

NOTES

SELECTIVE INCAPACITATION AND THE JUSTIFICATIONS FOR IMPRISONMENT

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I

INTRODUCTION

Let us suppose that we could distinguish the dangerous criminals from the nondangerous criminals. Then a judge who was about to pass sentence on an offender would know whether the criminal standing before the bench was a menace to society or a harmless offender. Would it be wrong for that judge to send to prison a convict who, if she is not incarcerated, will commit a hundred more offenses in the next ten years and to place on probation a convict who will never endanger another individual's safety? Isn't it in society's interest to incarcerate the dangerous — the potential murderers, rapists, burglars and robbers — as long as they are likely to commit more crimes; and isn't it contrary to society's interest to imprison convicts who have "learned their lesson?"

In the last couple of years, several criminologists have proposed that state governments implement selective incapacitation,¹ a sentencing policy that seeks to identify dangerous high-risk offenders and imprison them for lengthy terms while placing the remaining nondangerous offenders on probation. The advocates of selective incapacitation maintain that we should base the punishment upon the offender. Otherwise the punishment will prove inappropriate. The punishment will be overly severe in many cases so that society will be forced to pay thousands of dollars to maintain in prison people who can make contributions to society, and the punishment will be overly lenient in other cases so that dangerous, habitual offenders will be able to commit crimes that a lengthier sentence would have prevented. To avoid these inappropriate sentences, proponents of selective incapacitation suggest that convicted offenders be divided into two groups, dangerous offenders (those offenders who pose a high risk of committing further dangerous crimes) and nondangerous offenders (those offenders who are unlikely to commit more dangerous crimes if released). The former group would be imprisoned; the latter would not.

1. The best known work advocating selective incapacitation is P. Greenwood, *Selective Incapacitation* (1982). Other works advocating selective incapacitation include J. Floud & W. Young, *Dangerousness & Criminal Justice* (Cambridge Studies in Criminology No. 47, 1981); Board of Directors, National Council on Crime and Delinquency, *The Non-Dangerous Offender Should Not Be Imprisoned: A Policy Statement*, 19 *Crime & Delinq.* 449 (1973) [hereinafter *The Nondangerous Offender*]; Council of Judges of the National Council on Crime & Delinquency, *Model Sentencing Act*, 18 *Crime & Delinq.* 335, 344 (1972) ("The policy of this Act is that dangerous offenders shall be identified, segregated, and correctively treated in custody for long terms as needed and that other offenders may be committed for a limited period.") See also M. Sherman & G. Hawkins, *Imprisonment in America: Choosing the Future* (1981); *Model Penal Code* § 7.01 (Proposed Official Draft 1962) (which opposes imprisonment except in any one of three circumstances; the first circumstance justifying imprisonment is the existence of undue risk that during the period of a suspended sentence or probation, the defendant will commit another crime).

Selective incapacitation's opposition to imprisoning the nondangerous offender makes it a seemingly attractive theory. The proponents of selective incapacitation observe that it is unnecessary to imprison the nondangerous, since by definition the nondangerous offender endangers no one.² Therefore, penalization should be reserved for those offenders who are likely to commit violent crimes if they are released. Incapacitating the dangerous, it is argued, is the only way to protect the law-abiding public.

The good news that proponents of selective incapacitation offer is that they can reduce crime rates dramatically and make the streets once again safe for law-abiding citizens.³ The bad news, rejoin the opponents, is that selective incapacitation will lead to the harsh new world of George Orwell's Big Brother. In fact, both sides overstate their cases.

Selective incapacitation is being seriously considered today — in many ways it is already applied in our criminal justice system.⁴ In addition, selective incapacitation forces the public to reconsider long held assumptions about the role of prisons.⁵ Therefore, it should not immediately be dismissed by facilely raising practical problems, such as the current inability to identify the dangerous offender, that may prove surmountable.

Nevertheless, dangerousness is an inappropriate criterion in sentencing proceedings. This Note, after pointing out why selective incapacitation is now so attractive,⁶ will argue that it should not be a factor in sentencing proceedings because at present it is impossible to predict with any accuracy who is likely to prove dangerous. The courts cannot distinguish the dangerous from the nondangerous. In addition, because the definition of violent crime will undoubtedly exclude most dangerous corporate crime, many dangerous offenders will remain free.⁷ Next, the Note will discuss the ethical concerns implicit in the use of selective incapacitation as a sentencing tool.⁸ Even if it were possible to identify the dangerous offender, it would be impermissible to incarcerate her on the grounds that she was dangerous. Imprisoning an

2. Moreover, there are practical reasons why alternative punishments should be used with the nondangerous. First, it is very expensive to imprison offenders. Society should be wary of imprisoning offenders unless it is essential. See text accompanying notes 21-23 *infra*.

Second, prisons are overcrowded. The shortage of prison cells was called an "emergency situation" by the Associate United States Attorney General, Rudolph Giuliani, a year and a half ago. See *N.Y. Times*, Nov. 14, 1982, § 4, at E9, col. 1. Now the prisons are still more crowded. The current annual growth in the prison population is 14.3%. *N.Y. Times*, Nov. 8, 1982, at A12, col. 5. Putting more prisoners in these overcrowded cells is inhumane, and judges should hesitate before sending anyone — even the dangerous — to prison. Unless the prison population can be reduced through selective incapacitation, the government will have to spend billions of dollars on new cells. *M. Sherman & G. Hawkins*, *supra* note 1, at 2-3.

3. *P. Greenwood*, *supra* note 1, at 78-79.

4. See notes 29-61 and accompanying text *infra*.

5. See notes 243-366 and accompanying text *infra*.

6. See notes 12-28 and accompanying text *infra*.

7. See notes 62-98 and accompanying text *infra*.

8. See notes 99-128 and accompanying text *infra*.

offender because she is dangerous is punishment based on status and future behavior. It constitutes an immoral and illegal intrusion upon the individual's freedom. Next, the Note raises various constitutional problems with selective incapacitation.⁹

The next section discusses the likely consequences of the implementation of a formal policy of selective incapacitation. It appears probable that selective incapacitation will neither lower the crime rate nor reduce the prison population.¹⁰ The Note concludes with an analysis of selective incapacitation's theoretical premises and what these premises imply about the future of imprisonment.¹¹

II

SELECTIVE INCAPACITATION

Under a program of selective incapacitation, the dangerous offender will be imprisoned, but the nondangerous offender will not. This is because the proponents of selective incapacitation believe that the purpose of penalization is incapacitation. Imprisoning an offender inevitably incapacitates her.¹² So long as she remains a prisoner, she is incapable of harming anyone outside of prison. Thus, if the sole purpose of imprisonment is incapacitation, imprisonment should be reserved for the dangerous. It is pointless to incapacitate the nondangerous.

Selective incapacitation in its pure form is a contemporary adaptation of utilitarianism. Imprisonment is justified because the evil done to the dangerous offender is outweighed by the benefit to society. Putting every offender in jail, however, is wasteful and counterproductive. If the goal is to protect society and reduce crime, it is not necessary to incarcerate the nondangerous offender. Only the dangerous offender need be imprisoned.

Utilitarians, beginning with Jeremy Bentham and J.S. Mill, have focused on the economy of punishments. Bentham asserted that it was wasteful to

9. See notes 129-206 and accompanying text *infra*.

10. See notes 207-42 and accompanying text *infra*.

11. See notes 243-381 and accompanying text *infra*.

12. This Note uses the female pronoun to refer to offenders, even though, of course, there are both male and female offenders. All offenders are the subject of this Note. However, in the absence of a commonly accepted, gender-neutral pronoun, it is the policy of the N.Y.U. Review of Law & Social Change to use the female pronoun. However, the author does recognize that approximately 96% of the prisoners in the United States are male. For example, on December 31, 1981, there were 353,482 male offenders and 15,527 female offenders in state and federal adult correctional facilities. U.S. Dep't of Justice, *Sourcebook on Criminal Justice Statistics: 1982*, at 538 (T. Flanagan & M. McLeod eds. 1983). This reflects both the fact that more men than women commit crime and the fact that judges, as a group, probably are readier to imprison male offenders. Many judges undoubtedly believe that prison is too brutal for female offenders, or that female offenders — unlike male offenders — are not really capable of being dangerous. Thus, to an extent, this disparity reflects and reinforces society's stereotypes.

imprison an offender for a moment more than was absolutely necessary.¹³ To do so would be contrary to the public good since an individual would be punished, even though the total happiness of the community would not increase. However, claims Bentham, "all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."¹⁴ According to this view, punishment should not be inflicted if it is (1) unprofitable (i.e., "where the mischief it would produce would be greater than what it prevented"¹⁵ so the harm prevented would be less than the cost to society and the individual of imprisoning her), or (2) needless (i.e., "where the mischief may be prevented. . . at a cheaper rate."¹⁶).¹⁷

Despite their concern with economy, utilitarians are not especially concerned about the cost to the individual. *They want to maximize the general good and minimize the harm to society as a whole.* While many utilitarians are unprepared to punish a blameless individual in order to benefit the rest of society,¹⁸ once an individual commits a wrong, it is permissible to punish—and even imprison—her, so long as society benefits.¹⁹

Under the purest form of selective incapacitation, the dangerous offender will remain in prison precisely as long as it is more expensive to society to leave her unhampered than to incapacitate her in a prison cell. The advocates of selective incapacitation contend that imprisoning an offender who has ceased to be dangerous is pointless.²⁰ It is also expensive. Today, imprisoning an offender costs taxpayers between \$10,000 and \$40,000 per year,²¹ and during

13. J. Bentham, *Introduction to the Principles of Morals and Legislation* 182 (1879) ("The punishment ought in no case to be more than what is necessary to bring into conformity with the rules here given.").

14. *Id.* at 170.

15. *Id.* at 171.

16. *Id.*

17. *Id.*

18. See, e.g., J. Floud & W. Young, *supra* note 1. This is a logical flaw in utilitarian theory. If social utility is the sole concern, it is irrelevant whether an individual has committed a crime in the past. If the individual creates a serious risk, she should be imprisoned regardless of her past.

19. Herein lies the major ethical flaw in utilitarianism: the suffering of a few persons is made good by the benefits accruing to the many. This indifference towards the individual ignores the fact that "each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. . . . [J]ustice denies that the loss of freedom for some is made right by a greater good shared by others." J. Rawls, *A Theory of Justice* 3-4 (1971); see also H.L.A. Hart, *Punishment & Responsibility* 25 (1968).

20. It may be worse than pointless. If the brutality of life in prison makes recidivism more likely, then imprisoning an offender who might have otherwise not committed any more crimes makes her more dangerous than she would have been if she had not been imprisoned. Thus imprisonment may transform nondangerous offenders into dangerous offenders. See text accompanying notes 214-20 *infra*.

21. D. McDonald, *The Price of Punishment: Public Spending for Corrections in New York* 17, 55 (1980); cf. M. Sherman & G. Hawkins, *supra* note 1, at 2 (\$7,000 to \$10,000 per year).

that period the offender will be rendered incapable of producing anything beneficial to society. Moreover, prisons are overcrowded;²² when an offender is added to the prison population, either an incapacitated offender must be released or a new cell must be built. The cost of prison construction is now \$30,000 to \$200,000 per cell²³ and is rising rapidly. It is difficult to justify spending as much as \$200,000 to build a prison cell and \$40,000 annually to guard, clothe, house, feed and care for an offender who really does not need to be imprisoned, especially if the principal justification for imprisoning the nondangerous offender is that only incarcerating her will ensure that all offenders are treated alike (i.e., receive the same punishment for the same offense).

Therefore, according to a utilitarian analysis, imprisonment should be reserved for offenders who will commit more crimes if they are released. And even where there is a risk of recidivism, imprisonment—because of its high cost—has a limited role. It should only be used if the cost of incarceration is less than the risk the offender will pose to society if she is released. Thus, selective incapacitation balances the cost of imprisonment against the cost of potential crimes.

Such a policy of decarcerating the nondangerous will reduce the prison population. According to the most sanguine estimates, if imprisonment is reserved for the dangerous offender, then no state need imprison more than one hundred offenders at a time.²⁴ Obviously, this estimate is overly confident, but selective incapacitation may indeed be able to lessen or even end prison overcrowding.

In theory, selective incapacitation should reduce the prison population without leading to an increase in crime. The dangerous offender will be incapacitated for as long as she remains dangerous. Only those who pose no danger will be released. Peter Greenwood, for example, calculates that his proposals can reduce crime by twenty percent without increasing the prison population.²⁵

Offenders should also benefit from the use of selective incapacitation as a sentencing tool. In addition to reducing the prison population, selective incapacitation, at least in theory, protects the convicted offender from ar-

22. See note 2 *supra*.

23. See M. Sherman & G. Hawkins, *supra* note 1, at 2 (\$30,000 to \$60,000 per cell); Gottfredson, *Institutional Responses to Prison Crowding*, 12 *N.Y.U. Rev. L. & Soc. Change* 259 (1984) (The cost of the average prison cell built in 1981 will be more than \$200,000 because most prisons are built with borrowed money.). The Manhattan House of Detention (Tombs) was rebuilt recently at the cost of \$43 million for 421 one-person cells. *New York's New Generation Jail*, *N.Y. Times*, Oct. 25, 1983, at A 34, col. 1.

24. *The Nondangerous Offender*, *supra* note 1, at 456 (citing NCCD Council of Judges, *Guides to Sentencing the Dangerous Offender* (1969)).

25. P. Greenwood, *supra* note 1, at 79.

bitrary justice. With selective incapacitation, unlike all other rationales for penalization, the appropriate sentence is easily determined: the offender should be imprisoned until she ceases to be dangerous. By contrast, if one uses a retributive or desert model, the offender deserves a punishment that is commensurate with the wrong she has done;²⁶ the sentence is supposed to be commensurate with the offense, but this scarcely helps determine when the offender should be released.²⁷ Thus, selective incapacitation is less subject to the fashions of the time or the whims of the judge.

Two characteristics of selective incapacitation that distinguish it from desert-based, determinate sentencing²⁸ should be stressed. First, advocates of selective incapacitation believe that the punishment should fit the criminal, not the crime. They would punish the easily dissuaded amateur mildly and punish the hardened repeat offender severely. The advocates of selective incapacitation would punish the nondangerous offender less severely than the dangerous offender not because they feel the nondangerous offender is less deserving of punishment, but because they realize that punishing offenders is expensive and that prisons are overcrowded.

Second, selective incapacitation is forward-looking. It de-emphasizes the past crime. Past acts (including the one which led to the conviction for which the judge is sentencing the offender) are examined only in order to establish whether the offender still poses a threat to the public. By the time the offender is convicted, it is too late to reverse the crime. Instead society seeks protection from future offenses that this or any other offender may commit.

In summary, proponents of selective incapacitation argue that it is inefficient to imprison for past acts: it is expensive and promotes recidivism. The true concern should be the well-being of society, and here it is essential to weigh the cost of incarcerating. Moreover, selective incapacitation will lower the prison population, thus reducing the cost to taxpayers, and at the same time it will lower crime rates.

III

THE CURRENT USE OF SELECTIVE INCAPACITATION

Although the concept of selective incapacitation seems startling, it is not as innovative as it may initially seem to be. As Andrew von Hirsch observes,

26. See, e.g., A. von Hirsch, *Doing Justice: The Choice of Punishment* (1976) [hereinafter *Doing Justice*].

27. Commensurability is not quantifiable. See text accompanying notes 297-98 *infra*.

28. Determinate sentencing refers to the practice of imposing a sentence of predetermined length. A five-year sentence is determinate; a three-to-nine year sentence is indeterminate. A desert-based (retributive) sentencing scheme is invariably determinate since, according to the proponents of desert, the offense merits a certain, precise punishment.

it is merely a "familiar product. . .given new packaging."²⁹ Prison overcrowding has already forced the criminal justice system to employ selective incapacitation to reduce the prison population. As a purely pragmatic matter, since there is only a limited amount of prison space available, it is impossible to imprison all offenders (unless all offenders are quickly released). Therefore, it makes sense to imprison only those who are most likely to endanger the public.

Today, the idea of incapacitating the dangerous offender is applied in four ways: (1) statutes for habitual offenders;³⁰ (2) preventive detention provisions;³¹ (3) judicial discretion in sentencing determinations;³² and (4) prosecutorial and investigative decisions on which crimes to pursue.³³

A. Habitual Offender Statutes

Many jurisdictions have special statutes for habitual or repeat offenders.³⁴ These statutes assume that if an offender continues to commit crimes even after repeated convictions, then only incapacitation can prevent further offenses. In other words, the fact that the offender has not mended her ways is viewed as proof that she is dangerous and will commit more crimes. This finding is used to justify especially severe treatment.

These statutes have withstood constitutional challenge.³⁵ All states have an interest "expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts [have] shown that they are simply incapable of conforming to the norms of society as established by its criminal law."³⁶

29. von Hirsch & Gottfredson, *Selective Incapacitation: Some Queries About Research Design and Equity*, 12 N.Y.U. Rev. L. & Social Change 11 (1984).

30. See notes 34-44 and accompanying text *infra*.

31. See note 45 and accompanying text *infra*.

32. See notes 46-57 and accompanying text *infra*.

33. See notes 58-61 and accompanying text *infra*.

34. See, e.g., Ill. Rev. Stat. ch. 38, § 1005-8-2 (1973); Ind. Code Ann. § 35-50-2-8 (West 1978); N.M. Stat. Ann. §§ 31-18-16, 31-18-16.1, 31-18-17 (1978).

35. The constitutionality of habitual offender statutes has been upheld many times. See, e.g., *Oyler v. Boles*, 368 U.S. 448, 451 (1962) ("Petitioners recognize that the constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge."); *Williams v. New York*, 337 U.S. 241, 243 (1949). Recently the Court upheld a recidivist statute that was invoked to prescribe a life sentence for an offender who had obtained \$120.75 under false pretenses, after having previously passed a forged check in the amount of \$28.36, and having fraudulently used a credit card to obtain \$80.00 worth of goods. *Rummel v. Estelle*, 445 U.S. 263 (1980). See also Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 Harv. L. Rev. 356 (1975).

36. *Rummel*, 445 U.S. at 276.

Probably the most sophisticated of these repeat offender statutes is the federal statute which increases sentences for the dangerous special offender.³⁷ Under this statute, the judge holds a special hearing after a conviction to determine if the offender is a "dangerous special offender."³⁸ If the offender is found to be such a "dangerous special offender," the judge may sentence the defendant for a term of as many as twenty-five years.³⁹

The statute defines both "dangerous" and "special." According to section 3575(f), "[a] defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant."⁴⁰

The statute has several definitions for special offenders. First, if the felony is part of criminal conduct which constitutes a substantial source of the defendant's income and in which she has "manifested special skills or expertise," the defendant is a special offender.⁴¹ Second, if the defendant has at least two previous felony convictions, has been imprisoned for one or more of these felonies and less than five years has elapsed since the defendant committed her most recent felony, she is a special offender.⁴² Thus, under the federal statute, most third-time offenders may be given incapacitating sentences if the judge finds that the defendant is dangerous.

The dangerous special offender statute, unlike pure selective incapacitation, makes no attempt to decarcerate the nondangerous offender⁴³ and usually requires two earlier felony convictions for its implementation. Thus, the federal statute reaches fewer offenders than selective incapacitation. However, the

37. 18 U.S.C. § 3575 (1976). The constitutionality of the statute has been upheld by several circuits. *United States v. Inendino*, 604 F.2d 458 (7th Cir. 1979); *United States v. Williamson*, 567 F.2d 610 (4th Cir. 1977); *United States v. Bowdach*, 561 F.2d 1160 (5th Cir. 1977); *United States v. Stewart*, 531 F.2d 326 (6th Cir. 1976).

38. 18 U.S.C. § 3575(b) (1976).

39. *Id.*

40. 18 U.S.C. § 3575(f) (1976).

41. 18 U.S.C. § 3575(e) (2) (1976) ("the defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise.").

42. 18 U.S.C. § 3575(e)(1) (1976) which states in part that:

the defendant has previously been convicted. . . for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's release. . . from imprisonment for one such conviction or his commission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year. . . .

