

RESPONSES

MICHAEL SHERMAN *

Let me start with a summary statement of my position on the prison crowding problem. I think the root of the difficulty lies in the *composition* of the prison population: too many people in prison don't belong there, and a smaller number of people not in prison do belong there. Until policymakers focus more closely the scarce resource of prison space on the repetitive violent offender, the problem of the size of the prison population will remain intractable.

In most states, I submit, closer attention to the composition of the prison population will greatly improve its fit with available capacity. For the few states which already concentrate on the violent offender, additional capacity may still be necessary. But in both categories, more money will probably have to be spent on raising the quality of available capacity to humane and constitutional standards. Thus a distinction has to be maintained between prison construction which expands capacity, and prison construction which does not expand capacity but raises its quality. These are separate policy goals, with quite different long-term implications.

In that context, let me discuss some features of Jim Jacobs' paper with which I heartily agree. First, Jim emphasized the fact that there is more than one perceived crisis, and that these different crises are often mixed up with each other. If you don't get them straight, then an orderly policy analysis is virtually impossible. In many current discussions, a failure to accept Jim's point leads to an assumption of consensus where no consensus exists. Some of us at this meeting tend to assume that "the crisis" is one of overuse of incarceration. I accept this view, but many Americans do not. Indeed, many Americans believe exactly the opposite, that the nature of the crisis is the *underuse* of incarceration. Although polls are often unreliable, they do indicate that a majority of citizens hold "conservative" rather than "liberal" views on who belongs in prison.

I think Jim is also correct to question whether it is necessarily illiberal to support certain kinds of prison construction. Consider, for example, the difficulty of a liberal who is genuinely concerned about the conditions under which today's prisoners live. He may find himself trapped by the ideological debate into opposing any spending at all on the prison system. The effect of that, clearly, is to worsen the conditions under which the existing population of prisoners will have to live. Is that acceptable to a humane liberal? Ideological categories aren't always terribly useful, especially when they polarize discussion.

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Often, the quality of general public debate is so low that it is not fair to expect a citizen to know where to come down on a question like the bond issue. I believe that this is partly the fault of our political leaders. A lot of inexpensive political hay is made from the criminal justice debate, and politicians have not made enough of an effort to help the public understand what can reasonably be expected from the justice system. Even calling it a "debate" implies a kind of a structure which usually does not exist; too often, there is a debate only in the sense of marshaling data to score points against one's opponent, rather than an attempt to improve public policy.

Jim, quite correctly I believe, emphasizes symbolic aspects of the debate on prison construction. I've written about this in *Imprisonment in America*,¹ but I think it is important to repeat that the narrow technical debate about prison construction and expansion has gotten caught in a much larger and very heated debate about crime and punishment in this country. Thus, the question of spending money on prisons has become a symbol that people fight over, irrespective of what works or doesn't work in corrections. The same is true of the sentencing controversy, where longer or shorter sentences are advocated for largely symbolic reasons, rather than because they reduce crime, facilitate rehabilitation, etc.

The symbolic issue was touched on yesterday by a questioner from the floor. He made an analogy between military matters and prison matters. I have argued elsewhere that there is indeed a structural similarity between the debates about building prisons and building strategic weapons, in that both have much more to do with the symbolic significance of particular decisions than with the effectiveness of particular corrections policies or particular weapons systems.² Both debates can often be better understood as competitions among symbols than as efforts to credit or discredit particular arguments about effectiveness. We are dealing with what William McNeill has called "The Care and Repair of Public Myth."³

Of course, prisons have historically been fused in the American mind with the notion of punishment. Their symbolic aspect has always been important: for example, in the first third of the 1800's they came to be a symbol for America's humane departure from the capital and sanguinary punishments of the British. In contemporary America, the fusion between punishment and imprisonment is eroding somewhat, but it still dominates our thoughts and feelings. As long as this remains true, traditional policies will be difficult to change and innovation will be opposed on the ground that "we don't do things that way here."

Pursuing the analogy to weapons for a minute, consider the debate about the MX missile. Here we have a highly dubious strategic weapons

1. M. SHERMAN & G. HAWKINS, *IMPRISONMENT IN AMERICA: CHOOSING THE FUTURE* (1981).

2. *Id.* at 126-30.

