

DISCUSSION

DAVID RICHARDS, MODERATOR*

AUDIENCE COMMENT: My name is Alvin Bronstein. My friend, Ken Feinberg, has made a very vigorous presentation, as he always does, but he has ignored some of the facts. He went on at some length about current recidivist statutes, statutes that punish three-time felony offenders, as though they locked up only dangerous and violent people. All the statutes that I see make no distinction for violent felony offenders. In Texas and in New York they locked up three-time check forgers. These long time recidivist statutes simply increase prison population, because the length of sentences, as well as the number of people you send away, affect population. The only recidivist statute that I've seen recently which might reduce prison overcrowding, the issue here, is the one pending in Montana, which provides for the death penalty for a third felony offender. I don't think Ken Feinberg would support that one.

KENNETH FEINBERG: Nor would I support the one in Texas. But the sentencing proposal that I endorse is the presumptive sentencing system that was proposed by Senator Kennedy in the proposed federal criminal code. That proposal specifically attempted to limit the notion of incapacitation to the violent recidivist. It emphasized that the guidelines commission was to propose non-incarcerative alternatives for the rest of the convict population. Now, I suppose, you know Norval [Morris] will say, Well wait till the Congress gets hold of that bill, and changes it so that every burglar also goes to jail. That's where my viewpoint becomes important. I believe that the system is so bad now, that I'm prepared to take that risk in an effort to develop something that might work. If it doesn't we'll try something different.

AUDIENCE COMMENT: My name is Daniel Pochoda. I was happy to hear at the beginning of this panel someone mention, Mr. Feinberg to be precise, that he was the representative of the real world and I thought perhaps we would have some change in the tone of the talks. I was concerned when looking at the list of speakers and moderators, and I include myself in that class, that we were definitely getting the state of the art of white male academics. I think many of my fears were confirmed in the sense that once we start talking about reducing crime, it seems to me irresponsible to avoid relating that to causes of crime. And to say that a system, a so-called new concept of selective incapacitation, will reduce crime in the real world is patent nonsense.

In a sense we obviously have a system of selective incapacitation now. We are arresting a very small percentage of people who commit crimes, then

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incapacitating a very small percentage of people who are arrested, and on and on down the line. Within that system, the police, judges, we are all obviously utilizing some of the criteria that are present in selective incapacitation proposals.

I have no doubt that if we increased in New York State the number of people in prison from 28,000 to 500,000 crime might go down. We would have a police state. If we abolished prisons, crime might go up. But to say that if we maintain that number of 28,000, a slight shift in focus would reduce crime, is on its face nonsense when you start talking about causes of crime. Selective incapacitation might create some displacement for a year or two, but I just think it's silly.

It seems to me that you must start, if you're going to make any claims about reduction in crime, to talk about causes of crime. And I'm not saying you can't hold people personally accountable for their acts until all social conditions are changed. I'm just saying if you're going to make these kinds of claims, you have to talk about those conditions. If you're talking about cures, you have to talk about problems.

Having said that, I must also add, I think the person who represented himself as the representative of the real world in fact gave the most inaccurate portrayal, indeed irresponsible portrayal of what happens in the real world. To say that these proposals guarantee or are more likely to insure a more just and fair system is again totally belied by the history of the last number of years of criminal justice, and again by common sense. Your description of the bill is nice, but it's a bill that hasn't passed. And we've seen bills with all sorts of names, from right to left, conservative to liberal, that haven't passed. Once gotten hold of on the floor of the legislatures, we see wholesale changes, dramatic changes, always to be more punitive, given the population.

The best evidence of this is in the area that you talked about, preventive detention of pretrial persons. First of all, I find it hard to argue that because we are doing something now under cover, because a bastion of judges are not obeying the law now in the pretrial area, that we should make it legal. To me that seems a difficult argument to maintain. Further, it's difficult to imagine that judges, once we have legalized this, will no longer disobey the law in a wholesale fashion, and will no longer take race into account. Your argument would run, since they are disobeying the law now, and including variables they're not supposed to, let's make race one of those variables and bring it out into the open. Most importantly, though, the evidence shows in state after state after state that has adopted preventive detention, and many of them have now, that preventive detention has not, in any way, shape or form reformed the general bail practices. And I have no doubt the U.S. Congress would have done exactly the same thing. Preventive detention has not made anything better, it has only given judges another weapon to use to put people in jail unnecessarily.

