



SELECTIVE INCAPACITATION AND PUBLIC POLICY

Evaluating California's Imprisonment Crisis

KATHLEEN AUERHAHN

Selective Incapacitation and Public Policy

SUNY series in New Directions in Crime and Justice Studies

Austin T. Turk, editor

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Imprisonment Crisis

Kathleen Auerhahn

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To Robert A. Hanneman,
for his astounding intellect and generosity of spirit

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Part I

The Criminal in Society

Penal Response and Rationale

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Chapter 1

Introduction

This work is about criminal punishment. It is about the philosophical rationales that underlay this practice, and the way in which these justifications shape the methods employed in the enterprise of punishing criminal offenders. It is also about the outcomes that result when the theoretical purposes and operational realities of a system of criminal punishment meet blindly, proceeding without any explicit reference to one another. Many have argued that the current state of the entire enterprise of criminal punishment in America is a textbook case of “unintended consequences.” These days, prisons are generally perceived as institutions that do not appear to do much, if anything, about the level of crime in our society; nor are prisons widely hailed as institutions that are capable of effecting positive changes in the behaviors or attitudes of the offenders housed within them. Yet, these institutions are currently so central to the system of criminal sanctioning that a majority of state correctional systems contain populations that far exceed capacity limits. Surely these circumstances could not have been intended by anyone. This work attempts to explain how and why this situation came to pass, and to evaluate the system’s performance in terms of its own explicit objectives.

That the American criminal justice system produces unintended and perhaps undesirable consequences is not a novel observation. In fact, a fair amount of attention has been devoted to this very idea. What is perhaps most striking about this body of research, taken as a whole, is the overwhelming lack of recognition of the *systemic* character of the criminal justice system, and the effects of this systemic quality on the translation of reforms into operational policies. Important exceptions do exist. For example, Feeley and Simon (1992) have offered an explanation of the ways in which correctional authorities have

attempted to manage and adapt to the unintended consequences of sentencing policies in the process of carrying out the daily burden of custody by refocusing the conceptual orientation of the sanctioning process at the operational level. Similarly, Hepburn and Goodstein (1986) and Bales and Dees (1992) have examined how the intent of legislative sentencing reform is often distorted by the realities of implementation, much like a child's game of "Telephone," in which a phrase is whispered successively into the ears of a line of children, and frequently emerges at the other end as something that bears little resemblance to the original utterance.

This work focuses on a particular form of criminal punishment, imprisonment. Imprisonment arguably occupies a central position in criminal justice in the hearts and minds of most members of society (Dershowitz 1976; Foucault 1977). Over the past three centuries in American history, the justification of imprisonment as a criminal sanction has been defined by the goals that the incarceration of offenders is expected to achieve. These goals become institutionalized into widely accepted *paradigms*, which define an era in the operation of the criminal justice system (Kuhn 1996).¹ Paradigms of criminal punishment are founded upon assumptions about the causes of crime; these assumptions are in turn based on conceptions of human nature—and, by extension, the nature of criminal offenders (Wilson 1983). The understanding of the criminal act and the criminal offender quite naturally guides the selection of criminal justice responses to crime. Criminal justice paradigms are most prominently expressed in criminal sentencing policy (Hewitt and Clear 1983:24).

For this reason, my analysis focuses on criminal sentencing reform as the clearest expression of paradigm change. Often, reforms are accompanied by explicit statements affirming the new paradigm and/or rejecting the old; an example of this can be seen in the text of the Comprehensive Crime Control Act of 1986, in which Congress officially announced its disdain for "the outmoded nineteenth-century rehabilitative theory that has proved to be so faulty that it is no longer followed by the criminal justice system" (Congressional Information Service 1986).

Ultimately, I argue that *incapacitation* has emerged as the principal objective of criminal sentencing policy today. This book is not a philosophical undertaking; after exploring the historical trajectory that has established incapacitation as the dominant paradigm in criminal justice, the moral and ethical merits of incapacitation as the rationale for a system of criminal punishment will not be debated.² The purpose of this study is primarily an empirical one. Having demonstrated the prominence of the incapacitation paradigm in contemporary criminal justice (I argue that the incapacitation objective manifests itself in recent sentencing reforms in a highly specific form, *selective incapacitation*), the task is then to evaluate the operation of a sanctioning system in terms of this objective. For this purpose, the analysis focuses on the criminal justice system of the state of California.

