

Sentencing and prison overcrowding

*Sonja Snacken, Kristel Beyens*¹

A few years ago, we started researching prison overcrowding in Belgium, trying to understand the phenomenon and the mechanisms behind it, and studying possible solutions. We soon found out that many Western European countries had experienced a similar evolution of their prison population: a general increase starting at the beginning of the eighties, linked to a more specific rise in the number of remand prisoners, long-term prisoners, foreign inmates and drug-related offences. Only a few exceptions could be found where the prison population had decreased over the same period: Finland, Germany (BRD, before reunification), Austria and Italy. That made it clear to us that explanations for prison overcrowding or increases in the size of the prison population should be sought for in broad, structural changes occurring in these western societies, but with attention being paid to particular national differences.

Mechanisms explaining changing prison populations

The most common explanation given by policymakers is very simple: criminality is rising, therefore the prison population is rising. The solution to prison overcrowding is equally simple: expand prison capacity.

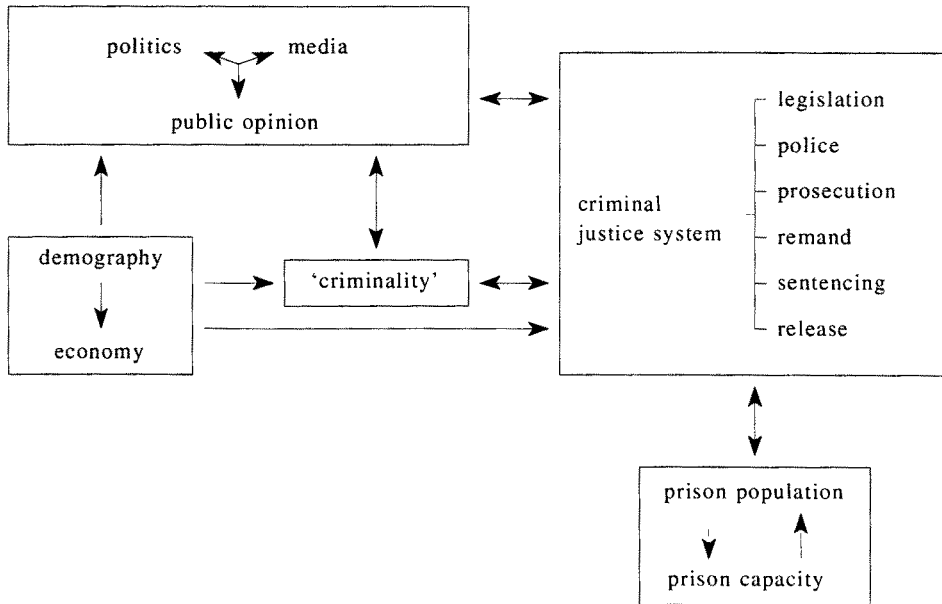
An extensive review of the international literature on mechanisms explaining changing prison populations, both decreases and increases, showed that reality is much more complex. It is impossible to render here our analysis of the extensive and often contradictory literature (Beyens et al., 1993). But we have tried to summarize the results in figure 1.

The prison population is the result of a very complex *interaction* between various factors:

1. factors external to the criminal justice system, such as demographic and economic evolutions;
2. 'criminality', understanding that the scope and content of officially

¹ Vrije Universiteit Brussel, Faculty of Law, Pleinlaan 2, 1050 Brussels, Belgium.

Figure 1



registered criminality is influenced both by societal changes and criminal policy changes;

3. attitudes, decisions, policies at the different levels of decision-making within the criminal justice system itself;
4. the political context of the period considered, and the way in which politicians interpret and react to often contradictory tendencies in public opinion.

The relation between *criminality* and prison population is certainly not automatic and direct. One can find crime rates increasing while rates of imprisonment decrease: the USA² in the 1960s, the Netherlands from 1950 till the end of the 1970s, Germany and Austria in the 1980s. In the USA during the early 1980s, rates of imprisonment even showed a considerable increase following a decrease in criminality (Nagel, 1977; Rutherford, 1984; Zimring and

2 Although this paper discusses evolutions in Western Europe, we sometimes refer to the USA because part of the literature on mechanisms explaining changing prison populations is American. We acknowledge that one should not refer to the US as if it were an homogeneous entity, each state having its particular features, comparable to the differences between European countries. Going into these differences would however exceed the scope of this contribution. Interested readers can be referred to the analysis of the American situation by Zimring and Hawkins, 1991.

