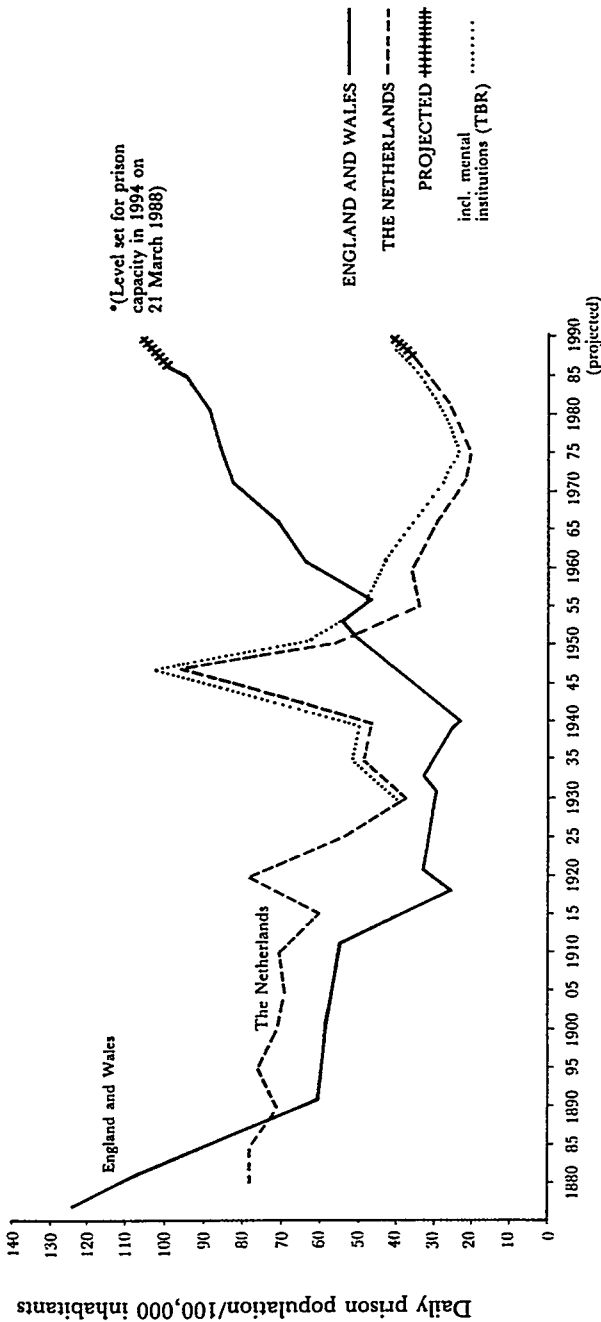
Chapter 6 compares the experience of imprisonment in the Dutch and English penal systems on the basis of interviews with prisoners in each system. The author confined his interviews to Dutch nationals in English prisons and English nationals in Dutch prisons. About half this group had experience with imprisonment in both countries. It is said that "all prisoners interviewed expressed a clear and strong preference for the Dutch system over that of England" (at 187).

Chapter 7, the final chapter of the book, argues that "we in England can edge a great deal closer to the Dutch example" without running any great risk because "we would do so from a position of such grossly inflated use of custody" (at 206).

III. HOW THE DUTCH DID IT

What is most striking about the Dutch experience is that absolute decline in prison population was sustained not for one decade as in the United States during the 1960s but over more than three decades. Over the 25-year period from 1950 to 1975 the rate of incarceration per 100,000 in the Netherlands fell on a substantial and sustained basis and the aggregate prison population also fell. The rate of imprisonment in the Netherlands today is about half the rate experienced 40 years ago. Downes's figure 1.1 tells the story.

