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Criminal Incapacitation



William Spelman

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William Spelman

Lyndon B. Johnson School of Public Affairs
University of Texas
Austin, Texas

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Preface

There is nothing uglier than a catfish. With its scaleless, eel-like body, flat, semicircular head, and cartilaginous whiskers, it looks almost entirely unlike a cat. The toothless, sluggish beasts can be found on the bottom of warm streams and lakes, living on scum and detritus. Such a diet is healthier than it sounds: divers in the Ohio River regularly report sighting catfish the size of small whales, and cats in the Mekong River in Southeast Asia often weigh nearly 700 pounds.

Ugly or not, the catfish is good to eat. Deep-fried catfish is a Southern staple; more ambitious recipes add Parmesan cheese, bacon drippings and paprika, or Amontillado. Catfish is also good for you. One pound of channel catfish provides nearly all the protein but only half the calories and fat of 1 pound of solid white albacore tuna. Catfish is a particularly good source of alpha-tocopherol and B vitamins. Because they are both nutritious and tasty, cats are America's biggest aquaculture product.

Incapacitation is the channel catfish of crime policy. In a world in which we value elegant solutions to thorny problems, mere imprisonment stands out as ill-bred and underdressed. And when incapacitation is combined with prediction, even the heartiest eaters scan the menu for an alternative. Some observers have made a cottage industry out of identifying the internal inconsistencies, potential injustices, and sheer gaucherie of selective activities. Predictive scales are of "low validity" and bring with them "unjustified risks of abuse." A review of the criminological literature (but not of estimates of the utility or equity of selective policies) finds that

the evidence is clear that the career criminal idea is not sufficiently substantial to command more than a small portion of the time and effort of the criminal justice practitioner or academic community. (Gottfredson & Hirschi, 1986, p. 231)

Such terms as *low validity*, *unjustified risks*, and *sufficient substance* are rarely defined.

No one wants to eat ugly food. But when there are limited sources of nutrition, appearances seem less important. Can a steady diet of prison construction be toxic? What is the nutritional value of predicting criminality? That's what this book is all about.

This is a complex issue. As I show in the text, many of the potential costs

and benefits are difficult to measure or even to describe. So this work is at best a partial analysis of some of the easier questions. But it all proceeds from the position that utility is the most appropriate guide to public decision making, and careful examination of consequences has been noticeably absent where this issue is concerned.

No one writes so many pages without help, and I am grateful to my friends and colleagues for assisting me whenever they could. John Eck was always available to apply good sense to the wildest of ideas and to contribute other ideas even wilder. William Bieck, William Gay, Kai Martensen, Susan Martin, Edward Spurlock, Stephen Pilkington, and Thomas Sweeney all contributed greatly to my thinking on the effectiveness and structure of selective police programs; Brian Forst, Peter Hoffman, and Joan Jacoby provided equally valuable contributions to my thinking on selective prosecution and sentencing programs. I am embarrassed to note that it took 3 years of intermittent haranguing before I took seriously Mark Kleiman's comments on the importance of deterrence; he and Philip Cook showed me that deterrence could be reasonably included in the effectiveness estimates, and their suggestions have improved this document considerably.

Alfred Blumstein, Jan and Marcia Chaiken, Kim English, Andrew von Hirsch, Julie Horney, Albert J. Reiss, Jr., and Barbara Salert all provided valuable data or pointed me to sources of information that proved vital to my understanding. David Geiger provided computational assistance at a time when it was badly needed. Barbara Jann typed the tables, and Jon Hockenyo and Glen Hartnett produced fine graphs on deadline. The primary data set analyzed in this report was collected by the Rand Corporation, under the supervision of Mark Peterson, Jan Chaiken, and Patricia Ebener. Their data were made available by the Inter-university Consortium for Political and Social Research.

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Much of the substance and most of the thinking processes in this book result from Mark H. Moore's end of our discussions over the last 10 years. Had he not exhibited good sense, humor, and patience in the face of my wildest flights—some of fancy, others in airplanes—this work could simply not have been completed. James Q. Wilson, in urging me to completely rethink the policy implications, gave me the best single piece of advice I received in 4 years of writing. Herman B. Leonard simplified my sometimes Byzantine logic. Were Joel Garner, my project monitor at the National Institute of Justice, any more patient and helpful, he would be eligible for canonization. But perhaps I sell him short.

