

## DISCUSSION

Daniel Pochoda, Moderator\*

**JAMES JACOBS:** I think I came off reasonably unscathed, so I'll be careful to not put my neck out any further in my responses. I'd just like to take issue with one criticism and to reemphasize a point I'd made earlier. Commissioner Johnson said there were obvious reasons for politicians to advocate increased prison terms. I think politicians have come off badly throughout the entire symposium. The history of American penology, and the history of American criminal justice, cannot simply be read to be one of American politicians inexorably and endlessly thrashing people who violate the law. That's not reading history correctly. Sentences have not increased, and executions have not increased every year; there are ebbs and flows. Politicians differ on these issues and many don't support harsher penalties at any given time. Moreover, there's not always political hay to be made out of appearing tough. These things are not all self-serving: they are responses to deep concerns in the society for safety and security that we need to take more seriously.

Michael Sherman made a related point when he said that the quality of the general debate is so low that the people can't decide. In looking at this issue, I've written two papers. In one I looked at mass media publications of all sorts, even the Daily News, the New York Times, popular magazines and so forth. I found that the public dissemination of knowledge is much better than people might expect. In looking at the bond debate, the issues were very well ventilated in the press, on television and through public speeches and debates. Perhaps they were not at a level sufficient to earn an "A" at a distinguished academic institution like this, but that's not the nature of the political process. We don't have a government run by the intelligentsia, and every issue is not debated with the wit, wisdom and the clarity with which we've debated here yesterday and today. But good points are made out there and some political leaders are trying. We have a very serious crime problem in the United States: we have a real amount of fear on the streets, and people's lives are genuinely disrupted. And I don't know if the solutions of the intelligentsia would be better than those of the politicians.

**AUDIENCE COMMENT:** My name is Kay Harris and I just wanted to mention a study which is going to be coming out shortly from the National Institute of Justice. The Center for Metropolitan Planning and Research at Johns Hopkins University with the help of Steve Gottfredson, actually did a three year study in which they not only conducted extensive interviews with key decisionmakers and key criminal justice actors in Maryland, but also did

---

\* Adjunct Professor, New York University School of Law.

extensive public surveying. I think that a lot of the results, although limited to one state, could be very enlightening with respect to the kinds of issues we're talking about here. For example, the decisionmakers thought the public disagreed with them on many, many things. In most cases, they were wrong about what the public thought. The public in fact had views which were close to those of the decisionmakers, which generally could be characterized at least as moderate, and not so punitive as might have been believed. The only two very conservative groups were the police and the prosecutors, who were consistent among themselves.

**AUDIENCE COMMENT:** My name is Alfred Blumstein, and I wanted to raise an issue that I think Mike Sherman raised explicitly and that I think was implicit in a number of other talks. This is the proposal that there are lots of violent offenders in prison who really shouldn't be there. Any of us looking over prison records will find individuals who surprise us by the fact that they're there, because their records may be less intense than we think appropriate. I'd be very surprised if they represent a very large proportion of the prison population. Nationally, about forty percent are imprisoned for murder or robbery, which I think legitimately fall within that class of violent offenses; another eighteen to twenty percent are in for burglary, and I'd be very surprised if any significant fraction of those burglars were first-time burglars: a large majority of those I anticipate will have been convicted several times. The system must have a graduated response, and eventually that graduated response must reach the level of imprisonment.

I believe that many of those imprisoned for burglary or larceny have previously committed some violent crime. In view of this considerable switching across offenses, we've got to make sure that the current offense is not the only indicator of whether an individual is a "violent offender" or a "property offender." We should have some concern for offenses other than the one the individual has just been convicted of committing, and although we could certainly find individuals who might more properly be out of prison, I don't believe that this is going to be a significant factor in making a major dent in prison populations. Invoking that consideration is more of a glib solution than an effective way of dealing with the overcrowding problem. In most states I've examined, there just don't seem to be significant numbers of people in prison who should not be there.

**MICHAEL SHERMAN:** Since I was the one correctly accused of having said something explicitly, let me respond. First of all, Al is right: I was putting a complicated business in too simple a way. Nevertheless, I believe that we might find fifteen percent of the prison population, about 30,000 people, ought to be released. Even allowing for 6,000 who are out of prison but who ought to be in, this seems like a significant number. I agree with Al, that I was wrong if I conveyed the notion that we were going to make a massive dent in prison population even in the less lean states that have historically incarcerated either first time offenders or multiple low level criminals. My proposal is more modest than I may have made it sound, and I think that

even at the levels at which possibly Al and I would agree, any disagreement would be one of judging the significance of this reduction. I would say that that is enough significance, especially in states where the overcrowding levels are about ten to fifteen percent; that's a lot of people and even in the short term, while we worry about the theoretical debates, I think that would be a significant contribution. It's a judgment call.