California was chosen for the analysis for several reasons. With over half a million adults under some form of correctional supervision, California has the largest criminal justice system in the United States (Maguire and Pastore 2001). Although approximately 8% of the total U.S. population resides in California, the state's correctional facilities house nearly 15% of all prisoners in American state and federal institutions (Gilliard and Beck 1998). Currently enumerating over one hundred sixty thousand inmates, California's prison population has more than quadrupled since 1980 (California Department of Justice 2002). It has been asserted that the majority of this increase has resulted from changes in criminal justice policy, rather than from changes in crime rates, which have remained relatively stable over the same period (Irwin and Austin 1994; Zimring and Hawkins 1994). California's criminal justice policy arena is a particularly volatile one. Amid the flurry of habitual offender statutes that has swept the nation in recent years, nearly 72% of California voters passed the most broadly written and widely implemented "Three Strikes" law despite ballot disclaimers stating that the impacts on crime, as well as the fiscal consequences of such a policy were "unknown."

An examination of the consequences of criminal justice policy reform in California is also worthwhile if one puts any stock in the idea that the state plays an agenda-setting role in the national public policy arena (Foster 1996). If, for example, there are states contemplating California's approach to Three Strikes, then an evaluation of the consequences of this approach might be helpful to other legislators formulating their own policy choices. Finally, an additional reason for focusing on a single state is largely a methodological one. It is my belief that analyses of criminal justice policy are best conducted at this level of aggregation. It is a misnomer to speak of "the American criminal justice system," when in reality the "system" is comprised of fifty-one independent systems (i.e., the states and the federal system).

This study seeks to fill in some of the gaps in the existing literature on the efficacy and effects of sentencing reform. In the past decade or so, a great deal of theoretical and empirical research has taken place in the area of criminal sentencing. Some of these studies have examined the success of sentencing reform with respect to the implementation of reforms (Wichayara 1995; Ulmer 1997; Austin et al. 1999). Some researchers have looked at the question of crime reduction impacts resulting from get-tough sentencing policies (Clear 1994; Spelman 1994; Wichayara 1995; Zimring and Hawkins 1995; Stolzenberg and D'Alessio 1997; Zimring, Hawkins, and Kamin 2000), while others paint with a broader brush, and analyze sentencing policy reform from a cost/benefit perspective (Zedlewski 1987; McIntyre and Riker 1993; Baum and Bedrick 1994; Greenwood et al. 1994; Connolly et al. 1996). Another prominent area of study is the impact of sentencing reform on racial disparity in the criminal justice system (Schiraldi and Godfrey 1994; Tonry 1995; Davis et al. 1996). In addition

to these empirical studies, a sizable literature has developed in the past decade that evaluates the value of existing policy goals from a normative or theoretical standpoint (e.g., Walker 1991; von Hirsch and Ashworth 1992; von Hirsch 1993; Clear 1994; Palmer 1994).

While the present work is informed by all of these contributions, it explores a territory that is rather different from that which has been investigated in previous works. Rather than considering the normative propriety of selective incapacitation as the primary goal of criminal punishment, I consider the prominence of selective incapacitation in penal purpose as a “social fact,” and examine the efficacy of criminal sentencing policy in terms of this objective. Two chapters of the book are devoted to offering an explanation of how and why selective incapacitation has come to supplant other goals of criminal punishment in the American consciousness. The primary *empirical* objective of the study is to evaluate sentencing policy in California with respect to this objective. Recognizing the limitations of the methods used previously in the literature, which include the estimation of crime-rate reductions and the calculation of “social costs and benefits,” I develop an evaluation strategy that focuses on the *selective success* of incapacitation policies with respect to dangerous offenders. This approach might be characterized as an exercise in “putting California’s money where its mouth is.” Simply put, I will seek to discover whether or not sentencing policy reforms that aim to protect the public by incapacitating dangerous offenders, such as Three Strikes and You’re Out and Truth in Sentencing, have indeed been successful in incarcerating such offenders.³ Although a sizable portion of these analyses focuses on the history and consequences of California’s Three Strikes statute, this work is not a study of Three Strikes per se—rather, Three Strikes is considered as merely a prominent example of the types of laws that emerge in the context of larger trends in sentencing policy.

