

Is Selective Incapacitation an Effective Policy for Reducing Crime?

Selective Incapacitation Is the Best Model for Stopping Criminal behavior

Advocate: James Q. Wilson, Ronald Reagan Professor of Public Policy, Pepperdine University School of Public Policy.

Source: "Selective Incapacitation," in Andrew von Hirsch and Andrew Ashworth, editors, *Principled Sentencing: Readings on Theory and Policy*, 2nd Edition (Oxford: Hart Publishing, 1998); a revision of "Dealing with the High-Rate Offender," *The Public Interest*, Volume 72 (1983).

Selective Incapacitation Is an Ineffective Criminal Policy

Advocate: Andrew von Hirsch, Director of the Centre for Penal Theory and Penal Ethics at the University of Cambridge Institute of Criminology; Honorary Professor of Penal Theory and Penal Law, Cambridge University; Honorary Fellow, Wolfson College.

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The policy of selective incapacitation is the policy of singling out or *selecting* the most dangerous criminal offenders and then locking them away or *incapacitating* them for an extended time. It incorporates several major assumptions: first, that specific individuals are the source of a very substantial proportion of crime; second, that locking those individuals from society for an extended period is an efficient

way of reducing the crime rate; and third, that such individuals can be accurately identified. All of those assumptions have been challenged. First, while individuals certainly commit crimes, there is a serious question of whether social structure and institutions are the major causal factors influencing the commission of crime by individuals. The second assumption—that removal of repeat offenders from society for an extended period is an efficient way of reducing the crime rate—has come in for extensive critique. First, long-term incarceration results in keeping prisoners incarcerated long past the age when their crime activities are likely to stop; and keeping people in prison who are unlikely to commit crimes is not very efficient. And second, incarcerating large numbers of people for long periods may break down the community social structure in such a way that crime results. The third assumption—that we can accurately identify those individuals likely to commit multiple crimes—has proved the most problematic. The problems of identifying which individuals are likely to commit more crimes have proved insurmountable: every means of identifying the target individuals turns out to also identify so many “false positives” (people who would *not* commit crimes) that any incarceration policy using such identification procedures would be grossly inefficient (as well as profoundly unjust).

Selective incapacitation policies are deeply contrary to a basic principle of justice: that punishment should be commensurate to the crime committed; that the worst crimes should receive the most severe punishment. Under selective incapacitation, the focus is not on the crime committed but on the potential for committing *future* crimes. The criminal behavior of someone who commits three acts of shoplifting is not as severe as that of someone who commits an unpremeditated murder. Under such “habitual offender” statutes as the three strikes law, the shoplifter can be sentenced to life without parole, while the murderer serves only a few years of imprisonment. The justification for the incapacitating sentence is that it will prevent *future* criminal acts, not that it is reasonable punishment for past criminal behavior.

Three strikes laws are the most evident effect of selective incapacitation theory. The state of Washington passed a three strikes law in 1993: upon conviction of a third felony, the offender received a sentence of life without parole. California passed a similar law in 1994, and by 2004 most states (as well as the federal government) had passed some form of three strikes law mandating long (often life) sentences for three-time offenders.

Points to Ponder

- James Q. Wilson claims that “one great advantage to incapacitation as a crime control strategy” is that “it does not require us to make any assumptions about human nature.” Is it true that selective incapacitation makes no assumptions about human nature?
- Suppose that we lock up Paul for 20 years, and we can determine—by an extraordinary calculation—that Paul would have committed 10 crimes during that period of incarceration. Does that imply that locking up Paul for 20 years actually prevented 10 crimes from occurring?

- Suppose that we discovered that people who grew up in poverty were much more likely to commit multiple crimes in the future than were people who grew up wealthy. Rhonda and Wendy are both convicted of shoplifting the same value of goods on the same day; for both it is their first offense; Rhonda grew up in poverty, while Wendy is from a wealthy family. If our studies show that impoverished Rhonda is more likely to commit future crimes than is wealthy Wendy, would we be justified in sentencing Rhonda to a much longer prison term in order to “selectively incapacitate” her?

Selective Incapacitation

James Q. Wilson

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...erty, as by imprisonment (or banish-
...ent, or very tight control in the com-
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...y these persons have been “incapaci-
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...ount by which crime is reduced by
...incapacitation.

