

## DISCUSSION

Graham Hughes, Moderator\*

Our panel has exercised such marvelous restraint that we really do, to my surprise, have time for comments.

AUDIENCE COMMENT: I'm John Irwin from San Francisco State. I find it peculiar that some of the panelists didn't mention, or at least they didn't thoroughly explore, public pressure although I consider it to be the main cause of overcrowding, and also what is going to prevent reducing prison populations. The only comment that really touched at it at all was Al's statement that the public, as he measured it, wanted at least twice as lengthy sentences as prison administrators, judges, and so on. I think that is really what the problem is.

But I want to step back a little bit. I think there's a big mistake in dwelling on the sentencing policy that has swept across the country as accounting for prison population increases. The just deserts model is blamed for precipitating a series of increases in sentences. I just don't think that's true.

I participated in the early development of the just deserts model when I worked on the American Friends Service Committee. We had two major concerns. One was reducing the length of prison sentences which had been steadily rising under an indeterminate sentence system; the other was disparity. But both were equally of concern. No one anticipated that it was going to lead to a drastic increase in prison sentences. The punitive movement was an independent movement which was not precipitated by the movement toward just deserts. California would have the same crowding today—even if it had never adopted determinate sentencing. Reagan demonstrated what you can do under an indeterminate sentence system; he reduced the prison population in two years from 28,000 to 17,000 and raised it back up to 29,000 in another year. It had ample flexibility to hold people for long periods of time and the same amount of discretion was there in the hands of judges to send more people to prison. It was the expression of a general public demand for more punitiveness.

In California, for instance, they're so frightened by any mention of reducing sentences that they're going to relabel the current sentences as minimum sentences, and then allow the commission to set them higher. So any revision in the law will necessarily include long sentences. And that's because the legislatures feel that the public insists upon that. Our work is going to have no impact on the length of sentences until there's a drastic change in the public's expressions toward punitiveness.

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And I think, Kay, your problems in Minnesota are now starting to reflect that. We used to consider Minnesota the one sane state which would never swing towards punitiveness. But you're revealing now that punitiveness is starting to creep into the minds of legislatures and prosecutors, and now you're going to have to try to withstand a bombardment on your system. And I think, really, that's the issue that should be addressed, not whether just deserts works or doesn't work at all. We're going to have punitiveness as long as the public wants it to continue.

KAY KNAPP: I agree a lot with what you say, which is, I don't think just deserts or any particular model is driving up the prison population. And I agree that public attitudes are very harsh toward crime. But I think if we expect to wait for public attitudes to change, we're going to wait a long time. Also, I don't think that public attitudes in Minnesota, either before the sentencing guidelines, or now, are all that different from those in the rest of the country. I don't think the body politic is very realistic about punishment. I think the difference is one of political leadership, not one of public attitudes. In California, there is some political leadership, but there certainly is not enough. But I think that's where it's going to have to come from. I don't think that the public is ever going to change its attitude, at least not in the foreseeable future.

AUDIENCE COMMENT: Just a footnote to my statement. I think that what has happened is that a little ripple of punitiveness occurred in the public, and politicians seized upon this and now it's gone beyond their control.

ALFRED BLUMSTEIN: There are two comments I'd like to make in response to the statement. The reformers should always anticipate what is going to happen to their reforms. It may well be that, as with many other reforms, here was a reform initiated by the liberals that got captured by the conservatives, and put to conservative purposes. But simply to declare the purity of intent at the start does not dismiss the necessity of anticipating the consequences of reform.

Second, to rail against the inappropriateness of public attitude and punitiveness is similarly not going to be terribly effective. Part of the reason that the public demands more punitiveness is that they perceive, or at least many of the political leaders, force or encourage them to perceive it as a free good. It is necessary to force the public to face up to the fact that it isn't a free good.

To the extent that capacity of existing facilities can be put on as a cap, then the public must deal with the operating costs of additional capacity and the construction costs of the additional capacity. We must force the public debate about punitiveness to include costs, by requiring, for example prison impact statements for each new piece of mandatory minimum legislation. As one forces the weighing of the prison impact statement and its associated cost against the legislative proposal, then I think we will at least see the public face up to its inconsistency in demanding more sentences from the

judiciary committees, and less appropriations from the appropriations committees. Bringing these two into an appropriate juxtaposition, I think, will force the public into recognizing that punitiveness is not a free good.

AUDIENCE COMMENT: My name is Andrew von Hirsch. Just two points, first of all, a propos of what John [Irwin] was saying; if you look at the states that have had a big increase in prison populations, some, such as California, did have a "change in rationale" that accompanied it. Others, like New York, did not.

That does suggest that if you move towards a selective incapacitation model, you may still be wrestling with the same problem—the people who wanted tough desert will want tough selective incapacitation.

