

RESPONSES

NORVAL MORRIS*

As is often the case, I feel somewhat superfluous. My role is, I assume, to provide a brief period of peace while Peter Greenwood regains his equanimity. While the papers merit your attention, I won't try to respond to them. Instead, I'll respond to some of the things that have been said, and then put my own perspective on this issue to you.

I am skeptical of selective incapacitation's ability to provide guidance for a mature response to prison overcrowding. I am equally skeptical that a "just deserts" theory of sentencing will help resolve the problem. I am further skeptical that you will find among my suggestions a response to the problem of prison overcrowding.

The fundamental error is the assumption that a theory of punishment will make much of a difference to that problem. That does not mean that I think these matters are unimportant. They concern important questions of justice, fairness and decency in society, but they are not going to have much impact on prison overcrowding.

I spoke on this topic at the Hudson Institute. I prepared a powerful attack upon selective incapacitation, and Mark Moore responded, and we did one of those academic soft shoe acts.¹ I thought yesterday, when I was coming here, I would get the notes and advance the same arguments to you. But mercifully, I've lost the notes. What I shall do is to make a couple of points that I recall from those elegant lost notes.

The idea of habitual criminal legislation, of selecting a group of particularly high risk criminals for special, protracted incarceration to minimize their later criminality, has a long tradition.² Once, in Europe, it was carried to the point where they invented what was called the "dual-track system of punishment". Prisoners did their time for the crimes that they committed. Then the prisoners were locked up in more comfortable conditions with pool tables and cocoa at night for a second, longer period, as their preventive

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1. See generally M. MOORE, S. ESTRICH & D. MCGILLIS, *DEALING WITH DANGEROUS OFFENDERS* (National Institute of Justice 1983) (This is a two volume report prepared under the auspices of Harvard University's John F. Kennedy School of Government's Program in Criminal Justice Policy and Management and with the support of the National Institute of Justice. Mark Moore is the Faculty Chairman of the Program).

2. See L. SLEFFEL, *THE LAW AND THE DANGEROUS CRIMINAL: STATUTORY ATTEMPTS AT DEFINITION AND CONTROL* (1977), E. CHELIMSKY, *CAREER CRIMINAL PROGRAM NATIONAL EVALUATION: FINAL REPORT* (U.S. Dep't of Justice 1977).

detention sentence. And that was straight predictive-selective incapacitation for high risk groups. It did not work particularly well, because it was corrupted by the squalor of the marketplace and by the complexity and difficulty of the field in which we work.

Usually I find that I'm echoing Ken Feinberg's political judgments, but on this point my political judgment is contrary to his. The likelihood is that people who do not understand selective incapacitation will seize upon it and misuse it for larger punitive purposes. I do not think one has to embrace a selective incapacitation position at all to be in favor of presumptive sentencing, the path Minnesota has wisely followed in this area.

I want to be very careful. I think there are many good ideas within selective incapacitation. For example, the criminal careers projects have been very valuable in both the prosecution of offenders and the allocation of police resources. I think it quite desirable that judges should know the base expectancy rates for serious criminality by the person they are sentencing. As long as courts are going to do their best to make those judgments, the more refined we can make them, the better. I'm not at all against the acquisition and feeding of knowledge into the criminal justice system. I think that the work of Peter Greenwood³ and that of the Chaikens,⁴ among others, represents such acquisition and feeding. I think we should encourage it, and not let our views about its utility as a sentencing theory inhibit our support for it as a means of acquiring knowledge.

But as a sentencing theory it does have considerable difficulties. Look at the rhetoric. Rehabilitation didn't work; deterrence didn't work; just deserts has its problems. So therefore, let us embrace selective incapacitation. It's terribly superficial rhetoric. The fact of the matter is that in the complexity of the world and the reality of sentencing processes, all of these aims of punishment are important factors. Retribution is most certainly an important value in sentencing. While some of you will think it heresy to say so, for large groups at least, rehabilitation, the opportunity to maximize their capacity to conform, is a very important purpose. You will be hard put to persuade people in the community at large that deterrence isn't important. I think it is important in many areas of the criminal law. The sin is that of falsely erecting one purpose among many into an overriding principle.

