



**The 'Great Recession' and criminal justice:
The value of scarcity?**

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Abstract

The paper takes as its starting point that what has been termed the 'Great Recession' signifies the beginning of a new phase, with significant implications for the field of crime and punishment. Over the last few decades, market rationale as an organising principle has penetrated criminal justice public policies. However, there has been a tendency to overlook the economic principle of resource scarcity, and the recent evolution of the penal system in many jurisdictions appears to be characterised by an expansion which took for granted the unlimited elasticity of public resources. The paper looks at the cases of Spain and the United States, both countries that have seen recent contractions in their penal systems, and suggests that the economic crisis has led to the penetration within the criminal justice system of the concept of scarcity. The paper concludes with a suggestion to examine in depth the reasons underlying the change of tendency in the US case, in order to encourage a similar reduction in other jurisdictions.

Introduction: The ‘Great Recession’ and the criminal justice system

This paper takes as its starting point a seemingly indisputable assumption: what has been termed the ‘Great Recession’ has opened up a new period, thoroughly affecting our life in common, at least in the countries which stand at the core of the crisis. Whether the Great Recession is interpreted as the onset of a new cycle of capitalist accumulation at a global level (Arrighi, 2007) or regarded as a moment of less transcendental importance, the Great Recession constitutes a genuine event, with all the semantic density that term implies.

The field of crime and punishment has not remained unaffected by this event – the Great Recession raises questions of clear relevance to the field. Without a doubt, one of them has to do with the crisis of legitimacy of traditional criminalisation processes, seen from the perspective of the debate on social harm (Bernal et al., 2012). In a nutshell, it demands that we reflect on the purpose of a criminal justice system still aimed at prosecuting and punishing behaviours which cause very limited harm (e.g. petty property crimes), at a moment when the crisis, originated not only by risky financial operations but also by law-breaking and criminal acts, crushes the hopes and expectations of millions of people. This observation should impel us to reflect on the principles which have sustained the modern criminal justice model until now.

The Great Recession also entails a second, perhaps more unexpected, transformation of the criminal justice system. The crisis has led to the penetration within the criminal justice system of the concept of resource scarcity, a notion which previously had not touched this area of public provision. The recession has fostered an increasing interest in economic texts, and has compelled the field of criminal justice to pay attention to this literature as well. Yet perhaps it is not the best time to go back to texts from the political economy of punishment tradition. Instead, we advise rereading an article far from any critical tradition: Gary Becker’s (1968) seminal text on the economic analysis of crime and punishment (Law and Economics (L&E)). In this text, the University of Chicago neo-classical economist set out a starkly utilitarian methodology for normatively analysing the criminal justice system. Becker concluded that a society should accept that in certain cases criminalisation and prosecution is cost-inefficient, and hence a certain level of impunity should be collectively accepted (Becker, 1968: 170).

Market rationale and the criminal justice system

Probably the most striking point of Becker’s claim is that, irrespective of his own intentions, it allows for a certain progressive reading (Harcourt, 2011). Its radical utilitarianism offers a less sinister outlook than the punitive dystopias that have arisen in many countries during the last decades.

This economic perspective cannot be regarded as wholly new to the current criminal justice system. Simultaneous with the spread of the neo-liberal *doxa* in the last decades, market rationale as an organising principle has gradually penetrated public policies, even in the field of penal systems which seemed particularly resistant to this kind of logic. The market rationale has penetrated the criminal justice system through the introduction of public managerialism (Anitua, 2005; Garland, 2001), the responsibility of individuals in the management of their own crime risks (Bauman, 1998; Dean, 2007), and the commodification of crime prevention and punishment (Christie, 1993; Garland, 2001). Indeed, the actuarial teleology of risk management and control is completely consistent with the market rationale (Dean, 2010; O'Malley, 2004).