This pattern is in sharp contrast both to other historical periods in the Netherlands and to trends in other countries. The decline from 1950 to 1975 contrasts with more recent trends in the Netherlands and those expected by most observers the over the coming years. In the period 1975–85 the Netherlands' prison population has expanded modestly, both in rates per 100,000 and in absolute terms. It is expected to increase more substantially in the future, but the probable level of expansion is the subject of debate. In 1985 Tony Vinson reported that "[t]he Dutch prison



Sources: England: Rutherford (1986a: App. for England and Wales); The Netherlands: population data from 1900 are from the Netherlands Central Bureau of Statistics; prison population for 1877-1979 are from Van Ruller (1981a), and for 1980 on from the Prison Department, Ministry of Justice. The prognosis for 1990 was made at May 1987 (Home Office, *Statistical Bulletin*, 10/87). Dutch population figures for 1880-95 are the author's estimates.

FIG 1.1 Prison population: Average daily rate per 100,000 inhabitants, 1877-1985 (excluding offenders detained in mental institutions and Dutch state labour colonies)

Downes's Fig. 1.1 (at 7)

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system is about to undergo considerable expansion.”³ David Downes says that “[r]ecent developments in the Netherlands suggest that even there the early 1980s have been something of a watershed in penal policy. Sentence lengths are creeping up; the prison population is likely to double in the decade 1980–1990 . . . though the latest official projections . . . suggest a lower increase” (at 187). But even with the recent increases counted, the rate of imprisonment reported in 1985 is about a third of the base rate of 1950. The effects of prior decarceration remain strong in the Netherlands of the late 1980s.

When examining the large and sustained decrease in imprisonment in the Netherlands over the period 1955–75, it is necessary to distinguish *how* the Dutch reduced prison population from *why* they reduced prison population. Professor Downes's most concrete contribution to the political economy of imprisonment relates to the *how* rather than the *why* of penal reductionism. What he demonstrates is that no single structural condition is a sufficient explanation of the decline in Dutch prison population. The coordinated nature of the Dutch criminal justice system and the significant powers of Dutch prosecutors certainly cannot be a sufficient explanation of that decline. Thus, for example, the dominance of prosecutorial power in the American system has been associated in recent history with both a significant decline in prison population and with the unprecedented increase of the more recent years.

Indeed, when asking “how did the Dutch do it?” a review of Downes's analysis provides a good deal more in the way of concomitants than of causes of the decline. The most striking illustration of this is Downes's table constructed to apportion the contrast in rates of imprisonment between England and the Netherlands according to the importance of a number of different contrasts in imprisonment policy.

A review of Downes's table 2.5 shows both the originality of the analysis in the book and also its limitations. The table reports an analysis in which differences in crime rates and several disaggregated elements of sentencing and criminal justice policy are separately analyzed to estimate how several features that differentiate England from the Netherlands might contribute to differences in prison population observed at a particular point in time. This practice necessarily involves the assumption that mechanisms (such as variations in clear-up rate) are causes of fluctuations in prison population (because high rates pass on some extra offenders who will not be screened out at later stages of criminal justice processing). The table presents a list of such factors and estimates the impact of each on differences in imprisonment in the Netherlands and England in 1980.

The process Downes uses is more sophisticated in its disaggregation than any other transnational comparison we have encountered. It points

3. Tony Vinson, *Impressions of the Dutch Prison System* 43 (The Hague: WODC, 1985).

TABLE 2.5 *Variables reducing The Netherlands' prison population relative to that of England in 1980*

	% difference if level aligned to that of England	Cumulative total	% contribution to reduction	Level in England
Daily average prison population	100	100	—	370
Crime rate	+23	123	8	
Clear-up rate	+26	149	9	
Policy waivers	+38	187	13	
Use of prison	+65	252	23	
Call-up system	+15	267	5	
Time served	+108	375	38	
TBR	+11	386	4	16 ^a
TOTAL	386	386	100	386

Source: See Appendix A.

^a In closed mental institutions.

Downes's Table 2.5 (at 51)

NOTE: There is in fact no Appendix A included in *Contrasts in Tolerance*.

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in a direction that future comparative scholars should explore. But a detailed examination of the elements of the table also reveals how quickly some of the inherent limits of comparative analysis are encountered (and in this case ignored).

