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BOOK REVIEW

ZIMRING, HAWKINS, AND THE MACRO PROBLEMS OF IMPRISONMENT

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I. INTRODUCTION

Six years ago, Franklin Zimring and Gordon Hawkins wrote an extraordinary book about America's use of imprisonment as a policy tool and as the product of complex macrosociological forces.¹ The subject matter of *The Scale of Imprisonment* has only gained in public significance since 1991.² Sadly, however, perhaps because it is a "difficult read," the book has been under-noticed by the legal, academic and policy communities.³

* Associate Professor, University of Colorado School of Law. A number of colleagues provided useful comments on an earlier draft of this essay, including Richard Leo, Marc Miller, Robert Nagel, Edward Rubin, Pierre Schlag, and Steven Smith. My father, as always, was my most valued editor.

¹ FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* (1991).

² America is in the midst of the greatest long-term experiment in increased severity of punishment we have ever undertaken as a nation. Since the early 1970s, our prisons have grown at a rapid and ever-faster pace, with no sign of slowing down. There were 196,429 prison inmates in 1970, 315,974 in 1980, 775,124 in 1990, and more than a million today. See AMERICAN BAR ASSOCIATION, *CRIMINAL JUSTICE STANDARDS, SENTENCING* (3d ed. 1994) [hereinafter ABA SENTENCING STANDARDS] xxxv tbl.3; BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, *PRISON AND JAIL INMATES AT MIDYEAR 1996*, at 3 tbl.2 (1997) (1,164,366 prisoners as of June 30, 1996) [hereinafter PRISON AND JAIL INMATES AT MIDYEAR 1996]. This quintupling of prisoners looks only slightly less dramatic when general population growth is taken into account. America's per capita imprisonment rate more than quadrupled in the same period. Compare ABA SENTENCING STANDARDS, *supra*, at xxxvi (national imprisonment rate of 96.7 per 100,000 population in 1970), with PRISON AND JAIL INMATES AT MIDYEAR 1996, at 3 tbl.2 (imprisonment rate reached 420 per 100,000 in 1996). The federal government reported that, from 1990 to 1996, the nation's prisons and jails expanded at a rate of 1,686 inmates each week. *Id.* at 2.

³ *The Scale of Imprisonment* has never been reviewed in a law review. It has been cited infrequently—although usually in glowing terms. See, e.g., Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 565-68 (1992); cf. LAWRENCE FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 475 (1993) (bibliographic essay).

This essay proceeds from two ambitions. First, it seeks to draw attention to a work that has the power to change people's ways of thinking about our legal institutions for the incarceration of criminals. Second, and on two scores, the essay ventures to add to the claims explicitly asserted in *The Scale of Imprisonment*. Pulling the book apart for its academic style in addition to its substantive content, I will argue that the book exemplifies a kind of interdisciplinary, empirically-aware legal scholarship that is worthy of notice for its methodology alone. As a study of legal *systems*, Zimring and Hawkins' work fits into a model of law scholarship recently touted by Richard Posner and Mary Ann Glendon.⁴ The law professoriate, so often under fire for its (allegedly) pointless or politicized work products,⁵ might draw comfort, and a few good ideas, from inspection of the academic approach of two of its most distinguished practitioners.

In addition, and on substantive policy grounds, I will suggest that the raw material of *The Scale of Imprisonment* can be reassembled (somewhat against the authors' wills) to provide a novel and forceful argument in support of the latest, but still-controversial, legal institution in criminal punishment systems. Across the country, a plurality of jurisdictions have chartered sentencing commissions as new governmental agencies to formulate and administer sentencing policy on a systemic level.⁶ The American Bar Association, in a recent report, heralded the sentencing commission as the "nerve center" of punishment systems.⁷ Still, the advisability of such institutions remains hotly disputed in many states, and some jurisdictions have created commissions only to disband them.⁸ Zimring and Hawkins' work adds new

⁴ See MARY ANN GLENDON, A NATION UNDER LAWYERS 248-49 (1994) ("Some of the teachers now working with statutes have taken the next step to institutional analysis, carrying forward the unfinished work of Hart and Sacks on the functions and interrelationships of courts, legislatures, the executive, and administrative agencies"); RICHARD POSNER, OVERCOMING LAW 88 (1995) ("Increasingly, too, traditional legal scholars are unable to answer the most pressing questions about law. In an era of rapid social change, systemic questions sometimes become more interesting, more urgent, than doctrinal ones.").

⁵ See, e.g., Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991); cf. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

⁶ See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING (1996).

⁷ ABA SENTENCING STANDARDS, *supra* note 2, at 149.

⁸ See PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND THE REALITY OF RETRIBUTIVE JUSTICE (1991) (chronicle of New York's failed sentencing commission); Michele Deitch, *Giving Guidelines the Boot: The Texas Experience with Sentencing Reform*, 6 FED. SENT. RPTR. 138 (1993) (account of the creation and demise of the Texas Punishment Standards Commission); Kevin R. Reitz, *The Cutting Edge of Sentencing Reform*, 8 FED. SENT. RPTR. 64, 64-65 (1995) (from 1993 to 1995, new sentencing commissions were created in Massachusetts, Michigan, Missouri, Montana, Oklahoma, South Carolina, and Virginia; at the same time, existing commissions in Tennessee and Wisconsin were discontinued).

layers to the argument of whether an agency of systemic competency is a desirable addition to the traditional legal structures of criminal punishment.

II. THINKING BIG

The Scale of Imprisonment is infused with the idea that the laws and policies of imprisonment should be examined in the big picture. That is to say, instead of relying on an accretion of decisions about individual offenders, however thoughtfully these are made, someone should be watching over the larger trends and outcomes. The authors want to spur analysis from the top down; they want a macrosocietal view to balance against the micro problem-at-hand orientation; they want historical and comparative perspectives to enrich the presentist and parochial; they want systemic examination of sentencing structures to rise to parity with case-by-case decisionmaking.⁹

The Scale of Imprisonment focuses its militantly macro perspective on one question, the problem of prison scale, which can be paraphrased as follows:

What are the factors within criminal justice systems, and in societies at large, that contribute to the differences in the amount of incarceration used in different places, and to changes in incarceration rates over time?¹⁰

Thus, for example, one could ask what is known about the reasons for the United States' expansion of its prison systems over the past twenty-five years, or the reasons for this country's heavy reliance on confinement in comparison with other Western democracies.¹¹

From the outset Zimring and Hawkins endorse the view that any meaningful analysis of such questions must take account of broad social forces in addition to the specialized priorities of the criminal justice system itself.¹² But what are these forces and priorities, and how do they translate into aggregate imprisonment practices? The chief

⁹ See ZIMRING & HAWKINS, *supra* note 1, at xii, 85.