The first substantive chapter of the book (chapter 2) examines the ideological and operational trends in the history of criminal punishment. While this discussion focuses primarily on the United States, attention is directed abroad when other nations influence and house the origins of American practices. This chapter also provides an account of twentieth-century trends in criminal justice leading up to the most recent penal paradigm, selective incapacitation. Michael Sherman and Gordon Hawkins (1981) note that thinking about policy choices that is engendered by the “crisis mentality” and by the search for quick-fix solutions is often ahistorical in nature. They remind us that

It must be remembered that correctional populations result from decisions based on qualitative, normative assumptions. The prison population rises not by some mysterious levitation but because society, through its agents, decides that certain people ought to be locked up. To see the prison crisis exclusively as a problem of crowding and conditions is pos-

itively dangerous. It addresses effects while ignoring causes. (Sherman and Hawkins 1981:4; see also Zimring and Hawkins 1991, chapter 3)

A number of scholars have identified a growing emphasis on actuarial strategies of risk reduction and reallocation in crime control (Reichman 1986; Simon 1987, 1993; Feeley and Simon 1992; O'Malley 1992), as well as in the larger society (Beck 1992; Douglas 1992). The prominence of selective incapacitation in contemporary penal purpose is a logical expression of these trends. In the words of Malcolm Feeley and Jonathan Simon, "incapacitation promises to reduce the effects of crime in society not by altering either offender or social context, but by rearranging the distribution of offenders in society" in such a way that probabilities and risks are altered in the general population (Feeley and Simon, 1992:458). The present research differs from previous analyses of "risk society" in that most prior work in this area has tended to focus on abstract, "Foucauldian" (O'Malley 1998) conceptions of risk; these analyses emphasize the *social meaning* of risk and the societal responses to its occurrence. This research focuses more concretely on the notion of dangerousness as it applies to criminal offenders and penal responses to crime.

Chapter 3 addresses itself to demonstrating how the process of philosophical and ideological evolution outlined in the previous chapter has manifested itself in California sentencing law. Particular focus is given to the legislative reforms of the last half of the twentieth century. There are two reasons for this. First these reforms are responsible for the enormous changes in the sheer magnitude of prison populations. The second reason is simply that in California, as in the nation as a whole, little novelty was in evidence in the "science of penology" for nearly two centuries in terms of beliefs about the best way to deal with criminals.⁴ It was not until the early 1970s and the onset of the nationwide phenomena that Francis Allen has termed "the decline of the rehabilitative ideal" that states undertook sweeping programs of reform in their criminal justice systems (Blumstein et al. 1986).

The idea of incapacitating criminals is hardly a new one; indeed, as Morris and Rothman (1995) suggest, since the "system of trials presupposes the existence of a jail [to secure the accused's appearance] . . . the original justification for the prison may well have been incapacitation" (Morris and Rothman 1995: ix). Chapter 4 delves a bit more deeply into the idea of incapacitation, and argues that due to the apparent infeasibility of a strategy of *collective incapacitation* (demonstrated in a number of widely publicized studies), it is *selective incapacitation* that has captured the imagination of policymakers and their constituents. This is apparent in the focus on "career criminals," "habitual offenders," and "violent predators" that pervades the public discourse about crime and criminal justice today. Chapter 4 details the emergence of selective incapacitation in the research and policy arena. Attention is also devoted to some of the

legal policy prescriptions deriving from this idea, with particular focus on the California experience.

The ultimate goal of selective incapacitation is the reduction of crime. The strategy traditionally employed to evaluate the effectiveness of selective incapacitation focus on crime rate reductions attributable to incapacitation-oriented sentencing policies. Crime rate reductions are usually calculated as a summary function of the average rate at which high-rate or dangerous offenders commit criminal offenses (λ), multiplied by the number of such individuals assumed to be incarcerated under a policy of selective incapacitation. The crime-reduction impacts of selective incapacitation are ostensibly accomplished via the incarceration of “high-rate offenders,” “career criminals,” or some other name given to a class of offenders who are believed to contribute disproportionately to the total volume of crime.

In chapter 5, I assert that the various names given to the targets of policies based on the idea of selective incapacitation (e.g., “habitual offenders,” or “career criminals”) are synonymous with a single underlying construct: the *dangerous offender*. The traditional evaluation strategy *assumes* the intervening step—a step that this work problematizes and investigates—namely, that dangerous offenders are successfully targeted under these sentencing policies, thus resulting in a reduction in crime. This assumption is problematic for several reasons. First, it is entirely possible that a policy of selective incapacitation could be quite successful in targeting dangerous offenders yet fail to accomplish a reduction in the crime rate. This is due in large part to the failure of this calculation strategy to account for other influences on crime rates, such as the replacement of offenders or the effects of criminal groups (Blumstein et al. 1978:65; Spelman 1994; Zimring and Hawkins 1995). A second, and even more serious problem is the inherent artificiality in the calculation strategy and the sensitivity of results to foundational assumptions. The artificiality of these mathematical approaches is particularly well-demonstrated by the lack of consensus concerning estimates of λ ; published estimates of this value range from 2 to 187 offenses yearly per offender (see Spelman 1994:71–80 for a comprehensive review).

