Prison On Trial Thomas Mathiesen


This third edition of Prison On Trial contains all the material from the first and second English editions together with a new Foreword, Preface and Epilogue and other revisions.

Published by
WATERSIDE PRESS
Donum Road
Winchester SO23 9NN
United Kingdom

Telephone or Fax 01962 855567 UK Local-call 0845 2300 733
E-mail: enquiries@watersidepress.co.uk
Online catalogue and bookstore: www.watersidepress.co.uk

Copyright © Thomas Mathiesen 2006. All rights reserved. No part of this book may be reproduced, stored in any retrieval system or transmitted in any form or by any means, including over the Internet, without prior permission.

ISBN 1 904 380 22 0

Waterside Press Criminal Policy Series Editor Andrew Rutherford


Catalogue-In-Publication Data A catalogue record for this book can be obtained from the British Library

Cover design Waterside Press. Based upon a 100-year-old aquatint: 'I am Shewn Two Interesting Penitents'

Printed and bound by Antony Rowe Ltd, Eastbourne

North American distributors International Specialised Book Services (ISBS),
920 NE 58th Ave, Suite 300, Portland, Oregon, 97213-3786, USA
Telephone 1 800 944 6190 Fax 1 503 280 8832 orders@isbs.com www.isbs.com
Prison On Trial

Thomas Mathiesen

THIRD EDITION

Criminal Policy Series

Editor Andrew Rutherford

WATERSIDE PRESS

WINCHESTER UK
CHAPTER 1

Prison: Does it have a Defence?

THE PRISON: A SYSTEM IN GROWTH

'The phenomenon has European dimensions.' Thus wrote Michel Foucault, in 1961, about the sudden and rapid growth of the new institutions of confinement in the 1600s, institutions which brought tens of thousands of people behind walls within a few decades. In his book on the topic, he called the major chapter on the growth of the new institutions 'The great confinement' (Foucault, 1967, Ch. 6).

That title, 'The great confinement', could well be used about the European prison situation of our own time, the late 1900s. And though precise comparisons of numbers and proportions cannot be made, it could be said too that the phenomenon, in the late 1900s, has 'European dimensions'.

In our own time, as in the 1600s, the large, central Western European countries take the lead in a spectacular growth in prison populations. Add to this North America, and the scene of our own time is more complete.

Figure 1.1 shows the increase in prison populations between 1970 and 1985 for four selected large Western countries—the United States, England and Wales, West Germany and Italy. The United States takes the lead, with an increase from about 180 prisoners per 100,000 population in 1970 to a little under 320 in 1985, an increase of about 106 per cent over fifteen years. This includes federal, state and local prisons. For the state prisons alone, the increase was even more marked—156 per cent (based on Rutherford, 1986: 49). England and Wales shows an increase from under 80 to close to 100 per 100,000. The figures for England and Wales are all the more serious because figures went down during the early 1970s, to a low of a little over 70 in 1974. We shall return to this temporary trend in a moment. Suffice it here to say that it means a major growth in English/Welsh prison populations over a few years. Italy shows an increase from a little over 40 to over 70 per 100,000 during the period. This is close to a doubling of the prison population over a period of fifteen years. Though Italy has shown a decrease after the period (see below), the only country among these four which shows a reversal of the trend during the period is West Germany, with a marked increase up to 1983, but an interesting and major drop after that year.
Figure 1.1 Average number of prisoners per 100,000 inhabitants for the United States, England/Wales, West Germany and Italy 1970-85


Why the drop in West Germany? The process started with remand prisoners in 1982, was followed by juvenile prisoners in 1983 and adult sentenced prisoners in 1985 (Feest, 1988). The shift cannot be explained
by the unemployment rate (which has increased dramatically rather than decreased). It can only be explained marginally by demographic factors (there are currently smaller birth cohorts, but any major effect of cohort size could only have reached adult criminal courts in 1988 at the earliest). The crime rate cannot explain anything (it has increased, or, for imprisonable offences, only decreased slightly). There have been no major changes in legislation (Feest, 1988: 4-6). The reduction, Feest says, is therefore attributable to changes in the practice of prosecuting authorities and/or judges. He emphasizes the prosecutors in particular, and speculates about whether the long tradition of academic critique of remand, a growing number of ambulatory alternatives with an educative function in relation to prosecutors, and the movement against prison construction channelled through the Greens, may be important background factors explaining increasing restraint on their part. Now, these background factors are partly present in other countries as well. Could their particular activation in the German context follow from Germany’s dark political experience in the fairly recent past, an experience not shared (or not to the same extent) by other countries, which warns seriously against an unlimited growth of the use of physical power on the part of the state? We do not know, but sentencing practice at least seems to be a factor, partly keeping figures in check.

