SELECTIVE INCAPACITATION AND THE EFFORT TO IMPROVE THE FAIRNESS OF EXISTING SENTENCING PRACTICES

KENNETH R. FEINBERG*

I

INTRODUCTION

The principal objective of this paper is to provide a justification for pursuing a policy of selective incapacitation. This issue is extremely timely because the nation's approach to criminal sentencing and corrections policy is in disarray. Correction officials are unsure of the utility of alternatives to existing sentencing procedures and are therefore uncertain about new steps that might be taken to improve existing practices. Because priorities are confused and resources misallocated, citizens perceive that federal, state and local governments are paralyzed in their efforts to combat crime and to develop a sound, just corrections strategy. There is a disquieting, even cynical attitude among our citizens that our elected public officials, criminal justice professionals and other policymakers are bereft of constructive ideas precisely at a time when the nation seeks innovative proposals.

What I hope to bring to this colloquium is an additional perspective, that of the policymaker who has the task of weaving the insights and thoughts of Messrs. von Hirsch, Gottfredson, Morris and Greenwood into politically viable, realistic public policy. Fashioning a politically acceptable and rational criminal justice policy is almost impossible.

It is hard to discuss the issues of violent crime and criminal justice reform outside of a political, ideological context. For five years, first as Special Counsel to the United States Senate Committee on the Judiciary and then as Administrative Assistant to Senator Edward Kennedy, I assisted Senator Kennedy in shaping federal criminal justice policy. I believe that the pragmatic political considerations which guide our elected public officials and appointed criminal justice professionals must be an integral part of this colloquium. My defense of a policy of selective incapacitation is therefore grounded as much in my perception of what is politically obtainable as in any belief I may have in the policy itself. I view my role today in large part as a political gadfly, occasionally reminding the recognized experts on this

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* B.A. 1967 Univ. of Massachusetts; J.D. 1970 New York University School of Law. The author, currently the Managing Partner of Kaye, Scholer, Fierman, Hays & Handler in Washington, D.C., was formerly Special Counsel to the United States Senate Committee on the Judiciary and Administrative Assistant to Senator Edward M. Kennedy. He is also an Adjunct Professor of Criminal Law at Georgetown University Law Center.

panel of the realities of current practice and what is realistically likely to transpire in the future.

At the same time, I view the recent trend towards selective incapacitation as affording an opportunity to make the criminal justice system in general, and criminal sentencing in particular, more equitable and just. The motivations of those who advocate the policy solely as a crime control measure may distract attention from my point but do not destroy it.

My defense of selective incapacitation is based on two overriding considerations. First, and of primary importance is that regardless of the imperfect state-of-the-art of predicting future criminal behavior, a policy of selective incapacitation as an important (but not exclusive) justification for imprisonment would constitute a major improvement over existing sentencing practices. A candid, public consideration of offender "dangerousness" is preferable to the arbitrary and unarticulated assumptions upon which sentencing often rests today.

Second, and of somewhat less importance to this panel, but of very real concern to the policy-maker, are the financial advantages of a carefully crafted policy of selective incapacitation. The criminal justice system can no longer afford the luxury of scattering financial and technical resources in the direction of all offenders. There are not enough police to apprehend suspects, not enough prosecutors to prosecute, not enough judges to try the cases and not enough prisons to house all of those convicted.

The issue of prison capacity is of particular importance. Selective incapacitation, if properly implemented, offers the public official the way out of a thorny political thicket—either build more prisons (and confront the inevitable twin dilemmas of who will pay for the cost of construction and maintenance and where will the new prison be located) or de-emphasize the sanction of imprisonment in favor of non-incarcerative alternatives (a policy that calls for more than a modest degree of political courage). Selective incapacitation provides the way out of this political Hobson's choice by focusing on the composition of the prison population and asking who should be incarcerated and for how long. We can remedy the current prison population crisis indirectly through a more selective determination of who should occupy available prison space.