My wife, Nancy La Vigne, was by turns whip, wheedler, and safe harbor during the last stages of writing. Without her good counsel and support, I would

doubtless still be making marginal “improvements” well beyond the limits of cognition.

As always, none of the good people or fine organizations cited above may be blamed for the remaining faults and errors of analysis and interpretation. These are all mine. If experience is the name one gives to one’s mistakes, in writing this I have no doubt become rich in experience beyond my imagination!

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Introduction

SPRINGFIELD, MASSACHUSETTS—When Hampden County ran out of jail space, Sheriff Michael J. Ashe, Jr. seized the local National Guard armory to handle the overflow. Nine months later, the state turned down his request for \$450,000 to continue the operation, and the inmates were released.

ALBANY, NEW YORK—At their graduation from the New York Correctional Academy, 154 rookie prison guards were informed that they would be laid off in six weeks. Due to the state's budget deficit, almost 3,000 guards lost their jobs—even though the number of prisoners increased by 7 percent.

AUSTIN, TEXAS—Despite a \$4.8 billion deficit, the Texas State Senate voted to spend \$1.1 billion more to build 30,000 new prison beds. A move to create additional alternatives to prison was dismissed as “a public relations disaster.” Meanwhile, fear of crime and sales of burglar alarms and guns rose sharply in Houston after the Harris County Sheriff released 150 inmates to relieve jail overcrowding.

The number of Americans in prison more than doubled in the 1980s, and continues to expand today. Some 740,000 Americans are in prisons, and another 200,000 are in county jails serving felony sentences (Beck, 1991; Cohen, 1991). Often the use of imprisonment has exceeded the capacity: According to 1990 Department of Justice statistics, 32 of the 50 states were imprisoning more offenders than their prisons were designed to hold. The federal system was 51 percent above designed capacity. Still, legislators face considerable public pressure to expand the use of imprisonment. According to public opinion polls, 84 percent of Americans felt the courts were too lenient with convicted offenders; only 3 percent felt the courts were too harsh. Identical figures were reported in 1977—460,000 prison cells ago (Flanagan & Maguire, 1990, pp. 160–161, 583).

Many members of the criminal justice community feel the same pressures. Efforts to rehabilitate and deter offenders, and to reform the society that produces them, have come and gone without apparent effect. But incapacitation—putting criminals behind bars, where they cannot get at the rest of us—seems certain to work, at least temporarily. Will incapacitation strategies be effective enough to merit the costs?

In part as a means of cutting costs, some states have experimented with selective approaches. Criminal justice professionals have long known that a few, especially frequent and serious offenders commit a lot of crimes; by reserving scarce jail and prison space for the most dangerous—and perhaps devoting extra police and prosecution attention to them, as well—some believed we could cut the crime rate at no extra charge. On the other hand, research showed that the frequent and serious offenders looked a lot like the others, and predictions of future dangerousness were often wrong. This ethical dilemma had a practical corollary: If the predictions were wrong often enough, selective incapacitation could do more harm than good. Are selective incapacitation policies a practical solution or a mistake?

To answer these questions, quantitative information about the careers of criminals and the operation of the criminal justice system is needed. In this book, I examine what is known about criminal careers—how long they last, how often offenders commit crimes, how often they get caught—and use the available information to estimate the likely effectiveness of prison expansion and of selective police, prosecution, and judicial policies. Because much of this information is uncertain (after all, offenders go to some trouble to keep their activities a secret), the focus is on setting reasonable limits on the effectiveness of these policies, rather than on making single point estimates.

Criminal careers and incapacitation policies are examined in detail in Chapters 2 through 7. Before turning to the details, however, let us first step back and consider the question of selective criminal justice policies from a broader perspective. In the next section, an economic model of crime control through incapacitation is developed. This model provides the basic framework for considering the benefits and costs of competing policies.