Nonetheless, the gradual penetration of the market rationale into the realm of penal policy has rarely included the principle of resource scarcity. The recent evolution of the penal system in many jurisdictions appears to be characterised by an expansion which takes for granted the unlimited elasticity of public resources. Indeed, according to International Centre for Prison Studies (ICPS) data (Walmsley, 2011), during the period 1992–2010 only two of the G20 states (Canada and South Korea) witnessed a decline in their prison population rates, while these rates doubled in three countries (Argentina, Indonesia and Mexico), and tripled in two more jurisdictions (Brazil and Turkey)¹.

The Great Recession and change in the Spanish criminal justice system

The trend of expansion and the consequent tendency to overlook the economic principle of resource scarcity does not pertain solely to G20 States. According to the latest edition of the *World Prison Population List* (Walmsley, 2011), the prison population grew in 78 per cent of world countries between 2009 and 2011.

Nor is the expansionist trend alien to the Spanish criminal justice system. According to the National Institute of Statistics (INE), the Spanish prison population increased 102.7 per cent between mid-year 1997 and mid-year 2010, while the Spanish population grew by only 18 per cent during the same period. Indeed, Spanish penal policy appears to be a paradigmatic case of neglecting the limits of collective resources. As in the US (Cavadino and Dignan, 2006; Holleman *et al.*, 2009; Wacquant, 2004), in Spain the huge financial, human and logistical resources required by an uninterrupted penal expansionism never seemed to be a big deal.

¹ The prison population rate dropped in South Korea between 1992 and 2010 from 126 to 99, and in Canada from 123 to 114. The Argentinian rate increased during the same period from 62 to 145, the Indonesian rate from 21 to 49, and that of Mexico from 98 to 197. The Brazilian prison system witnessed during the same time span a growth from 74 to 253, while that of Turkey multiplied its rate from 54 to 164.

Nonetheless, the Great Recession has constituted a remarkable turning point for the Spanish criminal justice system. Though the Spanish prison system has experienced almost constant growth since the end of the autocratic period², the deepening of the economic downturn has finally curbed the rise of punitiveness. As can be seen in Table 1, between mid-year 2010 and mid-year 2013 the Spanish prison population dropped by 10.2 per cent, while the prison population rate diminished from 163 to 146.

Table 1: Evolution of the Spanish prison population, 2010–2013

Year (month)	Prison population (total)	Prison population rate
2010 (June)	76,701	163
2010 (Dec.)	73,929	157
2011 (June)	72,961	155
2011 (Dec.)	70,472	149
2012 (June)	70,695	150
2012 (Dec.)	68,597	146
2013 (June)	68,857	146

Sources: INE (www.ine.es); Spanish Prison Office (*Secretaría General de Instituciones Penitenciarias*) (www.institucionpenitenciaria.es)