Finally, there are two errors proponents of selective incapacitation often make. First, they overstate their case by arguing that such a policy offers society a revolutionary break with past sentencing practices. Second, proponents argue that incapacitation of the high-risk offender should be the *sole* purpose of imprisonment. Both arguments are flawed and promise too much. Selective incapacitation is not new; the law enforcement community has always, to some extent, attempted to establish as a priority the apprehension and conviction of the violent criminal.[1] What is new and promising

1. Current examples include career criminal units in many local district attorneys' offices and special felony offender statutes. *See generally* Gillers, *Selective Incapacitation:*

is recent research used to justify a broad based incapacitation policy that seeks to imprison a relatively small, highly-active segment of the criminal population in order to prevent high rate offenders from committing crimes in the future.[2]

Nor should the policymaker readily discard other equally important rationales for imposing criminal sanctions. Selective incapacitation should not be viewed as the sole justification for comprehensive sentencing reform. We will always need to depend on concepts of retribution, deterrence and "just deserts" to justify the incarceration of some offenders and to help determine their length of imprisonment. In cases, for example, where there is obviously no likelihood of repetition of the offense, it may still be necessary to imprison the offender, either to acknowledge the seriousness of the offense or to deter others similarly disposed. Indeed, to the extent that a policy of selective incapacitation relies exclusively on evidence of the prior criminal history of the offender in predicting future dangerousness, it can be justified independently in terms of "just deserts," i.e., since the truly high-risk offender has a more extensive criminal track record, he "deserves" more punishment.

II

DEFINING "SELECTIVE INCAPACITATION"—CHOICES FOR THE POLICYMAKER

In discussing the strengths and weaknesses of selective incapacitation, we must first reach a definition of the term. For purposes of this colloquium, "selective incapacitation" is an attempt to deal with the difficult problem of offender "dangerousness." The criminal justice system can be most efficient and effective in combating violent crime by focusing its attention and limited resources "selectively" on carefully defined types of "dangerous," violent offenders.

But the policymaker who seeks to promote such selective sentencing immediately confronts formidable obstacles: What crimes should trigger the policy, how should such crimes be measured and which personal offender variables, if any, should be utilized in attempting to define accurately the so-called "high-risk" offender?

A. The Meaning of "Prior Criminal Activity"

In attempting to fashion a sentencing policy which targets certain offenders for imprisonment, one must determine which crimes should provoke

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Does It Offer More or Less, 38 RECORD OF THE ASSOC. OF THE BAR OF THE CITY OF N.Y. 379, 385 (1983).

2. *See, e.g.,* J.M. CHAIKEN & M.R. CHAIKEN, VARIETIES OF CRIMINAL BEHAVIOR (Rand Corp. R-2814-NIJ 1982); P. GREENWOOD & A. ABRAHAMSE, SELECTIVE INCAPACITATION (Rand Corp. R-2815-NIJ 1982) [hereinafter cited as P. GREENWOOD]; Forst & Wish, *Drug*

consideration of longer sentences. This point is quite different from the issue of imperfect prediction discussed below.[3] Imagine that one could surmount this latter obstacle, and predict with sufficient accuracy that a particular offender would, in fact, commit the *same* crime if released. We still would have to decide which criminals we should selectively incapacitate. As Professor Morris puts it, "[t]he concept of dangerousness is so plastic and vague—its implementation so imprecise—that it would do little to reduce either the present excessive use of imprisonment or social injury from violent crime."[4]

One can appreciate this concern without concluding that selective incapacitation is forever doomed by its own "plasticity." Precise public policy choices can be made by defining which crimes satisfy the prerequisite of "dangerousness." For example, "dangerousness" could be measured in terms of crimes of violence, such as murder, rape, aggravated assault, etc.; offenses involving a risk of violence, such as weapons offenses and burglary; or the commission of any "index offense," such as violent or potentially violent crimes plus the addition of certain property crimes such as theft.[5] Of course, as one expands this group of index offenses, "prior criminal activity" becomes a more "plastic" concept and poses a risk that too many offenders will be included in the group targeted for incapacitation.

Fortunately, this has not happened. The numerous federal legislative proposals aimed at assuring the incarceration of "high-risk" offenders also look to prior violent criminal activity as a prerequisite.[6] It is not that our elected officials share Professor Morris' concern about "plasticity," but that focus is on the kind of violent crime that most troubles the American people. Thus, in this case at least, political considerations may very well work to the advantage of a narrower definition of prior criminal activity.[7]

Use and Crime: Providing a Missing Link in VIOLENT CRIME IN AMERICA (K. Feinberg, ed. Washington: National Policy Exchange 1983) at 84.

3. *See infra* text accompanying notes 15-21.