¹⁰ See *id.* at xi-xiv.

¹¹ See *supra* note 2; see Marc Mauer, *Russia, United States World Leaders in Incarceration*, OVERCROWDED TIMES, October 1994, at 1 (for America's world leadership position in comparative incarceration rates).

¹² See ZIMRING & HAWKINS, *supra* note 1, at 13-14:

Rusche and Kirchheimer were clearly right about at least two things. In the first place, there is no doubt that "[t]he penal system of any given society is not an isolated phenomenon subject only to its own special laws. It is an integral part of the whole social system, and shares its aspirations and its defects." They were also right in insisting that, in order to understand the history of imprisonment or any other penal method, it is necessary to investigate "... punishment in its specific manifestations, the causes of its change and developments, ... in specific historical periods."

quoting GEORG RUSCHE & OTTO KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* 5, 207 (1939).

findings of *The Scale of Imprisonment* are: (1) There has been a near-total failure among criminologists, social historians, correctional planners, and punishment theorists to give attention to this question, and—as one might expect—(2) No one has yet posited a satisfactory answer, or even an approximation of such an answer, to the problem of prison scale.

III. WEALTHS OF IGNORANCE: WHAT WE DON'T KNOW ABOUT THE PROBLEM OF PRISON SCALE

The first half of *The Scale of Imprisonment* is a multi-disciplinary survey of fields that ought to have something useful to say about the determinants of prison size. Chapter 1 reviews the contribution of sociologists and criminologists such as Georg Rusche, Otto Kirchheimer, Alfred Blumstein, and David Greenberg. Chapter 2 considers social histories of institutions, including the work of David Rothman, Michel Foucault, and Michael Ignatieff. Chapter 3 evaluates the more prosaic formulas for correctional forecasting developed by professional criminal justice researchers (such as those working for the U.S. Sentencing Commission) whose names are not well known in academic circles but whose work affects hundreds of thousands of offenders. Chapter 4 collates studies from various fields, including punishment theory, economics, and criminology once more, all premised on the "prescriptive" hypothesis that explicit choices about crime control policy are leading factors in determining prison scale.¹³ Taking the first four chapters as a whole, the scope of Zimring and Hawkins' literature survey is grand indeed, embracing analyses of imprisonment in Europe and America and, in some cases, looking back over centuries.

Before commenting on the bleak scorecards that must be given the efforts surveyed, it is worth noting the imagination required to bring the above personalities and outlooks together in one place. Zimring and Hawkins have performed a service merely by assembling the crew. Their additional substantive message is that interactive lines of communication should be established between these normally balkanized fields. It is a rare correctional planner, for instance, who will have familiarity with macrosociological theory or the work of social historians of institutions.¹⁴ And few social theorists try hard to make their work useful or even accessible to the policy making community.¹⁵ In exploring these and other missed connections Zimring and

¹³ ZIMRING & HAWKINS, *supra* note 1, at xiii.

¹⁴ See *id.* at 59-60.

¹⁵ As Zimring and Hawkins note, the criminologists considered in Chapter 1 offer no

Hawkins make an especially compelling case for interdisciplinary study. Beyond this, Zimring and Hawkins believe that critical judgment should be passed on professional and scholarly work in part for its ability to address important concerns of other disciplines and the "real world" of applied theory. The tools of the social historian, they claim, could be turned with powerful effect on the problem of prison scale, but this simply has not been done.¹⁶ Criminologists and punishment theorists, in focusing on individualistic case analysis or abstractions of justificatory philosophy, too often separate themselves from inquiry into systems operations and the larger social, economic, political, and cultural currents that buffet the criminal justice machinery in operation.¹⁷ One subtext of Part I of *The Scale of Imprisonment* is that academics and nonacademics alike would be spurred to do better work if they made greater effort to take cognizance of the issues, expectations, and standards of related disciplines.¹⁸

Turning to Zimring and Hawkins' assessment of the present state-of-knowledge concerning the problem of prison scale, they can find little useful theorizing from any quarter. The criminologists in Chapter 1 fare better than the representatives of other fields, but this is faint praise. In "all of modern criminology" the authors could locate only two serious attempts to describe "the forces that influence levels of imprisonment."¹⁹ Both of these turn out to be methodologically flawed and, with the benefit of 1990s hindsight, historically discredited. Yet, to belabor the state of affairs, these are the best of all studies in all fields. Their inadequacies thus define the extent of ignorance that permeates the issue of prison scale.

Georg Rusche and Otto Kirchheimer, sometimes labeled Marxist criminologists, argued in 1939 that prison growth occurred chiefly in response to labor shortages; they believed that involuntary inmate workers were needed to keep the economy moving in certain historical periods.²⁰ Working with sometimes meager quantitative data go-

specific proposals for reform. *Id.* at 36-37.

¹⁶ *Id.* at 38-39, 44-45, 59-60 (historians have "signally failed to influence current debate about levels of prison population").

¹⁷ See, e.g., *id.* at xi-xii, 86-87 (philosophers have not asked how many prison beds are needed to serve the multiple purposes of the sentencing system).

¹⁸ See, e.g., *id.* at 84 (the accuracy of different models of correctional forecasting has never been assessed; in part this is due to the "lack of attention by criminological or sociological theorists who could act as external evaluators").

¹⁹ *Id.* at 3.