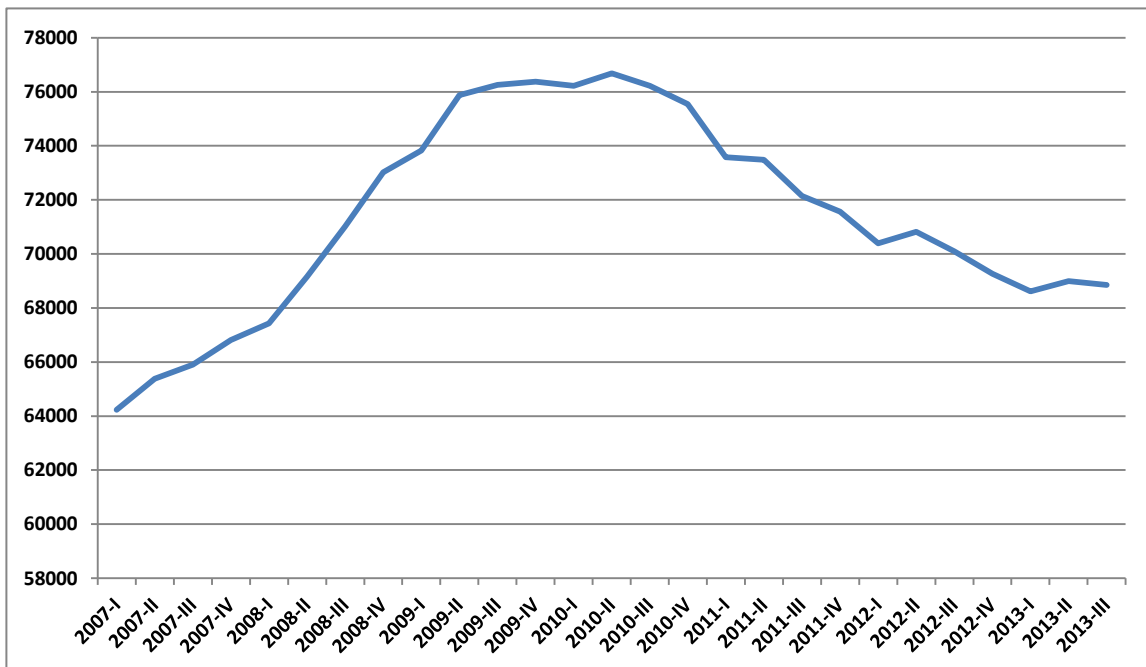


Chart 1: Evolution of the Spanish prison population, by quarters, 2007–2013

Source: Spanish Prison Office

² The Spanish prison population skyrocketed 901.4 per cent between 1975 and 2009, and its rate climbed from 24 to 165.

In principle, these figures could be interpreted as showing that this is not a real change of cycle but rather a momentary juncture (Forero and Jiménez, 2013). Nonetheless, it seems difficult to dismiss this situation in a jurisdiction traditionally characterised by unbounded penal expansionism. Two further arguments challenge the notion that the current trend is irrelevant. First, the evolution cannot be seen as a mere mechanical effect of the system, due to a reduction in the number of prosecuted crimes. In contrast to what has been happening in the field of prisons, since the onset of the recession the recorded-crime rate has steadily fallen, but both the number of convicted individuals and the number of individuals sentenced to prison have been increasing³. Second, the contraction of the penal system has not affected only prisons, but also other sectors of the system characterised as especially costly. The most striking case is the deportation

³ This can be seen in Table 2:

Table 2: Evolution of the Spanish penal system since the beginning of the Great Recession

	2008	2009	2010	2011	2012
Recorded-crime rate	51.9	50.0	48.9	48.4	48.0
Number of arrested individuals	350,859	362,488	351,967	468,253	461,042
Number of convicted individuals	206,396	221,916	215,168	221,590	221,063
Prison sentences	129,890	139,663	141,849	135,713	142,444
Prison sentences longer than 2 years	-----	-----	15,336	13,297	12,328
Number of prison entries (rate)	49,852 (106)	52,458 (111)	49,034 (106)	-----	-----
Number of prison releases (rate)	-----	44,130 (94)	48,686 (105)	-----	-----
Prisoners classified in open regime (Dec.) [rate]	8,372 (16.0%)	9,618 (16.2%)	9,731 (16.4%)	9,701 (16.9%)	9,083 (16.2%)
Average length of imprisonment (months)	17.3	17.9	18.5	-----	-----

Sources: Spanish Home Office, INE (arrests and conviction data); Eurostat, Spanish Home Office (crime data); SPACE I, Council of Europe; Prison Office (prison data).

Both Forero and Jiménez, 2013, and Rodríguez and Larrauri, 2012, highlight that the crime rate has been diminishing since the beginning of the crisis, and claim that the reduction of the prison population may be partially explained by the legal reform that attenuated penalties for drug trafficking in 2010, and by the rise in the number of foreigners sentenced to deportation instead of imprisonment.

regime: according to official Spanish Home Office data , the number of deportations dropped by 23.6 per cent (from 13,278 to 10,130) between 2009 and 2012, irrespective of the evolution of the irregular migrant population.

To sum up, it would be ingenuous to imagine that this is a merely conjunctural dynamic, or that the current trend is unrelated to the deepening economic recession. Rather, it seems reasonable to accept that the Spanish criminal justice system has encountered the principle of scarcity.

