# DESERT SENTENCING AND PRISON OVERCROWDING: SOME DOUBTS AND SOME TENTATIVE ANSWERS

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## I

## INTRODUCTION

I wish to explore the question of the relationship between desert theory and prison overcrowding. This requires an initial definition of desert theory. Desert, or retribution, is primarily concerned with the moral blameworthiness of an act. It focuses primarily on the crime, not the criminal. In determining the type and intensity of confinement, it focuses on the past act, not on the future criminality of the offender or others like him. It rejects deterrence, incapacitation, and rehabilitation on both moral and empirical grounds. Desert theory is based on a belief that it is immoral to impose *undeserved* suffering on some so that others may gain happiness. Supporters of the theory further argue that the data thus far accumulated by researchers is at best too ambiguous to show that any utilitarian goal can be achieved by punishment, and at worst, shows that in most instances these utilitarian goals have not been achieved.

Desert theory means, in a sentencing context, that all persons committing the same crime should be sentenced to conditions which are similar in both type and duration; individual character traits, such as rehabilitation or recidivist potential, are irrelevant. But because desert theory is a morally based approach to criminality, it also requires that the substantive criminal law recognize excuses and defenses far beyond those recognized by the common law. Mens rea and a proper understanding of moral culpability and blame are essential as the basis for punishment. Defenses such as duress, necessity, diminished capacity, and perhaps even physical weaknesses such as premenstrual syndrome, would occupy a greater role in a desert-based substantive criminal law.

Thus defined, desert theory seems to increase the problem of overcrowding by threatening as a matter of principle to send every felon to prison, perhaps for a very lengthy period. I am grateful, therefore, for the opportunity to try to sift out for myself, and I hope, for others, the relation between desert sentencing and prison overcrowding.

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## II

## DESERT SENTENCING AND PRISON OVERCROWDING—ARE PRISONS NECESSARY?

The first critical point about the relationship between deserved punishment and prisons is that desert does not require incarceration. A desert theorist not only could, but should, favorably consider the total abolition of prison. Prison, after all, is a utilitarian, not a desert, institution. It was invented by the prime rehabilitationists, the Quakers, and designed by the paradigmatic utilitarian, Jeremy Bentham. It was Bentham's Panopticon (prison built radially so that a guard at a central position can see all the prisoners) which, as David Richards reminds us, was to be a "factory" for observation and control:

> These institutions (prisons), as Foucault observed, were designed not for the dignified punishment of free persons, but rather for complete isolation, surveillance, and manipulative control. If prisons arose under the impetus of religious conceptions of inducing penitence by radical isolation, they received their secular justification not from a rights perspective but from a moral perspective that regarded rights as nonsense—namely Bentham's utilitarianism.[1]

Kant, the leading desert theorist, was opposed to prison,[2] and preferred corporal punishment to incarceration in institutions which were primarily utilitarian. Desert, therefore, could be totally achieved without prison, and surely without prison overcrowding.[3]

Any concern with prison overcrowding is primarily moral, and not utilitarian. In a utilitarian world, with a consistent and rational sentencing policy, the mere fact that more people were being sent to prison than could comfortably fit there *might* not give any pause. If selective incapacitation is properly applied to only those very likely to commit offenses if released, their extra pain and the extra financial costs would be measured against the

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1. Richards, Book Review, 49 U. CHI. L. REV. 235, 247 (1982) (reviewing N. WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE (1983)).

2. I. KANT, THE METAPHYSICAL PRINCIPLES OF JUSTICE 99-107 (J. Ladd ed. 1965).

3. This does not mean, of course, that the desert theorist may simply advocate increasing the number of lashes or days in the stocks. When *lex talionis* (law of retaliation) was literally the paradigm of desert, the appropriate punishment was clear. But as punishments changed, offences against property were criminalized, and corporal punishment disappeared, the question of proportionality became murky. It is, after all, relatively easy to construct a proportionate punishment for assault, mayhem, murder (and possibly even rape) on the *lex talionis* basis. But what is the physical equivalent of the loss of a horse, or a sheep, much less bribery or an overdraft on the bank? The appropriate duration of confinement for such crimes may be no more apparent, but the clash is not so clear.

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extra suffering experienced by their victims if the offenders were not imprisoned. So long as the pain avoided by the victims exceeded the prisoners' extra pain (a most probable outcome) the prisoners' suffering would be a *necessary* (or at least a *justifiable*) and hence a valid pain.

Similarly, from a deterrence viewpoint, unless prison conditions became so serious that judges and juries simply nullified the law by refusing to sentence criminals, and thereby negated the certainty of punishment, degrading and miserable conditions could serve as a deterrent to potential offenders. It is only from a rehabilitationist approach, which is no longer viable as a *reason* for sending people to prison,[4] that overcrowding is detrimental to utilitarian goals.[5]

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4. I take it that rehabilitation, at least as a purpose of imprisonment, is dead. Virtually all recent sentencing legislation and sentencing models have eschewed the notion that sentencing should be governed by, or even informed by, the goal of rehabilitation. In retrospect, it is startling to see how the idea could ever have achieved any success at all.

I refer not to the notion that prisoners can be rehabilitated in prison—I think that hope still lingers, and indeed I would support voluntary programs of rehabilitation and education no matter how poorly they fared in the past. *See* R. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT (1979) (especially ch. 7). It is, I think, possible to become rehabilitated *in* prison, indeed even *because* of prison. It is even possible that prisoners can be rehabilitated coercively, although most observers seem to agree that this is morally questionable.

Instead when I refer to the amazing acceptance of rehabilitation, I mean the alacrity with which the system embraced the impossible argument that certain offenders could be "treated" *only* in prison. In the 1960's the ALI, Model Penal Code, § 7.01(1)(b) (Proposed Official Draft 1962) and then the ABA, Standards Relating to Sentencing Alternatives, § 2.5(c) (ii) (1968), both adopted the view that, even if an offender did not "deserve" incarceration and even if there was no need to incapacitate him or deter others by imprisoning him, he could still be imprisoned if "treatment" were available there which was not available in the free world. It is a shocking, incomprehensible notion. Society was not chastised by these groups for failing to provide alternatives to incarceration in order to treat offenders who did not need to be imprisoned. Instead, the offender was charged with accepting society's good will, even though he could receive it only by accepting the pains of imprisonment.

I leave aside the unwarranted optimism concerning the possibility of treatment at all. It is alarming that some of the most intelligent, well-meaning, humane, people in our nation could believe that we could not merely excuse, but could justify incarceration of the body to try to help the soul.

That idea is, I think, gone for good. If we continue to cling to faith in rehabilitation, we have certainly rejected it as a reason for sending people to prison.

Some critics of desert theory have argued that it constitutes an abandonment of rehabilitation. *See, e.g.*, Glick, *Mandatory Sentencing: The Politics of the New Criminal Justice*, 43 FED. PROBATION 3 (Mar. 1979). Others, somewhat more restrained, have argued that as a practical matter, law and order advocates will seize on the argument against considering rehabilitation when sentencing as a reason for rejecting rehabilitation programs in prison. *See* Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29 (1978). The first position is, at best, a simplistic misreading of desert theory, and at worst a purposeful distortion of it. *See* R. SINGER, *supra* note 4, at 97-100. The second prediction is perhaps more accurate, and to the extent that it is true, the result is to be deplored. But that is not a justification for adhering to a discredited theory.

5. It could, of course, be argued that overcrowding leads to increased tension, which may result in prison riots such as those at Ossining in December 1982. The riots caused so

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Yet no one doubts that prison overcrowding must be halted; our moral senses are repulsed by the conditions under which human beings, whatever their past deeds, are forced to live. When a legislature authorizes punishment, whether imprisonment or some other form of discipline, there are underlying assumptions about the conditions under which that punishment will be served. If we assume that the duration of the sentence is intended to impose a particular amount of suffering on the individual, then unintended suffering imposed by unexpectedly hard conditions is *underserved* suffering, and must be immediately relieved.[6]

Let us assume, however, that incarceration will continue to be, if not the sanction of first choice, a viable choice for punishment in the immediate future. How can desert theory alleviate prison overcrowding?