43. Selective incapacitation, however, need not decarcerate the nondangerous offender. *Greenwood*, for example, favors "minimum sentences based on just deserts" for the nondangerous offender. *P. Greenwood*, *supra* note 1, at 88.

difference in reach is not great. One of the clearest indices of dangerousness is prior felony convictions. Few offenders would be selectively incapacitated without prior convictions. Also, the alternative definition of special offender is broad enough to cover offenders who live off their earnings as pickpockets or muggers even though they may never have been imprisoned in the past. Therefore, the most important difference between the federal statute and selective incapacitation is that most forms of selective incapacitation attempt to use objective factors to determine whether the offender is dangerous,⁴⁴ while the federal statute leaves the determination to the judge.

B. Preventive Detention

Preventive detention provisions⁴⁵ are analogous to the dangerous offender statutes. Preventive detention permits courts to hold defendants without bail if they are charged with dangerous crimes and the judge concludes that only detention can ensure the safety of the community.

Preventive detention differs from selective incapacitation in two ways. First, the detainee must be released as soon as her trial is over. The length of incarceration is short (and thus unlikely to prevent much crime). Second, the detainee, unlike the dangerous offender, has not been convicted of a crime and may in fact ultimately be acquitted.

44. For example, Greenwood uses seven variables:

1. Prior conviction for the same type of offense; 2. Incarceration during at least 50% of the preceding two years; 3. Conviction before age sixteen; 4. Time served in a state juvenile facility; 5. Drug use in the preceding two years; 6. Drug use as a juvenile; 7. Employment during less than 50% of the preceding two years.

Id. at 50. Those who score four or more are high-risk offenders. Id. at xvi.

45. See, e.g., 1976 D.C. Code Legis. & Ad. Serv. § 23-1322 (West 1976). The constitutionality of this statute was upheld in *United States v. Edward*, 430 A.2d 1321 (D.C. App. 1981).

The Supreme Court has recently upheld the preventive detention of juveniles, noting that children "are always in some form of custody." *Schall v. Martin*, 52 U.S.L.W. 4681, 4684 (1984). The Court also observed that the maximum period of detention was seventeen days for serious crimes and six days for less serious crimes. Id. at 4686. The constitutionality of preventive detention for adult defendants has not been settled. Many commentators question the constitutionality of preventive detention. See, e.g., Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. Pa. L. Rev. 1125, 1135 (1965) (the defendant "is being denied the fundamental fairness guaranteed by the due process of law because, although he alleges he is innocent, he is being punished by imprisonment before he has been tried."); Hickey, *Preventive Detention & the Crime of Being Dangerous*, 58 Geo. L.J. 287 (1969); Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371 (1970).

If a jurisdiction does not have a preventive detention statute, the defendant is to be released if she can meet the bail conditions. See, e.g., 18 U.S.C. § 3146 (1976). The judge must grant bail if the defendant will reappear; the question of the defendant's dangerousness is irrelevant to this issue and therefore is not to be considered. See *Stack v. Boyle*, 342 U.S. 1 (1951).

Nevertheless, even though judges are not to consider dangerousness, it is an important factor. When Judge Lasker ordered New York City to release 400 defendants from its overcrowded jails, the city argued that some of the released offenders would commit crimes and

C. Judicial Discretion

Even outside special statutory schemes, the concept of selective incapacitation is applied today. Wherever there is an indeterminate sentencing scheme,⁴⁶ the judge's perception of the risk the offender poses to society is likely to contribute to her sentencing decision. Except in the few jurisdictions with determinate sentencing schemes⁴⁷ that prevent the judge from varying the sentence according to her perception of the individual defendant's nature, dangerousness may always play a part in sentence determinations. "Every day. . . judges pass sentences longer than they would otherwise be on the express or implied ground that the offender has shown by his record that the public needs to be protected against him."⁴⁸

When offenses do not have predetermined punishments, judges are expected to use their discretion. In 1949 the Supreme Court recognized in *Williams v. New York*⁴⁹ that different defendants required different punishments: "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. . . . [I]ndeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments."⁵⁰

Judges must decide whom to incarcerate and whom not to incarcerate. It would be absurd to claim that their opinion regarding the defendant's prospective risk to society does not go into the calculus. If the United States had an abundance of prison space, judges would not be constrained to use imprisonment sparingly nor forced to consider the potential danger posed by the offender when sentencing her. However, the limited amount of cell space available today forces judges to use imprisonment sparingly. Overcrowding often reaches the point where there is no more room for new prisoners within a prison. Some federal judges, prompted by local prison conditions, have

tried to ensure that the released inmates would be principally defendants accused of property crimes. See 341 City Detainees in Crowded Jails Are Being Set Free, *N.Y. Times* Nov. 2, 1983, at A1, col. 1. Judge Lasker ordered the city to release those with the lowest bail to "guarantee that no dangerous inmates are freed." The Jail Space Shortage Seems Chronic As Crime, *N.Y. Times*, Oct. 23, 1983, § 4 (Week in Review), at E6, col. 3.

46. For a brief description of various types of indeterminate sentencing schemes, see S. Saltzburg, *American Criminal Procedure: Cases and Commentary* 1060 (1980).

47. See, e.g., Ca. Penal Code §§ 1170(a)(1) 3000, 3040 (West Supp. 1984). Ind. Code § 35-1-1 (West Supp. 1983); Minn. Stat. Ann. § 244.09 (West Supp. 1984).

48. J. Floud & W. Young, *supra* note 1, at 83.

49. 337 U.S. 241 (1949).

50. *Id.* at 247, 249; *Hutto v. Davis*, 454 U.S. 370, 377, 380, reh'g denied, 455 U.S. 1038 (1982) (Powell, J., concurring) ("[T]he limits of a prison sentence normally are a matter of legislative prerogative, and trial courts have the primary responsibility to determine an appropriate sentence. . . . [W]ith the sentencing decision in particular cases vested. . . in trial courts, a good deal of disparity is inevitable.").

ordered local judges to stop sending offenders to prison.⁵¹ Recently, thirty-one states were operating their prisons under the guidance of a court order.⁵² Under such conditions many judges will incarcerate offenders only if it is absolutely essential. In other words, the present conditions probably lead many judges to refuse to incarcerate anyone who is not dangerous. New York, for example, already has de facto selective incapacitation: ninety-seven percent of New York State prisoners have multiple felony convictions.⁵³

The Supreme Court concedes that sentencing courts currently use dangerousness as a criterion. In *Jurek v. Texas*,⁵⁴ the Court, although admitting that the prediction of future behavior is difficult, concluded that a court must make such an evaluation when sentencing: "Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . . [A]ny sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."⁵⁵

Proponents of selective incapacitation believe it is important that judges, in their attempt to determine if an offender is dangerous, have the tools that will permit the most accurate predictions.⁵⁶ Currently, judges tend to give the longest sentences to offenders who have been convicted of the most serious offenses and who have prior records.⁵⁷ At the same time, judges tend to disregard other indices of dangerousness. Proponents hope to ease the difficulty of making accurate predictions through express recognition of selective incapacitation.

D. Prosecutorial and Investigative Decisions

The use of dangerousness as a criterion to distinguish among offenders is not limited to the courts. Long before a case reaches a judge, the criminal justice system weeds out many nondangerous offenders. Selective incapacitation helps to shape police investigations and prosecutions. If a particular individual is considered dangerous, she is more likely to be investigated and

51. M. Sherman & G. Hawkins, *supra* note 1, at 20.

52. State Prisons Around Nation Scramble for Relief as Overcrowding Mounts, *N.Y. Times*, Sept. 29, 1983, at A18, col. 1. The same article reports that the number of inmates in at least forty states exceeds the state's official housing capacities. Several states, including Michigan, Iowa, South Carolina and Arkansas, have laws reducing the length of sentences if the prisons remain overcrowded for extended periods of time. *Id.*

53. Gillers, *Selective Incapacitation: Does it Offer More or Less?*, 38 *Rec. A.B. City N.Y.* 379, 388-89 (1983) (citing Roderick C. Lankler, Executive Director of the Advisory Committee on the Administration of Justice).

54. 428 U.S. 262, reh'g denied, 429 U.S. 875 (1976).

55. *Id.* at 275.

56. J.Q. Wilson, *Thinking About Crime* 153 (rev. ed. 1983).

57. Peterson & Greenwood, *Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations*, 69 *J. Crim. Law & Criminology* 604, 615 (1978).

subsequently prosecuted. The New York Police Department, for example, has established a career criminal program. If someone has two or more robbery arrests and one felony conviction within the last ten years, she is subject to special surveillance.⁵⁸ Similarly, since district attorneys' offices have limited resources, prosecutors want to obtain information about the potential defendant and the risk she poses to society before investing a lot of effort in prosecution, particularly if conviction is uncertain. "If the defendant is someone who [sic] it is important to prosecute and convict, then that will tip the balance in favor of going forward with a close case."⁵⁹ The practice of characterizing criminals according to dangerousness is widespread. As the Supreme Court observed in *Rummel v. Estelle*:⁶⁰ "It is a matter of common knowledge that prosecutors often exercise their discretion in invoking recidivist statutes or in plea bargaining so as to screen out truly 'petty' offenders who fall within the literal terms of such statutes."⁶¹

Thus, the term selective incapacitation is novel. However, while the formal theory of selective incapacitation presents an apparently novel framework by which to justify expressly distinguishing between dangerous and non-dangerous offenders, the criminal justice system has applied selective incapacitation for many years. The theory is not as revolutionary as it appears to be.

IV

THE PREDICTIVE PROBLEM: ATTEMPTS TO IDENTIFY THE DANGEROUS

The most fundamental practical problem with selective incapacitation is the inability of the courts to determine which offenders are dangerous. Although different approaches — some clinical and some actuarial — have been used, no one has been able to identify the dangerous offender.⁶² It is essential to note that the issue here is the prediction of *future* dangerousness, not the assessment of *past* acts. Therefore, even if the sentencing judge knows that the offender was dangerous when she committed the crime for which

58. Gillers, *supra* note 53, at 388 (citing Kenneth Conboy, Deputy Commissioner in Charge of Legal Matters for the New York City Police Department).

59. *Id.* at 386 (citing Barbara Underwood, Chief of the Appeals Bureau of the Kings County District Attorney's Office).

60. 445 U.S. 263 (1980).

61. *Id.* at 281.

62. Ferdinand D. Schoeman, an advocate of preventive detention, admits that no means of prediction has more correct diagnoses of dangerousness than incorrect diagnoses. Furthermore, the ratio of incorrect to correct predictions increases as one attempts to identify a higher percentage of the dangerous. Schoeman, *On Incapacitating the Dangerous*, 16 *Am. Phil. Q.* 27, 28 (1979). Flood and Young suggest that to get the highest degree of accuracy, it is best to label everyone nondangerous. Then there are no incorrect predictions of dangerousness, although the problem of incorrect predictions of nondangerousness remains. J. Flood & W. Young, *supra* note 1, at 180.

she is being sentenced, that judge cannot know whether or not the offender remains dangerous and will commit a crime if she is released.

The difficulty in predicting future dangerousness is evident from follow-up studies of offenders who have been diagnosed as dangerous by courts, parole boards, psychiatrists and social workers. In every study, the majority of these supposedly dangerous offenders has failed to act true to form; only a small minority has committed more offenses. Those incorrectly diagnosed (i.e. those who did not, contrary to predictions, commit any more crimes) have invariably outnumbered those correctly diagnosed (i.e. those who upon release did commit more crimes),⁶³ sometimes by as much as eight to one.⁶⁴ Thus, when an offender is incapacitated for being dangerous, most of the time incapacitation is unnecessary—the offender is no longer dangerous. In an extreme case, only 5.2% of a group of supposedly dangerous juvenile offenders offended anew.⁶⁵ This is more aptly called “unselective incapacitation.” If incarceration is appropriate only for the dangerous, then most imprisoned offenders have been unjustly incarcerated.

Redefining dangerous offenders to include all those who will commit any crime, no matter how trivial, can reduce the number of incorrect predictions. Under this definition, the number of correct diagnoses of dangerousness may rise to forty percent, but even here three out of five offenders will still be erroneously labelled dangerous,⁶⁶ and it is difficult to demonstrate the need for protection from many of these offenders.

Almost as disturbing as the fact that most offenders labelled dangerous are actually nondangerous is the discovery that offenders deemed nondangerous are as likely to be dangerous as nondangerous.⁶⁷ Therefore, if incarceration is to be based on the courts' current ability to predict dangerousness, almost as many dangerous offenders will be released as imprisoned.⁶⁸ If the goal of selective incapacitation is to protect the public from the dangerous offender, it is necessary to make more accurate predictions.

63. See, e.g., Coccozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 *Rutgers L. Rev.* 1084 (1976); Gordon, *A Critique of the Evaluation of Patuxent Institution, with Particular Attention to the Issues of Dangerousness and Recidivism*, 5 *Bull. Acad. Psychiatry & L.* 210 (1977); Kozol, Boucher & Garofolo, *The Diagnosis and Treatment of Dangerousness*, 18 *Crime & Delinq.* 371 (1972).

64. Sturgeon & Taylor, *Report of a Five-Year Follow-Up Study of Mentally Disordered Sex Offenders Released From Atascadero State Hospital in 1973*, 4 *W. St. U. Crim. Just. J.* 31 (1980).

65. Wenk, Robison & Smith, *Can Violence Be Predicted?*, 18 *Crime & Delinq.* 393, 398 (1972).

66. See Wenk & Emrich, *Assaultive Youth: An Exploratory Study of the Assaultive Experience and Assaultive Potential of California Youth Authority Wards*, 9 *J. Research Crime & Delinq.* 171, 180 (1982); see also Gordon, *supra* note 63.

67. See, e.g., Coccozza & Steadman, *supra* note 63.

68. The current state of predictive ability is probably not as bleak as the follow-up studies suggest. These studies are flawed. The statistics inevitably underrepresent correct diagnoses

Moreover there appears to be a link between the two types of mistaken predictions. Attempts to reduce incorrect predictions of dangerousness will increase incorrect predictions of nondangerousness and vice versa. To understand why this occurs, it is useful to observe that there are only two possible predictions: dangerous and nondangerous. In addition, each prediction may be correct or incorrect. Thus there are four possibilities:

- (1) those correctly identified as dangerous;
- (2) those incorrectly identified as dangerous when actually nondangerous;
- (3) those correctly identified as nondangerous;
- (4) those incorrectly identified as nondangerous when actually dangerous.

A predictive technique attempts to minimize or eliminate all the incorrect predictions, both those which label as nondangerous offenders who nonetheless commit violent acts and those which label as dangerous offenders who in fact are not dangerous. Proponents of selective incapacitation are not especially concerned about mistakenly labelling an offender nondangerous. In every study the vast majority of offenders diagnosed as nondangerous are in fact nondangerous.⁶⁹ Thus, when an offender is reported to be non-

of dangerousness (and incorrect diagnoses of nondangerousness) and overrepresent erroneous diagnoses of dangerousness. Those offenders who commit more crimes after their release, but are not convicted, will erroneously be added to the number of incorrect diagnoses of dangerousness.

Also, studies examine only the dangerous offenders who are released. Presumably, these are the offenders that judges, psychiatrists and parole boards thought were the least dangerous of the dangerous offenders. Those offenders who were ultimately labelled dangerous after much uncertainty are eventually released, while those offenders who were unanimously labelled dangerous often remain in prison. Thus, only the least dangerous of the dangerous offenders are studied. If the most dangerous offenders were also released, perhaps the number of correct predictions of dangerousness would be greater. See Dix, *Expert Prediction in Capital Sentencing: Evidentiary and Constitutional Considerations*, 19 *Am. Crim. L. Rev.* 1, 18 (1981).

Some of the follow-up studies cover very short periods. The Wenk-Robison study, for example, followed the released offenders for only fifteen months. Wenk, Robison & Smith, *supra* note 65. The number of true positives obviously would rise if a longer period were used.

However, the use of longer periods for the follow-up studies creates problems. Several studies conclude that predictions are only accurate over a short term. As time passes, an assessment loses accuracy. One study indicated that after three years, the nondangerous are as likely as the dangerous to commit violent crimes. Sturgeon & Taylor, *supra* note 64.

When one starts to worry about crimes that may take place in the distant future, one begins to consider very long sentences. A short sentence will not prevent crimes that may occur ten years after imprisonment. If an offender is likely to commit one crime within twenty years, a five-year sentence will prove ineffective in 75% of the cases. Only a twenty-year sentence will prevent the crime. However, one should not imprison offenders to prevent offenses in the distant future unless one is very certain that the individual will in fact then commit a violent crime. Otherwise the cost of penalization is too high to justify the incarceration.

69. This is not surprising. There are many more nondangerous than dangerous offenders. Most offenders, even those offenders who commit many offenses, will commit only nondangerous crimes. As a result, to obtain a situation where we have more dangerous offenders

dangerous, the label is probably correct. The number of false predictions of nondangerousness should be minimized, however, since every offender erroneously deemed nondangerous is by definition dangerous and will commit a violent crime. Unfortunately, as the number of incorrect predictions of nondangerousness is reduced, the number of incorrect predictions of dangerousness rises.⁷⁰

As the number of incorrect predictions of dangerousness rises, two problems become apparent. First, each offender who is mistakenly imprisoned for being dangerous adds to prison overcrowding and must be maintained at the state's expense. Attempts to end overcrowding and cut down the cost of running prisons will fail if, in order to prevent dangerous offenders from mistakenly being decarcerated, almost every offender is labelled dangerous and then imprisoned. Instead of being selective, this is universal detention.

Second, if prison sentencing is justifiable only on the utilitarian ground that it is permissible to incarcerate the offender for the good of the public, one wants to cut down the number of offenders erroneously deemed dangerous since each is actually nondangerous. The mistaken imprisonment of the nondangerous offender does not benefit the public; consequently she is wrongfully incapacitated. Unfortunately, the only effective way of eliminating erroneous predictions of dangerousness is by labelling everyone as nondangerous. But then no one is imprisoned for being dangerous.

So far several methods have been used to establish whether or not an offender is dangerous. One method of identifying the dangerous offender would be to compile a list of violent crimes and then say that whoever commits a violent crime is a dangerous offender. But this definition is of limited practical use since it does not permit identification until a violent crime is committed. It only identifies those who have been dangerous in the past, not those who will be dangerous in the future.

Determining that the offender has proven dangerous in the past does not tell the court whether or not the offender currently presents a high risk to the public. There is no logical reason to assume that since the offender has committed a violent crime in the past, she will commit more violent crimes

erroneously labelled nondangerous than we have nondangerous offenders correctly labelled nondangerous, one needs a definition of dangerousness that is simultaneously underinclusive (so that many dangerous offenders are mislabelled) and overinclusive (so that very few nondangerous offenders are correctly labelled). To take an extreme example, if not a single dangerous offender were labelled as dangerous, one would also expect all the nondangerous offenders also to be labelled nondangerous, but if the majority of the offenders who are labelled nondangerous are in fact dangerous virtually all of the nondangerous offenders must be mislabelled—otherwise the correct predictions will outnumber the erroneous predictions.

70. This is not surprising either. To eliminate the incorrect predictions of nondangerousness, it is necessary to label more and more offenders as dangerous. If one labels every offender as dangerous, every dangerous offender will be imprisoned. Unfortunately, all of the nondangerous offenders will be imprisoned as well.

in the future.⁷¹ Such definitions based on past behavior are both too broad — since offenders who are unlikely to offend again are incarcerated along with those who are likely to re-offend — and too narrow, since those offenders who have so far only been convicted of nonviolent crimes will be labelled non-dangerous even if they are highly likely to commit violent crimes in the future.

Actuarial tables have also been employed⁷² to make predictions on the basis of several variables including age, previous convictions and education. Unfortunately, some of the variables — age, for example — are not constants. Therefore, an offender may flip from dangerous to nondangerous overnight, merely because she has had a birthday. It would be absurd to argue that she has suddenly become any less dangerous as a result. However, if all the variables were constant, the results would be still worse. If an offender were dangerous at one point, she would remain dangerous forever, and it would be necessary to keep her incapacitated until she died.