I won't even talk about the basic injustice this concept does to the Bill of Rights. The Bill of Rights should mean something. If a practice is wrong,

it should be brought out in the open and condemned, not brought out in the open and legalized.

KENNETH FEINBERG: I would say in response to Mr. Pochoda that nowhere have I seen legislation proposed in the area of bail reform that approaches what Senator Kennedy has proposed. This proposal ties considerations of danger to other reforms dealing with money bail and the impermissible use of the likelihood of appearance standard.

AUDIENCE COMMENT: Every proposal did, initially, but none have ever passed. I can show you state after state where the same proposal was made and when it hit the legislative floor, the legislature changed it.

AUDIENCE COMMENT: My name is David Lovell; I am a Philosopher in Residence for the Connecticut Department of Corrections. Because of that identification I think it's important to add that I have spent a good bit of my time over the last five years dealing directly with prisoners. I would consider myself neither a down-the-line adherent of just deserts, nor of incapacitation. I can see some basis for both.

I want to phrase the moral objection to selective incapacitation in a different fashion, a slightly more hypothetical fashion. Suppose, Mr. Greenwood, that you had discovered that the best predictor variables were not tied so closely to crime as we think. That perhaps the best prediction variables for an active rate of criminality turned out to be things like having grown up on welfare, having been kicked out of school before the age of twelve, having an alcoholic or abusive parent, having been abandoned by one's mother, and so forth. Then the reasoning behind the theory of selective incapacitation, it seems, would dictate that those variables should be the ones that judges use in deciding which robber they will sentence to ten or fifteen years, and which they will sentence to two years. That is, the moral assumption that the purpose of the system is simply to figure out whom we should incapacitate, is really what is at issue here.

Second, I think that selective incapacitation is significant also because of the assumption that the major purpose of imprisoning criminals, and the only thing prisons succeed in doing to criminals these days, is incapacitating them. I think once you make that assumption, then we have to be selective. We have to identify, as you've tried scrupulously to do, those variables which will enable us to incapacitate in the most efficient fashion, simply because we cannot afford to incapacitate in a general and equitable fashion. So it seems to me, that in addition to the problem of the assumption of responsibility of crimes, we have a second problem. Selective incapacitation is a *reductio ad absurdum* of the assumption that incapacitation is itself an adequate justifying purpose for imprisonment. Then in order to be effective, it must be selective, and I think that if it's selective, it cannot be just.

AUDIENCE COMMENT: My name is John Irwin. Peter [Greenwood], I've heard that your best predictor which you didn't include in there was race. I understand you dropped that because you were afraid to use race as one of the predictors.

PETER GREENWOOD: Race turns out not to be a good predictor in any of the research that's been done in this field in terms of intensity of criminal behavior. Blacks are more likely to be arrested and involved in the criminal justice system, but once they are, color and race have no predictive value in terms of rate of offending.

If I can approach the question about the purpose of imprisonment, incapacitation is a conclusion, not a premise. If somebody can figure out other useful things to do with chronic offenders that will change their behavior or protect society, I'd want to hear about it. We started out doing this research to find such alternatives, and incapacitation is a policy by way of default, because we couldn't find other things that worked. If in fact all prisons do is to warehouse people till they get older I, for one, want to be honest and admit that. We should put big signs up on them that they're not, and do not pretend they are, fulfilling other, useful, beneficial, humanitarian purposes.

ANDREW VON HIRSCH: The question was not quite as hypothetical as you made it. There are seven predictive factors in Mr. Greenwood's scale. Three of them don't relate to criminal behavior directly at all, that is, drug use in the preceding years, drug use as a juvenile and being employed less than half of the preceding year. It's sometimes said that the others relate to criminal record, but, for instance, one of them is conviction before the age of sixteen. Certainly, on a blameworthiness theory, the fact that you were young when you did something nasty would usually be considered a mitigating factor. But here, to have been young, to have had poor judgment, becomes an aggravating factor.