3. McNeill, *The Care and Repair of the Public Myth*, 61 *FOREIGN AFFAIRS* 1 (1982).

system which galvanizes a great deal of political support from people who are not stupid, because they regard it as a sort of counter in a symbolic game. Many of the MX supporters don't really care exclusively or even primarily about its effectiveness; they feel that it symbolizes "standing up to the Russians" and "defending the free world." This goes some distance to understanding why some members of Congress support a program which they privately acknowledge as adding marginally or not at all to national security.

Similarly, the symbolic perspective helps understand why many politicians support correctional policies which they privately regard as a little bit silly. It's not enough to say that it's politically self-serving. The deeper question is: *why* is it politically self-serving? To understand the symbolism of the politics helps us see that opportunistic politicians may also be responding to values rooted deeply in American culture.

Jim emphasizes correctly the politics of prison projections, the process by which experts and nonexperts alike use projections of future prison populations to justify the building of more (not necessarily better) prison cells. Projections are a powerful influence on decisions to build, and I believe they are often misused because they usually concentrate not on policy options but on "business-as-usual" forecasts. "If we continue business as usual," the analyst tells the bureaucrat, "we will have X thousand prisoners by 1990 and therefore we have to build X thousand cells." But that will be true only *if* the bureaucrat chooses to continue business as usual. The whole point of projections should be to show that we don't have to continue business as usual and that policy decisions (not the crime rate or the baby boom) are the ultimate determinants of the size and composition of prison populations.

I'll conclude with a couple of points of mild disagreement with the Jacobs paper. First, I'm a little more sanguine than Jim about the effects of the defeat of the bond issue. In the short term, it is true that New York State has found ways to circumvent the effects of the voters' decision. (I question, incidentally, the appropriateness of the State bureaucracy's response: "We'll expand capacity out of general revenues if the voters won't let us do it through a bond issue.") In the long term, however, I think that the defeat of the bond issue may have an important political effect. It may galvanize and encourage a lot of people who were demoralized about the relationship between policy analysis and policy making. The cogent arguments against the bond issue did, after all, carry the day with the voting public.

In passing, I should note that New York State is a "leaner" state than many others. That is, a smaller fraction of its inmates are incarcerated for non-violent crimes than is the case in most other states. Indeed, variations across states are tremendous. In the south, for example, there are still a great many states where far more than half of all prisoners are incarcerated for non-violent crimes.

Jim discusses the proper role of the electorate in the policy making process. He cites with approval a paper by Ziegler to the effect that in a democracy the government must be responsive to the will and choices of the people. No one could disagree with that. But I get very uneasy when advocates of particular policies claim deep knowledge of "what the American people want" in criminal justice. Especially on a matter such as sentencing policy, which, after all, drives prison populations upward or downward, you will hear people say, "We need longer sentences because the citizens demand them." I'd take a deep breath before making policy on the basis of such unverified claims. The pollsters' data on these matters are notoriously volatile and hard to interpret.

In his paper, Jim finds it "not at all surprising" that the black and Puerto Rican caucus in the legislature opposes prison expansion. We have a nasty question here. Is it illiberal to expand the prison population because this may increase the fraction of the prison population which is minority? That question creates a lot of difficulty for liberals, especially since many see themselves as the defenders of the minority community's interests.

A final comment about the role of academics and specialists in this political debate on prison construction. Some speakers here have indicated that they think that specialized discussions such as this New York University symposium cannot affect policy, directly or indirectly. I'm more optimistic about this. In many states I think that we can see real effects from the work of academics and specialists, many of whom are present at this conference. It is commonly felt that a lot of good thinking has been done in this field but that it hasn't made any difference because the national prison population has risen. I wouldn't accept that conclusion. In individual states (for example Oregon, California, and Minnesota) sentencing policies have been altered and new institutions such as sentencing commissions established. The emerging links between specialists and policymakers contain some of our best hopes of the future for a more rational imprisonment policy.

KENNETH CARLSON*

The first thing that I think needs to be said is how absolutely central the question is that Jim is asking. I began my prison studies with the question of where prisoners come from. We attempted to project future prison populations to guide decisions about future prison space. In that study I began to see that there are very complex linkages between all of the decisions that are being made: sentencing patterns, release plans, tolerable levels of crowding, and restrictions on imprisonment imposed by federal and state courts. One question repeatedly emerged: Who is making the decisions about the amount of space that will be available? This question is crucial since the amount of space acts as an upper boundary on the number of prisoners. Answering this question tells us who is making the decision about the number of prisoners who will be crammed into how many square feet of space.