Recidivist statutes can be viewed as actuarial predictions.⁷³ These statutes rely on one variable — the number of previous convictions — to determine if it is necessary to imprison the offender for a long time. Implicit in these statutes is the belief that the repeat offender is still dangerous — she will commit more crimes. But even prior conviction is a poor prognosticator.⁷⁴ Statistics confirm that recidivism is probable only if the offender has more than three prior convictions for violent crimes; if the offender has three convictions, there is still a sixty percent probability that the offender will not re-offend.⁷⁵ Since prior conviction alone is a poor prognosticator, Peter Greenwood has combined it with several other variables.⁷⁶ Unfortunately, even his seven variables

71. It would be self-defeating to define dangerousness as the past commission of a violent crime. With such a definition, the punishment would be determined by the crime. It would be retribution relabelled. This would also often lead to the imprisonment of offenders who are unlikely to offend again, and to the decarceration of offenders who are likely to offend again. It contradicts the rationale of selective incapacitation.

72. See, e.g., P. Greenwood, *supra* note 1.

73. See notes 34-44 and accompanying text *supra*.

Although habitual offender statutes rarely mention the word "dangerous," they are predicated on the belief that the habitual offender will continue to commit crimes unless she is incapacitated. They provide a test of dangerousness (e.g. if the offender has committed three felonies, she is dangerous) that can be easily applied. But these statutes do not eliminate the predictive problem so much as to avoid it. The first-time offender's sentence is not lengthened, no matter how dangerous a threat she presents to the public.

74. von Hirsch, *Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Sentencing guidelines Commission*, 5 *Hamline L. Rev.* 165, 184 (1982) [hereinafter *Constructing Guidelines*]; cf. S. Gottfredson & D. Gottfredson, *Screening for Risk: A Comparison of Methods* (1979).

75. G.J.O. Phillpotts & L.B. Lanucki, *Previous Convictions, Sentencing & Reconviction: A Statistical Study of a Sample of 5000 Offenders Convicted in January 1971* (Home Office Research Study No. 53, 1979).

76. See note 44 *supra*.

have proven to be a poor prognosticator. Andrew von Hirsch has demonstrated that Greenwood's diagnosis is likely to be wrong. Incorrect predictions of dangerousness, for example, remain at fifty-six percent.⁷⁷

Because actuarial predictions have been unsuccessful in identifying the dangerous offender, individualized examinations have also been used to predict whether or not the offender will commit more crimes. These examinations may be given by psychiatrists, social workers or prison officials, and they may be used alone, or in tandem with actuarial evaluations.

It seems unlikely, however, that there is any preparation that can make one an expert in identifying the dangerous offender. The American Psychiatric Association and the American Psychological Association both think that clinical predictions of dangerousness are unreliable.⁷⁸ The California Supreme Court shares this belief:

In the light of recent studies, it is no longer heresy to question the reliability of psychiatric predictions. Psychiatrists themselves would be the first to admit that however desirable an infallible crystal ball might be, it is not among the tools of their profession. It must be conceded that psychiatrists still experience considerable difficulty in diagnosing mental illness. Yet those difficulties are multiplied manyfold when psychiatrists venture from diagnosis to prognosis and undertake to predict the consequences of such illness.⁷⁹

In another case, *People v. Murtishaw*,⁸⁰ the court decided that these doubts do not go merely to the weight of the evidence. Instead, they bar its admissibility because expert predictions that persons will commit future acts of violence are unreliable, frequently erroneous, and may be extremely prejudicial to the defendant.⁸¹

If psychiatrists and psychologists are ready to concede that they cannot predict which offenders will prove dangerous and which will not, judges who have not had training in prognosticating the future behavior of offenders should not use dangerousness as a factor in sentencing proceedings.⁸² As the

77. von Hirsch & Gottfredson, *supra* note 29, at 21-22. One of the problems with Greenwood's seven variables is that five of the seven variables are useless for predictive purposes. For example, no official records of drug use exist, and the offender will not be likely to volunteer information that will send her to prison.

78. See Amicus Curiae Brief for the American Psychiatric Association, *Estelle v. Smith*, 451 U.S. 454 (1981); Dix, *supra* note 68, at 3, 15-16; see also Steadman & Coccozza, *Psychiatry, Dangerousness & the Repetitively Violent Offender*, 69 J. Crim. L. & Criminology 226 (1978).

79. *People v. Burnick*, 14 Cal. 3d 306, 325-26, 121 Cal. Rptr. 488, 501, 535 P.2d. 352, 365 (1975). The court concluded that even several prior convictions may be insufficient to justify a prediction of dangerousness.

80. 29 Cal. 3d 733, 175 Cal. Rptr. 738, 631 P.2d 446 (1981).

81. 29 Cal. 3d at 767-71, 175 Cal. Rptr. at 758-60, 631 P.2d at 466-68.

82. For judges' use of dangerousness, see text accompanying notes 46-55 *supra*.

State of New York's Advisory Commission on Criminal Sanctions admitted, sentencing judges have "no unusual ability to prophesy" the future behavior of the offender.⁸³

It is not surprising that courts have had difficulty predicting dangerousness. It is probably impossible to provide a definition of dangerousness that will separate the nondangerous from the dangerous so that a court can determine whether the offender needs to be incapacitated. Classifications must assume that people will invariably act in character, but chance and circumstance lead people to behave out of character. No prediction is perfect. Consequently, attempts to punish on the basis of dangerousness must founder because the court is forced to guess whether or not the offender is dangerous.

These two categories, dangerous offenders and nondangerous offenders, are treated as antithetical, but there is no reason to believe that they are polar opposites. There is no threshold of dangerousness, with everyone on one side dangerous and everyone on the other side nondangerous. Instead there is a continuum of dangerousness-nondangerousness,⁸⁴ and each offender should be placed (temporarily)⁸⁵ on one point on the continuum. Unfortunately, the courts have no means of determining where the proper point might be for any individual offender. Moreover, while those offenders near either extreme will often adhere to expectation, the majority of offenders will prove unamenable to easy classification. They will be in the middle: some will commit violent crimes, and others will not — but distinguishing the two groups will prove impossible.

Some people contend that the inaccuracy of predictions should not lead to the rejection of selective incapacitation. Once an offender commits a crime, she no longer has the right to be presumed innocent, or in this case nondangerous; she may be imprisoned regardless of her actual dangerousness.⁸⁶ This argument ignores the two purposes of selective incapacitation. If the dangerous offender cannot be identified, then many will be mislabelled nondangerous and commit more crimes — the crime rate will not decline. Second, the inability to distinguish the dangerous from the nondangerous offender is likely to lead to too many predictions of dangerousness because as Norval Morris points out, if it is necessary to choose between protecting the

83. Advisory Commission on Criminal Sanctions [of the State of New York], Report of the Advisory Commission on Criminal Sanctions 83 (1982).

84. See Kozol, *Dangerousness in Society and Law*, 13 U. Tol. L. Rev. 241 (1982) [hereinafter *Society and Law*].

85. The disposition to inflict harm may be episodic, so that at one moment an offender is dangerous and at the next moment she is not. J. Floud & W. Young, *supra* note 1, at 22-24.

86. Feinberg, *Selective Incapacitation and the Effort to Improve the Fairness of Existing Sentencing Practices*, 12 N.Y.U. Rev. L. & Soc. Change 53 (1984).

convicted criminal and protecting her potential victim, he — as well as most people — would decide to protect the victim.⁸⁷

Another problem with the current definitions of dangerousness is that corporate crime is considered nondangerous because of selective incapacitation's narrow focus on street crime. As a result, no corporate offenders will be incarcerated, even if they are in fact very dangerous.

The law is ill-equipped to cope with corporate crime. As personal liability is difficult to assign in these cases, strict liability and civil sanctions are deemed more appropriate.⁸⁸ Also, even if the corporate offender is convicted, it is likely that she will be found to be as innocuous as a flea. Because the corporate offender is likely to be well educated, steadily employed, and past the age of peak criminality,⁸⁹ she is unlikely to be characterized as a high risk offender under Greenwood's seven variables.⁹⁰ Therefore, she will probably be fined rather than imprisoned.⁹¹

With the corporate criminal, neither predicate of selective incapacitation is met: the offender is not found to be dangerous and she has not been convicted.⁹² Nevertheless, she is in reality a most dangerous criminal. By authorizing the sale of a carcinogenic pill, the president of a drug company can kill thousands. Her acts may be much more destructive than those of even a repeat murderer.⁹³ Unless the concept of dangerousness can be applied to the corporate offender, selective incapacitation will have little effect on the actual crime rate.

In conclusion, the studies indicate that at present it is impossible to make accurate predictions of dangerousness. For every offender correctly labelled

87. N. Morris, *The Future of Imprisonment* 68 (1974).

88. J. Floud & W. Young, *supra* note 1, at 13-15.

89. The peak years of criminality are the late teens and early twenties. M. Sherman & G. Hawkins, *supra* note 1, at 110.

90. See note 44 *supra*. The hitherto successful corporate executive probably was not convicted before age sixteen and probably did not serve any time in a state juvenile facility. Her drug use—and Greenwood limits this to heroin and barbiturates (see P. Greenwood, *supra* note 1, at xvi)—as a juvenile and during the past two years is likely to have been minimal. Since she was a corporate employee, it is highly unlikely that she was unemployed during at least 50% of the last two years or that she was incarcerated during at least half of those two years. For only one of the seven questions is a positive answer at all plausible: it is conceivable that the offender has a prior conviction for the same type of offense.

91. J. Floud & W. Young, *supra* note 1, at 13-14.

92. While she may be held civilly liable, criminal liability is generally ruled out because of problems of causation. See text accompanying note 88 *supra*.

93. Floud and Young, for example, assert that: "[i]n terms of the numbers of lives lost, the number and seriousness of injuries sustained and the value of property stolen or destroyed, the social and economic cost of white collar crime in modern society is probably greater than that of traditional crime." J. Floud & W. Young, *supra* note 1, at 12. For a discussion of the consequences of failing to incarcerate the corporate offender, see text accompanying notes 229-34 *infra*.

dangerous, at least one offender will be erroneously labelled dangerous.⁹⁴ If the number of mistaken predictions of dangerousness is significantly reduced so that the predictions of dangerousness are correct even fifty percent of the time, there will still be several mistaken predictions of nondangerousness for every correct prediction of dangerousness.⁹⁵ Nor do the studies offer much hope for improvement. Many conclude that it will never be possible to identify the dangerous.⁹⁶ Therefore, since half the dangerous offenders will slip by—they will not be incarcerated—and many nondangerous offenders will be imprisoned mistakenly, bifurcating punishment according to an assessment of dangerousness is unjust. Given these facts, it is regrettable that the Supreme Court held last term in *Barefoot v. Estelle*⁹⁷ that courts are capable of predicting dangerousness.⁹⁸

V

THE ETHICAL PROBLEM: THE RIGHT OF AUTONOMY

A pure selective incapacitation scheme cannot rely upon past actions to justify imprisoning an offender. Incarceration is justified only if it will prevent dangerous offenders from committing crimes. It is unjustifiable if the offender will not commit more crimes. Therefore, if a selective incapacitation scheme were implemented, the court in sentencing the offender would not care whether the offender had been convicted of first degree murder or of passing a bad check. Its only inquiry would be whether the offender is still dangerous. But even if it were possible to identify the dangerous offender, dangerousness remains an inappropriate sentencing criterion. Moral, legal and practical reasons militate against the use of future dangerousness in sentencing determinations. Our society values the individual's autonomy or right of self-government. The right to make one's own decisions and then to act pursuant to them is central to our belief that people are not mere machines. To deserve credit or blame for one's acts and thoughts, it is necessary that a person be considered responsible for those acts and thoughts. As a result, any interference with one's freedom to govern oneself is immediately suspect.

Legally, the right of autonomy is the foundation of various constitutional rights. Although not explicitly guaranteed in the Constitution, it provides the

94. See notes 63-65 and accompanying text *supra*.

95. See note 67 and accompanying text *supra*.

96. See, e.g., Coccozza & Steadman, *supra* note 63; Ennis & Litwack, *Psychiatry and Presumption of Expertise: Flipping Coins in the Courtroom*, 62 *Cal. L. Rev.* 693 (1974). But see, e.g., Cohen, Grath & Siegal, *The Clinical Prediction of Dangerousness*, 24 *Crime & Delinq.* 29 (1978); *Society and Law*, *supra* note 84.

97. 103 S. Ct. 3383 (1983).

98. *Id.*

underpinnings for many recent Supreme Court decisions.⁹⁹ In criminal law, for example, one is responsible only so far as one has acted autonomously. To be convicted of a crime, it is necessary that the act have been done voluntarily¹⁰⁰ and with an appropriate mental state.¹⁰¹ As a result, one is not liable for acts committed while sleepwalking¹⁰² or unconscious¹⁰³, during an epileptic seizure or when insane.¹⁰⁴ One is criminally responsible only for acts one can control.¹⁰⁵ The criminal sanction exists in order to induce individuals to exercise their free will lawfully.

Imprisonment need not deprive one of free will. A prisoner is still an autonomous being, even if certain courses of action are barred. She can still think as she wants to and she commands her own actions within her sharply constricted universe. Merely telling a prisoner that she must remain in her cell does not destroy her right of autonomy. Selective incapacitation, however, by claiming that the dangerous offender will commit a violent crime if she is allowed to remain free, does implicate one's right of autonomy. It asserts that the individual will inevitably follow one course of action. Further, it forces the individual to follow a different course of action and overrides the choice that it claims the individual would make.¹⁰⁶

Selective incapacitation is a threat to the individual's autonomy. By intervening in her life and imprisoning the dangerous offender, the state deprives the offender of the opportunity to act in a way that does not harm. She is

99. See, e.g., *Smith v. Organization of Foster Families*, 431 U.S. 816, 850 (1977); *Carey v. Population Services Int'l*, 431 U.S. 678, 687-88 (1977) (which characterized the childbearing concerns in the birth control cases as one of autonomy, not privacy); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also Gross, *Privacy and Autonomy*, in *Nomos XIII: Privacy* 169, 180-81 (J. Chapman & J. R. Pennock eds. 1971), reprinted in *The Philosophy of Law* 246, 251 (J. Feinberg & H. Gross, eds. 1980) (arguing that the issue in *Griswold* involved autonomy, not privacy).

100. See, e.g., Model Penal Code § 2.01(1) (Proposed Official Draft 1962).

101. *Morissette v. United States*, 342 U.S. 246 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to.' Id. at 250-51. See also Model Penal Code § 2.02 (Proposed Official Draft 1962); W. LaFare & A. Scott, *Criminal Law* § 3-27, at 191-92 (1972).

102. *Fain v. Commonwealth*, 78 Ky. 183, 39 Am. Rep. 213 (1879).

103. See, e.g., *People v. Newton*, 8 Cal. App. 3d 359, 87 Cal. Rptr. 394 (1970).

104. Insanity has been accepted as a defense since *McNaughton's Case*, 8 Eng. Rep. 718 (1843).

105. H. Packer, *The Limits of the Criminal Sanction* 74-77 (1968) ("Nothing would more severely undermine the individual's sense of autonomy and security than to hold him to account for conduct that *he* does not think he can control." Id. at 76-77.).

106. See generally J. Floud & W. Young, *supra* note 1, at 39; M. Sherman & G. Hawkins, *supra* note 1, at 104-07.

not given a chance to exercise her free will in a lawful manner. Instead, the court decides for her how she will be permitted to act in the future.

If an individual is deprived of her liberty and her control over her fate before she has acted,¹⁰⁷ she is also deprived of the opportunity to demonstrate that she can act in a lawful manner. She is told in effect that she either cannot or will not act lawfully. The state says to the offender that despite all her protests to the contrary, she will act violently if she is left alone. The state feels that if it does not intervene, the dangerous offender will definitely commit a crime. Therefore it will decide how the dangerous offender will act. As a result of this prediction of dangerousness, she is pre-empted of the right to determine her future course of action.

Moreover, the offender is not merely deprived of the right to show society that she can act lawfully in the future. Once she is imprisoned for being dangerous, the offender has no assurance that there is anything she can do to convince the courts or the prison authorities that she has ceased to be dangerous: "His continued freedom would depend not upon his voluntary acts, but upon his propensities for future conduct as they are seen by the state. . . . [H]is liberty would depend upon predictive determinations which he would have little ability to foretell, let alone alter by his own choice."¹⁰⁸ The continued detention of one deemed to be a dangerous offender is as serious an infringement on the right of autonomy as was the initial decision to imprison her.

Judge Marvin Frankel believes that "the prisoner experiences as cruel and degrading the decision that he must remain in custody for some uncertain period while his fellows study him, grade him, and decide if and when he may be let go."¹⁰⁹ Prisoners, he suspects, prefer determinate sentences, especially since with indeterminate sentences, "there is a sense of mystery and bewilderment about what the rules are, about what will 'work' toward the tightly focused goal of release."¹¹⁰

In incapacitating the offender for being dangerous, the court does not punish her for a crime that she has already committed.¹¹¹ Instead, by assuming that she will act violently if she is not imprisoned, the court deprives her

107. It is essential to remember at this point that selective incapacitation is only interested in the future actions of the offender. The past acts are irrelevant and consequently for a proponent of selective incapacitation, incapable of justifying imprisonment.

108. *Doing Justice*, supra note 26, at 72.

109. Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L. Rev. 1, 39 (1972).

110. *Id.* at 40.

111. If the court were punishing her for her past criminal act, it would punish her no more severely than it would punish the nondangerous offender. The added punishment—either the lengthening of the sentence or the initial decision to incarcerate the offender—results from the finding that the offender is dangerous and will commit more crimes in the future unless she is incapacitated.

of her right of self-government. Although she asserts that she will behave lawfully, her autonomy is taken away. She loses the ability to make her own decisions.

Regardless of the legality of the violation of one's autonomy on the ground that one is dangerous,¹¹² selective incapacitation also raises ethical questions. What ethically permits society to imprison an offender for an act she has not committed and which she is therefore capable of preventing, assuming she in fact has free will? So long as the offender is an autonomous being, free to choose her course of action and responsible for the results of her actions, she must not be incapacitated in order to control her future conduct (although she may, of course, be punished, even incarcerated, for her past crime).

Proponents of selective incapacitation try to justify overruling the offender's autonomy by relying upon analogies to other situations where detention is accepted.¹¹³ Selective incapacitation, according to its proponents, will protect the public at large from a grave danger. According to this view, selective incapacitation is no different than civil commitment of the insane or the quarantining of the infectious carriers of certain diseases.¹¹⁴

The comparisons are inapposite. Civilly committing the dangerous insane person does not implicate the individual's right of autonomy. The insane person is not responsible for her actions.¹¹⁵ She cannot control herself. The dangers that the insane person and the dangerous offender pose may be identical, but the insane person does not legally choose her course of action. She is incapable of governing herself. Since she cannot prevent herself from acting violently, she is committed—but only if she is dangerous.¹¹⁶ Commitment is the only way that the harm can be eliminated. However, when the insane person ceases to be insane (when she regains control) or when she

112. For a discussion of the legality of selective incapacitation, see text accompanying notes 129-206 *infra*.

113. The proponents of selective incapacitation have been unprepared simply to assert that the government has the right to interfere with the autonomy of its citizens for the good of society. This utilitarian claim grants the government too much power to be palatable. It destroys individual rights. As John Rawls observes, "justice denies that the loss of freedom for some is made right by a greater good shared by others." J. Rawls, *A Theory of Justice* 3-4 (1971).

114. See J. Floud & W. Young, *supra* note 1, at 40-46.

115. See, e.g., *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972); *People v. Drew*, 22 Cal. 3d 333, 583 P. 2d 1318 (1978); Model Penal Code § 4.01 (1) (Proposed Official Draft 1962). A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect she lacks substantial capacity either to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law.

116. Statutes provide that only those who are dangerous, either to themselves or to others, may be involuntarily committed. See, e.g., D.C. Code Ann. §§ 21-521 (1967); N.Y. Mental Hyg. Law § 9.27-47 (McKinney 1978). *O'Connor v. Donaldson*, 422 U.S. 563 (1975) suggests that this finding of dangerousness is constitutionally required:

ceases to be dangerous, she must be released.¹¹⁷ The dangerous offender, however, is autonomous. She can choose not to harm others, and can act on that choice.

Ferdinand Schoeman attempts to defend selective incapacitation by arguing that it is no different than quarantining the contagious.¹¹⁸ If one admits that it is acceptable to quarantine the contagious, he claims, one cannot oppose incapacitating the dangerous. Unfortunately, by comparing two very different situations, and failing to notice the differences between them, Schoeman obfuscates the issues.