NORVAL MORRIS: Forgive me, I want to add a point here. There is an element of unfairness in the way this argument is being presented that bothers me. I think I heard Peter say, and I'm confident I did from his study, that he's not advocating the use for sentencing purposes of predictors of criminality *simpliciter*. I think I heard him say that he is talking about a multi-purposive system with a diversity of limits and controls on it.

If that be so, then I'm pushed to the uneasy situation of having to plead guilty to the indictment that was so gracefully phrased by the last question. There is a group of people who within my value system (which might possibly agree with the legislature's value system), deserve by virtue of what they have done punishment up to a given figure. In reference to those people, I am prepared to use those predictors that are neither race nor class-neutral. And I know that's a confession.

AUDIENCE COMMENT: My name is Jerome Miller. I want to first congratulate Peter for being willing to come to a forum like this. I think the kind of interchange here has been very helpful. But I don't think that this particular kind of theory is going to be very helpful at all, any more than I think Andrew von Hirsch's theory was very helpful.

One issue bothered me a great deal, given my long experience in the juvenile correction area. Three, maybe even four of the predictors, really

relate to a system that produces the very thing that we then predict as violent. Then we lock young offenders up in the same system that produced them since one of the variables is early conviction. We know that early convictions occur on the basis of race and social class, rather than with reference to seriousness of crime the first time around. We know what juvenile training schools actually do. Those are two of the predictors. So we have a self-fulfilling prophecy. I don't think it's any problem predicting that our system of corrections will produce violent people.

My quarrel really is with Ken [Feinberg]. Over the years, I've considered myself a liberal Democrat. I have served on the cabinets of three Governors, two of them Democrats in large industrial states. I think the liberals in this field have abandoned a very important issue and left those with any decency and humanity standing alone. Certainly you must know that to introduce a concept like selective incapacitation into any state legislature in Pennsylvania, or Massachusetts, or Illinois, the three states I know the best, would lead to locking up more people. Also, there's no evidence at all that it would be used to incarcerate anyone other than minority people, poor people, Hispanics, blacks, you name it. These are the people who always have populated our prisons.

The theory of just deserts fails just as quickly as any theory of incapacitation. Then we get back to individualization, rehabilitation, or tailoring the sentence to the individual offender. That's what anyone in this room made up primarily of middle-class whites would insist upon were their own in trouble, were it difficult trouble, were it serious trouble, or lesser trouble. We'd insist on a damn lot of individualization. We wouldn't want them sentenced on the basis of anyone's formula. And it seems to me that if it's not good enough for our own, it's not good enough for anyone else.

ANDREW VON HIRSCH: First of all, I think we always have known, since 1923, when these studies started, that there is some limited capacity to predict dangerousness. In other words, you can spot people who are risks better than you could by flipping a coin. But the prediction was subject to very high false positive rates, subject to not very much of the variability explained, and subject to, at least it appeared at that time, the fact that doing so would not have an enormous effect on the crime rate. Now as long as one sees prediction in that light, then it seems to me one can make a sensible moral choice between a system that emphasizes prediction, a system that emphasizes desert, or some kind of hybrid between them. We know that if we emphasize prediction, there'll be problems of false positives, problems of relying on factors that aren't related to the blameworthiness of the offense. If we rely on desert, it means that certain people who are risks may not be confined for the full length of their dangerous career. I think those kinds of trade-offs can be made, and have been made for a long time.

The problem I have with this particular study was the fact that the claims made are so strong, particularly the claim that somehow you could

have an enormous impact on the prison population. In reply to some of my comments, Mr. Greenwood said, "Well, you know, we've always extrapolated from prisoners to other people, and there's no better way." But that's the kind of argument that I heard often in defense of rehabilitative claims that things are going to work. "Oh, well, it's not very good, but the people in the program do better than the people outside the program if you discount the differences in their initial risks," or whatever it is. Or, deterrence claims, "Yes, we have an equation that shows that if you increase punishment, crime goes down, if you don't consider other factors, considering the crime rate."

