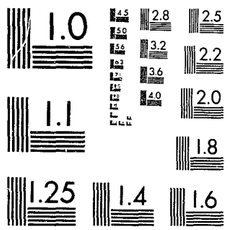

DEALING WITH DANGEROUS OFFENDERS

EXECUTIVE SUMMARY

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I. THE WIDE APPEAL OF "DANGEROUS OFFENDER" PROGRAMS

Federal legislation making repeated robbery and burglary a federal offense is only the most recent example of official efforts to reduce violent crime by focusing increased attention on the so-called "career criminal."[1] In the last year, the police of New York, Washington, Minneapolis, and many smaller cities, have initiated programs aimed at arresting career criminals. Legislation has been proposed in dozens of states to eliminate bail for career criminals and to extend their prison terms.[2] Politicians of every stripe campaigning for office in 1982 pledged, in one form or another, to "end the career of the career criminal."

The focus is hardly suprising. Whether serious crime is or is not increasing (a subject which can be much debated among statisticians and academics), there is no question that both public concern and fear of crime, particularly stranger-to-stranger violent crime, are high. Only unemployment surpasses crime as an issue for state and local government, and then only in some areas. And the growing public demand for action against violent crime coincides with other forces that make a focus on incapacitating the frequent, dangerous offender a particularly attractive response. Doubts about rehabilitation have increased, and scarce fiscal resources on the local level (coupled with cutbacks in federal aid) have made meaningful efforts to address growing poverty and unemployment more difficult. Prison space is in short supply; in many states, prisons

are already beyond capacity, and new building programs, even where funds are available, promise no early relief. In short, today's climate demands answers which do not rely on expensive rehabilitation, do not require major expansions in facilities, do not cost too much money, but do address citizen fears of violent crime, and indignation towards those who commit the offenses.

From this perspective, proposals to focus imprisonment on the most dangerous offenders seem ideal solutions. The theory is simple, popular, and fiscally responsible. It has long been the common wisdom of criminal justice officials that a small number of frequent offenders are responsible for a disproportionately large number of crimes. Career criminal proposals, in one form or another, aim to reduce crime by focusing the attention of the criminal justice system more selectively on apprehending, prosecuting, convicting and imprisoning these dangerous few. The reason is simple: incapacitation of one of these high rate offenders can reduce crime by ten or twenty times more than incarceration of lower-rate offenders -- and at no greater cost. On a system-wide basis, the results of such a focus are potentially impressive. Peter Greenwood, in the final report of a six-year Rand study, argues that robberies in California could be reduced by as much as 20 percent -- with no increase in prison population -- if selective policies were used.

Whether because of its real promise, its suitability to the times, or some evolutionary process in public policy, selective

incapacitation has begun to take hold as a basic criminal justice response to violent crime. How well programs designed according to this model will actually "work" -- whether they will bring substantial reductions in crime, particularly the violent stranger-to-stranger crime with which the public is most concerned -- and how much they will "cost" -- both in terms of dollars and the quality of justice -- are far less clear. Those questions have been the subject of our study for the past year. Our goal has been to examine what is known and to suggest what needs to be studied. Our final report is comprised of two volumes: the first is our analysis of the theory, practicalities, and costs of an enhanced focus on dangerous offenders both as a general matter and at each stage of the criminal justice process; the second is a compilation of papers especially prepared for our Conference by experts in the field. This summary sets forth some of our basic conclusions, based on our work and the papers and discussion at our Conference.

II. THE BASIC PREMISES OF SUCH PROPOSALS

A general policy of incapacitation of offenders is a very costly and inefficient means of controlling violent crime. There may be many legitimate reasons to incarcerate the typical offender, but great potential for reducing violent crime through incapacitation is not one of them. The average offender only commits about one crime that threatens violence each year, and only a tiny fraction of these offenses involve real physical losses to victims. Even among

recidivists -- offenders who are arrested two or more times -- the average is only two to three crimes including potential violence per year.[3] Thus, the popular conception that two-time offenders regularly commit dozens of violent offenses every year is simply not true; and general incapacitation fails because most of those who would be incapacitated would not, if free, commit more than one or two such offenses per year.[4]

Although it is very expensive to incapacitate the average offender, a more limited and selective use of incapacitation may be a practical means of crime control. Selective incapacitation would be effective if, and only if:

- o a small group of offenders is responsible for a large proportion of crimes, and commits offenses at rates so much higher than the average as to make their incapacitation efficient; and
- o fair and effective means are available to identify them; and
- o incapacitating them will eliminate all or virtually all of the crimes they would have committed.

Even if all three of these premises are correct, a special focus on dangerous offenders would still add nothing to a criminal justice system that regularly solves, prosecutes, convicts and sentences those who commit offenses. In such a system, high-rate offenders will inevitably be prosecuted more often, convicted more often, and sentenced more often to prison. Thus, a criminal justice system which made no pretense of selectivity would in fact produce results which

looked highly selective. It is only to the extent that our system does not reliably solve crimes and successfully prosecute offenders (and only because it doesn't) that selective incapacitation holds any significant potential for improving current performances. Moreover, such proposals risk the quality of justice delivered by our criminal justice system.