The main point I wanted to make is to defend the way Rick [Singer] went about the problem, to defend it a bit against something that Al [Blumstein] said. I think there are a number of alternative sentencing theories, one of which is a desert model, and one of which is a sort of neo-positivist model, where desert is some sort of outer limit and then you decide everything on utilitarian grounds. Another, which is what Norvil [Morris] seems to be suggesting in his last book, is somewhere between these. Now, I don't think we can legislate to each other agreement on which is the right model. The problem is there are some underlying value judgments that are being made, and I don't think that is going to work very well. So it seems to me that what Rick has been doing is interesting, to simply say, okay, suppose for the sake of argument, we adopt a desert model. And suppose that under that model we run up against the prison overcrowding problem. What moves can we make, consistent with that model, that allows us to solve the problem? And if somebody doesn't like the theory, for example, if somebody prefers Norvil's model, I think one has to go through the same process of saying, okay, this is what the model is, these are the problems that can arise under it, these are the pressures that one can run into, and these are the ways that we can respond. But what I liked about what Rick was doing is that the only way you can really talk about overcrowding is to start off with a model for the sake of argument and see how it works.

Then my only problem is some of the points that Shelly [Messinger] was making, some of the specifics. For example, it's not immediately obvious to me why duration goes first and the in-out decision later. If you shift to a selective incapacitation model, you'll have very much the same problems; for example, what's a sufficiently serious prospective crime to worry about if we have a shortage of resources.

SHELDON MESSINGER: I'd like to comment on that if I may. I agree in general with what Andrew said, one has to adopt a theoretical perspective. But it's not at all apparent to me that either a desert model or a utilitarian model is one that I would want to push if I wanted to realistically assess the problems of dealing with prison crowding—present and anticipated. This goes back to my remark that I want to challenge the idea that the desert theory deals with the crime rather than the criminal. I think a better way to talk about desert theory is to say that it deals with the moral aspects of

factors and situations; I want to put it that way because I think that realistically situations and persons continue to have moral and other aspects.

Let me use Rick's language: I wouldn't want to live in an ideal desert world. As a moral matter, I wouldn't want to live in an ideal desert world, and as a realistic matter, I don't think we ever can. And I think that what happens, unfortunately, is that what is a theoretical perspective, soon is mistakenly spoken about as if that's the way the world is, and, moreover, as if that's the way the world should be.

AUDIENCE COMMENT: I'm Bill Gibney from Prisoners' Legal Services in New York. Edward Hammock, Chairman of the New York State Parole Board, in arguing against the adoption of a Minnesota-type system for New York, pointed out that the Minnesota system failed to eliminate race as a disparity factor in sentencing in Minnesota. I wonder if the panel could comment on this.

KAY KNAPP: We did find differences in sentencing practices between whites and minority offenders. But one thing that a system like the sentencing guidelines provides is a much better measure of racial differences than we ever had before. We have much better ability to determine the seriousness of the offense and more uniform measures of offense seriousness. This does not necessarily translate directly into practices on the part of the courts. Therefore, we do still find differences. The disparity tends to be quite subtle, we can't isolate it by judge. The region where we find differences primarily tends to be the metropolitan area. What we can do is monitor this very closely, report it, and hopefully sensitize those who are doing the actual application of sentencing policy to the problem.

AUDIENCE COMMENT: I'm Jim Jacobs. It's only with some trepidation that I raise a question with Al Blumstein about his comments on the demography of crime. You seem rather confident that the crime wave has passed and that it will quickly make itself evident in the prisons. You say that the baby boom lasted until 1961 or 1962; that would make the youngest babies in their early 20's now.

Therefore, we should have seen a reversion to the pre-baby boom crime situation in the United States, but I don't think we've seen anything like that.

I'd like you to comment on that. Also, if you are right that we're pretty soon going to see abandoned prisons in the same way that we're seeing abandoned schools, shouldn't that already be evident in the juvenile justice system in the intakes, in the dispositions, and in the populations of the juvenile institutions? As far as I know, that isn't evident there, either.

ALFRED BLUMSTEIN: Let me say a few things on that. First, by no means do I argue that demography is the only factor affecting criminal activity; age is just a terribly powerful factor affecting an awful lot of it. The national crime statistics in 1981 were about two percent below 1980, down on all offenses but robbery; national crime statistics in 1982, at least the first half, were about five percent below 1981, and down in all offense types. And

while that little bit doesn't proclaim that the future is in our hands, at least it's not inconsistent with the expectation of the demographic projection. I think it's important to emphasize that there is something in the order of a ten year lag between peaking of crime ages and peaking of imprisonment ages. So that the period of the 80's, to the extent that demographic variables are important, could well see crime coming down and prison populations going up, with a peak being reached not until 1990. Incidentally, one of the things that scares me is that somebody is going to take these two curves of crime going down, prison population going up, and prove that there's a deterrence effect going on, when both of them are really driven by an exogenous age effect. The peak robbery age is at about age fifteen. By age twenty three, the age-specific arrest rate for robbery is about a half of what the peak is in the late teens.