The first issue is whether all prison terms are equal simply by virtue of their duration. The relation between conditions of incarceration and duration of punishment has always nagged at proponents of the desert theory who have wondered whether all lost liberty is of equal punitive value or whether sentence durations should be adjusted on a "sliding scale" which considers institutional conditions and perhaps even the idiosyncratic vulnerabilities of the offender.[7] For example, a two month sentence to a maximum security institution might be viewed as the equivalent of a four month sentence in a minimum security institution. Similarly, the current tendency to equate incarceration in a county jail with incarceration in a prison seems uninformed, since, except in the most unique jails, conditions are demonstrably worse than in state prison.

This notion raises the idea that perhaps rather than punishing with terms of a uniform duration, which are assumed to be under similar conditions, punishments should be meted out in terms of "punishment points" which could be served in a variety of ways. Instead of declaring that robbery requires a twelve month term of incarceration, the judge could assess that crime with sixty punishment points. Service in the community for one week or some other non-incarcerative punishment might be worth one point,

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much loss, both to persons and property, that some reassessment of overcrowding from a cost-benefit viewpoint is necessary. While there is no doubt that prison riots are costly, and may be wholly or partially caused by overcrowding, tracing sources of the riots would be so difficult as to make the cost-benefit argument ipse dixit. This would scarcely conform with true ultilitarianism.

6. That imprisonment in sub-standard prisons should as a matter of right reduce the sentence, if not leading to outright release, is not a new idea. It was put forward, for example, in the early drafts of the Conference of Commissions on Uniform State Law's Model Sentencing and Corrections Act, Conference of Commission on Uniform State Laws, where the reporters suggested that any prisoner in a facility declared to be in violation of either constitutional or statutory minima should be entitled to two days credit for every day spent in such an institution. The Commission Committee slowly whittled this provision away, and when the act was adopted by the Commissioners, there was no·trace of the idea.

7. *See* R. SINGER, *supra* note 4.

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imprisonment in the county jail for one month worth six points, imprisonment in the state prison for one month worth five points, etc. Thus, the sentence could be satisfied by either sixty weeks of community service, ten months in the county jail, or twelve months in the state prison. So long as the offender was informed of the conditions attached to each form of punishment, his choice would be morally valid.[8]

For the desert theorist, however, this requires that non-prison alternatives be sufficiently punitive, a concern not *necessarily* shared by the utilitarian. The desert school will ask "Do the alternatives 'punish'?"

## III

## DESERT THEORY AND INCREASED POPULATION

### *A. Sentencing Equality—Should Everyone Go to Prison?*

Few aspects of desert theory have received more vigorous attack than its insistence that like crimes be treated alike: that equality of sentences *means* something. Norval Morris, in particular, has railed against this view, urging both parsimonious[9] and exemplary sentences simultaneously.[10] Thus, for Morris, of six Denver doctors who have equally cheated on their tax

8. This moves raises several other questions. Besides the theoretical problem of equating different types of punishments, perhaps even more intriguing from a theoretical point of view is the question of who should determine the method by which the sentence is to be served: whether the defendant should be given the option, or whether the judge (or other tribunal), regardless of the defendant's wishes, should impose whatever restraints he deems appropriate. Giving the offender the option would avoid the possibility that the judge, under the rubric of desert, would impose a particular punishment to serve a utilitarian goal. This, however, has raised the question of whether defendants allowed to choose their own punishments would select those that seem less severe than the punishment deserved. In fact each offender would ostensibly have the option of selecting the "easiest" alternative for him.

The question of "punishment points" is indirectly dealt with in Erickson & Gibbs, *On the Perceived Severity of Legal Penalties,* 70 J. CRIM. L. & CRIMINOLOGY 102 (1979). The authors conducted a public survey to try to determine the public perceptions of the severity of various punishments for different crimes. The persons whom they surveyed considered that one year in a jail was the equivalent of six months in prison, 7.8 years on probation, or a $3,000 fine. The equivalent of a year in prison was approximately 2.4 years in jail, seventeen years on probation, and a $6,500 to $7,000 fine. This model would at least provide a working framework for implementing a system of punishment points.

9. While the argument of parsimony is appealing, it may run into operational difficulty. How, as between equally situated offenders can one be parsimonious except, perhaps, by lottery? Entrusting the decision whether to be parsimonious,or merciful, to a single judge or decision-maker violates notions of both equality and procedural due process. For example, Professor Morris is willing to simply "choose" one of six offerenders for incarceration, while leaving the other five on probation. The heritage of such uncharted discretion has been the chaos in sentencing which recent reforms have tried to alter. *See* M. FRANKEL, CRIMINAL SENTENCES (1973). Moreover, it is not clear that parsimony will "work"; if five of every six tax evaders are put on probation after having been threatened with prison, neither specific nor general deterrence is very well served.

10. Morris, *Punishment, Desert and Rehabilitation,* in EQUAL JUSTICE UNDER LAW 137 (Dept. of Justice 1977).

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forms, five should get parsimonious treatment—probably probation—while one, chosen on some utilitarian basis, should receive as an *exemplary* sentence the punishment which he deserves.[11] This nicely confounds desert and utility theories but I am not persuaded that Morris has sufficiently explained why equality should be only a "limiting" and not a defining principle, particularly in light of Andrew von Hirsch's observation that at least since Aristotle there has been a general consensus that justice primarily requires the equal treatment of equals.[12] Equality of sentences for like offenders, to the extent that we mortals can achieve that, seems paramount.

In his eloquent and elucidating essay *Madness and the Criminal Law* Professor Morris has recently clarified his views on why equality should be only a "guiding" rather than either a "limiting" or "defining" principle. Professor Morris seems to urge that while equality is a high desideratum, mercy is a practical necessity because of the likelihood that equal sentences in the real world of political pressures will mean equally Draconian sentences: "the principle of punishing like cases alike . . . would . . . in the context of current political attitudes create an excessively severe criminal justice system."[13] Desert writers would agree that most punishments today are far in excess of what is deserved because sentences also reflect deterrent and incapacitative goals. If Morris is correct that a "pure desert" theory including the modified sentences model is not possible, some escape valve must be tolerated, if not actively encouraged. If that is Morris's point, the bow to *realpolitik* is not overly disturbing.

It appears that Morris's compromise is with the reality, not the theory, of desert sentencing. Professor Morris does not make the mistake, made by many, of confounding punitiveness with desert theory; he simply asserts that the desert movement has been, and is likely to continue to be co-opted by right-wing law and order types who find in the punishment motif or desert a justification for punitiveness. So long as that continues in the real world, Morris suggests desert theory cannot be adopted as the sole, or even the governing, principle.

At a later point in the essay, however, Professor Morris seems to argue that, as a matter of principle (i.e., even in an otherwise "perfect" desert world), equality of sentencing is undesirable:

> [T]he principle of equality . . . is only a guiding principle which will enjoin equality of punishment unless there are other substantial utilitarian reasons to the contrary, such as those that favor exemplary punishment or . . . parsimonious punishment . . . or

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11. Id. at 153-55.

12. von Hirsch, *Utilitarian Sentencing Resuscitated: The American Bar Association's Second Report on Criminal Sentencing,* 33 RUTGERS L. REV. 772, 785 (1982).

13. N. MORRIS, MADNESS AND THE CRIMINAL LAW 181 (1982).

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> . . . where there are inadequate resources for or high costs attached to the application of equal punishment. The equality principle neither restricts nor limits; it merely guides.[14]

Professor Morris's supporting arguments for exemplary or parsimonious punishments are not convincing. His strongest point is that today judges "uniformly" depart from desert to impose exemplary punishments.[15] Even if true, this would be irrelevant since it is not clear that these judges are doing so for desert reasons. That judges *now* impose such disparate sentences for a variety of non-desert reasons is no reason to continue the practice under a new regime. If the argument is that judges will continue to do so *even if instructed by the legislature to the contrary,* that speaks of lawlessness. If the argument is that judges *should* impose exemplary sentences, this should be explored, but Morris does not in fact explore it.

With regard to parsimony in punishment, Morris is more convincing, but only because he continues to expect (possibly correctly) that legislatures will authorize, and perhaps mandate, excessive sentences. Morris is aware, however, of sentencing guidelines enacted in Minnesota which impose modest sentences across the board. The Minnesota experience, to which he devotes several pages, tends to show that judges will follow a desert orientation if told to do so by the legislature. Intriguingly, Morris does not link this experience to his expectation that neither legislatures nor judges will be persuaded to establish such a system. Morris may be correct that most states will not follow Minnesota's lead as to the proper duration of sentences; but if he is, then we return to the *realpolitik* argument, rather than to one from principle.