²⁰ As to Rusche and Kirchheimer's stature as Marxists or neo-Marxists, see DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 83-84 (1990). However, Rusche and Kirchheimer were not pure economic determinists. They believed that other forces such as crime rates, deterrent impulses, reformist movements, and even "sadism" could influence the shape of punishment systems. See RUSCHE & KIRCHHEIMER, *supra*

ing back to the sixteenth century, they thought they discerned an expansion of prison systems during times of increasing market and financial activity but stagnant populations.²¹ Rusche and Kirchheimer predicted that the twentieth century, with global population growth and labor surpluses, would see the decline of the penitentiary and greater use of economic sanctions.²²

More recently, Alfred Blumstein and a series of collaborators offered an alternative thesis about prison scale that, through the 1970s, was taken seriously as grist for academic debate.²³ Blumstein argued that every society maintains a "roughly constant" rate of imprisonment over long periods of time. He and his co-authors asserted, for instance, that American incarceration rates had been more or less stable from 1930 to 1970, and that the same was true of Norway and Canada over eighty-year periods.²⁴ Prison systems might expand moderately for several years, or shrink for awhile, but long term patterns in each society would reveal oscillation around a constant mean.²⁵

Needless to say, the Rusche & Kirchheimer and Blumstein theses have not withstood the test of time; both are manifestly inadequate as explanations of U.S. incarceration experience over the last twenty-five years.²⁶ As Zimring and Hawkins evaluate things, however, they still rate as "best efforts" because they (1) at least *posed* the question of prison scale, (2) pursued the issue with intellectual ambition and an appreciation that social forces outside the criminal justice system were at work, and (3) recognized that empirical analysis was necessary to their investigations. They failed, according to Zimring and Hawkins, primarily in methodological rigor. Both theories were developed in

note 12, at 21-22 (sadism), 72-75 and 127-28 (influence of reformers), 96-97 (crime rates), and 112 (deterrence policy).

²¹ They claimed that such varied penal institutions as galley slavery, transportation, houses of correction, and modern prison industries could be fitted into this model. See RUSCHE & KIRCHHEIMER, *supra* note 12, at 53-71.

²² See *id.* at 140 (in the early twentieth century "[t]he senseless imprisonment of individuals became undesirable and out of step with the times"); *id.* at 173 (wider use of fines in the same time frame "helped empty the prisons").

²³ See Alfred Blumstein & Jacqueline Cohen, *A Theory of the Stability of Punishment*, 64 J. CRIM. L. & CRIMINOLOGY 198 (1973); Alfred Blumstein et al., *The Dynamics of a Homeostatic Punishment Process*, 67 J. CRIM. L. & CRIMINOLOGY 317 (1976) [hereinafter Blumstein et al., *Dynamics*]; Alfred Blumstein & Soumyo Moitra, *An Analysis of Time Series of the Imprisonment Rate in the United States: A Further Test of the Stability of Punishment Hypothesis*, 70 J. CRIM. L. & CRIMINOLOGY 376 (1979) [hereinafter Blumstein & Moitra, *A Further Test*]; Alfred Blumstein & Soumyo Moitra, *Growing or Stable Incarceration Rates: A Comment on Cahalan's "Trends in Incarceration Rates in the United States Since 1880,"* 26 CRIME & DELINQ. 91 (1980); Alfred Blumstein et al., *On Testing the Stability of Punishment Hypothesis: A Reply*, 72 J. CRIM. L. & CRIMINOLOGY 1799 (1981).

²⁴ See, e.g., Blumstein et al., *Dynamics*, *supra* note 23, at 317.

²⁵ See, e.g., Blumstein & Moitra, *A Further Test*, *supra* note 23, at 376.

²⁶ See *supra* note 2.

the teeth of data that did not fit their models—and the theorists showed reluctance to reassess their overall claims.²⁷ Zimring and Hawkins, aided by hindsight, draw a lesson of theory skepticism from these examples. They would place heavy responsibility on the researchers, not only to take notice of problematic facts, but actively to search out “disconfirmatory” theses and information.²⁸ In addition, and again with the advantage of hindsight, Zimring and Hawkins identify a tendency toward historical parochialism, on the parts of Rusche & Kirchheimer and Blumstein, that can cloud sociological analysis. Both failed theories of prison scale were developed at times when the recent past lent them surface credence. From 1900 to 1930, incarceration rates in several European countries were in decline; Rusche and Kirchheimer’s thinking was probably colored by then-current events.²⁹ Similarly, Blumstein’s stability thesis fit well with the prior trends of his own lifetime up to the 1970s.³⁰ Zimring and Hawkins have always been stern critics of ahistoricism in scholarship or public policy.³¹

²⁷ For example, Rusche and Kirchheimer noted the development of the Quakers’ “Pennsylvania system” of penitentiary management in the late eighteenth and early nineteenth centuries, which was based on the isolation of prisoners in solitary confinement. This unfactorylike approach was created at a time in U.S. history when there was a voracious appetite for productive labor. See RUSCHE & KIRCHHEIMER, *supra* note 12, at 127-28. They also conceded that many convict industries, including those that did not follow the Quaker scheme, were losing propositions. *Id.* at 48-50. Despite their awareness of such facts, however, Rusche and Kirchheimer did not deem it necessary to revise their theory that economic forces were the major determinant of prison use. See ZIMRING & HAWKINS, *supra* note 1, at 10-11, 13 (“what emerges from any serious examination of the history of imprisonment is that frequently the determining factors are largely if not entirely divorced from economic considerations”). In Blumstein’s case, the contemporaneous literature contained a series of attacks from scholars who produced counterexamples to the stability thesis from societies—and even American states—whose imprisonment rates had changed markedly over time. See, e.g., Richard A. Berk, et al., *A Test of the Stability of Punishment Hypothesis: The Case of California, 1851-1970*, 46 AM. SOC. REV. 805 (1981); Margaret Cahalan, *Trends in Incarceration in the United States Since 1880*, 25 CRIME & DELINQ. 9 (1979); David F. Greenberg, *The Dynamics of Oscillatory Punishment Processes*, 68 J. CRIM. L. & CRIMINOLOGY 643 (1977); David Rauma, *Crime and Punishment Reconsidered: Some Comments on Blumstein’s Stability of Punishment Hypothesis*, 72 J. CRIM. L. & CRIMINOLOGY 1773 (1981); Irwin Waller & Janet Chan, *Prison Use: A Canadian and International Comparison*, 17 CRIM. L.Q. 47 (1974). Still, Blumstein and his colleagues continued to defend and refine their theory until, as the 1980s wore on, it was disproved definitively by current events. See ZIMRING & HAWKINS, *supra* note 1, at 16-29.

²⁸ ZIMRING & HAWKINS, *supra* note 1, at 31.

²⁹ Rusche and Kirchheimer assembled data indicating declines in the use of imprisonment over the first third of the century in France, England, Belgium, and Germany. RUSCHE & KIRCHHEIMER, *supra* note 12, at 146-50. Consistent with their approach to unfriendly data, however, they downplayed the significance of contrary trends in Italy. See *id.* at 148-49.

³⁰ See ZIMRING & HAWKINS, *supra* note 1, at 30-31.