With respect to the juvenile issue, in Pennsylvania juvenile institutions are being vacated, and we're now seeing many of the private sector juvenile institutions fighting with each other for clients, and fighting against the state system in order to maintain their clientele.

So that I think we are seeing a real reduction in the juvenile institutions, but I haven't looked very carefully at them, and others may have a better perspective on them.

My sense is that we are seeing a real age effect, that's now impacting juveniles, and that's certainly an important factor in the growth of the prison populations over the last five to ten years, and we can anticipate continuing; but if we expect this growth to go on forever, then we ought to scurry out and build a lot more prisons. But if we anticipate that the growth is going to peak by the end of this decade, then our strategy has got to be very different; and that's finding a way to get through the rest of the decade, because if we think the construction solution is the one, by the time we go through all the processes of deciding to build, finding the site, getting the money, putting up the prison, by the time the prisons are built, it will be the end of the decade, just about the time that the pressure starts to alleviate.

RICHARD SINGER: I would suggest that the demographics might well indicate that the crime population of serious offenders will increase in the 1990's, because there will be more people in positions to dump toxic wastes around the country than there are now, etc. Now, I don't know whether dumping toxic wastes is more serious or less serious than robbery, but I think there is a concern that we always focus too narrowly on the index crimes of the FBI. We've got to think about what other things we mean by seriousness, and not talk only about prison population going up or down in terms of those things. Or in the alternative, we've got to talk about seriousness of offense without necessarily talking about imprisonment in the same breath, and we've got to talk about other kinds of ways to blame and stigmatize people. I agree that the demographics on robbery are X or Y, but

I don't think that alone answers the question of whom we should be sanctioning seriously, and I wouldn't want us to make that assumption.

KAY KNAPP Professor Jacobs, I'm very grateful to you for raising the issue of demographics because I did want to respond to Al's comment about demography perhaps producing the increased prison populations in Minnesota. A very small part of the increase is due to the increased number of people going through the courts, but I'm not even going to attribute that to demography. Certainly the primary increase is due to harsher sanctions for the people that a few years ago we weren't sanctioning quite so harshly. And it's clearly attributable to increased sanctions on the part of prosecutors and judges, and, to a lesser extent, the legislature in their laws. It's not demography; and I don't even think the increase in volume we have coming through the court can be traced very well to demography. We have two counties side by side, Hennepin and Ramsey, quite similar—there are some demographic differences, but they're similar in composition and culture. And in the last year, Hennepin's felony volume remained virtually constant. But Ramsey county increased by about thirty percent. The court processing in the two areas are very different, the prosecutorial offices are very different, the judiciary is very different, and so even the change in volume I would not attribute to demography in Minnesota.

AUDIENCE COMMENT: I'm David Corcoran from the Record newspaper in Hackensack, New Jersey. I'd like to ask one of the panelists to clarify a point that was made fleetingly here. It has to do with reduction in the crime rate in certain places. In my state, we've had a pretty general reduction of the crime rate over the last year. And law enforcement officials have been quick to attribute that to the stiffer sentencing laws in New Jersey. Is that a completely trivial argument, or is there something to it?

GERALD KAUFMAN: In the four states where we work, we have been presenting Todd Clear from Rutgers. He shows, with all the studies, very, very little. There's just very marginal decreases in crime for large increases in incarceration.

ALFRED BLUMSTEIN: I think a great test of creativity is to give a bunch of people two data points and ask them to explain which is causing the change. I've seen more explanations of the drop in crime rate. It's awfully tough to really sort it out after someone tells you crime went down, and it's not inconceivable that stiffer sentences have had an influence, but almost certainly there are going to be a lot of other factors as well. To attribute it to any single cause is almost silly.

SHELDON MESSINGER: I'd like to make one comment. One of the few generalizations that I am certain of is that criminal justice officials will never claim credit for a rise in the crime rate; they will always claim credit for a drop in it. And I'll tell you that is one of the few generalizations that I know applies to any country, any time. There's very little that we're certain of in social science, but that's one thing we are certain of.

KAY KNAPP: Yes, that's exactly right. The chair of the sentencing commission just spoke to the legislature the other day. He said, "You know, if the crime rate had gone up, we'd be blamed, there's no question that we'd be blamed." He then asked, "Does that mean we get to take the credit because it went down?" And clearly the commission was not suggesting they should take the credit, but I don't think there's any question who would get the blame if the rates gone up instead of down.