A. The Structuring of Offending

There is persuasive evidence, primarily derived from work by Marvin Wolfgang and the Rand Corporation, that at least among the offender populations they studied, the distribution of rates of offending is quite skewed: a relatively small group -- the "right tail of the right tail" of the curve -- accounts not only for a disporportionate number of serious offenses, but also for a significant portion (probably a quarter to a half) of all the violent crimes. The first piece of evidence is based on an examination of criminal records for the "birth cohorts" in Philadelphia. After tracking the criminal records of youths born in Philadelphia in 1945, Marvin Wolfgang and his colleagues discovered that 6 percent of this cohort had five or more criminal offenses, and that these offenders accounted for 52 percent of all offenses commited by the cohort. And as a group, they tended to commit the more serious offenses: these "chronic recidivists" accounted for 82 percent of the robberies, 71 percent of the murders, 73 percent of the rapes, 70 percent of the aggravated assaults, and 63 percent of the index offenses. A similar

pattern was found in a second cohort born in Philadelphia in 1958. In that group, 23 percent of those arrested one or more times -- just 8 percent of the entire cohort -- were arrested five or more times, and they accounted for 73 percent of the robberies, 61 percent of the murders, 76 percent of the rapes, 65 percent of the aggravated assaults, 68 percent of the index offenses, and 61 percent of the total offenses by the cohort.[5]

The second piece of evidence is based on surveys of the prison populations in California, Michigan, and Texas conducted by the Rand Corporation. Using the responses of inmates themselves, the Rand researchers found that even among the population of offenders who have committed crimes that are serious enough to result in incarceration, the distribution of offending is quite concentrated: a few commit crimes at very high rates; the vast majority of offenders commit crimes infrequently.

Half the imprisoned robbers in the Rand study, for example, commit 5 or fewer robberies per year; ten percent, however, commit 87 or more per year of street time. The median number of assaults per year, among the prisoners who commit assaults, was 2.4; ten percent, however, commit at least 13 per year. The concentration for burglary is most striking: half the imprisoned burglars commit fewer than 6 burglaries per year, while 10 percent commit in excess of 200.[6]

The Rand researchers also developed a typology of criminal offenders from their study. The most serious offenders were

designated "violent predators" -- those who concurrently robbed, assaulted, and dealt in drugs. This group was not only the most violent; they committed all offenses at much higher rates than other groups. The typical violent predator was younger than other inmates, and began committing violent crimes as a youth; he was chronically unemployed; and he began using hard drugs, and using them heavily, as a juvenile. Among the violent predators, the worst of the group's robbers committed over 135 robberies per year, and the worst of the group's burglars commited as many as 500 burglaries per year.[7]

The evidence from the Rand and Wolfgang studies provides support for the first essential premise of selective incapacitation theory. The skewed nature of the curves for the distribution of offending (both in general, and particularly for violent offenses) and the existence and characteristics of the "violent predators," suggest that there is a group that commits so many offenses per year that their incapacitation, even in view of its high costs, is nonetheless an attractive means of controlling crime -- provided, of course, that we can identify them in a timely way, and that incarceration will eliminate all the crimes they would have committed. But the same studies, particularly the Rand work, also suggest significant limits on how much could ever be accomplished through selective incapacitation -- even assuming no problem with the second and third premises.

It appears that the group of very high-rate offenders is in fact

much smaller than commonly thought. The overwhelming majority of offenders -- even those convicted of serious offenses and incarcerated in prison -- in fact commit offenses quite infrequently. Of the roughly 2,000 incarcerated prisoners studied and classified by Rand -- already a relatively select group on the right tail of the distribution of offending -- 15 percent qualified as violent predators. Even among this small group of the highest-rate and most serious offenders, however, the number of true high-rate offenders is smaller still. One-fourth of the violent predators commit three or fewer robberies per year, and one half commit eight or fewer. As for burglary, again, one fourth of this group commits three or fewer, and one half nine or fewer burglaries. Few would question the crime control benefits of incapacitating the top quarter or so of this group; but that turns out to be a very small percentage (perhaps 5 percent) of even the incarcerated population, let alone the offending population. And the small size of the group of truly high-rate violent predators, while a benefit in terms of the costs of incarceration, suggests definite limits as to how much crime can truly be attributed to the high-rate offender, and how much can thus be addressed directly by selective incapacitation.

B. Identifying the High-Rate Offender

It is one thing to know that a small group of offenders commits a vastly disproportionate and significant fraction of violent offenses; it is quite another to select them out of the much larger group of

less active offenders which makes up most of the the overall workload of the criminal justice system. Neither self-report data nor the perspective of an historical study is an answer to the problems of propsective identification of future offenders on the basis of available data. For selective incapacitation, in any of its forms, to be feasible as a policy approach, there must be some test which will tell us who the dangerous few are -- and will do so in a manner that is consistent with notions of justice and fairness. That is the second basic premise to be examined.