DANIEL POCHODA, MODERATOR: Michael Sherman has said that he did not want to use only the violent/nonviolent crime dichotomy to determine whether or not people would be imprisoned. Rather, he agreed that the more flexible "frequency of offense" should be combined with "violent/nonviolent" to make the determination. Andrew von Hirsch thinks that a lag exists between legislative action and people's perceptions of legislative action. Thus, people still believe the legislature is too lenient, so the legislature keeps escalating punishments until there is the overcrowding problem that we face today.

JAMES JACOBS: I'm not so sure that there has been a policy shift—these ideas about sentencing alternatives and guidelines and reducing the population have been talked about during every legislative session, and people have tried to drum up support for those suggestions. But assuming that now there is a change of attitude, how would we know? I think that we'd be glib to give any quick answer to explain why in a particular year public attitude changes or legislative coalitions change. Surely there must be some feedback effect. The prison system has expanded very dramatically, which means that the punishment policies of large numbers of legislatures that were not being implemented before, or were perceived not to be implemented, are now being implemented, and perhaps the sense is that the crisis for them is over, to an extent.

But I think the important thing that I gain from your comments is that it reminds us again and again not to think of this as a decision that is made in a single point of time. This is a continuous process, continuous feedback, and the system of punishment adapts and changes and emerges and recedes each year and each generation.

AUDIENCE COMMENT: My name is Dorothy Keller and I'm from the New York State Coalition for Criminal Justice. I was involved in the prison bond issue campaign—on the winning side, happily. As a volunteer, as most of us were, we worked on our own time, whereas the debators on the other side were working on state time. In addition to that, the state put tremendous resources toward this campaign: notices went out in every state envelope. Mayor Koch in New York City went on prime time television campaigning for the bond issue. Those of us on the other side could never afford this. So there was no even match. Instead, there was a David and Goliath situation here, and the fact that the nay's did win was a tremendous victory. In addition, we did a district by district analysis of the voters in the New York City area. In the districts where we were able to go out and debate and in districts where we could speak to several hundred people at one time, such

as in homes for the aged, they voted against the bond issue. The point is that once the populace is given the correct facts of the situation, where they are convinced that incarceration is a most inappropriate sentence for many people, they then realize that prisons are no free ride. Taxpayer's vindictiveness seems to be connected somewhat to the size of their pocketbook.

I was happy to hear racism being brought up by at least one speaker and I think it's regrettable that this whole symposium has a dearth of black or minority representation and point of view. I saw one black person yesterday, and I think I saw one today. I think it is a big mistake not to incorporate this as a big issue in this whole problem.

DANIEL POCHODA, MODERATOR: The only observation I would make about the bond issue campaign, as someone who also was involved in it, is that it was one of the first times—it was the first time I can recall—that the specific decision, the policy decision, about whether to expand prison space and use prisons more, was specifically and intentionally tied to underlying questions about criminal justice policy. So I think it was important. I had no illusions that those prisons would not be built anyway because of the politics of crime and criminal justice and prison construction. But I think it was an important debate. I have no illusion that some of the voters who voted against it did so because they didn't want prisoners to be treated better, and all sorts of other reasons, but I think it was an important debate because it was the first time that decisions that have been constantly made in every state—in New York to increase the numbers from twelve to twenty eight thousand in ten years—had any relationship to the questions: Are we getting something for our money? Does it make any sense in terms of crime deterrence, or the way we deal with people?

AUDIENCE COMMENT: My name is Carol Bergman and I'm with the National Moratorium on Prison Construction in Washington. I'm also troubled that minorities are not on the panels nor is their perspective raised. I find this indicative of how this whole question is gone about throughout this country. I think that the decision regarding the politics of prison construction are reflective of the power structure in the criminal justice system in this country. The prisons are just the end result of the choices and possibilities in people's lives. And that's why we end up with a prison system that is reflective of a very class-biased and racist society. In my opinion, prisons and jails are used to warehouse people of color and people with very small economic possibilities in their lives. And I think Jerry Miller spoke of this quite eloquently yesterday, when he talked about the kind of options that are available to those of us, or those of our own kind, who get into trouble. And I think this issue becomes reflective in the whole question of violent versus nonviolent crime. I think it's very easy to get sidetracked into seeing exactly what somebody has done. We continue to hold an individual absolutely responsible and accountable for his or her actions. And I don't mean to advocate a total abdication of individual responsibility, but we

aren't including any of the root causes of crime. But if we continue to focus on each individual in prison, without looking at why that person got there, or what kind of alternatives are going to help that person change her life, all we're doing is perpetuating this ongoing cyclic process, regardless of whether we keep somebody locked away for three years, or fifteen years, or life; if we do nothing to change the kind of conditions on the outside, we're perpetuating this cycle.