But it seems to me that if you want to, are starting to, make claims such as that you can reduce robberies by fifteen percent, then you have to be extremely scrupulous. You have to consider if you're looking at imprisoned robbers, only what they might do in the future, not other people that you haven't studied. And I think if you do, what you will discover is that, yes, these studies are different. They use a different methodology, they look at rates of offending, instead of merely whether you do it, did it, will do it, or not.

But, although wonderful things seem to come out, the reduction in crime, the possibility of sharply using less prison resources, all of these things will tend to disappear, and what you will be left with are the old moral dilemmas. Namely, trade-offs exist involving marginal changes in the sentencing structure between utilitarian benefits of limited sorts, and fairness benefits, also of limited sorts. And I think if we shrink these claims down to their proper size, I think we can continue this debate in a sensible way.

AUDIENCE COMMENT: My name is Bill Strachan; I haven't read any learned journals or articles of history about prisons. When I was sixteen I got caught with two buddies of mine breaking into a supermarket and having a stolen automobile. They got sent to Spofford. Anybody who knows anything about the New York State criminal justice system knows what Spofford is. The only reason I didn't get sent to Spofford is because I had A's and B's in school, and they were constantly being suspended because they smoked in the boy's room, stuff like that. One of them is now doing a bit for Federal auto theft in Leavenworth, the other one is at Rahway for armed robbery. When I got busted it was for things like voter registration with SNCC and CORE and anti-Vietnam stuff. I think that was selective incapacitation. But because I had good grades and they didn't I was selected out; I was lucky, I got opted out.

If anything is clear about the criminal justice system in this country, it's the fact that justice is criminal, the way it's handled between white-collar crime and people who grow up in a low-income area, the kind I did. To see people like Richard Nixon and his cohorts spending minimal amounts of time in a Federal prison, and seeing other people do fifteen years, or as in

Texas, 400 years, for having 3 ounces of marijuana, that's criminal. And I just don't see signs that anything has been done in this country. And I don't see that anything is going to be done by the people who are in power at this particular point. It's very disheartening.

Prisons continue to make people infantile. They don't make them independent, they don't teach them to take care of themselves. When an inmate has to get up at 5:30 in the morning, and then has his entire life regulated, he doesn't know how to take care of himself when he gets out. It's a whole process and it perpetuates itself. So that for a lot of inmates that I know, prison is the best place for them; they can't handle the street, so they might as well come back.

AUDIENCE COMMENT: My name is Sidney Lezak, and I'm ex-U.S. Attorney from Oregon. I have to echo something that Norval [Morris] said, but from a little different perspective. It seems to me that everything does work, a little bit. What I'm concerned about is whether or not the factors that Peter Greenwood takes into account in his selective incapacitation model would ever get to the attention of the court in the first place. The basis of Peter's study is essentially information gained from the convicts themselves. Most of that information, it seems to me, would not come to the attention of the court. Every matrix that I've seen in use is a matrix which includes risk scores based upon the history which is essentially a history of convictions. I'm just wondering how much difference Peter's factors would make, beyond those things which already are taken into account by the court and by every matrix system I know?

PETER GREENWOOD: Let me answer that question. There are some factors that predict and some that don't. One of the interesting parts of that study was some of the factors we looked at—total number of convictions, injury to victim, conviction on multiple counts—had no predictive value at all. Yet in fact those are the kind of items that can be used to aggravate or enhance a sentence in California. In fact, amongst all the imprisoned burglars and robbers we looked at, we found that the predicted low rate and high rate offenders weren't serving any different terms. So yes, selectivity is used. But it's based on hunches and how the defendant looks in the chair and squirms at the time of sentencing. Moreover, it's based on a presentence report that goes into many sensitive and personal details that are beyond the offender's control. So it's not just an issue of having some variables and using them, but also the correlation and the accuracy of those variables.

Hopefully some form of incapacitation will become an expressed objective of sentencing. Then, it would be nice to see some kind of accepted rules, perhaps a burden of proof about the correlation in the non-suspect, non-racial distribution of the variables that are used. In other words the predictive factors could be challenged, just the way you make challenges in jury selection.