But West Germany is the deviant case for the period concerned, not only compared to the other three countries in Figure 1.1, but compared to other large European states. Furthermore, the pressure on the prison systems has also been great in smaller European countries, such as Sweden, Denmark and Norway. Prison administrators have been greatly concerned with the overload in Scandinavian prisons. In Norway, the pressure has not led to a significant increase in the prison population, but to a very sizeable waiting list: you now have to ‘queue up’ to serve your sentence. The country has about 2,000 prisoners at any one time, and—in 1985—about 6,500 on the waiting list. The waiting list increased by 49 per cent between 1981 and 1985. Of course, there are priorities in the queue: drug offenders and violent offenders do not have to wait. Yet the list does not include only minor criminals. Thus, in late 1985, about 52 per cent of the queue consisted of people who had not been convicted for drunken driving (at the time, driving with an alcohol concentration of 0.05 per cent automatically implied three weeks or more in prison). Finland is the only Nordic country with a steady decline in its (high) prison figures during the period.

For Western Europe, a condensed general picture of the development can be given. For the member states of the Council of Europe, the prison figures for 1 February 1986 have been calculated with a basis of 100 on 1 February 1983 (Council of Europe, 1986: 27). Only four states showed a
decrease from the base of 100 in 1983: Austria to 95, West Germany to 91, Malta to 89 and Sweden to 85. The decline in Sweden was temporary, caused by a change in release practice in 1983 (see pp. 84-6). For all other states where information was provided, a greater or smaller increase could be seen: Belgium to 119, Cyprus to 110, Denmark to 109, France to 122, Greece to 109, Ireland to 145, Iceland to 106, Italy to 120, Luxembourg to 116, The Netherlands to 124, Norway to 103, Portugal to 183, Spain to 104, England/Wales to 105 and Scotland to 108. Altogether, this amounts to fifteen member states. It should be mentioned that three of these, Belgium, Cyprus and Greece, showed a provisional peak in 1984, with a subsequent decline to 1986. However, the main overall tendency is very clear.

Above, we have brought the figures up to 1985 or early 1986. We should note that the overall tendency has continued in the latter part of the 1980s. In absolute numbers, West Germany, Italy, Turkey, Portugal and Malta showed a decrease between 1985 and (approximately) 1987. Denmark and Norway were fairly constant (for Norway, however, note the large queue mentioned earlier). But England and Wales, France, Spain, Belgium, Sweden, Greece, Ireland, Luxembourg and Cyprus showed an increase. Only three states showed a stable decrease from the early part of the 1980s to 1987: West Germany, Turkey and Malta (Council of Europe, 1987: 19-20). The total growth in absolute numbers for member states in the Council of Europe, excluding Austria, Iceland, The Netherlands, Switzerland and Turkey, between 1971 and 1986 is shown in Figure 1.2 (the necessary data for Austria, Iceland, The Netherlands and Switzerland are not available; Turkey is omitted due to special features of the Turkish situation). The overall development for Western Europe has also continued beyond 1986/87: between 1 February 1987 and 1 February 1988, a clear majority of eleven out of nineteen countries within the Council of Europe showed an increase in their prison populations: Iceland (with 13.3 per cent), Italy (8.4 per cent), Cyprus (8.3 per cent), Sweden (7.8 per cent), Spain (7.2 per cent), Greece (6.1 per cent), Luxembourg (5.8 per cent), France (4.1 per cent), Ireland (3.2 per cent), Federal Republic of Germany (3.1 per cent; in contrast to its long-term decline), and the United Kingdom (2.3 per cent). In three states, the figures were relatively stable: Belgium (0.6 per cent), Denmark (-0.2 per cent), and Portugal (-1.7 per cent). Five countries saw a drop: Turkey (-2.5 per cent), The Netherlands (-4.0 per cent), Norway (-6.0 per cent; note again, however, the large queue), Austria (-6.4 per cent) and Malta (-25.3 per cent); Council of Europe, 1988: 18). Though it should be noted that detailed comparisons between countries are a hazardous business due to differences in registration practices, the general tendency is clear. For the United States it may be added that by 1989, the state of
California had reached 570 prisoners per 100,000 inhabitants (and 255 on death row; information provided at IV International Conference on Penal Abolition, Kazimierz Dolny (Warsaw), May 1989).

Figure 1.2 Changes in prisoner numbers in Council of Europe member states since 1970 excluding Austria, Iceland, The Netherlands, Switzerland and Turkey

Source: Prison Information Bulletin, Council of Europe, No. 9, June 1987: 18

The growth becomes all the more significant if it is viewed in a somewhat broader context. Four features should be kept in mind.

First, the growth implies that conscious efforts, made in several Western countries during the 1970s and the early part of the 1980s, to change the course of development of the respective prison systems, were quickly and easily overcome by other forces. The mid-1970s saw a decline and to some extent a reversal of the growth tendency in prison figures. For example, a decline could be seen in several states in the United States, in England and in Sweden. At the same time, conscious efforts were made to channel convicted individuals into alternative measures, and in several countries—such as Sweden and Norway—the
political administration in the area of criminal policy was distinctly liberal, with ministers of justice having liberal convictions or inclinations. The early 1980s saw attempts, in Sweden and Denmark, to halt prison increase by, inter alia, changes in release practices and in maximum sentences (for more details, see pp. 90-2 and Chapter 6 below). These efforts and tendencies were rather quickly superseded by later developments in Sweden and Norway, with the political ‘fall’ of liberal cabinet ministers.