One cannot compare the dangerous offender with the carrier of a communicable disease. The dangerous offender—if she is in fact dangerous—will commit a wrong to some unidentified individual at some unknown, and perhaps distant, time. But we do not know whom the offender will wrong, or if she will ever commit a wrong. The dangerous offender may see ten thousand people each day for ten years and do none of them a wrong. The risk she poses to any one individual is infinitesimal. If the carrier had an analogous disease so that she might easily move freely in society without harming anyone, she would not be quarantined. The risk to each individual would not justify the infringement upon the carrier's rights. Quarantine has traditionally (and perhaps improperly)¹¹⁹ been justified because everyone in contact with the carrier is in immediate and great danger. The risk to the public is great. The carrier can, theoretically, infect hundreds of people, and these hundreds can, in turn, each infect hundreds more. It is because of the gravity of the risk of spreading infectious disease that quarantine is accepted by society.

Moreover, while the dangerous offender may be imprisoned for many years, the carrier will be quarantined for a (usually) brief period. Quarantine today is generally reserved for lepers, aliens and Americans returning to the United States.¹²⁰ Only cholera, plague, smallpox and yellow fever are quaran-

[A] state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.

Id. at 576.

The problems of determining which insane persons are dangerous are at least as great as the problems of determining which offenders are dangerous. Presumably, if one cannot identify the dangerous offender, one cannot identify the dangerously insane person. See *Barefoot*, 103 S. Ct. at 3396-99. But this section of the Note assumes *arguendo* (and contrary to fact) that the dangerous can be identified.

117. *O'Connor*, 422 U.S. at 575 (when the initial basis for finding the individual to be dangerous ceases to be present, the individual must be released). Thus, state statutes require periodic re-examinations to see if the individual is still likely to injure herself or others. See, e.g., D.C. Code Ann. § 21-548 (1967); N.Y. Mental Hyg. Law § 9.33(d) (McKinney 1978).

118. Schoeman, *supra* note 62.

119. However, the legality and morality of quarantine are beyond the purview of this Note.

120. See, for example, the federal regulatory scheme: 42 U.S.C. § 247(e) (1982) covers the detention, treatment and release of lepers; 42 U.S.C. § 264(b) (1982) provides for quarantine to prevent the transmission of communicable diseases; 42 U.S.C. § 264(c) (1982) indicates that generally only individuals entering the United States are subject to the quarantine regulations.

tinable diseases,¹²¹ and for cholera the period of isolation may not exceed five days; for plague and yellow fever, six days; and for smallpox fourteen days.¹²² Lepers are no longer isolated for life. Scientists now admit that the cause of leprosy is unknown and that even extensive contact creates only a slightly higher risk of infection.¹²³ As a result, lepers need not be quarantined. Instead, they may be provided with outpatient treatment and they will be discharged when they have received optimum hospital benefits.¹²⁴

Similarly, the comparison between the dangerous offender and the carrier obfuscates the question of responsibility. Society assumes that the individual is responsible for her actions unless the individual lacks capacity (e.g., she is underage or insane). The dangerous offender is incapacitated to prevent her from committing an act that she could prevent, but which she would (inevitably) choose to commit at some time. Therefore, the dangerous offender is responsible for her criminal action. However, the carrier does not choose to harm those who come in contact with her.¹²⁵ Unless she terminates her existence, the carrier cannot prevent the injury. As a result, there is an injury, but there is no crime.

Schoeman ignores this question of responsibility.¹²⁶ He fails to see that with the dangerous offender, the offense to be prevented by incapacitation is not the offender's social intercourse. She can safely walk down the street, eat in restaurants and visit stores. Danger to others arises only when she decides to abuse this social intercourse, when she chooses, for example, to enter a restaurant without getting out of her car. If she chooses, however, to obey the law, no one is endangered. Her abuse of social intercourse may be punished, but her walking down the street is harmless. It may not be prohibited. However, with the carrier, it is precisely walking down the street that must be prevented. The act itself is the evil: if the carrier is allowed to walk down the street, there is nothing she can do to prevent the injury.

Nevertheless, Schoeman's comparisons raise a crucial question. Is the dangerous offender in fact responsible for the wrong she inevitably will commit? Selective incapacitation is justified on the assumption that there is no question of the prediction's accuracy. If released, the offender will commit

121. 42 C.F.R. § 71.1(w) (1981).

122. Persons ill from cholera, plague, smallpox and yellow fever shall be removed and isolated until they are no longer infectious, 42 C.F.R. § 71.83(a) (1983), 42 C.F.R. § 71.85(a) (1983), 42 C.F.R. § 71.87(b)(1) (1983) and 42 C.F.R. § 71.91(a) (1983) respectively, but the period for which they may be isolated is limited in 42 C.F.R. § 71.2 (1983).

123. Levine, *New Hope for Treating Leprosy*, N.Y. Times, Dec. 12, 1982, § 6 (Magazine), at 110.

124. 42 C.F.R. § 32.89 (1982).

125. Of course the carrier can also choose to commit a crime. Once she knows that she is a carrier, if she chooses to come in contact with other people, she is recklessly endangering them and is liable for the consequences.

126. See J. Floud & W. Young, *supra* note 1, at 41.

a crime. If this is a certainty, if it is more than an inclination that the offender can resist if she chooses, then the offender is not really responsible for her actions.¹²⁷ In comparing the dangerous offender to the carrier who cannot prevent herself from harming those she meets, the proponents of selective incapacitation really deny that the dangerous offender is autonomous. By asserting that the dangerous offender will inevitably commit a violent offense, the proponents deny the existence of a free will. Thus selective incapacitation starts by depriving the offender of her right to autonomy, but it concludes by denying the existence of her autonomy. Selective incapacitation contradicts our "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil," which the Supreme Court has found to be "universal and persistent in mature systems of law."¹²⁸ Before any legislature decides to enact a selective incapacitation statute, it must realize the consequences of that action. Such legislation may well eliminate individual autonomy.

VI

THE CONSTITUTIONALITY OF SELECTIVE INCAPACITATION

Last term in *Barefoot v. Estelle*,¹²⁹ the Supreme Court held that, legally, dangerousness can be predicted.¹³⁰ The Court's principal justification was *stare decisis*. Having already held in *Jurek v. Texas*¹³¹ that although difficult, it is possible to predict dangerousness,¹³² the Court decided that it was now too late to contend otherwise,¹³³ despite the mass of evidence that rebutted the Court's conclusion.¹³⁴

The Court's justifications for its holding in *Barefoot* were weak. First, the Court asserted that such an assessment is necessary for many sentencing decisions.¹³⁵ Yet even if it is necessary to determine which offenders are dangerous, necessity does not justify using predictive tools that are more likely to produce wrong results than right ones. Second, the Court observed that the determinations of dangerousness (or nondangerousness) are not always wrong.¹³⁶ Since predictions were wrong only two-thirds of the time, the Court

127. If she is not responsible for the act, she may lack the *mens rea* required for conviction. Perhaps only civil commitment is permissible.

128. *Morissette*, 342 U.S. at 250.

129. 103 S. Ct. 3383 (1983).

130. *Id.*

131. 428 U.S. 262 (1976).

132. *Id.* at 274-75 ("It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made.").

133. *Barefoot*, 103 S. Ct. at 3396 ("The suggestion that no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness is somewhat like asking us to disinvent the wheel.").

134. See *Barefoot*, 103 S. Ct. at 3408-17 (Blackmun, J., dissenting).

135. *Id.* at 5194 (citing *Jurek v. Texas*, 428 U.S. 262 (1976) ("Prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system.")).

136. *Barefoot*, 103 S. Ct. at 3398. However, as Blackmun noted, "[n]either the Court nor the state of Texas has cited a single reputable scientific source contradicting the unani-

was not convinced that "the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness."¹³⁷ Why juries should be capable of guessing whether or not defendants are dangerous even though the experts are usually wrong, the Court did not explain.

Although the Supreme Court has stated its view that it is possible to identify the dangerous offender, it has never been asked to rule on the constitutionality of a selective incapacitation statute.¹³⁸ In *Jurek v. Texas*,¹³⁹ the Court examined a Texas criminal procedure statute¹⁴⁰ that required juries which had already convicted the offender of first-degree murder to determine, *inter alia*, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."¹⁴¹ If so,¹⁴² the convict would be executed; if not, the convict would serve a life sentence. In either case, the penalty was very harsh.

The Court's inquiry in *Jurek* was limited. First, the Court determined that the Texas statute allowed juries to consider both aggravating and mitigating circumstances.¹⁴³ This distinguished it from the Georgia statutory scheme which had been struck down the same day in *Gregg v. Georgia*¹⁴⁴ for failing to include mitigating circumstances. Second, the Court decided that the statute did not lead to arbitrary and capricious results.¹⁴⁵ It was not fortuitous that *Jurek* was sentenced to death. Unlike the statute struck down in *Furman v. Georgia*¹⁴⁶ for producing arbitrary results, the results of the Texas statute were considered rational since one can, albeit with difficulty, predict dangerousness.¹⁴⁷

mous conclusion of professionals in this field that psychiatric predictions of long-term future violence are wrong more often than they are right." *Id.* at 3408. (Blackmun, J., dissenting).

137. *Id.* at 3398.

138. Nor has the Supreme Court ruled on the constitutionality of de facto selective incapacitation such as police limiting their investigations to dangerous offenders, prosecutors deciding not to press charges against nondangerous offenders or judges reserving prison cells for the dangerous offenders.

139. 428 U.S. 262 (1976).

140. Tex. Code Crim. Proc. Ann. § 37.071 (Vernon 1976).

141. *Id.* at § 37.071(b)(2).

142. The jury must also find (1) that the defendant had acted deliberately and with the reasonable expectation that a death would result, *id.* § 37.071(b)(1), and (2) that the defendant's conduct was unreasonable in response to the deceased's provocation, *id.* § 37.071(b)(3). Usually these two issues are not contested; once the jury has convicted the defendant, only the issue of future dangerousness remains.

143. 428 U.S. at 272-74.

144. 428 U.S. 153 (1976).

145. *Jurek*, 428 U.S. at 274.

146. 408 U.S. 238 (1972).

147. *Jurek*, 428 U.S. at 274-75.

In *Barefoot v. Estelle*,¹⁴⁸ the Supreme Court's inquiry was still narrower. The Court upheld the use of psychiatric testimony to help the jury decide whether an offender was dangerous.¹⁴⁹ Since the Court had already decided that lay testimony is admissible and that jurors can determine who is dangerous,¹⁵⁰ the Court felt "it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue [of the defendant's dangerousness], would know so little about the subject that they should not be permitted to testify."¹⁵¹

The two cases say only that courts are capable, legally, of determining who is dangerous, and that with murderers, dangerousness is "a constitutionally accepted criterion for imposing the death penalty [instead of a life sentence]."¹⁵² None of the constitutional problems inherent in a selective incapacitation statute were present in the Texas statute. The finding of dangerousness did not turn on race or sex. For example, there was no attempt to show, as the petitioner had shown in *Furman*,¹⁵³ that black murderers would be sentenced to death while white murderers would be imprisoned for life. Nor is the difference between the death penalty and life imprisonment akin to the difference between imprisonment and decarceration. One can scarcely maintain that those subject to life imprisonment are not punished (or even that the death penalty is an unnecessary and unusual imposition on top of the normal punishment for these crimes). There is no question of proportionality. Therefore, the constitutionality of selective incapacitation has not been resolved.

There are four constitutional arguments against selective incapacitation's legality. First, the eighth amendment is violated when the offender is imprisoned because of her future predicted acts. Second, the eighth amendment is violated when the dangerous offender is imprisoned because of her status of being dangerous. Third, selective incapacitation discriminates against minorities. Fourth, the prohibition against cruel and unusual punishments may strike down some selective incapacitation statutes for providing disproportionate punishment.

A. Selective Incapacitation as Punishment for Future Behavior

If one is imprisoned for being dangerous, one is incarcerated to prevent a future act from ever occurring, and not as punishment for past crimes.¹⁵⁴

148. 103 S. Ct. 3383 (1983).

149. "The question before us is whether the Constitution forbids exposing the jury or judge in a state criminal trial to the opinions of psychiatrists about [the issue of defendant's dangerousness]." 103 S. Ct. 3397 n.6.

150. *Id.* at 3386 (citing *Juerk v. Texas*, 428 U.S. 262 (1976)).

151. 103 S. Ct. at 3396.

152. *Id.*

153. 408 U.S. 238 (1972). See text accompanying notes 182-84 *infra*.

154. If the incarceration were punishment for the past act, the nondangerous offender would also be imprisoned.

Furthermore, if the punishment is going to fulfill its purpose, it must in fact prevent the action; therefore, the criminal act never occurs. The dangerous offender is imprisoned for an act that will never take place.

One can only be convicted for a criminal act. As the Supreme Court explained in *Powell v. Texas*,¹⁵⁵ "criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*."¹⁵⁶ Under common law, conviction for a crime requires that the accused commit a criminal act as well as possess a wrongful intent or requisite state of mind.¹⁵⁷ This is also true under statutory schemes.¹⁵⁸ While the concept of the *actus reus* has been expanded to include attempts, it does not include mental preparation alone.¹⁵⁹ It remains impermissible to punish individuals for their state of mind. The eighth amendment is violated if one is punished for bad thoughts; as a result, attempts to make bad thoughts into crime have invariably been struck down as unconstitutional.¹⁶⁰

With selective incapacitation nondangerous offenders are decarcerated. They either will not be imprisoned at all or will be imprisoned for a very short term. The dangerous offender, however, will be imprisoned until she ceases to be dangerous. She is likely to remain incarcerated for a long time. She is not imprisoned for her past acts, but to prevent future ones, although they have not yet been attempted, let alone completed. Thus, a prediction of future dangerousness makes a vast difference in the nature of the punishment that two similar offenders receive: for the lucky one, freedom; for the other, perhaps the prospect of spending most of the rest of her life in prison.

Proponents defend selective incapacitation by asserting that although it would be unconstitutional to punish dangerous individuals who have not yet been convicted of a crime, the eighth amendment is not violated here because the dangerous offender already has committed a crime and been convicted. The dangerous offender is not being punished for her future acts, but for her past acts, and it is indisputable that one can be punished for a criminal act. If, in fact, selective incapacitation punished people for future acts, it would also incarcerate those dangerous individuals who have not been convicted of crimes.

155. *Powell v. Texas*, 392 U.S. 514 (1968).

156. *Id.* at 533.

157. See, e.g., *State v. Young*, 57 N.J. 240, 271 A.2d 569 (1970); *Dugdale v. Regina* 1 E.1, 118 Eng. Rep. 499 (1853); W. LaFare & A. Scott, *supra* note 101, § 3-25, at 177.

158. See, e.g., Model Penal Code § 2.01(l) (Proposed Official Draft 1962) ("A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.")

159. See, e.g., *People v. Gallardo*, 41 Cal. 2d 57, 257 P.2d 29 (1953); *People v. Berger*, 131 Cal. App. 2d 127, 280 P.2d 136 (1955); *Commonwealth v. Peaslee*, 177 Mass. 267, 59 N.E. 55 (1901).

160. See, e.g., *Ex parte Smith*, 135 Mo. 223, 36 S.W. 628 (1896); *Proctor v. State*, 15 Okl. Cr. 338, 176 P. 771 (1917), *Lambert v. State*, 374 P.2d 783 (Okla. Crim. 1962).

This distinction between dangerous individuals and dangerous offenders is insufficient to justify selective incapacitation. While it would be permissible to prescribe the same punishment for the dangerous offender as that given to the nondangerous offender, any punishment beyond that is imposed to prevent future acts. A selective incapacitation statute uses conviction as a pretext for transforming dangerous offenders into second class citizens devoid of the eighth amendment rights of their unconvicted fellow citizens. Since the dangerous offender has been convicted, according to the proponents' reasoning, anything may be done to her as long as it is called a punishment. But the offender is not being punished for her past action—if that were so, all offenders would be imprisoned. The offender is not imprisoned because incarceration is appropriate for her offense. She is imprisoned because she is dangerous and she will be released when she is no longer dangerous.

*B. Selective Incapacitation
as Punishment for Status*

Even if one were persuaded by the proponents' argument that with selective incapacitation, offenders are punished for their past acts and not for their predicted crimes, the dangerous offender can contend that she is being penalized on account of her status of dangerousness.

In *Robinson v. California*,¹⁶¹ the Supreme Court held that criminalizing the mere status of being a drug addict constituted cruel and unusual punishment.¹⁶² Instead, as the Court explained six years later in *Powell v. Texas*,¹⁶³ the state must limit criminal liability to conduct or acts. Although the condition of being an alcoholic is not criminal, the conduct of appearing drunk in public may be made a crime.¹⁶⁴ *Powell* did not overrule *Robinson*; it only reaffirmed that status or condition provides no immunity from responsibility for criminal acts. If an ordinary citizen could be convicted for appearing in public while drunk, an alcoholic could also be convicted for public drunkenness.¹⁶⁵ But criminalizing status remains repugnant to the constitution. As Justice Black observed in his concurrence in *Powell*, “[p]unishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense.”¹⁶⁶

After *Robinson* and *Powell*, imprisonment based on status is illegal. The State cannot imprison an individual for being a drug addict, an alco-

161. 370 U.S. 660 (1962).

162. *Id.* at 666-67.

163. 392 U.S. 514 (1968).

164. *Id.* at 532.

165. See *id.* at 531-36.

166. *Id.* at 543 (Black, J., concurring).

holic, or a mental defective. Instead, if necessary for the public's welfare, the individual may be civilly detained.¹⁶⁷ A drug addict, for example, may be institutionalized if, as a result of her addiction, she endangers the public¹⁶⁸ but she may not be imprisoned until she commits a crime.

If one offender is imprisoned because she is dangerous, and another offender who has committed the same offense is not imprisoned because she is not dangerous, the dangerous offender is being punished on account of her status. With selective incapacitation, imprisonment does not turn on conviction—it is not because the offender has been convicted that she is imprisoned.¹⁶⁹ Rather, imprisonment turns on the finding of dangerousness. The offender is not imprisoned on the basis of her actual conduct. The offender is imprisoned because she is dangerous. Consequently, penalization predicated on dangerousness is impermissible punishment based on status.

Proponents of selective incapacitation would contend that although imprisonment turns on status, punishment does not. The nondangerous offender is also punished, even if she is not imprisoned. Thus both nondangerous and dangerous offenders are punished, and although it would be impermissible to punish the dangerous and not punish the nondangerous, it should be permissible to provide different punishments to dangerous and nondangerous offender.

Courts need not treat all offenders alike. Individualization of sentences is permitted, even favored, by the Supreme Court.¹⁷⁰ When the definition of the crime does not dictate the penalty, the judge's "possession of the fullest information possible concerning the defendant's life and characteristics" is "highly relevant—if not essential—[to the] selection of an appropriate sentence."¹⁷¹ In death penalty cases, for example, mandatory sentences are unconstitutional because "in capital cases the fundamental respect for humanity underlying the Eighth Amendment. . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."¹⁷²

In *Barefoot*, the Supreme Court admitted that dangerousness is a "constitutionally accepted criterion for imposing the death penalty."¹⁷³ If it is a

167. *Robinson*, 370 U.S. at 665.

168. After *Robinson*, the Supreme Court of California held that *Robinson* did not bar the five-year involuntary civil commitment of a drug addict. In re De La O, 49 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489 (1963).

169. If conviction were determinative, then the nondangerous offender would also be imprisoned.

170. *Lockett v. Ohio*, 438 U.S. 586 (1978) ("Individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country.")

171. *Williams v. New York*, 337 U.S. 241, 247 (1949).

172. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

173. *Barefoot*, 103 S. Ct. at 3396.

permissible factor in death penalty cases, it should be permissible in all sentencing cases. The Fourth Circuit supports this view: "[I]t is within the power of the state to segregate from among its lawbreakers a class or category which is dangerous to the public safety and to confine this group . . . for the purpose of protecting the public from further depredations."¹⁷⁴ Moreover, the dangerous offender, unlike the drug addict, is not imprisoned solely on the basis of status. She has also committed a crime.

The problem with this argument is the fact that the punishment for the dangerous and nondangerous offenders are so very different from each other. Individualizing sentences to make the penalty fit the criminal is not the same as imprisoning one offender for life and placing a second offender on probation. The disparity can be so great that it seems that the nondangerous offender is not being punished at all, in which case punishment—and not merely sentencing—turns on the finding of dangerousness.