Hawkins, 1991); from 1980 to 1988, the 'reported index crimes' increased slightly (4 percent) while the prison population doubled (Austin et al., 1992).

The same is true for the *external* factors. Demography (natality and immigration) only partly explains the decrease in the German prison population (Feest, 1988; Graham, 1990), and certainly not the increase in the American prison population (Zimring and Hawkins, 1991). Economic recession increasing unemployment and income discrepancies have been found to affect the prison population in several countries (Box and Hale, 1986; Box, 1987), but not in Japan or the Netherlands (Rutherford, 1984; Fiselier, 1987; De Haan, 1990). One of the factors explaining these contradictory results is (criminal) policy: how the political system and the criminal justice system react to changes in society and in criminality. This becomes clear when we compare different European countries, who, despite similar evolutions in external factors, witness opposite trends in prison populations.

This paper will focus specifically on policy measures affecting the size of prison populations, and on sentencing in particular.

The influence of sentencing on prison population

The influence of sentencing on prison populations seems self-evident, as the decision to impose a prison sentence for a particular offence rests with the judges.

We should however remember that sentencing is only one of the decision levels in the *criminal justice system*. Initially, the scope of decision-making is primarily structured by legislation, which defines the offence and the choice of penalties available to the judge. But prosecution policy and the application of remand custody also influences sentencing. Systematic waivers of prosecution signify an important selection procedure being in operation regarding the cases brought before the courts, and in some countries (e.g. the Netherlands) judges tend to follow the prosecutor's request for a particular sentence quite strictly. Remand custody is an important aspect of prison overcrowding. The increase in its application or its duration directly affects the size of the prison population (e.g. Belgium). Moreover, it strongly determines sentencing, at least in some countries. In Belgium 95 percent of remand custodies are subsequently 'covered' by the sentencing judge, albeit through a partial custodial sentence which does not exceed the remand custody (Snacken, 1986; Peeters, 1988). It therefore also hampers the application of non-custodial sanctions. This re-introduction of short-term prison sentences through remand custody has also occurred

in the Netherlands (Oomen, 1970), in Germany (Feest, 1988; Heinz, 1989; Graham, 1990) and in England (Vass, 1990). At a later stage, sentences may be affected by decisions concerning their execution, especially early release through parole or other individual or collective measures. Many countries have resorted to collective measures of early release in an attempt to curb prison overcrowding (e.g. Belgium, France, Portugal, USA, ...). This, however, raises questions of legal insecurity and inequality, and may prompt courts to compensate for the early releases by imposing longer prison terms.

Keeping this in mind, we can now examine the relation between sentencing and the prison population. We have to distinguish several factors in this relationship: the use of imprisonment, the length of the prison sentence, the policy regarding juveniles, the application of non-custodial sanctions and initiatives to curb disparity in sentencing.

The use of imprisonment

Although most Western European countries face an increase in their prison population, the proportion of prison sentences in global sentencing has decreased over the last decades. A few examples: in Germany, prison sentences decreased from 40 percent in 1945 to 6-7 percent in the seventies and eighties (Oberheim, 1985); in the Netherlands they decreased from 12.3 percent in 1975 to 7-8 percent in the eighties (Verhagen, 1989b). This trend reverses however when we look at particular offences, especially drug offences: in Germany, prison sentences for drug offences rose from 10.8 percent in 1971 to 31.5 percent in 1976 (Oberheim, 1985); in the Netherlands the proportion of prison sentences for drug offences is six times higher than the average (Verhagen, 1989c).

The length of the prison sentence

One of the most striking similarities between western countries is the often spectacular increase in the number of long-term prisoners during the eighties, even in countries which saw their general prison population decrease (e.g. Germany). Although in some countries a more restrictive release policy may have added to the effect (e.g. 'security periods'), an increase in the length of the prison sentences cannot be denied. Again, this is especially true for specific offences: violent offences and sexual offences (rape) (the Netherlands, England and Wales, France), and most notably drug offences (drug-trafficking in particular) (the Netherlands, England and Wales, France, Germany,

Switzerland, Austria, Norway, Sweden, ...) (Verhagen, 1989; Barclay, 1991; Faugeron, 1994; Oberheim, 1985; Kuhn, 1993; Christie, 1993; Bishop and Von Hofer, 1994).

The policy regarding juveniles

The influence on the prison population exerted by changing policies towards juveniles will depend on the definition of 'juveniles' (age limit), the possibilities available to deprive them of their liberty and whether those deprived of their liberty are considered to be part of the total prison population.