Secondly, if the growth of the prison systems between 1970 and the latter part of the 1980s is seen in a broader time perspective, two major trends appear. Together, the two trends form a general picture. On the one hand, in some countries the growth dates from before 1970. This, for example, is the case for England/Wales, where an important increase took place before 1970, and where the prison population per 100,000 population was about 32 in the 1930s, as opposed to a little less than 80 in 1970 and 96 in 1985. In England/Wales, then, the growth is a part of a long-term trend. On the other hand, in some countries the growth superseded major falls in prison figures before 1970. This is the case for Italy, West Germany and Norway. In Italy, new legislation concerning pardoning was introduced in 1970, bringing prison figures down to the lowest number since records have been kept (1860). In West Germany, the number of short prison sentences was significantly reduced prior to 1970, also bringing prison figures significantly down. In Norway, public drunkenness was decriminalized in 1970, resulting in the release of a large number of alcoholic vagrants, who had spent years in forced labour camps within the prison system, again bringing overall prison figures down. The subsequent increases in prison figures mean that with the possible exception of West Germany, reforms of this kind were more than neutralized by later developments.

One reservation should be made: however overcome by later developments, some of the reforms, prior to 1970 as well as later, did contain interesting evidence in terms of finer details pointing to the possibility of change in prison policy and figures. We shall return to some of this evidence in the final chapter (Chapter 6).

But as an overall conclusion, it may be said that the present growth has either been part of a long-term trend, or been of such strength that even major reforms prior to 1970 have been cancelled out as far as effect goes.

Thirdly, in several countries the growth has led to appalling prison conditions. The doubling of prison figures in Italy between 1970 and 1985 meant extensive overcrowding. The growth in England/Wales and France, as well as several of the smaller European countries, has brought about the same result. For the United States, conservative and reputable
*Time* magazine had this to say about prison conditions as early as 1983 (5 December):

> This spectacular increase has created appalling living conditions for many inmates, who are sleeping in gymnasiums, day rooms, corridors, tents, trailers and other forms of makeshift housing. Until early November, 170 prisoners were sleeping on the floor of a gymnasium at Illinois’ Centralia Correctional Center. And Maryland, with one of the country’s most grossly crowded systems, is bunking prisoners in basements, recreational areas, temporary buildings and ‘anywhere they’ll fit’, according to an official.

Fourthly, the growth in prison figures has—in varying degrees in many countries—been followed by major building programmes in the prison systems concerned. The building programme in the United States became a public issue in the early 1980s, when, to quote the same cautious source, *Time* informed its readers (5 December 1983) about ‘A growing crisis behind bars’, and about the fact that ‘New prisons cannot be built quickly enough to accommodate all of the new inmates . . .’. The construction bill alone is enormous: about $4.7 billion in prison and jail construction is planned across the country over the coming decade, including $1.2 billion for 16,500 new cells in California and $700 million for 8,800 in New York’. The sums, in other words, are extremely large. An important development in the United States is the advent of private prisons. The market mechanism, with an emphasis on profit, is currently in the process of penetrating a prison system under pressure. In England/Wales the autumn of 1985 saw the planning of sixteen new prisons, with total costs of about £500 million (1983 value). Twelve thousand new prison places were planned (Sim, 1986: 42). The programme has been characterized as the ‘biggest-ever jail-building programme’ in England (*The Evening Standard*, 23 November 1983: 5). For the smaller European countries, the building programmes are more modest. But they are usually there, with prison construction for example in Sweden, Norway and Holland.

The growth of the Western prison systems, and the four features mentioned here which expand on the growth, add up to a conclusion. In terms of statistical developments, living conditions, and construction programmes, there are significant differences between Western prison systems—as there are in terms of size, with a range from 45-60 inmates per 100,000 in Holland and the Scandinavian countries through 100 per 100,000 in England/Wales to far more than 300 in the United States. Despite these differences, which should be given their due emphasis, a change appears to be taking place as far as the role of the prison goes: the importance of the prison, as a sanctioning mechanism, seems to be increasing. With some exceptions, the phenomenon seems to be general
throughout the West. In some countries, notably the United States and Great Britain, the increase is staggering.

The growth of the prison systems raises a new question: why the growth?

WHY THE GROWTH?

The question is complex. It is not easy to give an unequivocal answer. But some explanations may be ruled out, at least as major explanations, and others given credibility. Three possibilities will be briefly reviewed.

The first is that the increase follows from an increased crime rate, notably an increase in registered crime. With the courts as an intervening mechanism, the registered crime rate is presumably automatically reflected in higher prison figures. There are several problems with this explanation. Two may be singled out.

For one thing, we have solid empirical examples showing that the registered crime rate may go up while the prison rate goes down, and vice versa. West Germany today partly provides an example of the former possibility (see p. 1). The 1970s provide a good example of the latter: in many countries—notably in Scandinavia—the crime rate showed a rapid increase during that decade, while prison figures were failing or at least constant.