...Incapacitation cannot be the sole
...pose of the criminal justice system;
...it were, we would put everybody
...who has committed one or two
...cences in prison until they were too
...to commit another. And if we
...ught prison too costly, we would
...ply cut off their hands or their
...ads. Justice, humanity, and propor-
...ality, among other goals, must also
...served by the courts.

...But there is one great advantage
...incapacitation as a crime control

strategy—namely, it does not require
us to make any assumptions about
human nature. By contrast, deterrence
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 peo-
ple almost surely do take such matters
into account, it is difficult to be certain
by how much such considerations
affect their behaviour 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. Rehabilitation
works only if the values, preferences, or
time-horizon of criminals can be
altered by plan. There is not much evi-
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James Q. Wilson, “Selective Incapacitation,” from *Principled Sentencing: Readings on Theory and Policy, Second Edition*, edited by Andrew von Hirsch and Andrew Ashworth (Oxford: Clarendon Publishing, 1998): 113–120. Reprinted with permission from James Q. Wilson.

can be done for a few under certain circumstances.

Incapacitation, on the other hand, works by definition: its effects result from the physical restraint placed upon the offender and not from his subjective state. More accurately, it works provided at least three conditions are met: some offenders must be repeaters, offenders taken off the streets must not be immediately and completely replaced by new recruits, and prison must not increase the post-release criminal activity of those who have been incarcerated sufficiently to offset the crimes prevented by their stay in prison.

The first condition is surely true. Every study of prison inmates shows that a large fraction (recently, about two-thirds) of them had prior criminal records before their current incarceration; every study of ex-convicts shows that a significant fraction (estimates vary from a quarter to a half) are rearrested for new offences within a relatively brief period. In short, the great majority of persons in prison are repeat offenders, and thus prison, whatever else it may do, protects society from the offences these persons would commit if they were free.

The second condition—that incarcerating one robber does not lead automatically to the recruitment of a new robber to replace him—seems plausible. Although some persons, such as Ernest van den Haag, have argued that new offenders will step forward to take the place vacated by the imprisoned offenders, they have presented no evidence that this is the case, except, perhaps, for certain crimes (such as narcotics trafficking or prostitution) which are organized along

business lines. For the kind of tory street crimes with which I am concerned—robbery, burglary, theft, larceny—there are no entry and no scarcity of opportunities. No one needs a “vacancy” to appear before an opportunity to become a robber. The supply of robbers is not limited by the number of robbers already in the streets because existing robbers have no incentive of excluding new robbers as long as the opportunity for robbery exists. If the “demand” for robbery is much larger than the existing supply of robbers, the incidence of robberies. In general, the incidence of street crimes is not a function of how many “competitors” there are.

The third condition that must be met if incapacitation is to be effective in reducing crime in prisons must not be such that the prisons become “schools for crime” that are prevented by incarceration from committing more crimes than they would have committed after release. It is undoubtedly the case that for some offenders prison is a school for crime; undoubtedly that for other offenders prison is a deterrent. The net effect of this group will commit more crimes after release than they would have committed if they were free. The question, then, is whether the net effect of these offsetting tendencies is negative. In general, the evidence indicates that the prison makes offenders as a whole less criminal, and there is some evidence that certain kinds of offenders, especially certain younger offenders, are deterred by a prison. Moreover, interviews with released offenders reveal no relationship between

the kinds of pre-emption of crimes committed and whether the offenders had served a prior prison term. Though there are no barriers to many qualifications that should be made to this bald summary, there is no need wait for evidence that the net effect of incarceration is to increase the crime rates of convicts sufficiently to cancel out the gains to society resulting from the incapacitation of robbers practicing their trade.

To determine the amount of crime prevented by incarcerating a number of offenders for a given length of time, the key estimate we must make is the number of offences a criminal commits per year free on the street. If a community experiences a thousand robberies a year, it obviously makes a great deal of difference whether these robberies are the work of one thousand robbers, each of whom commits a hundred robberies per year, or the work of one hundred robbers, each of whom commits only one robbery per year. In the first case, locking up only five robbers will cut the number of robberies in half; in the second case, locking up one hundred robbers will only reduce the number of robberies by 10 per cent.