An Economic Model of Incapacitation

The social tradeoff between crime and crime control, like many such tradeoffs, can be considered to consist of two parts: a utility or cost function and a production function. Simply put, the production function tells us what is available, and the cost function tells us how to choose among available alternatives. Consider the cost function first.

The Costs of Crime and Crime Control

Crime is bad news. Victims are sometimes injured. They often suffer financial losses. When they attempt to cooperate with the authorities, they are often inconvenienced. Many crimes involve the use or threat of force, and the victims are understandably anxious about what happened, what could have happened, and what their experience tells them about what may happen in the future. Perhaps most important, bad news travels fast—through the news media, in popular

fiction, and most devastatingly, through word of mouth. Many Americans, whether victims or not, are uneasy about their prospects of surviving attacks on their person and property, to the point that crime is usually ranked in public opinion polls as one of the most serious social problems with which the government must deal (Farah & Vale, 1985; Ladd, 1988). To calm our fears, we spend millions of dollars each year on insurance and self-protection devices and organizations; many of us avoid activities we enjoy because we are afraid of victimization.

The primary governmental response to crime—the criminal justice system—is also bad in an important sense. Police, prosecutors, courts, jails, and prisons all cost enormous amounts of money. Some \$50 billion is spent on the system each year; this is about 3 percent of all government expenditures, and about 8 percent of state and local government expenditures (Lindgren, 1988). Add in the construction costs of jails, prisons, and office buildings, the loss to society of the (perhaps scant and sporadic) positive contributions of incarcerated offenders, and the economic and psychological costs of incarceration on the dependents of offenders and the communities in which they live, and the costs of crime control grow even larger.

Of course, there are good reasons for spending so much money on the criminal justice system. By providing for police, judges, prisons, and the like, we may buy ourselves a measure of security. Providing the money is well spent, it is reasonable to suspect that the more we spend on crime control, the lower the incidence of crime. And expenditures on crime control make us feel better, too: The thought that justice is done, if less swiftly and efficiently than we might like, salves the wounds created by criminal acts.

Schematically, the tradeoff between crime and the criminal justice system might be portrayed as in Figure 1.1. The costs of crime and the expenses of the

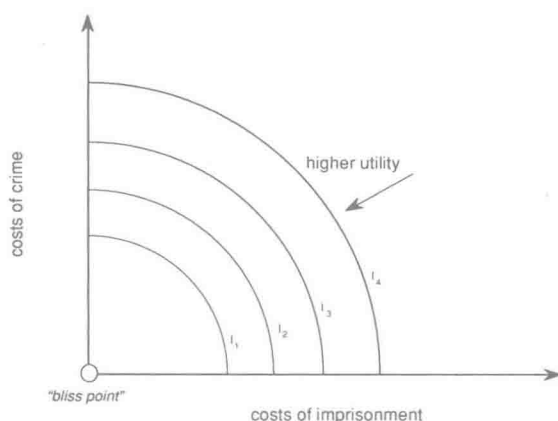


FIGURE 1.1. The best tradeoff between crime and imprisonment probably involves some of each.

criminal justice system are both economic *bads*, and the best situation—the “bliss point”—is the case where there is no crime, and no need for crime control. In making decisions as to how much to spend on crime control and justice, society must trade off between these two *bads*. The social utility of any given tradeoff may be represented by a series of indifference curves, designated I_1 , I_2 , and so on (Hicks, 1946). The highest valued curves are those closest to the bliss point.

This tradeoff is constrained by what it is possible for the criminal justice system to produce. Consider next how the system reduces the incidence and seriousness of crime.

The Production of Crime Control

The criminal justice system controls crime in several ways. By maintaining a threat of punishment for those who commit crimes, it may deter potential offenders from committing criminal acts in the first place. Alternatively, offenders who have been punished may be deterred by the threat of being punished again. If deterrence is unsuccessful, the system may rehabilitate offenders once they have been caught. And if rehabilitation is unsuccessful, the system can put convicted offenders in jails and prisons where they are unable to harm the rest of us. That is, incarcerated offenders are incapacitated.