For another, the crime rate is not unequivocally increasing at present. In the United States, the national crime rate was dropping in the early 1980s, while prison figures were soaring (Moerings, 1986).

An automatic reflection of the general crime rate in prison figures, if it had occurred, could have been interpreted as a consequence of political decisions: it would have implied that the countries concerned simply followed the same criminal policies as earlier. Put differently, even such an automatic reflection would have been a result of political decision making—an often overlooked fact. However, since an automatic reflection hardly exists, even more clearly political interpretations are near at hand.

A second possibility is that a change has been occurring in the pattern of criminalization. New behaviour patterns may have been drawn into the criminal policy orbit and criminalized, or criminalized more harshly. This seems to have happened in several European countries as far as drug offences go. Increased criminalization and harsher legislation/sentencing practice in relation to drug offences has apparently been of great importance in countries like Holland (de Haan, 1986) and Norway (Falck, 1987). For example, Norway recently (1982) changed its classification of drug use from misdemeanour to felony (forseeel to forbrytelse), thus increasing the degree of criminalization.
Within a few years, the maximum penalty for drug-related offences in Norway has increased from ten through fifteen to twenty-one years of imprisonment (see also pp. 122), a fact which has influenced sentencing practice in a major way. Of course, drug-related offences as such, reflected in the registered crime rate, have also increased. But without the increase in criminalization, and without the above mentioned spectacular increase in maximum sentences (which is all the more spectacular in view of Scandinavia’s relatively low punishment level), the significant increase in the number of long-term drug offenders in prison would certainly not have occurred to the same extent. And that number clogs up the system, and is in a major way responsible for the Norwegian queue.

A third possibility, which does not exclude the second one, is that a general increase in the punishment level has occurred across several, or some, offence types. There is evidence to suggest that this has happened in several countries, partly through legislation, partly through sentencing practice, partly through both. It seems to have happened for example in the United States. Mandatory sentencing legislation, stipulating that offenders convicted of certain crimes, or of a succession of crimes, must go to prison, is part of the pattern. For example, the prison explosion in the state of New York may partly be viewed as a result of a 1978 law requiring judges to imprison all violent-felony offenders. At the same time, minimum prison sentences have been significantly increased in many states. In Norway, the number of long-term unconditional prison sentences, which for that country means one year or more, has increased significantly from 1981 on, as opposed to the shorter sentences, which have stagnated (Bødal, 1984; with supplementary data in Mathiesen, 1987: 36). The number of drug-related offences with long sentences may partly, but probably not wholly, account for this. There seems to be a general tendency, also in Norway, towards a higher punishment level for several offences over and above the drug-related ones.

Of the three explanations given so far, the first—the automatic reflection theory—has been more or less ruled out, whereas the second and the third—new criminalization patterns and a generalized increase in punishment level—have been given credence. As already suggested, different countries probably vary in terms of the latter two explanations. On this level of analysis, it may therefore be said that there is no one ‘cause’ behind the institutional growth pattern. But on a more generalized level, the two explanations have something in common: whether through new criminalization patterns and/or more or less across-the-board stiffer legislation/sentencing practice, the implication is that a tougher criminal policy, with more active use of prison as a response to criminality, is behind the growth. In one form or another,
then, a more severe criminal policy, with more relentless use of prison, seems to be an underlying pattern in a wide range of Western countries.

A NEW STAGE IN THE USE OF PRISON?

In several countries the institutional growth pattern is so marked that one wonders whether we are entering a new stage in the use of prison.

When asking this question, we should note immediately that the prediction of institutional development is a hazardous business. The history of institutions is full of examples of predictions that proved to be false. One example is the development of prisons in Norway in the 1800s. As a consequence of the change from corporal punishment to prison towards the end of the 1700s, prison figures showed a spectacular increase during the first part of the 1800s. Responsible authorities, predicting continued increase, were greatly worried, and during the 1840s an extensive building programme was launched. But after the mid-1840s, figures again declined significantly, and continued to do so until 1900. From then on, figures were fairly stable for many decades, in fact during most of this century.

As we shall shortly see, however, the concept of 'stages', and the possibility that we are entering a new stage of penal development, may usefully be introduced without implying that prison figures will continue to rise more or less indefinitely. Irrespective of the difficulties of prediction, a new stage of development in a sociological sense may be hypothesized.

The prior development of Western penal institutions, and the growth of such institutions, may be viewed in terms of two major stages.

The first stage was the 1600s, which we have referred to already. Numerous works have been published on this particular period of institutional history (among them Rusche and Kirchheimer, 1939; Coë, 1939; Sellin, 1944; Foucault, 1967; Wilson, 1969; Olauessen, 1976; Mathiesen, 1977). This was the stage of the first rise of the institutional 'solution' to social problems. Those incarcerated were not just criminals, but a broad range of unemployed beggars and vagrants. And institutionalization did not supplant physical punishment, but was apparently added to it. In the wake of Rusche and Kirchheimer's classic work, which emphasized the importance of variations in the labour market as a causative factor, a great debate has followed concerning the causation of the rise of institutions during the 1600s. We need not enter the debate in detail here; it is well known, and readers not familiar with it are referred to the works mentioned above. For our purposes, two points may briefly be singled out.
First, the institutions which saw such a rapid and spectacular growth in the late 1500s and during the 1600s—so-called hospitals in France, zuchthäusern in Germany, tuichthuisen in Holland, correctional houses in England, and tukthus in the Norwegian periphery 100 years later—were to a large extent forced labour institutions. Labour, selected on the basis of market considerations and performed as profitably as possible, constituted a major core of institutional life—knitting in France (Cole, 1939), the rasping of wood in Holland (Sellin, 1944), and so on.