³¹ See FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 45 (1992) (“even given the dismal norm for historical awareness in policy debates, the immunity to historical evidence that characterizes the contemporary discussion of

However natural it may be to generalize one's contemporary experiences to other eras and to the future, Zimring and Hawkins want researchers to be attuned to the embarrassments that may result.

If the Rusche & Kirchheimer and Blumstein theories appear fantastical today, that is all the more reason to wonder that nothing has risen to take their place. The remaining disciplines surveyed in the first half of *The Scale of Imprisonment* have little to offer concerning the problem of prison scale chiefly because they have not taken the first step of asking why prisons grow and contract under different conditions. In the cases of social historians and criminal punishment theorists, this is a striking omission.³² Historians have been most interested in examining the origins of the penitentiary (usually alongside other institutions of social control) and the symbolic role it has played in different societies and periods.³³ Considerations of scale have not been neglected, one hopes, because the matter is thought unimportant. Rather, the shortage of analysis may stem from the generally thin state of criminal justice history, especially in America.³⁴ The few scholars at work in the field, however able they may be, cannot deal with every issue of consequence.

No such explanation will wash in the realm of punishment theory, where the bookshelves are quite full. As Zimring and Hawkins see it, prescriptive theorists since Bentham have suffered from a kind of occupational blind spot:

Historically the relationship between sentencing policy and the issue of

drugs in the United States is peculiarly pervasive"); FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 27 (1995) ("The revival of interest in incapacitation in the 1970s appears to have been both ahistoric and disjunct"); *id.* at 40 ("the incapacitation literature is noncumulative because each new dialectic episode seems to start from scratch rather than learning from, and building on, earlier discourse"); Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, ANN. AM. ACAD. POL. & SOC. SCI., Jan. 1996, at 15, 26 ("neither side in the 1993 debate in the U.S. Senate displayed any knowledge of the previous occasion when Congress had drifted close to the nationalization of all firearms crime").

³² The correctional forecasters discussed in Chapter 3 use "blind models" that project future prison populations based on a jurisdiction's immediate past history rather than any theory of why prison size changes. See ZIMRING & HAWKINS, *supra* note 1, at 72-73, 82-83. Their long-term validity has never been demonstrated. Indeed, forecasters attached to prestigious presidential commissions in the late 1960s and early 1970s failed utterly to predict the vast prison expansion upon which the nation was about to embark. *Id.* at 65-66, 84.

³³ See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977); GARLAND, *supra* note 20; MICHAEL IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750-1850* (1978); *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN MODERN SOCIETY* (Norval Morris & David J. Rothman eds., 1995); DAVID J. ROTHMAN, *DISCOVERY OF THE ASYLUM* (1971).

³⁴ See LAWRENCE FRIEDMAN, *supra* note 3, at 467, 470; DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE* 4 (1980).

prison capacity requirements has received little consideration. Such questions as how much imprisonment would be required for prisons to fulfill their proper function have not been answered because they have not in the past been raised It was simply assumed that prison space would be, or would somehow be made, available to accommodate all those consigned to them by the courts.³⁵

Beginning late in the nineteenth century, and persisting well into the twentieth, punishment theorists—and whole court systems—gave their attention to the proper dispensation of justice on a one-case-at-a-time basis. “Individualized” sentencing discretion was the norm, practiced by sentencing judges and parole boards, working with few constraints in terms of general principles or, heaven forbid, systemic priorities.³⁶ Under these conditions, the scale of the prison enterprise would be revealed only after all of the ad hoc sentencing decisions had been made and could be counted. As Zimring and Hawkins observe, punishment theorists and practitioners believed that such a process of accumulation would “axiomatically” produce “an optimum prison population.”³⁷

The first and most significant contribution of *The Scale of Imprisonment* is the authors’ argument that such small-to-large thinking is an incomplete model for the study of imprisonment or the making of confinement policy. Serious attention should be, but has not been, given the question of prison scale. For readers outside the correctional system, and even for some with considerable criminal justice expertise, there is a shocking quality to the revelation that, even retrospectively, we lack a grasp on the reasons why our prisons grow and shrink.³⁸ Perhaps the causative forces have seemed self-evident and not needful of examination. If so, the catalogue of failed specifications in *The Scale of Imprisonment* will come as still more of a thunderbolt. This element of surprise is part of the book’s capacity to induce readers to rethink their assumptions about criminal punishments. Far more important than any sensation of intellectual dismay, however, are the prescriptive implications of Zimring and Hawkins’ exposé. If we lack a rudimentary understanding of the determinants of prison

³⁵ ZIMRING & HAWKINS, *supra* note 1, at 88. For a discussion of Bentham’s legacy, *see id.* at 86-87.

³⁶ The history of the development of the high-discretion individualized sentencing model in the U.S. is told in ROTHMAN, *supra* note 34. The leading policy critique of such a sentencing structure is MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973). One reason for the persistence of the high-discretion model has been its endorsement by the influential Model Penal Code, drafted in the 1950s. *See* MODEL PENAL CODE §§ 6.01-7.09 and cmt. at 11-30 (1985).

³⁷ ZIMRING & HAWKINS, *supra* note 1, at xii.

³⁸ *See* Weisberg, *supra* note 3, at 566 (*The Scale of Imprisonment* “leaves one amazed at how little we know of the breadth and complexity of the forces driving imprisonment”).

use, we are badly positioned in our forward-looking efforts to regulate the size and shape of incarcerative programs. Unless something changes, the findings that American imprisonment practices have always been unplanned and are opaque to rational explanation do not augur well for the future.

These messages are delivered at a propitious time for American criminal justice policy. In the early and mid-1990s an increasing number of states, largely for reasons of budgetary stress, have begun to take serious interest in reform initiatives to provide deliberate governmental control over the future shape and size of their prison populations.³⁹ Zimring and Hawkins have limned both the difficulty and importance of addressing the problem. This establishes, at the leading edge, a convergence of concern among academic and policy communities. What remains to be explored, in the pages that follow, is the form and content of the potential contributions that law-oriented scholarship has to offer.