In Germany and England and Wales, a changed policy towards juveniles has resulted in a decrease in the prison population. In England and Wales, the change was induced by legislation: the Criminal Justice Acts of 1982 and 1988 (especially the latter) (Home Office, 1992). In Germany, the change occurred independent of legislation, through changing attitudes from the judiciary (both prosecution and judges), who became actively involved in the establishment and running of non-custodial alternatives (Pfeiffer, 1988).

On the other hand, the actual tendency in many countries towards 'repenalization' of the juvenile justice system and the lowering of the age limit for penal responsibility may lead to an increase in the imprisonment of juveniles and thus to an expanding prison population.

The application of non-custodial sanctions

Attempts to reduce the use of imprisonment through the introduction of alternative non-custodial sanctions were established a long time ago. The most common alternatives are fines, suspended sentence, probation and community service. Research concerning their application and potential to effectively reduce prison populations is too extensive to report here. We would like to emphasize only a few points which are directly relevant in their relation to prison overcrowding. The most obvious point is that the existence of alternative sanctions has not impeded the recent rise in prison populations in Europe. That does not mean that in the past alternatives have not replaced imprisonment at all: the aforementioned decrease in the proportion of prison sentences in the global sentencing is certainly due to the existence of other sanctions. But they have not been able to counter the recent increase. How can we explain this?

1. We should remember that in most countries non-custodial sanctions were introduced to replace *short-term or medium-term* imprisonment, while the recent prison overcrowding is mostly due to the increase in

long-term sentences (and remand custody). Sentencing practice actually reinforces this restriction. In Germany, the penal reforms of 1969 and 1975 abolished prison sentences of less than one month and restricted the use of sentences of less than six months. Day-fines were to become the principal sentence for offences previously sanctioned with prison terms of up to six months, and community service was to replace the subsidiary imprisonment for fine-defaulters. In practice, day-fines have mainly replaced the lower range of sentences, those up to three months (especially for traffic offences), while the upper range of sentences (for more traditional offences such as theft and drugs) have remained or even become longer (Oberheim, 1985).

2. The introduction of alternatives by legislation does not necessarily and automatically imply their *application*. In Belgium, several studies have shown that non-custodial sanctions such as suspended sentence and probation are applied to only a small proportion of those offenders who qualify legally. The reasons are numerous and may be related to the structural context surrounding sentencing practice (waivers of prosecution, application of remand custody, workload, lack of information about the individual offender), or to the uncertain position of the alternative sanctions in the sentencing tariff, or to the personal attitudes and penal views of the sentencing judges. The lack of sufficient infrastructure for the execution (and control) of the non-custodial sanctions may also hamper their application (Eliaerts, 1988; Peeters, 1988; Rutherford, 1984).

3. Even if alternatives are applied, some of their *side effects* pervert the aim to reduce prison sentences and, on the contrary, lead to an increase in the prison population. Subsidiary imprisonment is often (sometimes automatically) imposed in case of recidivism or failure to comply with the alternative sanction. In England (Bottoms, 1981 and 1987) and in Switzerland (Kuhn, 1989 and 1993), judges have been found to impose longer terms of imprisonment when the sentence is suspended, thus leading to a longer stay in prison in the event of recidivism. A general, unescapable feature of the introduction of new alternatives seems to be the infamous 'net-widening' effect: suspended sentences, probation, community service only partially replace imprisonment (40-50 percent) and partially replace other, usually less restrictive, alternatives (Rutherford, 1984; Pease, 1985; Van Kalmthout and Tak, 1988 and 1992). This is also true for the more punitive alternatives, such as intensive probation or electronic monitoring, often introduced because they are thought to be more acceptable to the judiciary: in practice they at least replace less restrictive alternatives to some extent or are used in combination with them (Beyens et al., 1992; Zimring and Hawkins, 1991; Morris and Tonry, 1990). This means that judicial control not only widens, but

also deepens: conditions become stricter, enhancing the risks of failure and of a more repressive reaction.

4. Many countries now face the seemingly paradoxical situation that on the one hand, non-custodial alternatives are developed and encouraged, while on the other hand, the prison population increases and prison capacity is expanded. This seems to point to a growing *bifurcation* in sentencing: less 'serious' offences or offenders are 'granted' a non-custodial sanction, while those who do not – or no longer – deserve such a favour are dealt with by ever-stiffer prison sentences (King and Morgan, 1980).

