

RESPONSES

SHELDON L. MESSINGER*

I want to make six comments on Richard Singer's paper. I shall emphasize practical realities of punishment systems, because I believe Singer needs to pay greater attention to these realities when he discusses the relation between desert theory and prison overcrowding.

1. In his paper, Singer says that it is only from a desert perspective that concern with overcrowding makes sense. I think that's wrong in at least two ways. First, it's not obvious why those with other perspectives on the proper ends of punishment would not be concerned with whether prison overcrowding affects the propriety or efficacy of imprisonment as a punishment. Even utilitarians could and should have this concern. To me, it makes sense that they would.

Second, and more important, a concern with prison overcrowding could stem from a perspective that is entirely operational, one that emphasizes the increasing difficulty of operating prisons under overcrowded conditions and is indifferent to the ends imprisonment is supposed to serve. As a matter of fact, I think that it is this kind of perspective which, in the main, motivates concern with crowded prisons. Operational personnel worry about their own day-to-day safety, and thus, about crowding.

2. Singer suggests that imprisonment, as such, is not necessary to desert theory. What desert theory needs, so to speak, is punishment, or a set of punishments, and not imprisonment in particular. By implication (or, perhaps, Singer says so explicitly), imprisonment was adopted in part because of its promise of superior utilitarian efficacy.

I am much less certain about all this than Singer appears to be.

If, abstractly, desert theory does not need imprisonment, practically, in our day, it may need it because no other form of punishment so clearly fits the way we think about the world. In our world imprisonment may seem the only punishment sufficiently severe in the relevant respects to be fittingly administered to those convicted of serious crimes.¹ Utilitarian efficacy, in my view, has little to do with the matter. Thus, I wanted Spiro Agnew to go to prison not because I was worried that, if he didn't, he might do it again. (Or even, I might add, that others would cease to be deterred.) Much less was I worried that Richard Nixon would recidivate. To see these gentlemen spend some time in prison would have satisfied certain retributive notions I entertain about persons who violate certain norms and laws. Utilitarian considerations have little to do with it.

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1. Like Singer, I put the death penalty to one side. But I think we are slowly rejecting it because it is increasingly unfitting in the relevant respects.

My point is that desert theorists would be well advised to consider how ways of being in the world, and thinking about the world, affect our sense of what counts as a fully recognizable and appropriate punishment. Imprisonment may well fit our time as a negative sanction for those convicted of serious offenses better than other negative sanctions. Michel Foucault, among others, has begun to spell-out the ways in which, and reasons why, that may be so.² That it is so, if it is, may also help account for our progressive abandonment of corporal measures and our adoption of imprisonment. Again, utilitarian considerations may have, and had, little to do with these matters.

3. Singer holds that there is nothing in desert theory which inexorably leads to prison overcrowding. That's probably correct. Yet, punishment systems in the United States arguably have been more influenced by desert theory in the past decade, than at any time since the turn of the century. And now prisons in many states have become overcrowded. If there is no necessary connection between these phenomena, is there, perhaps, some sufficient, historically-conditioned connection?

I can't offer a satisfactory answer, but clearly the question needs to be addressed by desert theorists. I can speculate most confidently about my own state, California, which moved its sentencing system for felons in a more explicitly desert-oriented direction in 1977. The rate of imprisonment had been rising since 1972. The change in the sentencing system did nothing to slow this trend; indeed, it appears to have supported it. Further, with the change the ante was upped for minor offenders; people who, earlier, would not have been imprisoned were now being sent to prison. Terms of imprisonment did not increase in length. In fact at first, if anything, they decreased. But, along with a shift to a more explicitly desert-based sentencing system, more offenders, and especially more minor offenders, were being imprisoned.³ There seems to be, at least in California, some connection between desert theory and increased imprisonment. In the California context, desert theory provided a rationale for greater punitiveness, a rationale that was sorely wanted by those already moving the system in that direction anyway. This may suggest a certain affinity between desert and punitiveness, or that desert theory lends itself to use by those supporting greater punitiveness.

2. FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977). See also D. MELOSSI & M. PAVARINI, *THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM* (1981).

3. Data on numbers and rates of persons imprisoned in California may be found in *California Prisoners*, published by the California Department of Corrections; *Crime and Delinquency in California*, published by the California Department of Justice; and *Sentencing Practices Quarterly*, published by the Judicial Council of California. The latter also has some data on lengths of prison terms. The statement about the increased incarceration of minor offenders is based on an unpublished analysis by Richard Sparks.

4. Before going on to my next comment on Singer's paper, let me ask you to reflect on the title of this conference, which includes the term "overcrowding." What the heck is "overcrowding"? Perhaps it is crowding about which, for whatever reasons, we feel something should be done, unlike plain, old "crowding," which is the normal state of affairs for prisons. Prisons in the United States have been crowded, most of the time, for about two hundred years. From time to time, they have been overcrowded. These latter times, as I've already suggested, may have more to do with the concerns of prison personnel about operating prisons than they have to do with concerns about accomplishing the various punishment goals ascribed to prisons. Maybe, too, they have more to do with the shifting views of personnel about the manageability of those being imprisoned than with any concerns about the number of those imprisoned.