In 1980 the daily average prison population in England was on the order of 375% of that in the Netherlands. In the table Downes is asking: What would be the Dutch rate of imprisonment if the various factors believed to be responsible for driving the rate were operating at the level found in Britain? Thus, the crime rate is one of the factors; what if it were at Britain's level? And what about the clear-up rate, and so on? In the case of each factor, he looks at the difference between Britain and the Netherlands and divides the difference by the Netherlands' rate for that factor; this gives the percentage increase. Thus, 8.5% of the Netherlands cases resulted in prison sentences, 14% of Britain's. The difference is 5.5%. Britain's rate of imprisonment is 65% higher ($.14 - .08 = .055$; $.055/.085 = .65$). The first column in the table is a list of figures derived in this way (although in the discussion Downes gives reasons for reducing the percentage gains in some cases).

The second column simply cumulates the percentage figures. Thus, $100 + 23 = 123$; $123 + 26 = 149$, and so on. The implication is that if all these factors operated on the Dutch rate of imprisonment at the levels found in Britain, the Dutch rate of imprisonment would be 386% of what it is—100% [what it is] + 286% [gain].

The third column uses the *same* figures another way. It asks what proportion of the 286% increase is accounted for by each factor. Thus, the difference between Britain's crime rate and the Dutch crime rate is 23%. That 23%, in turn, is 8% of the 286% difference between the Netherlands' imprisonment rate and Britain's ($23/286 = .08$).

But what really does this third column explain? The heading suggests that reductions in the Dutch prison population can be explained by cross-sectional differences noted between England and the Netherlands; to wit “% contribution to reduction.” But that is not the case. Whatever the peculiarities in English and Dutch history that lead to the noted differences in imprisonment rate in 1980, the comparison between two different countries as if the author were comparing the same country at two different points in time is methodologically incorrect. The table assumes causal relationships that cannot be established by cross-sectional comparison. Yet one cannot help but feel that what the author is searching for in the Dutch system is an alternative version of English penological history to use as a model of achievable decarceration policy.

Searching for an answer to the question of *why* the Dutch diverged in criminal justice policy from other countries is inescapably a historical rather than just a comparative task. To his credit, Professor Downes dis-

cusses a rich variety of historical factors and social and historical characteristics that might explain why the Dutch were motivated to reduce the numbers under penal confinement over a sustained span and to allow them to grow only modestly more recently.

Downes focuses on five features of recent Dutch history in his search for decarcerative motives. First, there were negative feelings among elites about imprisoning that can be traced to wartime occupation experiences; second, there was an absence of political pressure to respond to high crime rates in a punitive fashion; third, there was a long-term tradition of pluralism and tolerance in Dutch culture; fourth, the Netherlands enjoyed high levels of economic growth and prosperity; and finally, the Netherlands was a benign welfare state with one of the highest levels of expenditure on welfare in western Europe.

Unfortunately, these elements of Dutch history are not integrated into a model of historical explanation at any point in the book. The author rightly rejects wartime experience with the Nazis as a sufficient explanation for later decarceration by pointing out that other countries which experienced German occupation did not also experience a sustained period of decarceration to match that in the postwar Netherlands. But because the experience of wartime occupation is not a sufficient condition for explaining the adoption of a policy of decarceration, it does not follow that it was not a necessary condition of decarceration in the postwar Netherlands. In Downes's account the motives for decarceration in the Netherlands during the period 1955 to 1975 remain something of a mystery.

The emphasis in the book on factors such as a tradition of tolerance in Dutch society and coordinated prosecutorial power is problematic as an explanation of the postwar trend in prison population. These same long-term features were present prior to the period of decarceration when the Dutch rate of imprisonment exceeded that of England. In our view, a more plausible explanation which would fit the specific timing of decarceration in the Netherlands would place more emphasis on the wartime experience of Nazi occupation than does this account, in which it is played down (at 78). That experience interacting with other characteristics of Dutch government and society would better explain a 25-year trend that began in the 1950s.