Initiatives to curb disparity in sentencing

These initiatives are discussed elsewhere in this special issue. We limit ourselves to their effect on the size of the prison population.

1. Strengthening the *transparency* of the sentencing process. A Belgian law of 1987 obliges judges to explain the motives for their choice of sanction. Apart from improving the transparency of the decision and providing guidelines for the execution of the sentence, this new regulation was also expected to limit the use of imprisonment. The evolution of the prison population does not seem to corroborate this hope. In the USA, the improved transparency of the sentencing process through clarification seems to lead to longer prison sentences: judges tend to 'play safe' for fear of criticism from 'the public' (Zimring and Hawkins, 1991).

2. Limiting the type of *information* allowed to influence the judge in his decision-making. The English Criminal Justice Act of 1991 tries to reduce the application of prison sentences and to stimulate 'community sanctions'. Following 'just desert' considerations emphasizing the objective seriousness of the offence, the judge is no longer allowed to let his choice between those two types of sanctions be influenced by the criminal record of the offender. This innovation stands sharply in contrast to actual decision-making and has already led to vehement protest by the judiciary (Thomas, 1992). Its chances of curbing the existing practice and reducing reliance on prison sentences seem very small.

3. The elaboration of *sentencing guidelines*. Sentencing guidelines were first established in the United States in order to reduce disparity in sentencing. 'Grids', covering the gradations of seriousness of the offence and importance of the criminal record, result in a limited choice between minimum and maximum penalty. Sentences departing from these limits require specific motives. Advocated by the 'liberal' proponents of the 'just desert' theory, they were meant to replace indeterminate sentences and to lower the actual length of stay in

prison. Both the theory and the guidelines were however soon recovered by more repressive tendencies, the penalties in the grids increased constantly, the 'war on drugs' erased all limits, and the prison population soared (Von Hirsh, 1976 and 1993; Lensing, 1992).

How to cope with rising prison populations? Policies in Europe

We have now discussed those aspects of sentencing policy which have contributed to the increase in the number of prisoners in most Western European countries. How then should we cope with this evolution? To answer this question, we will examine the different policies in Europe, including the role of sentencing, and evaluate their results.

We can broadly distinguish three policies in response to rising prison populations: an expansionist policy, a reductionist policy and a 'stand still' policy.³

Expansionist policy

According to Rutherford (1984) expansionist systems are characterized by a constantly increasing prison population, serious prison overcrowding, expansion of prison capacity, extension and strengthening of closed capacity, an increase in prison personnel and an intensification of the bureaucratic structure.

Examples of this situation were plentiful during the eighties: the Netherlands, England and Wales, the USA, France, all resorted to an impressive prison building programme. The Netherlands is an especially striking example, because it used to have one of the lowest detention rates in Europe (28/100,000 inhabitants in 1983) (Prison Information Bulletin, 1983), due to the imposition of comparatively shorter terms of imprisonment. In 1985, a policy outline called 'Society and Criminality' (*Samenleving en Criminaliteit*) advocated important changes in criminal policy and led to a doubling of the prison capacity (from 3,800 cells in 1980 to 7,600 in 1990). Following much publicized media-events, reporting the release of remand prisoners suspected of serious crimes, due to a shortage of cells, a further increase was recently sanctioned. Total prison capacity

3 We will not discuss here the 'homeostatic' or 'stability of punishment' model, as elaborated by Blumstein a.o. (Blumstein and Cohen, 1973; Blumstein et al., 1977; Blumstein and Moitra, 1979; Blumstein et al., 1983), for it does not seem to form the basis of any of the actual policies. For a critical evaluation of this model, see Rauma (1981) and Berk et al. (1981) for the USA and Fiselier (1987) for the Netherlands.

is expected to reach more than 10,000 cells by the turn of the century. In the United Kingdom, at least 28 new prisons have been built since 1980, expanding prison capacity with 25,000 cells. In the USA additional capacity has been created for at least 200,000 inmates (Snacken, 1988). In France 13,000 new cells were built over a two year period (Beyens et al., 1992). These building programmes were often based on and legitimized by predictions, forecasting a continuous upward trend in prison populations.⁴