In the past, one of the most effective arguments against policies of selective incapacitation has been that it was virtually impossible to predict accurately -- or even relatively accurately -- who was and was not dangerous. With ratios of false to true positives as high as 20 to 1 or more, it was unnecessary to resolve questions of just how accurate a test must be or what variables could properly be considered.[8]

These questions must now be confronted, because the tests have improved substantially. Peter Greenwood, using the Rand survey and the typologies based on it, has developed a seven- variable test to distinguish between low, medium, and high-rate robbers. The discriminating power of the test, measured by its capacity to differentiate the average offense rates of the predicted groups, is substantial: in most cases, the average offense rate for the high-rate offender group exceeds that of the low-rate group by a factor of

at least four.[9]

But there are significant problems. The first is the nature of the variables Greenwood uses. Nearly everyone agrees -- and the criminal justice system presently reflects this agreement -- that an individual's past adult criminal record is an appropriate factor to be taken into account in sentencing (and perhaps policing and prosecuting as well). But the discriminating powers of the tests, with respect to both average differences in rates of offending and ratios of false to true positives, diminish substantially if status variables (such as employment history and drug abuse) as well as juvenile records are not included. Utilitarian crime control concerns support the inclusion of any variable which makes the test more powerful and more accurate; concerns with justice and fairness, on the other hand, are raised when we move from convictions to arrests, from adult records to juvenile records, and particularly from criminal acts to status variables, particularly those which tend to be correlated with or identical to measures of lower socio-economic status.

The second problem, which compounds the first, is the problem of false positives. The Greenwood test, which may well be the most accurate to date, appears far more powerful when judged by its group averages than by its accuracy as to any individual. The ratio of false to true positives of the Greenwood test, when all seven variables are used, is 1 to 1: 49 percent of the classified sample is in fact misclassified. High-rate offenders are defined as those who

score 4 or higher on the seven variable test. When the test was applied to Rand's sample of 870 burglars and robbers, 236 -- 30 percent of the group -- score "high". Not only does this group of "high-rate" offenders seem large in light of what we know about the distribution of offending, but more than half of them do not even rank in the top quarter of individual offense rates for their states. Of the 236, 105 (44 percent) are actually "high-rate" offenders (defined as the top 25 percent), while 72 (31 percent) are medium-rate (defined as those ranking between the 50th and 75th percentile) and 59 (25 percent) are actually low-rate (the bottom half).[10]

Whether any such tests are sufficiently just and sufficiently accurate to be used by the criminal justice system, particularly as a basis for enhancing sentences, is a matter of some dispute. Even the Rand researchers disagree among themselves, with Peter Greenwood arguing for the accuracy of his tests, at least compared to the current system, and the Chaikens -- who created the models for identifying violent predators -- arguing that they make too many false identifications to be used. The debate, inevitably, involves crucial differences on important social values, as well as some subtle technical disagreements.

It is problematic at least, if not intolerable to justify extending an individual's prison term (or denying him the "privilege" given others of a shorter term) on the grounds that he is very dangerous when there is a better than 50-50 chance that he is not.

But the problems with the Greenwood test, and others like it, stem as much from the variables used as their level of accuracy. Even a predictive test with no false positives would raise problems of justice if the punishment it prescribed could not also be justified on grounds of retribution and just deserts. In our system, both the Constitution and felt notions of justice make clear that it is not enough to be a danger in the future (let alone a 50-50 danger in the future); criminal punishment (unlike civil commitment) is limited to those who have committed a bad act with the requisite bad intent, and must at least in some rough sense be proportionate in its terms to the wrong done.

Within this system, there is a good deal of room for achieving incapacitative effects. The range of acceptable sentences is quite broad. Moreover, few question the justice of enhancing the punishment of a repeat offender, even though he has already been punished for his past bad acts;[11] the justification might be that he has shown his bad character more conclusively, and made clear his rejection of common values. On this basis, the forward-looking program of selective incapacitation is justifiable on backward-looking retributivist grounds so long as it is imposed on the basis of past criminal acts. But when factors unrelated to criminal record (and not necessarily ascertainable from the record, such as drug use or, worse still, employment history) are the basis -- and particularly when these factors are such imprecise and so often inaccurate predictors of past

or future criminality -- the retributive grounds disappear.

The easy answer and, we believe, the just one is to limit the basis for any program of selective incapacitation to past criminal record. That is justifiable retribution, as well as useful selective incapacitation. But, given current criminal justice system performance in solving crime and keeping records, this brings less crime control than less restrictive systems. Both Greenwood and the Chaikens found the number of prior felony adult convictions to have limited value in identifying high-rate offenders or violent predators, although prior conviction for robbery or burglary does have force as a discriminator. But the problem goes deeper. Greenwood found that relying solely on the variables related to past adult record did not produce a group of high-rate offenders that was large enough to produce any significant benefits from selective incapacitation; the smaller group, it appears, did not include enough of the true highest-rate offenders to have an impact sufficiently greater than its size. And the Chaikens found that in Michigan and Texas, it was not possible to identify violent predators even considering all official record information, including juvenile record; as for California, they found that the official information on prior adult convictions and drug history allowed them to define a subgroup of robbers who were significantly more likely to include violent predators than other varieties of robbers, although those so identified did not commit crimes at higher rates than other robbers.