Selective incapacitation has the problems of false positives, racial and class bias, inadequate knowledge about youthful records, and many other difficulties. But the predominant problem arises when by overreaching we inflate the value of our work. This proclivity is understandable, but it is also mischievous. Those who think that larger social problems can be solved by the criminal justice system will grasp hold of selective incapacitation. I do

3. P. GREENWOOD, *SELECTIVE INCAPACITATION* (Rand Corporation, R-2815-NIJ 1982).

4. J. CHAIKEN & M. CHAIKEN, *VARIETIES OF CRIMINAL BEHAVIOR: SUMMARY & POLICY IMPLICATIONS* (Rand Corporation, R-2814-NIJ 1982).

not think they will make the trade-offs of lesser prison population that Peter Greenwood talks about. They'll use his language of selective incapacitation as a justification for the increased severity of punishment which they wish to impose for other reasons.

And I think that lying behind that is the fundamental error, the belief that the theory and practice of the criminal justice system has much to do with crime rates. Of course, the criminal justice system overall does influence crime rates. But marginal changes in the criminal justice system, even changes as dramatic as substantial shifts in sentencing policy, are not very important to crime rates. Most serious students would concur that their potential for effecting change is marginal. Yet, constantly led by the political desire that we should do something about crime rates, and minimize the problems of crime in the inner cities of this country, we promise more than we can deliver. Selective incapacitation is the most recent example of such over-promising. Some of the popular sentiment toward more severe punishment may be a price we pay for our promises.

PETER GREENWOOD*

GREENWOOD: Since I am in general agreement with Ken Feinberg's paper I will devote most of my time to von Hirsch and Gottfredson, who find much to criticize in my recent work. Of course, I applaud Mr. Feinberg for sticking his neck out in what is apparently becoming a very controversial subject. Also, since one of the accusations in the von Hirsch-Gottfredson paper charges that selective incapacitation has been subject to overzealous salesmanship, I am going to attempt to undersell it in my remarks here.

My remarks will be organized as follows: I will first briefly describe what is in the report, "Selective Incapacitation,"¹ because in recent months the term has been used by others to describe many policies different from those in the report. Next, I will respond to the issue of whether selective incapacitation is really something new, or just repackaging of an old idea. The third issue I will cover is the propriety of using the survey data on which it is based. Finally I will discuss the moral and ethical objections to the concept, and the fundamental issue that Norval Morris and others have raised. This requires asking whether selective incapacitation or just deserts is a more dangerous tool in the hands of the "barbarians" if either one were to be used as a basis for establishing sentencing policies.

First of all, what is the report, "Selective Incapacitation," by Greenwood and Abrahamse all about? It uses data that is derived from a survey of 2200 inmates in prisons and jails in three states—Texas, Michigan, and California.² This was the third in a series of surveys that were designed to find out the kind of crime that offenders were committing in the two or three years before they were incarcerated.

Responses to some of the items in the survey were compared to official record data as a means of evaluating the reliability of the survey data. This analysis showed that while there were considerable differences between the survey and official record data, there was no consistent bias which would affect the analyses we planned to do.³

The survey data was used to identify a number of characteristics that are associated with high-rate offenders. We then used this information to show what would happen if offenders with particular characteristics were

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1. P. GREENWOOD & A. ABRAHAMSE, *SELECTIVE INCAPACITATION* (Rand Corporation, R-2815-NIJ, 1982).

2. M. PETERSON, J. CHAIKEN, P. EBENER & P. HONIG, *SURVEY OF PRISON AND JAIL INMATES: BACKGROUND AND METHOD* (Rand Corporation, N-1635-NIJ, 1982).