4. N. MORRIS, THE FUTURE OF IMPRISONMENT 62 (1974).

5. Recent studies have concluded that the dangerous offender commits all types of offenses more often than the less dangerous offender. Thus, it may be possible to use a high rate of hybrid offenses—property offenses along with one or more violent offenses—to identify the dangerous offender. *See* J.M. CHAIKEN & M.R. CHAIKEN, *supra* note 2.

6. *But see* Criminal Code Reform Act of 1981 S. 1630, 97th Cong., 1st Sess. § 126 (proposed 28 U.S.C. § 994(h) [hereinafter cited as S.1630].

7. Of course, none of the federal bills would specifically limit incarceration to only those offenders labeled "dangerous" because of their prior criminal activity. So the issue of prison overcrowding remains a primary concern. There are signs, however, that implementation of a policy of selective incapacitation could be tied to the availability of current prison space, thus, at least implicitly, encouraging a decision not to incarcerate the less dangerous. *See, e.g.,* Blumstein, *Crime Control: The Search for the Predators* in VIOLENT CRIME IN AMERICA 2, 13 (K. Feinberg, ed. Washington: National Policy Exchange 1983). This trend is most apparent in the proposed federal criminal code reform bill. *See, e.g.,* S.1630, *supra* note

Critics who fear that selective incapacitation will be used to justify incarcerating more offenders through a codified expansion of what constitutes a "dangerous" crime may, therefore, be correct; but the validity of that concern depends on a public policy determination—whether such incapacitation is, indeed, reserved for the violent offender.

B. Measuring Prior Criminal Activity

Even if one relies upon prior violent criminal activity as a necessary prerequisite to the application of selective incapacitation, the problem remains as to how to measure such activity. How does one determine the incidence of such crimes? Does one consider previous arrests? If so, should the inquiry be limited to adult arrests or should juvenile arrests be considered as well? Is it more justifiable to rely only on convictions? The policymaker must decide these critical issues.

Once again, the federal proposals are very narrowly drawn. Indeed, they are too restrictive. Federal proposals limit the application of selective incapacitation to offenders with prior violent criminal activity as demonstrated by one or more convictions (no distinction is made between adult and juvenile convictions).[8] Reliance solely on convictions poses difficulties, since convictions notoriously underrepresent the volume of reported crime. As a result, the practical value of a selective incapacitation policy is severely undercut if it is based solely on convictions. Reliance on past arrests, particularly juvenile arrests for violent crime, would seem to provide a more accurate indicator of criminal potential.[9]

I recognize that there is a certain injustice in relying upon certain types of arrests absent any evidence of conviction. But arrests have proven superior to convictions as a basis for estimating levels of criminal activity. More

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6, at § 126 (proposed 28 U.S.C. § 994(g)). Subsection (i) states that "The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."

8. *See, e.g.*, S. 1630, *supra* note 6, at § 126 (proposed 28 U.S.C. § 994(h)).

9. Obviously, the practical value of a policy of selective incapacitation increases as we are less restrictive in choosing which indicators of prior criminal activity should be used. There is very little power if we limit ourselves to adult convictions. There is more if we can include *juvenile* convictions, and there seems to be good reasons for doing this. We are tempted to go further and include indictments or arrests covered by warrants on the ground that one must meet a moderately high standard of evidentiary proof to secure such actions from the criminal justice system, and because such information can give clues about the rate and persistence of offending.

M. MOORE, S. ESTRICH, & D. MCGILLIS, DEALING WITH DANGEROUS OFFENDERS 132 (Washington: National Institute of Justice 1983); *see also* J.M. CHAIKEN & M.R. CHAIKEN, *supra* note 2, at 111; M. WOLFGANG, R. FIGLIO & T. SELLIN, DELINQUENCY IN A BIRTH COHORT (1972); Wolfgang, *The Violent Juvenile: A Philadelphia Profile* in VIOLENT CRIME IN AMERICA 17, 21-22 (K. Feinberg, ed. Washington: National Policy Exchange).

to the point, arrests are currently used at every stage of the criminal justice system to justify law enforcement decisions. Consequently, one can hardly accuse the policymaker who favors the use of certain arrest data in fashioning a policy of selective incapacitation of permitting a new, inappropriate factor to enter into the decision making process.