Morris's third argument against equality and in favor of selective enforcement and prosecution is also initially appealing. Punishment, as well as detection, he suggests, "is a scarce resource" which should not be indiscriminately expended for every crime. This is due, in part, to the realities we face today of an overloaded system; but even if the system had adequate resources, "the case for selective enforcement and for the rejection of the desert-equality principle" would stand. Here, he returns to his famous tax-evading doctors of Denver and argues for parsimony of punishment, in the service of deterrence. Yet he has still failed to "prove" that the suffering of one (or two) of the six doctors who are sent to prison for exemplary sentences is less than that of all six sent for non-exemplary sentences, much less that an equal amount of deterrence will occur. Moreover, this example demonstrates a hidden aspect of the entire scheme: parsimony for *some*

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14. *Id.* at 198. Morris' appeal that a world without mercy would be hell may be true; but the fact seems to be that in order to encourage a system in which mercy may play a significant role, Morris would urge the establishment of very high (though "deserved") maximum sentences.

15. *Id.* at 187.

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offenders requires *exemplary* sentences for others. To reject equality by simply stating that sentencing should not be based on equality is still unconvincing.

Morris is not unaware of these problems. It may be that he wants to favor a desert based scheme, but that he believes that real life will intrude and result only in equality or proportionality and not in desert. Given this vision, it is clear why he rejects equality. I might do the same if I thought that excessive sentences were the inexorable result of a sentencing reform based on desert theory. But, like Morris, I make a leap of faith—but in the other direction—and suggest that we try, at least, before giving up the ship.

In any event, to the extent that desert theory requires equal sentences for all similarly situated felons, there is trouble on the horizon in terms of prison overcrowding. Half of all convicted felons never see prison.[16] Even if one focuses on "serious" felonies, however they are defined, in many jurisdictions a large percentage of persons committing them are not sent to prison either. For example, in California, only fifty six percent of all first degree burglars and only thirty eight percent of second degree burglars were sent to prison in 1981.[17] For robbers, the figure was sixty seven percent. For all other felony categories less than one half, and usually less than one third, were incarcerated in prison.[18] In New York in 1979, the relevant figures were forty five percent for burglars, seventy five percent for robbers (including armed robbers), twenty two percent for negligent homicide and twenty two percent for grand larceny.[19] If burglaries, robberies and armed robberies are serious crimes, then all such offenders should receive the same punishments—in this case incarceration. Thus, the desert theorist appears to require more prison space, and therefore to cause prison overcrowding. For those who think that prisons should either be abolished totally or severely restricted in their use, these implications of adopting desert theory are disturbing.

### *B. Plea Bargaining*

Unless all those charged with and convicted of the same offense receive equal sentences, desert theory is served only partially.[20] This raises the issue of desert theory's inherent distaste for plea bargaining.

Superficially, any reduction of plea bargaining would appear to lead toward an increase in the prison population. If defendants are not allowed

16. BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, STATISTICAL REPORTS (1973).

17. Judicial Council of California SENTENCING PRACTICES QUARTERLY 1 (Nos. 13-16, combined).

18. *Id.*

19. CORRECTIONAL ASSOCIATION OF NEW YORK, THE PRISON POPULATION EXPLOSION IN NEW YORK STATE: A STUDY OF ITS CAUSES AND CONSEQUENCES WITH RECOMMENDATIONS FOR CHANGE, 114 table 8 (1982).

20. In a recent passage, von Hirsch suggests that desert applies only to sentencing but not to the selection of specific crimes or specific criminals to prosecute, a fact which may

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to plead down and are convicted for their "real" crime, it would seem likely that they would receive harsher sentences. However, as Jonathan Hyman has convincingly argued, desert considerations may figure into plea bargaining much more than is apparent.[21] Moreover, it is not clear that plea bargaining actually affects sentence length. It is surely clear by now that an armed robber who pleads down to robbery is not treated by all subsequent actors in the system as though he were "only" a robber. For decades, both judges and parole boards have surreptitiously cancelled the defendant's benefits of the bargain, by dealing with offenders on the basis of their "real offense" rather than the offense of conviction.[22] In the past ten years, parole boards[23] and, to a lesser extent, judges, have openly endorsed real offense sentencing. The Model Sentencing and Corrections Act posits this chicanery as a sine qua non of sound sentencing.[24] I leave the moral and constitutional validity of this practice to another time. However, to the extent that plea bargaining is no bargain for the defendant[25]—when either

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result in unequal or entirely unfair determinations. von Hirsch, *Desert and White-Collar Criminality: A Response to Dr. Braithwaite,* 73 J. CRIM. L. & CRIMINOLOGY 1164, 1170 n.29 (1982). Although he later seems to alter this view slightly, *id.* at 1171, the suggestion is disturbing. Consider, for example, his statement that desert "suggests" that a substantial punishment "should be sought within the limitations of available resources" but that it applies more strongly after the conviction to assure that the severity of a sentence is in proportion to the crime of conviction. *Id.* If decisions as to who should be prosecuted, or even investigated, are made on the basis of utilitarian concepts such as availability of resources, then all the crime prevention goals against which desert has argued will simply be transferred to the prosecutor as many critics have suggested they should be, and the movement would be undermined.

21. Hyman, *Bargaining and Criminal Justice,* 33 RUTGERS L. REV. 3 (1980).

22. *See, e.g.,* R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH AND CONDITIONS OF SENTENCE 219-21 (1969).

23. The United States Parole Commission, for example, explicitly retains the right to consider the "real offense" in determining the severity of crime for purposes of its matrix. 28 C.F.R. § 2.19 (1982).

24. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act,* 72 J. CRIM. L. & CRIMINOLOGY 1550 (1981). *See also* Perlman & Potuto, *The Uniform Law Commissioner's Model Sentencing and Corrections Act: An Overview,* 58 NEB. L. REV. 925, 927 (1979).

25. Courts have held that it is not necessary for a court to make certain that the defendant, in making a plea, was made aware of any loss of parole opportunities which were a component of his sentence. Nor must the court explain to the defendant what parole opportunities are in general. *But see* State v. Kovack, 91 N.J. 476, 453 A.2d 521 (1982).

It might be argued that the failure of the prosecution or the court to inform the defendant that the parole board may rely on the "real offense" renders the defendant's guilty plea "unintelligent" under Zerbst v. Johnson, 304 U.S. 458, 464 (1938), or, for a federal defendant, under Rule 11 of the Federal Rules of Criminal Procedure. The latter argument would have been more potent under the pre-1975 wording of the Rule, which required that the defendant understand "the nature of the charge and the consequences of the plea." Particularly since the United States Parole Commission explicitly reserves the right to consider the "real offense", 28 C.F.R.§ 2.19(c) (1982), the use of "real offense" was more than a mere possibility. In Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364 (4th Cir.

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either the court or the parole board ignores the bargain and deals with the "real offense"—it does not necessarily follow that elimination or reduction of plea bargaining in favor of a desert system would inevitably lead to burgeoning prison populations. On the other hand, it does appear that plea bargaining can theoretically and might practically result in a smaller prison population. Certainly to the extent that the bargaining process is explicitly attuned to the in-out determination, population size is affected; desert theory, by attacking plea bargaining, could potentially result in a larger prison population.

### C. *Multiple Offenders*

A third aspect of desert which seems to require longer sentences and hence a larger prison population is the treatment of multiple offenders—not recidivists but persons who are about to be sentenced for several crimes

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1973), *cert. denied,* 414 U.S. 1005 (1975), for example, the court held that the defendant had to be aware of any circumstance which has a "definite, immediate and largely automatic effect on the range of the defendant's punishment." *Id.* at 1366. Statutory ineligibility for parole, under this approach, was such a consequence. *Accord* Jenkins v. United States, 420 F.2d 433 (10th Cir. 1970); Myers v. United States, 426 F.2d 99 (6th Cir. 1970); Durant v. United States, 410 F.2d 689 (1st Cir. 1969). Mandatory minimum special parole terms also came within this Rule. *See, e.g.,* United States v. Yazbeck, 524 F.2d 641 (1st Cir. 1975).