In the late 1970s, researchers at the Rand Corporation had been interviewing prisoners (first in California, then in other states) to find out how many crimes they were committing while free. No one can be certain, of course, that the reports of the convicts are accurate, but the reports of the convicts as a whole constitute an accurate record of their crimes, both undetected as well as detected. The Rand researchers cross-checked the information against arrest records and looked for evidence of consistency in the self-reports. However, the inmates volunteered

information about crimes they had committed but for which they had not been arrested. Still, it is quite possible that the self-reports were somewhat inaccurate. However, it is reasonable to assume that inmates would be more likely to conceal crimes they did commit rather than admit to crimes they did not commit. Thus, any errors in these self-reports probably lead to an underestimate of the true rate of criminality of these persons.

The Rand Group learned that the "average" individual offence rate was virtually a meaningless term because the inmates they interviewed differed so sharply in how many crimes they committed. A large number of offenders committed a small number of offences while free and a small number of offenders committed a very large number of offences. In statistical language, the distribution of offences was highly skewed. For example, the median number of burglaries committed by the inmates in the three states was about 5 a year, but the 10 per cent of the inmates who were the highest-rate offenders committed an average of 232 burglaries a year. The median number of robberies was also about 5 a year, but the top 10 per cent of offenders committed an average of 87 a year. As Peter W. Greenwood, one of the members of the Rand group, put it, incarcerating one robber who was among the top 10 per cent in offence rates would prevent more robberies than incarcerating eighteen offenders who were at or below the median.

All the evidence we have implies that, for crime-reduction purposes, the most rational way to use the incapacitative powers of our prisons would be to do so selectively. Instead of longer

sentences for everyone, or for persons who have prior records, or for persons whose present crime is especially grave, longer sentences would be given primarily to those who, when free, commit the most crimes.

But how do we know who these high-rate, repeat criminals are? Knowing the nature of the present offence is not a good clue. The reason for this is quite simple—most street criminals do not specialize. Today's robber can be tomorrow's burglar and the next day's car thief. When the police happen to arrest him, the crime for which he is arrested is determined by a kind of lottery—he happened to be caught red-handed, or as the result of a tip, committing a particular crime that may or may not be the same as either his previous crime or his next one. If judges give sentences based entirely on the gravity of the present offence, then a high-rate offender may get off lightly because on this occasion he happened to be caught snatching a purse. The low-rate offender may get a long sentence because he was unlucky enough to be caught robbing a liquor store with a gun.

Prosecutors have an understandable tendency to throw the book at persons caught committing a serious crime, especially if they have been caught before. To a certain extent, we want to encourage that tendency. After all, we not only want to reduce crime, we want to see criminals get their just deserts. Society would not, and should not, tolerate a system in which a prosecutor throws the book at purse snatchers and lets armed robbers off with a suspended sentence. But while society's legitimate desire for retribution must set the outer

bounds of any sentencing, there is still room for flexibility within those bounds. We can, for example, say that all robbers are put in prison for a certain number of years, but give, within relatively narrow ranges, different sentences to those robbers who commit the most crimes.

If knowing the nature of the present offence and even knowing the offender's prior record of the offences are not accurate guides to identifying high-rate offenders, what is? One cannot ask the offenders to co-operate with research while in jail, but they have little choice but to co-operate with prosecution if they go to jail, especially if the co-operation is to get a lighter sentence. But we can see what factors are most admissible, objective attributes of offenders that best predict who is not a high-rate offender. In the Rand study, Greenwood and his colleagues discovered, by trial and error, that the following seven factors, taken together, were highly predictive of a convicted person being a high-rate offender: he (1) was convicted of a serious crime while a juvenile (under age 16), (2) used illegal weapons, (3) used illegal weapons in the previous two years, (4) was employed less than 50 per cent of the time during the previous year, (5) served time in a juvenile institution, (6) was incarcerated in a prison for more than 50 per cent of the previous years, and (7) was previously convicted for the present offence.

Using this scale, researchers found that 82 per cent of offenders were predicted to be low-rate offenders, 82 per cent of offenders were predicted to be medium-