Secondly, however, the emphasis on profitable labour did not necessarily constitute the ‘cause’ of the rise of institutions. The study of social ‘causation’ presupposes knowledge of the relevant actors’ subjective motivation or definition of the situation. That motivation or subjective experience may be formed by a context of factors, but is in itself a necessary condition for grasping the ‘why?’ question when it comes to dramatic political changes such as the introduction of institutions on a grand scale throughout a continent. Although there were variations, substantial historical material (summarized in Mathiesen, 1977) suggests that what primarily motivated the French, the British, and even the Dutch mercantilist state builders of the 1600s was the deeply troublesome issue of the vagrants in European cities and towns. After the breakdown of the feudal social order based on disposition over land, Europe in the 1500s and 1600s was overpopulated by large numbers of people—beggars and vagrants in general—adrift in society (for attempts to give figures, see Wilson, 1969: 125; Cole, 1939: 264, 270). The vagrants constituted a deeply disturbing and disruptive element to mercantilist production and trade. The control of the vagrants therefore became an immediate political problem. The numbers were far too large for old-fashioned penal methods alone to be effective, and mass rounding up and subsequent incarceration on a large scale became the solution. Once institutionalized, it is not surprising that the beggars and vagrants were put to work, and to as profitable work as possible. This was entirely in line with mercantilist economic philosophy.

In short, then, the first stage of institutional development had the disciplining of new and highly disturbing groups of people as its motivational background.

The second stage of development occurred during the late 1700s and early 1800s. Again, the phenomenon had European dimensions. This was the time of the differentiation of the criminals, and their placement in actual prisons in the modern sense. And this was the time when the institutional ‘solution’ actually supplanted physical punishment. Much has been written about the institutions of the 1800s (Rusche and Kirchheimer, 1939, Ch. 8; Foucault, 1977; Melossi and Pavarini, 1981). In terms of ideological content, Godly penitence, in the context of radical
isolation, was central, at least in Europe. A number of new penitentiaries were built for the purpose. What was the motivational background of this development? The question is clearly complex, but the following hypothesis may be ventured.

By this time, the large European countries were entering a new mode of production, the truly capitalistic mode. A formally free working class was now in the making. But it was an impoverished, destitute working class. Crime was in a very real sense rooted in material poverty. The violent physical penal methods of earlier times could in theory have been used against the crimes of the new class. But physical punishment could not sensibly be related to the new type of discipline—'the assembly line discipline'—which was now being developed in the economy, and which was demanded in production. It seemed senseless to use spectacular and arbitrary mutilations when people were to be adapted to the pedantic and detailed types of disciplined work now necessary in production. On this motivational background, the new truly disciplinary prisons—the penitentiaries so well described by Foucault—rose as a main method of bringing the impoverished criminals of the new working class in line. Thus, the second stage of institutional development also had the disciplining of new groups—the deviants of the working class in the making—as a main motivational background.

With this as a background, we may return to our original question: are we today entering a third stage of institutional development? Three major developmental points suggest that we are.

First, the major long-term increase in prison populations. Similar increases characterized the two prior stages. As already pointed out, the present increase may level off or even decline at some later date, due to new historical conditions. But as we have illustrated, so in fact did the increases during the 1600s and the 1800s. The concept of 'stage' as used here does not imply that incarceration reaches a new and higher plateau than earlier stages, although this has been suggested as a possibility for some countries (for the United States, see Austin and Krisberg, 1985). The concept of 'stage' only implies that a dramatic and long-term increase takes place.

Secondly, the greatly increased significance of the institutional solution as a component in criminal policy is important. Today that increased significance is reflected in the sizeable or enormous building programmes in a number of countries, and the general expansion of the prison systems in question. Similar increased significance of institutions, including large scale building programmes, characterized the 1600s and the 1800s. Then as now, the institutional solution moved to become a much more centrally located factor in the sanctioning system.
Thirdly, a presumption on the part of responsible authorities is present to the effect that there is an increased need for the disciplining of important population segments and groups. This is reflected in the significantly increased reliance on stiffer legislation involving prison and/or longer prison sentences, partly for new groups such as drug offenders, partly on a more general level. As we have suggested, a presumed increased need for discipline was probably an important motivating factor also in the 1600s and the 1800s. As far as the late 1900s go, we may now briefly expand on this latter point.

As a point of departure, legislators and the courts may be viewed as 'anxiety barometers', that is, institutions which, through their decisions, reflect the anxiety level in society. (The term 'anxiety barometer' is taken from Box and Hale, 1982, 1985, but used independently here.)