Penal dystopia in decline? The evolution of the US criminal justice system

The Spanish situation is in no way exceptional⁴. In recent years, even the extraordinary expansionism of the US has encountered its own limits. The rise of the US prison population has slowed remarkably since the beginning of the century, and began to fall from 2007–08 onwards (see Table 4). Indeed, while the US criminal justice system has stood for decades as the best example of the dystopia of apparently unlimited penal expansionism, in the context of the crisis it has become a paradigmatic case of the consequences of the Great Recession and the principle of scarcity in the field of punishment.

Table 4: Evolution of the US prison population, 2007–2011 (in thousands)

Year	Prison	Probation	Parole	Prison population (total)
2007	2298	4293.2	826.1	7337.9
2008	2308.4	4270.9	828.2	7312.4
2009	2291.9	4204	819.3	7232.8
2010	2266.8	4055.5	840.7	7076.2
2011	2239.8	3971.4	853.9	6977.7

Sources: *Sourcebook of Criminal Justice Statistics* (www.albany.edu), *Bureau of Justice Statistics* (bjs.ojp.usdoj.gov)

⁴ The evolution of several EU countries, particularly those most acutely hit by the economic downturn, can be seen in Table 3:

Table 3: Evolution of the prison population rates in several EU countries, 2007–2013

	2007	2008	2009	2010	2011	2013
Cyprus	106	104	111	112	108	-----
France	100	104	103	103	111	102
Germany	94	91	89	88	87	80 (2012)
Greece	100	110	98	106	110	111 (2012)
Ireland	80	85	88	97	93	92
Italy	78	96	107	113	111	108
Portugal	109	101	104	109	120	136
UK	145	151	150	152	151	147

Sources: SPACE I, Council of Europe (2007-2011 data); ICPS (2012/2013 data)

This recent downturn was foreseen by several authors, even before it was confirmed by statistical data (Beckett and Sasson, 2004; Tonry, 2004; Wacquant, 2004)⁵. This scholarship provides insight into the reasons behind this reduction, giving little credence to simplistic explanations which mechanically associate it with crime trends. Three different factors seem to have influenced the emerging contraction of the US penal system.

First, the decline of the importance attributed to crime by US society (Lynch, 2008; Pratt, 2007), despite the persistence of punitive attitudes among the population (Pratt, 2002; Western, 2006). Declining anxiety about crime seems to be influenced, at least to a certain extent, by a drop in crime rates, which in recent years have remained distinctly lower than some 20 years ago (Beckett and Sasson, 2004; Pratt, 2002; Simon, Haney-Lopez and Frampton, 2008). Moreover, the increasing momentum gained by other concerns (e.g., terrorism, immigration, or the decline of the middle class) have influenced the falling salience of the fear of crime (Clear, 2008; Simon, Haney-Lopez and Frampton, 2008).

Second, the recent evolution of the US penal system owes much to increasing awareness of the failures of constantly increasing punitiveness as the sole response to crime (Campbell, 2010; Clear, 2008; Simon, Haney-Lopez and Frampton, 2008). Therefore, other issues have been gaining relevance in the field of penal policy, particularly the re-entry of released prisoners into the community (Beckett and Sasson, 2004; Simon, 2008; Western, 2006). In accordance with this shift in penal policy, several US states have undertaken legal and logistical measures aimed at reversing the trend of prison population growth (Brown, 2009; Gottschalk, 2013; Harcourt, 2011; Karstedt, 2013; Koulisch, 2010; Pratt, 2007)⁶.

This latter point leads to the third explanation of the US penal evolution, which appears to be particularly relevant. The US economic slowdown of the beginning of the century – which obviously intensified after 2007 – led to fiscal restraints and to concerns regarding the cost of the penal system, crucial in halting its expansion and in initiating its contraction (Brown, 2009; Campbell, 2010; Gottschalk, 2013; Karstedt, 2013; Lynch, 2008; Re, 2006; Simon, Haney-Lopez and Frampton, 2008; Western, 2006)⁷. This last matter can hardly be overestimated: as a sort of confirmation of the blunt utilitarian realism of the L&E perspective, even a penal expansionism as ambitious as that of the US finally encountered the budgetary limits of its development.