When Professor Pochoda introduced this panel, an interesting distinction struck me between the way Jim analyzes this question and the way that most of us begin answering it. Professor Pochoda mentioned mayors, governors, and elected officials as the people who are making the choices. Having looked at the question for about five years, I'm not sure that anybody makes a choice. I think the way Jim characterizes it, as a process with prisons as one end product, is a much closer summary of the way in which those "choices" are made. I doubt that someone somewhere *decides* the number of prison beds that New York now needs and where to put them. I think that there are so many people involved in that process, all of whom must reach consensus, that no one can be said to be making a choice. All of them, when asked about their role, will say that they are merely responding to conditions including prison crowding. I think that that particularly applies when we think about the actors who determine the absolute level of prison population—sentencing judges, parole boards, and state legislatures. All of them feel that they are not controlling prison population: they are just doing their jobs. Moreover, they're doing it in accordance with the same rules that they have been following and have been told to follow all along. As conditions shift, the effects of unadaptive policies result in *de facto* choices, but nobody recognizes them as choices.

I think much the same process probably applies to prison construction. Correction departments often have felt that their job was to house whoever the courts sent them. In their view, when it's necessary to build or acquire space in order to do that, it's not really their choice, it's their mandate.

Another point seems to me especially important about Jim's analysis. He looks beyond the narrow group that is legally empowered to make the

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construction decisions, and treats the electorate as part of this process. Given the close vote on the New York State bond issue, it is hard to understand the position of the electorate. Those who would like prisons not to be built would interpret the vote as a resounding defeat for the concept of more prisons. Since I've just said that prison construction is a process of building a complex coalition, it might be said that the right answer is the one that gets fifty-one percent of the vote. If New York pares back slightly on the construction level and gets fifty-one percent approval, that's the level of construction that pleases average people. So it's not at all clear what the recent vote means. The electorate has many components that function not just as voters but as advocates as well. The largest ones that come to mind are people who believe that the main issue of prison construction is race, or jobs, or social priorities, or community interaction. Somewhere, way down on the list is the coalition that is concerned about criminal justice. Everybody in the prison construction debate has an ax to grind, and the sound of those grinding axes seems to dominate the dialogue that goes on between the builders and their opponents. This debate is only slightly guided by people for whom prison construction is the primary issue.

Finally, I emphasize Jim's remark about the fundamental conflict between the thinkers and the doers. A state agency which has been administering the imprisonment process has a commitment not to admit its own mistakes. Insiders find themselves in a position where they need to assert that every parole decision to release someone was made at exactly the right time. It becomes impossible to acknowledge error, or even uncertainty. If paroling authorities were asked to change policy in order to regulate prison population as an alternative to prison construction, they would have to acknowledge making wrong or at least arbitrary decisions. The other part of the doer-actor problem is that construction, unlike population control, is a wholesale measure. Specific individuals have to be sentenced to probation or to unconventional alternatives, or released in order to control population. It takes a great conceptual leap to multiply everybody's sentence by ninety percent. That's simply not the kind of decision that we think of as just, because it implies that a robber convicted in 1983 will be treated differently from a robber convicted in 1982. The decision to build prisons does not in itself force us to face that kind of a dilemma.

In summation, I return to my point that the process by which construction occurs is absolutely central to all of the questions about how punishment is delivered. I think Jim is to be commended for raising it. I'm not sure I know the answer yet, or understand the process, but I think I understand it better because of Jim's theoretical analysis of the actors. I think part of the reason that we are and will continue to be uncertain about how the process works is that it is so amorphous and unstructured that there may not be any single object to understand.

PERRY M. JOHNSON*

I've been in the bureaucracy for many years, twenty-eight to be exact, and that makes me a bureaucrat. And in the sense that politics is the art of the possible, I am a politician. I've been warden and deputy and commissioner and bureau chief; therefore, I am a practitioner. What I would like to do today is to give you some ideas, from the standpoint of a practitioner, on practical solutions to overcrowding.