C. The Use of Personal Offender Variables

A third consideration for the policymaker is what personal offender variables, if any, should be included in constructing a selective incapacitation policy. For example, do we include variables over which the individual has no control, such as I.Q. and demographic characteristics? What about variables that constitute "suspect classifications," such as race and religion? Finally, how should we treat those variables that are at least partially under the offender's control and which correlate significantly with criminal conduct, such as drug use? A purely utilitarian argument can be made that improving our ability to predict offender dangerousness justifies consideration of any variable that helps distinguish the high-risk from the low-risk offender. Yet one must exclude, even at the expense of accurate prediction, both those variables over which the individual has no control and those deemed constitutionally "suspect."[10]

This restriction appears to pose a conflict for the constitutionally conscientious policymaker bent on using the most accurate predictions of dangerousness to justify selective incapacitation. But the conflict is more apparent than real for two reasons. First, use of such questionable variables is viewed by most public officials as obviously unjust, possibly unconstitutional and politically unpopular as well.[11] Second, there is increasing evidence that the use of such personal variables is of relatively limited utility in defining dangerousness.[12] The most accurate predictors appear to relate to the prior criminal activity of the offender. These include age at first arrest, the number and type of prior arrests and the time recently served in jail. Other accurate predictors reflect variables over which the individual has some degree of control, such as drug use and unemployment.[13] Thus, it is

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10. *See, e.g.,* Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Justice,* 88 YALE L. J. 1414 (1979). As to the inappropriateness of considering the factor of race, *see* Blumstein, *supra* note 7, at 11-12.

11. *See, e.g.,* M. MOORE, S. ESTRICH, D. MCGILLIS, *supra* note 9, at 132-133; *see also* S. 1630, *supra* note 6, at § 126 (proposed 28 U.S.C. § 994(d)). ("The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.")

12. P. GREENWOOD, *supra* note 2; K. WILLIAMS, SCOPE AND PREDICTION OF RECIDIVISM (Washington: Institute for Law and Social Research, 1979).

13. *See, e.g.,* Forst & Wish, *supra* note 2, at 84; Blumstein, *supra* note 7, at 10; *cf.* M. MOORE, S. ESTRICH, D. MCGILLIS, *supra* note 9, at 132-133.

unlikely that the reluctance to use such individual variables will compromise the effectiveness of a selective incapacitation program. Instead, the new policy consider only those variables associated with the offender's prior criminal activity and factors primarily under the offender's control.

Opponents of selective incapacitation may criticize as unjust the consideration of such voluntary control variables as drug use. Most pending legislative proposals to implement a policy of selective incapacitation incorporate a reference to drug use on the assumption that such a variable is under the control of the offender, is evidence of criminality and is relatively easy to measure in the individual case. The variable has, therefore, been deemed to yield substantial crime control benefits.[14] Beyond this, we must remember that such voluntary control variables are routinely used today. It then seems unfair to criticize the policymaker for developing a formal policy of incapacitation which seeks to include a more candid, open reference to those very voluntary control factors which today constitute an unarticulated justification for imprisonment.

III

SELECTIVE INCAPACITATION: THE PROBLEM OF IMPERFECT PREDICTION

Even if proposed selective incapacitation policies are based primarily on carefully measured prior criminal activity with only limited use of voluntary control variables, a major obstacle still remains: how does one determine which individual offenders should, in fact, be subjected to such a policy? It is one thing to maintain that an effective law enforcement strategy should be based on the idea of incarcerating the so-called high-risk offender. But how does the policymaker guard against the problem of the imperfect prediction, which can lead to the unjust, lengthy incarceration of a "low-risk" offender? The legitimacy of selective incapacitation is placed in question by this issue.[15] In attempting to predict future criminal behavior, how justifiable is it for the policymaker to rely on past data in deciding whether to imprison today? The effort to predict future criminal behavior by making

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14. E. WISH, AN ANALYSIS OF DRUGS AND CRIME AMONG ARRESTEES IN THE DISTRICT OF COLUMBIA (Washington: U.S. Dept. of Justice 1981); Forst & Wish, *supra* note 2, at 84.