⁵ In contrast to this literature, Pratt, 2002 and Western, 2006, among others, predicted an upward trend of the US prison population.

⁶ Lea and Hallsworth, 2012, claim that similar measures have been undertaken in Britain.

⁷ A similar perspective has been highlighted in relation to Britain (Pitts, 2012; Reiner, 2012), and to other EU countries (Karstedt, 2013).

Concluding remarks: towards an updating of critical thought on punishment?

This brief analysis of the evolution of several different penal systems in the context of the Great Recession allows us to venture a few hypotheses, intended to engage in an ongoing reflection upon critical approaches to punishment. These claims are both provisional and rather bold, but our times, like any other moment of crisis, should be taken as an invitation to test new ideas or recycle old ones by reconsidering them (Karstedt, 2013).

First, as mentioned above, there are good reasons to believe that we are at the beginning of a new period. At least to a certain extent, analytical models that were as widespread some years ago as Giorgio Agamben's (2005) *permanent State of Exception* or Loïc Wacquant's (1999; 2004) *Penal State* begin to seem somewhat outmoded⁸. In part the novelty of the current situation has to do with the closure of a historical cycle, at least in the United States, where an ambitious experiment of penal severity finally met its limits, both in terms of its poor effectiveness in prevention and in terms of the relative inelasticity of public resources.

Second, the onset of this new phase invites innovation in the field of critical discourses. It is important to examine in depth the reasons underlying the change of tendency in the US case and to analyse the applicability of these reasons to other jurisdictions, in order to encourage a similar reduction. The crisis should be approached as an extraordinary moment of opportunity for reshaping collective priorities, rethinking the penal system in terms of social harm (Bernal et al., 2012; Huisman, 2012), and putting an end to its role as the warehouse for social anxieties which have little to do with those conflicts we label as crime (Bauman, 2006; Zedner, 2009). For these purposes it will probably be necessary to learn to speak new languages and accept strange bedfellows. The language of rights and that of the suffering caused by punishment are still necessary, but heretofore they have clearly been insufficient. The crisis pushes us to embrace the language of scarcity, opening up a broader debate on what is really essential in addressing social needs and problems. Within this framework, critical analysis should not shy away from economic semantics. In the short term, an immanent utilitarianism such as Becker's appears to be a better alternative than the experiences of sovereign, exceptionalist and incapacitating penalty we have witnessed in many countries during the last decades.

With regard to a draft version of the paper, it was pointed out that its claim may be either too heterodox, or even cynical. We still tend to think that it is not. We would

⁸ Karstedt, 2013, claims that the recent penal evolution shows that neo-liberalism does not unavoidably lead to a persistent expansion of the penal system.

prefer to believe that the argument may be read as an expression of what the *Situationist International* (Internationale Situationniste, 1959) called '*détournement*', that is, overdetermining and overemphasising a claim which is alien to our reasoning, and subsequently twisting it for our own purposes. Thereafter, as the Situationists would have recommended, it is time to see where *la dérive* (the drift) will take us (Debord, 1958).

Annex: Re-imagining penal policy

Before being appointed as senior advisor to President Barack Obama, Rahm Emanuel gave a public speech during which he said: 'You never let a serious crisis go to waste. And what I mean by that it's an opportunity to do things you think you could not do before'⁹. The perspective we seek to develop on this paper mirrors, at least to a certain extent, Emanuel's perspective.

A period of crisis, like the current one, may be understood as the best time to rethink public policies, and particularly penal policies. Issues such as the scarcity of public resources, the accountability of public policies and the need to reframe them in terms of public managerialism are gaining momentum since the onset of the economic downturn.

From a critical stance, that is, without assuming the neo-liberal *doxa*, the current period of scarcity appears to be a most suitable time to reflect on these managerial claims in regard to penal policies, and to resort to them in order to re-imagine justice and penalty.

⁹ Quote from The Wall Street Journal CEO Council of the 19 of November 2008 in Washington DC.

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