Unlike many social problems, prison crowding is really very simple to define. The size of the prison population is determined by just two things: how many people are coming in and how long they stay. When the population has grown beyond the capacity of the prison to hold it, only three things can be done. Either reduce the number coming in; reduce the time they stay; or expand the capacity of the system. Given the struggle in New York in the last several years, it won't surprise any of you that getting any of these three things done is a real problem.

Before I discuss my experiences in Michigan, I want to make a point which I think applies to New York and elsewhere. Although prison crowding is obviously a consequence of society's reaction to the problem of crime, it is not geared directly to the reality of crime. If reported crime is graphed against prison intake over any extended period you will find that the lines on the chart go in opposite directions almost as often as they go together.¹ This was especially true in the United States during the early 1960s, when crime was increasing and prison intake and prison populations were declining. In Michigan we had three or four thousand empty beds in the mid-1960s. A more recent and dramatic example of this occurred in Michigan in the middle 1970's when the amount of serious crimes committed by women was declining but our female prison population doubled. The point is that the public perception of crime and official reaction to that perception probably are more important than objective reality.

In order to affect prison population in either direction, you must influence the people making the decisions about who goes to prison and for how long. Even if it were possible to influence the objective reality, reducing the number of people who commit crimes or reducing recidivism might have little influence on actual prison population.

The "in-out" decision is the single most important element in prison overcrowding. The optimal strategy to prevent overcrowding would be to create diversion programs to keep people out of the system in the first place. Obviously, that will influence prison population. But a much less obtrusive

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1. MICHIGAN DEPARTMENT OF CORRECTIONS, *Court Dispositions by Type*, in ANNUAL STATISTICAL REPORT, 1974 through 1981; MICHIGAN DEPARTMENT OF STATE POLICE, ANNUAL INDEX CRIME REPORT (1974 through 1981).

remedy, but which will have a dramatic effect, is a reduction in the length of the average prison term. In Michigan we have about six thousand new commitments each year. An average term now is over three years. Ten years ago it was less than two years.² An average increase of a year with our volume of intake means the prison population has increased by six thousand prisoners. These six thousand beds cost more than a quarter of a billion dollars in prison construction alone. A similar situation exists in New York. But is the average term of three years really more effective than two years in achieving any goal of corrections? Can we say that an average burglary should be worth three years, rather than two years or four years? I think that remedies which aim at reducing the terms for relatively low-risk offenders have been overlooked too often in the pursuit of more fashionable alternatives to prison overcrowding.

Population pressures in most prison systems around the country have been so intense during the past few years that administrators have been forced to pursue all avenues of relief. We must, where possible, increase diversion of low risk offenders from prison; accelerate the release of better parole candidates and also expand the capacity of the system. We must confront policymakers with the cost of longer mandatory sentences that are politically appealing. Even these measures may be insufficient. Where they fail, we must have some emergency mechanism that will limit crowding in prisons. When you board a plane, you accept the fact that only a certain number of passengers can be carried. There's a limit set by the fire marshall on the number of people that can be in this room. Why is it so strange that a prison has a limit as well?

This leads me to my real task which is to talk briefly about the Michigan Emergency Powers Act, which was put into practice three years ago, and the prison conditions which it sought to improve.

Michigan has a unified adult corrections system that's typical of many of the larger states and which is responsible for probation, parole, and institutions. Somewhat more than seventy percent of our sentenced felons are in the community: either on probation, parole, or in halfway houses.³ Another ten percent are in minimum security, and the remainder are housed in medium security, or heavier security institutions.⁴ This distribution is probably similar to most other states.

During the six years between 1973 and 1979, Michigan's prison population doubled. It was the most rapid period of growth ever in the history of the department.⁵ This was consistent with the national trend.

2. MICHIGAN DEPARTMENT OF CORRECTIONS, *Commitments and Minimum Term Distribution*, in ANNUAL STATISTICAL REPORT, (1972 through 1982).

3. Michigan Department of Corrections, Summary Client Census Report, (June 1, 1983) (mimeographed weekly census report).

4. *Id.*

5. MICHIGAN DEPARTMENT OF CORRECTIONS, *Population by Facility, Sex and Year*, in ANNUAL STATISTICAL REPORT (1973 through 1979).