encing policy. The predictability within these differences is also big. For example, a median California prison inmate who is predicted to be a low-rate offender will in fact commit slightly more than one burglary and slightly less than one robbery per year free. By contrast, the median California inmate who is predicted to be a high-rate offender will commit ninety-three burglaries and sixteen robberies per year free. In identifying these offender states, this prediction scale may be more or less accurate. Opinions differ as to the effect on crime rate and prison population of giving sentences for high-rate offenders longer than those for low-rate ones. Greenwood applied his scale to California and found that if all low-rate robbers received two-year prison terms (most now receive longer ones) and all high-rate robbers received two-year terms (most now receive longer ones), the number of robberies committed in the state would drop by an estimated 20 per cent with no increase in the prison population. Obviously, a policy of reducing sentences by selective incapacitation (that is, adjusting prison terms to reflect individual offence rates) raises a number of issues. Though these issues are important, one must keep in mind that they cannot be resolved by comparing selective incapacitation to some ideal system of justice in which everyone receives exactly his just deserts. No such system exists or ever will. One must compare instead the proposed scale, Greenwood's, with what exists now, with all its imperfections, and ask whether the crime reduction are worth the cost. The cost is not the cost of the crime reduction when we try to make predictions about human behaviour.

The first issue is whether it is permissible to allow crime-control to be an objective of sentencing policy. Some persons, such as Andrew von Hirsch, claim that only retribution—what he calls “just deserts”—can be a legitimate basis for sentencing. To some extent, he is undoubtedly correct. Even if we were absolutely certain that a convicted murderer would never murder again, we would still feel obliged to impose a relatively severe sentence in order to vindicate the principle that life is dear and may not be unlawfully taken without paying a price. Moreover, the sentences given low-rate offenders must reflect society's judgment as to the moral blame such behaviour deserves, and the sentences given high-rate offenders ought not exceed what society feels is the highest sentence appropriate to the crime for which the offenders were convicted. And low-rate offenders should get a sufficiently severe sentence to help persuade them, and others like them, not to become high-rate offenders. Still, after allowing for all of these considerations, there will inevitably remain a range of possible sentences within which the goal of incapacitation can be served. The range will exist in part because there is no objective way to convert a desire for retribution into a precise sentence for a given offence and in part because legislatures will almost invariably act so as to preserve some judicial discretion so that the circumstances of a case which cannot be anticipated in advance may affect the sentence. Among those circumstances is a concern for protecting society from the threat that a given offender represents.

The second issue is whether our prediction methods are good enough to allow them to influence sentence length. The answer to that question depends on what one will accept as "good enough". Absolute certainty will never be attainable. Moreover, criminal justice *now*, at almost every stage, operates by trying to predict future behaviour. When a prosecutor decides how much plea bargaining he will allow, he is trying to predict how a judge or jury will react to his evidence, and he is often trying to guess how dangerous an offender he has in his grasp. When a judge sets bail, he is always making a prediction about the likelihood of a person out on bail showing up for his trial and is frequently trying to predict whether the person, if out on bail, will commit another crime while free. When a defence attorney argues in favour of his client being released on his own recognizance, without bail, he is trying to persuade the judge to accept his prediction that the accused will not skip town. When the judge passes a sentence, he is trying, at least in part, to predict whether the convicted person represents a future threat to society. When a parole board considers a convict's application for early release, it tries to predict—often on the basis of a quantitative system, called a "base expectancy table"—whether the person will become a recidivist if released. Virtually every member of the criminal justice system is routinely engaged in predicting behaviour, often on the basis of very scant knowledge and quite dubious rules of thumb. The question, therefore, is this: are the kinds of predictions that scholars such as Greenwood make about future

criminality better (more accurate) than the predictions that judges and judges now make?

A third issue is tougher. Is it fairer to give a low-rate offender who is caught committing a serious crime to a shorter sentence (because he is a low-rate offender who gets caught committing a relatively minor crime) than to give a high-rate offender who gets caught committing a relatively minor crime a longer sentence? Probably not. Sentences would have legal boundaries set so that the use of selective incapacitation would not lead to perverse sentences—arranging for a low-rate offender to get one year, a high-rate offender to get five.

Finally, there is bound to be a debate about the legal and even propriety of using certain factors as a basis for making predictions. Everyone would agree that race should not be a factor; everyone would probably agree that prior record should be a factor. But not everyone would certainly believe that it is proper to take into account an offender's adult record as well as his adult record. Some people are aware that some people disagree about whether one can take into account alcohol or drug use. Suppose the person can be cured of his drinking or drug use; do we believe him? And do we wipe the slate clean of information about these matters? Should we penalize more severely persons who are chronically unemployed, even if unemployment is a good predictor of recidivism? Many people will argue that this amounts to making unemployment a crime, though I think that is not the matter. After all, advocates of the trial release of arrested persons, of bail policies, and diverting of offenders away from jail do not hesitate to argue that having a good employment

are accurate) should be counted in the accused's favour. If employment counts in favour of some, then obviously unemployment may be counted against others. Since advocates of "bail reform" are also frequent opponents of incapacitation, selective or collective, it is incumbent on them to straighten out their own thinking on how we make use of employment records. Nonetheless, this important issue deserves thoughtful attention.