Chapter 5 explores the notion of “dangerousness” and the nature of the process by which something comes to be considered dangerous. Turning our attention to the problem at hand, historical and contemporary conceptions of the *dangerous offender* are reviewed, as are a number of attempts to prospectively identify and control such offenders. These studies lead to the unmistakable conclusion that the prospective identification of dangerous offenders remains, as Norval Morris (1974) so delicately phrased it, “quite beyond our present technical ability” (Morris 1974:62).

In chapter 6, I propose an alternate strategy for evaluating the efficacy of sentencing reform in terms of the proximate goal of selective incapacitation—that is, the incarceration of dangerous offenders. This strategy includes a concep-

tualization of “dangerousness” for use in the retrospective evaluation of criminal sentencing policies. Dangerousness is here conceived as a stochastic property of *populations* rather than as a property of individuals. The probabilistic nature of dangerousness renders nonsensical a statement like “Offender A is dangerous” or “Offender B is not dangerous.” A statement along the lines of “Offender A is *more* dangerous than Offender B,” is less problematic, but in and of itself, this information is not terribly useful from a policy evaluation standpoint. It is both logical and instructive to conduct an analysis that allows us to say that “based on the known correlates of dangerousness, Population X is likely to harbor a greater proportion of dangerous individuals within it than is Population Y.”

Because of this, the dangerousness construct developed in chapter 6 is designed to be used to compare the relative dangerousness of criminal justice populations, and also to assess changes in the level of dangerousness within a particular population over time. It is the logic of statistics and not that of prediction that characterizes this approach. In an essay entitled “Some Statistical Questions in the Prediction of Dangerous Offending,” John B. Copas (1983) points out that

The absurdity of expecting precise predictions of individual behavior has already been stressed. . . . Although the outcome of tossing a coin is quite unpredictable, everyone will agree that to start a sports contest by the toss of a coin is “fair”. This is because the chaos at the individual level is replaced by an order at the group level. (Copas 1983:136)

What may seem like a graceful linguistic maneuver is really of crucial analytic importance. Prior attempts to measure dangerousness (most notably the 1982 Rand report *Selective Incapacitation*) have proceeded as if dangerousness were an absolute quality instead of a relative one. Since dangerousness is a subjectively defined characteristic,⁵ it is most sensibly considered in relative terms. In other words, we cannot say with certainty that a given individual is dangerous, only that he or she is more or less likely to be dangerous than another. The same is true of populations. While we cannot say with any measurable degree of certainty that California’s prison population in 2003 contains even a single dangerous individual, the measurement strategy I offer allows us to comment with some confidence on the likelihood that this population contains a greater or fewer number of such individuals (relative to the total population size) than did the comparable population in 1980.

In order to assess the impacts of sentencing reform in California with respect to the objective of selective incapacitation, dynamic systems modeling is employed as the primary investigative tool. Although criminologists and sociologists commonly refer to “the criminal justice system,” empirical research in criminology tends to take the form of static or time-series analyses of single

components of the system (e.g., jails, prisons, and courts) rather than conceiving of the entire system as a system (important exceptions include Blumstein and Larson 1969; Cassidy and Turner 1978; Cassidy et al. 1981; Cassidy 1985; and Ohlin and Remington 1993). However, legislative changes that are intended to affect one component of the system may result in unintended systemwide consequences. For example, the primary aim of California's 1994 Three Strikes law is the incarceration of "habitual offenders" for lengthy prison terms. However, this law has had a dramatic impact on many other parts of the criminal justice system as well. For example, trial volume has greatly increased, as defendants facing a second or third strike become increasingly unwilling or unable to plead guilty to lesser charges in exchange for reduced sentencing recommendations (Legislative Analyst's Office [LAO] 1995). An additional consequence of the law is being observed in the state's jails, where great numbers of defendants charged under the law are held awaiting trial, reducing available space for sentenced offenders (Turner 1999). Analyzing the impacts of legislative changes to sentencing structures from a systems perspective can provide important and useful insights into the unintended outcomes that result from these changes.