In our case, one contributing factor to the prison population increase was a shift by judges to more use of prison and less use of probation. The shift was not big, but it had a big impact. From 1973 to 1975 the prison disposition shifted from twenty-eight percent to thirty-three percent of all felony convictions.⁶ We attempted to reverse this trend by developing enriched probation services, probation incentive, and halfway houses with the hope that improved resources would encourage judges to use probation more. We also attempted to offset the political pressure on judges to send more people to prison by advocating and encouraging broader use of restitution and community service orders. These strategies resulted in some 1,400 fewer offenders being imprisoned in 1981 than would have been according to the 1975 rate of imprisonment. But that alone was not enough to offset the tremendous pressures that were building in our prisons. The most significant of these pressures was a referendum promoted by a county prosecutor that resulted in the abolition of special "early parole" and "good time" allowances on minimum sentences for the majority of prisoners coming into the system. This law effectively lengthened prison terms by an average of more than a year, and by itself may increase the prison population by 5,000 before the end of the decade, even if crime rates and commitment rates remained stable.

Several methods of meeting this population increase were attempted. In a five year period we increased the capacity of the prison system by 5,500 beds. We converted a mental health facility, an air force base, and a Catholic seminary. We built three new major facilities, three minor ones, and added some modular housing units to existing prisons. We expanded halfway houses to handle more than twelve percent of our population. But still, this was not enough.

During this same time, more than fifty mandatory sentencing bills were considered by the legislature. Although only a two year mandatory gun law passed, the message was loud and clear: "Get tough with criminals." The Parole Board was under incredible pressure to become more conservative in granting parole. We attempted to offset that pressure by providing the board with objective criteria for parole decisionmaking based on actuarial risk predictions. This effort met with success; violent crime committed by prisoners paroled at the earliest date was cut in half without any reduction in the proportion of the numbers granted parole at the earliest date. Still this was not enough.

In 1980 the department was the target of many lawsuits pertaining to overcrowding, and the state entered into a consent decree that resolved these. But the court did not provide the agency with sufficient authority to limit prison crowding. So in November, 1980, the Emergency Powers Act was passed.⁷

6. MICHIGAN DEPARTMENT OF CORRECTIONS, *Court Dispositions by District*, in ANNUAL STATISTICAL REPORT, (1973, 1974, 1975).

7. MICH. COMP. LAWS ANN. § 800.71 (West 1982).

The Emergency Powers Act effectively reduces a prisoner's minimum sentence. When the prison system exceeds its designed capacity for thirty consecutive days, the governor is required to declare a state of emergency. All prisoners who have established minimum parole eligibility dates have those dates reduced by ninety days. This includes everybody—whether their minimum date will be in ninety years, five years, two years, or tomorrow. If this does not reduce the population to five percent below designed capacity within ninety days, an additional ninety days is deducted. This act has been triggered five times in the last two years. Surprisingly, there has been little public outcry and little attention from the press.

Although the Emergency Powers Act has worked as a short-term remedy in periods of serious overcrowding, it is, at best, a temporary solution. The more frequently the law is triggered, the less it achieves. As prisoners in the system are moved ninety days closer to their eligibility date, other prisoners come into the system with their sentences intact. This creates a gap between the two groups. Sooner or later, the Act's impact will be much less than if two or three years passed between triggerings. In short, the Emergency Powers Act has been invaluable in allowing our state to maintain its prison population at court-mandated levels, but it is not a long-term solution to prison crowding.

The question that remains is how can a long-term solution be achieved. Prison crowding is a function of the capacity of the system, the number of people coming in and the length of their stay. Therefore, you have to start and end with the persons and agencies who have discretionary control over these matters. Ultimately only the legislature can provide funding for increased capacity. Only the sentencing judge can influence the number of people coming in the front door. The length of stay is the decision shared by the judge and the parole board within limits which are legislatively determined. Ironically, the people who have the least control over the prison crowding crisis are those closest to it, the prison administrators. They have neither the cause nor the solution under their control, and that is the real source of the difficulty. An obvious incentive exists for legislators to take a tough public *stance* on crime, but there is no obvious incentive toward *spending money* on prisons. The same motivational gap exists for judges and parole boards.

There are no easy answers. I can only say that the solution to the problem resides in the hands of those who set the length of prison terms or have the power to construct prisons. These are the people who must be influenced, and there is almost no use at all in talking to anyone else except as a means of indirectly influencing those persons.