Notably, added information of juvenile convictions and adult arrests both detracted from the identification process.

Underlying these difficulties seems to be the very simple fact of our poor clearance rates. With the chance of arrest and conviction as low as 3 percent for any offense, the violent predators -- who are younger than other offenders -- do not have long criminal records at the time they are most active. On paper, the older, less serious offender may well "look" more dangerous.

C. The Impact of Incapacitation

The third premise of selective incapacitation theory is that the incarceration of an individual who commits 30 street robberies per year will result in 30 fewer street robberies per year. There are a number of reasons why this might not occur.

First, if criminal acts are the product of dangerous circumstances (or, put another way, opportunities for crime which are particularly attractive) more than of dangerous offenders, than a policy of selective incapacitation which does nothing to reduce the number of dangerous opportunities would have little impact on crime.

We simply do not know the exact proportions by which offender motivation and circumstance or opportunity combine to produce criminal events. But the shape of the distribution of offending curves suggest that there are a small group of offenders who do have both a strong and unusual motivation towards offending; it strains credulity to suggest that an individual's commission of as many as fifty times more

burglaries per year than the average offender (not the average person) is a product of circumstances to which he alone is exposed. At least for the "right tail of the right tail," offender motivation would seem a critical factor in most if not all of their crimes.

A related, and perhaps more likely, reason that incapacitation of even a high-rate offender would fail to reduce crimes is the impact of groups and group criminality. Where crimes are committed by groups, the incapacitation of one or more group members may be more likely to lead to more recruitment than to less crime. Indeed, the necessity to recruit additional group members may lead to a larger overall population of offenders committing more, rather than fewer, criminal acts.

A third possible reason that incapacitation might fail to reduce crime is its impact on deterrence. Depending on how it is structured, a program of selective incapacitation may make all too explicit the system's lack of concern (and, therefore, the lack of punitive sanction) for those who do not meet its criteria for recidivism. If the first two prosecuted offenses are "free," and the third carries with it an enhanced sanction, there is at least a danger that far from deterring the first and second offenses, the system encourages them. If a bright line is drawn, an incentive is in place to come as close to the line as posible (which many will do) without crossing it (which some will do unwittingly).

The fourth reason incapacitation might fail relates to the

duration of criminal careers. The bulk of crimes -- particularly the violent crimes so feared by the public -- are commited by young men in their late teens or early twenties. As these young men grow up, they tend to "age out" of crime; the offenses they commit, if any at all, are fewer in number and less violent in nature. This phenomenon of "age out" is well-known and accepted among criminal justice professionals. Nevertheless, it had been suggested that high-rate offenders constituted an exception to this pattern -- a group that did not "age out." The findings of the Rand study, however, point in the opposite direction. The Chaikens found that the violent predators tended as a group to be young -- not older than the average, less serious prisoner. Even more important, they found that violent predators are very uncommon among older prison populations. Whether this is because the violent predators age out, or die young, or because the "violent predators" represent a new and unique generation of offenders that has now reached mid 20's is not clear. But the fact remains that the "career" criminal in the Rand study is not the high-rate violent predator, but the lower rate, less serious offender. To the extent that is true, it not only places enormous pressure on us to identify serious high-rate offenders early, but also suggests further limits on the long-term crime control benefits of even a correct identification.

III. IMPLICATIONS FOR CRIMINAL JUSTICE SYSTEM OPERATIONS

Our examination of the empirical evidence on the structure of

offending persuades us that there is a small group whose incapacitation would bring significant crime control benefits. But that group is, we believe, far smaller than commonly assumed: given the low rates of offending among the vast majority of incarcerated robbers or burglars, the percentage of offenders in the system as a whole who have the combined attributes of violence, high rates and persistence in offending that would qualify them as "dangerous offenders" must be small indeed. Moreover, while concerns with retribution justify enhanced punishment of this group whenever we can identify them, the crime control benefits of incapacitation depend upon an early identification -- a task which the work of the Chaikens suggest is difficult if not impossible based on currently available records. And our own concerns with justice counsel us against relying on factors -- such as employment or education or perhaps even drug use -- which do not serve as a basis for attention and punishment in a retributivist-based system of justice. Retribution theory allows us to achieve incapacitative effects through reliance on past criminal record (perhaps even including juvenile record for young offenders -- although the work of the Chaikens suggests that it adds little to discriminating power); but we are unwilling to seek those effects on the basis of other factors having no direct or inevitable connection to prior offending.

These conclusions, in turn, suggest the important stage for changes in the criminal justice system is not the "back-end", the

sentencing stage which is often identified with proposals for selective incapacitation, but the "front-end" -- the policing and prosecution stages. And the changes we would advocate are aimed not only at increasing selectivity at these stages, but also at improving the clearance rates for the key crimes of robbery and burglary, so that just selectivity is possible at the sentencing stage. This objective may require a sharper focus on frequent offenders at investigative and prosecutorial stages to overcome limiations in resources and current investigation and prosecutorial procedures. But the aim is primarily to increase our effectiveness in solving crimes, regardless of who commits them.