Are these increases due to changes in *sentencing* policy? As we have already stressed, sentencing is only one of the decision levels in the criminal justice system. The effect of a revised criminal policy on the prison population will be greatest if these changes occur at the different levels. An expansionist situation therefore arises when the use, or the length, of imprisonment increases at those distinct levels. This happened most clearly with the *drug policy*. Many western countries increased the maximum penalties in their legislation during the seventies: Germany (1972 and 1982), Switzerland (1975), Austria, France (1987), the Netherlands (1976) and Belgium (1975). To cite one example: Germany raised the maximum penalty for a drug offence from 3 years to 10 years in 1972, then to 15 years in 1982. The internationalization of the 'war on drugs', launched by the USA, has made police forces concentrate their efforts on drug criminality. A recent illustration was offered by Europol, which put the international repression of drug criminality as a priority on its programme in 1992 and established 'Europol Drugs Unit' (De Jong, 1994). We have already described how sentences have become stiffer for drug offences, especially drug-dealing and trafficking. And finally, several countries have made early release more difficult for this category of offence (e.g. Belgium, France), thus further increasing the duration of imprisonment. The cumulative effect of these measures puts a heavy burden on the prison populations, besides introducing other penitentiary problems (the presence of drugs and drug-dealing inside the prisons, the treatment of drug addicts, the effects on prison regimes, ...). To illustrate this point, one can cite Mr. Verhagen of the Dutch Ministry of Justice, who contends that the extensive prison building programme in the Netherlands is due entirely to the changed drug policy (Verhagen, 1989c).

During the eighties some countries also felt the effects of changing attitudes towards sexual offences and some violent offences, e.g. within the family. Legislative changes increasing the penalties have

4 The main criticism on the technique of predictions concerns the lack of reliable data and, more fundamentally, the omission of different policy options from the calculations.

followed a growing public awareness, often stimulated by active campaigns by interest groups, victims have been encouraged to report to the police, and the police has become more alert to this type of offence. Longer sentences and delayed releases again culminate in much longer stays in prison.

Has the *expansion* of prison capacity solved the prison overcrowding (or 'lack of prison capacity', as in the Netherlands)?⁵ Clearly not: prison populations keep rising, filling up the newly built institutions, raising demands for more and more cells. The reason for this is simple: when we look at the chart of factors influencing changing prison populations, it is clear that expansion of the prison capacity cannot stem the flood of people into the prison system. It has been claimed that the mere expansion of the capacity even attracts more detentions,⁶ thus creating a never ending self-fulfilling prophecy. We want to add a nuance to this assertion. The mere existence of examples where prison capacity has been reduced, due to a shrinking number of inmates (the Netherlands in the 1970s), or where the prison population fell after a period of expanding prison capacity (Germany in the 1980s), proves that the principle of capacity-driven prison population is not absolute and automatic. The effect of the expansion of prison capacity must again be seen in the context of general criminal policy. In face of a global trend to resort to more (long-term) imprisonment, the expansion of prison capacity will enhance this trend.

Reductionist policy

Characteristic of a reductionist policy is a general scepticism among practitioners (prosecutors and judges) towards the effects of imprisonment, a reduction in the use and length of prison sentences, a profound intolerance of overcrowding in prisons, coupled with a refusal to expand prison capacity (Rutherford, 1984).

Having examined those countries which succeeded in reducing their prison population during the eighties, we distinguish two patterns: reductions following major changes in legislation and reductions

5 For a discussion of the differences between those two concepts (and policies), see Beyens and Snacken, 1992.

6 The basis for this assertion is a much cited (and criticized) American study by Abt Associates (Mullen et al., 1980), which compared changes in prison capacity and prison populations in the 50 states of the US, over the period 1955-1976. The authors concluded that each newly built cell was filled within two years. This finding led to the 'National Moratorium on Prison Construction' in the US (Zimring and Hawkins, 1991), and was generally used as an argument by opponents of prison expansion.

happening quite independent of legislation.

1. Reductions following *legislative* changes: Finland reduced its prison population by half through the decriminalization of public drunkenness in 1969, a social plague previously sanctioned by stiff prison penalties, and the lowering of the maximum penalties for theft (Lang, 1989; Lahti, 1993). Sentencing practice followed the trend and the prison population has remained low. Denmark likewise curbed a rising population through abolition of indeterminate sentences and the lowering of the maximum penalties for property offences in 1973 (Brydensholt, 1980). England reduced the number of juveniles in prison by restricting the use of imprisonment in the Criminal Justice Acts of 1982 and 1988 (Home Office, 1990). The most effective way to reduce prison populations hence seems to be to prohibit and limit the use of imprisonment through legislation. This means that the scope of choices for the sentencing judges is reduced instead of enlarged (cf. the already mentioned problems with the application of 'alternative' sanctions). The following example is all the more intriguing.