In its later chapters, the path of the book turns away from a comparative criminology involving the Netherlands and England toward a discussion of the particular history of recent trends in the Netherlands. It is difficult for us to know whether this is a defect in the plan of the book or a virtue or both. But the book veers away from the fascinating question of how much can be done in the analysis of European history toward build-

ing a systematic comparative explanation of penal developments in England, in the Netherlands, and in other countries.

We would not be justified in criticizing this book because the author fails to provide a systematic analysis of transnational trends in imprisonment. The task is vast and any work that points the way toward increasing efforts to explain different imprisonment rates deserves praise. The problem with this book is that no acknowledgment is made that research in this area is required or would be useful. No further comparative research is advocated. Indeed no research of any kind is suggested. The experience with decarceration in the Netherlands is used more as an exhibit in an illustrated lecture on decarceration than as an incremental step in empirical criminology. Prison overcrowding in England seems a more pressing concern to the author than seeking the determinants of levels of imprisonment in industrial democracies.

IV. THE CRIMINAL LAW AND THE SCALE OF IMPRISONMENT

In the Netherlands, a country of special importance because of its low use of imprisonment, only 8.5% of all criminal cases dealt with resulted in prison sentences in 1980. In England, where Professor Downes argues that the use of imprisonment is unjustifiably high, his figures show prison sentences imposed in 14% of all criminal cases. These figures help us to specify the questions that must be examined when studying variations in rates of imprisonment.

First, when commitments to prison occur in less than one-seventh of all criminal cases, considerable variation in rates of imprisonment can occur independently of any changes in rates of crime or of arrest. In every Western country the pool from which prison cases are selected is very large; much larger than the number sent to prison.

Second, it is not clear that variations in the black-letter law of criminal codes will be of great importance in explaining the difference between 8.5% and 14% utilization of imprisonment. Differences in written law are more likely to correlate with variations in the length of prison sentences. The factors that are likely to explain why one system uses a sanction in one-twelfth of its cases and another system uses it in one-seventh seem more likely to be based on differential exercise of discretion than to be found in specific provisions of the penal code.

Third, these figures suggest one reason why programs that are called alternatives to imprisonment so inefficiently and so seldom displace imprisonment in a sentencing regime. Introducing a new criminal sanction in the high imprisonment environment of England in 1980 would still provide an opportunity to expose the 86% of unimprisoned offenders to the

new treatment without removing a single prisoner from his cell. The mathematical odds seem stacked against the displacement of the prison.

These comparative statistics also help to provide a specific context for the questions to be investigated in the study of imprisonment policy. In distinguishing 8.5% from 14% systems we should look for the social, governmental, and criminal justice system features that influence the handling of marginal cases. And we do so on due notice that there will be a very large number of marginal cases.

We are in the prehistory of empirical studies of the determinants of the scale of imprisonment. The subject has been of episodic interest to criminologists, where forays have usually featured the cursory analysis of highly aggregated data. More significant for our purposes, questions relating to what determines the scale of imprisonment have not been considered important by scholars of the criminal law. Yet rigorous study of the determinants of imprisonment policy will require both knowledge of the law and sophistication about the criminal justice system components of the regimes under examination. So the skills of the empirically trained scholar of criminal law and procedures are of some importance to the proper study of these issues.

The question, What distinguishes an 8.5% from a 14% imprisonment regime? is one of theoretical as well as practical significance to the criminal law. No one these days denies the central tenet of realist jurisprudence that only those who know how the system works can know the living law. The criminal justice system was Exhibit A in the realist brief for fact-based and institutional comprehension of legal regimes. And the operations of the criminal law still provide many of our most graphic examples of questions that cannot be comprehended without appreciation of empirical fact and institutional context.

Variations in rates of imprisonment and in the scale of the imprisonment enterprise are among the central and crucial empirical facts that define criminal justice in Western democracies. Comprehending those features of system, polity, and society that influence the scale of imprisonment is therefore an indispensable requirement of a realist jurisprudence of the criminal law.