In 1975, the Rules were amended to require that the judge inform the defendant of the "mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered." The advisory committee made it clear that this rewording was intended to affect the case law. FED. R. CRIM. P., 11, Note of the Advisory Committee (1975). While there is some indication that courts may not be so limiting the Rule, *e.g.,* United States v. Harris, 534 F.2d 141 (9th Cir. 1976) (reverses lower court which failed to inform defendant of consequences), most case law demonstrates that the change has had the desired effect. Moreover, a number of cases have held that the Parole Commission's use of the sentence corresponding to that for the "real offense," or of charges that had been dropped as a result of the plea bargain, does not violate the offender's due process rights. These cases, however, do not address the question of whether the defendant's plea bargain was voluntary. *See, e.g.,* Edwards v. United States, 574 F.2d 937 (8th Cir.), *cert. denied,* 439 U.S. 1040 (1978); Holland v. United States, 427 F. Supp. 733 (E.D. Pa. 1977), *aff'd,* 571 F.2d 571 (3d Cir. 1978). Agreeing with Lupo v. Norton, 371 F. Supp. 156, 162 (D. Conn. 1974) that the inmate must be informed if and how his alleged offense is considered in parole decisionmaking, one court implied that the inmate would have grounds for challenging such parole denial when it stated that "Explicit reference to his alleged offense as a reason for parole denial by the Board will afford the inmate an opportunity to challenge the allegations in his administrative appeals." Manos v. United States Board of Parole, D.C., 399 F. Supp. 1103 (M.D. Pa. 1975).

At least one state court, relying on state law, has held that a defendant must be informed of a period of parole ineligibility, State v. Kovack, 91 N.J. 476, 453 A.2d 521 (1982), but in light of the general ambiguity of parole board operations, there appears to be no requirement that the defendant be informed of customary parole board practice. *Id.*

Even assuming that the defendant's lack of knowledge of the parole matrix might invalidate a plea, it is not clear that his failure to know is attributable to the state, since the practices and procedures of the board may be "public knowledge," particularly if, as in the case of the United States Parole Commission, those practices, or considerations, are published. See, however, Tonry, *supra* note 24, at 1569-76.

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which they have recently committed. Should the sentences be consecutive or concurrent? Utilitarians can quite easily adopt concurrent sentencing as the norm, leaving consecutive sentencing to deal with those who appear to require long-term incapacitation. Desert theory, however, cannot be so facile. The essence of desert, after all, is that for every crime committed there should be some identifiable, separate censure, and some identifiable, separate punishment. This means, at the very least, that the person who has recently committed seven robberies should be censured, blamed, and punished more severely than a person who commits one. The difficulty is in quantifying the increased punishment. Prima facie, the person who has just robbed seven banks will be punished seven times as severely as the person who has robbed one bank. That would virtually mean that the seven-time robber would serve between fifteen and forty years in prison. For all practical purposes, his entire adult life would be spent behind bars because of a series of armed robberies which took little more than a few days, no one of which individually justifies such a loss.[26]

The real problem is raised by different, distinct criminal offenses, committed at totally different times. Thus far, the states which have adopted determinancy, whether on the basis of desert theory or some other foundation, have continued to adhere to concurrency, or have used some complex algebraic formula to increase the sentence. Such a formula involves lengthening sentences at a decreasing rate for each additional offense, or adopting an arbitrary "lid" on such an offender's sentence.[27] Desert theory

26. The case envisioned is not whether possession of 40 grams of heroin is 40 violations of a statute prohibiting the possession of one gram, or whether robbing a bank while waving a shotgun at 40 patrons includes, among other things, 40 assaults. These are primarily semantic problems, arguably dealt with by a carefully crafted definition of a "criminal transaction."

The question of whether or not one "transaction" can constitute different (or multiple) crimes generally arises in the context of the double jeopardy clause, and has generally been decided on statutory interpretation grounds. *E.g.,* Gore v. United States, 357 U.S. 386 (1958); Blockburger v. United States, 284 U.S. 299 (1931). Recently, the Court held that a defendant may be sentenced for "two offenses" even if those offenses are the "same act" under *Blockburger.* Missouri v. Hunter, 51 U.S.L.W. 4093 (Jan. 18, 1983). This, of course, does not necessarily suggest an answer to the policy question of whether a series of crimes should be serially punished.

27. With very few exceptions the decision on whether to impose concurrent or consecutive sentences has not been regulated; it has been left to the discretion of the court. Recently, however, this has changed.

North Carolina requires an additional term of 14 years for offenders convicted of repeat felonies involving deadly weapons. N.C. GEN. STAT. §§ 14-2.2 (1981). Indiana's new code provides for an additional 30 years for defendants with two prior felony convictions. IND. CODE ANN. § 35-50-2-8 (West 1978). New Mexico's additional penalty provisions range from one to ten years and govern habitual offenders and offenses involving deadly weapons on elderly victims. N.M. STAT. ANN. §§ 31-18-16, § 31-18-16.1, § 31-18-17 (1978). California provides for the imposition of a one, two or three year additional term to the normal disposition of the offense if arms, weapon use, infliction of great bodily injury or excessive property damage is involved, or if the defendant has served prior prison terms. CAL. PENAL CODE §§ 12022, 12022.6, 12022.7, 667.5 (West 1982).

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cannot automatically adopt such a position. Thus, again, desert seems to point toward a larger prison population.[28]

### D. The Role of Harm

Still another pressure for increased prison population might come from desert's rejection of the importance of actual harm done. I have elsewhere[29] suggested that the principle of aggravated harm by which prison terms are increased due to fortuitous events such as the unexpected death of the victim cannot survive in a desert world. Thus, if A stabs B without an intent to kill him, and B later dies from unforeseen complications, A should be punished for the stabbing, not the death. Concommitantly, however, desert would punish equally both the successful and unsuccessful attemptor. Thus, if A and B, with intent to kill, shoot C and D respectively, A's sentence should not be lighter than B's, simply because his bullet hit a medal worn by C, and C continues to live, while D is dead.

Thus, while reducing the duration of confinement for those whose acts had unfortunate results, desert would also increase the duration of confinement of those whose acts, fortunately, had no dire result. Whether, factually, this would increase or decrease population is unclear, and can only be answered by statistical analysis. But there is surely the possibility that it would mean greater, rather than lesser prison populations.

### E. Summary

On its face desert seems to point toward even more prison overcrowding: (1) all persons convicted of crimes punishable with imprisonment should be imprisoned, as opposed to current levels for such offenses, which

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In California an aggravating factor used to establish the upper base term can only increase the sentence by one year. CAL. PENAL CODE § 1170(a)(2) (West 1983). Moreover, the same fact cannot be used to establish an aggravating factor and an enhancement. Cal. Rules of Court § 44 (West 1983). *See* Note, *Durational Departures: Aggravating and Mitigating Circumstances,*5 HAMLINE L. REV. 341, 343 n.7 (1982). There is a five year limitation on total enhancements for consecutive nonviolent offense, CAL. PENAL CODE § 1170.1(a) (West 1983); the total sentence imposed cannot exceed twice the base terms unless the crime is a violent one, there is a specific statutory enhancement, or a consecutive sentence is being imposed. CAL. PENAL CODE § 1170.1(g) (West 1983). Even with this elaborate scheme it appears that sentences imposed for violent crimes with multiple enhancements can more than double the presumptive tripartite "ranges." Note, *supra See* HARLAN & GREER, *Criminal Code Revision and the Issue of Disparity,* in SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY (M. Forst ed. 1982).

28. For other discussions of the problems raised by multiple offenders, see Note, *Buck Should Stop Here: Consecutive Sentencing of Multiple Offenders in Iowa,* 65 IOWA L. REV. 468 (1980); Caraway, *Sentencing Reform in Multiple Offense Cases: Judicial and Legislative Avenues,* 7 CONN. L. REV. 257 (1974); Rossett & Green, *Comment on Multiple Prosecutions: Sections 703-708,* in 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 331 (1970).

29. R. SINGER, *supra* note 4, at 24.

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often fall far below fifty percent; (2) persons who have in fact been convicted of serious offenses, punishable by imprisonment, should be treated as such, and barred from pleading to, and therefore being sentenced as though they had committed, less serious crimes; (3) multiple offenders should be given consecutive, rather than concurrent sentences which are now given; (4) the importance of harm should at least be substantially reduced in determining sentence. It is, of course, possible that those theoretical pressures would actually not increase population. But if they do, what should be done?

## IV

## Reducing Imprisonment in a Desert World

The foregoing analysis assumes that our current sentencing system is, in most respects, satisfactory. From a desert standpoint, however, that is not the case. In the first place, most offenders serve far more time in this country than do similar offenders in other countries.[30] While there may be many explanations for this, it should at least suggest that our sentences are disproportionate. Since proportionality is a keystone of desert theory,[31] the severe reduction in actual time served which would be required by a true desert approach might well balance the increased time served by the increased number of offenders required to serve time.