Assume for the moment that offenders are only incapacitated while they are serving terms in jail or prison. More dramatic or innovative methods—electrocution or electronic monitoring, for instance—will be put aside for now. The more offenders who are serving time in jails or prisons, the fewer there will be out on the street, and the lower will be the crime rate. Thus the criminal justice system produces crime control according to a schedule—a “production possibilities frontier”—similar in form to that shown in Figure 1.2. Society may trade off between the number of offenders in jail or prison on the one hand, and the number of crimes committed by those at large on the other. A rational society with perfect information will choose Point A, corresponding to that available tradeoff between the two that puts it on its highest valued indifference curve.

Production under Perfect Information

What should this production function look like? It will surely be downward sloping, because the criminal justice system rarely incarcerates innocent people, and guilty offenders are likely to commit crimes in the future. So the more money spent on incarceration, the less crime there should be. Of course, there are infinitely many possible downward-sloping functions; to specify the production function more exactly, it is necessary that we make additional assumptions.

One convenient assumption is that the number of offenders in jail or prison

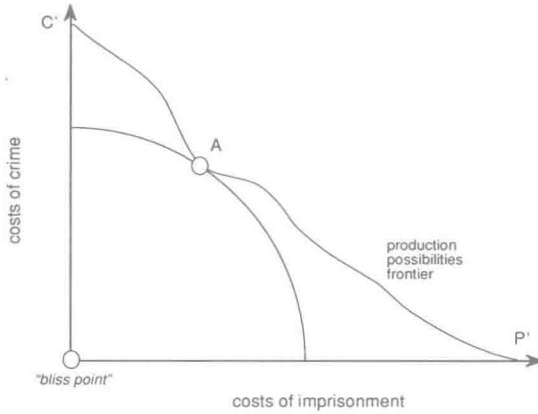


FIGURE 1.2. The production possibilities frontier is the best available set of crime/prison tradeoffs.

does not affect the total number of active offenders, including both those in jail and prison and those out on the street. That is, the size of the criminal population is set by circumstances beyond the control of the criminal justice system; we may choose to keep some criminals in jail or leave them out on the street, but in so doing we do not cause noncriminals to enter the criminal population, and we do not cause these or any other criminals to leave the population. A second convenient assumption is a corollary to the first: By incapacitating or failing to incapacitate any given offender, we do not affect the number and seriousness of the crimes that offender would have committed, had he or she been free. More simply, the criminal justice system is deterring and rehabilitating no one.

If this were true, then it would be possible in theory to spend nothing on crime control and suffer a given, maximum number of crimes. It would also be possible to spend some finite amount on crime control, lock up all active offenders, and suffer no crimes at all. Thus our production possibilities frontier may be anchored on both the vertical and horizontal axes. The anchors are marked C' and P' on Figure 1.2.

This assumption is obviously untenable at the extremes. For example, if there were no punishment at all, many would be tempted to lie, cheat, and steal; if the likelihood of punishment were nearly certain, it is probable that few would remain criminals for long. More generally, it is very likely that some offenders are deterred by current threats of punishment, and that others are rehabilitated as a result of diversion, pretrial intervention, and similar programs (Cook, 1980; Gendreau & Ross, 1979). Nevertheless, the effectiveness of these strategies is in dispute, and at the margin it does not seem unreasonable to suppose that the

effects of deterrence and rehabilitation will be small enough to discount. We will consider deterrence and rehabilitation in more detail in Chapter 8.

Between these two anchors there are still an endless variety of feasible production frontiers. To help specify the shape of the correct frontier, let us consider the notion of the benefit/cost ratio.

From the standpoint of the criminal justice system, the costs of incapacitating offenders are those associated with maintaining the jail or prison in which they are held—guards, food, utilities, administration, and so on. We may wish to hold some offenders in more expensive cells than others: Dangerous offenders merit higher security, for example. Still, let us assume for simplicity that the costs of incarcerating each offender per unit of time are about the same.