Our times are full of disquieting signs. Some of these are close to us and therefore observable, such as, in many Western countries, political protests, conflicts between immigrants and other parts of the population, and stagnation or even dissolution of social services and support systems which a few years ago were thought to be utterly solid. Other worrying signs are reflected through the Mass media: for example, increased violence (despite the fact that violent crimes have only increased slowly, and despite the fact that a large majority of them are of the least serious kind), increased drug use (despite the fact that drug use—at least in the Norwegian setting—has stagnated, and despite the fact that heavy use is limited to a few; see Hauge, 1982; Christie and Bruun, 1985), and so on. With their tendency to focus on personified drama, the mass media have a significant magnifying effect on the realities involved in these issues. Together, the actual conflicts and the media-enlarged problems produce a 'legitimacy crisis', that is, minor or major breakdowns in people's confidence in general in the state's attempts at problem solution and people-oriented activity. I would say that 'below' the legitimacy crisis we find the economic crisis: the late capitalistic economic stagnation, in several countries with persistent and extremely high unemployment towards the end of the 1900s. But in people's minds, the crisis appears as a question of confidence in the state's problem solution in a wide sense.

There are probably great variations in the extent of the legitimacy crisis in various Western countries. The crisis seems to be widespread and deeply felt in the British context (Hall et al., 1978). It is probably less widespread and not so acute in a society like the Norwegian, with greater confidence in public solutions common to everyone. But the question of confidence is certainly present there too.

The legitimacy crisis is reflected in the decision-making process in legislative bodies and the courts. More precisely, in both of these institutions the legitimacy crisis is perceived as a new and increased need for
discipline in given segments and groups in the population. Put differently, when the confidence in public and authoritative organs begins to fail, the failure appears, from the point of view of the legislators and the courts, as an increased need for discipline. The definition of the situation on the part of legislators and the courts constitutes a connecting link between external and influential factors such as actual conflicts and media-created problems on the one hand and the growth of the prison system on the other. When legislators and judges experience the situation this way, that experience becomes consequential for penal practice and development (Box and Hale, 1982).

In the preceding discussion, we have viewed the development of the penal system in a sociological context. But the galloping development of the prison solution most certainly also represents a question of values. The question of values is this: do we wish to have this galloping development? Do we want a society which is becoming increasingly reliant on the use of prison as a major method of conflict resolution? The question of values is acutely important.

First, it is important to the increasing number of people—in England one out of a thousand of the population, in the United States between three and four out of a thousand—who are in prison at any one time, and who are subject to isolation, rejection, deprivation and meaningfulness.

Secondly, it is important to the political climate and life of the society. The growth of the prison solution implies a significant change of traditional methods of control. It implies that sheer physical repression is increasingly used in relation to significant parts of the population.

Thirdly, the question of values is important in a wider cultural sense. The use of physical force through prison signals that violence is an adequate method of conflict resolution in society. A significant increase in the use of physical force will strengthen that signal, thus having wide-ranging effects on our norms and on our understanding of our fellow human beings.

This book is written in an attempt to take the question of values seriously. It is written in an attempt to contribute to the levelling off and reversal of the major contemporary trend. It is written in an attempt to contribute to the shrinking—perhaps abolition—of the prison solution.

As I have indicated, the developmental sequence in terms of growth and possible stages may usefully be viewed with a background in broad economic and social forces: the breakdown of the feudal social order towards the 1500s and 1600s, the new mode of production before and during the 1800s, an economically motivated, increasing legitimacy crisis during the late 1900s. These forces create conflicts and issues perceived and treated as issues of discipline. But the implication is not that
institutional development is pre-determined, inescapable, and not subject to change through concerted and persistent political action.

My contribution is a modest one: it consists of a collection of arguments. In the chapters that follow, I shall discuss in some considerable detail the usual arguments for the prison solution, used by those advocating that solution. I will confront these arguments with a wide range of empirical evidence and theory, and for each argument I will raise the following question: \textit{Does prison have a defence on these grounds?}

When discussing the various arguments in favour of prison, and when confronting them with theory and evidence, I will not be particularly original. I will rely on my own research, but certainly also heavily on the work of others. So far, however, much of the discussion of these issues has been scattered throughout criminological and sociological literature. Because they are scattered, the various parts of the discussion have little or no bearing on policy, and remain the semi-secrets of criminological and sociological specialists. I see my task as that of bringing the scattered discussion together, thus in a collected and systematic fashion \textit{taking stock} of the prison as a mode of punishment in our society.

When delivering this contribution, and when thus taking stock, I am making an assumption. The assumption is that communicative rationality—where ‘rationality’ is taken to mean sensible and convincing argumentation rather than efficient methods to reach ends—may have a political effect, and is still a political possibility, in societies like ours.

Certainly, much of sociology and criminology goes against such an assumption. Most significantly, much of what we know about the communication systems of modern society goes against it. Political decision making in our society is very far indeed from anything like a ‘seminar’.