On one matter, critics of prison may take heart. If Greenwood and the others are correct, then an advantage of

selective incapacitation is that it can be accomplished without great increases (or perhaps any increases) in the use of prisons. It is a way of allocating more rationally the existing stock of prison cells to produce, within the constraints of just deserts, greater crime-control benefits. Many offenders—indeed most offenders—would probably have their sentences shortened, and the space thereby freed would be allocated to the small number of high-rate offenders whom even the most determined opponents of prison would probably concede should be behind bars. ■

Selective Incapacitation: Some Doubts

Andrew von Hirsch

bound to be and even ethical facts as predictions. Every should not be probably a fact it is proper offender's juvenile record, but I disagree. account alcohol person claim prediction research in criminology by and large, focused on characteristics of offenders. Various facts about criminals are recorded: age, previous arrests and convictions, social history, and so forth. It is then statistically determined which of these factors are most strongly associated with subsequent offending. The result is a "selective" prediction strategy: among those convicted of a given type of

offence, some will be identified as bad risks and others not.

Traditional Prediction Methods

Traditional statistical prediction techniques pursued this selective approach. Generally, they found that certain facts about an offender—principally, previous criminal history, drug habits, and

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history of unemployment—were to a modest extent indicative of increased likelihood of recidivism.

These techniques did not, however, distinguish between serious and trivial recidivism. Both the offender who subsequently committed a single minor offence and the individual who committed many serious new crimes were lumped together as recidivists. Moreover, the techniques offered no promise of reduced crime rates, as they did not attempt to estimate aggregate crime-prevention effects. Locking up the potential recidivist thus assured only that he or she would be restrained; since other criminals remained at large, it did not necessarily diminish the overall risk of victimization. By the 1970s, these limitations reduced penologists' interest in traditional prediction techniques.

"Selective Incapacitation"

Surveys of imprisoned offenders, conducted in the United States in the early 1980s, found that a small number of such persons admitted responsibility for a disproportionate number of serious offences. If that minority of dangerous offenders could be identified and segregated, perhaps this could reduce crime rates after all. These surveys thus generated a renewed interest in prediction research.

The most notable product was a Rand corporation study published in 1982 by Peter W. Greenwood. Greenwood named his prediction strategy "selective incapacitation". His idea was to target *high-rate, serious* offenders—those likely to commit frequent acts of robbery or other violent crimes in future. For that purpose he took a group of incarcerated robbers,

asked them how frequently they committed such crimes, and identified the characteristics reporting the highest robbery rates. From this, he fashioned a selective predictive index, which identified high-rate offenders on the basis of their early criminal records: histories of drug use and unemployment.

Greenwood also devised a method of projecting the crime impact of this technique. On the basis of offender self-reports, he estimated the annual rate of offending by robbers who were identified as high risks by his prediction index. He calculated the number of offenders that, supposedly, would be prevented from offending by incarcerating such individuals for given periods. By increasing the incarceration terms for the high-risk robbers and reducing terms for the low-risk offenders, he concluded, one could reduce the robbery rate by as much as 15 percent—without causing prison overcrowding to rise.

Questions of Effectiveness

While the study initially attracted much interest, problems later became apparent. One difficulty is that not all predictions hold up when offenders are released. Of the kind of predictions available are relied upon. The effectiveness of selective incapacitation depends on whether it targets the potential high-rate offenders, and distinguishes between recidivists who reoffend frequently or gravely. To make this distinction, the Rand studies, like Greenwood's, relied upon offender self-reports. A sentencing strategy, however, is seldom in the position of relying upon the defendant's

frequently they were unable to supply the necessary information about his criminal past. The characteristics of the self-report would have to rely on officially recorded information about offenders' criminal history. The best robbery rate was based on a seven-factor self-report study which identified offenders' records make the distinction poorly. On the basis of these data Greenwood's data were reanalyzed using court records and found to see how well the potential high-risk serious offenders could be identified from information available in court records, the results were disappointing. The officially recorded arrests, convictions, and meagre information about offenders' personal histories—did not permit the potential high-rate robbers to be distinguished from the other (say) the potential car thieves. The factors in the self-report study which individuals had proved the most useful—such as increasing participation in early and extensive youthful violent and multiple drug use, were not reflected in court records. To make the self-report study work, the courts would have to obtain and rely on information from school and social-service files—with all the problems of practicability and process that would involve.