3. K. MARQUIS, *QUALITY OF PRISONER SELF-REPORTS: A RECORD CHECK EVALUATION OF BIAS AND RELIABILITY IN ARRESTS AND CONVICTION RESPONSES*, (Rand Corporation, R-2637-DOJ, 1981).

sentenced to different terms, particularly the impact on the crime rate and prison population. Our report makes no claim that it is a judge's handbook for sentencing. In fact the preface and the introduction stand for the opposite conclusion. Our recommendations are for more research on this topic and not for overzealous implementation. In fact, during the past six months, I've spent much time cautioning audiences against over-hasty implementation of selective incapacitation, and warning them about the problems they will face if and when they try to implement it. I certainly recognize that we need to find out if selective incapacitation would really work through a validation of the prediction models on which it is based.

Is this idea new or is the whole notion of selective incapacitation just repackaging an old idea? I think the former attempts to predict which inmates are still going to be criminals when they get out and, therefore, need additional rehabilitation while in prison, were very different notions from trying to predict the *rate* at which people are going to be offending out on the street. I think the latter concept is a substantial change from the former.

The second innovation in our study was the modification of the Shinnar model.⁴ Shinnar and Shinnar proposed a model for estimating incapacitation effects on crime rates, which assumed that all offenders committed crimes at the same rate. Our modification allowed us to specify different individual offense rates for specific groups of offenders, as indicated by our analysis of the survey responses. This was a fairly modest modification; but nobody else has done it. It lets one move from Wolfgang's⁵ notion that there are the chronic or frequent offenders to an ability to estimate the impact on crime if we sentence such offenders differently.

Andrew von Hirsch is correct in pointing out the history of the incapacitation debate. In an early article Shinnar and Shinnar⁶ claimed that reductions in sentencing severity could explain a good part of the increase in crime rates that had occurred in New York City over the preceding decade. Later it turned out that if you made fairly realistic assumptions about the magnitude of average individual offense rates, *general* incapacitation did not have much effect.⁷

The concept of selective incapacitation becomes obvious when one looks at the distribution of individual offense rates, which are extremely skewed toward the high end. For instance, half of the self-reported burglars in the survey reported a rate lower than five burglaries a year.⁸ But ten

4. Shinnar and Shinnar, *The Effects of the Criminal Justice System on the Control of Crime: A Quantitative Approach*, 9 LAW & SOC. REV. 581, 586 (1975).

5. M. WOLFGANG, R. FIGLIO & T. SELIN, *DELINQUENCY IN A BIRTH COHORT* (1972).

6. Shinnar and Shinnar, *supra* note 4, at 581.

7. See generally NATIONAL RESEARCH COUNCIL, *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECT OF CRIMINAL SANCTIONS ON CRIME RATES*, (A. Blumstein, J. Cohen & D. Nagin eds. 1978).

8. J. CHAIKEN & M. CHAIKEN, *VARIETIES OF CRIMINAL BEHAVIOR* 13 (Rand Corporation, R-2814-NIJ, 1982).

percent of those burglars reported a rate of more than 232 a year.⁹ We found the same distribution for robbery, theft, drug sales, or any combination of the offenses we looked at.¹⁰ The high rate offenders are clearly the ones we want to incapacitate. So the critical issue becomes whether we can identify these people who commit more than that fifty or a hundred serious crimes per year.

Andrew von Hirsch has already told you many of the details about this issue so I will not spend much time on it. Basically our study found that in our California sample a simple prediction scale allowed us to identify a high-risk group of robbers who committed, on the average, thirty-one robberies a year.¹¹ If the sentencing policy were changed to provide longer terms for the high-rate offenders and much shorter terms for the predicted low- and medium-rate offenders, we estimated that there would be approximately ten percent fewer robberies in California by adults and a reduction in prison population of approximately five percent.¹² A ten percent reduction in robberies may sound like a small number. However, given a rate of 150,000 robberies per year, we're talking about 15,000 robberies. We are also talking about a five percent reduction in the number of people locked up for robbery, that's 500 or 600 people or the equivalent of a small prison.

