
Essay

Frank Zimring Responds

Franklin Zimring[†]

INTRODUCTION

It was both a pleasure and an honor to participate in the 2019 *Minnesota Law Review* symposium, “Mass Incarceration as a Chronic Condition: Diagnosis, Prognosis, and Treatment.” The symposium offered empirical law-related scholarship to serve as a model for academic legal studies. The commentators there were an all-star cast of penal policy and imprisonment scholars, and their essays here represent both an independent contribution to the analysis of the causes and cures of mass imprisonment and a helpful guide to final revisions on my upcoming book concerning the topic, *The Insidious Momentum of American Mass Incarceration*.¹

My aim in this Essay is to put the diversity of papers and criticisms presented at the symposium in the context of the overall organization and objectives of my study. The first important issue to consider is whether I am wasting your time—that is, why write yet another book on mass incarceration as an American predicament in 2020? The problem has already been considered in depth and the need for remedial action is one of very few policy issues that is widely acknowledged across the spectrum of American political opinion, even in 2020. Why, then, another book?

Because the phenomenal growth of penal confinement in the United States in the last quarter of the twentieth century is still a public policy mystery with lingering and consequential questions: Why did it happen when it happened? What explains the unprecedented magnitude of prison and jail expansion? Why are the current levels of penal confinement so very close to the all-

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1. FRANKLIN E. ZIMRING, *THE INSIDIOUS MOMENTUM OF AMERICAN MASS INCARCERATION* (forthcoming 2020) (on file with author).

time peak rate reached in 2007? What is the likely course of levels of penal confinement in the next generation of American life? Are there changes in government or policy that can avoid the prospect of mass incarceration as a chronic element of governance in the United States?

My study is organized around four major concerns, each of which is addressed by the other articles in this issue: (1) What happened in the thirty-three years after 1973? (2) Why did these extraordinary changes happen in that single generation? (3) What is likely to happen to levels of penal confinement in the next three decades? And (4) what changes in law or practice might reduce this likely penal future? Let me comment on each of these topics as discussed at the symposium.

I. WHAT HAPPENED FROM 1973 TO 2007?

Alfred Blumstein has shown that stability in levels of imprisonment rather than large variations in penal populations was the best description of prison population trends in the United States in the half-century from 1925 to 1975, a pattern of constancy that became an important contribution to the empirical study of penal policy.²

This extraordinary continuity was interrupted in the middle of the 1970s by what a chapter in my book calls “An American Surprise.”³ Figure 1 shows the relative levels of imprisonment of the United States and seven other developed nations in 1970.⁴

2. See Alfred Blumstein & Jacqueline Cohen, *A Theory of the Stability of Punishment*, 64 J. CRIM. L. & CRIMINOLOGY 198, 204 (1973).

3. ZIMRING, *supra* note 1 (manuscript ch. 1).

4. *Id.* (manuscript ch. 1 at 6 fig.1.2).

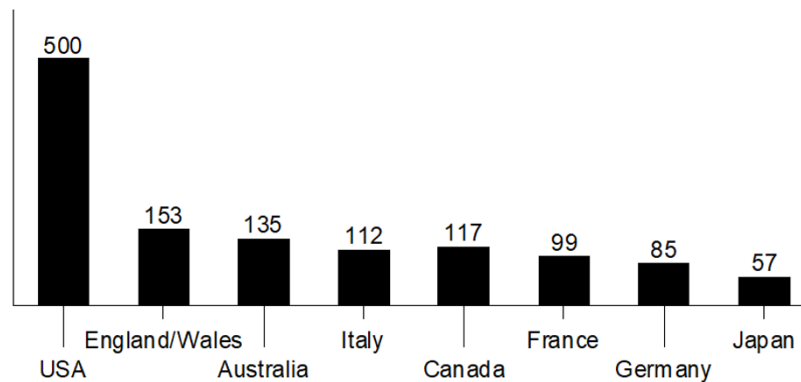
Figure 1. Imprisonment Rates per 100,000 of National Population, 1970.



What this graph adds to Professor Blumstein's analysis is a surprising comparative perspective. In 1970, the stable rates of imprisonment in the United States were strikingly similar to the imprisonment rates of several Western developed nations. When American imprisonment rates are measured against nations like Italy, Australia, England and Wales, the similarities are much more evident than any differences.

Figure 2 reports imprisonment rates for the same nations in 2010, and now the position of the United States in the international profile is singular.⁵

Figure 2. Imprisonment Rates per 100,000 of National Population, 2010.