Not so for the benefits of incarceration. The benefit is the number of crimes that are not committed because the offender is in jail or prison and thus prevented from committing them. All offenders are not alike: Some commit crimes in which the victims are hurt particularly severely; some commit crimes that inspire particularly oppressive fears among the general population; some just commit crimes more often than others. And incapacitation of the most serious, fear-provoking, and frequent offenders will reduce the costs of crime by more than incapacitation of offenders chosen at random from the offending population. So the benefit/cost ratios associated with incarceration of each offender will differ; if we can identify the most dangerous offenders—those with the largest ratios—we would naturally like to be certain they were the first to be jailed.

In a world of perfect information, the optimal policy might work something like this. A central decision maker collects all the information about the future activities of criminal offenders. The decision maker then assigns a numerical benefit/cost ratio to each offender, corresponding to the frequency and severity of the criminal acts this offender will commit over the next decision period—say, 6 months. He or she then rearranges the list, ordering the offenders from most dangerous to least dangerous. The most dangerous offenders—those for whom the benefit/cost ratio is sufficiently large to merit incarceration—go to jail or prison. The others are left free, presumably to continue their criminal careers. By only incapacitating the most frequent and dangerous on the list, the decision maker can get to a point on the highest valued indifference curve.

The optimal policy resulting from such a utopian policy can be summarized in Figure 1.3. Note that the production possibilities frontier is concave, or “inward sloping.” Due to heterogeneity in benefit/cost ratios among offenders, the number of crimes has been reduced substantially (here, 50 percent) by incarcerating only a small proportion of the offenders (here, 10 percent). It is easy to see that, the more heterogeneity in benefit/cost ratios among offenders, the more beneficial incapacitative actions of the criminal justice system are liable to be: The frontier will be more concave, and the points on it will lie closer to the bliss point.

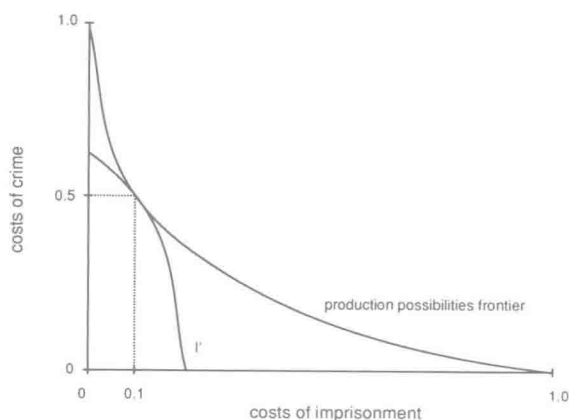


FIGURE 1.3. Optimal incapacitation policy given perfect information.

Production under Imperfect Information

The perfect information allocation sets a standard by which we may compare true allocations. But it is obviously impossible, because the information available is by no means perfect. There are several sources of uncertainty.

First, it is uncertain who the most dangerous offenders have been, much less who the most dangerous offenders will be. Arrest and conviction records, drug and employment histories, and informant reports all provide valuable clues as to the dangerousness of active criminals. But these data are themselves often unreliable, and the picture they give of any given offender's past activities may well be incorrect.

Even if our data as to the recent criminal activities of individuals were perfect, the crime control effectiveness of incapacitation depends upon future, not past activities. It seems reasonable to suspect that the recent past will be highly correlated with the short-term future; but unless the correlation is perfect, some information will be lost. And our reasonable suspicion is little more than that: Little is known about changes in an individual's degree of dangerousness over time.

Third, note that we can only collect information about the present or future activities of individuals by keeping them out of jail for a time, and observing their activities. Now changes in dangerousness become particularly critical: If the typical frequent offender is only very frequent for a short section of his or her criminal career, or if criminal careers are themselves short, then it may be that we are unable to gather enough information about the frequency of offenders until they are no longer committing serious crimes at high rates. In the limiting case, it

is conceivable that dangerous offenders stop being dangerous at just about the point that we recognize who they are. Thus selectively incapacitating those offenders who appear to have been most dangerous may be even less beneficial than incapacitating offenders at random.