A similar approach to the analysis of criminal justice systems was pioneered by Alfred Blumstein and his colleagues in the late 1960s and 1970s (Blumstein and Larson 1969; Belkin et al. 1972; Cohen et al. 1973). The JUS-SIM model developed by these researchers represented the criminal justice system as a series of stocks and flows representing, respectively, phases or states that could be occupied by offenders (from committing a crime to being incarcerated in a facility), and what the authors call "branching ratios," or the percentage of offenders that transition from one state to another at any given time. These models were not purely simulated, in that data were used to validate and parameterize the simulations. The modeling strategy was revolutionary in that it attempted to account for "feedback" of offenders through the system due to recidivism, and thus to delineate between crimes committed by "virgin" offenders and those committed by recidivists (Blumstein and Larson 1969). Later modifications of the model (JUSSIM II and JUSSIM III) also focused on modeling the "careers" of *victims* as well as offenders (Blumstein and Koch 1978). The JUSSIM model has also been modified by R. Gordon Cassidy (1985) as the CANJUS model, which is used to study the operation of the Canadian criminal justice system.⁶

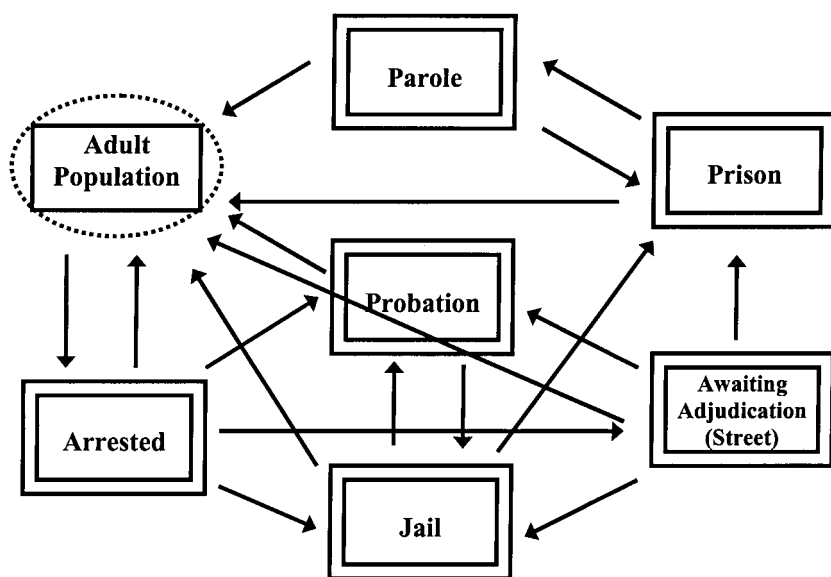
While the models I develop are structurally quite similar to the JUSSIM and CANJUS models, the focus and logic of the analysis is rather different. The JUSSIM models were primarily concerned with understanding the process and determinants of criminal careers, and on the impacts of criminal activity on law enforcement workload. The analyses conducted by Cassidy using the CANJUS model are somewhat more similar to the present work, in that he focused on

processes of adaptation in the face of system change (Cassidy 1985; see also Cassidy and Turner 1978). The approach to modeling the California criminal justice system I develop in the work that follows is explicitly unconcerned with the processes that generate populations of criminal offenders; for this reason, it is perhaps more appropriate to consider this work as an analysis of the criminal *sanctioning* system. A detailed understanding of process is not necessary to the central question explored in this work. Rather, my goal is to faithfully reproduce the emergent structures that arise out of these processes, making use of data to validate the analyses.⁷ The analysis of dangerousness in criminal justice populations thus relies on a census-like logic—it is the composition of the populations that is of the utmost importance; a deep understanding of the nuances of the process that create these populations, is, in a sense, epiphenomenal.

The modeling strategy employed in the analysis uses Berkeley Madonna software to construct a simulation model of the sanctioning processes in the California criminal justice system. This approach is based on the systems dynamics approach of Jay W. Forrester (1969a, 1969b) as explicated in Hanneman (1988). Chapter 6 details the particulars of the methodology. The system is comprised of *states* and *rates*. The *states* are *population-states* occupied by individuals within the system. These include the arrested population, the jail population, and the prison population. Figure 1.1 shows a simplified schematic of the systemic model. The *rates* represent the probability of an offender moving from one state to another (e.g., moving from the state of being arrested to the state of being detained in jail). The transition rates in the system are potentially dynamic, in that the simulation methodology allows for the modeling of the effects of feedback and informational processes on these rates. The outcomes that result from the operation of the system, such as the size and composition of correctional populations, are thus the result of the movement of individuals through the various states comprising the system. However, all individuals are not alike with respect to their experience of the criminal justice process. For example, black male offenders are more likely to be detained prior to trial than are white female ones.⁸ It is important to recognize that while some of these differences will coincide with indicators of dangerousness, the determinants of differences in transition rates need not be conceptually related to offender dangerousness. Indeed, in this analysis, offender attributes that contribute to differences in movement through the system are overtly considered to be *unrelated* to offender dangerousness, despite the fact that some indicators may overlap (e.g., sex).⁹