5. *Id.* (manuscript ch. 1 at 3 fig.1.1).

In a single generation, the United States shifted from a prison population of 96 per 100,000 to a rate of imprisonment five times that magnitude. Examining Figure 2, when one asks the question “which nation is in second place?” one plausible answer is “none” because the separation in magnitude between the United States and other nations is a difference in kind rather than in degree.

II. WHY THE GROWTH EXPLOSION?

The timing of the sudden growth in penal confinement complicates searches for the immediate causes of the penal explosion, and this problem has not been adequately addressed in the literature on American mass incarceration. Hyper-incarceration is a recent rather than long-term phenomenon in the United States. There are a number of long-standing conditions in American government and society that may make the United States more vulnerable to penal change and that increase the scale of changes when they occur, but the American experiment was two centuries old before our institutions were overcome with huge increases in the scale of imprisonment. What lit the fuse for this relatively recent explosion? What changes in society and government match the timetable of the beginning of the penal expansion and were sustained across the thirty-five years of consecutive high magnitude growth? High rates of crime?

There was growth in crime and violence for a decade in the beginning of the mid-1960s that continued until 1974, and then the mid-1970s drop was followed by an increase in violent crime back to 1974 levels in 1980.⁶ But then crime dropped again in the first half of the 1980s even though the imprisonment rate did not.⁷ And the last fifteen years of huge incarceration growth happened during the Great American Crime Decline.⁸ But perhaps levels of public fear and anger had a more sustained elevation? Here again, public opinion measures of concern are neither singular nor sustained.⁹

One important clue to the immediate causes of the prison explosion is the increase in felony convictions and prison admissions linked to the activity of local prosecutors. Crime rates and

6. *Id.* (manuscript ch. 2 at 13 fig.2.3).

7. *Id.* (manuscript ch. 1 at 14 fig.1.4).

8. See FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 6–8 (2007).

9. ZIMRING, *supra* note 1 (manuscript ch. 2 at 14 fig.2.4).

arrest rates are relatively stable, but prison admissions are skyrocketing.¹⁰ So the moving parts in the take-off and sustained imprisonment growth are in felony prosecution and plea negotiations in the evolving administrative law of crime, as John Pfaff suggested in his 2017 study.¹¹ But what changed in prosecution and why? Those who choose careers in criminal prosecution have strong preferences for punitive sanctions, but this is a chronic and relatively stable social fact.¹² This was true of prosecutors in 1965 as well as 1985, which can also be found in other nations, as my discussion of Canada shows.¹³ What happened in the mid-1970s to change the dynamics of criminal prosecution in the United States that substantially increased prison commitments here?

One important change, which tracks the timing of the increase, was the advent of prosecutor management systems to provide detailed data on case disposition and penal sanctions and to evaluate the outcomes in particular cases.¹⁴ Prosecutors and the persons who supervise them could swiftly measure a prosecutor's case outcomes and compare them with the case outcomes of other prosecutors.¹⁵

These systems came into use just as local criminal justice had become an administrative process of plea negotiation.¹⁶ Prosecuting attorneys who rarely participate in criminal trials cannot measure their effectiveness as adversaries by their rate of conviction.¹⁷ Might they instead have started to measure their effectiveness by whether the guilty pleas they secured were for felonies or misdemeanors, and by the severity of the punishment they obtained in this administrative plea bargaining process?

There are political and governmental aspects of local prosecution in the United States that might explain why this phenomenon has become much more prevalent in the American system than in Canada or Europe. Can we blame the explosive growth

10. *Id.* (manuscript ch. 2 at 24 fig.2.7).

11. JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 135–37 (2017).

12. See ZIMRING, *supra* note 1 (manuscript ch. 8).

13. *Id.* at 12–15.

14. *WHAT'S CHANGING IN PROSECUTION? REPORT OF A WORKSHOP* 12–13 (Philip Heymann & Carol Petrie eds., 2001).

15. *Id.*

16. ZIMRING, *supra* note 1 (manuscript ch. 3 at 17–19).

17. *WHAT'S CHANGING IN PROSECUTION? REPORT OF A WORKSHOP*, *supra* note 14, at 23–24.

of imprisonment in the United States on the appetite of prosecutors for punishments as a measure of their adversarial effectiveness?