5. Singer suggests that, in a situation defined as "overcrowded," desert theory implies that one's preference should be for reducing terms rather than changing the criteria for deciding who should and shouldn't be imprisoned. I don't see the theoretical basis for preferring shorter terms, nor do I see how to shorten terms justly from a desert perspective. I do see, however, the practical advantages. Shortening terms, after all, can be done quickly, releasing prisoners and immediately relieving the overcrowding crisis. Changing "in-out" criteria probably takes more time and, in any event, will not resolve as quickly or certainly the immediate crisis.

But in the long run, particularly if overcrowding signals a long term shift in the numbers imprisoned, changing the "in-out" criteria seems necessary, and desert theory can help assure an acceptable change. Singer may want to distinguish between planning in advance to take account of prison resources, and dealing with the overtaxing of such resources when this occurs. Desert theory, presumably, can inform policy with respect to both.

6. I want to conclude with a word in support of guidelines, for decisions about both who should be imprisoned and how long they should be imprisoned. Guidelines can help avoid overcrowding and deal with it when it occurs, and both in ways consistent with a desert perspective focused on meting out deserved punishment fairly. Without guidelines and without articulated criteria for punishment, punishment systems are quite certain to result in more arbitrariness than is consistent with justice and fairness and more arbitrariness than we need to countenance, even taking account of the vagaries of punishment.

Not that guidelines will resolve all problems, or any problems permanently. As Kay Knapp's remarks have suggested, even carefully designed guidelines will not satisfy everyone, at least not for long. Why should they? There's no more reason to expect a full or lasting consensus in practical affairs than there is in theoretical matters. One can only hope for assistance in reaching clearer choices about permanently unclear, and changing, situations. Richard Singer has offered such assistance. I hope that my comments have too.

ALFRED BLUMSTEIN*

I'd like to comment both on the paper, and then on the assigned subject, because I think that the subject of prison overcrowding and how we deal with it through sentencing is probably the most important issue facing the criminal justice system today, and will continue to be so over the next decade. I'm concerned that the paper itself dealt with an issue that is only on the periphery of that subject.

I think overcrowding is getting worse because a major factor affecting prison populations is the demography of the U.S. population, and especially the group known as the "post-war baby boom."¹ That group, born in the period from about 1947 to 1962, came through the school systems in the sixties; we built lots of schools, and now, of course, the schools are empty and being closed. This group was a major factor in the crime problem in the seventies. That is because crime rates peak at the mid to late teens. We now seem to be starting to come out of that problem because the 1962 birth cohort is now twenty one years old—well past the peak crime ages.

At first glance, one might be tempted to think that prison and crime rates go together, but they don't. The baby boomers are now coming out of the peak crime ages, but moving into the peak prison ages. The peak age for prison is the mid-twenties, and that's where the peak of the baby boom is today. So one of the important factors driving the prison situation today must be that large bulge in the population that is now in its twenties and thirties.

It's terribly important that we establish the factors contributing to the prison overcrowding situation. If the current reliance on imprisonment represents a major shift to the right in the country, overcrowding might very well continue indefinitely. On the other hand, if it is because of a transient demographic bulge, one which should soon pass through, then we want to consider our reactions in terms of how long it will take for that bulge to pass through. The public policy response to a permanent shift would probably be very different from the response to a temporary shift.

This is not to say that there are no other factors affecting prison populations. In fact, there is probably more punitiveness being displayed today than, say, five years ago. We've seen it in judicial sentences, and we've seen it in legislative mandates (for example, statutes providing mandatory minimum sentences). Unemployment is also undoubtedly having an effect. The elimination of parole, which has always served as a safety valve

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1. For a discussion of the effects of demography on prison populations, see Blumstein, Cohen & Miller, *Demographically Disaggregated Projections of Prison Populations*, 8 J. CRIM. JUST. 1 (1980).

for overcrowded prisons, is another exacerbating factor. But certainly a very significant factor—and probably the most significant one—is demography. And the indications suggest that it is going to continue to get worse over the rest of the decade.²

These considerations make the problem of prison overcrowding an absolutely critical one, especially so as crime rates begin to diminish. I'm distressed that the Singer paper fails to address this basic issue. As I looked at his paper, I wasn't sure whether Singer was arguing for or against desert. If what he describes is "desert," then I don't want it. It transforms a legitimate concern for avoiding injustice into an obsession with a rigid interpretation of a unique perspective on the moral assessment of blame. It then attempts to transform that moral assessment into some rigid sentencing schedules that defy implementation by any administrative or political process. Singer's desert reflects an obsession with "likeness"; one can conceptualize "like" murderers A and B, but one rarely has murderers A and B. Crime is an extremely multidimensional phenomenon. It involves attributes of the offense, attributes of the offender, and attributes of the environment in which it took place; trying to develop some inevitably arbitrary scale that prescribes precisely what will be the consequence of any assessment of blame is as foolhardy as chasing a phantom with a butterfly net.

Singer's paper displays an excessive concern with the issue of disparity. One should be concerned with avoiding injustice; one should be concerned with preventing gross disproportionality; but transforming those concerns into a formula of rigid proportionality becomes not only extremely difficult but could create its own distortions. Desert theory needs its Werner Heisenberg to try to point out the difficulty of pinning down too precisely as elusive a concept as variability or proportionality. It is more appropriate to attempt to avoid disproportionality than to attempt to instill arbitrary proportionality. Disproportionality thereby defines constraints, or boundaries that one ought to be careful not to exceed; it should not try to define absolute schedules of rules to be prescribed. And then, as long as one stays within those boundaries, issues other than disparity can become primary.