IV. THE STUDY OF AMERICAN IMPRISONMENT

The second half of *The Scale of Imprisonment* segues to Zimring and Hawkins' original exploration of the determinants of prison size, focused on American prison systems in the latter half of the twentieth century. The slice of U.S. history they have chosen includes a period of relative stability in confinement (the 1950s), one of slight decline in incarceration rates (the 1960s and early 1970s), and a remarkably sustained stretch of prison growth (the early 1970s to the present). Aside from its obvious topical relevance, this time span offers a challenging backdrop of incarceration experience against which the dynamics of prison scale may be examined.⁴⁰

The organization of Part II is more difficult to capsuleize than earlier material. Once its broad sweep is on the table, the reader must still contend with a furious cavalcade of data, observations, debunkings, conjectures, and admonitions that fill out the book's second half. Scarcely three pages go by without a new and provocative argument concerning a "hot button" issue of criminal justice policy. The list of subject matters alone is daunting. In the space of 103 pages Zimring and Hawkins comment on the relationships between prison scale and mandatory minimum sentencing, sentencing commissions and guidelines, the decline of rehabilitative and indeterminate sen-

³⁹ See, e.g., ABA SENTENCING STANDARDS, *supra* note 2, at std. 18-4.4(c)(i) and commentary at 168; Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679, 686-89 (1993).

⁴⁰ ZIMRING & HAWKINS, *supra* note 1, at 119-121.

tencing structures, the "intermediate sanctions" movement, past changes in drug enforcement policy (including pre- and post-Prohibition incarceration experiences), current recommendations to decriminalize drug offenses, the effects of federal court prison litigation, calls for prison construction moratoriums, the abolition of parole in some jurisdictions, the experiments with emergency early release in others, theories linking prison use to crime rates, demographics, economic forces, and public opinion about law and order, among other subjects.

There are problems with this peripatetic approach. Some readers will find it exhausting; none will skim Part II in one sitting. The material becomes manageable only with devoted concentration—and those who expend such effort will at times find themselves wishing for more elaboration as the ideas go whizzing by. Still, in the context of their overall project, the approach makes a degree of sense. First, the delineation of a new field of inquiry is aided by the variety of Zimring and Hawkins' preliminary excursions, even if those excursions are sketched rather than fully developed. Second, the authors are often successful—even when they stray toward unabashed conjecture—in challenging conventional wisdoms and opening windows to new analytic viewpoints. Many readers will find their opinions about U.S. imprisonment changed by the sheer weight of the data and the perplexing patterns and nonpatterns the authors note in passing.⁴¹

⁴¹ For example, Chapters 5, 7, and 8 test a number of hypotheses for the patterns of American prison contraction and growth since 1950, based on data assembled from a variety of sources: (1) Does incarceration expand in response to rising crime rates? The authors can find no such consistent relationship. ZIMRING & HAWKINS, *supra* note 1, at 121-24. (2) Does public opinion drive prison growth? This cannot be demonstrated. (Opinion surveys show that the public continuously wants harsher penalties, no matter what the current imprisonment rate is.) *Id.* at 125-30. (3) Do demographic or economic trends correlate with prison use? Not very well. *Id.* at 130-34. (4) Does prison scale fluctuate because of deliberate policy initiatives such as mandatory minimum sentencing laws, new "determinate" sentencing structures, old "indeterminate" approaches to sentencing, or the attempted innovations of intermediate sanctions? No, upon examination the authors conclude there is no "conspicuous programmatic explanation" for America's recent imprisonment experience which, as they put it, remains "a compound mystery." *Id.* at 175. See generally Chapter 7 ("Policy or Process?"), *id.* at 156-75, and Chapter 8 ("Decarceration Policies and Their Impact"), *id.* at 176-204.

At about the same time as *The Scale of Imprisonment's* publication, an independent study of America's recent prison growth likewise reported the absence of expected correlations between the use of incarceration and crime rates, arrest rates, demographics, or criminal justice policies such as the use of mandatory minimum sentences or the abandonment of indeterminate sentencing systems. Patrick A. Langan, *America's Soaring Prison Population*, 251 SCIENCE 1568 (1991). For an updated examination of patterns of growth in the U.S. prisons, see Alfred Blumstein, *Prisons*, in CRIME (James Q. Wilson & Joan Petersilia eds., 1995).

A. TOWARD A SCHOLARSHIP OF PRISON SCALE

Rather than surveying the many topics packed into the second half of *The Scale of Imprisonment*, I will offer some thoughts in overview about the research agenda Zimring and Hawkins envision and the standards for scholarship they promote. One reason for doing so is that the authors themselves do not pause to lay out their views on the subject in any one place,⁴² even though a central mission of Part II was (or should have been) to prescribe a "way of thinking" about the problem of prison scale.

Features of the authors' research sensibility were articulated in the earlier discussion of Part I: their plan begins with top-down analysis that asks systemic questions, is historically-informed, comparative, and inter-disciplinary. As social scientists, however, the authors also believe that overarching theories must be checked and validated in small and careful steps.⁴³

The elemental building blocks the authors think necessary are single-jurisdiction and comparative studies of imprisonment patterns at the state and regional levels.⁴⁴ Some such work, as they see it, should amass data about long-term trends in individual states' incarceration usage; other efforts should evaluate the impact of particular confinement programs (such as three-strikes laws or attempts to divert prison-bound offenders to nonprison sanctions).⁴⁵ This subnational research would add significantly to current knowledge, which is weighted with over-aggregated studies of national trends or overly-narrow analyses of the federal system standing alone.⁴⁶ In the impressive Chapter 6 ("Fifty-One Different Countries: State and Regional Experience") the authors show that state confinement practices have astoundingly diverged.⁴⁷ For example, state-by-state incarceration rates in 1980 varied up to a factor of ten.⁴⁸

Beyond an emphasis on subnational studies, Zimring and Hawkins insist upon recognition of the nightmarish administrative com-

⁴² There are passages near the end of the book that purport to outline a "research agenda," ZIMRING & HAWKINS, *supra* note 1, at 215-20, but this is only a partial enunciation of the authors' thinking as it emerges from the book as a whole.

⁴³ See *supra* notes 9-12, 14-18, 27-31 and accompanying text.

⁴⁴ ZIMRING & HAWKINS, *supra* note 1, at 216-18.

⁴⁵ See *id.* at 216-20.

⁴⁶ See Kevin R. Reitz, *Sentencing Reform in the States*, 64 U. COLO. L. REV. 645 (1993) (arguing for closer study of state systems).

⁴⁷ ZIMRING & HAWKINS, *supra* note 1 at 137-55.