Two of the commentaries in this symposium discuss this part of my book. Professor Weisberg notices my mention of the case management impact possibility and my ambivalence about attributing too much of the penal explosion to this mundane and procedural detail.¹⁸ Weisberg wondered in his oral presentation whether my mixed feelings might suggest that I am backing off this hypothesis. I am not. My ambivalence about this causal theory is, in fact, a reflection of a larger problem: the fabulous contrast between the triviality of the independent variable and the enormity of its massive impact. If statistical reporting innovations set off the epidemic of imprisonment increases, it would be the equivalent of a modest spark igniting a huge destructive forest fire. And it is not just this immediate cause of the penal explosion that seems peculiarly trivial relative to the scale of the resulting disaster, but this contrast also applies to any of the possible immediate causes of the penal explosion we are likely to identify.

Professor Pfaff reads my account of the parable of the sheep farmer and the coyote as seeking to concentrate blame on prosecutors exclusively, when my intention was quite the reverse.¹⁹ The point I was trying to make is that we should expect district attorneys and their staff to be biased in the direction of penal severity and should therefore design systems to compensate for this predictable bias, just as sheep farmers should take precautions if there are predatory animals near their farms. For example, Canadian prosecutors also prefer more severe punishments in surveys, but they evidently do not have the power to carry out those preferences.²⁰ The American system should also be designed with safeguards against untrammelled prosecutorial power just as the sheep farmers should build fences around their flocks rather than just blaming coyotes for their losses.

18. See Robert Weisberg, *Zimring on Mass Incarceration: Empirical Pessimism and Cautious Reformist Optimism*, 104 MINN. L. REV. 2695, 2701–05 (2020).

19. See John F. Pfaff, *Why the Political Failures of Mass Incarceration Are Really Political Failures*, 104 MINN. L. REV. 2673, 2687–88 (2020).

20. ZIMRING, *supra* note 1 (manuscript ch. 8 at 12–15).

III. WHAT HAPPENS NEXT?

One of the most important sections of my analysis is also the most discouraging part of the book—my projection of likely trends over the next thirty years. In the almost four decades after the all-time high point, it is likely that more than half and as much as two-thirds of the huge increase will still be in place into the middle of the twenty-first century. Why? What might we do to avoid this outcome? It is worth noting that not one of the symposium articles takes issue with this analysis.

The bad news is discussed in my forthcoming book, when the first decade of the penal increase is compared to the first decade after the 2007 peak rate.²¹ The characteristics of the first decade of growth from 1972 to 1982 were uniform in the fifty-one separate penal systems that control the prison population, with large levels of change in almost all systems and persistence in trend year-to-year.²² In the first post-peak decade from 2007 to 2017, however, there has been diversity in outcome among the penal systems—small rather than large changes each year—and no steady temporal trend. The net effect of this contrast is that the decline in imprisonment in the later period was a tiny fraction of the 1972 to 1982 growth rate.²³ Why is this “business is usual” relative stability in mass incarceration the new normal in the United States?

The good news is that there is no deep commitment by our citizens or our social structures to a permanent republic of mass incarceration. The reality is that what I call the “momentum” of persistently high levels of both felony convictions and terms of imprisonment is an operational characteristic of the system without any deep connections to American social values or security needs. The patterns and practices that generate high imprisonment are superficial in that they do not have important links to social values or security needs.

IV. STRATEGIES OF REFORM

The central conclusion of my analysis is that the threat of excessive incarceration is not a short-term problem. The same organizational characteristics that produced high rates of imprisonment are also likely to sustain very high levels of imprisonment into the middle of the twenty-first century. What can we

21. *Id.* (manuscript ch. 5).

22. *Id.* (manuscript ch. 5 at 12–14).

23. *Id.*

add to reform efforts that might lessen epic levels of penal confinement? And how does the chronicity of mass incarceration change the reform agenda that should respond to it?

The levels of local government that now hold the most power in determining the scale of state imprisonment do not pay its costs, and the level of state government that pays the cost of imprisonment often does not have effective control of rates of imprisonment.²⁴ There are two organizational strategies that can rationalize this peculiar political economy of imprisonment. The first is to create economic incentives or costs for county governments when they sentence offenders to state prisons.²⁵ The second is to make the state's power to determine prison capacity non-responsive to sentences issued by local governments.²⁶ This requires state power to release prisoners.²⁷ Rather than choose between these strategies, the best approach to reduce over-confinement would be to employ both strategies.