Even if one could develop a scale of proportionality, desert still doesn't tell us what the constant of proportionality is. That is, we may know that a robbery is twice as serious as a burglary, so that robbers ought to get twice as long a sentence as burglars. But there are lots of ways that this could be satisfied; it could be one year for burglary and two years for robbery; it could be two years and four years, or four years and eight years. So one needs further specification of the principles, and that hasn't emerged from any discussions of desert theory.

2. In Blumstein, Cohen & Miller, *Crime, Punishment, & Demographics*, AM. DEMOGRAPHICS 32 (1980) we projected that prison populations of Pennsylvania would climb throughout the 1980's, reaching a peak in about 1990. The rest of the Northeast and the Midwest have a comparable stable-but-aging population structure.

Jacqueline Cohen and I have explored people's perceptions of how long someone should spend in prison for various kinds of crimes, and we found a striking degree of consensus on inter-crime proportionality.³ There seemed to be consistent agreement between the public at large and the criminal justice system on which offenses warrant twice as much prison as which other offenses. But there was an enormous difference in the constant of proportionality. The public seemed to call for far longer sentences than the criminal justice system imposes. If the actual time served were one and two years, they wanted something more like four and eight years. So while there seems to be general agreement on the notion of proportionality, there still remains a serious problem in finding the proportionality constant.

I think one important way to find that proportionality constant is to invoke prison capacity as a key constraint on sentencing schedules. Doing so would link the question of sentencing policy to the concern over the nation's grossly overcrowded prisons.

Prison capacity is not necessarily the only consideration in developing the proportionality constant. If prisons were largely empty, I would not argue that we ought to increase sentences to fill the prisons. But in the current era of crowded prisons, it is important that we find means to make sentencing policy responsive to prison congestion. If the prison populations exceed prison capacity, that is likely to create severe injustices. The fact that these injustices are equitably distributed over all the people in prison is not very consoling. These injustices are far more distressing than any of the disproportionalities or disparities that might arise from the failure to adhere to a rigid line of truly "just" deserts. Uniform injustice is not preferable to some reasonable degree of disparity.

A key issue in assuring appropriate concern for prison capacity involves finding some means for "hardening" the excessively soft concept of prison capacity. The number of cells in a prison is one indication of capacity, but one that is ignored when the criminal justice system wants to add more prisoners. The activism of federal judges represented an important pressure restraining prison populations until *Chapman*⁴ reversed that momentum. Even though the *Chapman* decision was narrowly drawn, it has served symbolically to enhance the notion that capacity is far more flexible than is appropriate. In Pennsylvania, a middle-level appeals court judge ran for the Supreme Court on a platform that there should be no limit to prison capacity; we have 10,000 in there now, and he argued that we could get 40,000, and should feed them bread and water. I cannot distinguish how much of that position is driven by principle and how much is in response to that individual's estimation of the public's mood.

3. Blumstein & Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public's View*, 14 LAW AND SOC'Y. REV. 223 (1980).

4. *Rhodes v. Chapman*, 452 U.S. 337 (1981).

There are a variety of approaches that can and should be brought to bear in trying to link prison capacity to sentencing policy. One, of course, can simply shift the thresholds determining who goes in and for how long they go in. It is not clear that one can easily or trivially, as Professor Singer did, segregate the issue of who goes to prison from the issue of how long they stay. Indeed, I would urge paying more attention to the utilitarian considerations. In deciding between shorter sentences for more people and longer ones for fewer people, the former choice is preferable. In deterrence research, sentence severity (measured by sentence length) less often shows a discernible effect than sentence certainty (measured by the probability of imprisonment).⁵ From the viewpoint of incapacitation, the longer the sentence, the more likely that the offender would have discontinued his criminal activity well before he is released from prison, and any extra time spent in prison is thus wasteful in terms of incapacitative effect. Such considerations are necessary in a time of severe constraints on prison capacity and should be possible within a flexible and reasonable deserts framework.

One could also use prisons more efficiently with approaches such as selective incapacitation—if there were good bases for selecting the offenders to incapacitate. I don't believe we have very good bases yet, but research on that issue should be pursued to permit more sensible choices and to eliminate some of the inappropriate considerations some judges use today. And this too should be possible within a flexible rather than a rigid just deserts framework.

Implementing guidelines which reflect a capacity constraint similar to that of the Minnesota guidelines⁶ is probably the ideal approach to developing a rational sentencing policy that accommodates both desert and utilitarian considerations, and that makes capacity an explicit concern and constraint in the development and implementation of the sentencing schedule. The capacity constraint provides discipline, as demonstrated by the case of the Minnesota Sentencing Guidelines Commission. Just like a fiscal budget, the capacity "budget" inhibits those who want to crank up the sentences for some particular crime. They have to convince others that there is some other crime for which the sentence should be reduced. Without such a constraint, any sentence increase seems free and therefore politically attractive. This approach seems to represent the most sensible way for any jurisdiction to develop a responsible and coherent sentencing schedule.