Virtually every study of the subject suggests that the sentencing stage, even now, does operate with a relatively high degree of selectivity -- at least with respect to the variable of prior criminal record which provides the only just basis for selectivity. According to the research in this area, criminal record almost always emerges as the most important factor, other than instant offense, in judicial sentencing decisions.[12] The problem, it appears, is not that judges do not take account of available information as to prior criminal record and enhance sentences on this basis, but rather that so much of this information is unavailable. Part of this problem -- and clearly the easiest part -- is a result of inadequacies in recordkeeping; known information is not available. The situation varies considerably among, and even within, jurisdictions. In this computerized age,

there is surely no reason why systems should not be in place to ensure that information as to past record is reasonably available without invading individual privacy. Indeed, the system should make a strenuous effort to assure that it has this capability.

The more difficult and more important aspect of this problem relates to clearance rates, and prosecutorial policies. The probability of arrest for any given robbery is, on average, under 10 percent; the probability of arrest and conviction is closer to 3 percent; and the probabilities for burglary are even lower.[13] Just selectivity in sentencing requires that enhancements be based on prior criminal record. Incapacitation benefits depend on early identifications. Investigative and prosecutorial difficulties, more than judicial reluctance to sentence on the basis of prior criminal conduct, make both tasks impossible. It is the limited capacity to solve crimes which force Greenwood and others to turn to other factors -- such as employment -- which show at least some correlation with rates of offending. But if we are to realize the potential benefits of selective incapacitation (as well as avoid large numbers of false positives), then it is imperative that we improve our general rates of apprehending and convicting those who commit the crimes which frighten the public and characterize the violent predator -- robbery and burglary.

To this end, what is called for is not a selective focus on high-rate offenders but rather an across-the-board effort to produce

the arrest and conviction information essential to just identification of the high-rate offender. At the same time, given the recognition that even a perfect system of selective incapacitation would still leave much crime unaccounted for, such an effort would also serve more general crime control and retributive goals.

Beyond this, we have no objection to procedures which ensure thorough investigation and vigorous prosecution of cases against individuals who are justly identified as high-rate offenders. But we have serious objection to police or prosecutorial establishment of "career criminal units." Our objections are three.

First, the population of true high-rate offenders -- let alone those who can justly be identified as such -- is simply too small to justify separate units of any significant size, even in major cities. If the units focus exclusively on "dangerous offenders" defined as high-rate, persistent violent offenders, then their case-load relative to available resources will be very small. But neither police departments nor district attorneys will long tolerate separate units whose caseloads are embarrassingly low. If dangerous offender units, once established, are to survive -- and there will surely be important people (including those who originated them, those who run them, and those who derive prestige from their assignment to such an elite unit), who have an interest in seeing that they do -- then they will inevitably have to expand the population of "dangerous offenders" to include even more low-rate and less serious offenders. Such an

expansion raises questions of justice with regard to the individual offenders who are thus targeted; how serious these questions are depends on the consequences for an individual of being targeted or labeled. Moreover, once expanded, the unit has ceased being, in fact, a "dangerous offender" program. It has become simply part of the general crininal justice apparatus dealing with accidental and occasional offenders as well as truly dangerous offenders.

Second, there is a real danger of corruption -- a prospect which is made even more likely by the inevitable inefficiency of such units and their need to expand to survive.[14] After all, the decision to designate an individual a "career criminal" -- particularly when that designation brings with it surveillance, denial of bail, refusal to plea bargain, and a longer sentence -- is a critically important one. And without control over that discretionary decision, no one can be sure that the decision to subject offenders to this extra liability was fair. In theory, due process may be protected in this decision by: 1) developing explicit definitions of "dangerous offenders" that require evidence of violence, high rates of offending, and persistence in offending;[15] 2) notifying offenders upon conviction of an offense that qualifies them for this designation that they have been so designated; and 3) having procedures that remove this designation if the "dangerousness" of the offender fades.[16] But we worry that the actual implementation of the programs will be less rigorous than is desirable.

Third, if a special bureaucratic unit is created, problems of coordination among different operational units will inevitably develop within the police and prosecutors' units. Who has jurisdiction of a case will be unclear and the potential for cases falling between cracks and generating bureaucratic tensions will increase.

For these reasons, we think it is probably a mistake to establish special bureaucratic units to focus on "dangerous offenders" within police departments and prosecutors' offices. We think a superior approach would be to have a special procedure utilized by everyone in the various units when they encounter an offender who meets the criteria for dangerousness. Specific procedures which hold some potential include: 1) more extensive "post-arrest investigations" of offenders identified as "dangerous offenders;"[17] 2) special police and prosecutor efforts to enhance and preserve cases made against "dangerous offenders"; and 3) "descriptive charging" by prosecutors that make the charges filed by prosecutors fit more what is known about the offender rather than prosecutorial convenience. Such efforts will not only increase the likelihood that "dangerous offenders" will be incapacitated, but should also make it easier to distinguish "dangerous offenders" in the future on the bases of past criminal record.

