

CLOSING ADDRESS

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It's an impossible task to try to draw into a coherent single presentation the range of material that we have been involved in yesterday and today. Today, unlike yesterday, I haven't lost my notes; the problem is that I've got the damn things! And they seem to me incoherent at best. I can maintain no pretense of comprehensiveness of coverage. All I can achieve is a sort of a dull repetition. I suppose what one does in a closing address is offer a sort of a secular blessing, and I seem peculiarly well fitted for that with a Jewish father and an Irish mother.

I did write a few things recently, one bit of which I think is relevant to the problems we face. I suggested that this is a trying time for the values implicit in criminology. I think that's been demonstrated in our two days. It is a time when the public demands breakthroughs in knowledge about crime and criminals, and great leaps forward in the effectiveness of crime control. But small increments in our store of information and minor improvements in crime control are all that we can offer, unless fundamental democratic values are to be sacrificed. The mythology of burgeoning crime, and of overwhelmed or inept police, courts and correctional institutions, dominates public discourse and distorts political action.

The tension between belief and truth in criminology is by no means unique to criminology. It is common in the social sciences and elsewhere. But it is particularly strong here, and for two main reasons. First, people are born experts on the causes and control of crime. They sense the solutions in their bones. These solutions differ dramatically from person to person, but each one knows, and knows deeply and emotionally, that his perspective is the way of truth. A peculiar blend of intuition and common sense guides everyone on these topics, clearly, firmly, and to widely divergent conclusions. Second, there is no developed discipline of criminology. Criminology is the effort to apply insights from the social and biological sciences to the causes of crime and the consequences of different crime prevention and control methods. Hence, no one can possibly be an expert. The range of knowledge required is too great.

Criminological insight is inherently synthetic. In such a situation, with confident belief confronting uncertain glimmerings of knowledge, the strain on the synthetic discipline of criminology is very great.

I think the right first question was asked by Sheldon Messinger yesterday: what does overcrowding mean? Crowding, you know, is business as

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usual. What is overcrowding? Well, I suppose it has two perspectives. And these have been suggested in different ways by different speakers. First of all, it has a human rights and eighth amendment perspective that has been elegantly presented by this panel. Institutions must provide minimum human decencies. This isn't connected with crime control, and it shouldn't be. It's got nothing to do with the rate of crime in the community. It's got to do with our view of minimum conditions that a fellow citizen should live under.

The other perspective on overcrowding is that of the prison administrator. It concerns the political risks of riot, and the difficulties of administering institutions with large numbers of people in close circumstances, with insufficiencies in both supervision and provision of reasonable opportunities for self-expression.

Neither of those propositions speaks to how many people should be in prison in America. Neither of those perspectives says whether there are too many prisoners in America now, as many people think, or too few, which many people think. And both of these views are passionately held. Jim Jacobs' insistence on a nonemotional approach is I think a prime lesson of this morning's session, and I thought it very important.

So it's either too many prisoners or too little space, or some mixture of those, and they are very difficult to quantify. But surely we are anxious about it, because the numbers increase, and there is too little space from a human rights perspective, and from a prison administrator's perspective. In addition, we're embarrassed to have such a large portion of our population in prison, and in particular such a large proportion of our Black, Hispanic and Indian communities in prison. So, at present, we have thirty-six state commissions on prison overcrowding and this one excellent colloquium.

And the task of the colloquium, you'll recall, was to develop responses to prison overcrowding. And I suppose that's the task of all the thirty-six state commissions. But I'm a bit skeptical about that too. The reason I'm skeptical derives from a personal experience where I was in the office of my then law dean. He shouldn't have let me stay there, but he did. The Prime Minister of Australia telephoned him and asked him to serve on a commission on public broadcasting in Australia. My dean, George Paton, said how privileged and flattered he was by the invitation and how very much he'd like to serve the Government. Unfortunately, however, he had to be out of the country for the next six months. And the Prime Minister replied: "The very man I've been looking for!" One wonders whether the prison commissions are not techniques of buying time. And that's not stupid either; that may be a thing that needs to be done.