Another approach that accommodates not only the explicit concern about capacity but also much of the political concern about sentences is the one used in Michigan, the Prison Overcrowding Emergency Powers Act

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

6. MINNESOTA SENTENCING GUIDELINES COMMISSION, *MINNESOTA GUIDELINES AND COMMENTARY*, (rev. ed. 1981) *reprinted in* MINN. STAT. ANN. § 244 app. (West Supp. 1982).

introduced by Representative Jeffrey Padden.⁷ This act permits the corrections commission to declare that overcrowding exists. That declaration requires the governor to lower every prisoner's minimum sentence, thereby expanding the pool of prisoners eligible for parole, while preserving the selective incapacitation powers that have always been available to the parole board. By retaining the power to decide who enters and who leaves, the parole board can prevent the release of prisoners deemed too dangerous.

These are two approaches, sentencing guidelines and emergency release, that have been used successfully and that represent important options available to states in dealing with overcrowding.

A third option I would like to put on the table is one that was proposed by Corrections Commissioner John Manson of Connecticut.⁸ This proposal urges the allocation of prison cells to courts, first among the courts and then among judges or perhaps even among prosecutors. If a judge uses up the allocation, then he or she has to decide how to handle the next sentence. It's not likely that judges will be enthusiastic about accepting the responsibility of deciding whom to release from their cells in order to put somebody else in. But that principle is ultimately involved, and someone has to make that decision. The Manson proposal has the virtue of forcing us to recognize the necessity in a finite-capacity environment of dealing with the question of who goes out if we want to put someone else in. Too often, additional imprisonment is viewed as a "free lunch" by legislators, prosecutors, or judges pursuing their own political gains. The public must recognize that that free lunch is paid for through the construction cost of additional capacity, through the operating costs of the additional capacity, or through the inhumanity and risk of riot associated with the overcrowded prisons. No state is likely to accept the Manson proposal, but forcing us to face the issue at least makes us look much more kindly at the Minnesota and the Michigan approaches as means for addressing this issue in ways that are probably far more acceptable and fully as responsible.

All of these approaches are driven by a mixture of considerations: utilitarian concern about crime control and retributive concern about appropriate punishment. The approaches also serve to link these objectives to the current problem of severely constrained prison capacity. We can and must accommodate all of these considerations while maintaining appropriate concern for the critical problem of prison congestion.

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

8. J. Manson, *The Prison Overcrowding Dilemma: A New Approach* (1981) (unpublished manuscript, Connecticut Department of Corrections).

This panel discussion comes at a very opportune time for us in Minnesota. We have a somewhat desert-oriented sentencing system. While we are not experiencing crowding as yet, we're now at the capacity that was defined for us back in 1979. Our projections indicate that our prisons will soon be overcrowded, unless there's significant intervention to reduce the prison population. As some of you may know, in 1980 we instituted a system of sentencing guidelines that defined for whom prison was appropriate, and defined the length of sentence for those who did go to prison.¹ The commission developed those sentencing guidelines with prison populations in mind, and attempted to coordinate the sentencing and correctional system by developing a sentencing policy that would fill about ninety five percent of our then existing prison capacity. We conducted an evaluation after the guidelines had been in effect for about a year and a half,² and we found that prison populations were not exceeding capacity. In fact, our prisons were at between ninety and ninety five percent of capacity even though our projections of prison populations based on pre-guideline sentencing data indicated the population would have exceeded the prison capacity without sentencing intervention. The sentencing guidelines are desert-oriented: they recommend prison for serious person offenders and reduced use of prison for property offenders. Only property offenders with extensive criminal histories received a presumptive imprisonment sentence.

That was the result of the first year and a half of guideline application; we've now had a second year and third year of guideline application. During that third year of guideline application, prison commitments increased beyond that which we had anticipated. We are now examining interventions through sentencing policy, primarily through the sentencing guidelines commission, but also through the legislature to prevent a prison crowding situation from occurring.

I found it very striking that our theoretical discussion on reducing prison crowding through sentencing policy deemphasized the sources of prison crowding, at least compared to our experience in attempting to forge a sentencing policy in response to impending crowding. Richard Singer's paper discusses some aspects of desert theory which may or may not increase sanctions, and thereby increase prison population. Yet, there is no discussion in the paper that links the sources of a particular crowding situation with the policy response. I found the absence of discussion on the source of crowding interesting, because last summer or last fall, I would have left that out of a discussion as well. If you have a prison crowding

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1. MINNESOTA SENTENCING GUIDELINES AND COMMENTARY (1980) *reprinted in* MINN. STAT. ANN. § 244 app. (West Supp. 1982).

2. MINNESOTA SENTENCING GUIDELINES COMMISSION, PRELIMINARY REPORT ON THE DEVELOPMENT AND IMPACT OF THE MINNESOTA SENTENCING GUIDELINES (1982).

situation, I would have argued, it doesn't really matter what the source is. The point is you've got it, and you've got a limited number of responses you can address to that situation. You can send fewer to prison, or you can reduce the durations of those that are going. There are a few other administrative adjustments that could be made: increase jail credit, for example, but basically, last year I would have argued that the solutions are really quite independent from the sources of the crowding problem. In fact, I did make those arguments with the sentencing commission. I said that they didn't have to understand exactly why commitments were going up; they just had to know that they were going up and that we had a problem on our hands.