Courts individualize punishments under the belief that different penalties are necessary to inflict the same amount of pain on different offenders.¹⁷⁵ For example, a \$10,000 fine may impose less suffering on a millionaire stockbroker than a \$1,000 fine imposes on a janitor with no savings. Differing penalties may be meant to be of equal severity. However, under selective incapacitation the penalties for the nondangerous offender and the dangerous offender are not equivalent. The additional punishment imposed upon the dangerous offender is inflicted because of her status.

Individualization is an especially flimsy rationale for differing sentencing in a scheme such as Greenwood's where a statistical analysis determines what penalty the court will impose. The court ignores the circumstances of the particular offense; once an offense is designated, for example, a first degree robbery, no attempt is made to compare it with other first degree robberies. Also, the court examines only superficially the character and record of the individual offender. The court asks seven questions and abruptly stops its inquiry.

C. Selective Incapacitation and Equal Protection

The dangerous offender may have an equal protection claim. The offender cannot contend that she is being discriminated against for being

174. *Sas v. Maryland*, 334 F.2d 506, 509 (4th Cir. 1964); *Accord, St. v. Sandoval*, 80 N.M. 333, 455 P.2d 837 (1969) (treating recidivists differently from other classes of criminals is permissible because it is reasonably related to the legislative purpose of protecting the public). See notes 34-36 and accompanying text *supra*.

175. See, e.g., Singer, *Desert Sentencing and Prison Overcrowding: Some Doubts and Some Tentative Answers*, 12 N.Y.U. Rev. L. & Soc. Change 85 (1984).

dangerous since dangerousness is not a suspect classification.¹⁷⁶ Consequently, the state need only show that there is a rational relationship between the classification and a legitimate state policy.¹⁷⁷ Protecting the public is a legitimate state policy and incapacitating those offenders who endanger the public is rationally related to that goal. The fourteenth amendment, however, does protect minorities and in certain circumstances, will bar classifications based on sex and wealth.¹⁷⁸ Therefore, if the finding of dangerousness turns on variables such as race, sex, income or education, imprisonment would amount to unconstitutional discrimination. A selective incapacitation statute that relied on such variables would be facially invalid.

Even if the variables relied upon to selectively incapacitate are facially neutral, imposition of selective incapacitation may lead to discrimination. In *Yick Wo v. Hopkin*,¹⁷⁹ the Supreme Court held that a law may be struck down because it is applied discriminatorily, even though it is fair on its face. Thus, in *Moore v. East Cleveland*,¹⁸⁰ a housing ordinance that limited occupancy of homes to members of a single family was struck down because it in effect proscribed extended families. The concurring opinion emphasized that the ordinance hurt black families much more than it hurt white families.¹⁸¹ In *Furman v. Georgia*,¹⁸² two of the Justices found the Georgia death penalty statute unconstitutional because it was applied discriminatorily against blacks.¹⁸³ Justice Douglas, for example, believed:

it is "cruel and unusual" to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.¹⁸⁴

176. Only classifications based on race or ethnic factors have been recognized as "suspect" by the Court. See *University of California Regents v. Bakke*, 438 U.S. 265, 303 (1978).

177. The Supreme Court applies stricter scrutiny to statutes that burden fundamental rights or employ suspect classifications, see *Bakke*, 438 U.S. at 303; *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), and a reasonable relationship test to other statutes, see, e.g., *New Orleans v. Dukes*, 427 U.S. 297 (1976); *McGowan v. Maryland*, 366 U.S. 420 (1961).

178. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (sex); *Harper v. Virginia Board of Education*, 383 U.S. 663 (1966) (poverty). But see *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

179. 118 U.S. 356 (1886).

180. 431 U.S. 494 (1977).

181. 431 U.S. at 508-10 (Brennan, J., concurring).

182. 408 U.S. 238 (1972).

183. *Id.* at 249-51 (Douglas, J., concurring); *id.* at 364-66 (Marshall, J., concurring).

184. *Id.* at 245.

As applied, a selective incapacitation statute may lead to a higher rate of incarceration for minorities.¹⁸⁵ Thus, if ninety percent of the black offenders were labelled dangerous, but only fifteen percent of white offenders were labelled dangerous, it would be arguable that the classification of dangerousness was based on race and therefore was unconstitutional.

Finally, in *United States v. Batchelder*,¹⁸⁶ the Court observed that the Equal Protection Clause prohibits the selective enforcement of criminal laws according to the race of the defendants.¹⁸⁷ This is important because it broadens the range of activity where selective incapacitation should be found impermissible. Selective incapacitation schemes that discriminate against minorities either in sentencing or in investigating crimes and prosecuting them should be unconstitutional.

D. Selective Incapacitation and Disproportionality

Selective incapacitation may lead to disproportionate sentences for some offenders. In determining if a punishment is cruel and unusual, the Court now uses a proportionality analysis. The proportionality test was originally applied in death penalty cases,¹⁸⁸ but is now applicable to noncapital offenses as well. Last term, in applying a proportionality analysis to a recidivist statute, the Court observed that "there is no basis for the State's assertion that the general principal of proportionality does not apply to felony prison sentences."¹⁸⁹ Therefore, the Court held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."¹⁹⁰ Equally important, the Court explained how appellate courts are to determine whether or not a punishment is proportionate:

[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction [for different of-

185. Although exact statistical analyses are not available, it may well be that the use of Greenwood's seven variables would affect more young minority offenders than young white offenders. See note 44 supra.

186. 442 U.S. 114 (1979).

187. *Id.* at 125 n.9 (citing *Oyler v. Botes*, 368 U.S. 448 (1962)).

188. See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976). The use of proportionality analysis was first suggested in two noncapital cases, *O'Neil v. Vermont*, 144 U.S. 323, 360-65 (1892) (Field, J., dissenting), and *Weems v. United States*, 217 U.S. 349, 365-67 (1910).

189. *Solem v. Helm*, 103 S. Ct. 3001, 3003 (1983).

190. *Id.* at 5023.

fenses]; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.¹⁹¹

The initial question with a selective incapacitation statute will probably be how to interpret the duration of the sentence. If a dangerous offender is sentenced to prison for as long as she remains dangerous, the statute should be construed as a life sentence with the possibility of parole when the offender convinces the parole commission that she is no longer dangerous. California, for example, looks at the maximum term when there is no assurance that the term will be less than the maximum.¹⁹² Thus, in a one-year to life sentence for a second conviction for indecent exposure, the court was compelled to view the sentence as one of life imprisonment.¹⁹³

The Supreme Court, however, has sent confusing signals on how to analyze similar statutes. In *Rummel v. Estelle*,¹⁹⁴ a recidivist was imprisoned for life, but was eligible for parole within twelve years. The Court said:

We agree with Rummel that his inability to enforce any "right" to parole precludes us from treating his life sentence as if it were equivalent to a sentence of 12 years. Nevertheless, because parole is "an established variation on imprisonment of convicted criminals," *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972), a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life.¹⁹⁵

In *Hutto*, Justice Powell implied that Rummel's sentence must be viewed as a life sentence when he said it was greater than Davis's forty-year term;¹⁹⁶ but in *Solem*, the Court attempted to avoid overruling *Rummel* by observing that in *Solem* the offender had a life sentence without parole, but in *Rummel* there was the possibility of parole.¹⁹⁷

A sentence lasting as long as the offender remains dangerous should be analyzed as a life sentence. Once incarcerated, the dangerous offender can

191. *Id.* Despite claims that *Rummel* is not overruled, *id.* at 5026 n.32, this proportionality test is irreconcilable with the Court's refusal in *Rummel* to compare penalties with those imposed in other states, 445 U.S. at 281-82, and with those imposed within the state for different offenses, *id.* at 282 n. 27. The future of proportionality analysis is uncertain. See *Maggio v. Williams*, 52 U.S.L.W. 3363, 3364-65 (1983) (Brennan, J., dissenting). *Pulley v. Harris*, 52 U.S.L.W. 4141 (1984), rejected the comparative proportionality analysis in death penalty cases. The case did not eliminate proportionality analysis. Instead, it reaffirmed the proportionality analysis used in *Solem*. *Id.* at 4142. The Court only rejected the argument that appellate courts must compare the punishments that different offenders receive for the same offense. *Id.* at 4143-45. In theory *Solem* remains good law.

192. *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

193. 8 Cal. 3d at 419, 503 P.2d at 927, 105 Cal. Rptr. at 223.

194. 445 U.S. 263 (1980).

195. *Id.* at 280-81.

196. *Hutto v. Davis*, 454 U.S. 370, 380 (1982) (Powell, J., concurring).

197. *Solem*, 103 S. Ct. at 3006.

do little to alter her status and bring about her release. Further, prisons, rather than rehabilitating inmates, tend to harden them and make them more dangerous.¹⁹⁸ Consequently, once imprisoned, an offender is unlikely to become nondangerous and eligible for parole. Therefore, only if the statute provides a maximum number of years should a selective incapacitation statute be viewed as anything less than a life sentence. If selective incapacitation is viewed in this way, many sentences may run afoul of the eighth amendment. The penalty may seem too harsh when the court examines the defendant's crime in detail or when it is compared to penalties imposed elsewhere in similar circumstances.

A proportionality analysis may also be used to strike down determinate sentences given to dangerous offenders. For example, if one dangerous offender receives a ten-year sentence because she is dangerous, and another offender receives a two-year sentence because she is not dangerous, a proportionality review should be appropriate.

Proportionality tests have not been limited to death penalties¹⁹⁹ and life sentences.²⁰⁰ They have also been used to strike down short sentences.²⁰¹ In *United States v. Wiley*,²⁰² the Seventh Circuit struck down a three-year sentence for possession of stolen goods after the court compared the defendant's sentence with that of the three other participants in the crime. Although Wiley had only been a minor participant in the crime, he had received the longest sentence, and this was held to be an abuse of the judge's sentencing discretion. In *United States v. Daniels*,²⁰³ the Sixth Circuit found excessive a five-year sentence imposed on a conscientious objector for his refusal to report to his local selective service board for instructions on commencing civilian alternate service. In New Jersey, a two to three-year sentence for marijuana possession was struck down under a proportionality analysis.²⁰⁴

As a result of the proportionality requirement, the dangerous offender can be imprisoned only for a term that is proportionate to the crime she has already committed, and not to the crime it is feared that she may commit. Even the most dangerous offender cannot be incapacitated for life unless she has committed a crime that will justify the sentence; if she has been convicted of only a minor felony (e.g., shoplifting), it would almost certainly be unconstitutional to incarcerate her for more than several years.²⁰⁵

198. See text accompanying notes 214-20 *infra*.

199. See note 188 *supra*.

200. See, e.g., *Solem v. Helm*, 103 S. Ct. 3001 (1983); *Workman v. Commonwealth*, 429th S.W.2d 374 (Ky. 1968) (rape); *Cannon v. Gladden*, 203 Or. 629, 281 P.2d 233 (1955) (rape).

201. See, e.g., *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960).

202. *Id.*

203. 446 F.2d 967 (6th Cir. 1971).

204. *State v. Ward*, 57 N.J. 75, 270 A.2d 1 (1970).

205. Unfortunately the future of proportionality analysis is unclear. See note 191 *supra*. Even if it is not eliminated after *Pulley*, it may prove to be of less value than it is at present.

In summary, no court has ruled on the constitutionality of a selective incapacitation scheme. However, if any jurisdiction were to officially implement such a scheme it would be subject to attack on several grounds. Selective incapacitation appears to imprison for future behavior, not past crimes; it punishes for status; it may discriminate against minorities; and it may lead to disproportionate punishments for some offenders.²⁰⁶ Selective incapacitation may thus prove unconstitutional.

VII

PRACTICAL PROBLEMS: THE LIKELY CONSEQUENCES OF A SELECTIVE INCAPACITATION POLICY

The proponents of selective incapacitation make two claims in favor of implementing their policy. First, selective incapacitation will reduce the crime rate. Second, selective incapacitation can end prison overcrowding and lower prison costs. These two claims provide the rationale for choosing selective incapacitation instead of a rival policy. Thus, it is necessary to examine the validity of these claims.

A. *Selective Incapacitation and the Crime Rate*

Although sentencing policies generally are not expected to have any effect on crime rates,²⁰⁷ proponents of selective incapacitation argue that it should be adopted precisely because it will reduce the crime rate without increasing the prison population.²⁰⁸ By selectively imprisoning dangerous offenders, the

Moreover, in two recent cases, the Supreme Court, after utilizing a proportionality review, upheld a 40-year sentence for possession and distribution of nine ounces of marijuana, *Hutto v. Davis*, 454 U.S. 370 (1982), and a life sentence for three petty felonies, *Rummel*.

206. There may be even another eighth amendment argument. That is, one may argue that imprisonment is *per se* cruel and unusual. Proponents of selective incapacitation want to incarcerate the dangerous, but they also want to make certain that the nondangerous are not imprisoned, since according to their view imprisonment is inhumane—i.e., it is cruel and unusual.

At present, it may be difficult to prove that incarceration is unusual, as there are almost 500,000 inmates currently imprisoned. (See *N.Y. Times*, Nov. 8, 1982, at A12, col. 5). However, incarceration may still be an unusual sentence for offenders. Most offenders may receive lesser punishments. Selective incapacitation proponents' desire not to incarcerate the nondangerous offender is predicated on the fact that imprisonment is ineffective, expensive and unnecessary, but clearly most opponents of imprisonment also believe that imprisonment is cruel. Furthermore, once imprisonment is reserved for the dangerous, it will be an unusual punishment. According to the National Council on Crime and Delinquency, in no state will more than 100 offenders need to be incapacitated. The Nondangerous Offender, *supra* note 1, at 456. Even if the NCCD has drastically underestimated the number of dangerous offenders, it seems incontrovertible that imprisonment will be an unusual and cruel fate. It could become unconstitutional.

207. See, e.g., M. Sherman & G. Hawkins, *supra* note 1, at 41, 69-71; von Hirsch & Gottfredson, *supra* note 29, at 22.

208. See note 25 and accompanying text *supra*.

streets will supposedly be made much safer for law-abiding citizens. However, selective incapacitation's effect will not be nearly as great as its proponents suggest.

Proponents forget that selective incapacitation, although not the official sentencing policy, is the *de facto* policy in many jurisdictions. Judges give lengthy sentences to repeat offenders who have committed serious crimes, but give first offenders, or repeat offenders who have committed minor crimes, short sentences or probation. As a result, implementing an official selective incapacitation scheme probably will not have a dramatic effect on the crime rate. Criminologists such as James Q. Wilson initially promised that four-fifths of all street crime would be eliminated if a collective incapacitation scheme were implemented and all offenders were imprisoned for five years.²⁰⁹ Advocates later modified this promise with a much more sober estimate: the mandatory prison terms would decrease the number of felonies by 45%, but the prison population would increase by 450%.²¹⁰ Alternatively, the crime rate might be reduced by 18%, and the prison population increased by 190% if all repeat offenders received five-year terms.²¹¹ Currently, the expectations are still more modest.²¹²

Incapacitating an individual prevents that person from committing a crime so long as she is imprisoned. However, if the offender is not permanently incarcerated, she is not permanently incapacitated. Most offenders will eventually be released even if they remain dangerous, as the proportionality requirement²¹³ will usually preclude permanent incapacitation.

Selective incapacitation, therefore, is a practical method of crime prevention only if prisons rehabilitate. Unfortunately, prisons do not (and perhaps cannot) rehabilitate.²¹⁴ Rehabilitation is especially unlikely to work in the currently overcrowded and lawless prisons. When the inmate leaves prison, most likely she has not been reformed.

In fact, in many cases prisons make prisoners more dangerous. The utilitarian forerunners of the selective incapacitation advocates understood that the use of incarceration should be limited.²¹⁵ Jeremy Bentham realized that by sending offenders to prison, society was teaching them how to be still

209. J.Q. Wilson, *supra* note 56, at 148; Shinnar & Shinnar, *The Effects of the Criminal Justice System on the Control of Crime: A Quantitative Approach*, 9 *Law & Soc'y Rev.* 581 (1975).

210. J.Q. Wilson, *supra* note 56, at 152; Peterson & Greenwood, *supra* note 57, at 111-15.

211. *Id.*

212. P. Greenwood, *supra* note 1, at xvii-xix.

213. See text accompanying notes 188-97 *supra*.

214. See, e.g. Martinson, *What Works? Questions and Answers About Prison Reform*, 35 *Pub. Interest* 22, 25 (1974) ("with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."). See also text accompanying notes 246-53 *infra*.

215. J. Bentham, *Principles of Penal Law*, in *The Works of Jeremy Bentham* 399 (J. Bowring ed. 1962) ("Punishment may be too small or too great.").

more dangerous: "In a moral point of view, an ordinary prison is a school in which wickedness is taught by surer means than can ever be employed for the inculcation of virtue. Weariness, revenge, and want preside over these academies of crime."²¹⁶ A study made after *Gideon v. Wainwright*,²¹⁷ a case that led to the release of more than 1,000 inmates in Florida, revealed that prisoners who were not released until the end of their sentences were more likely to be recidivists than those who were released early.²¹⁸ While it is not inevitable that prisons must prove deleterious, at present incarceration makes future criminal behavior more probable²¹⁹ and this is not likely to change in the near future. Judge Frankel correctly observes that "taking prisons as they are, and as they are likely to be for some time, it is powerfully arguable that their net achievement is to make their inhabitants worse, not better."²²⁰ Recidivism is not surprising.

If the ordinary (i.e., nondangerous) offender is prepared (or forced by circumstances) to resume a criminal career, it is especially likely that the dangerous offender—who was incarcerated precisely because it was certain that she would commit a violent crime if she was not imprisoned and who was not paroled because she remained dangerous—will soon offend again. In fact, if she did not, the assessment of dangerousness would have been wrong, and the premise upon which incapacitation was justified would be invalid.

Since rehabilitation is unlikely, recidivism can be prevented only by keeping the dangerous offender in prison for a long time, often either until she dies or until her peak criminal years have passed.²²¹ Regardless of the offense, long sentences are almost invariably necessary to incapacitate dangerous offenders.

216. J. Bentham, *The Theory of Legislation* 352 (C.K. Ogden ed. 1931).

217. 372 U.S. 335 (1963).

218. A.B.A. Project on Minimum Standards for Criminal Justice, *Standards Relating to Sentencing Alternatives & Procedures* 56-59 (1967) (citing Eichman, *Impact of the Gideon Decision upon Crime & Sentencing in Florida: A Study of Recidivism & Socio-Cultural Change* 71-73 (Florida Division of Corrections, Research & Statistics Section, Research Monograph No. 2, 1966)).

219. See, e.g., President's Commission on Law Enforcement & the Administration of Justice, *Task Force Report: Correction* 12, 159-85 (1967); Hopkins, *Imprisonment and Recidivism: A Quasi-experimental Study*, 13 *J. Research Crime & Delinq.* 13 (1976); Martinson, *supra* note 214, at 36-37; Morris, *Prison in Evolution*, in *Criminology in Transition* 267 (Grygier, Jones & Spencer eds. 1965); Playfair, *Why Imprisonment Must Go*, 53 *Ky. L. Rev.* 415 (1965).

220. Frankel, *supra* note 109, at 34.

221. The peak years of criminality are the late teens and early twenties; by the time an offender is in her 40's, it is unlikely that she will commit another imprisonable offense. M. Sherman & G. Hawkins, *supra* note 1, at 110. Cf. *Regina v. Hercules*, (1980) *Crim. L. R.* 27 (denying an indeterminate sentence of up to life to a 40-year old man because he was approaching an age where his aggressive tendencies might be expected to subside); *Regina v. Storey*, 57 *Crim. App.* 840 (1973) (where a 16-year old offender was given a 20-year sentence because it was believed that the offender might easily remain dangerous until he reached his early 30's).

Only if the constitutional safeguard of proportionality is removed can selective incapacitation protect the public from the dangerous offender.²²² The dangerous offender, unreformed by her experience in prison and likely to repeat her offense, cannot be deterred. To safeguard the public she must be imprisoned for a disproportionately long time.

Moreover, no sentencing scheme is capable of stopping those criminals who escape detention. Many crimes are not solved. Dangerous offenders are not incapacitated if they are not identified or if there is insufficient evidence to convict them.