No matter how good our information as to past, present, or future criminal activities, as a practical matter we cannot imprison people just because we have a moral certainty that they are prisonworthy. Perhaps in part because our information is unreliable, each offender must be implicated in one or more past offenses, charged with committing them, and convicted before being sentenced to jail or prison. Many crimes are not solved, many solved cases will not stand up in court, and the adjudication process is slow. So even if it takes little time to establish that a given offender is dangerous, it will typically be months or years before we can do something about it. Even when we have grounds for imprisoning offenders, we may not have grounds for imprisoning them for very long if the crime is minor.

These are sources of uncertainty about the criminal population. There is also considerable uncertainty as to the indifference function. The cost of any crime is the harm done to the victims, plus the harm to nonvictims who insure, avoid, self-protect, or merely worry as a result. If we could predict all the crimes an offender would commit, we could probably estimate the direct costs of incarcerating that offender (Cavanagh, 1990), and the direct benefits of preventing these crimes (Cohen, 1988). But the indirect benefits and costs are difficult to estimate. It is uncertain the degree to which insurance, avoidance, and other reactions to crime depend on objective crime rates and subjective factors that would not be affected by reductions in crime (DuBow, McCabe, & Kaplan, 1979). And little is known about the effects on the economic and social life of a community of incarcerating a large proportion of its members, even though many urban neighborhoods fit this description (Silberman, 1977). So we cannot even be sure as to the slope of the indifference curve.

All this means that the production possibilities frontier facing the real criminal justice system is less favorable than it would be, were perfect information available: We lose benefits in direct proportion to our inability to collect and use the data we need. Similarly, our inability to evaluate the benefits and costs of different points on the frontier reduces our ability to choose intelligently among different levels of crime control. In the limiting case, it may be that the data are so unreliable, the benefit/cost ratios are so mutable, the opportunities to use what little information is available are so infrequent, and the indirect effects of incapacitation so uncertain, that it is hardly worth the trouble to use this information at all.

This seems to be the (implicit) position of the present criminal justice system. Some police departments have adopted programs aimed at increasing the risks of apprehension to the most dangerous offenders; some prosecutors have

adopted procedures that increase the likelihood of conviction and the seriousness of the conviction charge for dangerous offenders; some courts and correctional systems have instituted changes in incarceration policies aimed at holding the worst offenders for longer periods. Some have advocated that prison-construction decisions be made on the basis of benefit/cost calculations, rather than (sometimes slippery) philosophical arguments. But, by and large, the present system makes decisions on the basis of justice (and politics) rather than economics. Characteristics of the offense in question are far more important to the present system than the apparent characteristics of the offender (see, for example, Eck & Spelman, 1987; Green, 1961; Institute for Law and Social Research, 1977). Politicians cite a few, egregious cases when they argue for additional prison beds (e.g., Abell, 1989). So the present criminal justice system is probably not working on the highest-valued production possibilities frontier. For example, by using offender information more effectively, we could obtain any point in the shaded region of Figure 1.4.

If the criminal justice system systematically took benefits and costs into account in decision making, it could presumably achieve a better tradeoff. That is, it could either reduce the number of people in jail, or reduce the number of crimes committed, or both. In attempting to do this, two classes of policy handles are available:

Resource levels. How many jail and prison beds are enough? What proportion of offenders should be imprisoned for their actions? Proposals to reduce crime by increasing the number of jail and prison beds are often referred to as *collective incapacitation*.

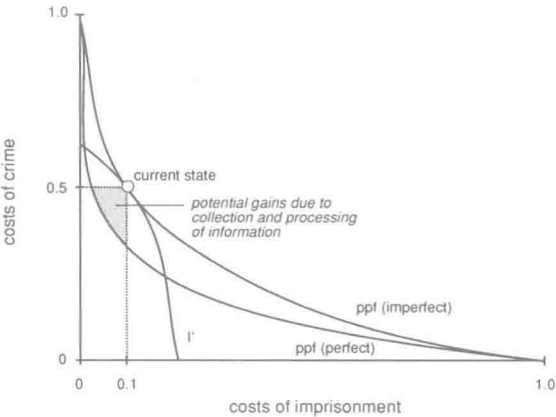


FIGURE 1.4. Better information allows reductions in crime and prison costs.