⁴⁸ ZIMRING & HAWKINS, *supra* note 1, at 148-49. Zimring and Hawkins base this figure on 1980 imprisonment rates. *Id.* In 1996, due to overall growth in practically every jurisdiction's use of confinement, the range of divergent incarceration rates across state lines had declined from 10:1 to 7.3:1. See PRISON AND JAIL INMATES AT MIDYEAR 1996, *supra* note 2, at 3 tbl.2.

plexity of American sentencing processes. Whether one is attempting historical description or prescriptive policymaking, it is a fundamental error to overlook the multi-governmental, multi-actor, decentralized, uncoordinated, and economically perverse characteristics of America's so-called sentencing "systems."⁴⁹ Zimring and Hawkins have at least a partial answer to the disconnection between announced criminal justice policies and real-world implementation: few coherent lines of authority exist in most states to translate official policy into a recognizable pattern of street-level decisions.⁵⁰ Rigorous attention to the vicissitudes of public administration, through such avenues as public choice theory, are therefore central to *The Scale of Imprisonment's* agenda.⁵¹

The interdisciplinary strands of Zimring and Hawkins' thinking ultimately weave into an intense prescriptive skepticism. Informed by the historical record, failures of empiricism, and a fine sense of governmental complexity, they are wary of every "solution" or "reform" they encounter.⁵² For example, Zimring and Hawkins express grave doubts that the intermediate sanctions movement can succeed as a broad-based decarceration program, and suggest instead that such efforts must be targeted narrowly to specific classes of offenders and categories of sanctions.⁵³ This position is considerably more cautious and pessimistic than that in much of the mainstream criminal justice literature.⁵⁴ Similarly, Zimring and Hawkins have not signed on with the majority of their colleagues in endorsing the institution of the sentencing commission as the best hope for improved punishment policy for the coming decades.⁵⁵

⁴⁹ Cf. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979).

⁵⁰ ZIMRING & HAWKINS, *supra* note 1, at 138-42. See also MALCOLM M. FEELEY, *COURT REFORM ON TRIAL* (1983); Hans Mattick, "The Pessimistic Hypothesis" and "An Immodest Proposal," *PUB. WELFARE*, Spring 1973, at 2.

⁵¹ To give one example, the authors identify a substantial problem of economics in many states, which they call the "correctional free lunch," such that the governmental entity that pays for prison space (the state) is not the unit that makes imprisonment decisions (county prosecutors and judges do this). ZIMRING & HAWKINS, *supra* note 2 at 211-15. The officials who send people to prison, in other words, and who garner political approval for doing so, are not accountable financially for their actions. A matching of authority and fiscal responsibility must somehow be achieved, the authors point out, if we think it desirable for government to take stock of both the benefit and costs of confinement sentences. *Id.* at 211-12.

⁵² As for apparently simple explanations that fail, see *supra* note 41.

⁵³ See ZIMRING & HAWKINS, *supra* note 1, at 177-91. This skeptical evaluation is further refined in ZIMRING & HAWKINS, *INCAPACITATION*, *supra* note 32, at 156-68.

⁵⁴ See, e.g., NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* (1990); SMART SENTENCING: THE EMERGENCE OF INTERMEDIATE SANCTIONS (James M. Byrne et al. eds., 1992); ABA SENTENCING STANDARDS, *supra* note 2, at stds. 18-2.2 to 18-3.11.

⁵⁵ See *infra* text accompanying notes 79-84.

Finally, but not last in order of importance, Zimring and Hawkins regret the politicized and emotionalized character of much current criminal justice debate, and struggle to move our thought processes closer to a state of political detachment. Near the end of *The Scale of Imprisonment*, for example, the authors offer a personal observation:

In our experience most participants in policy debates about prison crowding have a strong preference for one of these two remedies for crowding [reducing the number of prisoners or increasing the number of prison spaces] to the detriment of the other. And in the ideological division which is pervasive in the field of crime control, conservatives favor the construction of more prisons while liberals favor policies designed to reduce the number of prisoners. So implicit assumptions about the appropriate scale of imprisonment have played a major role in policy debates about prison construction. However, explicit references to the appropriate scale of the prison enterprise or the criteria that should inform judgment on that matter are quite rare.

Commonly liberals appear to infer from the fact that prisons are crowded that there are too many persons in prison. Conservatives, on the other hand, seem to infer from the same factual base that prison cells are in insufficient supply. Parties to this kind of dispute may well not even be aware of the significance of the assumptions about the scale of imprisonment which are implicit in the policies they endorse or reject. Because these assumptions about scale are implicit rather than explicit in contemporary dialogue, there is little to suggest how decisions about an appropriate penal scale might be derived. The dominant tone of the debate is the expression of strong feelings rather than the statement of particular value premises.⁵⁶

For readers of a certain sensibility, particularly those who have been embroiled in the politics of criminal justice for any length of time, the two paragraphs above are worth the price of the book. Intellectual objectivity is often (and too easily) dismissed as a vaporous goal. Aiming short of a grand call for neutrality, however, Zimring and Hawkins ask for calm recognition that people differ in their first principles, but should search for ways to engage with each other despite that fact, in other than moralistic or condemnatory tones. *The Scale of Imprisonment* is written from an apparent faith that information can play a role in the formation of moral and political preferences, so that we are not doomed to hold conversations that begin and end with "the expression of strong feelings." The authors do not take the naive view that all problems can be resolved through rationality; their more limited but forceful position is that rational inquiry should be undertaken to the extent possible.⁵⁷

⁵⁶ ZIMRING & HAWKINS, *supra* note 1, at 206.

⁵⁷ Zimring and Hawkins have not aspired to exclusively apolitical scholarship. See, e.g., FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA xvi (1986) ("This book is advocacy scholarship, and the reader might well wonder whether

Most passages of *The Scale of Imprisonment* are not self-consciously "about" legal scholarship, but the subject is never far below the surface as the authors critique research efforts of the past, build arguments of their own, or propose new directions for the future. I have tried to tease out the explicit and implicit criteria motivating Zimring and Hawkins' discussion. In summary, it may be worthwhile to consolidate the list. To Zimring and Hawkins, scholarship about the scale of imprisonment should: (1) recognize both the intricate complexity of the matter and the macrosocietal and historical forces implicated in its study, (2) employ rigorous empiricism that focuses down on meaningful units of study (in the U.S., subnational regions) and is theory-skeptical rather than theory-driven, (3) produce useful results—measuring "usefulness" by a work's propensity to speak to important issues raised in related professional fields, to satisfy the standards of validity of other fields, and to solidify into proposals for action in the world of policy making and implementation, and (4) strive for an attitude of inquiry that is politically detached or, more carefully put, that seeks to separate out elements that are determined by political or moral preferences from those that can be examined rationally and empirically.