In the past couple of months we've been grappling with this issue, and I would say that central to the whole issue are the sources of the increases. The sources are central, not only in discussing, defining, and understanding the problem, but also in forging the solution. This is something that I did not anticipate, and I gathered from Richard's paper that he did not anticipate it either. In Minnesota, we've finally analyzed all the sentences from the last year, and we found three major sources that are leading to the impending problem.³

The primary source is a change in prosecutorial charging practices. This did not occur in the first year and a half of guideline application; it waited a while to surface. Prosecutors are building criminal histories for lower-severity offenders. Property offenders who used to go to prison but whom the guidelines defined as inappropriate for prison, are now being targeted to go across the "dispositional," or "in-and-out" line. Such targeting has burgeoned in the second and third year of guideline operation. The first year of guideline application, about 15% of all of our felons received a presumptive imprisonment sentence. This last year, 18.6% received presumptive imprisonment. That results in a significant increase in commitments, and it is a primary source of our increase in commitments. Our increase in offenders below the dispositional line is almost exclusively due to lower severity offenses (i.e., property offenders who now have high criminal history scores) because prosecutors are not dismissing charges against people they want to go to prison. Therefore the prosecutor builds a criminal history score, and presumptive imprisonment results.

A second source of impact is increased mandatory minimum sentences for the use of a firearm. The legislature in 1981 amended our mandatory minimum law for firearm use, and raised mandatory minimums from a year and a day for first-time offenders to three years, and from three years to five years for second or subsequent offenses. The duration of imprisonment increased an average of two years for offenders who used firearms.⁴ That was basically our attorney general's bill. The attorney general was running

3. MINNESOTA SENTENCING GUIDELINES COMMISSION, 1981-1982 SENTENCING PRACTICES: PRELIMINARY ANALYSIS (1983).

4. MINN. STAT. § 609.11 (1981).

for governor. He did not win, but we are still paying for the costs of his campaign.

The third source of the impact is increased court activity. We have more felons going through the courts even though crime is down in Minnesota, as it is in many states. This source has the least impact of the three.

In order to get people's attention, and to get them to think about possible solutions, it was necessary to identify the sources of the increase. The fact that there was an impending problem did not seem to be sufficient to get their attention. Identifying the sources is important politically because it enabled decisionmakers to understand the problems, so that they're willing to think about them and forge some solutions. But identifying the source was even more important for developing sentencing policy modifications that would be effective in addressing the problem. For example, the identification of the criminal history score as highly unstable (in the sense that the distribution of cases is unstable) is very significant in forging a solution. Unless we somehow redefine criminal history and reduce its importance, any solution that is developed this year is probably going to be unstable next year. Consequently, we will have to go back and develop solutions over and over again. Thus, identifying the source suggests certain kinds of solutions.

Is the criminal history score consistent with Richard's desert theory? Some may argue that the property offenders with higher criminal history scores who are now getting presumptive imprisonment deserve to go to prison because they committed those crimes and are being prosecuted for them. Therefore, it is consistent with desert theory to send them to prison. In one sense that is valid, because there's no question that they did commit the crimes, and that the procedure that the sentencing guidelines commission established for counting criminal history scores suggests that it is appropriate to send those people to prison. However, that is not the intention of the commission's initial policy. The policy of the commission was to send more offenders who committed crimes against persons and fewer offenders who committed crimes against property to prison. The fact that more property offenders are going to prison is consistent with the procedures, but this does not alter the fact that sending them to prison conflicts with the initial policy of the commission. I don't think it is appropriate for desert theory to send property offenders to prison when there are serious person offenders for whom we need to use those limited resources.

So I view the change not as the result of desert theory, or really of the intended policy of the guidelines, but as a measurement and an operationalization problem. We've developed a criminal history index that is unreliable. Unless we address that unreliability and instability, we're going to be in continued trouble. The same could have been true, or could become true, of our severity index. We have not seen prosecutors reducing charges inconsistently but it might occur. For example, there are always quite a few cases involving aggravated robbers that are reduced to simple robbery. So far there's been no change in the extent to which those kinds of offenses are reduced. If that should happen, the distribution of cases across the severity

index would change, and we would have an unstable situation again. When these kinds of changes occur, the solution must be to modify the indexes in such a way that the original index is reestablished. For example, if we were to find a situation where aggravated robbery was no longer being reduced to simple robbery, that would probably change the usual nature of aggravated robbery cases. If the cases that had been reduced, either for evidentiary problems or because they tended to be relatively minor offenses, were no longer reduced but remained aggravated robberies, the current sanction would probably be viewed by the Commission and legislature as inappropriately harsh. Therefore, either the dispositional line would have to be changed, or the ranking of aggravated robbery would have to be changed in order to maintain the meaning initially intended.