In all events, there's a pervasive sense of crisis, and we're not very clear what the crisis means. I'm told that for years it has been thought that the criminal justice system of New York City would break down one day. It's clear to me that it broke down years ago. Crisis is, like other things, very much in the eye of the beholder, and a crisis can exist for a long, long time indeed.

Well, why crowding? What's changed? What are the optimum numbers? I think the first insight is a depressing one. The rates of crime among certain parts and among certain groups of communities that make up the United States, particularly the destroyed inner-city areas, are such that they are capable of producing, with rational and defensible sentencing structures, very much larger prison populations than we've got.

We have, compared with other countries, not only high prison populations, but also, among the groups that produce the prison population, very much higher crime rates. Now that's got nothing in my view to do with police, with courts, or with corrections. It's got to do with many other processes in which the criminologist is not particularly useful, with the complex history of a vibrant, anonymous, independent, and government-suspicious country. I go to many prisons, and so do many of you, and I look at lots of records. You do find a few records of prisoners who you think should not be in prison. But I must confess that for most of the people I talk to, or whose records I examine, the prison sentence is appropriate. I apologize for what may be offensive to some, but mine is an effort to state the truth as I see it. It is not a result of my liking prison; I find the process of caging an awful degradation of the human spirit, no matter what the conditions are in the prison. But largely for reasons offered the other day by Jerome Miller, it is clear that we are short on alternatives to prison, and for large numbers of our criminals we don't know what else to do except to imprison them.

We had a better statement than mine, for what causes the increased crowding or overcrowding, from Alfred Blumstein: demography. The baby boom moves in a halting sort of way, from schools, to crime, to prisons, and part of the increase can be so explained. But also there seems to be increased numbers in prisons by virtue of increased punitiveness by the functionaries of the criminal justice system who believe, probably correctly, that the community at large is increasingly punitive. This is not, as Perry Johnson pointed out, related to any reality of increased crime. Crime rates and imprisonment rates seem to march to quite different drummers. It's geared to the mythology about crime, not the reality of crime. But nevertheless, it seems to exist.

It may also be true that part of the grounds for increase is that we have imposed on the criminal justice system in the last ten years improved front-end efficiencies. And I think what Kay Knapp said yesterday about looking into why they were moving towards their cap in Minnesota, was enormously important. She said that it went against her assumptions, but on looking into the data it seemed that what was moving this was change in prosecutorial practice. That is, prosecutors decided that certain selected more dangerous offenders should be pursued in such a fashion that they would fit within the guidelines and go to prison. You should not assume that that is wickedness on the part of the prosecutors. Prosecutors may well be right in their selective incapacitation decisions. And that is what prosecutorial discretion

is—allocating their resources for increased efficiency for more dangerous offenders.

Likewise, legislative initiatives in providing for increments in judicial sentencing pass on messages, as do the mandatory minimum sentences, to all those who impose sentence. They have clearly led to increased severity of sentencing and an increased prison population. In relation to the increased court activity, I take it the courts have become less clogged, freeing up resources, and the courts therefore can get ahead more swiftly with their work.

In other words, the earlier protections of inefficiency have been in part removed. If that's a cheerful message, anything will comfort you. But it is probably true. Over more than a decade we allocated substantial resources to police, courts, and corrections which were grossly disproportionate to the resources, energy and intelligence that was allocated to sentencing and everything that follows it. And I think we're paying part of the cost of that now. We have fewer resources from sentencing onwards, and more at the earlier stages.

We've heard panels on sentencing theory. Papers by Singer, Feinberg, the von Hirsch-Gottfredson gavotte, and an earlier comment to draw this together made by Al Bronstein, who said that he didn't think what we were doing would have any impact on crime. But I want to make a larger point. I don't think any difference between those of us on the panel on sentencing theory has any influence on prison overcrowding. Under all of these systems or any variation of them you could put linkages to practice in sentencing, which would produce twice as many or half as many prisoners.

Sentencing theory is important. It's important to the values of equality, fairness and justice. But it doesn't happen to be important to prison population, unless you do something the Minnesota system did and does, which is to build into your sentencing theory a prison population cap, and stick to it. But you could do that with any of the theories. You wouldn't need presumptive sentences to do it. Yet, because it is easier to do it through presumptive sentencing, and because presumptive sentences could be used under any of these theories. I think it is an important mechanism. It is one of the tools we will have to use if we wish to reduce the number of Americans that go to prison, and put them in better condition, or at least remove the most undesirable conditions. However, I don't think that sentencing theory will provide us with an extensive guide.