15. *See, e.g.,* Blumstein, *supra* note 7, at 10-11. Of course, an argument can be made that *even if the prediction of future criminality is accurate,* it is inherently unjust to extend the term of incarceration beyond that justified as punishment for commission of the present offense. *See* Underwood, *supra* note 10, Von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons,* 21 BUFFALO L. REV., 717, 745 (1972). But the imposition of any term of imprisonment takes into account various utilitarian societal interests, such as general deterrence, along with the interests of the individual offender. Such utilitarian justifications should not suddenly offend basic notions of justice simply because they are considered pursuant to a policy of selective incapacitation. *See, e.g.,* H. Packer, THE LIMITS OF THE CRIMINAL SANCTION 37-58 (1968).

questionable distinctions among offenders may produce errors resulting in low-risk offenders being swept into the high-risk group.[16]

There are various answers to this dilemma. One could, of course, maintain that the problem of the false prediction is not a problem at all, that the policymaker need not be particularly concerned with sending too many present offenders to jail for too long a period of time. The offender has, after all, already been convicted of a crime; any cries of unfairness directed at the length of her imprisonment have a particularly hollow ring.

But surely this is not a satisfactory answer. Even if one refuses to recognize the injustice of sentencing an offender to a lengthy term of imprisonment based upon a false prediction of "high-risk" future criminality, there are important pragmatic reasons for rejecting this approach. Where would society house this expanding group of offenders? Who would pay for the expensive construction and maintenance of new prison facilities? To what extent does such a nonselective policy repeat past errors by spreading the resources of the criminal justice system too thin? These and other practical questions cannot be ignored.

One answer to this problem of imperfect prediction is to continue research aimed at improving the process of determining the characteristics of the "high-risk" offender. The policy of selective incapacitation should proceed, but with caution.[17] In the meantime, however, the ideal perfect justice must not be allowed to prevent us from implementing changes for the better. This is the message conveyed by recent Rand studies and others.[18] Important weaknesses in the methodology of predicting future dangerousness, for example relying *only* on adult conviction records in determining prior criminal activity, should be corrected. In one recent article, authors Brian Forst and Erick Wish convincingly demonstrate the relationship between drug use and crimes committed by high-risk offenders.[19] They conclude that "[v]irtually every study of selective incapacitation has identified drug use generally, and heroin use in particular, as one of the strongest determinants of dangerousness." They recommend "[m]ore reliable detection of drug use by urinalysis testing and more systematic use of this and other relevant information in criminal justice decisions."[20] Such research

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16. J. MONAHAN, PREDICTING VIOLENT BEHAVIOR 31-36 (1981); N. MORRIS, *supra* note 4, at 62-73.

17. *See, e.g.,* Gillers, *supra* note 1 at 381-82; M. MOORE, S. ESTRICH, & D. MCGILLIS, DEALING WITH DANGEROUS OFFENDERS: EXECUTIVE SUMMARY, 24-25, 30-31 (Washington: National Institute of Justice 1983), Blumstein, *supra* note 7 at 14.

18. J.M. Chaiken & M.R. Chaiken, *supra* note 2; P. GREENWOOD, *supra* note 2; Sherman, *Prisons in the Theatre of American Justice* in VIOLENT CRIME IN AMERICA 54, 60 (K. Feinberg, ed. Washington: National Policy Exchange 1983); Forst & Wish, *supra* note 2, at 84, 86.

19. Forst & Wish, *supra* note 2 at 84.

20. *Id.* at 92-93. *Cf. M. Moore, S. Estrich, D. McGillis, supra* note 10, at 133.

constitutes one more attempt to draw a more accurate composite picture of that high-risk offender who should be the target of a selective incapacitation strategy.

The Forst and Wish article is important for another reason: it describes an attempt to distinguish the serious high-risk offender from the relatively low-risk offender before detention and sentencing. At the present time, significant differences between less predatory offenders and career criminals are almost always detected in hindsight rather than before detention decisions when they can be useful. There has still been very little research into the predictive methodologies that enable one to distinguish the serious predatory offender from the relatively more benign one.[21] Research into such "predictive methodologies" by Forst, Wish, and others, must continue.

Merely improving our research, however important a goal this may be, is an inadequate political response to the charge of imperfect prediction. There is, however, a pragmatic answer to the critics which is both more convincing and politically marketable. In addition, it lies at the heart of any defense of a sentencing reform policy based upon selective incapacitation. This is the crucial importance of comparing a forthright policy of selective incapacitation with existing law.

This approach of defending selective incapacitation as a means of improving the fairness of the existing system can be demonstrated by examining two controversial criminal justice procedures: bail and parole release.