Yet I make the assumption, believing that it most certainly should not be left unmade and untried. Added to this, on my part, comes a strong belief in political practice related to argumentation.

Perhaps my belief in communicative rationality in the area of penal policy stems from the fact that I personally live and work in a very small society on the periphery of Europe—where arguments still have a chance. If arguments do have a better chance in such a society than in the large Western countries, perhaps the latter countries may learn something from the former through a book like this.
CHAPTER 6

The Future of Imprisonment

The theories of individual prevention—rehabilitation, incapacitation, individual deterrence—are unable to defend the prison. Neither is the other major theory of social defence—the theory of general prevention. And neither is, finally, the theory of justice. The prison does not have a defence, the prison is a fiasco in terms of its own purposes.

This is what we find when we carefully and in detail take stock of the prison. It forcefully raises the question of what is to be done with the prison. Before trying to answer that question, it is necessary to look at another: since the prison is a fiasco in terms of its own purposes, why do we have prisons at all?

THE IDEOLOGY OF PRISON

In a very general sense, it may be said that we have prisons despite the fiasco because there exists a pervasive and persistent ideology of prison in our society.

Ideologies are belief systems which render social life meaningful and legitimate. An ideology of prison exists which renders the prison as an institution and a sanction meaningful and legitimate. The ideology of prison contains two major components—a supportive and a negating component.

The supportive component
Some fifteen years ago, I argued that the prison serves four important ideological functions in advanced welfare state capitalist societies (Mathiesen, 1974: 76-8).

I called the first of them the expurgatory function. I saw the prison as an institution within which a proportion of the unproductive population of late capitalist societies could be housed, controlled and conveniently forgotten. I saw the prison, in this perspective, as part of a much larger expurgatory system—comprising a wide range of institutions and institutional arrangements.

The second function was the power-draining function. Those who are purged away, I argued, are placed in a structural situation where they remain unproductive non-contributors to the system containing them. Unlike the factory’s dependence on the workers’ contribution, which gives
the workers power because they can withdraw the contribution, the prison is not dependent on the prisoners' contribution.

The third function was the diverting function. Socially dangerous acts are increasingly being committed by individuals and classes with power in society. Those caught by the punishment machine, and especially those placed behind bars, are, on the other hand, very largely traditional criminals from the lower working class. The heavy-handed use of prison against them, I argued, diverts our attention from the dangers flowing from those in power.

The fourth and final function was the symbolic function. I saw the symbolic function as closely related to the diverting function, but with a difference: when those caught by the punishment machine are imprisoned, they are stigmatized as black. Against this background the rest of us, on the outside, may define ourselves as all the whiter, though also we are certainly grey or black.

A basic underlying notion in the analysis was that though other types of institutions and institutional arrangements have these functions too, the prison in a unique way combines all of them. Therefore the prison survives, even in situations where other institutional types are dismantled.

I viewed these functions as ideological in the sense mentioned above. Nowhere do we see more clearly that ideological functions have material underpinnings (Mathiesen, 1980). In terms of observable consequences, the prison physically helps to bifurcate society between the 'productive' and the 'unproductive'; it sets up a structure which, quite observably, places the prisoners in a powerless situation; it also sets up a structure which places members of one class in such a situation that the attention we might pay to the members of another is diverted; and it uses a variety of physical—but not only physical—methods to stigmatize the members of the former class. But the functions as such are ideological; they make prisons appear meaningful and legitimate.

Through the fifteen years which have passed since the above analysis was presented, I have not seen analyses or data fundamentally contradicting the significance of the functions summarized here. I would today add a fifth function, perhaps equally important, which I would call the action function: the prison, and imprisonment, is the most observable type of sanction in our society. In earlier times, bodily harm was the most observable type. Our society has passed beyond that sanction. The prison, however, is equally observable, not on the individual level, but as an institutional entity. In this sense there is continuity and change between the two types of sanction. They are similar in the sense that they both 'stand out', as positive, observable signs that something is done. They are dissimilar in the sense that the former sanction is observable in individuals, and the latter in establishing a physical arrangement covering...
large numbers of people. The change is in turn continuous with a changed society: modern society, with its size and complexity, in this context requires collective solutions. By relying on the prison, by building prisons, by building more prisons, by passing legislation containing longer prison sentences, the actors on the political level of our own times thus obtain a method of showing that they act on crime as a category of behaviour, that they do something about it, that something is presumably being done about law and order—to quote the title of a recent book. No other sanction fulfils this function as well.

The analysis may be tied to the introductory discussion in Chapter 1. There we emphasized that the three major stages in the development of prisons may be viewed as institutional attempts to discipline disturbing or threatening population categories, brought forth by basic upheavals in society, in our own time by an important legitimacy crisis on the part of the state (see pp. 18-21). The various theories of punishment and prison which we have reviewed in the preceding chapters are ideologically acceptable and rationalized formulations of such a perceived need for discipline. The functions introduced here explain why the prison continues to exist and thrive despite the fact that the need, formulated so acceptably and rationally, is not met.