IV. CONCLUSIONS AND RECOMMENDATIONS

Proposals to focus criminal justice resources on unusually dangerous offenders are popular, largely because they promise to make

major inroads into the problems of crime and prison overcrowding. In addition, they have all the virtues and risks of a retributivist concept of justice that focuses attention on those who seem most deserving of punishment. As we see it, however, the proposals will not achieve their promise -- and what will be achieved will be with greater difficulty and more risk to important social values than might be hoped. Moreover, prospects for achieving potential gains in crime control and justice through a more selective focus requires us to work on different parts of the criminal justice system than we originally imagined: specifically, it seems less important to work on sentencing decisions which are already selective, and much more important to work at the front end of the system -- arrest and prosecution.

It is important to understand that our concerns should be as important to the practical-minded utilitarian as the justice-oriented retributivist. For the utilitarian, the practical risk of a selective focus is that the crime reduction benefits may be smaller than imagined. This could occur if the distribution of offending turns out to be less skewed than the bulk of the current evidence suggests, or if our capacity to distinguish dangerous offenders remains as weak as it now is, or if incapacitation of offenders bought smaller reductions in crime than we now calculate. Moreover, even the most determinedly practical utilitarian might worry a little about the fairness of the tests which exposed some offenders to additional punishment and exempted others. For the retributivist, the risks are that corrupting

ad hominem motivations might come into the criminal justice system (or exaggerate those already there), and that the practical crime control benefits of focusing only on offenders who have extensive prior criminal records would be smaller than could be achieved if practical considerations could be given some play. In short, we cannot escape the fact that important social concerns for justice and crime control are at stake in proposals for a more selective focus: the risks cannot be made to disappear by declaring oneself to be in favor of victims and against criminals; or a practical minded fellow who wants to reduce crime at low cost in terms of use of prison.

Despite our caution, it is clear that the concept of focusing on "dangerous offenders" and "career criminals" is taking hold in the nation's diverse criminal justice institutions. Moreover, while we think our "conclusions" (expressed largely as cautions) make powerful claims on a fair-minded person's view of "selective incapacitation," in one important sense, we are uncertain about their wisdom and accuracy. Some of the uncertainty stems from inevitable and unresolvable debates about social values: the relative importance of controlling crime against maintaining standards of justice; the relative weight of retributivist notions of justice against due process notions; and so on. But our uncertainty also arises from important gaps in our empirical knowledge of the world: for example, the actual distribution of rates of offending, the discriminating power of different tests and scales, and the current degree of

selectivity in criminal justice system operations. While we are not entirely ignorant about these matters, we certainly do not know them all with confident precision. This means that our proposals for improving criminal justice system operations are not certain to do so: at best, they are "plausibly effective" and "tolerably just".

To us, the fact that criminal justice agencies are moving to implement selective programs at the same time as researchers are trying to resolve empirical issues about the feasibility and practical effect of these programs creates a unique opportunity for policy-makers and researchers to help one another.[18] Evaluations of the innovations can help us learn from our current experience. Similarly, some planned research seeded into the future can help guide future innovations. In effect, if research plans could be tied to the natural evolution of selective policies, the society as a whole would have the opportunity to both learn from and guide the evolution in "plausibly effective" and "tolerably just" directions. In this sense, research may facilitate policy action.

When we reflect on the natural evolution of the criminal justice system towards a more selective focus, and imagine the areas in which current ambiguities and uncertainties might lead to failure -- even disaster -- for the policies, we can identify five crucial areas in which the federal government should become active in supporting research, and building an institutional infrastructure that can aid the nation's local criminal justice systems in their shift to a more

selective focus.

- o First, develop a clear, widely supported operational definition of "dangerous offenders".

In our view, the definition should require evidence of violence, high rates, and persistence in offending. This rules out many current definitions. (For example, those included in "habitual offender" statutes are based on the absolute number of offenses rather than the rate, and do not require violence.) It would also rule out persistent and frequent, but minor property offenders. We also think that the operational criteria defining "dangerous offenders" should not include variables other than those describing prior criminal conduct. We think there is room to use information about juvenile offending. Moreover, given convictions for violent offending, it may be appropriate to use information about indictments or arrests for other offenses (including property offenses) to help distinguish the high-rate violent offenders from the others.

Note that although the definition of "dangerous offenders" is often treated as a technical issue and although there are complicated technical aspects of the issue, it is not only a technical issue. In fact, all the social values at stake in proposals for a selective focus in the criminal justice system turn critically on this definition: it will profoundly influence both the magnitude of crime reduction benefits and the quality of justice associated with various proposals.

- o Second, develop "protocols", ways of analyzing the current degree of selectivity of different stages of the criminal justice system.