In summary, what is new about our study is our examination of individual offense rates, the identification of high-rate offenders, and an attempt to estimate the consequences of particular sentencing policies. We make no claim that this work does not have to be validated.

We also found wide differences in individual offense patterns between states. Our expectation that we would find such differences is one of the reasons that we had several states in our sample. Those of you who read the report will find substantial differences between Texas and California. There is minimal payoff from selective incapacitation in Texas, because there aren't many high-rate offenders. If they're not there, you can't lock them up, and you can't prevent a lot of crime by *selectively* incarcerating low-rate offenders. That raises a question for most other states: is Missouri like Texas, or Michigan, or California? This is an issue that will certainly come up, even between jurisdictions within a state.

The charge is made that our study inappropriately uses data on inmates to make inferences about all offenders; that we interviewed those in the lung cancer ward to make inferences about smoking, as von Hirsch puts it. Looking back over the history of criminology, I would point out that we are not unique in using data on people who come in contact with the criminal justice system to make inferences about what criminals are like in general. If

9. *Id.*

10. *Id.* at 14.

11. P. GREENWOOD & A. ABRAHAMSE, *supra* note 1, at 47-61.

12. *Id.* at 85.

we exclude all the studies that rely on arrest figures, or interviews with incarcerated offenders, we wouldn't have much knowledge about the behavior of serious criminals.

Certainly when one does such research, there's always the danger that there is a hidden group of offenders who never come in contact with the system, and therefore are not reflected in the study. However, there is considerable evidence to suggest that there is no such hidden group. Even the very skilled, sophisticated offenders make mistakes, get caught and sentenced, and end up in our samples. We also checked on the veracity of the data in our study done by comparing the amount of crime we estimated on the basis of the survey data (by estimating the number of offenders on the street and their average crime rates) with the reported crime rate. These two methods of estimating the crime rate are within ten or fifteen percent for burglary and robbery.¹³ If we were off by an order of magnitude of two or three, we would be less satisfied. But the fit is close enough to justify our proceeding. Until somebody finds a better way to study offenders, we are stuck with the problem of looking at arrest rates, conviction rates, or incarcerated criminal samples, and doing the best we can statistically to try and infer what the general population is like.

I will turn now to the moral and ethical objections to selective incapacitation, because they appear substantial. These moral and ethical objections even get in the way of validation because it is hard to put together a peer review panel in this field that does not contain some strong "just deserts" advocate. In fact this problem has frustrated my attempts to get funding for a validation study, to date.

Three moral and ethical arguments are usually raised against selective incapacitation: 1) the deserts argument, that we ought to sentence offenders for the crime they committed, not for what they might do in the future; 2) the false positive argument, that we are going to inappropriately sentence some "good guys," or "not-so-bad-guys" to longer terms because of our limited accuracy in predicting offense rates; and 3) objections to the use of particular variables, such as juvenile record or employment, for prediction for sentencing purposes.

Andrew's theory of pure just desert sentencing is not universally accepted. "We," whoever we are, are not in agreement that deserts is the only purpose for sentencing. As Norval Morris mentioned, we still adhere to the other purposes—rehabilitation, deterrence and incapacitation. If you are a supporter of the priority of consistency in sentencing then you should object to leaving these objectives floating around for any judge to use, whenever he wants, in whatever combination he wants, because then he can come out with any sentence he wants. I think it is appropriate now, given what we know about the effects of sentencing, to focus on deserts vs. incapacitation.

13. *Id.* at 76-78.

There is a real trade-off depending on whether you focus on what somebody did, or what he or she is likely to do in the future. All of the sentencing schemes of which I am aware involve a combination of the two objectives. In fact, selective incapacitation, as we proposed it in our study, was a supplement to a desert sentencing schedule.