Second, under a desert theory, it is likely that a large number of offenders who have committed relatively trivial offenses, some of whom now are sentenced to imprisonment, would no longer be so sentenced.

Third, the "in-out" figures cited from California and elsewhere are misleading. While the percentages of "serious" felons who are sent to state prison are still quite low, even in a state like California, the fact is that most burglars, robbers, and others convicted of felonies, do spend time incarcerated in the local jail as a condition of probation. Thus, in California, while only one-third of those convicted of assault with a deadly weapon are sent to state prison, another forty three percent are sent to the local jail.[32] This is true even in Minnesota, where the Sentencing Commission has adopted a fairly rigid "in-out" guideline system. Thus, while Minnesota guidelines call for most convicted felons to be "out," in fact most of these offenders serve

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30. Doleschal, *Rate and Length of Imprisonment: How Does the United States Compare with The Netherlands, Denmark, and Sweden?*, 23 Crime & Delinq. 51 (1977) (In Sweden in 1974, "76 per cent of those who were committed to prison were sentenced to terms of less than four months. Terms of less than one year accounted for 91 per cent of all inmates; in the U.S. only 2 percent are sentenced to less than one year. The proportion of prisoners sentenced to one year or more is 9 per cent in Sweden and 98 per cent in the United States." *Id.* at 55.

31. R. Singer, *supra* note 4.

32. Judicial Council of California, *supra* note 17, at 91. See text accompanying notes 17-19 for "in-out" figures.

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time in the county jail or workhouse as a condition of stayed sentences.[33] If jail incarceration time "counts" for purposes of punishment (and there is every argument not only to count it, but, as already suggested, perhaps even to count it *more* than prison time), then the implementation of a regime of equal sentences for all serious felonies may not have such a cataclysmic effect on the total incarcerated population.[34]

As to the "multiple" offender, there are a few possible responses in desert theory. One possible response is that whether or not one believes that prior offenses for which punishment has already been served should be considered at all in a desert system,[35] the argument for punishing the recidivist *at least* as severely as the actor without priors is that the mental state was the same for each crime he committed. Thus, if A commits one robbery in 1975, is punished, and commits another robbery in 1977, his mental state, his "mens rea," is (ostensibly) the same for both offenses, and requires similar punishment. But if A commits one robbery on June 1, another on June 2, another on June 3, etc., it is at least *arguable* that some mitigating factors concerning his mens rea, even if not recognized as a defense to each crime, may be present—A may, in some sense, be "weakened" throughout this period. Accordingly, *some* amelioration of the full "seven times" penalty may be appropriate.

Another possible response for the desert theorist is to accept some compromise with pure desert theory. W.D. Ross has argued that the duty to "do justice," no matter how forcefully stated, can be seen as merely a "*prima facie*" duty which yields to more important duties.[36] If proportionality of punishment to culpability and harm is seen as a "more important" duty, at least in some instances, then the desert writer can argue that a sentence of, e.g., sixty years for seven robberies committed in the span of a week is simply disproportionate not to the crimes committed, but to the ultimate culpability of the offender. And if that is not enough, then perhaps a passing acknowledgement to the hope for rehabilitation may justify even the crassest of algebraic formulae. I am not sure of this, but it does not strike me as totally implausible.

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33. MINNESOTA SENTENCING GUIDELINES COMMISSION, PRELIMINARY REPORT 34 (1982), *cited in* Knapp, *Impact of the Minnesota Sentencing Guidelines on Sentencing Practices*, 5 HAMLINE L. REV. 237, 249 (1982).

34. This may also suggest a reason, as well as a pragmatic need, for combining all institutions of confinement under one political management.

35. Andrew von Hirsch, a leading advocate of a desert approach to sentencing, has urged that first offenders can be, indeed should be, sentenced more leniently than repeat offenders, i.e., that prior record should be taken into account in sentencing. *See* von Hirsch, *Desert and Previous Conviction in Sentencing*, 65 MINN. L. REV. 591 (1981). Several others have urged that prior criminality has no place in a desert system. G. FLETCHER, RETHINKING CRIMINAL LAW (1978); Fletcher, *The Recidivist Premium*, 1 CRIM. JUST. ETHICS 54 (1982); Harris, *Disquisition on the Need for a New Model for Criminal Sanctioning Systems*, 77 W. VA. L. REV. 263 (1974); R. SINGER, *supra* note 4, at 67-74.

36. W.D. ROSS, THE RIGHT AND THE GOOD (1930).

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So far as plea bargaining is concerned, I have already suggested that the dire forecasts for a desert-based system are probably highly overblown, at least so far as an increase in prison population is concerned. Thus, I do not necessarily believe that desert requires an actual increase in prison population. But suppose such an increase did occur. If it resulted in overcrowding, and hence an undermining of those assumed conditions according to which the rulemaker established desert sentences, hence requiring some lessening of the penalties, what could be done?

Two alternatives are possible: (1) reduce the number of persons sent to prison; and (2) shorten the duration of punishment. Does desert theory suggest which of these alternatives is initially preferable? I think some minimal guidelines are discernable. In essence, however, the two options are variations of the two critical questions in desert theory, the fixing of ordinal and cardinal rank.

By ordinal ranking I mean the determination of which crimes are truly "serious" and which crimes are less serious: For example, whether rape is in fact worse than burglary and whether polluting drinking water is worse than jaywalking. I will not discuss here the various methods suggested or used for determining ordinal rankings in a desert system. I think it is only necessary to say that the difficulties of ordinal ranking are to a very large degree surmountable. There will generally be consensus upon this issue.

Once ordinality has been achieved, there is a second step in the process: deciding not the duration of punishment, but the type. This could involve segregating offenses by "classes" of seriousness, and setting out different types of punishment, e.g., imprisonment, probation, corporal punishment, community service, etc. for each class. For our purposes however, there is only one demarcation differentiating those who go to prison and those who do not. The question is not "Is this crime serious?" or "Is this crime more serious than that crime?," but instead, "Which crimes deserve incarceration, the ultimate deprivation of liberty as punishment?" There would, of course, be some debate about some crimes but if the only choice were imprisonment or no imprisonment I think we would find a substantial consensus. I will refer to this as the "in-out" line.

Critics of desert argue that if such a consensus is achieved by the legislature, it will be Draconian. Thus, there is a continuing cry that legislatures are prone to be concerned with crime control; the political system will not tolerate policies that only require incarceration for a small number of crimes for a modest period of time. Hence the system will both lower the "in-out" line and raise the ante. This is the infamous Zimring eraser theory.[37]

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37. Zimring, *Making the Punishment Fit the Crime*, 6 HASTINGS CENTER REPORT 13 (Dec. 1976).

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As a criticism of desert as a sentencing theory, this observation is misplaced; the confounding of revenge and desert, while common, is not proper, and the notion that desert theory could reflect revenge is wrong. As a criticism of desert theory as a guide to practical sentencing reform in the 1980's, however, it is not unfair. Indeed, there is strong reason to believe that the punitive movement drew great support from the punishment (desert) movement. While the criticism is only a half-truth, as a practical matter, this is critically important. The fact is that if there is a punitive movement in the legislature, the theory which is used to justify increased sentences is irrelevant. And surely selective incapacitation, the only proffered reform alternative to desert sentencing, is even more open to abuse and misuse than desert theory. It is just as easy, after all, to say "Let's reduce the incarcerative threshold to salient factor three" (thereby preventing all jaywalking recidivists) as it is to say "Let's lock up all the jaywalkers." And, if crime control is the prime consideration of politicians, as the eraser critique assumes, then the eraser is more likely to be used with selective incapacitation criteria than with desert theory criteria. History supports such conjecture: actual time served increased when indeterminate sentencing became sovereign.[38]

How, for example, will we determine who we want to incapacitate selectively? Only those likely to commit fifteen robberies? Why not those likely to commit ten? Or thirty five burglaries? Or two jaywalkings? Consensus on the relevant criteria (in desert, justice; in selective incapacitation, cost) will be necessary. But if the consensus is for punitiveness, neither desert theory nor selective incapacitation is likely to affect the results.