The Negating Component
The ideological functions discussed above constitute a ‘supportive’ ideological component in the sense that they imbue the prison with something positive. The prison performs something. The ideology of prison also contains what we may call a negating component, that is, a component through which the fiasco of the prison is negated.

Negation of the prison’s fiasco takes place in three important public spheres in society—in the widest public sphere, consisting above all of the whole range of modern mass media; in a narrower public sphere, consisting of institutions directly engaged in crime prevention such as the police, the courts, the prosecuting authorities and the prisons themselves; and in an even narrower sphere consisting of particular professional groups, for example in research.

The three public spheres are, simultaneously, systems which supposedly perform the task of continually keeping institutions such as the prison under review and control. The first sphere may be called the ‘outer’ feedback circle of control, the second may be called the ‘inner’ feedback circle, and the third may be viewed as a kind of ‘kernel’ circle. Therefore, the negation which takes place of the prison’s fiasco is particularly serious.
In the first public sphere or feedback circle, negation takes place through what I will call non-recognition, in the second through what may be called pretence, and in the third through disregard.

In the widest public sphere or 'outer' feedback circle, non-recognition of the prison's fiasco takes place all the time. In the newspapers, on television, in the whole range of media, the prison is simply not recognized as a fiasco, but as a necessary if not always fully successful method of reaching its purported goals. The prison solution is taken as paradigmatic (see pp. 55-8), so that a rising crime rate is viewed as still another sign showing that more prison is needed.

In the narrower public sphere or 'inner' circle—in the police, the courts, and so on—there is also a good deal of non-recognition of the fiasco. But the fiasco is also partly recognized as such. The various earlier quotes from authoritative Swedish sources are indications of this. Many in the police, in the courts, in the prosecuting authorities, know. But pretence takes over: the participants pretend that the prison is a success, though in fact it is not and they more or less know it. Pretence in this sense may be found throughout the police, the courts, and so on. Why? Because without it, much of the work done by people and institutions within this sphere would appear meaningless and counterproductive.

It is important to realize that the boundaries between the wider and the narrower public spheres are perforated, so that the pretence in the 'inner' circle feeds into the non-recognition pattern in the 'outer' circle, perhaps in many ways creating it, or at least supporting it. There is, in other words, an important interaction between the two spheres.

In the narrowest public sphere, or 'kernel' feedback circle consisting of professional groups such as researchers and others, there is probably non-recognition as well as pretence. But for professionals, and indeed for researchers, it is more difficult not to recognize the fiasco, and it is—in view of very traditional professional and research ethics—more difficult to pretend or lie that success reigns when in fact a fiasco is recognized. But here disregard partly takes over: the ineffectiveness of prison, and the deep troubles involved in establishing proportionate justice, which are well known, are overlooked: simply not discussed or treated in the context of the functioning of the penal system as a whole. The prison as such is conveniently forgotten in some of the discussions.

Again, there is interaction between the various spheres: the boundary between the narrowest sphere and the two other spheres is perforated, so that the disregard in the narrowest sphere spills over into the other two, strongly supporting pretence as well as non-recognition there. The disregard of the facts of the fiasco supports, if not creates (that would imbue researchers with too much influence), the development of mythology in the other spheres.
Let it be emphatically stated that not all research has the quality of disregard. There is, certainly, a large body of research of a fact-finding, critical kind; if there was not, this book could not have been written. But it should be recognized that the information reception centres in the other spheres—journalists in newspapers, etc., as well as police chiefs, judges and so on—actually seek confirmation rather than information, so that the message of disregard is quite selectively transposed in the other spheres, in line with the convictions and needs in those spheres. This makes the responsibility of those disregarding the facts of the fiasco all the greater.

While non-recognition in the widest and pretence in the narrower sphere are probably reasonably acceptable notions to many readers of a book like this, the process of disregard in the narrowest sphere, especially in the research branch of it, requires some further detailing. We shall return to this detailing shortly.

WHAT IS TO BE DONE?

In one sense, what is to be done is a simple question. The fiasco of the prison rationally requires a contraction of the prison, and an eventual abolition of it. From a practical point of view, however, the question is obviously not so simple. The strategic problem is acute.

When approaching the question, it is essential to keep the ideological character of the functions and defences of the prison in mind. The purging, power-draining, diverting, symbolizing, and action-signifying functions of the prison make it appear meaningful and legitimate, and throughout the spectrum of public spheres or feedback circles, a pervasive ideological mystification packages this legitimacy further.

With this as our point of departure, we shall proceed by sketching some possible steps, keeping in mind that this is the beginning of an analysis rather than a final one.

From where?
First, from where can an attack on the ideological defence of the prison be expected? I am thinking of countries like Norway, Sweden and Britain. In a wide sense of the word: from the left, from social democracy and leftwards. Why? Because the left, in this wide sense, fosters an ideology which directly counters the prison solution, and which would, if taken seriously, basically challenge the presumed meaningfulness and legitimacy of prison.

I am thinking of the ideological components, common to socialists in a wide sense and social democrats, consisting of solidarity and compensation.

Solidarity refers to instrumental—task-oriented—and expressive—empathic emotional—relationships between two or more actors, whether