A. Bail and Preventive Detention

Nowhere is the value of public accountability more obvious than in the fruitless, ongoing debate over the issue of "preventive detention." There are those who criticize federal legislative proposals which recommend that judges assess a suspect's threat to the community in deciding whether or not to permit bail.[22] Such assessments are made every day, albeit under the traditional guise of determining the suspect's likelihood of appearance at trial.[23] If the suspect is, in fact, deemed a danger, the judge imposes a high-money bail, purportedly based on a finding that the defendant is unlikely to appear for the scheduled trial.[24] If the defendant is unable to raise the

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21. Blumstein, *supra* note 7, at 2, 6-7.

22. *See, e.g.*, S. 117, 98th Cong., 1st Sess. (1983); S. 829, 98th Cong., 1st Sess. (1983); H.R. 2151, 98th Cong., 1st Sess. (1983), *see also* S. 1630, *supra* note 6, at § 101 (proposed 18 U.S.C. § 3502) where the idea of tying considerations of community safety in making the bail decision to limitations on the arbitrary use of money bail first received Congressional attention.

23. 18 U.S.C. § 3146(a).

24. S. Rep. No. 307, 97th Cong., 1st Sess. 1148-1149, 1154-1155 (1981); J. Roth & P. Wice, PRETRIAL RELEASE AND MISCONDUCT IN THE DISTRICT OF COLUMBIA (Institute for Law and Social Research: Washington 1980).

required sum, she can be detained pending trial. Thus, preventive detention is accomplished indirectly and with a lack of judicial accountability.[25]

A major improvement in the existing system would be accomplished if judges were required to make an assessment of danger for the record and were prohibited from using "likelihood of appearance" as a substitute for the dangerousness decision.[26] Candor and accountability would replace subterfuge. The consequence of an inaccurate prediction of danger at the pretrial bail stage would be limited to pretrial detention for a few weeks or months.

An interesting question is whether or not such bail reform would actually lead to less pretrial detention. Judges would no longer be able to hide their detention decision behind the guise of "likelihood of appearance." Forced to be candid, judges may decide that many defendants really are not dangerous.

B. Parole Release

Current parole release practices also demonstrate how efforts at predicting future behavior, however well-intentioned, can promote injustice.

Not all prisoners are paroled. A prediction is sometimes made that the prisoner cannot be safely released. The prisoner constitutes a danger to society if released now, and parole is denied. In effect the prisoner is "selectively incapacitated."

The merits of parole release are not usually considered from an incapacitative perspective. Instead, parole is viewed by many policymakers and civil libertarians as either a benevolent device, designed to promote early release, or as an important safety valve, designed to shorten excessive sentences of imprisonment and rectify sentencing disparities.[27] If one examines parole from these traditional perspectives, one may oppose those efforts by Senator Kennedy and others to abolish parole.

Senator Kennedy views parole as an unfair means of extending the prison terms of those prisoners who are not released.[28] From this perspec-

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25. S. Rep. No. 307, *supra* note 24, at 1154-1155. For a good example of how the existing system works in practice, *see* Landes, *Legality and Reality: Some Evidence on Criminal Procedure,* 3 J. LEGAL STUD. 287 (1974).

26. This is precisely what Senator Kennedy has proposed. *See* S. 1630, *supra* note 6, at § 101 (proposed 18 U.S.C. § 3505). Critics of preventive detention seem not at all troubled about basing bail decisions on predictions of likelihood of appearance, even though such predictions may be less reliable than predictions of dangerousness. *See* J. Roth & P. Wice, *supra* note 24.

27. *See, e.g., Reform of the Federal Criminal Laws, Hearings Before the Senate Committee on the Judiciary,* 97th Cong., 1st Sess. 8973, 9020-28, 9127 (1981). S. Rep. No. 307, *supra* note 24, at 1331-33.

28. *See, e.g.,* Kennedy, *The Federal Criminal Code Reform Act and New Sentencing Alternatives,* 82 W. VA. L. REV. 423 (1980); Kennedy, *Toward a New System of Criminal Sentencing: Law With Order,* 16 AM. CRIM. L. REV. 353 (1979).

tive, inaccurate predictions of potential offender danger are made every day under the benevolent guise of parole release.[29] Senator Kennedy would not attempt to reform the parole system through accountability and candor. Instead, he would abolish parole release on the ground that it constitutes an unnecessary division of sentencing authority within the court system. In its place, he would enact a comprehensive sentencing reform package based on a return to the determinate sentence and the promulgation of a presumptive sentencing guidelines system.[30]

IV

SELECTIVE INCAPACITATION AND THE PROMOTION OF EQUITY

In defending a policy of selective incapacitation, one must first compare it to present sentencing practices. Today, sentencing decisions are often made in the dark.[31] As a result, the criminal justice system is seriously flawed in two important respects.