The fact that some criminals are not convicted is ordinarily considered irrelevant to the analysis of a sentencing scheme. But selective incapacitation is supposed to dramatically reduce the amount of crime. If the crime rate remains high, many citizens may conclude that selective incapacitation has not worked. They may advocate replacing it with yet another theory.

Selective incapacitation schemes also are incapable of handling non-dangerous offenders. With selective incapacitation, the nondangerous offender is not imprisoned. This practice permits the offender who only commits non-violent crimes to offend anew. Since most offenders are not dangerous, selective

222. If proportionality is abandoned, however, the relation between the offense and the sentence will quickly erode. When the dangerous offender is incapacitated until she is no longer dangerous, the sentence is determined solely by the offender's character. In determining the length of the sentence, the offense is ignored. The sentence, if it is intended to incapacitate, must be based on the offender's threat to society. If this premise is accepted, one cannot release a more dangerous offender who has been convicted of a minor offense earlier than a less dangerous offender who has been convicted of a more serious offense. One person may commit murder, and another may steal a motorcycle. If the first offender is not dangerous, perhaps she will not be imprisoned, but if the latter is sufficiently dangerous, she may be imprisoned for life. If proportionality is abandoned as an obstacle to public safety, this jettison may eventually produce frightening consequences. Trivial offenses may lead to life imprisonment. Prosecutors and police officers will no longer care whether they charge the offender with robbery or jaywalking. Any pretext may lead to life imprisonment.

If proportionality is abandoned, the requirement that the crime precede the punishment may be discarded as well. Proponents of selective incapacitation may eventually deny that there is a justification for treating dangerous offenders and dangerous individuals differently. They present identical risks. In neither case should the public be interested in the past wrongs that can no longer be cancelled and reversed. The public is concerned about the present danger. Logically, the constitutional safeguards of proportionality and due process are irrational. If dangerousness is the determinative factor, every dangerous person should be incapacitated for as long as she is dangerous. Therefore, Schoeman argues that quarantining carriers is no different than incapacitating all dangerous individuals. Schoeman, *supra* note 62. He is prepared to civilly incapacitate the dangerous individual who has not been convicted of a crime.

Once it is admitted that the offender is incapacitated because she is dangerous, not because she has committed a crime, the logical conclusion is to abandon the pretext of criminality altogether. It will no longer be necessary to prove that the dangerous individual has committed a crime. If selective incapacitation is proposed as a self-defense and is justified by asserting that it maximizes public welfare, it is irrational to wait for the dangerous offender to murder. See generally Walker, *Dangerous People*, 1 *Int'l. J.L. & Psychiatry* 37 (1978). An individual may be imprisoned for life even though she has never committed a crime.

incapacitation will decarcerate the majority of offenders. These decarcerated offenders will not lead blameless lives. Although they will not commit violent crimes, many will commit nonviolent crimes. Follow-up studies indicate that only one-third of recidivists commit violent crimes.²²³ Thus, selective incapacitation would decarcerate two-thirds of the recidivists. Selective incapacitation would not discourage either these offenders, or the nondangerous offenders who currently are deterred from committing more crime by the fear of reincarceration, from re-offending. They would know that if they are convicted again, they will not be imprisoned. Since the risk that deters them would be removed, they will have no incentive to abandon crime.²²⁴

With selective incapacitation violent crime will not cease. Many violent crimes are committed by people with no record of violence. Under a selective incapacitation scheme at the time of this violent offense they would not have been incapacitated since, if they had previously committed any crimes, those crimes would be minor ones. Nor, if they are unlikely to commit more violent crimes in the future, will they be incarcerated for this crime.

The consequences of offenders' knowing or suspecting that they will not be imprisoned may prove disastrous. Many violent crimes are committed by the non-dangerous who temporarily act out of character (often because of the pressure of unusual circumstances). Crimes of passion may increase. Currently, the potential offender tries to curb her passions since she knows that if she does not curb them, she will be incarcerated. But if nondangerousness is a bar to prison sentences—as some of the advocates of selective incapacitation propose²²⁵—this deterrent is removed. Many murderers could be released immediately after conviction since there would be little likelihood that they would re-offend.²²⁶ Realizing that they would probably not be imprisoned, these potential murderers would not be deterred by the fear of punishment. If selective incapacitation were adopted, the murder rate might rise.²²⁷

Selective incapacitation may actually lead to an increase in crime. If one believes that offenders are deterred by the certainty of punishment, especially the certainty of imprisonment,²²⁸ selective incapacitation is counterproductive

223. Cf. Wenk & Emrich, *supra* note 66, at 184 (where 10% of the parole violators committed violent crimes; thus, according to this study, 90% of the recidivism consists of non-violent crime).

224. This argument assumes that the risk of imprisonment deters the potential offender and that the offender is deterred more by this than by the risk of other forms of punishment. This assumption may be false. See text accompanying notes 262-86 *infra*.

225. See, e.g., *The Nondangerous Offender*, *supra* note 1.

226. *Doing Justice*, *supra* note 26, at 126.

227. Ideally, the offender should be incapacitated before she murders, but many murderers have no prior record. Since they have not been convicted before, selective incapacitation would not have incapacitated them at the time of the murder.

228. For a discussion of the deterrent effect of the certainty of punishment, see text accompanying notes 266-84 *infra*.

since the likelihood of imprisonment decreases. The offender, who currently does not know if she will be caught, or prosecuted, or convicted, will face one more uncertainty: she will not know whether she will be labelled dangerous or nondangerous. Because fewer offenders will be imprisoned, offenders may be readier to commit crimes.

Nor will selective incapacitation in its present form reduce corporate crime. Current definitions of dangerousness focus on street crime so that all corporate crime is likely to be considered nondangerous.²²⁹ As a result, selective incapacitation is unlikely to reduce corporate crime. Nevertheless, corporate crimes are very destructive. When a car manufacturer makes an unsafe car, and then, after calculating the number of lawsuits and the probable damages, treats future damages as part of the cost of the car, the manufacturer is extremely dangerous. Drug companies that sell drugs with carcinogenic side effects and corporations that dump toxic wastes into rivers are equally dangerous. Corporate crime is not a rare occurrence. Quantitatively, more harm results from modern white collar crime than from most conventional street crime:

In terms of the numbers of lives lost, the number and seriousness of injuries sustained and the value of property stolen or destroyed, the social and economic cost of white collar crime in modern society is probably greater than that of traditional crime.²³⁰

Thus, selective incapacitation will have little effect on the safety of the average citizen unless corporate crime is also prevented:

[P]reventive confinement of 'dangerous' offenders is of only marginal value as a protective device. Measured against the full range of modern social hazards, its contribution to public safety is tiny, as is also its likely impact on the rates at which serious offenses are committed.²³¹

This is only a problem of definition, but it is a problem with enormous practical consequences. If selective incapacitation continues to ignore corporate crime, it will not be able to adequately protect the safety of the average citizen.

But even if corporate crimes are considered acceptable risks, street crimes are not. Since nondangerous offenders would not be incapacitated at

229. See notes 88-93 and accompanying text *supra*.

230. J. Floud & W. Young, *supra* note 1, at 12.

231. *Id.* at 19. Of course, the proponents of selective incapacitation may argue that its purpose is met if even one crime is prevented, that it is not expected to make the streets safe, it is only expected to prevent specific individuals from committing crimes they will inevitably commit if released. This utilitarian argument attempts to maximize the good to the public. But even if it is permissible to redistribute the risk of harm from the innocent potential victims to the culpable wrongdoer, it is essential that good and bad be weighed accurately. Here the likely decrease in crime seems trivial when balanced against the gross violation of the individual's rights.

all and since dangerous offenders generally are not permanently incapacitated, skeptics assert bluntly that selective incapacitation will not reduce crime. Because the factors controlling crime are unaffected by the penal code, "[s]entencing policy can have only slight influence, if any at all, on crime rates."²³² Advocates such as Jean Floud and Warren Young are uncertain to what extent selective incapacitation can reduce crime²³³ since even a very stringent policy that would increase the prison population by 450% would lessen violent crime by only one third.²³⁴

B. Selective Incapacitation and the Prison Population

The promise that selective incapacitation will reduce crime is inconsistent with the promise that selective incapacitation will reduce the prison population. In fact, if selective incapacitation is implemented, this change in policy should noticeably lengthen the sentences for high-risk offenders²³⁵ and ensure that all high-risk offenders are prosecuted and imprisoned. Unfortunately, even if a pure form of selective incapacitation is implemented and all low- and medium-risk offenders are decarcerated, no appreciable reduction in the prison population is likely. Today, the shortage of cells has led most jurisdictions to apply selective incapacitation unofficially.²³⁶ Therefore, it is not at all certain that a substantial number of inmates would be decarcerated.

Moreover, it is probable that the prison population will not be limited to high-risk offenders. Much of the public will be opposed to placing on probation murderers, rapists, armed robbers and others who have committed violent crimes but who are low-risk offenders. As far as the public is concerned, these offenders will be getting away without any punishment. Thus, most of the current proponents are unwilling to recommend pure selective incapacitation, either because they also believe in retribution or because they recognize that it would be impolitic to disregard the function of retribution in a sentencing scheme.²³⁷ Low- and medium-risk offenders will still be incarcerated. Even if these offenders receive shorter terms, the reductions will be offset by the lengthening of the high-risk offenders' sentences, yielding a net increase in the prison population.

232. Constructing Guidelines, *supra* note 74, at 187.

233. J. Floud & W. Young, *supra* note 1, at 16-17.

234. M. Sherman & G. Hawkins, *supra* note 1, at 118-19 (citing Petersilia & Greenwood, Mandatory Prison Sentences: Their Projected Effects on Crime & Prison Populations, 69 *J. Crim. L. & Criminology* 604, 610, 613 (1978)).

235. P. Greenwood, *supra* note 1, at 82.

236. See text accompanying notes 29-61 *supra*.

237. See, e.g., P. Greenwood, *supra* note 1, at 86-87; Feinberg, *supra* note 86, at 55.

In recent years, even without selective incapacitation the prison population has increased dramatically. The prison population has grown from 196,000 in 1972 to 431,829 as of June 30, 1983.²³⁸ It is likely to exceed 500,000 by the end of 1984.²³⁹ This phenomenal growth has taken place even though courts have attempted to control the prison populations and ordered the early release of offenders.²⁴⁰

Selective incapacitation might accelerate the growth rate for the prison population, especially since population caps and early release programs, the principal reins on prison growth today, are inconsistent with selective incapacitation.

Since selective incapacitation will increase the permanent prison population still more, it will be necessary to build an enormous number of cells. As a result, selective incapacitation will prove to be an expensive program. Implementing it will require major prison construction. Today a cell costs approximately \$200,000.²⁴¹ With selective incapacitation it may be necessary to build 100,000 cells at a cost of \$20 billion. This would be only the beginning.

As the prison population rises, so does the cost of maintaining the prisoners. Once cells have been constructed, vocational and recreational programs must be expanded. Building additional cells indicates that the permanent prison population has increased and courts will become less willing to tolerate programs which are too sparingly financed to cover the prison population's needs. Instead, courts will undoubtedly require prison boards to supplement their programs as larger prison populations become a permanent part of American prison life.

Constructing these cells and then providing programs for the prisoners placed in them will require enormous expenditures. While the public is quite happy to put more and more offenders into prisons for longer and longer terms, the public has been unwilling to foot the bill.²⁴² Small bonds have been voted down repeatedly. Large budgetary requests and bonds will stand no chance of success. Therefore, as a practical matter, the cost of selective incapacitation will lead the public to reject it.

In conclusion, proponents advocate selective incapacitation because it will reduce crime, end overcrowding and lower prison costs. However, selective incapacitation almost certainly cannot do all three simultaneously, and is unlikely to accomplish any one of them.

238. *Strict Penalties for Criminals: Pendulum of Feeling Swings*, N.Y. Times, Dec. 13, 1983, at A1, col. 5.

239. *Nation's Prisoner Population Rose 6.9% in First Half of '82*, N.Y. Times, Nov. 8, 1982, at A12, col. 5.

240. See note 52 *supra*.

241. See note 23 and accompanying text *supra*.

242. See note 238 *supra* ("The public's desire for punishment seemingly continues to exceed its willingness to pay for decently housing all the people it wants to imprison.").

VIII

SELECTIVE INCAPACITATION AND THE
JUSTIFICATIONS FOR IMPRISONMENT

Proponents do not offer only practical justifications for implementing selective incapacitation; they also offer theoretical justifications. In addition to claiming that selective incapacitation will reduce crime and the prison population they also argue that selective incapacitation suits the purpose of imprisonment, which is to incapacitate offenders.

Greenwood and the other proponents of selective incapacitation question the theoretical underpinnings of traditional sentencing policies. Specifically, the proponents attack the three traditional justifications for imprisonment: rehabilitation,²⁴³ deterrence²⁴⁴ and retribution.²⁴⁵ After dismissing all the traditional justifications for imprisonment, selective incapacitation then concludes by asserting that since the traditional justifications for imprisonment have uniformly proven to be untenable, another justification is needed to justify imprisonment. Here the proponents suggest that offenders be imprisoned in order to incapacitate them and thereby prevent them from harming anyone. Even if selective incapacitation is ultimately rejected, its proposal may prove beneficial if it forces criminologists to examine closely all of the traditional justifications for imprisonment. For in redefining the purpose of imprisonment, selective incapacitation puts forth a major question: What justifies imprisoning offenders?

A. Rehabilitation

Both proponents and opponents of selective incapacitation have abandoned rehabilitation as a justification for imprisonment.²⁴⁶ A consensus has developed that prisons do not reform offenders — they do not reduce the likelihood of recidivism. Statistics show that offenders who are imprisoned are no less likely to become recidivists than offenders who are placed on probation.²⁴⁷ The high recidivism rate of released prisoners is not surprising.

243. See text accompanying notes 246-61 *infra*.

244. See text accompanying notes 262-90 *infra*.

245. See text accompanying notes 291-309 *infra*.

246. See, e.g., National Research Council, Panel on Research on Rehabilitative Techniques, *The Rehabilitation of Criminal Offenders* (1979); J.Q. Wilson, *supra* note 56, at 162-63; Andenaes, *The General Preventive Effects of Punishment*, 114 U. Pa. L. Rev. 949 (1966); Martinson, *supra* note 214; Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 Hofstra L. Rev. 243 (1979); Robison & Smith, *The Effectiveness of Correctional Programs*, 17 *Crime & Delinq.* 67 (1971).

247. Andenaes, *supra* note 246, at 973-74 (“[R]esearch suggests that there is little difference between the overall results of various kinds of treatment. . . . Probation shows almost the same results as institutional treatment; a short period of treatment about the same results as long one (sic). . . .”).

Overcrowded living quarters, the lack of money to provide useful vocational training, the difficulty — if not impossibility — of finding a job when released, and especially the influence upon a prisoner of confinement with other offenders, all combine to make rehabilitation highly unlikely, if not impossible.

Greenwood dismisses rehabilitation as a nineteenth century notion which has been discredited as a realistic goal of incarceration. The studies cited by Greenwood indicate that rehabilitative programs within prisons "have proven . . . no more successful in curbing subsequent criminal behavior than community programs or no program at all."²⁴⁸ Because the experience of having been imprisoned does not deter the offender from re-offending when she is released, the only way to prevent the dangerous offender from committing more crimes is to keep her incapacitated.

Andrew von Hirsch, a leading opponent of selective incapacitation, is equally skeptical about the ability of prisons to rehabilitate offenders. In light of the failure of programs such as vocational training to reduce the rate of recidivism,²⁴⁹ von Hirsch concludes that "it cannot be rational or fair to sentence for treatment, without a reasonable expectation that the treatment works."²⁵⁰

Moreover, von Hirsch and many retributionists find it unjust that if two offenders commit the same offense they will be imprisoned for different terms because one reforms (or appears to reform) more quickly than the other.²⁵¹ Since they committed the same offense, both deserve the same punishment.

A rehabilitative scheme (where the offender remains in prison until she is reformed) requires indeterminate sentences, since a judge cannot know how long it will take the offender to reform. Since the sentence is indeterminate, somebody, generally the parole board, will be given discretion to decide whether the offender has been reformed and should be released. Such indeterminacy and discretion readily lend themselves to abuse by the judge or parole commission.²⁵²

Because of the loss of faith in rehabilitation and the potential for the abuse of discretion, many jurisdictions have adopted determinative sentencing schemes²⁵³ which offer no leeway for either rehabilitation or discretion.²⁵⁴

248. P. Greenwood, *supra* note 1, at 2 (citing National Research Council, Panel on Research on Rehabilitative Techniques, *supra* note 246).

249. *Doing Justice*, *supra* note 26, at 15 (citing R. Dickover, N.E. Maynard & J.A. Painter, *A Study of Vocational Training in the California Department of Correction 10* (Cal. Department of Corrections, Research Report No. 40, 1971)).

250. *Doing Justice*, *supra* note 26, at 18.

251. See, e.g., R. Singer, *Just Deserts* 98 (1978).

252. See, e.g., Lopez, *The Crime of Criminal Sentencing Based on Rehabilitation*, 11 *Golden Gate U. L. Rev.* 533 (1981).

253. See note 33 and accompanying text *supra*.

254. See, e.g., Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 *Hofstra L. Rev.* 29 (1978).

Under such schemes, the judge has no choice in selecting the term and the parole board is rendered impotent. The prisoner is released when her term expires — not sooner if she reforms, and not later if the prison authorities believe she is still unrehabilitated.

Incarceration may actually increase the likelihood of recidivism. Statistics indicate that an offender who is imprisoned is more likely to commit crimes in the future than an offender who receives another form of punishment.²⁵⁵ Nearly two centuries ago, when the use of imprisonment was first becoming widespread, Jeremy Bentham described prison as “a school in which wickedness is taught.”²⁵⁶ The longer one is imprisoned the more likely one will commit more crime. This observation has proven accurate. For example, a recent Florida study revealed that prisoners who were not released until the end of their sentences were more likely to be recidivists than those who were released early.²⁵⁷ If prisons in fact increase the likelihood of recidivism, no one should be imprisoned for rehabilitation.

Rehabilitation alone cannot justify imprisonment. But this does not mean that prisons should not attempt to rehabilitate their inmates. Even though an offender should not be imprisoned for rehabilitation alone, once an offender is imprisoned, it is sensible to try to rehabilitate her.²⁵⁸

Not only does the experience of imprisonment fail to rehabilitate the imprisoned offender; it also does not seem to deter her from future criminal acts.²⁵⁹ Studies indicate that the choice of sanctions has no specific deterrent effect on the individual who is actually punished. A methodological problem exists here: it is impossible to separate the effects of rehabilitation from the effects of specific deterrence. As Greenwood observes, “if a longer term of participation in some particular form of treatment results in reduced recidivism, we can never know whether the cause is specific deterrence or rehabilitation.”²⁶⁰ Nevertheless, this problem may be unimportant since neither justification appears to have any relationship to the crime rate.²⁶¹

255. See, e.g., Antunes & Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policies*, 51 *J. Urb. L.* 145, 146 (1973); Frankel, *supra* note 109.

256. J. Bentham, *supra* note 216.

257. See note 218 and accompanying text *supra*.

258. See, e.g., R. Singer, *supra* note 251, at 98; *U.S. v. Bergman*, 416 F. Supp. 496, 498-99 (S.D.N.Y. 1976) (“[T]his court shares the growing understanding that no one should ever be sent to prison *for rehabilitation*. . . . If someone must be imprisoned—for other, valid reasons—we should seek to make rehabilitative resources available to him or her.”).

259. Nagin, *General Deterrence: A Review of the Empirical Evidence*, in *Deterrence & Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* 95 (A. Blumstein, J. Cohen & D. Nagin eds. 1978).

260. P. Greenwood, *supra* note 1, at 3.

261. *Id.*, Nagin, *supra* note 259, at 95-96.