We should construct techniques that could be used by local criminal justice officials to look at the operations of their own systems and make judgments about how "selective" their system now is, and how it is changing over time. The virtues of such an effort are three. First, it will help us to resolve an uncertainty that plagued our analysis: namely, the crucial question of how selective the system already is. Obviously this matters because if the system is already very selective, it will do little good to propose that it become selective. Although we have enough information to make guesses about this issue (for example that the system was now more lenient with dangerous offenders than their conduct would warrant, and that the system was more selective at the "back-end" than the "front-end"), we remain basically uncertain about these matters. Second, if these methods were applied in many different areas over time it would eventually be possible (perhaps five years from now) to perform aggregate cross-sectional analyses that would show whether heightened selectivity did in fact reduce crime. This would be true because we would be developing an accurate measure of the independent variable in the analysis -- namely, the selectivity of local criminal justice institutions. Third, and perhaps most importantly, the development of methods for gauging selectivity to be used by local officials would

inevitably give impetus to current efforts to increase selectivity. Measuring something always increases people's interest in what is measured. If we begin measuring degrees of selectivity in criminal justice operations, it is a good bet that they will gradually become more selective. So there is an immediate operational benefit of developing the protocols as well as short- and long-run research benefits.

- Third, launch field experiments of proposals to increase the effectiveness and selectivity of police and prosecutors with respect to serious crimes.

This recommendation is based on three simple observations. First, we think the "front-end" of the system is less selective than the "back-end," and therefore that there is more room for improvement in police and prosecutorial agencies. Second, we note that it is the capacity of the police and prosecutors to solve crimes that not only exposes dangerous offenders to effective incapacitation, but also provides the only just basis for distinguishing dangerous offenders from others. If they fail in their task of persuasively attributing offenses to given offenders, dangerous offenders will not only elude our grasp, but once in our grasp, look very much like other less dangerous offenders on the basis of their criminal record. Third, we think there are some simple and just procedures that could conceivably work at this stage of the system.

- Fourth, develop and begin experiments with forms of punishment and incapacitation that are less expensive than prison for less dangerous offenders.

This recommendation is also based on several simple observations. Proposals of selective incapacitation answer the question of what is to be done with dangerous offenders unambiguously: they are to be incapacitated for as long as their current offense and criminal record justify. But they leave unanswered the question of what is to be done with all the others. This question has great force in a world where old prison capacity is very scarce, new prison capacity very expensive, and current space occupied by many offenders whom it would be difficult to describe as "dangerous." The idea of simply releasing less dangerous offenders is unappealing because the offenders deserve punishment, and not to administer it would erode the power of the law. But it also seems clear that the enormous cost of imprisonment seems slightly wasted on such offenders. Thus, we must begin to search for an answer to the question of what we will do with less dangerous offenders, as we begin dealing more harshly with dangerous offenders.

- Fifth, invest in offender-based criminal justice records to provide a just basis for a selective focus in the criminal justice system.

In the end, the decency and effectiveness of a selective focus will depend crucially on the existence of an accurate and convenient

system for storing and retrieving individual criminal records. We note that the creation of offender-based criminal justice records has lagged badly despite the computer revolution, and can see no compelling reason not to speed up the development of such systems. As part of the development of such systems, we would insist on stringent policies against the circulation of such information to non-criminal justice personnel, and only carefully limited access to juvenile records even among criminal justice personnel. But provided such safeguards exist, we would encourage the speedy development of these systems.

In sum, the wisdom of the idea of giving a sharpened focus on dangerous offenders in the criminal justice system is that it is consistent with a simple fact: individual offenders differ in terms of their contribution to the crime problem, and their degree of culpability or wickedness. While there are risks to justice and due process in adapting the criminal justice to note and respond to these differences, there are also potential gains to be made. And the gains are not only in the form of lowered crime, reduced costs, and less imprisonment. Increased selectivity may also enhance the justice of the system by being harsher with the more dangerous and determined offenders, and gentler and more accomodating with the more accidential and occasional offenders.[19] We think the potential gains are attractive enough to merit continued experimentation with proposals

that sharpen the focus of the system on dangerous offenders. But we also note the risks and urge that the innovations be evaluated to determine if their practical effects are large, and their short- and long-run threats to the overall decency and justice of the system small. We have the opportunity to learn as the system adapts, and should not miss it because of political risks or inadequate funding.

Notes

1) The legislation was ultimately vetoed by President Reagan, because of Administration opposition to another section of the bill which would have created a "drug czar".

2) Pretrial Reporter, 6 (July 1982) 4-5.

3) These figures were derived from a variety of studies of several kinds of populations, using both official records and offender self-reports. See Chapter 2 of Volume I of this report for a discussion of the basic issues surrounding measurement of offense rates, and Appendix 2 for details of estimation.

4) Although the average offender in prison is more active and dangerous than the average offender on the street, neither the natural filtering of the criminal justice system nor the selective activities of criminal justice agencies are strong enough to make this difference very large. See, generally Chapters 4 through 8 of Volume I for a discussion of the selectivity of each stage of criminal justice processing.