Effectiveness

Flaws were found, also, in the projections of preventive impact. Greenwood initially based his crime reduction estimates on the self-reported activity of incarcerated robbers, and then extrapolated those estimates to robbery sentencing courts generally. Incarcerated robbers, however, are scarcely a representative sample: they may well rob more frequently than robbers generally in the community. (It is like trying to distinguish the smoking habits of reoffenders about the smoking habits of the general population.) To make the estimates generally by studying the self-reported smoking activity of inmates (as was done in a lung cancer ward.) When this extrapolation is eliminated, the projected crime reduction impact is reduced by about one-half. Other

defects in the projections exist. Greenwood assumed, for example, that his high-rate robbers would continue offending for a long time. When shorter and more realistic residual criminal careers are assumed instead, the estimated preventive effect shrinks.

These doubts are confirmed by the 1986 report of the National Academy of Sciences' panel on criminal careers. The panel included several noted advocates of predictively-based sentencing, and the report endorses the idea of predictive strategies (within certain limits) if these could be shown to be effective. Nevertheless, the panel's conclusions on the crime-preventive effects of selective incapacitation are sceptical. After recalculating Greenwood's results and scaling his initial preventive estimates down considerably, the panel notes that even those revised estimates (1) do not hold up in two of the three jurisdictions studied; (2) would shrink further were the scale drawn from a broader and potentially more heterogeneous population than persons in confinement and were it to utilize officially recorded rather than self-reported information; and (3) could nearly disappear if the estimated length of the residual criminal career were scaled down. While the report urges further research, it does not claim that selective incapacitation methods now exist that yield more satisfactory results.

Prospects for Improvement

Can these difficulties be overcome? Greenwood's research was only the beginning, and future selective incapacitation studies might conceivably do better. The obstacles are considerable, however. If the aim is to distinguish

potential high-rate, serious offenders from lesser potential criminals, this remains difficult to achieve using the scant official records courts have at their disposal. Records of early offending might become somewhat more accessible, with a change in the law concerning the confidentiality of juvenile records—but such records, notoriously, suffer from incompleteness and inaccuracy. Social histories, such as drug use and employment, will be even more difficult to ascertain accurately.

Estimation of the impact of selective incapacitation on crime rates involves difficult problems of sampling. Analyses of convicted or incarcerated offenders' criminal activities suffer from the difficulty mentioned already: it is not clear to what extent these persons' activities are representative of the activity of offenders in the community. Samples drawn from the general population are free from such bias, but may contain too small a number of active offenders.

Another obstacle concerns estimating the length of criminal careers. The serious offenders with whom selective incapacitation is concerned generally would be imprisoned in any event; the main policy issue is the length of their confinement. The strategy is to impose longer terms on the supposed high-risk offenders, but that assumes they will continue their criminal activities. Little prevention is achieved if the bad risks who are confined are those whose careers will end fairly soon. This means that selective incapacitation, to succeed, needs not merely to pick out high-risk offenders but *those who are likely to continue offending for an appreciable time*. But how much do

we know about forecasting criminal career? The National panel suggests that recidivism may depend on new as well as not so much prior criminal activity, but later events, including employment and marriage, are scarcely matters concerning which the court can readily obtain information at time of sentencing.

A valuable review of selective incapacitation research has been provided by Franklin Zim and Gordon Hawkins writing after the National Academy of Sciences. They note that the research mentioned above has not resolved—and notes a number of other problems for example, to deal adequately with the problem of group offending (incarcerating one member of the group does not necessarily reduce the overall level of offending) and of selective incapacitation (where incarcerated offenders' criminal activities are taken up by other potential offenders). He notes the tendency of incapacitation policies to yield diminishing returns. It is indeed true that only a small number of offenders commit a large number of crimes. He concludes that the present projection methods "invite overestimation of the impact of incapacitation to be expected from marginal increments of sentencing". Real improvement will require better estimating incapacitative effects that have not yet to have occurred.