If the "academic voice" is going to find a place in the highly politicized domain of criminal punishment, it must draw strength and distinction both from its informative value and from a carefully maintained credibility. The policy community is quick to suspect unrealism or left-leaning agendas when perusing law scholarship, and with some provocation.⁵⁸ These traits, if exaggerated, undermine the pertinence of scholarly argument or else render it little different from other forms of political input.⁵⁹ *The Scale of Imprisonment* might be viewed as one particularly sophisticated attempt to avoid such infirmities.

V. SENTENCING COMMISSIONS AND *THE SCALE OF IMPRISONMENT*

One of the most striking developments in the criminal justice

that phrase is a contradiction in terms").

⁵⁸ POSNER, *supra* note 4; Edwards, *supra* note 5.

⁵⁹ Meir Dan-Cohen issued the memorable characterization of court-oriented doctrinal scholarship as shadow lawyering conducted by surrogate litigants. See MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 1-2 (1986) (a law professor finds himself playing "a kind of deputy-judge, presiding over moot courts, or a shadow lawyer writing mock briefs for hypothetical or past disputes"). This theme might be extended to describe policy-oriented legal scholarship as "shadow lobbying" activity that merely puts forward the preferences of one more interest group, the law professors. For alternative views of the value of legal scholarship, see Learned Hand, *Have the Bench and Bar Anything to Contribute to the Teaching of Law?*, 24 MICH. L. REV. 466 (1926); Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313 (1989).

field since the 1970s has been the proliferation of the sentencing commission as a new institutional player in state and federal punishment systems.⁶⁰ The idea of the sentencing commission was first proposed by Judge Marvin Frankel in 1972 as the beginning point for reform of traditional U.S. sentencing practices.⁶¹

In the mid-1970s no such agencies existed; by the early 1980s there were seven (in Florida, Maryland, Michigan, Minnesota, Pennsylvania, Washington, and Utah); there are now more than twenty.⁶² In 1993 the sentencing commission won the endorsement of the American Bar Association as the most effective vehicle for guiding the discretion of sentencing judges and for monitoring the performance of sentencing systems as a whole.⁶³ Still, in 1997, more than half the states operate without such a commission.⁶⁴ In some quarters there is high controversy over the wisdom of creating such agencies, and even greater dissensus about the desirability of sentencing guidelines, which commissions usually produce.⁶⁵

The Scale of Imprisonment is relevant to the debate over sentencing commissions more as a matter of implication than the authors' explicit argument. The book goes much of the way toward demonstrating that every state should charter a permanent sentencing commission to facilitate systemic thinking about criminal punishment, but Zimring and Hawkins draw short of a firm position. Despite the authors' reticence, readers in the policy making sector who are involved with the workings of a sentencing commission, or who are weighing the prospect of creating such a commission in their state, should consider adopting *The Scale of Imprisonment* as a near-manifesto.

All of *The Scale of Imprisonment's* most forceful messages are about process: Zimring and Hawkins believe that someone with sophistication should be making top-down judgments about the use of the prison sanction, should be monitoring and evaluating the systemwide performance of punishment initiatives, and should be assembling information that can be used to educate government officials, scholars,

⁶⁰ See Kevin R. Reitz, *Michael Tonry and the Structure of Sentencing Laws*, 86 J. CRIM. L. & CRIMINOLOGY 1585, 1586 (1996).

⁶¹ MARVIN E. FRANKEL, CRIMINAL SENTENCES (1973); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

⁶² MICHAEL TONRY, SENTENCING MATTERS 25-31 (1996); Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 174 (1995).

⁶³ ABA SENTENCING STANDARDS, *supra* note 2, at std. 18-1.3.

⁶⁴ BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 28-29 (1996).

⁶⁵ See, e.g., TONRY, *supra* note 63, at 72 ("The guidelines developed by the U.S. Sentencing Commission . . . are the most controversial and disliked sentencing reform initiative in U.S. history"). See also GRISET, *supra* note 8 (applauding the demise of New York's sentencing commission in the 1980s).

and the public at large about the operation of the whole and the parts of the criminal justice system.⁶⁶ Below I will suggest that sentencing commissions are promising vehicles to accomplish many or all of these things.

There are enough commissions across the country, and they have operated for a long enough time, that their track records can be evaluated.⁶⁷ First, the commissions have acted as information and policy centers.⁶⁸ They have assembled state-specific data sets that resemble those Zimring and Hawkins would like to see, have developed the most sophisticated correctional forecasting models in existence (these work only in conjunction with sentencing guidelines), have experimented with the formation of systemwide policy that is then transmitted to courtrooms across the jurisdiction, and have proven that the predictive power of projections and the prescriptive power of guidelines can, in combination, be used to bring inmate populations under control.⁶⁹

The commissions have given priority to the accumulation and dissemination of information. They have learned that their credibility as "players" in the state policy making melee depends on the generation of useful and accurate data, year after year.⁷⁰ A commission with a good record of reliable cost projections, for example, can gain the ear of appropriations committees when high-budget-impact legislation is on the table.⁷¹

In addition to the production of in-house research, the commissions are natural consumers of scholarship about sentencing practices. Given their full-time focus on punishment issues, commission members and staff are an important audience for the kind of academic work Zimring and Hawkins promote. People who work for sentencing commissions have both the need for information and the power to put it to work.⁷² Just as importantly, the commissions can play an in-

⁶⁶ See *supra* text accompanying notes 9-12, 14-18, 38-39.

⁶⁷ See *supra* note 64.

⁶⁸ The ABA characterized the commission as the "nerve center" of the sentencing system. ABA SENTENCING STANDARDS, *supra* note 2, std. 18-4.1 & commentary at 149.

⁶⁹ Most new commissions have been chartered with the initial mandate to take control over previously unplanned prison growth. See Knapp, *supra* note 39, at 686-89; Leonard Orland & Kevin R. Reitz, *Epilogue: A Gathering of State Sentencing Commissions*, 64 U. COLO. L. REV. 837, 839-40 (1993).

⁷⁰ See Debra L. Dailey, *Minnesota: Sentencing Guidelines in a Politically Volatile Environment*, 6 FED. SENT. REP. 144, 145 (1993).

⁷¹ Commissions thus help governments respond to the "correctional free lunch" problem that occurs when policy decisions and their fiscal implications are too far disassociated. See *supra* note 51. An intriguing new proposal along these lines is Ronald F. Wright, *Three Strikes Legislation and a Sinking Fund Proposal*, 8 FED. SENT. REP. 80 (1995).