A number of different solutions are being considered and examined. I think there is substantial agreement at the commission that the ordinality among offenses should be maintained, similar to Richard's suggestion. The cardinality (or duration of sentences) will certainly be modified, probably to decrease the importance of criminal history, at least in property offenses. This will be done in order to mitigate the instability of the criminal history score. I hope that the dispositional line is changed so that more stability is achieved. It is possible that the mandatory minimums will be reduced by the legislature. The sentencing guideline system was a movement toward truth in sentencing; it could be that the legislature is not going to be willing to maintain quite the level of truth in sentencing that it has in the past. Rather than three year and five year mandatory minimums for firearms we can make them two and three and a half years instead, by legislating good time off mandatory minimum sentences. There are a lot of other things that could be done as well, like applying jail credit and residential treatment credit for people who are put on probation and then later revoked. Currently these people do not get credit. Perhaps we could develop a policy that would reduce probation revocations by providing higher requirements. Right now probation revocations are not covered by guideline standards. Another idea is to institute some kind of charge-back provision similar to the former charge-back provision in the Community Corrections Act for certain kinds of offenders who go to prison.

At any rate, there are a number of ways to respond to a crowding problem, even though there is already a sentencing policy in place. And I think it's going to be extremely interesting to see what the commission will do with a crisis situation. The initial guidelines were effective at coordinating sentencing and correctional policy on a short term basis. Now we're facing a major test that will reveal whether that coordination can be reimposed in times of crisis. If the commission and the legislature together can do that, we will have a structure that can work over decades rather than merely years. If not, I see little reason for having a sentencing guidelines commission. This is a crucial point for the Minnesota Sentencing Guidelines.

GERALD KAUFMAN*

I will not respond directly to Professor Singer's paper. My concern today is not with the philosophy of deserts. My concern is how to affect public policy. How do you alter public policy, regardless of your position on crime and punishment, in this society? This is the concern of the Prison Overcrowding Project which I head. The project is in four states, Oregon, Michigan, Colorado and South Carolina, with funding from the National Institute of Corrections and the Edna McConnell Clark Foundation.

Before explaining more about how our project operates, I would like to make two introductory comments. First, earlier today Judge Lasker mentioned that our current economic problem is a boon to dealing with the problem of prison overcrowding. In a sense, I believe it is true. I don't think we would be here today without Ronald Reagan and the recession. People would have built their way out of this problem, or attempted to, and in this way relieved the pressure. Indeed, I don't think we would be here today without Al Blumstein and the ACLU Prison Law Project. Without that kind of pressure, the pressure from the courts in many states, and the fact that some constitutional standards are being set, we also would not be here. Instead we would cram more people into prisons. This is what the Pennsylvania judge whom Al Blumstein mentioned wants to do—if there are ten thousand people in a prison, add forty thousand more. It's only the courts that will stop us.

We do have an opportunity to deal with the problems and the underlying philosophies of crime and punishment in this society. The prison overcrowding crisis which brings us here is a great opportunity. It's an opportunity to do some rethinking about who belongs in prisons, for how long, and under what kinds of conditions of confinement. This evaluation is essential since most states cannot afford to keep building and building.

In the four states, where the Prison Overcrowding Project operates, we have implemented a process that appears to be successfully moving toward a policy of dealing forthrightly with prison capacity. In my opinion, as long as no capacity limit is set on prison populations, we will not be able to effectively control crowding, and prison populations will continue to expand.

There is some evidence that suggests that building new prisons, rather than alleviating crowding, may simply lead to "overcrowding" more offenders at higher population levels in the system. In other words, when a state decides to build more prisons, the system implicitly expands the number of people it incarcerates. This is a public policy decision which should be made explicitly rather than implicitly by policy makers.

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Prison overcrowding is the means by which we can get states to face up to some of these issues—particularly states without the wealth to continue to build.

The other introductory remark I want to make is that I am bothered by the concern raised throughout this conference that each state has its own corrections policy, but there is not a national policy. There should not be one. There is no national approach to incarceration. As a matter of fact, even if a state did adopt a seemingly unified approach, it would quickly change. Kay Knapp mentioned how the criminal justice system is in a constant state of flux; it is dynamic, always adjusting to new forces. For example, look at the senior citizens lobby in this country which is trying to get an increase in the penalty for committing a crime against individuals over sixty-five.

Our project encourages each state to examine and develop its own philosophy of sentencing and punishment; we try to point out that the decisions reached occur within a changing political environment. Sentencing laws are not constant. What will remain constant is the variety of groups in the sentencing area.

I would like to speak more specifically about the Prison Overcrowding Project. Our approach is based on several assumptions which may be useful in evaluating how to make policy changes in other areas in the criminal justice system. These assumptions are signified by four words: *Systemic*, *Control*, *Forum* and *Process*.

First, *Systemic*: Central to the project design is the premise that overcrowding is a result of multiple factors and an array of individual decisions made by criminal justice system officials, including police, prosecutors, judges, corrections officials, and legislators. Often, these decision-makers represent a wide spectrum of philosophies and practices that may be at odds with each other. Decisions made in one part of the system can, and often are, offset by decisions made in a different part of the system. Therefore, a systemic approach is needed for devising sentencing and overcrowding policies.

We must understand the influences exerted by each element of the criminal justice system so that changes in sentencing policies and in methods to control crowding are not circumvented. For instance, we have seen how correction officials' use of good time can be offset by restrictive parole boards or longer sentences. We have also seen how alternatives to incarceration programs for the serious offenders often widen the net of criminal justice control by accepting offenders who in the past would not have been incarcerated.