We posited a sentencing guideline review similar to that of Minnesota. You start out with maximum capacity as a limitation constraint, then estimate the future crime rate. From these you derive a set of minimum and maximum sentences based strictly on deserts and estimate what the prison population will be. If there is any capacity left over, then that is the cell space or capacity that can be used for selective incapacitation purposes. That is, if you choose to do it. You may choose to use that extra space to attack a particular crime problem, and here a specific choice is required. You can focus on all violent crimes, just robbery, or robbery and burglary. Then within the just deserts schedule you can consider longer terms for some kinds of robbers and shorter terms for other kinds of robbers within the acceptable constraints on space and sentence length.

Andrew is a purist in his defense of just deserts. He likes to push his critique of selective incapacitation to a pure but extreme position. His hypothetical situation requires that anybody arrested at age thirteen, even for some minor offense, will get held up to the Greenwood scale, and if he is *predicted* to be a high-rate robber, he will get locked away. That is Andrew's reason for rejecting selective incapacitation. I don't choose to push selective incapacitation to that extreme. I think selective incapacitation and just deserts coexist, and will continue to coexist. If you look at most of the sentencing guideline matrices that have been proposed, the rows are based on a desert basis and the columns measure prior record in some way, and are in fact a back door risk prediction scale.¹⁴ The columns are never a pure measure of prior record. The weight of prior offenses may be discounted with time. Juvenile record may or may not be included. Certain kinds of offenses may be given more weight.

Which is the better way to come up with such a risk prediction scale, mere hunch or objective criteria? I would argue for the latter. I would see the arguments over the appearances of a sentencing guideline grid as invariably some balance between selective incapacitation and deserts. And I would certainly expect different jurisdictions to set their balancing differently.

One of the novel aspects about the selective incapacitation concept is the notion of making risk predictions in an explicit and consistent manner. Judges have always considered future risk. So have the police and prosecutors. The whole system is selective at every phase. There must be judges who feel as Andrew does—they sentence primarily on the basis of deserts. But there must also be judges who feel like Ken Feinberg does—they sentence

14. For a discussion of this issue, see Greenwood, *Controlling the Crime Rate Through Imprisonment*, in *CRIME AND PUBLIC POLICY* (J.Q. Wilson ed. 1983).

primarily on the basis of future risk. Is that the way we want it to work? Does that support the goal of consistency within the criminal justice system? Or should we continue debating this issue in an attempt to reach some common perspective that will allow judges to operate in a similar fashion. I favor the latter approach and therefore I'm eager to be here discussing these issues. But I have no particular investment in how the debate should come out. Ultimately it is a political rather than a philosophical or social-scientific choice.

False positives exist. There may be some people inappropriately kept in prison for longer terms. But to reduce the false positives, you have to create more false negatives, high rate offenders who will be released and will commit more crimes and produce more victims. It's not just an issue of whether or not to lock up some particular offenders. What we are balancing is the social costs of additional incarceration against the social costs of additional crime.

The final issue is the one we are all here to talk about: prison overcrowding. Which one of the sentencing concepts is likely to lead to a reduction in overcrowding, deserts or selective incapacitation? Much to my surprise, I have found the selective incapacitation argument used most frequently as an argument against longer sentences. In California it's been used to defeat the traditional kind of habitual offender sentencing bill proposed, and is one of the issues to be considered by a new sentencing commission.

Right now, California has a desert-based sentencing scheme.¹⁵ And every time there is a heinous crime, some lobby group comes forward arguing that this particular type of crime deserves a longer sentence. So we have an assembly committee that has to deal with fifty to one hundred special interest sentencing bills a year, some of which invariably pass.

I think the notion of selective incapacitation, and a clear perspective on what prison sentences actually accomplish, can bring about interest in more cost-effective means of punishment. The finding that prison does not produce much of an incapacitation effect for most offenders, but ought to be restricted to the high-rate few, may help hold down the growth in prisons. Whether that happens is something I can neither predict nor control.

15. A. LIPSON & M. PETERSON, *CALIFORNIA JUSTICE UNDER DETERMINATE SENTENCING* 4-7 (Rand Corporation, R-2497-CRB, 1980).