B. Deterrence

The advocates of selective incapacitation also reject deterrence as a justification for imprisonment. Deterrence is premised on the common sense belief that since punishment is an unpleasantness that is best avoided, the threat of punishment will have a chilling effect on criminal activity. But common sense also leads to overgeneralizations: if I am deterred by this threat, then everyone will be deterred.²⁶² Also, deterrence assumes a rationality in criminal behavior that we do not normally expect of ourselves.²⁶³ Deterrence theory treats the criminal like a business person weighing the costs and benefits of her proposed course of action. Offenders are expected to rationally weigh the consequences of crime and select crime *A* instead of crime *B* because crime *A* is punished less severely. Unfortunately, most criminals have not learned to weigh the many imponderables that must go into this calculus.²⁶⁴ Deterrence becomes irrelevant if the offender cannot find a legally sanctioned solution to a given dilemma. For example, a starving and unemployed woman who is about to be evicted from her apartment may have no desire to rob a nearby grocery store, but it is not easy to deter her if she feels she has no choice. And deterrence can have only minimal effect on the offender who acts out of frustration or alienation.²⁶⁵

Evaluations of the effect of deterrence must distinguish the likelihood of punishment from the severity of punishment. Over two hundred years ago Cesare Beccaria wrote that the certainty of punishment is a stronger deterrent than the severity of punishment.²⁶⁶ Studies suggest that the certainty of punishment — the likelihood that the offender will be apprehended, prosecuted, convicted and punished — does deter.²⁶⁷ However, these claims must

262. F. Zimring & G. Hawkins, *Deterrence* 19 (1973).

263. Gardiner, *The Purposes of Criminal Punishment*, 21 *Mod. L. Rev.* 117, 122-24 (1958).

264. Cf. J.Q. Wilson, *supra* note 56, at 145 (“[D]eterrence works only if people take into account the costs and benefits of alternative courses of action and choose that which confers the largest net benefit (or the smallest net cost). Though people almost surely do take such matters into account, it is difficult to be certain by how much such considerations affect their behavior and what change, if any, in crime rates will result from a given feasible change in either the costs of crime or the benefits of not committing a crime.”).

265. Cf. Andenaes, *supra* note 246, at 958 (which points out the importance of differences between people and that only some people are truly receptive to effects of deterrence).

266. C. Beccaria, *An Essay on Crimes and Punishments* 98 (1769). See also Antunes & Hunt, *supra* note 255, at 158 (“certainty, considered by itself, has a moderate deterrent effect for all crimes, while severity acting alone is not associated with lower rates of crime.”).

267. See, e.g., California Assembly Committee on Criminal Procedure, *Progress Report Deterrent Effect of Criminal Sanctions* 25 (1968) [hereinafter *Progress Report*], quoted in S. Kadish & M. Paulsen, *Criminal Law and Its Processes: Cases and Materials* 23 (3d ed. 1975); F. Zimring & G. Hawkins, *supra* note 22 at 167-69; National Research Council, *Panel on Research on Deterrent and Incapacitative Effects, Deterrence and Incapacitation: Estimating the Effects of Criminal Sanction on Crime Rates* 7 (A. Blumstein, J. Cohen & J. D.

be viewed with caution. What is perhaps the most thorough and error-free²⁶⁸ study in this field found no deterrent effect in punishment.²⁶⁹ The evidence also suggests, although more tentatively, that the fear of imprisonment deters.²⁷⁰ Unfortunately, the scarcity of reports on the deterrent effects of conviction²⁷¹ makes it difficult to determine what additional deterrence, if any, is created by the fear of imprisonment — as opposed to a lesser punishment — after conviction. Even if the threat of punishment deters, there is no conclusive proof that threatening imprisonment is a more effective deterrent than threatening other punishment.

Moreover, studies indicate that lengthening sentences does not increase their deterrent effects.²⁷² A short sentence is as effective a deterrent as a long sentence. For example, when Michigan released 1,500 offenders early to reduce prison overcrowding, the crime rates did not increase.²⁷³

The irrelevance of sentence lengths *qua* deterrent has two important consequences. First, since in addition to failing to deter others, lengthening sentences also makes recidivism more likely, short sentences may be best.²⁷⁴ Long sentences have no added deterrence to compensate for the fact that they increase recidivism. Second, it follows that exemplary sentences, which make an example of an offender by lengthening her sentence, are inefficient. This implies that Norval Morris' suggestion of exemplary punishment for one out of every six tax offenders²⁷⁵ is counterproductive. Providing more severe sentences for the offenders who are singled out will have at most a slight deterrent effect, but this effect will be more than offset by the fact that the remaining offenders are not punished at all.

Even the studies that suggest that punishment has some deterrent effect, offer no conclusive proof that the threat of punishment deters. Various fun-

Nagin eds. 1978) [hereinafter *Deterrence & Incapacitation*]; Andenaes, *supra* note 246, at 960; Antunes & Hunt *supra* note 255; Nagin, *supra* note 259, at 110.

268. For a discussion of the problems in studies of the effect of deterrence, see text accompanying notes 276-84 *infra*.

269. Forst, *Participation in Illegitimate Activities: Further Empirical Findings*, 2(3) *Policy Analysis* 477-92 (1976), cited in Nagin, *supra* note 259, at 106.

270. See, e.g., *Progress Report*, *supra* note 267, at 25. ("There is evidence that fear of arrest, conviction and imprisonment deter many persons from many types of crimes.")

271. See *Deterrence & Incapacitation*, *supra* note 267, at 42.

272. See, e.g., *Progress Report*, *supra* note 267, at 25 ("There is no evidence that fear of lengthy incarceration affects any significant number of criminal decisions."); F. Zimring & G. Hawkins, *supra* note 262; *Deterrence & Incapacitation*, *supra* note 267, at 37; Antunes & Hunt, *supra* note 255, at 146 ("in spite of popular expectations that crime can be deterred through severe penal sanctions, this is not generally the case."); Nagin, *supra* note 259, at 111; Tittle, *Punishment & Deterrence of Deviance*, in *The Economics of Crime & Punishment* 85 (S. Rottenberg ed. 1973).

273. Wicker, *The Better Way*, *N.Y. Times*, Feb. 25, 1983, at A31, col. 5.

274. See Antunes & Hunt, *supra* note 255.

275. Morris, *Punishment, Desert and Rehabilitation*, in *Equal Justice Under Law* 137, 153-55 (U.S. Dept. of Justice 1977).

damental problems that probably are inherent in the studies have falsely created an impression that deterrence works. First, the errors in measuring crime rates are large.²⁷⁶ Crime records are invariably incomplete: not all crimes are reported and not all crimes are detected. The underreporting of the number of crimes tends to create an erroneous impression of deterrence.²⁷⁷ These errors may lead to a perceived but non-existent correlation between penalties and lowered crime rates.²⁷⁸ Second, testing conditions are far from ideal. A controlled environment is unavailable. No country has offered itself as a laboratory cage for criminologists and then proceeded to modify its criminal statutes for the benefit of researchers who want to see how different punishments affect crime rates.²⁷⁹ Third, and perhaps most serious, is the fear that crime rates may influence sanctions as readily as sentences influence (i.e., reduce) crime rates.²⁸⁰ The correlation between low crime rates and heavy sanctions is meaningful only if light sanctions lead to a lowering of the crime rate. But conceivably, if there is a high crime rate, the sanctions must be light because of the intolerably high fiscal burden of weighty sanctions: if the offenders received heavy penalties, the cost of imprisonment would be unacceptably great. Thus, only in a state where there is a low crime rate is it feasible to have heavy sanctions.²⁸¹ Analogously, if the most severely punished crime, murder, is the least common crime, this does not prove that the severity of the punishment has deterred potential murderers. It is equally plausible that high penalties and the low crime rate both reflect the same cause: society's condemnation of murder.²⁸²

Consequently, the National Research Council has concluded that while the existing evidence suggests that deterrence may exist, the studies have not proven the existence or magnitude of deterrence.²⁸³ As one of the authors of the report observed, it is premature to conclude that deterrence works.²⁸⁴

Deterrence is alien to the philosophy of selective incapacitation. Deterrence would suggest imprisoning all offenders, at least briefly, but selective incapacitation in its purest form would refuse to imprison the nondangerous offender. Because deterrence is so alien, proponents of selective incapacitation take a conservative, cautious attitude towards its claims: unless evidence conclusively demonstrates that imprisoning an offender will deter others, the harm to the unnecessarily incarcerated offender and the cost of maintaining

276. See, e.g., *Deterrence & Incapacitation*, supra note 267, at 53-58.

277. See, e.g., Nagin, supra note 259, at 111-12.

278. See, e.g., *id.* at 111-35; *Deterrence & Incapacitation*, supra note 267, at 53-58.

279. See, e.g., *Doing Justice*, supra note 26, at 41-43; *Deterrence & Incapacitation*, supra note 267, at 53-54.

280. See, e.g., *Deterrence & Incapacitation*, supra note 267, at 25-39.

281. *Id.*

282. See, e.g., F. Zimring & G. Hawkins, supra note 262, at 30.

283. *Deterrence & Incapacitation*, supra note 267, at 46-47.

284. Nagin, supra note 259, at 98.

her in prison outweighs the benefit to the public.²⁸⁵ Further, society's real interest is in deterring the maximum amount of violent crime, not the maximum number of offenders. More crime will be prevented by incapacitating the high risk offenders and decarcerating the rest than by incarcerating every offender for a shorter period. While fewer people will be deterred, more crime will be deterred.²⁸⁶

Andrew von Hirsch and the retributionists raise a final objection to deterrence. They view deterrence as a utilitarian approach that permits each individual offender to suffer so that society as a whole may benefit (because potential offenders are deterred).²⁸⁷ The retributionists question the propriety of inflicting pain on one person to deter others. To quote Kant:

[P]unishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else.²⁸⁸

For the retributionists, deterrence is not a sufficient justification for making an individual suffer. Unless the individual deserves the punishment, it is unjust.²⁸⁹ The punishment must remain commensurate with the offense.²⁹⁰

C. Retribution

Selective incapacitation also rejects retribution or desert as a justification for imprisonment.²⁹¹ The advocates of retribution say that the offender deserves a punishment that is commensurate with the wrong she has done.²⁹² Retribution "is primarily concerned with the moral blameworthiness of an act. It focuses primarily on the crime, not the criminal."²⁹³ Since selective incapacitation is basically a form of utilitarianism, it cannot accept punishment which may prove pointless or even counterproductive as far as society is concerned. Imprisoning an offender is expensive and should only be utiliz-

285. See, e.g., P. Greenwood, *supra* note 1, at 5 ("The lack of evidence on the effects of . . . deterrence leaves incapacitation as the only utilitarian basis for rationalizing differences in sentence severity for different types of offenders.").

286. See R. Singer, *supra* note 258, at 12 n. 4.

287. *Doing Justice*, *supra* note 26, at 64.

288. I. Kant, *The Metaphysical Elements of Justice* 100 (J. Ladd trans. 1965).

289. *Doing Justice*, *supra* note 26, at 65.

290. See, e.g., R. Singer, *supra* note 258, at 13-14.

291. For a discussion of retribution, see, e.g., *Doing Justice*, *supra* note 26 and R. Singer, *supra* note 251.

292. *Id.*; Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 *Hofstra L. Rev.* 379, 397-404 (1978-1979).

293. Singer, *supra* note 175, at 85.

ed if society will benefit. But retribution promises no benefit to society: it does not contend that it will reduce crime.²⁹⁴ Therefore, Greenwood rejects retribution by observing that it is not among the utilitarian purposes of sentencing.²⁹⁵

Even if Greenwood's philosophical objection is disregarded as a cavalier dismissal, it is clear that retribution, whatever its possible merits as a philosophy, has major practical difficulties. Retribution indicates who deserves to be punished; it justifies punishing the offender. But unlike selective incapacitation, it does not say what punishment is appropriate.²⁹⁶ Retribution does not even say when to imprison and when to provide another punishment.²⁹⁷

Retribution does not say how long the imprisoned offender should be incarcerated; it says only that the punishment should be commensurate with the crime. But desert theory provides no means to quantify commensurate punishments. Is it a return to an eye for an eye? If the offender raped his victim, will the offender be raped in return? Even if the Old Testament standards are not prescribed by commensurate punishments, retribution can lead to long, harsh sentences.

Retribution requires ranking all offenses in sequence from the most heinous to the most innocuous. Once this ranking is completed, the appropriate sentence for each offense or the list must be determined. Ranking the offenses will prove impossible, however, especially when the sentencing commission starts to consider every possible variation of each particular crime.²⁹⁸ Yet ranking the offenses is the easier part; determining the appropriate punishment is far more subjective.

Furthermore, the more sophisticated justifications of retribution rely heavily on deterrence.²⁹⁹ The offender is to be punished not because of some primitive and bloodthirsty desire for vengeance, but rather to express and reaffirm society's condemnation of the offender's act³⁰⁰ or to rectify through expiation the imbalance that arose when the wrong took place.³⁰¹ Under the latter rationale, society tells the law-abiding citizen not to commit

294. P. Greenwood, *supra* note 1, at 3.

295. *Id.* at 5 n. 3.

296. See M. Sherman & G. Hawkins, *supra* note 1, at 97-98, 105.

297. Selective incapacitation, by contrast, is explicit: if the offender is dangerous, she will be imprisoned, and if she is imprisoned, she will not be released until she ceases to be dangerous. Thus, selective incapacitation, unlike retribution, provides a rational basis for choosing the offender's sentence.

298. P. Greenwood, *supra* note 1, at ix.

299. See N. Morris, *supra* note 87, at 75.

300. See, e.g., E. Durkheim, *The Division of Labor in Society* 105-110 (G. Simpson trans. 1933); J. Feinberg, *Doing & Deserving: Essays on the Theory of Responsibility* 101-105 (1970).

301. I. Kant, *supra* note 288, at 99-107; *Doing Justice*, *supra* note 26, at 47-49, 51.

crimes because she will pay in the end. The potential offender is deterred by the realization that she will gain nothing through offending. Under the former rationale, society reaffirms that this act is wrong, that it should not take place, and that if it does, it will be punished. The connection between retribution and deterrence is made explicit by Johannes Andenaes: "The idea is that punishment as a concrete expression of society's disapproval of an act helps to form and to strengthen the public's moral code and thereby creates conscious and unconscious inhibitions against committing crime."³⁰² Andrew von Hirsch says that although deterrence is not by itself a sufficient justification for punishment, it helps justify punishment.³⁰³ If deterrence is rejected on the grounds that it does not work,³⁰⁴ then the modern clothes that have dressed up retribution must be removed and retribution emerges once again as the *lex talionis*, the demand for blood that is based on an undocumented biological or psychological need for vengeance. Whether this vengeful mentality is innate or not is debatable. Society clearly does its best to teach us to yearn for vengeance, and to be upset and feel that there has been a miscarriage of justice when the offender's punishment is not sufficiently brutal. Having acquired the taste for blood, we crave it,³⁰⁵ but this means neither that this craving is natural nor that our need for retribution cannot be untaught.

Finally, the Rand studies³⁰⁶ have inadvertently raised a new problem with retribution. With a desert-based scheme, the offender is punished for a specific act. All other crimes which she may have also committed are ignored during sentencing because the offender has not been convicted of them. But the Rand studies demonstrate that most offenders — or at least most imprisoned offenders (a perhaps atypical cross section since they are likely to be repeat offenders who have committed serious crimes³⁰⁷) — commit a variety of crimes.³⁰⁸

302. Andenaes, *General Prevention: Illusion or Reality*, 43 *J. Crim. L.C. & P.S.* 176, 179 (1952).

303. *Doing Justice*, supra note 26, at 44. But see R. Singer, supra note 251, at 13-14 (Singer argues that because the evidence is uncertain as to whether any of the utilitarian goals of punishment can be achieved under the current process, the offender should receive the punishment she deserves regardless of the effectiveness of this punishment as a deterrent. Punishment will thus provide retribution, not deterrence.).

304. See text accompanying notes 262-90 supra.

305. Cf. G. B. Shaw, *The Crime of Punishment* 44 (1946) (As an expression of outraged public morality burning murderers is "a sport for which a taste can be acquired much more easily and rapidly than a taste for coursing hares.").

306. See, e.g., P. Greenwood, supra note 1; J.M. Chaiken & M.R. Chaiken, *Varieties of Criminal Behavior* (1982).

307. See von Hirsch & Gottfredson, supra note 29, at 25. (Von Hirsch and Gottfredson conclude that the use of self-reporting surveys by this atypical cross-section renders the results worthless. They have overstated the consequences of the methodological difficulties, while the flaws make it unwise to generalize, it is highly unlikely that Greenwood's discovery—which, after all, only confirms the obvious—is wrong.).

308. P. Greenwood, supra note 1, at 41-43. For example, of the 178 California offenders convicted of robbery, 58% reported committing burglaries, 57% reported selling drugs, 59%

Offenders are not specialists. Instead, one day the offender is a robber, the next day she is a drug dealer. If this is true, then basing the punishment on the crime is inappropriate. It is only by accident that offender *A* is convicted of burglary and offender *B* is convicted of armed robbery. Is offender *B* any more deserving of a lengthy sentence because she was unfortunate enough to get caught with a gun at a supermarket, when in fact offender *A* commits twice as many robberies as *B* does?³⁰⁹

D. Incapacitation as an Alternative

Selective incapacitation's rhetoric is direct: rehabilitation did not work, deterrence did not work, retribution is not working. Therefore, only selective incapacitation is left; let's try it.³¹⁰ As Greenwood himself observes, "incapacitation is a policy by way of default, because we couldn't find other things that worked."³¹¹ Selective incapacitation is founded upon despair; it is the proposal of a bankrupt. The proponents have retreated to the position that even though the threat of imprisonment will not deter people outside prison, not even those who have just been released, and even though incarceration does not reform criminals, imprisonment is beneficial. It is beneficial not because of any satisfaction that law-abiding citizens may obtain when they hear the news that an offender is to be deprived of her liberty and locked in a cell with other equally vile offenders, but merely because while the offender is locked behind bars, she cannot commit any more crimes.

Incapacitating offenders, however, must also be rejected as a justification for incarceration. Because the dangerous offender cannot be identified,³¹² incapacitation will prove unselective. There will be either arbitrary incapacitation or general (i.e., total) incapacitation. The implementation of selective incapacitation is unlikely to reduce prison overcrowding or reduce the cost of running prisons.³¹³ Because selective incapacitation punishes for future acts, implementation of this theory may be unconstitutional³¹⁴ and it clearly is incompatible with the right of autonomy.³¹⁵ Nor is it evident that it will reduce street crime.³¹⁶

reported committing theft and 49% reported committing assaults during their last two years out of prison. Interestingly, only 76% reported committing robberies. *Id.* at 42.

309. See J.Q. Wilson, *supra* note 56, at 154.

310. Colloquium, *The Prison Overcrowding Crisis*, 12 N.Y.U. Rev. L. & Soc. Change 67, 68 (1984) (Morris, Response). Morris's response is unsatisfactory: people in the community at large believe in these justifications, so they should not be discarded, even though the public's belief is based upon ignorance.

311. Colloquium, *The Prison Overcrowding Crisis*, 12 N.Y.U. Rev. L. & Soc. Change 80 (1984) (Greenwood, Discussion).

312. See text accompanying notes 62-98 *supra*.

313. See text accompanying notes 235-42 *supra*.

314. See text accompanying notes 129-206 *supra*.

315. See text accompanying notes 99-128 *supra*.

316. See text accompanying notes 207-34 *supra*.

Not only must dangerousness be excluded as an explicit factor in sentencing decisions, but judges must be forbidden from using dangerousness on their own, either implicitly or explicitly. Legislatures should revise their penal codes accordingly. Legislative silence, however, should not be taken to imply legislative consent to judges' use of dangerousness in the sentencing process. American courts should follow the practice of the Court of Appeals in England, which reduces the length of a sentence if the court believes that a longer-than-usual sentence was chosen to protect the public.³¹⁷

Inadvertently, the debate surrounding selective incapacitation has raised a major question: what justifies imprisoning offenders? If none of the traditional justifications are valid, why is imprisonment the standard punishment for serious offenses? Is there any justification for imprisonment?

E. The History of Imprisonment

Punishment is not the same as imprisonment. To punish, it is not necessary to imprison. Yet in the United States, it is commonly thought that anything less than imprisonment is unsatisfactory; if the offender is not imprisoned, she is not punished.³¹⁸ Americans tend to believe that there always have been and always will be prisons; the only question is which people to place in them. In fact, the prison is a modern institution which has not gained the popularity outside the United States that it has within this country.³¹⁹

From a historical perspective, punishment without imprisonment is not merely conceivable, it is typical. It is imprisonment which is atypical. Because punishment without imprisonment was historically the norm, perhaps those opposed to incarceration should not face the probably insurmountable burden of showing that there is no validity to any conceivable justification for imprisonment. Instead, those who promote incarceration should be obliged to present a valid justification for the continued use of prisons.