The criminal justice system is constantly changing and adapting to changes within its various components. Unless there is a fundamental change in our approach to punishment, in which we strive to balance the elements of the system, overcrowding relief measures will accomplish little. The mere adoption and implementation of policies in any one arena will not

solve overcrowding. There must be ongoing review so that changes can be anticipated and policies modified when necessary. In this regard, as far as I am concerned, the Minnesota sentencing guidelines effort is the only example of a systemic and long range approach to controlling prison population in this country. More typical responses, for example, are emergency powers acts modeled after the Michigan Emergency Powers Act. These acts have limited utility. In Michigan, after repeated use, the pool of offenders eligible for release is decreasing. Another problem with the Emergency Powers Act is that it allows other parts of the system to be profligate. Judges can sentence to their hearts' content and DA's can do whatever they want while running for office, and be as punitive as they want, as long as they know there will be some relief when the prison population gets above a certain level.

Second, policymaker *control*: This is the idea that prison overcrowding can be controlled since the number of people in prison is largely the result of cumulative decisions made by criminal justice policy makers. If police don't arrest more people and don't put more people into the system, it doesn't matter how the demographics change. In fact, how prosecutors charge or plea-bargain, or how judges sentence, or whether legislatures pass sentencing laws, or whether governors recommend money to build new prisons, all of those decisions affect the size of the prison populations. Therefore, these actors can control the size of the prison population.

As they did in Minnesota, policy makers can decide that they will have no more than X number of people in prison. Reaching this decision involves wrestling with fundamental philosophical issues such as why are you punishing, who should be in prison and for how long. In this regard, I had a friend in Hartford who was also my legislator. Before I moved to Philadelphia, he asked me what I was going to be doing there. I described the prison overcrowding project and our hope to help states look at ways of controlling prison crowding other than simply building new prisons. He hid his head and said, "Oh my, I never knew there was any other way." Here was a progressive, bright legislator. Yet as far as he was concerned, when prisons are overcrowded, you build a new one. No one ever told him, or even suggested to him, that he had any other control over that system. Indeed, it is difficult sometimes to make legislators and other policy makers understand that they do control the system.

The third key word is *forum*: It is closely related to the notion of policymaker control. For policymakers to take responsibility for controlling the size of the prison population, there must be a structure which facilitates decision-making. In our project, policymakers in each state assemble in a "policy group" which meets frequently. This structure provides the forum to cut across the traditional organizational lines which frequently act as impediments to communication and effective action. It enables these decision-makers to take a "systems" approach to collectively examine, adopt,

and implement particular policies to control crowding. To be effective, the policy group members must not only represent the broad range of criminal justice decision-makers but must also be people of power and influence so that they can implement changes once they decide what those changes should be. In this regard, I would like to give you an idea of the kind of people who sit on these policy groups in the four states. They really do represent the broad range of criminal justice decision-makers, from local law enforcement officers, sheriffs and police chiefs, all the way up to chief aides to governors. There are judges (in two states, Supreme Court justices), key legislators, and other important public officials. In Oregon, one policy group is chaired by an ex-United States Attorney, who served in that capacity for twenty years; in Colorado, the head of the group is the majority leader of the House of Representatives; and in South Carolina the leader is a very powerful and influential Senator.

The fourth word that I mentioned is *process*: It is necessary to go through an analytical process before deciding on appropriate punishment and overcrowding policies. I was really interested in some of the comments about why prisons are overcrowded in this country. As far as I'm concerned, no one can make a statement that's universal about why prisons are overcrowded in this country. Each state has its own reasons. Without looking at the factors that have caused the overcrowding, which Kay Knapp talked about, you are not going to reach solutions that adequately deal with the problem in each state.

In our Project, each state policy group, assisted by staff, gathers and analyzes information to develop an understanding of the overcrowding problem and to reach some conclusions. This process recognizes that rational data gathering and analysis must be done within a political context; that decisions about sentencing, punishment, and overcrowding involve normative choices by policymakers and the public. This process involves six phases, although not necessarily in the order described below.

First, in order to control overcrowding, it is necessary to *define the problem*. This is not an easy task. The problem is defined in a different way in each jurisdiction. It is considerably more complex than "too many people in too few beds." Al Blumstein talked about capacity. Well, what is capacity? In some states, they double bunk every single cell in the system and then say, "We're at one hundred percent capacity." Other states refuse to double bunk, and have an entirely single bunk system. They say when every cell has one person in it, "We are at one hundred percent capacity." One is really twice the size of the other. We have difficult definitional problems which are really value problems. They involve answering such questions as: What is it you want to do in your system? How big is the cell? The issue in each state involves the conditions of confinement that each is willing to tolerate, not simply a matter of counting beds.

The second phase involves *identifying the factors which have led to population increases*. This is a difficult phase of the analysis for several

reasons. Every policymaker "knows" why overcrowding has occurred. The legislature has passed new, tougher sentencing laws. Judges are sending more people to prison and are not using enough alternative sentences. Parole boards are not releasing prisoners as early as they used to. Policy members do not like their assumptions challenged, thus the art is to present information in a way that will be accepted. In Oregon, for example, policy group members were surprised to learn that although the prison population was increasing rapidly, prison admissions were dropping. It was the increasing length of stay that was causing the problem.

Another difficulty is that information is not readily available. One of the important by-products of our Project is the assembling of extensive data bases in each state. This provides a basis for policy makers to understand their system and the impact that various policies will have on the system.