Imprisonment, then, is our residual punishment under every sentence, under every system. And I just want to contrast three statements about imprisonment that I heard here. First of all, Jim Jacobs: Imprisonment remains, in the public mind, the only response to serious crime. I think that's true. Jerry Miller: We do imprisonment because we can't think of anything else to do. We have been lacking in innovativeness, we have been lacking in seriousness of purpose, and we have been uninventive about the reality of alternatives and our investment of energy into them. I think that's

also true, and the two propositions don't contradict one another. Finally, Perry Johnson: Well that may be all right, but it's not imprisonment that's the problem, it's the duration of imprisonment that's the problem.

It may be, that out of a mixture of those three diverse insights, the central area where we've gone wrong emerges: linkage should be made between any sentencing theory and time if we have to do imprisonment, because we can't yet be more innovative. And it leads me to think that the rational path of development is to devote our energy to move towards shorter periods of time as the norms of sentencing in this country. One of the great contributions in this area was made by Gottfredson and Wilkins.¹ They made the United States Parole Commission guidelines move from assessing time to be served in years to assessing it in months. The techniques of measurement became enormously important in changing the mental frame of reference toward sentencing, which in this country assumes very long sentences as compared with sentences in other countries.

All right, what about prison overcrowding and sentencing practice? I assume the problem is one of not widening the net. I assume the problem also is one of being innovative and putting teeth into alternatives; but I can't contribute usefully there. I can say that the move towards mandatory minimum sentences has't helped at all. That has aggravated the problem by precluding a rational allocation of prison space. More importantly, the symbolic significance to politically sensitive judges is also a source of mischief. That's what the legislature thinks the community wants.

It seems to me that Perry Johnson's statement is very important. That is that much of the increase came from a group of prisoners who previously would have been given probation. Instead, stimulated by a belief in greater punitiveness, these prisoners had been moved to imprisonment, and towards longer terms of imprisonment.

This leads me to a problem we all confront: political considerations become centrally important. "Political" here tends to be used in a pejorative sense; I think that's a pity. By and large, our processes of government are reasonably good, even in Chicago. And I am prepared to play within them, and I imagine you agree. And in so doing, we have a situation in which it gets votes to overpromise a decrease in crime by an increase in punitiveness. And it seems to me that one of the roles that we who try to study this must assume is to be serious, rigorous, and open critics of that promise. That is to endeavor to demonstrate, over and over again, that the promises are false.

Many of you took refuge, it seemed to me, in the belief that fiscal constraints were going substantially to reduce or limit the numbers of people who would be sent to prison in this country. I think that's an extraordinarily

1. D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *GUIDELINES FOR PAROLE AND SENTENCING: A POLICY CONTROL METHOD* (1978).

weak reed to rely on. I think that the constant statement of what it costs to build a cell misses the point. There are many alternative forms of incarceration that have been pursued. Tents and conversions demonstrate that states and the federal government are capable of the most extraordinary absorption of increased numbers. I wish it were true that money would operate as a constraint. I think that at best all it can do is to make the legislators and the community more sensitive to the possibility of developing alternatives. But this will be in addition to their movement toward punitiveness. I'm skeptical that costs, even in a period of depression, have so far shown much capacity to put a lid on prison population.

That's not very cheerful, but let me be a little Pollyannaish on another matter. Alvin Bronstein was kind enough to talk to me at breakfast about these matters. He started this series of divulgements of confidences, so why shouldn't I continue it? He said that he thought over the years conditions had got a lot better in Alabama prisons. I agree. In the eighteen years that I've been in this country, the general measure of minimum human rights within prisons has improved substantially. I think there is considerably less brutality by staff to prisoners. In the more grossly overcrowded prisons, a bigger problem is brutality by prisoners, but that is not a new problem.