317. *Regina v. Gooden*, [1980] Crim. L. R. 250 (where the Court of Appeals said it was wrong to provide a protective sentence that would incarcerate the offender for longer than was commensurate with the crime for which the offender was being sentenced); *Regina v. King and Simpkins*, 57 Crim. App. 696, 702 (1973) ("[T]he fact remains that the correct principle for sentencing is to sentence for the offenses charged and on the facts proved or admitted.").

318. See, e.g., M. Sherman & G. Hawkins, *supra* note 1, at 75.

319. See, e.g., Waller & Chan, *Prison Use: A Canadian and International Comparison*, 17 Crim. L.Q. 47, 58 (1974-75) (The United States imprisons more people on a per capita basis than any other country. We imprisoned 200 people per 100,000 in 1970 and the number is at least twice as high now.) In 1971, the western European countries ranged from England with 81.3 per 100,000 to the Netherlands with 22.4 per 100,000. See also Doleschal, *Rate and Length of Imprisonment: How Does the United States Compare with the Netherlands, Denmark, and Sweden?*, 23 *Crime and Delinq.* 51, 55 (1977). (Almost all (91%) sentences in Sweden are for less than one year, but almost all (98%) sentences in the United States are for more than a year.)

As recently as the eighteenth century, imprisonment was still rare.³²⁰ While small local jails were common, they served a narrow function:³²¹

A sentence of imprisonment was uncommon, never used alone. Local jails held men caught up in the *process of judgement*, not those who had completed it: persons awaiting trial, those convicted but not yet punished, debtors who had still to meet their obligations. The idea of serving time in a prison as a method of correction was the invention of a later generation.³²²

David Rothman suggests that imprisonment was unpopular in Colonial America because the prevailing Calvinist doctrines stressed the depravity of man, the ever present temptation to sin, and the difficulty of reformation.³²³ Moreover, local jails were too comfortable to frighten potential offenders; indeed, jails might even have attracted them.³²⁴

The dominant forms of punishment at this time were fines, whipping (and occasionally other forms of corporal punishment), mechanisms of shame (e.g., stocks, pillories, public cages), banishment and execution (usually by means of the gallows).³²⁵ But widespread dissatisfaction with these punishments was developing.

The lesser punishments were proving unsatisfactory because they did not effectively deter crime and could not be applied equally to rich and poor. Fines provided an unjust means of punishment because those who could not afford to pay their fines were whipped.³²⁶ After the American and French revolutions it seemed inappropriate to whip the poor and let the rich off with a fine. Both fines and mechanisms of shame lacked bite; they did not, it was felt, deter crime. Many offenders would gladly pay their fines or sit in a pillory and continue to violate the law.³²⁷ Towns began to realize that banishment was shortsighted. While the town was temporarily rid of the banished offender, the offender was probably committing crime elsewhere.³²⁸ It was still more intolerable for a town to realize that it was receiving other towns' petty criminals. As allegiance spread beyond the walls of the town, banishment lost

320. D. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* 48 (1971); see also M. Foucault, *Discipline & Punish: The Birth of the Prison* 117-20 (Sheridan trans. 1979) (imprisonment was rare in France during the ancien regime).

321. D. Rothman, *supra* note 320, at 52.

322. *Id.* at 48.

323. *Id.* at 53.

324. *Id.* at 53-56; cf. M. Foucault, *supra* note 320, at 16 (contemporaries attacked early prisons by arguing that they didn't punish sufficiently because often prisoners were less deprived than the poor).

325. D. Rothman, *supra* note 320, at 53-56.

326. *Id.* at 49.

327. *Id.* at 51.

328. *Id.* at 50.

favor. After the revolution, states soon drafted regulations to prohibit banishment.³²⁹

Believing that lesser punishments were ineffective, lawmakers turned with greater frequency to capital punishment. In England, the number of capital statutes grew from about fifty in 1688 to over two hundred in 1820.³³⁰ As the number of capital offenses grew, increasingly trivial offenses (e.g., stealing shipwrecked goods³³¹) became capital offenses.

Despite the rise in the number of capital offenses, the number of executions remained relatively constant³³² and the use of the death penalty in the eighteenth century may have been less frequent than in earlier centuries.³³³ When offenders were prosecuted for trivial offenses, judges and juries started to rebel and refused to convict.³³⁴ Contemporary critics argued that the death penalty terrified prosecutors and juries more than it terrified criminals.³³⁵ Frequently, critics warned the government to show restraint: the show of force might be too brutal and thereby anger people, promoting violence instead of obedience.³³⁶ Further, it was feared that the impact of the death penalty would be weakened if it was applied too frequently.³³⁷ As a result, when the middle or working classes were victims of crime, discretion often led to the dropping of charges; judges were merciful and the king granted pardons to offenders.³³⁸ Capital punishment was anything but certain.

At the end of the eighteenth century and the beginning of the nineteenth, imprisonment suddenly became the dominant form of punishment in England and the United States. After the American colonies gained independence England could no longer deport criminals there, and in 1779 Parliament drew up plans for England's first penitentiaries.³³⁹ In the United States, under the influence of the Enlightenment and the revolution, Americans began to consider the pre-revolutionary punishments to be barbaric.³⁴⁰ In the euphoria of independence, Americans felt they could build a utopia if they threw off the shackles of England, including the colonial legal system that, they believed,

329. *Id.* at 204.

330. L. Radzinowicz, *A History of English Criminal Law & its Administration* 4 (1948).

331. 26 *Geo. II* c.19, cited in Hay, *Property, Authority & the Criminal Law*, in *Albion's Fatal Tree: Crime & Society in Eighteenth-Century England* 20-21 (D. Hay, P. Linebaugh, J. Rule, E.P. Thompson & C. Winslow eds. 1975) [hereinafter Hay].

332. Hay, *supra* note 331, at 57.

333. *Id.* at 22.

334. L. Radzinowicz, *supra* note 330, at 86.

335. Hay, *supra* note 331, at 23.

336. *Id.* at 50.

337. *Id.* at 56.

338. *Id.* at 60.

339. M. Foucault, *supra* note 320, at 123.

340. D. Rothman, *supra* note 320, at 58.

had encouraged deviant behavior. If the proper republican criminal code was passed, deviant behavior would vanish.³⁴¹

The rise in the use of prisons was very fast.³⁴² Within a short period of time it became the dominant form of punishment³⁴³ and critics quickly complained that it was being applied too frequently.³⁴⁴ In the early nineteenth century imprisonment was still novel, but no alternative existed. All rival options were quickly forgotten.³⁴⁵

The initial impetus was humanitarianism. Incarceration was more humane than hanging or whipping.³⁴⁶ Also, the influence of Beccaria's *Of Crime and Punishment* was great in both the United States³⁴⁷ and Europe.³⁴⁸ Beccaria emphasized that the certainty of punishment was more important than the severity. If an individual was certain she would be punished, she would be reluctant to commit an offense. The revolutionary codifiers believed that incarceration would lead to greater certainty; although juries might be reluctant to order an execution, they would not be hesitant about sending a person to prison.³⁴⁹

The rise of the middle class was largely responsible for the reform. The well-guarded upper class estates were better protected from crime than were middle class houses.³⁵⁰ Also, to lessen the harshness of penalties, courts and the crown often exercised mercy and granted pardons — but not if the victim was from the upper class.³⁵¹ Thus, only if an offender robbed the rich was punishment certain. Increases in wealth and property led the middle class to seek greater security in the form of laws that would take into account offenses that had not been punished, or had not been punished regularly, in the past.³⁵² Believing that there was an increase in crime,³⁵³ the middle class sought to make punishment more regular, effective, consistent and precise so that the potential offender would know exactly what she would be getting herself into if she committed a crime.³⁵⁴

341. *Id.* at 59-62.

342. M. Foucault, *supra* note 320, at 116.

343. *Id.* at 116-18.

344. *Id.* at 117 (“[s]o that if I have betrayed my country, I go to prison; if I have killed my father, I go to prison; every imaginable offense is punished in the same uniform way.” (quoting C. Chabroud, in XXVI Archives parlementaires 618)).

345. *Id.* at 232.

346. D. Rothman, *supra* note 320, at 62.

347. *Id.* at 59-60.

348. M. Foucault, *supra* note 320, at 117.

349. D. Rothman, *supra* note 320, at 62.

350. Hay, *supra* note 331, at 59-60.

351. *Id.* at 60.

352. M. Foucault, *supra* note 320, at 76.

353. *Id.* at 76-77.

354. *Id.* at 80-81.

Initially, the prison was designed to deter crime through the certainty of punishment, but when crime did not cease, penologists concluded that the environment spawned crime. In order to rectify the damaging influence of the environment, criminologists decided that it was necessary to reform the offender. Thus, in the 1820's the rationale for imprisonment shifted from deterrence to rehabilitation, and the prison, now relabelled penitentiary, was redesigned to counteract the influences that had produced crime:³⁵⁵

[C]onvinced that deviancy was primarily the result of the corruptions pervading the community, and that organizations like the family and the church were not counterbalancing them, they believed that a setting which reformed the offender from all temptations and substituted a steady and regular regimen would reform him. . . . The penitentiary, free of corruptions and dedicated to the proper training of the inmate, would inculcate the discipline that negligent parents, evil companions, taverns, houses of prostitution, theaters and gambling halls had destroyed.³⁵⁶

The length of time necessary to reform a person depends on the individual. Since the goal of penitentiaries was reform, sentences became indeterminate.³⁵⁷

Expectations were great. Penitentiaries would quickly reform the inmates, who would be released as soon as they repented and were rehabilitated. The two leading prisons, Auburn and the Eastern State Penitentiary, had rival adherents who adamantly insisted that their prison was far superior to the other,³⁵⁸ even though today the two prisons seem nearly indistinguishable. It became fashionable to visit these prisons: even foreigners came to see these world-famous institutions.³⁵⁹ Prisons were constructed in such a way that the inmates were always visible and always watched;³⁶⁰ prisons were laboratories, places for experimenting on people and analyzing their behavior.³⁶¹ Peniten-

355. D. Rothman, *supra* note 320, at 62-71.

356. *Id.* at 82. See also J.B. Treilhard, *Motifs du Code d'instruction criminelle* 8-9 (1808) ("The order that must reign in the *maison de force* may contribute powerfully to the regeneration of the convicts; the vices of upbringing, the contagion of bad examples, idleness. . . have given birth to crime. Well, let us try to close up all these sources of corruption; let the rules of a healthy morality be practiced in the *maisons de force*; that, compelled to work, convicts may come in the end to Like it. . ."), quoted in M. Foucault, *supra* note 320, at 234.)

357. D. Rothman, *supra* note 320, at 250; cf. M. Foucault, *supra* note 320, at 8 (punishment was adapted to the individual offender).

358. See, e.g., D. Rothman, *supra* note 320, at 81-83.

359. *Id.* at 81.

360. Jeremy Bentham, for example, designed a prison which he called a Panopticon because of its design, which allowed guards who remained in the center to watch all the prisoners who were placed in a ring of cells surrounding the guards' tower. J. Bentham, *Panopticon; Or, The Inspection-House*, 4 *The Works of Jeremy Bentham* 37 (J. Bowring ed. 1962). See generally M. Foucault, *supra* note 320, at 195-228.

361. M. Foucault, *supra* note 320, at 204.

tiaries became models for a new order. They soon inspired asylums which would cure mental illness and almshouses which would rehabilitate the poor.³⁶² In short, the penitentiary model was thought to be capable of producing a society without insanity, poverty or crime.

Unfortunately, within a generation the flaws of imprisonment became apparent. Rehabilitation was not inevitable. For example, in 1852 a New York commission reported that if the purpose of imprisonment "is to make [the offender] a better member of society. . . that purpose cannot be answered by matters as they now stand."³⁶³ Critics asserted that penitentiaries were unable to reform because they forced prisoners to live in an artificial environment.³⁶⁴ Incarceration became a means of controlling offenders. Rehabilitation was abandoned, but incarceration was retained. Wardens ceased to be ambitious: they sought only to prevent escapes and riots.³⁶⁵

For almost a hundred and fifty years, criminologists have known that their experiment with incarceration was a failure. Imprisonment has neither deterred crime nor rehabilitated offenders. As Michel Foucault observes: "[w]e are aware of all the inconveniences of prison, and that it is dangerous when it is not useless. And yet one cannot 'see' how to replace it. It is the detestable solution, which one seems unable to do without."³⁶⁶

In fact, today we may be able to do without prisons. Since the offered justifications have been refuted, we must ask if we are deceiving ourselves in retaining incarceration. Notwithstanding the propriety, even the necessity, of punishing offenders, why do we imprison them? Inertia and lassitude should not lead us to retain a form of punishment that is both extraordinarily expensive and pointless. This contention is not novel. Criminologists³⁶⁷ and judges³⁶⁸ have proposed abolishing prisons. Selective incapacitation has peeled off layer after layer of flimsy and invalid justifications for imprisonment. Only one justification is untouched. Now, if that one, incapacitation, is rejected as well, there may be no justification for imprisoning offenders.

Prisons have survived because it is popularly believed that they reduce crime. Without prisons, it is feared, crime rates will escalate until America's

362. D. Rothman, *supra* note 320, at 131-205.

363. *Id.* at 242 (quoting G. Underwood, Report of the Committee Appointed to Examine the Several State Prisons 14 n.20 (N.Y. Assembly Documents 1852)).

364. *Id.* at 243; M. Foucault, *supra* note 320, at 266.

365. D. Rothman, *supra* note 320, at 245.

366. M. Foucault, *supra* note 320, at 232.

367. See, e.g., Harris & Dunbaugh, *Premise for a Sensible Sentencing Debate: Giving Up Imprisonment*, 7 Hofstra L. Rev. 417 (1979).

368. See, e.g., *Morales v. Schmeidt*, 340 F. Supp. 544, 548-49 (W.D. Wis. 1972), *rev'd*, 489 F.2d 1335 (7th Cir. 1973), *aff'd* on rehearing, 494 F.2d 85 (7th Cir. 1974) (*en banc*) ("I am persuaded that the institution of prison probably must end. In many respects it is as intolerable within the United States as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards, and probably less rational.").

cities resemble Germany, in the spring of 1945. Yet this fear is misplaced. Imprisoning offender *A* does not deter others,³⁶⁹ and once offender *A* is released from prison she is more likely to commit more offenses than she would have been if she had not been imprisoned.³⁷⁰ Admittedly, while in prison the offender is incapacitated: she cannot commit any crimes until she is released. Yet as this Note has shown, incapacitation is unselective: the imprisoned offender is more likely to be innocuous than dangerous. Therefore, in most cases imprisoning the offender does not benefit society. Furthermore, since the experience of imprisonment makes recidivism more likely, incapacitation may cause more crime than it prevents. America's infatuation with prisons lacks justification. Indeed, over the past twenty years, the prison population has more than doubled³⁷¹ and yet the crime rate has not declined, it has risen.³⁷²

It is incontestible that the crime rate in this country is alarmingly high. It is equally clear that although the number of police officers increased by 21% and the number of prosecutors increased by 70% during the 1970's,³⁷³ the criminal justice system still cannot cope with crime. Not only is it impossible to imprison all offenders, it is now impossible to process all suspects.³⁷⁴ The courts are so swamped that plea bargaining has become the norm³⁷⁵ — without it, courts would come to a standstill³⁷⁶ — and most cases are decided during the defendant's initial appearance. Even so, case load pressures force judges to dismiss cases.³⁷⁷ Justice becomes a lottery in which a defendant's fate is determined by the type of judge she draws,³⁷⁸ or still worse, justice becomes "turnstile justice"³⁷⁹ as judges try to resolve twenty cases in an hour.³⁸⁰

369. See text accompanying notes 267-84 *supra*.

370. See text accompanying notes 248-50 *supra*.

371. See text accompanying notes 238-39 *supra*.

372. See U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics: 1982*, 349 (T. Flanagan & Hindeland eds. 1983).

373. Clear, Harris & Record, *Managing the Cost of Corrections*, 62 *Prison J.* 3, 9 (1982).

374. For example, in New York, the number of indictments increased by 75% between 1977 and 1982. *The Jail Space Shortage Seems Chronic as Crime*, *N.Y. Times*, Oct. 23, 1983, § 4 (Week in Review), at 6E, col. 3.

375. See, e.g., N. Morris, *supra* note 87, at 50 (over 90% of those convicted of serious offenses plead guilty). In 1982, only 853 cases—fewer than .5% went to trial in Criminal Court in New York City. *The Criminal Court: A System in Collapse*, *N.Y. Times*, June 26, 1983, at A1, col. 1.

376. *Dirty Rooms to Dismissal: The Eight Key Areas of Failure*, *N.Y. Times*, June 30, 1983, at B4, col. 1.

377. *Id.*

378. *Strict Penalties for Criminals: Pendulum of Feeling Swings*, *N.Y. Times*, Dec. 13, 1983, at B8, col. 2.

379. *The Criminal Court: A System in Collapse*, *N.Y. Times*, June 26, 1983, at A34, col. 5.

380. *Id.* (one judge disposed of 340 cases in a day; another disposed of 178); *Dirty Rooms to Dismissal: The Eight Key Areas of Failure*, *N.Y. Times*, June 30, 1983, at A1, col. 3 (In Manhattan Criminal Court, judges have 150 cases on their daily calendars; in Brooklyn, they have 100 cases.).

Under these circumstances, it is absurd to think that a prison sentencing policy—or even the retention of imprisonment—can affect the crime rate. Although Greenwood and the other proponents of selective incapacitation contend that their policy will reduce the crime rate, it is generally recognized that punishment, especially imprisonment, does not reduce crime.³⁸¹ Today, when so many offenders are not caught, or if caught, are not prosecuted, or if prosecuted, are allowed to plead to trivial lesser offenses in order to receive short sentences or probation, incarceration should not be expected to affect the crime rates.

If the United States wants to lower its crime rate, much more drastic changes than a new prison policy or a new form of punishment are needed. Until society changes, crime will remain. Selective incapacitation can never deliver its promises. But selective incapacitation may, accidentally, prove useful if it inspires a wide debate on imprisonment which in turn leads to the popular realization that most of the justifications for imprisonment are worthless. Then, a constructive beginning may be possible.

IX CONCLUSION

This Note has examined selective incapacitation, the sentencing policy that seeks to identify dangerous, high-risk offenders. This group will be sentenced to lengthy terms while the remaining, nondangerous offenders will receive short sentences or probation. Selective incapacitation theorists attempt to distinguish between the dangerous and nondangerous offender for two reasons. First, they argue that by imprisoning the dangerous offenders for extended terms the crime rate can be reduced. Second, they assert that the cost of running prisons and the overcrowding that is all too typical of today's prisons can be reduced by giving the nondangerous offenders shorter sentences. Since these offenders are not dangerous, decarcerating them will not, they claim, lead to a rise in crime.

A careful analysis suggests that selective incapacitation should be rejected. First, it is impossible to identify the dangerous offender. As a result, either the vast majority of offenders are imprisoned to insure that all dangerous offenders are incarcerated or a small number of offenders is imprisoned so that most of the nondangerous offenders will not be imprisoned mistakenly. If the former policy is followed, the prison population will rise and overcrowding will increase. If the latter policy is followed, many dangerous offenders will not be imprisoned and, if the proponents of selective incapacitation are correct, the crime rate should rise.

381. See, e.g., M. Foucault, *supra* note 320, at 24. See also note 207 accompanying text *supra*.

Moreover, any attempt to make imprisonment turn on a finding of dangerousness involves ethical and constitutional difficulties. The dangerous offender is imprisoned not for her past acts, but for her predicted future acts and for being "dangerous." Since one cannot be punished for one's status or for still-unattempted acts, selective incapacitation rests on constitutionally infirm ground. Moreover, the offender's autonomy is denied when she is told that she will commit a crime, despite all her protests to the contrary.

Finally, it seems unlikely that selective incapacitation can provide the benefits that it promises. The crime rate is unlikely to go down. The prison population will remain at least as large as it is today.

Selective incapacitation theorists raise an important question, however, when they argue that all the other justifications for imprisonment are invalid. If this assertion is correct, and if selective incapacitation is also an unsatisfactory justification, imprisonment is not justifiable. Perhaps the use of imprisonment should be greatly curtailed if not abolished altogether.

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