The necessity of taking into account all of the factors that are relevant to dangerousness and those that influence transition probabilities results in 450 different subpopulations. This is one reason why simulation modeling is preferable to attempting to directly estimate the system dynamics with actual data. The equation system that corresponds to the path diagram represented in figure 1.1 must be simultaneously estimated for each of these 450 subpopulations.

FIGURE 1.1
Structural Model of the California Criminal Justice System



An equation system with such a high degree of complexity simply cannot be estimated using direct mathematical methods—at least not without making many simplifying assumptions that have only tenuous theoretical justification. A common way of circumventing this problem in applications of structural equation modeling involves the imposition of a number of simplifying assumptions. However, I believe that the condition of California's troubled criminal justice system has resulted in large part from a failure of researchers, politicians, and practitioners to attempt to conceptualize the system in all of its complexity. The skeptical reader may claim that I am defending a fictional method (i.e., simulation modeling) by highlighting the fictional qualities of another. However, although the modeling strategy employed in this study is indeed "simulation" (and therefore bears some resemblance to fiction) the first stage of the modeling process consists of replicating the existing system with reference to validation data, and is therefore grounded in empirical reality.

Chapter 7 reports the results of the model that re-creates the compositional dynamics of the California criminal justice system from 1979 to 1998.¹⁰ This application of simulation modeling differs from other, more purely theoretical applications of simulation modeling (e.g., Jacobsen and Bronson 1985; Hanne-man 1995) in that the construction of the simulation model is conducted with

explicit reference to actual criminal justice data. The purpose of this exercise is twofold. The first goal is simply to evaluate the California's criminal justice system's efficacy in incarcerating dangerous offenders. The dangerousness construct developed in chapter 6 allows for the comparison of dangerousness levels in California's correctional populations (prison, jail, probation, and parole) before and after specific criminal justice reforms.¹¹ The second reason for modeling the system as it exists today is to gain an understanding of the system dynamics that have produced particular (objectively verifiable) outcomes with respect to the composition of criminal justice populations.

The existence of a working baseline model allows for the component of the study that I call *predictive evaluation*. Chapter 8 reports the results of experimental projection analyses designed to evaluate the potential effects of recent criminal justice reforms that have the explicit intention of incarcerating dangerous offenders, specifically the state's Three Strikes law. These analyses differ from ordinary population projections in several important ways. Most population projections rely on simple linear extrapolation of existing trends; however, as Zimring and Hawkins (1994) have pointed out, there is a great danger in making simple population projections in volatile periods of system growth (see also Greenwood et al. 1994, 1998). My strategy of predictive evaluation, in taking into account the dynamics of the entire system, differs from linear population projections in that I am modeling not only changes in the absolute numbers of inmates under various forms of correctional supervision, but the composition of populations—with respect to both dangerousness and demographic characteristics—as well as the *processes* that give rise to these outcomes. The simulation methodology makes it possible to explore the consequences of a variety of different potential policy choices—while being explicit about the assumptions underlying those choices. To use the metaphor of Sherman and Hawkins (1981), simulation modeling makes it possible, instead of simply *predicting* the future, to *choose* the future. In addition to estimating the likely consequences of the continuation of current sentencing practices, the simulation modeling strategy also allows for experimentation on the system to investigate “possible futures”—specifically, ways in which California's system dynamics might be altered via changes in sentencing policy and practice to more effectively utilize its limited incarceration resources to selectively incapacitate dangerous offenders.

My ultimate aim in offering this analysis lies in the hope that it will refocus thinking about penal strategy in a direction that is based on an *analytic* and *realist* criminology. David A. Jones identifies the roots of the analytic tradition in criminology in the work of Emile Durkheim (1982), who observed in *The Rules of Sociological Method*:

Imagine a community of saints in an exemplary and perfect monastery. In it crime as such will be unknown, but faults that appear venial to the