First, and of most visible concern to the public, is the justifiable perception that too many high-risk offenders who should be incarcerated are slipping through the system. This perception provokes the almost universal call to "get tough" with the violent criminal through increased use of incarceration. If a formal theory of incapacitation cannot justify such a policy on the ground that predicting future violent behavior is a difficult business fraught with inequity, the policymaker will simply find other justifications for imprisonment.

Second, the opposite problem, often ignored by the policymaker on grounds of political inconvenience, is that indifference towards the fate of false positives leads to imprisonment of the low-risk offender.[32] Unarticulated sentencing assumptions and criteria are used to justify the sanction of

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29. M. MOORE, S. ESTRICH, D. MCGILLIS, *supra* note 9 at 14.

30. This comprehensive sentencing scheme is found in S. 1630, *supra* note 6. In promulgating such guidelines, the Sentencing Guidelines Commission is instructed to take into account "the nature and capacity of the penal, correctional, and other facilities and services available in order . . . to assure that the available capacities of such facilities and services will not be exceeded." *Id.* at § 126 (proposed 28 U.S.C. § 994(g)). In addition, the Commission "shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." *Id.* (Proposed 28 U.S.C. § 994(i)). Thus, the Kennedy sentencing reform package is designed to confront head-on the fear voiced by Professor Morris and others that selective incapacitation might be used to expand the use of imprisonment.

31. Blumstein, *supra* note 7, at 10-11. *See also* M. MOORE, S. ESTRICH, & D. MCGILLIS, *supra* note 17, at 10-11. One commentator has noted that today even critics of prediction can and do "retain the benefits of prediction while denying its legitimacy." *See* Underwood, *supra* note 11, at 1419.

32. Sherman, *supra* note 18, at 54, 60; Forst & Wish, *supra* note 2, at 84, 86.

imprisonment. Imprisoning false positives fails to assure that the limited prison space will be reserved for the high-risk offender. The result is that today unnecessarily harsh sanctions are inflicted on those demonstrably less dangerous. At the same time, others, more dangerous, either avoid imprisonment altogether or are released on parole after serving only a portion of their sentence. The result is clear. Our current prison crisis is, in large part, a "composition crisis," with too many of the wrong people occupying limited available prison space.[33]

When compared to these existing sentencing practices based on implicit, unarticulated variables, candid reliance on selective incapacitation data, whatever its limitations, should be viewed as an important improvement in current law. Such "sunlight" can promote due process, place all the players in the criminal justice system on notice concerning the factors to be considered in deciding an appropriate sentence, and increase the possibility that like cases will be treated alike.[34] Before critics raise the red flag when it comes to a policy of selective incapacitation, they should compare proposals for reform with the sad state of existing law. Such comparison lends credence to the pursuit of a new candid incapacitation policy.[35]

V

SELECTIVE INCAPACITATION: BENEFICIAL SIDE EFFECTS

What are some of the beneficial side effects of a policy of selective incapacitation that may be ignored in the course of the debate? It is a mistake from a public policy perspective to view selective incapacitation as an inevitable harsh instrument of injustice; it can be an effective instrument for reconstituting the current prison population. Perhaps most importantly, implementing such a policy *would* force public officials to acknowledge the need to develop non-incarcerative alternatives for the low-risk offender. Programs based on community service, restitution, probation, and work release, would assume a new importance if premium prison space were reserved for the high-risk offender.

Selective incapacitation also encourages the other components of the criminal justice system, especially the police, to pay less attention to less serious crimes and criminals. This welcome side effect is especially important today as depleted budgets have compelled all components of the crimi-

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33. Sherman, *supra* note 18, at 54, 56-57.

34. *See* M. MOORE, S. ESTRICH, & D. MCGILLIS, *supra* note 9 at 117, 172 n.13.