It might be suggested that the easy answer to overcrowding, in a desert model, is simply to raise the "in-out" line, thus putting "out" some offenses (and offenders) which earlier qualified for imprisonment. This easy answer, however, is not the proper one. A distinction must be drawn between setting the "in-out" line during the initial stages of establishing a sound sentencing scheme (when consensus is reached on which offenses are serious enough to warrant imprisonment) and thereafter raising that line (and thereby decreasing the number of persons "in") as a temporary, or even permanent, reaction to prison overcrowding. In the first instance (the "original position") there is a strong likelihood that the consensus would result in a morally-based assessment of seriousness. But any attempt to raise that line simply as a response to prison overcrowding would almost surely abandon desert theory as a principle. This implication could be avoided by saying that what a crime or a criminal "deserves" is what society is willing to pay for the punishment, and if society is unwilling to pay for, e.g., two years' incarceration, then society no longer believes the crime "deserves" that punishment. There is, however, an obvious definitional stop, which can

38. S. Rubin, The Law of Criminal Correction 137-41 (1963).

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not be tolerated. Much more tenable would be accommodation with "practicality" and "reality," and a willingness to recognize, at least, that those who commit "the most serious" crimes are still being incarcerated according to their desert. Furthermore, if the "non-incarcerative punishment" which awaited those who suddenly found themselves "below the line" was, in fact, sufficiently punitive, this approach could work. This requires, however, if not differential sentencing with various options of equivalent severity, then at least one other equally punitive measure.

Thus the initial in-out line should be drawn as high (or low) as the moral sense of the community requires. Once drawn, however, that line should remain relatively (if not permanently) fixed unless and until there is some good moral reason for reassessing it.[39] While selective incapacitation (which facially employs a cost-benefits analysis) would allow infinite manipulation with the in-out line, such flexibility would not only be undesirable but virtually prohibited by a desert philosophy. If the line is properly delineated by the rulemaking entity from the outset, only major changes in social perception of the evil of an act[40] should allow variation.[41]

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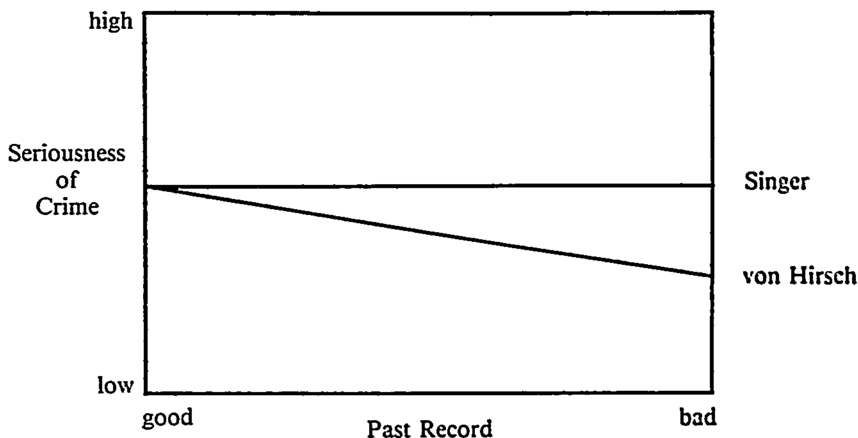
39. This operates the other way as well; if prison space is increased, or prison population declines, a well-drawn desert "in-out" line should not be moved downward.

40. Marijuana use, abortion, and draft resistance on the one hand and pollution and other "white collar crimes" on the other spring to mind here but even these examples are the result of a sea change rather than a tidal wave of new moral views. "Raising the line," of course, could have different meanings depending on the way in which the line had been initially drawn.

41. As already noted in note 35, the question of the use of prior offenses in determining proportionate punishment has split desert writers. I do not wish to continue that debate here, but the difference might have an effect upon the way in which the "in-out" line was raised. Graphically, my own desert line would be absolutely flat, while von Hirsch's would be slightly sloped (only those above the line are imprisoned):

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Rather than altering this consensus, I suggest that the proper course is to modify the duration of sentences, the cardinal rankings and determinations in the grid.

At the original position, agreement on ordinal ranking, on the kind of punishment a particular crime deserved, would be much easier to achieve than agreement on cardinal determinations on how much incarceration is deserved by crime X and how much *more* punishment should be imposed for X than is imposed for crime Y; cardinality has always seemed more tenuous than ordinality, particularly where the effects of imprisonment are both unmeasurable and so unlike the effects visited by the crime itself.[42]

That desert may leave gaps in cardinal ranking was recognized by Andrew von Hirsch.[43] He accepted the possibility, which other desert writers have rejected,[44] that the gap could be informed by utilitarian purposes. But now the softness of cardinal ordering seems to suggest a resolution of the question of which option can be achieved most easily by the desert school in response to prison overcrowding, reduction in incarceration rate or reduction in duration of incarceration. While there may be some flexibility at the fringes of the "in-out" line, there seems to be much more leeway in terms of setting actual periods of duration, and still remaining within the framework of consensus on what is "deserved" by a certain crime. For example, it is relatively easy to determine that intentional infliction of serious bodily injury, whether or not resulting in death, should be visited with a fairly heavy penalty while joy-riding never merits a sanction involving incarceration. On the other hand, whether aggravated assault "deserves" fifteen months, twenty months, or two years, is much more debatable. It is more

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If the flat line is adopted, "raising the line" means that some crimes must be eliminated from imprisonment entirely. On the other hand, if a von Hirsch "modified desert line" is accepted (which is, after all, the case in all the states which have thus far even shown any interest in desert at all), a "change" could mean simply readjusting the slope back toward a "true" desert model. Thus, for example, in Minnesota all persons who have committed aggravated robbery are incarcerated; on the other hand, while a possessor of marijuana will usually receive probation, a possessor with a "bad" criminal history may also be incarcerated. In a prison overcrowding situation, the slope of the "in-out" line could be readjusted to eliminate all possessors (even those with a "bad" criminal history) while continuing to incarcerate all aggravated robbers and other who commit more "serious" felonies. Of course, at some point the adjustments might consume all the "slope" of the "modified line," and the jurisdiction would then have to consider the alternative suggested earlier.

42. Bedau has criticized desert theorists on the basis of cardinality. Is a murderer to be sentenced to twice the term of the rapist? Is he twice as culpable? Bedau contends that the desert principle has no mode of measurement to determine the degree of harm implicated by different offenses. H. Bedau, *Concession to Retribution in Punishment* in JUSTICE AND PUNISHMENT 51, 64 (J. Cederblom & W. Blizek eds. 1977). I agree, in part, and, along with others, have suggested that desert cardinality can only seek rough justice. *See* R. SINGER, *supra* note 4, at 29-30.

43. A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 132-190 (1976).

44. R. SINGER, *supra* note 4, at 14-18.

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likely to require substantial compromise at the outset, and hence leaves much more ground for a later compromise at a point of overcrowding.[45]

If such a move were to be endorsed by a desert theory supporter, it would have to take one of two approaches: reduction by a fixed percentage of time already served,[46] (1) of all sentences for all crimes, followed by nondiscretionary release of those within X days of their release date; or (2) of all sentences of those who had committed the least serious crimes. The second option, reducing only the sentences for the "lesser" crimes, is less consistent with desert theory, since there is a good chance of both aggravating the moral differences between some crimes, and collapsing the distinction based on the seriousness of certain crimes.

Simplistically, assume three crimes, A, B, and C, have respective presumptive sentences of one, two and three years. In theory, the cardinality not only represents proportionality between the specific crime and the specific punishment, but reflects the perceived difference among the seriousness of the crimes involved. Crime C is considered three times (or twenty-four months) more "serious" (whatever that encompasses) than crime A. If the sentence for crime A is reduced by six months, while the sentence for crime C remains the same, two difficulties arise: first, crime A may be "worth" more than six months, which thereby defeats proportionality and second, crime C is now perceived as being six times as (or thirty months more) serious than crime A. On the other hand, substantial reductions for all crimes (A, B, and C) *might* result in disproportionately lenient sentences for all crimes. Since cardinality has more "give," however, it will be less rapidly infringed upon.

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45. This "solution" to the overcrowding problem may seem much like that endorsed by states (e.g., Michigan, Illinois, New Jersey and New York) which have simply granted parole ahead of schedule to persons already sentenced, thereby effectively reducing their terms. But in most of those states, there is still some discretion as to who should be released; these determinations are made on an overtly utilitarian basis. Moreover, the reductions are applied not to the offense but to the offender. For example, if there is prison overcrowding in Michigan, sentencing reductions of up to 90 days apply to all persons soon to be considered for parole, whatever their crime. From a utilitarian viewpoint, of course, this is eminently sensible. But from a desert theory perspective, it means that those burglars who were "fortuitous" enough to have committed their crime long ago will receive a shorter sentencing than those who committed their crime yesterday. If the overcrowding crisis continues for a substantial period of years, all sentences for the same crime will be effectively reduced.