Proportionality Problem

Selective prediction requires a decision whether the traditional sentencing methods such as Greenwood

testing the results of the National Academy of Sciences' career terms study. A few variables—criminal history, including steady employment, marriage. Those factors concerning which the main information

of recent years has been Zimring's writing a decade of the Academy Report on research problems have yet to be resolved. With selective risk prediction, the emphasis necessarily shifts away from the seriousness of the current offence. The aim is to select the higher risk individuals from among those convicted of a specified type of crime, the character of the current crime cannot be given much weight. Traditional predictive indices largely ignored the gravity of the current offence and concentrated on the offender's earlier criminal record and social histories. The newer "selective incapacitation" techniques have a similar emphasis. Of Greenwood's predictive factors, three do not measure criminal activity of a significant nature at all, but the offender's personal drug consumption and lack of employment, instead. Of the four other factors, only two measure the offender's recent criminal record; and one measure the heinousness (e.g., the degree of violence) of the offender's current offence.

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Problems

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Greenwood's projection of a significant reduction in the robbery rate is made on the assumption that robbers who score badly on his prediction index would receive about *eight years'* imprisonment, whereas better-scoring robbers would receive only *one year* in jail. This means a great difference in severity—one of over 800 per cent—in the punishment of offenders convicted of the same offence of robbery; and one that can scarcely begin to be accounted for by distinctions in the seriousness of the offender's criminal conduct. When this punishment differential is narrowed—when high-risk robbers receive only modestly longer terms than robbers deemed lower risks—the crime reduction payoff shrinks to slender proportions, even by Greenwood's estimation methods.

Conclusions

Where does this leave us? A limited capacity to forecast risk has long existed: persons with criminal records, drug habits, and no jobs tend to recidivate at a higher rate than other offenders, as researchers have known for years. However, the limitations in that forecasting capacity must be recognized—for selective incapacitation as well as more traditional forecasting techniques. Identifying high-risk, serious offenders will be impeded by the quality of information available (or likely to become available) to sentencing courts. The potential impact of selective incapacitation on crime rates is far below proponents' initial estimates, and

is likely to be modest. Considerations of proportionality limit the inequalities in sentence that may fairly be visited for the sake of restraining high-risk offenders; and limiting these permissible inequalities will, in turn, further restrict

the technique's impact on crime—far from near panacea some of its advocates have asserted it is—is both on practical and ethical grounds a device of limited potential, at best. ■

The Continuing Debate

What Is New

"Three strikes" laws are the most obvious and most controversial manifestation of the selective incapacitation approach: in 2004, 26 states as well as the U.S. federal government had three strikes laws; in most of those cases, conviction for a third offense brings a mandatory life sentence with no possibility of parole. The sentences under the California Three Strikes Law can be very severe—Andrade, a heroin addict, was sentenced to 50 years with no parole for possession of children's videotapes (valued at \$154), which he wanted to give as Christmas presents to his nieces—the U.S. Supreme Court has upheld such sentences. In 2003 that life imprisonment for shoplifting does not count as "cruel and unusual punishment," and so does not violate the Eighth Amendment. In the Andrade case, the Ninth Circuit Court of Appeals had ruled that Andrade's sentence was cruel and severe as to be unconstitutional; in its 2003 decision (*Andrade*), the Supreme Court split 5 to 4; it reversed the Ninth Circuit's ruling and reinstated Andrade's 50-year sentence. Writing for the minority, Justice Stevens stated that "The application of the Eighth amendment prohibition against cruel and unusual punishment to terms of years is articulated in the 'clearly established principle' acknowledged by the court: a sentence grossly disproportionate to the offense for which it is imposed is unconstitutional . . . If Andrade's sentence is grossly disproportionate, the principle has no meaning."

Where to Find More

David Greenberg proposed selective incapacitation in "The Incapacitation of Imprisonment, Some Estimates," *Law and Society Review*, Volume 16, 541–580. The first detailed selective incapacitation plan was Peter Greenwood's *Selective Incapacitation* (Santa Monica, CA: RAND, 1982); see also Greenwood and Susan Turner, *Selective Incapacitation Revisited: Why Rate Offenders Are Hard to Predict* (Santa Monica, CA: RAND, 1987). A statistical analysis of incapacitation policies is presented in William J. Voth's *Criminal Incapacitation* (New York: Plenum Press, 1994). Dean J. Gendreau examines the challenges of classification in *Measuring Offender Risk: A Justice Sourcebook* (Westport, CN: Greenwood Press, 1994). See also L.