I'd like to address the question of why voters are in favor of more prisons but not more schools. They're voting from fear, and I contend that a lot of that fear is also racist. When I talk to a group of white people who are afraid of crime, what they're really afraid of is a group of black kids on the corner. There's a racist mentality that infuses that fear, and that in turn gets picked up by the media. Moreover, we haven't talked at all in any of these panels of the role of the media in sensationalizing crime data and victim data. Every time I testify on Capitol Hill, the response I get is that yes, the studies are right, we have people who don't belong in prisons and jails. But every congressman has constituents who are afraid, or who have been raped or mugged or know somebody else who has. We're not responding to those people, and what we can do about their perceptions in terms of effecting long-term change. Which brings me, I guess, to another point that really troubled me when Sherman spoke earlier. It is all too easy in this debate for anybody who's concerned with humanism, with people and how they live, to get sidetracked into the specifics of how many feet you have in a cell, and how awful those conditions are. We're talking about effecting long-term change, and conditions are only one piece of that. We end up getting sidetracked and voting to spend more and more money for building. Now we have the Parkinson law of prisons: the more we build, the more we fill them. And by not looking at it in a larger framework of both class and race analysis, I think we lose sight of this whole problem.

JAMES JACOBS: I'm not sure that there is a black position on this particular question. In the prison bond election as I read the data, the black community supported the prison construction more so than the white community. Black political leaders in the United States are certainly by no means unanimous in their condemnation of prison expansion; they're divided. There are important black leaders who emphasize the importance of stricter crime control measures, and there are also important black leaders on the other side of that question. Fear doesn't exist only in white, middle-class communities; quite the contrary, the fear is the greatest and the most devastating in the poorest minority communities. I wish I recalled the name of the recent book on the poor minority community in Boston that was reviewed in the New York Times. In the review there was a brief summary of the author's description of what it's like to live under conditions of such pervasive violence and fear. Surely it would be a grave misconception to say that the people of those communities believe that expanding our prisons is a

racist response to their troubles. And blacks in the criminal justice system and corrections and police and prosecutors' offices also have strong positions. So I think that there too we would see a rather varied and rich diversity of opinion, just as we've been seeing in the discussions yesterday and today.

DANIEL POCHODA, MODERATOR: I think Jim may be right about what he says, but I think his points support what Carol [Bergman] says about the politics of our prison system and its connection with race and class. I have no doubt that fear is great in the black community. I have no doubt that blacks are victimized at a greater rate than whites, and because we have perpetuated the thought that the way to reduce crime is more prisons, blacks will vote for more prisons. But I don't think that that necessarily means those in fact who are making decisions about prisons in our society are not race and class biased. In fact, my position is that they are race and class biased. The lower economic classes are disproportionately represented in our prisons. I think the whole issue of crime and our response to crime is connected with the fact that both those we incarcerate and those who are victims come from those classes and races that are historically hated and have the least power in our society. But the fact that blacks also vote for prisons cannot in any way shape or form be translated into the statement that therefore, our prison system and decisions about it are not racist or race and class biased.

AUDIENCE COMMENT: I [Carol Bergman] had a quick question or comment. Has anyone really looked up the relationship between the economy and our overreliance on incarceration? It seems to me right now we are in a period where there's rising unemployment, tremendous amount of frustration, and I wonder if there's a correlation between how we respond in terms of our jail and prison policies.

JAMES JACOBS: I know this gentleman over here has written very vigorously and exhaustively on the subject.

AUDIENCE COMMENT: My name is David Greenberg. Nationally, in the aggregate, there is a very powerful relationship between admissions to prison and the unemployment rate. It's a relationship that doesn't seem to be explained very much by the relationship between unemployment and crime. It seems to be more a question of how sentencing officials, judges, respond to this. But this is true in the aggregate, it's not true in every state. It's true not only in the United States, but also in Canada.

KENNETH CARLSON: The only anecdotes that I can bring to this question involve a couple of cycles of major federal funding proposals to assist states in prison construction. In both cases, there has been either explicitly within the statute or within the debate that surrounds it, specific observation that it would be very nice if these facilities could be built in states where the construction industry was particularly depressed.