46. I had initially thought that sentences would have to be reduced by a given amount, but this would visit a disproportionate boon to those who had recently been imprisoned. Instead, the reduction would have to be a percentage of time already served. This in essence gives "extra" credit for time spent under unconstitutional and crowded conditions. The rationale for this is that those who have already served that time have been punished more severely (per day) than they deserved. I think Professor Morris has recently argued correctly that the "block" approach to early release to alleviate overcrowding violates desert principles. N. Morris, Madness and the Criminal Law 189 (1982). But I believe that the above proposed solution that percentage decreases be based upon actual time served in overcrowded prisons could meet that concern.

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Several states have attempted to tie together prison overcrowding and sentencing. Section 3-115 of the Model Sentencing and Corrections Act provides that the Sentencing Commission shall include with proposed guidelines "a statement of its estimate of the effect of the guidelines on the resources of the department."[47]

The best known attempt to follow the Model Sentencing and Corrections Act was made in Minnesota. The legislature instructed the Sentencing Commission to "take into account" prison facilities when constructing a sentencing policy. The statute, however, is ambiguous as to precisely what is to be done if the proposed guidelines, as a matter of prediction, result in an increase in prison population. The Commission, with great skill and courage, adopted a firm rule that the guidelines should not allow or result in incarceration in excess of the rated capacity of the prison, approximately 90-95% of the total capacity, and has thus far been able to stay within the policy.

As we have already discussed, the importance of such a constraint seems obvious, both as an economic and moral matter. Indeed, the Commission calls it the most important aspect of its work.[48]

I have come, therefore, to the following conclusions:

1. Desert sentencing need not increase prison population;
2. In establishing a desert sentencing scheme, a Sentencing Commission should be instructed to set guidelines which will not result in prison overcrowding and which are based upon predictions of likely catchment populations;
3. If overcrowding does result from a desert model, reduction of prison population is required;
4. Reducing the duration of imprisonment as a matter of percentage of the original sentences—not changing the "in-out" decisional line for those crimes which qualify for imprisonment—is the proper means of avoiding overcrowding.

## V

## Problems with Utilitarian Sentencing—1983

Thus far, I have tried to address several concerns involving a sentencing system based on a desert theory and possible responses to these concerns, particularly in the context of an obscenely burgeoning prison population and the cruelty of the conditions which such overcrowding creates. I would like to turn to some problems with utilitarian sentencing (particularly selective incapacitation) which are not generally mentioned in a critique of this

47. Uniform Law Commissioners' Model Sentencing and Corrections Act § 3-115 (1979).

48. Minnesota Sentencing Guidelines Commission, Preliminary Report on the Development and Impact of the Minnesota Sentencing Guidelines (1982).

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nature. Professors von Hirsch and Gottfredson's *Selective Incapacitation: Some Queries about Research Design and Equity*[49] amply covers challenges to both the methodology and the morality of the Greenwood-Peterson-Inslaw position. It is, therefore, unnecessary to discuss them here. I seek to discuss other problems with selective incapacitation.

### *A. Effect on Reform of Substantive Criminal Law*

First, a sentencing structure based exclusively, or even substantially, on selective incapacitation or any other utilitarian proposition, would seriously jeopardize a growing movement in this country toward reforming the substantive criminal law. For the first four or five decades of this century, few persons, including academics, were preoccupied with substantive criminal law theory. The shortness of the list, which includes Keedy, Sayres, Wickersham, Hall, and a few others, is appalling. However, with the theories advanced by Herbert Wechsler and particularly with the adoption of the Model Penal Code in a majority of states, the debate about substantive criminal law and its relation to harm and culpability has been resumed. George Fletcher has challenged us to emulate the Germans and has particularly emphasized the distinction, long ignored in the common law, between excuse and justification.[50] Paul Robinson has suggested a new analysis of the system of defenses.[51] Great progress has been made by Joshua Dressler with his analysis of heat of passion,[52] and Hyman Gross has attempted an entirely new theory of criminal law.[53]

This debate, not surprisingly, parallels the sentencing debate particularly if the sentencing scheme adopts a pure desert or even a modified deserts approach. After all, in a forward-looking utilitarian scheme, the definition and parameters of the crime are at best secondary. The suggestions of Lady Wooton[54] and others[55] to remove *mens rea* entirely from the criminal law have made this clear. Indeed, in a selective incapacitation scheme, the occurrence of the crime is almost inconsequential.

Although the selective incapacitation scheme is, perhaps, the most overt in its rejection of substantive laws and defenses, all utilitarian methods share the general principle that definitions of crimes, and careful distinctions among them, are irrelevant. This blurring of distinctions permeates the system and allows "real offense" sentencing which thereby nullifies the

49. von Hirsch & Gottfredson, *Selective Incapacitation: Some Queries about Research Design and Equity,* 12 N.Y.U. REV. L. & SOC. CHANGE 11 (1984).

50. G. FLETCHER, RETHINKING CRIMINAL LAW (1978).

51. Robinson, *Criminal Law Defenses: A Systematic Analysis,* 82 COLUM. L. REV. 199 (1982).

52. Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale,* 73 J. CRIM. L. & CRIMINOLOGY 421 (1982).

53. H. GROSS, A THEORY OF CRIMINAL JUSTICE (1979).

54. B. WOOTTON, CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST (1963).

55. *E.g.,* K. MENNINGER, THE CRIME OF PUNISHMENT (1968).

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benefit of the plea bargain. With the substantial overlap of terms, (for example, for robbery and armed robbery) the crime that one is convicted of becomes irrelevant to sentencing; judges, parole boards and prosecutors know this.

In a structured determinate system, whether desert-oriented or not, if there is a reduction in the overlap of potential sentences, the crime one is convicted of does in fact have significance. However, as Professors Tonry and Coffee have shown, the intricate minuets by which actors may try to avoid the impact of the determinancy may be as complex as any employed with indeterminate schemes.[56]

In a desert system, the definition of criminal offenses does count, not only because it affects the punishment, but because the entire notion of desert requires that there be a full understanding and careful delineation of the degree of wrong which the actor has perpetrated.[57]

The salutary trend to reassess the substantive criminal law and its defenses, and to define the interests affected by particular crimes could be curtailed by any scheme, including selective incapacitation, which significantly minimizes the importance of the underlying offense. This is not to suggest, of course, that a proponent of selective incapacitation might not want clearer definitions, and interest-analysis of criminal offenses, in order to more carefully tune the mechanism of incapacitation. But since the primary focus is on the future behavior of the defendant, reform of the substantive criminal law (which deals with definition of past acts) is hardly a priority.

Of course, many utilitarians may be indifferent to such reform. But even such a fervent crime-controller as Chief Justice Burger has argued that our standards of proof (to which I would add our definitions of substantive criminality) even if ignored in the jury room, are important:

> Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the . . . nuances of a judge's instructions on the law may well be largely an academic exercise; there are no directly relevant empirical studies. Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be unknowable, given that factfinding is a process shared by countless thousands of individuals throughout the country . . . [E]ven if the particular standard-of-proof catch-words do not always make a great difference in a particular case, adopting a "standard of proof is more than an empty semantic exercise." In cases involving indi-

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56. Coffee & Tonry, *Hard Choices: Critical Trade-Offs In the Implementation of Sentencing Reform Through Guide-lines*, ___ CRIME & JUSTICE ANNUAL ___ (forthcoming).

57. This, of course, has led to the overstated "telephone directory" criticism of determinancy and desert.

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vidual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty."[58]

### *B. Dilution of Reassessment of "Seriousness" of Crime*

Current interest in selective incapacitation, recidivism, and the crime rate has come at a time when the country is coincidentally beginning to reassess the seriousness of non-violent white-collar crime and its appropriate punishment. Marxist[59] and other[60] critiques of the criminal justice system, as well as the Watergate and Abscam scandals, have influenced our thinking. Increased emphasis on "violence" or "recidivism" will very likely parry the thrust of the movement to reassess non-violent crime, since it is not likely that John Dean, or Harrison Williams, would be prime targets for incarceration under the Greenwood-Feinberg approach. (Though, to be fair, Greenwood does state that some "serious" criminals require incarceration regardless of incapacitation effects.)[61]

### *C. The Empirical Confusion of Selective Incapacitation Criteria*

A few final points about the practicality of selective incapacitation are worth mentioning. In the past year, three reports have been issued which expound ways to identify career criminals for selective incapacitation. Peter Greenwood's famous *Selective Incapacitation,*[62] and Peterson and Bariker's *Who Commits Crimes*[63] rely on essentially the same data base, but come up with substantially different approaches and incredibly different results. The third such report is INSLAW's *Developing Criteria for Identifying Career*

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58. Addington v. Texas, 441 U.S. 418, 424 (1979).