2. Reductions *independent* of legislative changes: Germany lowered its population through a change in prosecution policy, a decrease in the application and the duration of remand custody and a reduction of imprisonment for juveniles. These reductions occurred independent of legislative changes, and in the opinion of several authors were brought about by changing attitudes of practitioners in the criminal justice system: an increased scepticism towards the value and effects of imprisonment, and an active involvement of the judiciary in the increased use of non-custodial sanctions (Feest, 1988; Pfeiffer, 1988; Graham, 1990; Prowse et al., 1990). This change in attitude may however have been stimulated by demographical evolution which resulted in fewer juveniles being brought to court (Dunkel, 1987). These examples corroborate the earlier findings of Rutherford (1984)⁷, who stressed the importance of the practitioners' attitudes, especially in respect of their scepticism towards imprisonment. They also show that reduction of the prison population is most effectively obtained by limiting the numbers admitted into the prison system ('front door strategy'). Countries which tried to curb prison overcrowding by stimulating early releases through parole or collective 'emergency' measures (Austria, Belgium, France, USA) have been much less successful. As with expansion of prison capacity, the reason is that such releases do not stem the growing numbers being admitted into the prisons, and they may even have the adverse

7 He analyzed the reduction of the prison populations in England (1908-1938), Japan (1950-1975) and the Netherlands (1950-1975).

effect of leading prosecutors and judges to compensate for the earlier release by requesting/imposing longer prison terms, thus creating a full circle once again.

Stand still policy

Rutherford (1984) describes a 'stand still' policy as follows. Alternative sanctions are meant to reduce the use of imprisonment, judges are asked to apply alternatives more often and to limit the application and length of prison sentences, new prisons are built with the primary intention of replacing old ones, the power to grant early release is enlarged, there is no real limit on the size of the prison population and the use of imprisonment is not fundamentally questioned.

It is essentially a pragmatic policy, which we can see in several countries trying to cope with serious prison overcrowding: Belgium, France, England, ... There is often a *discrepancy* between penal rhetoric, which is 'reductionist' and considers imprisonment to be the 'ultimum remedium', and penal practice, which believes imprisonment is an adequate response to crime.

The already mentioned 'bifurcation' or 'two-track policy' seems to be a particular form of a 'stand still' policy: at the lower range, certain offences/offenders are dealt with by non-custodial sanctions, at the upper range stiff prison sentences are laid down by legislators, judges and release authorities. The power of sanctions to influence delinquency being grossly overestimated, recidivism of the first (non-custodial) category eventually also leads to imprisonment. A 'two-track policy' therefore tends to evolve into an expansionist policy.

Conclusion

Of the three policies considered, only the 'front door' reductionist policy seems able to offer a real solution to prison overcrowding or lack of prison capacity. We would also defend this policy on more fundamental and principled reasons: knowing how detrimental the effects of imprisonment are, not only to the prisoner and his family, but also to the victims of crime and society in general, its application should be limited as much as possible. But how can we achieve this goal and what would be the role of sentencing?

The countries cited as examples of a reductionist policy illustrate how policies vary over time: countries move from one policy to another and back again. And the chart that we elaborated on mechanisms explaining changing prison populations shows the

complexity of the interactions with external factors. We still believe however that active intervention on these interactions is possible, at different levels of responsibility. Politicians should be aware of their responsibility in elaborating an extensive and comprehensive criminal policy, without undue reliance on penal law and penalties. Measures should be taken in response to an increasing fear of crime felt by the public (or certain sections), without resorting automatically to repression. Several studies have indeed shown that crime is not the primary public concern in Europe, and that many people are still open to rehabilitative and restitutive sanctions (Van Dijk et al., 1991 and 1992). The media certainly also have a responsibility in offering a less sensational view of the reality of delinquency. The judiciary should maybe be made more responsible for the effects of its decisions: the allocation of a certain number of prison cells to each judge, to be used according to his own priorities, has been advocated (see Blumstein and Kadane, 1983; Blumstein, 1987). Imprisonment being the most expensive penalty, closer control being kept on the absolute necessity of imposing this sanction seems justified. Prison authorities could give wider publicity to the problems linked to prison overcrowding and imprisonment in general, both for the benefit of the general public and the judiciary. And researchers aware of these problems could try to influence any of these intervening bodies. We are busy trying ...

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