Factors which influence crowding are identified through an analysis of who enters prison, how long they stay, the capacity of the components of the corrections system to handle the offenders, and changes in each of these areas over the past several years.

We have found that inmate profile analyses can be very revealing. In South Carolina, for instance, policy group members were surprised to learn that 1700 minor property offenders were in prison, seventy-five percent of whom were first offenders. In Colorado, data revealed that four hundred inmates had profiles that were identical to many individuals on probation.

The third phase involves *setting population objectives*. This may be the most important phase of the policy analysis process. It can be approached, as in Minnesota, with a sentencing policy that is geared to current prison capacity. Colorado seems to be adopting the position that their current capacity is not enough. They are setting their objectives at a limited expansion of current prison capacity. Objectives can be framed, as Oregon is attempting, in terms of the number of prison spaces that the legislature is willing to fund every year. If the population exceeds that number, there would be a mechanism to release some inmates early until the desired level is reached.

However, as mentioned earlier, if a population control limit is not set, there is some evidence that prison populations will continue to expand regardless of the policies implemented. For instance, in states where new prisons are built regularly, there is often only temporary relief of overcrowding. As the new spaces are built, they get filled and then overfilled. Also, with the increased use of good time and other early release mechanisms in response to overcrowding, more offenders can be sentenced to prison to occupy those spaces or the parole board can become more stringent in its parole policies.

Certain kinds of analyses can be very helpful in this phase. For example, an analysis of the classification system used by the corrections department to assign inmates to appropriate security levels is important. This

analysis reveals that many inmates can be assigned to available minimum security facilities to relieve the overcrowding in more secure facilities.

The fourth phase involves the *selection of options to control overcrowding*. Many issues need to be considered in assessing and selecting options to control crowding. Identifying factors contributing to prison population increases coupled with means of controlling the prison population provides the first level of information. For example, if, as in Oregon, analysis shows that increased length of stay is the major factor contributing to overcrowding, then solutions which address this problem would be more appropriate than alternatives to incarceration programs. However, there are other factors which policymakers must consider in the selection of options which aim to shorten length of stay. These include the particular policies, their impact on controlling prison populations, costs, political acceptability, and both intended and unintended consequences on other parts of the criminal justice system.

After the policy group has selected a particular option, it is *their responsibility to see that it is adopted by the appropriate government agency*. During this fifth phase, our groups are expected to devise strategies to facilitate the adoption of options. How do you get the legislature to pass and change laws and how do you get the supreme court to adopt new rules? How do you get the prosecutors to begin to back off from some of their practices? The policy groups in our Project confront these very difficult tasks. To date the four states have focused on legislative options. However, one state is considering urging the parole board to adopt guidelines geared to existing prison capacity. There are also many other non-legislative approaches that can be taken. If policy group members feel a real sense of ownership regarding the selected options, they, as we have seen in this Project, can be powerful advocates for their adoption.

The sixth and final phase is *implementation*. Too often, once a proposal is adopted by the appropriate agency, proponents consider the problem solved. However, translating initial policy intentions into action is a complex process, involving multiple decision-makers and resources. Due to the complexity of the process, the changes that result may not be those originally conceived. Although corrections officials can be given authority to use work release, transitional beds in the community, and other kinds of early release programs, this does not insure that they will be used to their fullest. The legislature can pass a program to place certain offenders, who would otherwise have gone to prison, in supervised release programs. However, there is no assurance that judges and prosecutors will use the program for the appropriate offenders.

In the four states that we work in, the policy groups are obligated to implement the strategies once they are adopted, to monitor the implementation process, and to make any necessary adjustments to better insure that the selected options reduce overcrowding.

The beauty of the Minnesota system is that they have a staff that monitors all the cases and makes the adjustments that Kay Knapp spoke about. Because they have the information, they have the ability to make adjustments. In Michigan, our Project successfully lobbied the legislature to empower the Corrections Department to award deserving inmates disciplinary credits which would accelerate their release date. The Michigan Project prepared a projection on the impact that bill would have in the prison population. They will use that information to monitor the actual effect of the legislation.

What are the results of all this activity? The following are a few of the results directly attributable to the Prison Overcrowding Project policy groups in each state during the first year of the two year project:

1) Colorado expanded the use of community corrections beds as transitions from prison to the community. They also added five hundred new beds to their system and are considering an emergency release law.

2) Oregon prevented the enactment of penalty enhancement bills and is considering a change in the parole guidelines to relieve overcrowding.

3) Michigan, in addition to the disciplinary credits bill referred to above, passed the country's first Emergency Powers Act. The Prison Overcrowding Project is developing a sentencing guidelines proposal which would limit prison population to capacity. In this regard, the group is struggling to define capacity.

4) South Carolina enacted an emergency release bill which empowers the Governor to release certain inmates when the population exceeds "operating capacity." In addition, a new supervised furlough law was enacted and funds for additional parole agents were appropriated. Under this bill, hundreds of inmates will be released under intensive supervision during the period of their early release. Finally, the legislature established a Sentencing Guidelines Commission with a broad mandate to consider current capacity when formulating guidelines.

It is not clear yet whether the measures adopted by or under consideration in the four states will actually reduce crowding. However, as a result of the project, there is an influential group of state officials with a knowledge and understanding of complex criminal justice issues and the will to control the use of scarce prison resources in each of the four states.