   The potential deterrence benefits of general imprisonment strategies are alsc questionable so long as clearance rates remain as low as they are. See Alfred Blumstein and Jacqueline Cohen, "Estimation of Individual Crime Rates from Arrest Records," Journal of Criminal Law and Criminology, 70 (1979) 561-585.

5) Marvin E. Wolfgang, Robert Figlio, and Thorsten Sellin, Delinquency in a Birth Cohort (Chicago: University of Chicago Press, 1972) contains full information on Cohort I; Statistics for Cohort II are contained in Marvin E. Wolfgang and Paul Tracy, "The 1945 and 1958 Birth Cohorts: A Comparison of the Prevalence, Incidence, and Severity of Delinquent Behavior," paper prepared for our conference and published in Volume II of this report.

6) Rand has conducted three inmate studies: a preliminary study of 49 robbers, Joan Petersilia, Peter W. Greenwood, and Marvin Lavin, Criminal Careers of Habitual Felons (Santa Monica: Rand, 1977); a more complete survey of California prisoners, Mark A. Peterson and Harriet B. Braiker with Suzanne Polich, Who Commits Crimes (Cambridge, England: Oelgeschlagen, Gunn and Hain, 1981); and a survey of prisoners in California, Texas and Michigan, Jan M. Chaiken and Marcia R. Chaiken, Varieties of Criminal Behavior (Santa Monica: Rand, 1982).

7) Chaiken and Chaiken, Varieties of Criminal Behavior, have developed a typology of offenders based on the results of their second inmate survey. The violent predators turned out not only to be the most active violent offenders, but the most frequent property offenders as well.

8) For a comprehensive review of attempts to predict violence, see John Monahan, Predicting Violent Behavior: An Assessment of Clinical Techniques (Beverly Hills: Sage, 1981).

9) Greenwood presents his findings in Peter W. Greenwood with Allan Abrahamse, Selective Incapacitation (Santa Monica: Rand, 1982).

10) The figures cited are derived from Table 4.5, page 53 of Greenwood with Abrahamse, Selective Incapacitation.

11) Andrew von Hirsch has made the strongest arguments in favor of enhanced punishment for repeat offenders. See his Doing Justice, Report of the Committee for the Study of Incarceration (New York: Hill and Wang, 1976). For a critical response to his position, see Joseph Goldstein's "Additional View" in Doing Justice.

12) We consider research on selective sentencing in Chapter 4 of Volume I of this report. For an even broader review of what influences judges to pass sentences, see John Hogarth, Sentencing as a Human Process (Toronto: University of Toronto, 1971).

13) Blumstein and Cohen, "Estimation of Individual Crime Rates."

14) Eleanor Chelimsky and Judith Dahmann, Career Criminal Program National Evaluation: Final Report (Washington, D.C.: U.S. Department of Justice, 1981) have determined that prosecutors' career criminal programs usually consist of 10 to 20 percent of a district attorney's staff, but handle about one-fourth the caseload per attorney as the rest of the office. Although few career criminal cases were dismissed, reduced, or negotiated, the conviction rate is little higher -- if at all -- than in the rest of the prosecutor's office.

15) The importance of all these elements -- violence, high rates, and persistence -- in the success of selective policies is a major topic of Chapter 2, Volume I.

16) Even dangerous offenders "age out" and "mature out" of criminal offending, and rehabilitation (while not to be counted on as the major means of crime control) is by no means unheard of. See Chapter 2 of Volume I for a discussion of age and the dangerous offender.

17) One of the biggest stumbling blocks to a selective criminal justice system is the reliance on "satisficing" behavior on the part of police, prosecutors, and judges. Police stop investigating once an arrest has been made, usually content to bring one strong charge against even a frequent offender; prosecutors are reluctant to charge offenders with more than one crime, feeling that juries and judges will react to the weakest, rather than the strongest, charge; judges pass concurrent sentences, rather than consecutive sentences. These and similar issues are considered throughout Part II of Volume I.

18) We support what may be termed an evolutionary approach to research and policy. It differs from both the classical approach (that policy is based on relatively certain knowledge, and that research results should stimulate policy decisions), and the policy analytic view (that the proper role of research is to determine the likely efficacy of policies, and that policy decisions precede research). By consciously focusing a combination of basic, applied, and evaluation research projects on the problem of frequent, dangerous offenders, while at the same time implementing in phases selective programs and procedures, we can in effect arrange to learn from experience. See Charles Lindblom, The Intelligence of Democracy: Decision Making Through Mutual Adjustment. (New York: Free Press, 1965); Donald T. Campbell, "Reforms as Experiments," in Handbook of Evaluation Research, Volume I., Elmer L. Struening and Marcia Guttentag, eds., (Beverly Hills, Sage, 1975).

19) It is impossible to relatively order these two kinds of gains: the efficiency gain cited by those who care mostly about utilitarianism, and the gains in justice cited by those who emphasize retribution and just deserts. One of the main attractions of focused policies, in our view, is that they may be supported wholeheartedly by both calculating utilitarians and staunch retributivists. See Chapter 3 for a discussion of these philosophies and their effect on the policies recommended.

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