59. Among the leading Marxist critiques of the criminal justice system are W. CHAMBLISS, CRIMINAL LAW IN ACTION (1975); R. QUINNEY, STATE AND CRIME: ON THE THEORY AND PRACTICE OF CRIMINAL JUSTICE (1977); R. QUINNEY, CRITIQUE OF LEGAL ORDER: CRIME CONTROL IN CAPITALIST SOCIETY (1974); R. QUINNEY, THE SOCIAL REALITY OF CRIME (1970).

60. Among the many "conflict" theorists, Austin Turk is clearly one of the best known, and most prolific. Some of his works include: LEGAL SANCTIONING AND SOCIAL CONTROL (1972); CRIMINALITY AND LEGAL ORDER (1969); *Law, Conflict, and Order: From Theorizing Toward Theories,* 13 CANADIAN REV. OF SOC. & ANTHR. 282 (1976); *Analyzing Official Deviance: For Nonpartisan Conflict Analysis in Criminology, 16* CRIM. 459 (1979). *See also* Edwin Schurr, whose works include: RADICAL NON-INTERVENTION: RETHINKING THE DELINQUENCY PROBLEM (1973);, LABELING DEVIANT BEHAVIOR (1971); CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY (1965). *See also* RADICAL ISSUES IN CRIMINOLOGY (P. Curlen & M. Collison eds., 1980).

61. P. GREENWOOD, SELECTIVE INCAPACITATION (1982) [hereinafter cited as *Greenwood*].

62. *Id.*

63. M. PETERSON & H. BARIKER, WHO COMMITS CRIMES (1981) [hereinafter cited as PETERSON].

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*Criminals.*[64] There is a jarring incongruity in the criteria that each of these reports considers to be relevant to identifying career criminals. However, the three studies do not attempt to seek exactly the same end with precisely the same precision. Each report proposes a formula for imprisoning many for a very long time on the premise that this imprisonment will benefit society. It is shocking that their criteria for such a crucial proposal differ so sharply. Let me briefly turn to some of my concerns.

Peterson and Bariker found that the best predictor for determining who was to be a career criminal was the number of past felony convictions.[65] INSLAW did not consider the sheer number of convictions, but was interested in the number of arrests, broken down according to the type of crime.[66] In contrast, Greenwood found the number of convictions to be totally irrelevant, except where there had been past conviction for precisely the kind of felony for which the defendant was now being convicted.[67] In light of the plea bargaining process, both Greenwood and INSLAW's precision seems strangely placed since they were not concerned with the quantity of felony convictions, which Peterson and Bariker found crucial.

On the matters of juvenile activity and previous criminal activity itself, the reports were similarly at odds. Peterson and Bariker found that the age of first arrest was negatively related to career.[68] INSLAW did not directly consider either of these, although they might be encompassed in the report's concern with "length of criminal career."[69] Greenwood did not consider the fact of the record, but the fact of conviction, and only if the conviction occurred before the age of sixteen.[70] On the other hand, juvenile drug use was critical for Greenwood,[71] while the others found drug use to be a relevant but not critical factor.[72] Again, Peterson and Bariker concerned themselves not merely with the fact, but with the frequency and seriousness, of juvenile incarcerations,[73] which were not relevant to Greenwood[74] or INSLAW.[75]

The number of probation terms was the second best predictor, according to Peterson and Bariker,[76] while it was not relevant to Greenwood.[77]

64. INSLAW, Inc., DEVELOPING CRITERIA FOR IDENTIFYING CAREER CRIMINALS (U.S. Dept. of Justice 1982) [hereinafter cited as INSLAW].
65. PETERSON, *supra* note 63, at 185.
66. INSLAW, *supra* note 64, at 46.
67. GREENWOOD, *supra* note 61, at 50.
68. PETERSON, *supra* note 63, at 185.
69. INSLAW, *supra* note 64, at 46.
70. GREENWOOD, *supra* note 61, at 50.
71. *Id.*
72. INSLAW, *supra* note 64, at 46; PETERSON, *supra* note 63, at 186.
73. PETERSON, *supra* note 63, at 186.
74. GREENWOOD, *supra* note 61, at 50.
75. INSLAW, *supra* note 64.
76. PETERSON, *supra* note 63, at 185.
77. GREENWOOD, *supra* note 61, at 50.

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INSLAW found it to be the worst predictor of any factor which they were still willing to consider.[78]

On the other hand, the factor which INSLAW found most critical, the duration of previous terms of imprisonment,[79] was not mentioned by Peterson and Bariker,[80] and was only one of several factors considered by Greenwood.[81]

There is no agreed upon agenda, much less consensus, among the sociologists and statisticians who seek to persuade us, on the basis of their independent studies, to forego the moral, if not constitutional, issues of selective incapacitation and preventive detention.[82] Even if we were ready to incapacitate selectively, there is absolutely no agreement among the incapacitators about what are relevant predictors. At this point, arguments that we should jettison deepseated misgivings and reservations about predictive incapacitation are, at the very least, premature and should, on that basis alone, be ignored.

I have spoken thus far, as most desert theorists speak, as though crime control were totally irrelevant to sentencing strategy. On the theoretical, philosophical level, that is undoubtedly true. But there are several aspects of overlap which should be noted before desert theorists are simply cast aside because they have no concern with reducing the crime rate.

First, desert requires that every offender captured and convicted of the same crime be visited with some punishment. While there is little doubt that increased certainty of capture is much more of a deterrent than punishment, certainty of punishment, if captured, is still marginally relevent. Desert, more than any other theory, seeks to assure certainty of punishment without the availability of discounts, avoidance mechanisms, or plea bargaining. In short, strict adherence to a desert model would appear to have at least as great a deterrent impact on the crime rate as the present system.

Because of its stress on equality, desert theory also tends to have the same effect as a strategy of collective incapacitation, though the duration of imprisonment will not be as long as van den Haag[83] and others might suggest. If this is true, it is likely to have at least as substantial an impact on the crime rate as some specific programs of incapacitation. In fact, Peter Greenwood, the most recent proponent of selective incapacitation, has ex-

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78. INSLAW, *supra* note 64, at 46.

79. *Id.*

80. PETERSON, *supra* note 63, at 185.

81. GREENWOOD, *supra* note 61, at 50.

82. *But see,* Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism.* 96 HARV. L. REV. 511 (1982).

83. E. VAN DEN HAAG, PUNISHING CRIMINALS (1976); Professor van den Haag's suggestion that habitual offenders be confined until they reach 40 is hardly new; Edmund du Cane suggested it more than 100 years ago in England; it was rejected then and it should be rejected now. *See* Radzinowicz and Hood, *Incapacitating the Habitual Criminal: The English Experience,* 78 MICH. L. REV. 1305 (1980).

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plicitly stated that the crime rate would be more certainly lowered by incarcerating every felon for a year than by any program of selective incapacitation.[84] A year for every felon might appear disproportionately high (or low) for the offense because of the way in which many acts have come to be called felonies. Nevertheless, Greenwood's observation cannot be ignored. A firm determinate policy, strictly followed, is at least as effective as a morally dubious selective incapacitation program.

A desert system of sentencing might well have at least as large an impact on the crime rate as other more questionable (both ethically and empirically) methods of sentencing. Perhaps even the utilitarians among us should give a second glance at desert theory before embracing a system which tends to discriminate against those who use cocaine or heroin in quasi-public settings (but not those who use it privately), or who cannot hold a job because they are not blessed with the power to hide their addictions.

The contest between selective incapacitation and desert has clearly been joined. If we are lucky, principled public debate will ensue.

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84. Greenwood, *The Violent Offender in the Criminal Justice System*, in CRIMINAL VIOLENCE 320, 339 (M. Wolfgang & N. Weiner eds. 1982).

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