I think the professional interest of people like those in this room and our counterparts in prisons has had a beneficent effect. It is my experience, wandering around prisons, that there has been a general amelioration of prison conditions. There are, of course, contrary pressures, including those tensions which arise from the terrible pressures of over-population. And I repeat, this population is selected from a potentially vast pool compared with the numbers we now have locked up. Although I know that offends some of you, I think it is true. But, all in all, over these eighteen years, new constituencies, new interests, better standards of training, better quality of staff have together produced observable improvements.

Now what I think has confused our discussion is the oversight in failing to distinguish sufficiently between remedial and distributive justice. You've noticed the confusion whenever the problems of class and race arose. Generally speaking, the statements about the disproportion of Blacks in prisons were understated. The actual disproportion is of the order of 8 to 1 per 100,000.² And the same is true of both Indians and Hispanics.

If we regard ourselves as part of the criminal justice control system, does that mean that we are effecting discrimination in a pejorative sense? We may or may not be. It depends upon the emergence of color-neutral principles by which one can state who should go to prison, and for how long.

And absent acceptance of those principles, it's very hard to be sure. If you compare arrest rates with imprisonment rates, as Blumstein and others

2. Blumstein, *On the Racial Disproportionality of U.S. Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1260-61 (1982).

have done, it does not look as if the criminal justice system, from arrest onwards, is skewed against blacks. Arrest rates for what are judged as imprisonable crimes (and I know there's a class bias in that judgment), probably underestimate the black-white distinction. And from a distributive justice point of view, there is no doubt that the black victim is the most discriminated against person in the system.

As criminologists we cannot rectify those problems of distributive injustice. As citizens, with some impact on political processes, I hope we can be of use. But as criminologists, although we are interested in both the efficacy and constitutionality of the criminal justice system, we are not involved in *distributive* injustice. Instead we are involved in efforts at improving *remedial* injustice. The reality is that we are not going to be a curative force. Still, we must derive racially-neutral principles to minimize the harm that our criminal justice system may do, as well as maximize what little good it may do.

I don't offer any nostrums other than those offered by the Liman committee, or by Perry Johnson this morning. I think all we can do is to support alternatives to imprisonment, struggle for the imposition of lesser sentences generally, and work on earlier release and halfway house processes. We must also, regretfully, expand our prison capacity where necessary, because the human rights values remain very important. And to achieve minimum rights, we have to expand capacities, though many on this panel are troubled by it. We have also to oppose mandatory sentences. In other words, I am offering a very dull, very weak nostrum, suggesting that we are very modest people in this whole area. All we can do is make our work better, make ourselves more responsible in understanding the problems of crime, and focus directly and with information on the mythology of crime and the misleading information that politicians sometimes rely on.

One other situation was suggested to me by my late, great colleague, Hons Matik. He said, of course, it's all very simple, just give the prisoners the vote, and all else will follow. He may have been right. It may be that what we are looking at is a politically unprotected, or relatively unprotected, group of people who if they became a politically active constituency might move forward. But that's not going to happen.

So, what's the answer to overcrowding? I think the first answer is the one that Blumstein and Jacobs in effect suggested, which is a cheery one; you know, this too will pass. It is highly likely that the problem of prison overcrowding will pass for demographic reasons, and because there are already hints of perception by the political actors of the errors of some of their ways. I do not know what level of population in this country's prisons will have to be achieved before the problem begins to diminish, but it will pass.

We have to work on rational sentencing theory, knowing that it will only have a minor impact on prison overcrowding. And we have to try to relate more effectively to the decision-makers. I think Bronstein's criticism

of the absence of decision-makers from this conference is a well-taken point, but it's a hard one to meet. They simply don't come. In many cases, they simply are not politically interested. But it's not always so. In Illinois, Richard Ogilvie, then the Governor, was remarkably interested in this field. He made dramatic changes, changes from which subsequent governors, by sloth and inefficiency, have regressed. But the point is that there are decent people working in this field, and we've got to forge better relationships with prison administrators.

To conclude, I want to take issue with one figure of speech that Perry Johnson used. He said, you know, it's really terrible to blame the prison administrators for overcrowding. It's like taking a five gallon bucket and putting ten gallons of water in it and blaming the bucket. Well, it's a nice figure of speech, but it's false. That bucket has a voice. We need to form alliances here between prison administrators and those of us who study and talk in public about the criminal justice system.