The first step in reforming what Gordon Hawkins and I called "the correctional free lunch" would be to either charge county governments for all or over-limit prison commitments, or to reward county governments for reducing commitment levels.²⁸ The objective here is to give these local levels of government what Raphael and Stoll call "some skin in the game."²⁹ The basic shift in state policy would be a transition from passive to active management of prison capacity.³⁰ Since state governments both fund and administer prisons, the power to determine the scale of each state's prisons was always at the state level of government.³¹ But state governments typically did not regard their role as making policy choices about how much or how little prison capacity to plan.³² Instead, Zimring and Hawkins described a system that was passive and dedicated to reacting to the custodial demands of local governments: "The correctional planners

24. This problem has been called the "correctional free lunch." FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 211–15 (1991).

25. *Id.* at 212.

26. *Id.* at 212–13.

27. *See id.*

28. ZIMRING, *supra* note 1 (manuscript ch. 7 at 26–27).

29. STEVEN RAPHAEL & MICHAEL A. STOLL, *WHY ARE SO MANY AMERICANS IN PRISON?* 261 (2013).

30. *See* ZIMRING & HAWKINS, *supra* note 24, at 211, 213.

31. *Id.* at 211 (discussing how prisons are paid for at the state level of government out of the state correctional budget).

32. *Id.* at 213 (discussing how state governments are passive about prison populations).

commonly viewed prison population as though it were a natural phenomenon like rainfall totally beyond the control of policy agencies. ‘We take what the courts send us’ was the response of a New England state to a request for information about their projection methods”³³

Yet, this totally passive orientation shifts the power of determining the number of prisoners that must be confined from the state government to county governments, which pay none of the costs of building and maintaining prisons.³⁴ Once the state prison system adopts a strict “we take what the courts send us” approach, the local governments who determine prison populations have no need to regard prison cells as a scarce resource.³⁵ A forthright use of power that state governments have always had can achieve a much more rational political economy of imprisonment.

Expanding the power of state governments to influence both commitments and releases from imprisonment carries substantial risks as well as benefits. Professor Frase discusses some of those potential problems at the front end of the sentencing process,³⁶ and Professor Reitz reminds us of the arbitrary and punitive problematics of parole boards.³⁷ These cautions should become an important element in the careful expansion of state power.

Professor Barkow’s keynote reminded us of how past expansions of penal power require repairs as well as preventive reforms.³⁸ The vast expansion of criminal justice and imprisonment over the last half-century and the likelihood of continual

33. *Id.* at 62.

34. *Id.* at 62, 211–13.

35. *Id.* at 211 (describing how local governments do not contribute to the central state correctional budget and the state level of government uses the state correctional budget to pay for prisons).

36. See Richard S. Frase, *Can Sentencing Guidelines Commissions Help States Substantially Reduce Mass Incarceration?*, 104 MINN. L. REV. 2781, 2793–97 (2020) (discussing how sentencing guideline commissions have helped states limit the use of imprisonment).

37. See Kevin R. Reitz, *Prison-Release Reform and American Decarceration*, 104 MINN. L. REV. 2741, 2754–62 (2020) (analyzing different states’ use of prison-release discretion).

38. Rachel E. Barkow, Vice Dean & Segal Family Professor of Regulatory Law & Policy & Faculty Dir., Ctr. on the Admin. of Criminal Law at NYU Sch. of Law, Keynote Address at Minnesota Law Review Symposium: Mass Incarceration as a Chronic Condition: Diagnosis, Prognosis, and Treatment (Nov. 18, 2019).

high rates of prosecution and punishment will leave a substantial human legacy of penal disability and social disadvantage. By 2010, the number of persons ever imprisoned in the United States had already passed seven million, and the number of persons with felony criminal records was in excess of nineteen million.³⁹ Both the population of those ever imprisoned and the legion of persons with felony criminal records will increase further in the coming years.

Under these circumstances, the prevention of future excess in penal confinement is a necessary but insufficient reform priority in American criminal justice. The rate of felony convictions in the United States expanded fivefold in the same era that the prison population increased, but the number of felony convictions is more than twice the size of the number in prison.⁴⁰ The harms generated by disabilities imposed on felons have always been problematic, but the bite of penal disability now affects five times as many American citizens.⁴¹

Preventing as best we can the continued excess in penal confinement is one clear priority for reform. Repairing the damage of past excess must be a second imperative.

39. ZIMRING, *supra* note 1 (manuscript ch. 10 at 18).

40. *Id.* (manuscript ch. 1 at 17).

41. *Id.* (manuscript ch. 10 at 20).