35. Sherman, *supra* note 18, at 54, 60; Forst & Wish, *supra* note 2, at 84, 86. "In an important sense, the concept of 'selective incapacitation' may be justified because it is within our current practices. Indeed, one can argue that selective incapacitation *is* our current practice. We just call it something else and do it less explicitly and more unfairly than would be possible if the policy were explicitly acknowledged and managed." M. MOORE, S. ESTRICH, D. MCGILLIS, *supra* note 9, at 114.

nal justice system to prioritize their needs and goals. A policy of selective incapacitation can offer the law enforcement community a justification for spending limited criminal justice resources primarily on combating violent crimes committed by the high-risk offender.

Such prioritizing may, of course, promote short-term political flack, particularly among citizens who look to the police for the resolution of all disputes, however minor. General maintenance of community order, however, must be balanced against the need to investigate, apprehend, prosecute and imprison the high-risk offender. In the long run, selective incapacitation can be a catalyst for a beneficial reallocation of resources.

Finally, a carefully crafted policy of selective incapacitation can do indirectly what policymakers are reluctant to do directly—acknowledge that many crimes currently on the statute books are simply not worth enforcing. Selective incapacitation provides the policymaker with a convenient "out," an indirect way of acknowledging that society is not willing, or financially able, to prosecute all crimes, however minor or inconsequential. A policy would indicate that certain conduct should not be deemed criminal or, at the very least, that the limited law enforcement resources and the severe sanction of imprisonment should be reserved for commission of the most serious offenses.

VI

CONCLUSION

Selective incapacitation cannot be labeled per se "liberal" or "conservative," "pro law enforcement" or "pro defendant." In the hands of the policymaker, it can be either a harsh instrument for expanding an already overflowing prison population or a means for carefully restricting the use of incarceration. There is nothing inherently illiberal in championing a policy of selective incapacitation as the primary rationale for comprehensive sentencing reform. How selective incapacitation is defined and implemented determines whether it will be used as a method of controlling the size and nature of our prison population, or merely as one more political symbol of crime control, offered by those who promise success against crime only if we "get tough" with criminals.

Regardless of one's views about selective incapacitation, one should not be misled into believing that it constitutes a watershed in dealing with the high-risk offender. Selective incapacitation is not new. Our criminal justice system continues to focus the bulk of its resources on the dangerous offender. The flawed capacity to predict such dangerousness is a common, integral aspect of the existing system. Decisions to imprison are made every day by criminal justice officials relying on flawed predictions.

Opposition to any policy of selective incapacitation is based upon the justifiable fear that the formalized use of the policy constitutes a rationale

for increased use of imprisonment, which will result in a vast expansion of our prison population and the spawning of a harsher criminal justice system. Though legitimate, these concerns are based on a political judgment. Opponents assume that the potential benefits associated with selective incapacitation such as greater fairness in the handling of offenders, targeting the limited law enforcement resources at the most dangerous offender, more effective crime control at less cost, and new respect for the criminal law, are outweighed by anticipated harms or will simply not be realized. If compelled to evaluate the strengths and weaknesses of selective incapacitation in a public policy vacuum, without the benefit of comparison with existing criminal justice procedures, I might very well conclude that the downside risks outweighed the potential benefits. Innate political cynicism concerning how the public policy balance would ultimately be struck might lead me to side with the critics.

The current situation is, however, not that simple. We are not starting from square one; we have not been asked to fill a public policy vacuum. The criminal justice system practices a policy of selective incapacitation in the dark, and functions all too often through the use of "hunch, guess and gut reaction" when it comes to the critical issue of predicting dangerousness. I would opt instead for a policy of selective incapacitation designed to bring increased candor and accountability to the process. I acknowledge the limitations of my argument. Not only is candor no guarantee that unbridled law enforcement discretion will become more principled, but there is also the very real possibility that the policymakers will exercise their option to favor increased use of imprisonment. In addition, constitutional principles and considerations of justice and fair play preclude the use of certain variables, now used informally, that aid in the prediction process. Candor is not the answer to all of the problems surrounding selective incapacitation.

I conclude that a properly implemented policy of selective incapacitation can be an important part of a comprehensive criminal justice reform strategy. Though unlikely to have much of an impact on the violent crime rate, a policy of selective incapacitation can significantly reduce the current injustice in the criminal justice system. To those supporters and critics who view selective incapacitation simply in terms of crime control, this could prove to be the biggest irony of all.