⁷² The new Virginia sentencing commission, for example, has made extensive use of

termediary role between researchers and academicians, on the one hand, and governmental officials and the public on the other. A commission that wants to stay in business must supply defensible rationales for the sentencing matrices it designs. The annual and special reports of the commissions, the public hearings, the prison and nonprison sanctions projections, and the commentary appended to sentencing guidelines, all play an educative role that is not duplicated by other actors in the criminal justice system.⁷³

These institutional attributes suggest that the commissions can be loci for many of the forward-looking projects Zimring and Hawkins envision. Instead of applause for existing commissions, or an explanation for its absence, however, the authors show a wary refusal to take a position. Near the end of *The Scale of Imprisonment* they come abreast of endorsement when they say that sentencing commissions and guidelines are at least "an attempt to centralize authority over one major determinant of prison population and hold some power at the same level of government that pays the cost of imprisonment."⁷⁴ Elsewhere, however, it becomes clear that their judgment is very much withheld.⁷⁵ Indeed, they cite the Minnesota and federal experiences in support of the view that sentencing commissions are unreliable instruments of reform.⁷⁶ As evidence, the authors note that the Minnesota commission succeeded through most of the 1980s in slowing state prison growth, but draw a sharp contrast with the federal guidelines which, from the outset, were drafted with the expectation that federal prisons would expand continuously for a decade and more.⁷⁷ From this comparison they infer that "the example of Minnesota may be misleading."⁷⁸ Although the authors acknowledge that guidelines can be written to alleviate prison overcrowding, "it by no means follows that all sentencing commissions will take . . . constraints into

the empirical literature of criminal careers and selective incapacitation policy. See Richard Kern, *Sentencing Reform in Virginia*, 8 FED. SENT. REP. 84, 85-86 (1995). The earliest commissions based their work on "just deserts" philosophies emanating from the academic world. See ANDREW VON HIRSCH ET AL., *THE SENTENCING COMMISSION AND ITS GUIDELINES* 65-66; 84-85 (1987).

⁷³ See Sandra Shane-DuBow, *The Demise of the Wisconsin Sentencing Commission*, 8 FED. SENT. REP. 99, 101-02 (1995).

⁷⁴ ZIMRING & HAWKINS, *supra* note 1, at 212 (emphasis added).

⁷⁵ See *id.* at 160-62; 201-03.

⁷⁶ *Id.* at 160, 161, 202-03.

⁷⁷ *Id.* at 161, 201. And indeed, some other state commissions chose not to follow Minnesota's resource-sensitive model. See *id.* at 202. Minnesota itself, beginning in the late 1980s, amended its guidelines to usher in a period of planned incarceration expansion. See Richard S. Frase, *The Role of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines*, 28 WAKE FOREST L. REV. 345, 359-61 (1993).

⁷⁸ ZIMRING & HAWKINS, *supra* note 1, at 201.

account."⁷⁹

The divergent outcomes may be conceded, but they do not support Zimring and Hawkins' verdict that commissions and guidelines are "stunning" illustrations of "contingency in the impact of criminal justice reform."⁸⁰ Rather, the assembled data show that sentencing commissions have been successful at producing the aggregate sentencing patterns they have wanted to produce.⁸¹ The lesson of the federal and Minnesota commissions is that such agencies may be used to expand a jurisdiction's inmate population if that is the systemwide policy they are asked to pursue and, with equal facility, they can engineer the opposite result. Indeed, a recent study by Thomas Marvell found that "Sentencing guidelines are strongly associated with comparatively slow prison population growth whenever the legislature charged the sentencing commission to consider prison capacity when establishing presumptive sentencing ranges."⁸² Far from Zimring and Hawkins' assessment of "stunning contingency,"⁸³ Marvell remarks that "These findings are a refreshing departure from the usual negative results when evaluating criminal justice reforms."⁸⁴

The manuscript for *The Scale of Imprisonment* was prepared in the late 1980s, and the era of the sentencing commission has come more fully into bloom since that time.⁸⁵ It is surely too soon to pass historical judgment on the commissions with a capital "H," especially in the field of criminal punishment where so many self-advertised law reforms have gone awry over the years. This is perhaps the best explanation for the inconclusive treatment accorded to commissions in *The Scale of Imprisonment*. The very skepticism Zimring and Hawkins urge on other scholars makes them poor candidates for strong enthusiasm over late-breaking developments.

Even so, such academic restraint leaves the 1990s policy making community a bit high and dry. The needs of the coming decades do not allow for such purism, nor is it necessary to surrender all intellectual agnosticism in deciding how to move forward. To take a view that

⁷⁹ *Id.* at 202.

⁸⁰ *Id.* at 160.

⁸¹ See Michael Tonry, *The Success of Judge Frankel's Sentencing Commission*, 64 U. COLO. L. REV. 713 (1993).

⁸² Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696, 707 (1995).

⁸³ ZIMRING & HAWKINS, *supra* note 1.

⁸⁴ *Id.*

⁸⁵ In the 1990s, new commissions have been chartered in Arkansas, Kansas, Louisiana, Massachusetts, Michigan, Missouri, Montana, North Carolina, Ohio, Oklahoma, South Carolina, and Virginia. See Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 173-74 (1995); Kevin R. Reitz, *The Cutting Edge of Sentencing Reform*, 8 FED. SENT. REP. 64, 64-65 (1995).

is provisionally in favor of the creation of sentencing commissions, one need not approve of the workings of all existing commissions, nor does one have to approve entirely of the workings of any one commission. We may concede that the commissions are neither perfect nor perfectible, yet still believe that they add necessary elements to the administration of criminal justice.

VI. CONCLUSION

The Scale of Imprisonment is one of the most significant books about the legal institutions of criminal justice produced in the last decade. First, the book identifies a question of overwhelming social and policy importance that has been wholly ignored or weakly addressed. Second, the book's subtext contains a more ambitious set of standards for intellectual inquiry than those that have driven prior studies of imprisonment. Zimring and Hawkins' views of academic rigor may even provide a useful template for legal-empirical scholarship in other domains. Third, the book has currency in the historical moment. Although Zimring and Hawkins do not argue in these terms, *The Scale of Imprisonment* may interact with the ongoing phenomenon of prison expansion and the recent institutional innovation of the sentencing commission in powerful ways. The headless quality of our legal structures of criminal punishment, one way or another, needs to change.